

A
TREATISE
OF THE
PLEAS
OF THE
CROWN:

OR A

SYSTEM of the Principal Matters relating
to that SUBJECT, digested under their
proper Heads.

BOOK II.

By WILLIAM HAWKINS,
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In the SAVOY

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MDCCXXVI.

To the Right Honourable
THOMAS, Lord PARKER,
Baron of *MACCLESFIELD,*
A N D
Lord High Chancellor of *Great Britain,*

My LORD,

THE Experience I have so often had of your Lordship's Goodness, cannot but encourage me to hope for the Continuance of it: And the Success of my former Endeavours under the Protection of your Lordship's Name, is a sufficient Assurance, That if I can be so happy as to have your Lordship's Approbation and Encouragement, I need not desire any other.

NOR is my Application to your Lordship in Behalf of a Common Law Treatise, any way discouraged by your Lordship's Removal to the Station you at present adorn; for tho' the Publick Good, and his Majesty's Service, have put you under a Necessity of leaving the Common Law Courts, yet nothing can ever make you cease from being the most assured Friend, and Patron, as well as the most exquisite Master of the Common Law. And the Greatest Lovers of it have the less Regret for the Loss of your Lordship's Presence among them, from the Honour the Law it self has received by your Lordship's Advancement, whereby the World has been effectually convinc'd, That nothing so much conduces to make a
Con-

The Dedication.

Consummate Chancellor, as the most perfect Skill and Experience in the Common Law.

IT is with the utmost Pleasure we observe your Lordship with so much Steadiness adhere to those stated Boundaries of Property, which our Ancestors have always had in such high Veneration, and which your Lordship never departs from, but in such Cases, wherein evident Equity, Common Sense, and Natural Justice, undeniably point out an Exception.

IT is to your Lordship we are obliged for the Removal of that Vulgar Prejudice. That the Rules of Law and Equity could not possibly be reconciled: As your Lordship had formerly convinced us, That there is nothing in the Common Law rightly understood, that is any way repugnant to Equity; you have now given us the like Satisfaction, That there is no Rule of Equity skilfully applied, that in the least contradicts the true Reason of the Common Law.

I am,

My Lord,

With the greatest Respect,

Your Lordship's most dutiful,

and most obliged Servant,

William Hawkins.

A
TREATISE
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BOOK II.

CHAP. I.

Of Courts of criminal Jurisdiction in general.

HAVING in the first Book endeavoured to shew the Nature of criminal Offences, I am now to shew, in what Manner the Offenders are to be brought to Punishment; and in Order hereto I shall consider,

1. The Nature of the Courts, which have Jurisdiction over such Offences.
2. In what Manner the Offenders are to be proceeded against by such Courts.

And first, for the better Understanding of the Nature of such Courts, I shall premise some Considerations concerning them in general, and then consider the Nature of the Principal of them in particular.

As to the Nature of such Courts in general, I shall consider,

1. What is requisite to the Constitution of their Authority.
2. What is incidental to all such Courts in general.

S.P.C. 54, 55. *Sett.* 1. As to the first Point I shall take it for granted, That the King being the supreme Magistrate of the Kingdom, and intrusted with the whole executive Power of the Law, no Court whatsoever can have any such Jurisdiction, unless it some Way or other derive it from the Crown.

Dalr. ch. 1. *S.P.C.* 54, b. *4 Inst.* 71. *2 R.* 3 11. a. *Speed* 521, 524. *1 Rol. Ab.* 535. *Sett.* 2. Yet it seems, That the King himself cannot sit in Judgment upon any Indictment, because he is one of the Parties to the Suit; and therefore where it is said in some of our ancient Histories, that our Kings have sometimes sat in Person with the Justices at the Arraignment of great Offenders, probably it ought not to be intended that they came as Judges, but as Spectators only, for the greater Solemnity of the Proceeding.

24 Inst. 70, 71. *2 Inst.* 103. *8 H.* 4 13. b. *74* 20. *2 R.* 3 11. b. *Madox's History of the Exchequer, from Edw. 5 to 17. and Edw. 56 to 85.* *Dalton* ch. 1. *28 Aff. pl.* 52. *4 Inst.* 73. *Sett.* 3. And it is said by ^a Sir Edward Coke, That the King has committed and distributed all his whole Power of Judicature to several Courts of Justice; and though it may be argued with the highest Probability both from the Nature of the Thing, and the constant Tenor of our ^b ancient Records and Histories since the Conquest, and also from the Form of all Process in the King's Bench and Chancery, which is always made returnable before the ^c King himself, That in old Time our Kings in Person, often determined Causes between Party and Party, proper for those Courts; yet at this Day, by the long, constant and uninterrupted Usage of many Ages, our ^d Kings seem to have delegated their whole judicial Power to the Judges of their several Courts, which by the same immemorial Usage have gained a known and stated Jurisdiction, regulated by certain and established Rules, which our Kings themselves cannot alter without an Act of Parliament.

6 H. 7. 4. b. *5. a.* *Bro. Pat.* 53. *4 Inst.* 125, 127. *6 Co.* 11. b. *12. a.* *Sett.* 4. For it seems to be clearly agreed, That the King cannot give any Addition of Jurisdiction to an ancient Court, but that all such Courts must be holden in such Manner, and proceed by such Rules, and in such Cases only, as their known Usage has limited and prescribed; and from hence it followeth, That as the Court of King's Bench cannot be authorized to determine a mere real Action between Subject and Subject, so neither can the Court of Common Pleas to inquire of Felony or Treason.

4 Inst. 87. *1 Sid.* 338. *Sett.* 5. Nay, it is said by some, That the King is so far restrained by the ancient Forms in all Cases of this Nature, that his Grant of a judicial Office for Life, which has been accustomed to be granted only at Will, is void.

42 Aff. 12, 13. *4 Inst.* 164. *Bro. Com-mission.* 15, 16. *F.N.B.* 110. b. *Bro. Indictment* 12, 38. *See* 12 Co 31. *Sett.* 6. And the Law is so jealous of any Kind of Innovation, in a Matter so highly concerning the Safety of the Subject, as not to endure any the least Deviation from the old known stated Forms, however immaterial it may seem, as will be more fully shewn, *Ch.* 5. *Sett.* 1.

Chap. 1. Of Courts of criminal Jurisdiction in general.

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Sett. 7. And from the like Reason it follows, that Commissions to ^a seize the Goods and imprison the Bodies of all Persons, who shall be notoriously suspected of Felonies or Tréspasses, without any Indictment or other legal Process against them, are illegal and void.

^a 42 Aff. 5.
Bro. Bom-
mission, 3.
15, 16.
2 Inst. 54.

Sett. 8. And it is said, That the King cannot grant any new Commission whatsoever, that is not warranted by ancient Precedents, however necessary it may seem, and conducive to the publick Good; and therefore ^b Commissions to assay Weights and Measures, being of a new Invention, were condemned by Parliament; and it is said by ^c Sir Edward Coke, That the King could not authorize Persons to take Care of Rivers and the Fishery therein, according to the Method prescribed by the Statute of *Westm.* 2. *Ch.* 47. before the Making of that Statute.

^b 4 Inst. 163.
245.
18 E. 3. ch. 1. 4.
^c 2 Inst. 478.
^d 1 Rol. Abr.
382. b.
6 Mod. 87.
9 E. 4. 30. b.
31. a.

Sett. 9. As all Judges must derive their Authority from the Crown, by some Commission warranted by Law, they must also exercise it in a legal Manner, and hold their Courts in their proper Persons; for they cannot act by ^d Deputy, nor any Way transfer their Power to another, as the Judges of Ecclesiastical Courts may.

Bro. Judges,
11.
^e Latch. 7.

Sett. 10. ^f But it seems, That regularly where there are divers Judges of a Court of Record, the Act of any one of them is effectual, especially if their ^g Commission do not expressly require more.

^f Bro. Coron.
2. 1.
14 H. 4. 34. b.

Sett. 11. It hath been ^h resolved, That by the Common Law, all Patents of the Justices of either Bench, Barons of the Exchequer, Sheriff, Escheators, Commissioners of Oyer and Terminer, Gaol-Delivery, and of the Peace, are determined by the Death of the King who made them. Also it seems ⁱ certain, That at the Common Law (before ^j 1 Ed. 6. 7. set forth more at large, *Ch.* 6.) if one had been convicted of any Offence before any such Commissioners, and the King had died before Judgment, no Judgment at all could have been given, because the King was dead for whom the Judgment was to have been given, and because the Authority of the Judges was determined. Also it is said, that at ^k Common Law a Person attainted in the Time of a former King, could not have been executed without a new Warrant. Yet it hath been adjudged, That the Authority of a ^l Coroner or Verderor ceases not by the Demise of the King in whose Reign they were chosen; and that the Office of a ^m Sheriff, in such Places where he is chosen by a Corporation, having by its Charter the Inheritance of the Office, does not determine by the Demise of the King; from whence it seems also to follow, That no other Corporation-Officer, who by the Charter is invested with any judicial Authority, loses it by such Demise.

^g 14 H. 4. 34. b.
35. a.
^h 23 Aff. pl. 7.
39 H. 6. 41. b.
42. a.
ⁱ S. P. C. 53.
^j Letters B. C.
Cor. Delif.
24. 25.
^k H. 6. 70.
^l 2. fol. A 673.
Compt. 121.
^m 27 Aff. 23.
2 Rol. Abr.
677. G.
ⁿ Delif. 15.
Bealce 79.
Dy. 165. pl. 2.
1 And. 44.
4 E. 4. 44.
Bro. Judges,
32.
1 E. 5. 1.
Crom. Jur.
126. 2.
17 Co. 31.
^o 1 Aff. pl. 8.
Bro. Coron.
66.

Sett. 12. And to prevent the Disorders and other Inconveniences, which may happen upon the Death of a King, from the Want of Persons armed with competent Authority to execute the Laws, before the Successor can have Time to appoint others, it was enacted by 7 & 8 Gul. 3. 27. That no Commission either Civil or Military, shall cease, determine, or be void, by Reason of the Death and Demise of his said late Majesty, or of any of his Heirs or Successors, Kings or Queens of this Realm; but that every such Commission shall be, continue, and remain in full Force and Virtue, for the Space of six Months next after any such Death or Demise, unless in the mean Time superseded, determined, or made void by the next and immediate Successor, to whom the Imperial Crown of this Realm, according to the Act of Settlement in the said Statute before mentioned, is limited and appointed to go, remain or descend.

¹ Delif. 15.
Dy. 165. pl. 2.
2 Inst. 175.
1 Levin 120.
Bro. Coron.
201.
Commission,
19.
Crom. Jur.
126. a.
But this is
made a Query,
4 E. 4. 44. a. b.
and Bro. Of-
ficer, 25. and
denied in S. P.
C. fol. 19.
Letters B. C.
² 7 Co. 30. b.

Sett. 13. And it is further enacted by 1 Annæ 8. Par. 2. That no Patent or Grant of any Office or Employment, either Civil or Military, hereafter to be made, shall cease, determine, or be void, by Reason of the Death or Demise of

any

any King or Queen of this Realm, but that every such Patent or Grant shall be, continue, and remain in full Force for six Months, next after any such Death or Demise, unless in the mean Time superseded, determined, or made void by the next immediate Successor, to whom the Crown is limited and appointed to go, remain or descend.

And it is farther enacted, Par. 5. That no Commission of Assize, Oyer and Terminer, general Gaol-Delivery, or of Association, Writ of Admittance, Writ of Si non omnes, Writ of Assistance, or Commission of the Peace, shall be determined by the Death of any King or Queen of this Realm; but every such Commission and Writ shall be and continue in full Force for six Months next ensuing, notwithstanding such Demise, unless superseded and determined by the next Successor: And also no original Writ, Writ of Nisi Prius, Commission, Process or Proceedings whatsoever, in, or issuing out of, any Court of Equity, nor any Process or Proceedings upon any Office or Inquisition, nor any Writ of Certiorari, or Habeas Corpus, in any Matter or Cause, either Criminal or Civil, nor any Writ of Attachments, or Process for Contempt, &c. shall be determined, abated, or discontinued, by the Demise of any King or Queen of this Realm; but every such Writ, &c. shall remain in full Force, to be proceeded upon, as if such King or Queen had lived.

As to the second Point, viz. What is incidental to all such Courts in general, I shall only take Notice of the following Particulars;

- 22 Inst. 311, 312*
Reg. 111. b.
F.N.B. 85. b.
16. a. 249. d.
1 Rol. Ab.
541 E. 2. pl. 3.
Co. Lit. 117. b.
260. a.
2 Lev. 93.
1 Mod. 215.
3 Lev. 205.
8 Co. 38. b.
1 Salk. 200.
11 H. 6. 12. b.
1 Rol. Ab.
219. Y.
8 Co. 38. b.
11 Co. 43. b.
Cro. El. 581.
1 Sid. 145.
Brook Leet,
12, 36,
1 F.N.B. 82.
Dalton ch. 1.
Lamb. ch. 3.
10 H. 6. 10. b.
Crompt. 7.
11 Co. 43. b.
seems contrary.
11 H. 7. 16. a.
3 Inst. 29.
17 Aff. pl.
23.
2 Rol. A. 77.
G.
Bro. Indict-
ment, 17.
Crompt. 121,
122.
Salk. 201.
- Sett. 14.* First, That all Courts of this Kind must be Courts of ^a Record; for a Court which is not of Record, can neither impose any Fine on an Offender, nor award a *Capias* against him, nor even hold Plea of a common Trespas *Vi & Armis*; and from hence it clearly follows, That no Proceedings of any Court of criminal Jurisdiction, can be removed into a Superior, but by Writ of Error or *Certiorari*; and that no Averment can be taken against the Truth of any Thing recorded in any such Court; ^b and that all Courts of Common Law, that have Power given them to fine and imprison, are thereby made Courts of Record.
- Sett. 15.* Secondly, That ^c all such Courts may injoin the People to keep Silence under a Pain, and impose reasonable Fines, not only on such as shall be convicted before them of any Crime on a formal Prosecution, but also on all such as shall be guilty of any Contempt in the Face of the Court, as by giving opprobrious Language to the Judge, or obstinately refusing to do their Duty as Officers of the Court; and it is said, That all such Courts, except the Court-Leet, may also imprison all such Offenders: Also it seems, ^d That even a Court-Leet is so far intrusted with the Keeping of the Peace within its own Precinct, that the Steward of it may by Recognizance bind any Person to the Peace, who shall make an Affray in his Presence, sitting the Court, or may commit him to Ward, either for want of Sureties, or by Way of Punishment, without demanding any Sureties of him, in which Case he may afterwards impose a Fine according to his Discretion; from whence it follows *à fortiori*, that other Superior Courts of Record have the like Power.
- Sett. 16.* Thirdly, That no ^e Judge of any such Court is compellable to deliver his Opinion before-hand, in Relation to any Question which may after come judicially before him.
- Sett. 17.* That no such Judge is any Way punishable for a mere ^f Error of Judgment, as hath been more fully shewn in the first Book, Chap. 17.
- Sett. 6.*

Sett. 18. It is questioned, whether all Courts of Record may not discharge any Person arrested, during his Journeying to or from such Courts, or necessary Attendance there by Process from any other Court: However it seems to be agreed, That any such Court may discharge a Person who shall be so arrested in the Face of it.

Lamb. 403.
Query 1 Keb
 845.
 1 Lev. 159.
 1 Brown. 15
 Raym. 100.
 Bro. Privi-
 lege 35.
 Crompt. 18c

C H A P. II.

Of the Court of the High Steward of England.

AN D now I am to consider the Nature of the principal Courts of criminal Jurisdiction in particular, and

1. Of the Court of the High Steward of *England*.
2. The Court of King's Bench.
3. The Court of the Constable and Marshal.
4. The Court of the Justices of *Oyer and Terminer*.
5. The Court of the Justices of Gaol-Delivery,
6. The Court of the Justices of Assize and *Nisi Prius*.
7. The Court of the Sessions of the Justices of the Peace.
8. The Court of the Coroners.
9. The Sheriff's Turn.
10. The Court Leet.

The Office of High Steward of *England*, which anciently was Hereditary, not having been granted to any one since the Reign of King Henry the Fourth, but only *pro hac vice*, either for the Trial of a Peer on an Indictment for a capital Offence, or for the Determination of the Pretensions of those who claim to hold by Grand Serjeanty, to do certain honourable Services to the King at his Coronation: It seems needless to make a particular Inquiry, concerning the Authority of the Court of this High Officer, of which very little Mention is made in our ancient Records, or Law-Books; and therefore I shall content my self with remarking in this Place in general, That anciently the Duty of this Office consisting in supervising and regulating next under the King the Administration of Justice, and all other Affairs of the Realm, whether Civil or Military, and that no one under the Degree of Nobility is capable of so honourable a Post; and for the particular Manner of executing this Office in the Trial of a Peer, I shall refer the Reader to the Chapter concerning the Trial of Peers.

3 Inst. 58, 59.
Mad History
of the Exche-
quer 33, &c.
 Crompton of
 Courts. 84.
 Fleta, lib. 2.
 Ca. 2. 3.

13 H. 8. 11. b.
 3 Inst. 59.
 S. P. C. 152.
infra ch. 8. l. 1.

C H A P. III.

Of the Court of King's Bench.

Vide *supra*,
Ch. 1. S. 1.
and *Madox*,
ch. 19.

^a *Madox*, fol.
21 and 135.
1 *Roll. Ab.* 94.
Letter A. and
95. *Letter B.*
2 *Inft.* 24,
25, 26.

^b See *Madox*,
Chap. 19.
Query 2 Inft.
21, 22, 23.
1 *Inft.* 71.

^c *Madox* 543.

^d *Dyer*, 187.
pl. 6.

Madox 543,
544.
Compton of
Courts, 78. B

Seft. 1. **T**HE whole Jurisdiction which is now distributed among the several Courts of *Westminster-Hall*, seems in the first Reigns after the Conquest, to have been lodged in one Court, commonly called the King's Court, wherein Justice is said to have been administered sometimes by the King himself in Person, and sometimes by the High Justicier, who was an ^a Officer of very great Authority, and used in the King's Absence beyond-sea to govern the Realm as Vice-Roy.

Seft. 2. Out of this Court the Courts of ^b Common Pleas and Exchequer seem to have been derived, some Time before the making of the Statute of *Magna Charta*; the former of which Courts properly determines Pleas merely Civil, and the later those relating to the Revenue of the Crown. And after the ^c Erection of these Courts, the supreme Court seems by Degrees to have obtained the Name of the Court of King's Bench, and hath always retained a supreme Jurisdiction in all criminal Matters and also in certain personal Causes, and is still ^d supposed to have always the King himself in Person sitting in it.

For the better understanding the Nature of this Court, I shall consider the following Particulars:

1. In what Manner it corrects all Kinds of Misdemeanours of all Persons in general.
2. How far it reforms inferior Courts.
3. How far its Presence suspends the Power of all other Courts.
4. What Rules are to be observed in the Form of its Proceedings.

See 16 Ca. 1.
ca. 10. sec. 2.
11 Co. 98.
4 *Inft.* 71.

Seft. 3. As to the first Point, it is certain, That this Court is intrusted with the highest Jurisdiction, not only over all capital Offences, but also all other Misdemeanours whatsoever of a publick Nature, tending either to a Breach of the Peace, or to the Oppression of the Subject, or to the raising of Faction, Controversy, or Debate, or to any Manner of Misgovernment; so that whatsoever Crime is manifestly against the Publick Good, it comes within the Consuance of this Court, though it do not directly injure any particular Person; neither can any private Subject, who has not forfeited his Right to the Protection of the Law, suffer any kind of unlawful Violence or gross Injustice against his Person, Liberty, or Possessions, from any Person whatsoever, without a proper Remedy from this Court, not only for Satisfaction of the private Damage, but also for the exemplary Punishment of the Offender.

1 *Sid.* 168.
See the *Preamble*
of 16 Ca. 1.

Seft. 4. Neither is it necessary in a Prosecution of any such Offence in this Court, to shew a precedent of the like Crime formerly punished here agreeing with the present in all its Circumstances; for this Court being the *Custos Morum* of all the Subjects of the Realm, where-ever it meets with an Offence contrary to the first Principles of common Justice, and

and of dangerous Consequence to the Publick, if not restrained, will adapt such a Punishment to it as is suitable to the Heinousness of it.

Señ. 5. And so high a Trust doth the Law repose in the Justice and Integrity of this Court, as generally to leave it to the Discretion of its Judges to inflict such Fine and Imprisonment, and even infamous Punishment on Offenders, as the Nature of the Crime, considered in all its Circumstances, shall require; neither doth it confine them to make use of their own Prison, but leaves them at Liberty to commit Offenders to any Prison in the Kingdom, which they shall think most proper, and doth not suffer any other Court to remove or bail any Persons condemned to Imprisonment by them.

Señ. 6. Also this Court hath such a sovereign Jurisdiction in criminal Matters, that it may proceed as well on Indictments found before other Courts, and removed into this by *Certiorari*, as on Indictments or Informations originally commenced in it, whether the Courts before whom such Indictments were found be determined or suspended, or still *in esse*, and whether the Proceedings be grounded on the Common Law, or on some Statute making a new Law concerning an old Offence, and appointing certain Justices to execute it, as the Statutes of forcible Entries, and the Statute of *Philip and Mary*, against Persons taking away Females under the Age of sixteen Years from their Guardians, &c. Neither doth a Statute which appoints, That all Crimes of a certain Denomination shall be tried before certain Judges exclude the Jurisdiction of this Court without express negative Words; upon which Ground it hath been resolved, That *33 H. 8. 12.* which enacts, That all Treasons, &c. within the King's House, shall be determined before the Lord Steward of the King's House, &c. doth not restrain this Court from proceeding against such Offences: But where a Statute creates a new Offence, which was not taken Notice of by the Common Law, and erects a new Jurisdiction for the Punishment of it, and prescribes a certain Method of Proceeding, it seems questionable, how far this Court has an implied Jurisdiction in such a Case.

Señ. 7. But it is certain, That the Law has so high a Regard to this Court, that it will not suffer a Record regularly removed into it from an inferior one, to be remanded after the Term in which it came in, (except in some few Special Cases;) yet if the Justices perceive, that there is any Practice in endeavouring to remove any such Record, or that the sole Intention of such Removal is the Delay of Justice, they may on their Discretion refuse to receive such Record, and may before it is filed remand it back again, for the Expedition of Justice; and upon this Ground, as I suppose, where one who had pleaded not Guilty to an Appeal below, and at his Trial had challenged so many of his Jury, that the Inquest could not be taken for want of Jurors, whereupon a new *Disfringas* was awarded, removed himself into the Court of King's Bench, he was ordered to be remanded: Also by the Construction of the Statutes, which empower the Common Law Courts of *Westminster*, to grant a *Nisi Prius* for the Trial of Issues joined in those Courts, the Justices of the King's Bench may grant such Trial, as well in Cases of Treason and Felony as in other common Cases; because, for such Trial, not the Record it self is sent down, but only the Transcript of it.

Señ. 8. And it is recited by *6 H. 8. 6.* That divers Felons and Murderers, upon feigned and untrue Surmises, had oftentimes removed as well their Bodies as their Indictments, by Writ, and otherwise, before the King in his Bench, and could not by the Order of the Law be remitted and sent down to the Justices

M. 666. p. 913.
1 Sid. 145

** Dalil. 25.*

44 E. 1. 31 b.
Cromp. Jurisd. 131.

b. 9 Co. 118.
See B. 1. Ch. 64. S. 51.

c. Cro. Ca. 465.
2 Lev. 179
2 Mod. 128,
129, 130.

d. 3 Keb. 75,
94, 106, 273.
e. 2 Inst. 519.
2 Jones 53.

f. See 1 Sid. 296.
the Books above cited and the Chapter concerning Indictments.

g. 22 Ed. 3 6 b.
29 Aff. 43.
40 Aff. 29.
1 Rol. Ab.
534. G. 2.
492 K. 1.
4 Inst. 78.
S. P. C. 158.

h. 1 Rol. Rep. 85.

i. Cro. Car. 297.
1 Saunders, 97, 99.
1 Lev. 223.
1 Sid. 329.

k. 4 Inst. 74, 75.
16 E. 4. 5. 3.
Bro. Coron. 162.

l. 4 Inst. 74.
Ray. 364.

Crompt. Jur.
213.

of Gaol-Delivery, or of the Peace, nor other Justices, nor Commissioners, to proceed upon them after the Course of the Common Law. And thereupon it is enacted, That the Justices of the King's Bench have full Authority by their Discretions, to remand and send down, as well the Bodies of all Felons and Murderers, brought or removed before the King in his Bench, as their Indictments, into the Counties where the same Murders or Felonies have been committed and done; and to command all Justices of Gaol-Delivery, Justices of Peace, and all other Justices and Commissioners, and every of them, to proceed and determine, upon all the aforesaid Bodies and Indictments so removed, after the Course of the Common Law, in such Manner as the same Justices of Gaol-Delivery, Justices of Peace, and other Commissioners, or any of them, might or should have done, if the said Prisoners or Indictments had never been brought into the said King's Bench.

Ray. 367.

Se^{ct}. 9. In the Construction of this Statute it seems to have been holden, That it shall not be extended by Equity to High Treason.

Se^{ct}. 10. As to the second Point, viz. How far the Court of King's Bench reforms inferior Courts, there is no Doubt, but that this Court, being the highest Court of Common Law, hath not only Power to reverse erroneous Judgments given by inferior Courts, but also to punish all inferior Magistrates, and all Officers of Justice, for all wilful and corrupt Abuses of their Authority, against the known, obvious, and common Principles of natural Justice, but not for mere Mistakes, which an honest well meaning Man may innocently fall into.

^a H. P. C. 1. 6.
⁹ Co. 118. b.
²⁷ Aff. pl. 1.
³ Inst. 27.
⁴ Inst. 73.

^b 2 H. 7. 29b
Bro. Com-
mission, 10.
Vide infra
Ch. 5. f. 2.

^c 4 Inst. 73.

^d 4 Inst. 73
Dy. 286, pl.
45.

^e Keilw. 152
b.

^f Keilw. 153.

^g 3 Inst. 24.
⁴ Inst. 73.
H. P. C. 156,
157.

^h Co. Entries,
57. b. 58. b.
60. a.

ⁱ Co. Entries,
354. b. 355. b.
356. b. 358. a.

Se^{ct}. 11. As to the third Point, viz. How far the Presence of this Court suspends the Power of all other Courts, it is certain, That this being the ^a supreme Court of Oyer and Terminer, Gaol Delivery, and Eyre, doth so far suspend the Power of all other Justices of this Kind, in the County wherein it sits during the Time of its sitting in it, (if such Justices have ^b Notice of its sitting there, and even without such ^c Notice, as some say.) that all Proceedings commenced before any such Justices during such Time are void; yet it ^d seems, That such Justices may proceed upon Indictments taken in a foreign County and removed before them, because the Court of King's Bench hath nothing to do with such Indictments, unless they be removed into it. Also there seems to be the same Reason, That such Justices may proceed on Indictments taken before them, of Offences in the same County before the Term; for it is said in ^e Keilway, That if an Appeal be commenced before Justices in Eyre, and afterwards another Appeal be brought in the King's Bench, it will be a good Plea that another Appeal is depending; which shews that the King's Bench ought not without a *Certiorari*, &c. to intermeddle in an Appeal, whereof another Court is legally possessed before; and the Reason seems to be the same as to Indictments: And it is said in the same ^f Book, That if the King's Bench and Justices in Eyre are in one County, yet this shall not change the Power of the Justices in Eyre, but that if the King will make Process for any Thing not commenced before the Justices of Eyre, as to such Thing their Power is ceased; by which it seems to be implied, that as to what was commenced before them, their Power continues: However, it is certainly the ^g safest way for any of the Justices above mentioned proceeding on any such Indictment, to have a Special Commission for that Purpose, and it is most adviseable, that such Commission bear *Teste* in the Term.

Se^{ct}. 12. As to the fourth Point, What Rules are to be observed in the Form of the Proceedings of this Court, it seemeth, That all Process upon ^h Writs of Appeal, and also all Process upon ⁱ Indictments removed hither by *Certiorari* from a foreign County, ought to be made returnable

¹ Rol. Ab.
527. K.

Madox 31,
32, 33.

^a Fleeta Lib. 2.
Ca. 4.
Co. Lit. 74.
^b Madox 33.

^c 4 Inst. 123.
Cases in Par-
liament, 60.
^d Fleeta Lib. 2.
Ca. 3.

Madox 29.

ture of their Office or Duty in particular. However, we find that in the 22d Year of King *Edw.* 3. the Parliament granted Fifteenths on divers Conditions, one of which was, That there should be no Mareschalsy in *England*, except the Mareschalsy of the King, and of the Guardian of *England*, when the King shall be out of *England*. And it seems clear, That there was one Marshal superior to the rest, who was sometimes called the Master-Marshal, at other Times the King's Marshal, the Marshal of *England*, or the Earl Marshal, being an Officer of very great Authority both in War and Peace, whose principal Office in ^a Time of War, was to regulate the Incampments of the Army, and to assign to the Troops their respective Posts in the Day of Battle; and in ^b Time of Peace, to provide for the Security of the King's Person in his Palace, to distribute the Lodgings there, and to preserve Peace and Order in the King's Household, and to be assistant to the Constable in Determining Causes, and also to ^c execute the Orders both of the Court of the Constable, wherein he himself sate as Judge, and of the ^d Court of the High Steward, to which he seems to have been only an Officer.

Señ. 3. But whatever might be the original Institution of these Officers, or the Nature of their Authority, it is certain their Jurisdiction is at present declared, limited and restrained by certain Acts of Parliament, before the Making whereof, we have scarce any Thing memorable on Record concerning this Matter.

Señ. 4. And first it is enacted by 8 R. 2. 5. as followeth, *Because divers Pleas concerning the Common Law, and which by the Common Law ought to be examined and discussed, are of late drawn before the Constable and Marshal of England, to the great Damage and Disquietness of the People: It is agreed and ordained, That all Pleas and Suits touching the Common Law, and which ought to be examined and discussed at the Common Law, shall not hereafter be drawn or holden by any Means before the foresaid Constable and Marshal, but that the Court of the same Constable and Marshal shall have that which belongeth to the same Court, and that the Common Law shall be executed and used, and have that which to it belongeth, and the same shall be executed and used, as it was accustomed to be used in the Time of King Edward.*

Señ. 5. And it is farther declared by 13 R. 2. 2. in the following Words, *Because that the Commons do make a grievous Complaint, that the Court of the Constable and Marshal hath incroached to him and daily doth incroach Contracts, Covenants, Trespasses, Debts and Detinues, and many other Actions pleadable at the Common Law, in great Prejudice of the King, and of his Courts, and to the great Grievance and Oppression of the People: Our Lord the King, willing to ordain a Remedy against the Prejudices and Grievances aforesaid, hath declared in this Parliament, by the Advice and Assent of the Lords Spiritual and Temporal, the Power and Jurisdiction of the said Constable, in the Form that followeth: To the Constable it pertaineth to have Cognizance of Contracts touching Deeds of Arms and of War out of the Realm, and also of Things that touch War within the Realm, which cannot be determined nor discussed by the Common Law, with other Usages and Customs to the same Matters pertaining, which other Constables heretofore have duly and reasonably used in their Time. Joining to the same, That every Plaintiff shall declare plainly his Matter in his Petition, before that any Man be sent for to answer thereunto. And if any will complain, That any Plea be commenced before the Constable and Marshal, that might be tried by the Common Law of the Land, the same Plaintiff shall have a Privy Seal of the King without Difficulty, directed to the said Constable and Marshal, to surcease in that Plea, until it be discussed by the King's Council, if that Matter ought of Right to pertain to that Court, or otherwise to be*

be tried by the Common Law of the Realm of England, and also that they surcease in the mean Time.

Sett. 6. And it is farther 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 of England before this Time, it is ordained and stablished from henceforth, That all the Appeals to be made of Things done within the Realm, shall be tried and determined by the good Laws of the Realm, made and used in the Time of the King's noble Progenitors; and that all the 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: And moreover, it is accorded and assented, That no Appeal be from henceforth made, or in any wise pursued in Parliament in Time to come.

For the better understanding of the Construction of these Statutes, and the Nature of this Court, I shall examine the following Particulars:

1. How far the said Court hath Consuance of Points of Honour in general.
2. Whether it can punish private Persons for marshalling Funerals.
3. Whether it can be holden by a Lord Marshal alone without a Constable.
4. Whether its Power as to Appeals of Treason be superseded by 26 or 35 H. 8. or 5 and 6 Ed. 6. 11. or 1 and 2 Ph. and Mar. 10.
5. By what Law, and in what Manner it proceeds.
6. Whether it may be prohibited if it exceeds its Jurisdiction.
7. Whether it can be holden by Commission.

Sett. 7. As to the first Point it is observable, That the above mentioned Statute of 13 R. 2. declares the Jurisdiction of this Court, in Relation to Things done within the Realm in these Words, *To the Constable pertaineth Consuance, &c. of Things that touch War within the Realm, which cannot be determined nor discussed by the Common Law:* From whence it seems to follow, That this Court has nothing to do with a mere Civil Matter, no way relating to War, and therefore the Proceedings of the Court of the Lord Marshal, in the Time of King Charles the first, for bare scandalous Words, reflecting on the ^a Honour or Gentility of Families, seem no way to be maintained; yet it seems to be taken for granted in some ^b Books, That Disputes concerning Precedency, and Points of Honour, and Satisfaction therein, are proper for this Court: Neither do I find, That the Proceedings therein against Persons for falsely assuming the Name and Arms of honourable Families, were censured or disallowed by the ^c learned Members of the Committee of the House of Commons in the Year 1639. who were appointed to inquire into the Abuses of this Court. And it seems to be ^d admitted in the Argument of *Oldis's Case*, That all Matters of this Nature are proper for this Court; yet it seems to be a large Interpretation to make these Things relate to War, so as to come within the Declaration above mentioned; and the Rule laid down in ^e *Rolle's Reports*, that the Marshal has Power given him where the Common Law gives no Remedy, seems no way maintainable from the said Statute; for it doth not say in general, That to the Constable pertaineth Consuance of Things, which cannot be determined by the Common Law, but of Things of War, &c. which cannot be thereby determined; ^f neither is it a conclusive Argument, that a Matter which is remediless by the Common Law, must have a Remedy from some other Law; yet inasmuch as by the Preamble of the said Statute,

^a Rushworth's Coll. Part 2. Vol. 2. 1055, 1056.

^b Hob. 121.

^c Rol. Re. 87.

^d Lev. 134.

^e Show. 353.

^f Sid. 353.

^g Lev. 230.

^h Rushworth's Coll. Part 2.

ⁱ Vol. 2. 1055, 1056.

^j *Parliament*

^k *Caser*, 64, 65.

^l *Parliament*

^m *Caser*, 64, 65.

ⁿ *Parliament*

^o *Caser*, 64, 65.

^p *Parliament*

^q *Caser*, 64, 65.

^r *Parliament*

^s *Caser*, 64, 65.

^t *Parliament*

^u *Caser*, 64, 65.

^v *Parliament*

^w *Caser*, 64, 65.

^x *Parliament*

^y *Caser*, 64, 65.

^z *Parliament*

^{aa} *Caser*, 64, 65.

^{ab} *Parliament*

tute, its chief Intention appears to be to prevent Inroachments on the Common Law; and such Proceedings in Matters whereof the Common Law hath no Conusance, cannot be said any way to inroach upon it: And inasmuch as the said Statute is wholly declarative, and hath no negative Words; and the constant Practice, which is the best Interpreter of Laws, and the general Opinion of Lawyers, seem to countenance such Proceedings, I shall not take upon me to determine how far they may be warrantable.

1 Lev. 230.
1 Sid. 353.
Show. Rep.
353.

Seç. 7. As to the second Point, viz. Whether this Court can punish private Persons for Marshalling Funerals; though it should be granted, That the Marshalling publick Funerals belongs to the Heralds, who are Attendants on this Court, and that no other Persons without their Licence can lawfully intermeddle therein; yet it does by no Means follow, That the Marshal has Power to punish those who shall be guilty of any such Inroachment; but the proper Remedy seems to be by Action on the Case at Common Law, and not by a Suit in this Court, which by the above mentioned Statutes of 8 and 13 R. 2. has Cognizance only of such Matters, which cannot be determined nor discussed by the Common Law: And this seems to be the principal Reason of Dr. *Oldis's* Case, wherein a Suit in the Marshal's Court against one *Donmille*, for taking upon him without Licence to paint Arms and Escutcheons, and causing them to be fixed to Herfes, and providing and lending Palls for Funerals, and painting Arms for one who had no Right to their Use at the Funeral, and marshalling several Funerals, &c. was prohibited by the Court of Exchequer, upon great Deliberation, with the Advice of the rest of the Judges, and the Judgment was afterwards confirmed by the House of Lords.

Cases in Par-
liament, 58,
&c.

Seç. 8. As to the Third Point, viz. whether this Court can be holden by the Lord Marshal alone without the Constable, it was strongly insisted in the * Arguments made use of in Dr. *Oldis's* Case, That the Lord Marshal cannot hold this Court without the Constable; and this was also the Opinion of the ^b above-mentioned learned Committee of the House of Commons in the Year 1639. And it is certain, That all our ancient ^c Law-Books and ^d Reports, which speak of this Court, speak of it either as the Court of the Constable and Marshal, or of the Constable ^e only; and it is observable, that the above mentioned Statute of 13 R. 2. which in the Preamble speaks of this Court, as the Court of the Constable and Marshal, in the Body of the Act mentions the Constable only. And it is farther remarkable, That where-ever the Constable is mentioned together with the Marshal, as Judge of this Court, he is always put before him; which seems to intimate, that he is look'd upon as the principal Judge of it: And it is agreed by ^f all, That the Marshal cannot determine an Appeal of Death, or Treason, without a Constable; but on the other Side it may be argued, That the Reason why an Appeal of a capital Matter necessarily requires a Constable as well as Marshal, is, because 1 H. 4. which orders how such an Appeal shall be brought, is express, That it shall be tried and determined before the Constable and Marshal of England for the Time being; whereas the other Statutes only provide against the Inroachments of this Court, and do not mention in what Manner, or before whom it shall be holden; but they seem to refer such Questions to ancient Usage; so that if ^g before these Statutes the Court was usually holden before the Constable and Marshal jointly and severally, ^h according to the common Usage of other Courts, which generally may be holden before one Judge in the Absence

* Cases in Par-
liament, 65,
66.

^b Rush-
worth's Coll.
Pt. 2. Vol. 2.
1056.

^c S. P. C. 65.
Crompt. Juris-
diction, 82.

^d 1 Inst. 51.

^e 1 Inst. 123.

^f Co. Lit. 261. a.

391. b.

^g 13 H. 4. 46.

37 H. 3. 5. a.

48 E. 3. 3. b.

37 H. 6. 20. b.

21. a.

^h 30 H. 6. 6. G.

13 H. 4. 5. a.

ⁱ 1 Inst. 74. b.

Rushworth's

Coll. Pt. 2.

Vol. 1. 107,

112, &c.

Cases in Par-

liament, 61.

1 Lev. 230.

Hutton, 3

5 Cases in Par-

liament, 60,

61.

^j See Ch. 1.

S. 10.

of the rest it seems, a reasonable Construction of the said Statutes to allow this Court still to be so holden; neither is it probable, That the Lord Marshal upon the Extinguishment of the hereditary Office of the Constable, should from Time to Time in the ^a Reigns of King *Henry* the eighth, Queen *Elizabeth*, and King *James* the first, hold this Court by himself without any Constable, and also often be assisted therein by the Judges of the Common Law, unless it were then well known, that such his Proceeding was warranted by the ancient and established Usage of his Court; and it is very extraordinary, That our Judges and Lawyers should ^b generally take it as a Thing granted, that the Marshal is at this Day the proper Judge of Points of Honour, &c. if it were imagined that he has no Power to act without the Concurrence of a Constable.

Sect. 9. As to the fourth Point, *viz.* Whether the Power of this Court as to Appeals of Treason, be superseded by the Statutes of 26 H. 8. 13. or 35 H. 8. 2. or 5 and 6 Ed. 6. 11. or 1 and 2 Ph. and Mar. 10. it is observable that it is enacted by the said Statutes of H. 8. and Ed. 6. *That all Manner of Treasons, &c. done out of this Realm shall from thenceforth be inquired, heard and determined before the Justices of the King's Bench, or before Commissioners, &c. in like Manner to all Intents and Purposes, as if they had been done in the same Shire wherein they shall be inquired of, &c.* And it is enacted by the said Statute of 1 and 2 Ph. and Mar. 10. *That from thenceforth all Trials for any Treason, shall be had and used only according to the due Order and Course of the Common Law:* Yet it hath been adjudged, That none of these Statutes take away the Jurisdiction of this Court in Relation to such Treason: For the said Statutes of H. 8. and Ed. 6. being wholly in the Affirmative, and it being their chief Intention to supply a Defect in the Common Law, which had provided no Method for the Trial of such Offences by Jury, they shall not without exprefs Words be construed to take away the Authority of an ancient Court, confirmed by Parliament; and therefore the abovementioned Expression, *That all such Treasons shall be tried by the King's Bench, &c.* shall be taken to purport no more than that the King's Bench, &c. shall have Authority to try them; and as to the 1 and 2 Ph. and Mar. the plain Import thereof seems to be, to restore the ancient Manner of Trial by the Course of the Common Law to all Treasons within its Jurisdiction, which had been much altered by some Statutes in the former Reigns, and this is fully satisfied by abolishing all Innovations, in the Proceedings at Common Law, and has no Relation to Cases no Way within its Consuance.

Sect. 10. As to the fifth Point, *viz.* By what Law and in what Manner this Court proceeds, there is no Doubt but that it ought to follow its own Customs and Usages so far as they go, and in Cases omitted the Rules of the ^a Civil Law: And because this is not a Court of Common Law, a ^b Condemnation in it for a Capital Offence causes neither Forfeiture of Lands nor Corruption of Blood; neither can an Error in its Proceedings be remedied by Writ of Error, but only by Appeal to the King: And yet the Judges of the Common Law take Notice of the Jurisdiction of this Court, and give Credit to a Certificate of its Judges, for the Trial of an ^c Issue concerning its Proceedings; ^d for the Civil Law is as much the Law of the Land, in such Cases wherein it has been always used, as the Common Law is in others.

Sect. 11. It is questioned, Whether the ^e King hath any Remedy in this Court against an Offender, by Way of Indictment or Information by the Attorney General.

^a Cases in Parliament 60, 61.

⁴ Inst. 128.

^b Hob. 12.

¹ Rol. Rep. 87.

² Lev. 134.

Show 353.

¹ Sid. 353.

¹ Lev. 236.

Cases in Parliament 62.

Rushworth's

Coll. Part 2.

Vol. 1. 107.

⁴ Inst. 124.

Rushworth's

Coll. Part 2.

Vol. 1. 107.

Dyer 131.

pl. 75.

³ Inst. 24.

⁴ Inst. 124.

^a 3 Inst. 125.

² Inst. 51.

¹ Inst. 261.

37 H. 6. 3. 3. b.

20. b.

^b 3 Inst. 125.

Rushworth's

Coll. Part 2.

Vol. 1. 107.

113, &c.

Cases in Par-

liament 62.

² Inst. 51.

³ 3 Inst. 125;

341.

Case in Par-

liament 62.

^d 30 H. 6. 6. b.

37 H. 6. 3. b.

20. b. 21. a.

^e Hutt. 3.

*Cases in Par-
liament* 61, 65.

Sect. 12. As to the sixth Point, *viz.* Whether this Court may be prohibited, if it exceeds its Jurisdiction, it is expressly resolved in *Oldis's Case*, That the said Court being holden before the Lord Marshal only, may be prohibited by the Courts of Common Law, if it exceed its Jurisdiction, and it is strongly insisted on in the Argument of that Case, That the Court of the Constable and Marshal, may also be prohibited; but there having been no Court holden before a Constable and Marshal for these many Years, and there seeming to be small Likelihood of its being revived, I shall refer the Reader for the farther Examination of this Matter to the learned Sir *Bartholomew Shower's* Report of the said Case.

¹ Lev. 210.
¹ Sid. 353.

Sect. 13. As to the seventh Point, *viz.* Whether the said Court can be holden by Commission; it seems to be the better Opinion of the Court in *Parker's Case*, That during the Lunacy of an Earl Marshal, it may well be holden before Commissioners deputed to exercise his Office; and it seems hard to say, That such Commissions, founded on the plain Necessity of the Case, and intended to prevent a Failure of Justice, as to Cases of which no other Court hath Conusance, are against the Purview of the Petition of Right, made in the Third Year of the Reign of King *Charles the First*; which, complaining that Commissions had been granted for the Trial of certain Capital Offences and other Outrages, by the Martial Law, under Pretence whereof divers of the King's Subjects had been put to Death, prays that from thenceforth no Commissions of like Nature might issue forth to be executed as aforesaid.

C H A P. V.

Of the Court of the Justices of Oyer and Terminer.

FOR better Understanding of the Nature of the Courts of the Justices of *Oyer and Terminer* and Gaol Delivery, I shall premise some Considerations concerning them in general, and then consider the Nature of each of them in particular.

*Lamb. B. 1.
ch. 5.
Co. Lit. 114.
1 Lev. 239.*

Sect. 1. But in the first Place, it may not be improper to remark, That the Prerogative authorizing these or any other Justices, is inseparably united to the Crown, not only by the common Law, but also by Statute, to which Purpose it is enacted by 27 H. 8. 24. *That no Person or Persons, of what Estate, Degree or Condition soever they be, shall have any Power or Authority to make any Justices of Eyre, Justices of Assize, Justices of Peace, or Justices of Gaol Delivery: But that all such Officers and Ministers shall be made by Letters Patent under the King's Great Seal, in the Name and by the Authority of the King's Highness, in all Shires, Counties Palatine, Wales, &c. or any other his Dominions, &c. any Grants, Usages, Allowance, or Act of Parliament to the contrary notwithstanding.*

As to what belongs to Justices of *Oyer and Terminer*, and Gaol-Delivery in general I shall examine :

1. By what Kind of Instruments they must be constituted.
2. How their Authority may be suspended, revived or determined.

- 3 How far the precise Letter of their Commissions must be observed by such Justices.
4. What Form is to be observed in the Adjournment of such Commissions.
5. How far the Power given by them, may be extended by other Commissions to other Justices, or committed to fewer than were appointed by the former.
6. Whether such Justices can sit in one County to try Offences in another.
7. Where their Records are to be kept after they are determined.
8. Whether the same Justices at the same Time may execute both Commissions.

Sett 1. As to the first Point, *viz.* By what Kind of Instrument such Justices must be constituted; it seems to be laid down as a general Rule in some of the old Books, That though a Justice may be discharged by Writ under the Great Seal, yet that he cannot be made a Justice by such Writ, but only by ^a Commission: And it seems to be holden, both by ^b Sir Edward Coke and Sir ^c Matthew Hale, If any such Justices have their Authority by Writ, though made in the same Form and Words, that a legal Commission ought to have, yet their Proceedings are void; and yet it seems, that nothing more is meant by these Expressions, if strictly examined, than that all such Justices must derive their Authority from such Instruments as are of a known, stated, and allowed Form warranted by ancient Precedents; and 'tis only a Dispute of Words, whether such Instruments are to be called Writs or Commissions; for if you take the Import of the Word *Writ* from ^d Finch's Definition of it, who says, That it is a *Latin* Letter of the King's, from his higher Courts of Record, in Parchment, sealed with his Seal, and *tested* by him, it seemeth that the most approved Forms of Commissions of *Oyer and Terminer*, &c. may well enough come under the general Notion of Writs which by the last mentioned ^e Author are divided into Writs Original and Commission: And accordingly we find, that Commissions of *Oyer and Terminer*, Allocation, and *si non omnes*, granted upon special Occasions, are called Writs both by the ^f Register, and also by ^g Fitzherbert, who yet seems not to approve of this general Notion of the Word *Writ*, and says, That these Commissions should not properly be called Writs. Also it is said, by Sir Edward Coke in his Comment on the Statute of *Westminster* the second, Ch. 32, which mentions the Writ of *Oyer and Terminer*, that Commissions were anciently granted by Writ, by which he seems to imply, That they are otherwise granted at this Day; but he doth not tell us the Distinction between a Writ and Commission; neither can I find that the modern Precedents differ from the old ones; but on the contrary, that it hath always been agreed, That it is the safest Way to follow the old ones: But I must confess, That I cannot find a certain Instance from any ^h Book of Authority, wherein general Commissions of *Oyer and Terminer* are called Writs. However, as to the Resolutions of the Judges in 42 *Aff. pl.* 12, 13. which are but briefly and obscurely reported, and yet seem to be the chief Foundation of what is said in the later Books relating to this Matter; the Authority thereof seems to amount to no more than these two following Points: First, That Justices appointed by Commission to hear and determine certain Offences, cannot receive an additional Power by Writ directing them to inquire of other Offences; and this seems to be the Sense of ⁱ Staunford and ^k Fitzherbert

^a Long. Quinto. Ed. 4. 13 27. b. 42 *Aff. pl.* 12.

^b Bro. *Aff.* 384. Commission 16. 18 Indictment, 22, 38. 29 Finch 247.

^c 4 *Inst.* 164.

^d H. P. C. 161.

^e Finch. 237. See Theolal's Digest of Originals, 1 b. 2. b.

^f Finch 312, 318. See Theolal. 2. b.

^g Register. 123. b. 124. b.

^h F. N. B. 110, 111.

ⁱ Crom Jur. 131.

^j Vide infra, sect 33.

^k S. P. C. 94. A.

^l Fi 2. Indictment, 7. See Br. Commission 16, 18. Indictment, 22, 38, 39. 12 Co. 31.

herbert in Relation to this Matter. ^a Secondly, That Writ empowering Persons to inquire of Offences, without authorizing them also to determine them, are illegal, except in such Cases wherein they are allowed by ancient Usage, as were ^b Writs of this Kind to Sheriffs before the Statute of 28 E. 3. 9. And therefore where it is generally said in some ^c Books, That Commissions have been directed to certain Persons to inquire of certain Offences, in order to have them afterwards tried before other Justices, it seems, that it ought to be understood, That such Commissions were in the common Form of Commissions of *Oyer and Terminer*, tho' they be spoken of only as Commissions of Inquiry. As to the Resolution in the *Long* ^d *Quinto* of *Edward* the Fourth, which is the other principal Authority concerning this Matter, the Import thereof seems to be no more than this, That a Person cannot legally be associated to Justices of Assize by a Writ directed to such Justices, reciting a Commission of Association to such Person, and commanding the Justices to receive him, unless there be also produced a Commission of Association directed to such Person; for that the King cannot make a Justice by such Writ directed to others; by which it seems to be implied, That by a proper Writ he may do it. And it is certain, That the Commission of Association directed to the Party himself, is called a Writ both by the ^e Register, ^f *Fitzherbert*, and ^g *Finch*, and also by ^h *Sir Edward Coke*, as well as the Writ of Admittance directed to the other Justices. However it seems clearly to be agreed by all these Books, That the best Rule of judging of the Validity of any such Commissions, is their Conformity to known and ancient Precedents, and this seems to be the best Reason of the Resolution in ⁱ *And.* 296. wherein it is adjudged, That a Commission to a Corporation, appointing some of its principal Members to be Justices of Gaol-Delivery, together with those whom the King should appoint from Time to Time, was void: For such an Authority depending on the precarious Appointment of other Justices, is not agreeable to the known Forms of such Commissions; but the other Reason given in that Book, for such newly appointed Justices not joining with the former, because their Authority commences at several Times, seems not conclusive; for the Authority of Justices, appointed by Writ of Association, is of a subsequent Commencement from that of the Justices in the first Commission; and yet it is certain, That such may act jointly together, as will more fully appear in the following Chapter.

Seç. 2. As to the second Point, *viz.* How the Authority of such Justices may be suspended, revived or determined, there is no Doubt, but that their Power is wholly suspended by the Court of King's Bench sitting in the same County for which they are commissioned, during the Time of such Sitting, especially if they have Notice thereof, as hath been more fully shewn *Chap. 3. Seç. 10.* and it seems, That their Jurisdiction is revived of Course, when the said Court no longer sits there, without any Writ of *Procedendo*, &c. Also it is certain, that their ^h Authority may be suspended by a Writ of *Superfedeas*, which is grantable on Proof that their Commission was unduly granted, in which Case their Power may be restored by a Writ of *Procedendo*, without any new Commission. But a Commission once determined, cannot be revived by any Writ of *Procedendo*, nor the Justices authorized a-new without another Commission.

^a 12 Co. 31.
^b Register,
121.
S. P. C. 84.

^c 1 And. 106.
See Pl. Com.
390.

^d Fol. 111.
112. 29. b.
117, 118.

^e Register,
124. b.
F. N. B. 111.

^f Finch, 318

^g 4 Inst. 107.

Register,
124, 125.
12. Aff. 21.
4 Inst. 163.
H. P. C. 162.

Sett. 3. Such Commissions may be determined expressly or impliedly; ⁴ *Inst.* 163. expressly, by an absolute Repeal or Countermand from the King; impliedly, several Ways.

Sett. 4. First, by the Demise of the King by whom they were granted; but this Mischief is in a great Measure obviated by late Statutes, as hath been more fully shewn, *Ch.* 1. *sett.* 11, 12, 13.

Sett. 5. Secondly, According to some Opinions, by the Justice's Acceptance of any new Name of Dignity, as of that of Duke, Knight, or Serjeant, &c. But this is remedied by ¹ *Ed.* 6. 7. by which it is enacted, *That if any Person being in any of the King's Commissions whatsoever, shall fortune to be made or created Duke, Archbishop, Marquess, Earl, Viscount, Baron, Bishop, Knight, Justice of the one Bench or of the other, or Serjeant at Law, or Sheriff, yet that notwithstanding he shall remain Commissioner, &c.* But ^{Bro. Com-} ^{mission 4, 11.} it hath been questioned, whether the Dignity of a Baronet which has been created since that Statute, be within the Equity of it? ^{Cro. Ca. 104.} ^{Lit. Rep. 81.}

Sett. 6. Thirdly, By holding a Session without adjourning it, if the Commission have no Time limited for its Continuance; as where it is appointed *pro hac vice* only; but if it be granted for a certain Time, or *quamdiu nobis placuerit*, it does not necessarily require any Adjournment; and therefore, if the Court holden by Virtue of such Commission, break up without any Adjournment, or upon a void one, as being made without the Consent of the Majority of the Commissioners, yet it may be holden again on a new Summons. ^{Crom. Jur.} ^{125. b.} ^{H. P. C. 161.} ^{4 Inst. 165.} ^{Bro. Com-} ^{mission. 12.} ^{Dalif. 24, 25.} ^{Vide Dyer} ^{205. pl. 5.} ^{4 Inst. 165.} ^{1 Leon. 270.} ^{10 Ed. 4. 7.}

Sett. 7. Fourthly, by granting a new Commission to other Persons of the same Nature with the former, though but for Part of the District for which the former was granted, as some say: And whether ^a such new Commission be for a certain Time, or *pro hac vice* only; yet the former Commissions shall remain ^b in Force, so far as they are consistent with the later; and therefore it seems certain, that a Commission of the Peace is not determined, as to its Authority relating to the Peace, by a new Commission to hear and determine Felonies. But it hath been ^c holden, That it is determined as to its Authority relating to Felonies; but this seems justly questionable, not only as being contrary to common ^d ^{Bro. Com-} ^{mission 7.} ^{Bro. Com-} ^{mission. 8, 24.} ^{Bro. Com-} ^{mission. 8.} ^{Bro. Com-} ^{mission. 24.} ^{Bro. Com-} ^{mission. 5.} ^{H. P. C. 162.} ^{4 Inst. 165.} ^{34 Aff. 8.} ^{Bro. Com-} ^{mission 6, 14.} ^{H. P. C. 162.} ^{4 Inst. 165.} ^{Keilw. 116.} ^{Crom. Jur.} ^{125. b.} ^{34 Aff. 8.} ^{Bro. Com-} ^{mission. 14.} ^{Moor. 186.} ^{pl. 333.} ^{H. P. C. 162.} ^{4 Inst. 165.} ^{Dyer 355.} ^{pl. 36.} ^{Prædce, but also because Justices of the Peace, as such, seem to have Authority by ^{34 E.} 3. to hear and determine Felonies, without any special Clause in their Commission, for that Purpose, as will more fully be shewn *Ch.* 8. But it seems certain, That a Commission of ^d ^{Gaol-} ^{Delivery shall not be determined by a new Commission of Oyer and Terminer, because they are of different Natures. ^e Also it seems to be clear not only from ^{2 & 3 Ph. & Mar.} 18. set forth more at large, *Sett.* 12. but also in Cases not within the Statute, that a Commission of the Peace for a certain Town determines not the Authority of the Corporation, having a Grant from the King, that the Mayor and his Successors shall be Justices of the Peace within its Limits, because such a Grant is irrevocable. ^f Also it seems certain, That no new Commission doth determine an old one, unless the former Commissioners have Notice of it.}}

Sett. 8. Such Notice may be given expressly or impliedly; expressly, by ^g shewing the new Commission to the former Commissioners, which certainly determines the Power of all those to whom it is shewn; impliedly, two manner of Ways.

Sett. 9. I. By ^h holding a Session by Force of the new Commission, which seemeth to be agreed to be a Matter so notorious, that the first Justices shall be presumed to have Notice of it.

H. P. C. 161.
4 Inst. 165.
Bro. Com-
mission 6.
Kellw. 116.

Seet. 10. II. According to the general Opinion, by proclaiming the new Commission in the County.

1 Sid. 348.
2 Keb. 292.
Bro. Coro.
178.

Seet. 11. As the Authority of the Justices appointed by any former Commission, is determined by the Grant of a new one in the Manner abovementioned, so likewise were all Proceedings before such Justices discontinued at the Common Law; to remedy which Inconvenience it was enacted by 1 Ed. 6. 7. Par. 6. *That no manner of Process, or Suit made, sued, or had before any Justices of Assize, Gaol Delivery, Oyer and Terminer, Justices of Peace, or other of the King's Commissioners, shall not in any wise be discontinued by the making and publishing of any new Commission or Association, or by altering the Names of the Justices of Assize, Gaol-Delivery, Oyer and Terminer, Justices of Peace, or other the King's Commissioners, but that the new Justices of Assize, Gaol-Delivery, and of the Peace, and other Commissioners, may proceed in every Behalf, as if the old Commissions, Justices and Commissioners, had still remained and continued not altered.*

Seet. 12. And it is farther enacted by 2 & 3 Ph. & Mar. 18. *That all and singular Commissions granted to any City or Town-Corporate, not being a County in it self, for the keeping of their Peace and Delivery of the Prisoners remaining in the Gaols of any such City or Town Corporate, shall stand, remain, and be good, and available and effectual in the Law, to all Intents, Constructions and Purposes, the granting of any like Commission of Peace or Gaol Delivery, to any Commissioner or Commissioners for the Conservation of the Peace, or Delivery of the Prisoners remaining in the Gaol of any Shire, Lathe, Rape, Riding, or Wapentake within the Realm of England, bearing Date after the said Commission or Commissions granted as is aforesaid, to any such City or Town-Corporate, not being, as aforesaid, a County in it self, to the contrary notwithstanding.*

Dalif. 25.

12 Aff. pl. 21.
Crom. Jur.
126.
Long. quinto
E. 4. 133. 2.
Dalif. 25.
3 Inst. 31.
H. P. C. 160
Bro. Com-
mission, 18.
Kelynge 57.

Seet. 13. As to the third Point, viz. How far the precise Letter of such Commissions must be observed by the Justices, it is said to be agreed, That if a Commission of Oyer and Terminer, &c. be awarded to certain Persons to inquire at such a Place, they can neither open their Commission at another, nor adjourn it thither, nor give Judgment there; and that if they do, all their Proceedings shall be esteemed as *coram non judice*: Yet it is agreed, That Justices appointed by Commission *pro hac vice*, may adjourn their Commission from one Day to another, though there be no Words in their Commission to such Purpose; for nothing can be more reasonable, than to intend that a general Commission authorizing Persons to do a Thing, does implicitly allow them convenient Time for the doing of it.

^a Raym. 115.

Seet. 14. As to the fourth Point, viz. What Form is to be observed in the Adjournment of such Commissions, having already in the foregoing Part of this Chapter, in the 6th and 13th Sections, incidentally treated of the principal Questions relating to this Matter, I shall only take Notice in this Place, That it seems most proper to ^a enter all such Adjournments in the Present Tense; yet it is said, That the Entry of them in the Preter-Tense, is made good by the Multitude of Precedents: ^b However it is said, That the Court will never intend that there was an Adjournment, if no Entry at all were made of it.

^b 1 Sid. 348.
2 Keb. 284.
292.

Seet. 15. As to the fifth Point, viz. How far the Power given by such Commissions may be extended by new ones to other Justices, or committed to fewer than were appointed by the former; it is certain, That new Commissioners of this Kind may be added to the former by a Writ or Commission of Association, which setting forth the Purport of the former Commission, declares the King's Pleasure to associate to the Persons, appointed by the first, those to whom such new Writ or Commis-

sion

sion is directed, provided that such new Justices attend at the Times and Places appointed by the former; and it is usual to direct another Writ to the former Justices, commanding them to admit such new Justices as their Associates with the Proviso above mentioned; and the Writ to the Persons so associated is always Patent, and that to the other Justices to admit them is Close. But it hath been ^a resolved, That the first Justices are not bound by such Writ to admit the Persons named in it as their Associates, unless they produce such Patent of Association as is above-mentioned directed to themselves, as hath been more fully shewn in the first Section of this Chapter. And it hath been ^b questioned, Whether a special Commission of Association, relating only to a particular Cause, can associate the Persons named in it to Justices appointed by a general Commission? Also it hath been holden, That the King can grant but one Patent of Association to one Commission.

Sett. 16. If after Justices have sat by Virtue of a Commission, and taken divers Indictments, and awarded Process thereon, they shall all, or some of them die, the King may grant a new Commission to those who are living only, or to others, commanding them to continue the Proceedings begun, and to proceed upon such Process, and to hear and determine all the Offences in the former Commission: And thereupon the King shall send a Writ unto the Executors of the Justices who are dead, to send the Rolls, Records, and Processes touching the Premises, before the new Commissioners, &c.

Sett. 17. After a Writ of Association, it is usual to make out a Writ of *fi non omnes*, directed both to the first Justices, and also to those who are so associated to them, which reciting the Purport of the two former Commissions, commands the Justices, That if all of them cannot conveniently be present, such a Number of them may proceed, &c.

Sett. 18. As to the sixth Point, *viz.* Whether such Justices may sit in one County to try Offences in another? it seems agreed, That regularly all Offences are to be inquired of, heard, and determined in the County wherein they were committed, and that the King cannot authorize the taking of them in another; yet it was adjudged in the Case of the City of Gloucester, That if the King grant to a City the Privilege of being a County of it self, distinct from the County within which it lies, with a *Salvo* or Reservation, that the Justices of Oyer and Terminer, &c. for the County at large, may still sit in such City, such Reservation makes the City still remain Part of the County for such Purpose, and consequently, that an Indictment found within such City, of an Offence in the County at large, is good. Also it is certain, That by a special Custom Indictments of Offences within a County, may be taken in a Place out of it; as they are in Fact taken both for *Middlesex* and *London* at the Sessions-Hall at *Newgate*, which stands in *London*; for it shall be intended, That at the original Division of *London* from *Middlesex*, there was a special Provision made for this Purpose. Also it is certain, That the King may grant a special Commission of Oyer and Terminer, to sit in one County for hearing and determining Offences, whereof Indictments have been found in another: But it is agreed, That the Trial must be by the Jurors of the proper County.

Sett. 19. As to the seventh Point, *viz.* Where the Records of such Justices are to be kept after they are determined, it is enacted by 9 *Ed.* 3. 5. That Justices of Assize, Gaol-Delivery, and of Oyer and Terminer, shall send all their Records and Processes determined and put in Execution, to the Exchequer at Michaelmas, every Year once, to be delivered there; and the Treasurer

Register 124.
F. N. B. 111.
B.
Finch 318,
319.
H. P. C. 159,
162.
4 Inst. 165.

^a Long quin-
to E. 4 137.

^b Long quin-
to E. 4. 111,
112, 130, 131.

Fitz. Affize
17.
32 H. 6. 10.

Register 128.
F. N. B. 111.
D. 113, 114.

Register 124.
F. N. B. 111.

3 Inst. 27.
H. P. C. 162,
163.
Dy. 286 pl.
45.

Poph. 16, 17.
1 And. 292,
293.

3 Inst. 27.
H. P. C. 162,
163.
Dy. 286 pl.
45.

Raym. 193.

Popham. 17.

3 Inst. 27.
H. P. C. 162.
163.
Dy. 286 pl.
45.
Pl. Com. 390.

14 H. 7. 15 b.

suror and Chamberlains, which for the Time shall be, having the Sight of the Commissions of such Justices, shall receive the same Records and Processes of the said Justices under their Seals, and keep them in the Treasury, as the Manner is; so that the Justices always do first take out the Estreats of the said Records and Processes against them, to send to the Exchequer as they were wont before.

9 H. 7. 9. a. b.
Bro. Com-
mission, 17,
24.
Crom. Jur.
126. b.
H. P. C. 160.
Fitz. Cou.
47.
9 H. 7. 9.

Sett. 20. As to the eighth Point, viz. Whether the same Justices at the same Time may execute both the Commission of *Oyer and Terminer*, and also that of *Gaol-Delivery*? It seems certain at this Day, That the same Persons being authorized by both these Commissions, may proceed by Virtue of the one in those Cases, wherein they have no Jurisdiction by the other, and execute both at the same Time, and make up their Records accordingly; but this doth not seem to have been clearly agreed in former Times.

And now I am to consider the Nature of each of the abovementioned Commissions in particular; and first of that of *Oyer and Terminer*, concerning which I shall endeavour to shew;

1. Its several Kinds.
2. To what Cases the Jurisdiction given by it doth extend.
3. To whom, and on what Occasion it is grantable.

As to the first Point, these Commissions are of two Kinds:

1. General.
2. Special.

4 Inst. 162,
163.
Crom. Jur.
131.
Pl. Com. 384.
b.
2 Inst. 419.
Register 123.
34. Aff. pl. 8.
42 Aff. pl. 5.
2 Inst. 419.

Sett. 21. At this Day the common Form of such a General Commission, is to authorize the Persons to whom it is directed, or three or four of them, of which Number either such or such particular Persons among them are specially appointed to be, to inquire by the Oaths of lawful Men, and by other Means, of all Treasons, Felonies, and Misdemeanors, being specially mentioned, and of all others, in such and such Counties, and to hear and determine the same at certain Days and Places, to be appointed by them, &c. For which Purpose the King acquaints them, That he hath sent a Writ to the Sheriffs of such Counties, commanding them to return a Jury before them, at such Days and Places as shall be notified by them, in order to make Inquires of such Offences, &c.

Sett. 22. It is observable, That the abovementioned Commission makes no mention of the Suit of the Party; but it seems to have been anciently the most common Form of such Commission to direct the Justices to hear and determine Offences, as well at the Suit of the Party as of the King.

Of Special Commissions of *Oyer and Terminer*, there are many Precedents in our ancient Law Books; as first,

* Regift. 123.
F. N. B. 110.
b Regift.
125, 127.
F. N. B. 112,
113.
c Regift.
126
F. N. B. 112.
Letter C.

Sett. 23. 1. ^a For the inquiring and determining of some particular enormous Violence done to the Party, at whose Complaint the Commission is sued.

Sett. 24. 2. ^b Or for inquiring and determining of Trespasses done to the Possessions of a Bishoprick, while the Temporalities were in the King's Hands.

Sett. 25. 3. ^c Or for inquiring and determining of Injuries offered to Merchants, &c. under Pretence that their Ships were wrecked.

Sett. 26. 4. Or for inquiring and determining of Oppressions of Under-Sheriffs and Bailiffs, and other Officers; after which the King may send a Writ to the High Sheriff, commanding him as far as in him lies, to remove such Persons from their Offices till such Inquiries be made.

Register 120.
F. N. B. 112.
Letters D. E.

Sett. 27. 5. Or for inquiring into the Want of Reparations of Sea-Walls, Ditches, Gutters, Sewers, Bridges, &c.

Register 127,
128.
F. N. B. 113.

Sett. 28. 6. For hearing and determining the Right and Title of certain Persons claiming an Office, &c. Yet we find in *Dyer*, That the Defendant, sued before such Commissioners, demurred to the Jurisdiction of the Court; and it seems not to be clearly settled there whether such Commission be good.

Crom. Jur.
132.
Dyer 175.
pl. 25, 26.

Sett. 29. It is observable, That some of these special Commissions are mentioned to be granted at the Complaint of the ^a particular Persons supposed to be aggrieved; others at the Complaint of ^b divers Persons in general without naming them, and ^c others without any Complaint at all.

2 Inst. 419.
^a Register
123. a. 125. a.
b. 126. a.
127. a.
^b Register
125. b.
^c Register
127. a.

Sett. 30. Also there are Precedents of other Commissions of like Nature, granted on particular Occasions: but such special Commissions having been of late much disused, I shall refer the Reader for a more exact Knowledge of them to the *Register*, and *Fitzherbert's Natura Brevium*.

Sett. 31. As to the second Point, *viz.* To what Cases the Jurisdiction given by the Commission of *Oyer and Terminer* doth extend; it is generally said, That the Justices have no Power from it to proceed against any Persons, but those who are indicted before themselves, because the Words of it are, That they shall inquire, hear and determine; by which it seems to be implied, That they must inquire of an Offence before they proceed to hear and determine it: But this Reasoning depending wholly on the Wording of general Commissions, which are made in such Form, doth by no Means prove that a special Commission of *Oyer and Terminer*, reciting an Indictment of a particular Person, and authorizing the Justices to send for and proceed upon it to try the Offender, is not good; and accordingly we find, That the Attainder of *Dudley*, afterwards Earl of *Leicester*, by Virtue of such a Commission, was not objected against on this Account, in the Arguments concerning it, reported in *Plowden's Commentaries*.

Bro. Com-
mission 24.
4 Inst. 163.
H. P. C. 161.
12 Co. 31.

Sett. 32. It seems to be ^a agreed, That where a Statute prohibits a Thing, and does not appoint in what Court it shall be punished, the Offender may be indicted before Justices of *Oyer and Terminer*, because the King hath a Prerogative of suing in what Court he will. But it hath been ^b adjudged, That if such Statute appoint that the Offence shall be determined in any of the King's Courts of Record, it can be proceeded against only in one of the Courts of *Westminster-Hall*; because those being the highest Courts of Record, shall be intended to be only spoken of *secundum excellentiam*; and if the Act should be taken literally to intend any Court of Record whatsoever, the Sheriff's Turn, Court-Leet, and Pie-powders, and all other inferior Courts of Record, would be within the Purview of it: And it is farther reasonable to construe the Statute to extend to the said Courts of *Westminster* only, because the King's Attorney always attends there, whose Office it is, if the Defendant plead a special Plea, to make a Replication; yet both Sir *Edward Coke* and Sir *Matthew Hale* seem to be of Opinion, That on a Statute so worded, the Prosecution may be in any Court of *Oyer and Terminer*. And indeed seeing the abovementioned Limitation of such Suits to Courts of Record, is no more than the Law would have implied, if it had not been expressed:

Crom. Jur.
131, 132.
Plow. Com.
385, 386, &c.

^a Dy. 236. pl.
24.
Crom. Jur.
132.
^b 4 Inst. 164.
^c Dy. 236. pl.
24.
6 Co. 19. b.
20. a.
Cro. Jac. 538.
Cro. Eliz.
737.
Cro. Ca. 146.
Salk. 178.

4 Inst. 164,
165.
H. P. C. 161.

Fitz. Effoin.
173.

Dy. 236. pl.
24.

fed: And it is agreed, That if it had not been expreffed, the Suit might be in any Court of *Oyer and Terminer*, it may be reasonably argued, that it may be brought in any fuch Court notwithstanding fuch Limitation, according to the common Maxim, *quod expreffio eorum quæ tacitè infunt, nihil operatur*; efpecially confidering that the Court holden before Juftices of *Oyer, &c.* is a Court of Record of a very high Nature, and much regarded by the Law. And as to the Objection, That the Conftitution contended for, would extend fuch Suits to all inferior Courts of Record, it may be answered, that it would only extend them to fuch Courts of a general Jurifdiction, wherein Suits of like Nature may properly be brought, and not to Courts of a limited Authority, intituted for fpecial Purpofes, and confined either to Offences at the common Law, as the Court-Leet and Sheriff's Turn are, or to Contracts of a fpecial Nature, as the Court of Pie-powders is: As to the Objection, That it is moft reasonable to conftrue the Statute, to intend only fuch Courts wherein the King's Attorney attends, the fame may be faid in Relation to Profecutions on Statutes, which mention no Court at all wherein they fhall be brought; and yet it feems to be certain, That fuch Profecutions may be brought in any Court of *Oyer and Terminer*: Neither do I find any Reason affigned, why the King's Prerogative, of choofing in what Court he will commence a Suit, fhould be reftained without exprefs Words in this Cafe, where Courts at mentioned in general, more than in the others where they are not mentioned at all. Befides it ought to be confidered, That if fuch Profecutions are to be confined to the Courts of *Westminster*, no Offence againft any fuch Statute in any County, but that wherein the King's Bench fits, could be indicted at all; for it is certain, that no Offence can be inquired of out of the County wherein it was committed: Alfo fince 21 Jac. 1. 4. fet forth more at large in the Chapter concerning *Informations*, which reftains all Profecutions whatfoever on Penal Statutes to their proper Counties, (as the Conftitution of the faid Statute is now fettled.) if Suits on fuch Statutes could be brought only in *Westminster-Hall*, no Offences out of *Middlefex* could be profecuted at all.

Sect. 33. As to the third Point, *viz.* To what Perfons, and on what Occafions, Commissions of *Oyer and Terminer* are grantable, it is enacted by the Statute of *Westminster* 2 Cap. 29. That a Writ of *Trefpafs*, (*ad audiendum & terminandum*,) from henceforth fhall not be granted before any Juftices, except Juftices of either Bench, and Juftices in Eyre, unlefs it be for an heinous *Trefpafs*, where it is neceffary to provide speedy Remedy, and our Lord the King of his fpecial Grace hath thought it good to be granted.

Sect. 34. And it is farther enacted by 2 E. 3 Ch. 2. That *Oyers and Terminers* fhall not be granted but before Juftices of the one Bench or the other, or the Juftices Errants, and that for great Hurt or horrible *Trefpaffes*, and of the Kings fpecial Grace, after the Form of the Statute abovementioned.

Sect. 35. Alfo it is enacted by 34 Ed. 3. 1. That Writs of *Oyer and Terminer* be granted according to the Statutes thereof made, and that the Juftices which fhall be thereto affigned, be named by the Court and not by the Party.

2 Inft. 418.

Sect. 36. It may perhaps be argued from the general Words of thefe Statutes, That no Commission of *Oyer and Terminer* ought to be granted to any, but fuch Juftices as are therein mentioned, and on fuch fpecial Occafions. And Sir Edward Coke in his Comment on the faid Statute of *Westminster* 2. does not fhew whether all fuch Commissions in general are meant to be reftained by it, or fuch only as are of a particular Nature; yet if the Intention of the faid Statutes be fully examined, it feems reafonable to confine the Purview of them to fpecial Commissions of *Oyer* and

and *Terminer*, granted at the Complaint of particular Persons, upon some great Injury suggested to have been done to them; not only for that such special Commissions, for redressing of a particular Grievance at the Suit of the Party, seem to come more properly and generally under the Notion of Writs, than general Commissions issued by the King as the common Dispenser of Justice to his People, without any particular Application from, or Regard to any particular Person; but also because there may be a Mischief to the Subject from such special Commissions, which cannot be feared from the general ones; for the Party who sues out such a special Commission, may thereupon take out a Writ to the Sheriff, commanding him to arrest the Goods supposed to be wrongfully taken away, and to keep them in safe Custody till some Order be made concerning them, by the Justices assigned to determine the Matter, which may be very inconvenient to the Person complained of: Neither can it be imagined, that the Statute intended to restrain general Commissions to enormous Trespases, which could not but hinder the due Execution of Justice, which requires the Punishment of all Kinds of Misdemeanours, of which such Commissioners are the usual and proper Judges. But it is reasonable indeed, that such special Commissions should not be granted but upon urgent Occasions; and accordingly we find Precedents for the superseding of them, where the King has been informed, that he was imposed upon in granting them on a suggestion, that the Injury complained of was of a heinous Nature, where in Truth it was but a slight inconsiderable Trespas.

For other Particulars concerning the Proceedings of Justices of *Oyer and Terminer*, see the Chapter concerning *Approver*, and the Chapter concerning *Process against the Jury*.

C H A P. VI.

Of the Court of the Justices of Gaol-Delivery.

FOR the better Understanding of the Nature of the Commission of Gaol-Delivery, I shall consider,

1. What ought to be the Form of it.
2. What Jurisdiction the Justices authorized by it have by the Common Law.
3. What by Statute.
4. In what Place they ought to hold their Sessions.

Señ. 1. As to the first Point, having already shewn that all judicial Commissions must be agreeable to ancient Precedents, I shall only shew in this Place, the Purport of the most usual Commission of Gaol-Delivery, which is a Patent in Nature of a Letter from the King to certain Persons, appointing them his Justices, or two or three of them, of which Number either such or such a particular Person among them is especially required to be, and authorizing them to deliver his Gaol, at such a Place, of the Prisoners in it; for which Purpose it commands them to meet at such Place, at the Time which they themselves shall appoint, and

Theolof. Digest of Writs 1, 2, & super Sect. 1.
2 Inst. 419.

Register 126, 127.
2 Inst. 419.
F. N. B. 112. f.

Register 124, 125.
12 Aff. pl. 21.

Ch. 1. from Sect. 4. to Sect. 9. and Ch. 5. Sect. 1.

4 Inst. 168. Cromp. Jur. 125.

and informs them, that for the same Purpose the King hath commanded his Sheriff of the same County, to bring all the Prisoners of the same Gaol, and their Attachments before them, at such Day to be appointed by them.

Sect. 2. As to the second Point, *viz.* What Jurisdiction Justices of Gaol-Delivery have by the Common Law; it seems to be clear, That they may by Common Law proceed upon any Indictment of Felony or Trespafs, found before other Justices, against any Person in the Prison mentioned in their Commission, and not determined; and therefore these Words in the Statute of 4 E. 3. Ch. 2. *That the Justices assigned to deliver the Gaols shall have Power to deliver the same Gaols of those that shall be indicted before the Justices of Peace,* seem only to be in Affirmance of the Common Law; and herein the Authority of these Justices differs from that of Justices of Oyer and Terminer, who regularly can proceed only against Persons indicted before themselves, as hath been more fully shewn in the precedent Chapter, *Sect. 31.*

Sect. 3. But it is said in some ^a Books, That Justices of Gaol-Delivery, as such, have no Power to take any Indictment; but the Common Opinion, that they have such Power, seems much more agreeable to Reason; for ^b surely it cannot but be implied in their Commission to deliver Prisoners of their Prisoners, that they must have Authority to make such Deliverance by due Course of Law, which cannot be without a Proclamation, if there be no Prosecution, or a proper Trial, if there be one, in Order to which there must be an Accusation of Record, without which the Prisoner cannot be arraigned or tried.

Sect. 4. Also it hath been ^c holden, That Justices of Gaol-Delivery, as such, have no Power to deliver the Gaol of Persons committed for High Treason, perhaps for this Reason, because this being a Crime of so high a Nature, and against the King himself, shall not be included in the general Words of a Commission, nor tried without the King's special Direction; and this Opinion seems to be much favoured by the Preamble of the Statute of 3 H. 5. Ch. 7. wherein it is recited, *That the Punishment of counterfeiting Money, (which is a Species of Treason,) pertaineth not to any Judges of the Realm, but to the King's Justices before himself, or to special Commissioners thereto assigned;* and thereupon it is enacted, *That Justices of Assize shall have Power by the King's Commission to hear and determine the Offence above-mentioned:* Yet the contrary Opinion is not only warranted by very great ^d Authorities, but also it seems more agreeable to Reason; for since the Words of the Commission are general, and include all Prisoners alike without any Exception, why should those who are accused of Treason, be construed to be out of the Meaning of them more than others? especially considering, that the greater the Crime is for which a Man is imprisoned, the greater Hardship it is for him to lie under the Terror of a Prosecution for it, without being admitted to an Opportunity of clearing his Innocence: And the Statute of 1 Ed. 6. 7. which authorizes subsequent Commissioners of Gaol-Delivery, to give Judgment of Death against such as were found guilty before other Commissioners of Gaol-Delivery, of Treason, &c. and reprieved before Judgment, clearly supposes such Justices to have Power in Treason as well as in other Cases.

Sect. 5. It seems clear from the Words of the Commission, that these Justices have nothing to do with any Persons not in Custody of the Prison mentioned in it, except in some special Cases; for if Part only of those who were Accomplices to the same Felony be in such Prison, and other Part of them out of it; such Justices for the Necessity of the Case, may

H. P. C. 158.
4 Inst. 168,
169.
Bro. Coron.
179.
12 Co. 32.

*Cro. Eliz.
90, 179.
Bro. Commission 24.
1 And. 111.
Fitz. Coron.
47.
1 And. 111,
112.
H. P. C. 158.
4 Inst. 168.

*S. P. C. 183.
Letter A.
3 Rol. Rep.
12.
Crom. Jur.
28.
Fitz. Coron.
47.
1 And. 111;

^d 4 Inst. 169.
H. P. C. 159.
1 And. 112.
and the next
Ch. Sect. 4.

Fitz. Coron.
77.

may ^a receive an Appeal against those who are out of the Prison, as well as those who are in it; which Appeal after the Trial of such Prisoners, shall be removed into the King's Bench, and Process shall issue from thence against the rest: But if those out of Prison shall be omitted in such Appeal, they could never be put into any other, because there can be but one Appeal for one Felony. Also it is said both by ^b Staundford, ^b S. P. C. 64, and ^c Hale, That such Justices may receive an Appeal by Bill against one let to Bail. But I cannot find any Authority in the ^d Books, cited by them for that Purpose, to warrant this Opinion; for though it be true, That the Court of King's Bench may receive an Appeal by Bill, against one for whom Bail is filed, as being *in Custodia Mareschalli*; yet this seems to depend on the particular Usage of that Court. And I do not find it said in any Book, That those who are bailed by any other Court, are looked upon as Prisoners in the Prison belonging to such Court, but only in the Custody of their Sureties, who may detain them where-ever they please: However, it seems to be agreed by all the Books abovementioned, That such Justices have no more to do with one let to Mainprize, than if he were at large, because such Person can in no Sense be said to be a Prisoner, since it is not in the Power of his Sureties to detain him in their Custody, as will be more fully shewn in the Chapter concerning *Bail*.

Seç. 5. It seems clear, That such Justices have not only Power to discharge such Prisoners, as upon their Trial shall be acquitted; but also all such against whom, upon Proclamation made, no Evidence shall appear to indict them; which neither Justices of Peace, nor Justices of Oyer and Terminer can do.

Seç. 6. Also there seems to be no Doubt, but that the Justices of Gaol-Delivery may award Execution, against such Prisoners as have been outlawed for Felony before Justices of Peace.

Seç. 7. Also notwithstanding the Commission of Justices of Gaol-Delivery be in Strictness determined after the End of their Session, yet it seems to be settled at this Day, That they have Power either to order the Execution or Reprieve of the Persons who have been condemned before them.

Seç. 8. Also it is said by some, That the Justices of Gaol Delivery may by the Common Law punish those who unduly bail Prisoners, as being guilty of a negligent Escape; but it seems needless strictly to examine this Matter, since they have certainly such Power by Statute, as will be more fully shewn in the following Part of this Chapter.

As to the third Point, *viz.* What Jurisdiction Justices of Gaol Delivery have by Statute, I shall consider the same,

1. In Relation to Appellees.
2. To irregular Bailment of Prisoners.
3. To Sheriffs, &c. refusing to receive Prisoners.
4. To Persons convicted before former Justices.
5. To Offences created by Statute.

Seç. 9. As to the first Particular, it is enacted by 28 E. 1. That they may award Process into a foreign County against those who shall be appealed before them by an Approver, as shall be more fully shewed in the Chapter concerning *Approvers*.

Sett. 10. As to the second Particular, viz. The Power of such Justices in Relation to the Bailment of Prisoners, it is enacted by 27 Ed. 1. cap. 3. commonly called the Statute *De finibus*, That Justices of Assise shall deliver the Gaols of Counties where they take Assises, &c. and inquire if Sheriffs or any other have let out by Replevin Prisoners not replevable, or have offended in any Thing contrary to the Form of the Statute of Westminster, 1. Cap. 15. and whom they shall find guilty, they shall chasten and punish in all Things according to the Form of the Statute aforesaid.

F. N. B. 251.
H
H. P. C. 158.
3 Inst. 169.

Sett. 11. But this Statute mentioning only Justices of Assise, it may perhaps be questioned, whether it is to be extended by Equity, to Justices of Gaol-Delivery by special Commission, not being Justices of Assise.

Sett. 12. However, it is enacted by 4 Ed. 3. cap. 2. That Justices assigned to deliver Gaols, shall have Power to enquire of Sheriffs, Gaolers, and others in whose Ward Persons indicted before Wardens of the Peace shall be, if they make Deliverance, or let to Mainprize any so indicted, which be not mainpernable, and to punish the said Sheriffs, Gaolers and others, if they do any Thing against this Act.

Sett. 13. It is observable, that this Statute saith only in general, That such Justices shall have Power to punish the Offenders therein mentioned, without saying, That they shall punish them according to the Form of the Statute of Westminster 1. as the abovementioned Statute *de finibus* does; yet it is said, That they may punish them according to the Form of the said Statute of Westminster, as much as if it had been expressed.

S. P. C. 77. a.

Sett. 14. Also it is enacted by 1 & 2 Ph. & Mar. 13. That if any Justice of the Peace of the Quorum, or Coroner, shall offend against the Purview of the said Statute, either as to bailing Prisoners, or taking their Examinations, or the Information of those that bring them before them, or not putting the same in Writing, or not certifying them to the next Gaol-Delivery, or not putting in Writing the Evidence given to a Jury on a Coroner's Inquest of Murder or Manslaughter, or not binding over material Witnesses against Persons accused of Felony, to give Evidence at the next general Gaol-Delivery, or not certifying such Evidence, and also such Recognizances, &c. the Justices of Gaol-Delivery of the Place where such Offence shall be committed upon due Proof thereof by Examination before them, shall for every such Offence set such Fine as they shall think meet, &c.

Sett. 15. As to the third Particular, viz. The Power of such Justices in Relation to Sheriffs, &c. refusing to receive Prisoners. it is enacted by 4 E. 3. cap. 10. That Justices of Gaol-Delivery shall punish Sheriffs and Gaolers, refusing to take Felons into their Custody from Constables and Townships, without being paid for such Receipt.

Sett. 16. As to the fourth Particular, viz. The Power of such Justices, in Relation to Persons convicted before former Justices, it is enacted by 1 Ed. 6. cap. 7. That where any Person or Persons shall be found guilty of any Treason or Felony, for the which Judgment of Death should or may ensue, and shall be reprieved to Prison without Judgment at that Time given against him, her, or them so found guilty, those Persons that at any Time hereafter, shall by the King's Letters Patent be assigned Justices to deliver the Gaol, where any such Person or Persons found guilty shall remain, shall have full Power and authority to give Judgment of Death against such Person so found guilty, and reprieved, as the same Justices (before whom such Person or Persons was or were found guilty) might have done, if their Commission of Gaol-Delivery had remained and continued in full Force and Strength.

Señ. 17. It hath been holden, That this Statute extends not to Convictions before Justices of *Oyer* and *Terminer*, not only because Convictions before Justices of Gaol-Delivery only are mentioned, but because the Proceedings before Justices of *Oyer* and *Terminer*, after the *Oyer* determined, ought to remain in the King's Bench, and the Records before the Justices of Gaol-Delivery with the *Custos Rotulorum*. 12 Co. 33.
Bro. Oyer &
Terminer.

Señ. 18. Also it seemeth, That since the Statute speaks only of Persons reprieved before Judgment, it gives subsequent Commissioners no manner of Power over Persons condemned by former Justices; and therefore it hath been holden, That if a Person condemned by former Justices, plead a Pardon before their Successors, they have no Power to allow it, but that the Record ought to be removed by *Certiorari* into the King's Bench, and the Prisoner also by *Habeas Corpus*, and that there the Pardon shall be allowed or disallowed. And from the same Reason it seems to follow, That subsequent Justices have no Power from this Statute to award the Execution of Persons condemned by former Justices, and reprieved by them: But if Judgment had not been given by the former Justices, there is no Doubt but that the subsequent ones might by Force of this Statute, have allowed the Pardon, or given Judgment, and awarded Execution, &c. as the first might have done. Also it hath been adjudged, That not only such subsequent Justices as are authorized by the same King, by whom the former were commissioned, but also that the Justices of the next King may have the like Power by Virtue of this Statute. Dalison 20.

Quare Dy.
165. pl. 4.

7 Co. 31. b.
Dalison 25.

Señ. 19. As to the fifth Particular, *viz.* The Jurisdiction of Justices of Gaol-Delivery in Relation to Offences created by Statute; By 33 H. 8. 9. Par. 20. They may punish those who keep unlawful Gaming Houses, or use unlawful Games. By 5 Eliz. 3. Par. 9. They have Jurisdiction over Perjury and Subornation of Perjury against the Form of that Statute. By 8 Eliz. 3. They may punish those who transport Sheep alive. By 23 Eliz. 1. Par. 9. They may enquire of, hear and determine Offences against that Statute in not coming to Church; and generally they have the like Power in other Statutes, creating new Offences, which it would be too tedious particularly to set down in this Place.

As to the fourth general Point of this Chapter, *viz.* In what Place Justices of Gaol-Delivery ought to hold their Sessions, it is enacted by 6 Ric. 2. 5. That Justices assigned to take Assizes and deliver Gaols, shall hold their Sessions in the principal and chief Towns of every of the Counties where the Shire-Courts of the same Counties were then holden, or hereafter should be holden. For other Matters relating to these Justices, see Chapter 7. concerning Justices of Assize and Nisi Prius, and the Chapter concerning Procefs.

C H A P. VII.

Of the Court of the Justices of Assize and Nisi Prius.

Señ. 1. **T**HE Power of Justices of Assize, whether as such, or as Justices of *Nisi Prius*, in Relation to criminal Matters, depending wholly on Statute, I shall only take Notice of the principal Branches of their Jurisdiction of this Kind, given them by several Acts of Parliament; and for more particular Inquiries concerning their Authority in other Cases, and the Nature, Extent and End of their Commission, shall refer the Reader to Sir Edward Coke's 4th Institute, fol. 158, &c. and to his 12th Report, fol. 32. and to Mr. Crompton's Treatise concerning the Jurisdiction of Courts, fol. 204. &c.

The most considerable Parts of their Jurisdiction in criminal Matters, proper to be considered in this Place, are such as relate,

1. To the Delivery of Gaols.
2. To Counterfeiters of Money.
3. To Appellees.
4. To Conspirators, Maintainers, and other Offenders of the like Nature.
5. To Offences of Sheriffs, Gaolers, and other Officers.
6. To capital Offences tried by Writ of *Nisi Prius*.
7. To the Counties for which such Justices of Assize may be commissioned.

Señ. 2. As to the first of these Particulars, it is enacted by 27 Ed. 1. commonly called the Statute *de finibus*, cap. 3. That Justices assigned to take Assizes, in every County where they do take Assizes, as they be appointed incontinent after the Assizes taken in the Shires, shall remain both together if they be lay; And if one of them be a Clerk, then one of the most discreet Knights of the Shire being associate to him that is a Layman by the King's Writ, shall deliver the Gaols of the Shires, as well within Liberties as without, of all Manner of Prisoners, after the Form of the Gaol-Deliveries of those Shires, before Times used. And the same Justices shall inquire then, if Sheriffs or any other have let out by Replevin Persons not replevable, &c.

Señ. 3. Also it is recited by 2 Ed. 3. 2. That Offenders had been greatly encouraged, because the Justices of Gaol-Delivery and of Oyer and Terminer, had been procured by great Men against the Form of the said Statute of 27 Ed. 1. and thereupon it is enacted, That such Justices shall not be made against the Form of the said Statute.

S. P. C. 57. b.
Raym. 375.
H. P. C. 164.
12 Co. 32.

Señ. 4. It seems to have been the most general Opinion in the Construction of the abovementioned Statute of 27 Ed. 1. That the Purview of it extends only to Cases of Felony; and this is farther confirmed by the Recital of the Statute of 2 H. 5. set forth more at large in the following Part of this Chapter, by which it is declared, That no Judges but those of the King's Bench, or special Commissioners, have Power to punish Counterfeiters of Money. Also it is argued, That the Purview of

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the said Statute of 3 H. 5. empowering Justices of Assise, having the King's Commission for such Purpose, to hear and determine the Offences of such Persons, would be vain and to no Purpose, if such Justices, as such, had Power over such Offences before, by Virtue of the said former Statute: And yet perhaps the contrary Opinion is the more plausible; for since the said Statute is intended for the greater Expedition of Justice, and the Words of it expressly extend to all Manner of Prisoners, why should they be restrained by a violent Interpretation, inconsistent with the natural and obvious Sense of them? And since Justices of Gaol-Delivery, armed only with a general Commission to deliver Gaols of the Prisoners in them, are, according to the better Opinion at this Day, authorized to deliver such Gaols of Persons accused of Treason, as well as of others committed for Crimes of an inferior Nature, why should not the said Statute, the Intent whereof is to give Justices of Assise like Power with Justices of Gaol-Delivery, be construed to give them as large a Power? And as to the Arguments drawn from the Opinion of the Makers of the abovemention'd Statute of 3 H. 5. it may be answered, that perhaps the Purport of the said Recital may amount to no more than this, that no other Judges but those therein mentioned, would venture to take upon them a Power to try such Offences, because it was not clearly settled that they had Authority to do it.

Vide infra
sect. 9.

Vide supra
cap. 6. sect. 4.

Sect. 5. It seems to be the general Opinion, That Justices of Assise, as such, by Force of the said Statute of 27 E. 1. may deliver Gaols without any special Commission for that Purpose; and this seems to be most agreeable to the Purview of the said Statute, if such Justices be Laymen; for seeing the Act provides only, That if one of them be a Clerk, then one of the Knights of the County being associate by Writ to him that is a Layman shall deliver the Gaols; and make no Mention of any such Writ where both are Laymen; but only says in general, That in such Case they shall remain both together, it seems to imply that Laymen being Justices of Assise shall have such Power of Course.

H. P. C. 164.
S. P. C. 17. b.
Crom. Jur.
126.
Dy. 99. pl.
62.

Sect. 6. As to the second Particular, viz. The Power of these Justices in Relation to Counterfeiters of Money, it is recited by the Statute of 3 H. 5. cap. 7. *That Counterfeiting, Clipping, Washing, and other Falsity of Money, had then of late abounded, for that the Punishment of the same pertaineth not to any Judges of the Realm, but to the King's Justices before himself, or special Commissioners thereto assigned, &c.* and thereupon it is enacted, *That the King's Justices assigned to take Assises in all the Counties of England, shall have Power by the King's Commissions, to hear and determine in their Sessions, as well of the Counterfeiting and of the bringing such false Money into the Realm, as of Clipping, Washing, and every other Falsity of the said Money.*

See the precedent Chap.
Sect. 4. and
the 15th Sect.
of this Chapter.

Sect. 7. It seems clear from the manifest Purport of this Statute, That Justices of Assise can claim no Power from it over any of the Offences therein mentioned; without a special Commission for such Purpose; but this Statute being wholly in the Affirmative, and no way intended to abridge but enlarge the Jurisdiction of such Justices; it seems clear, That if they had Authority as Justices of Gaol-Delivery, by Virtue of the abovementioned Statute *De finibus*, without any special Commission, to deliver Persons in Prison for such Crimes, (which Question is more fully handled in the precedent Part of this Chapter,) they may still lawfully proceed upon the said Statute in the same Manner as before.

S. P. C. 18.
H. P. C. 164.

Supra Sect. 4.
Cro. Jur. 126.

Sect. 8. As to the third Particular, viz. The Power of Justices of Assise in relation to Appellees, it is enacted by 28 Ed. 1. commonly called the Staute *De Appellatis*, *That such Justices may award Process into any foreign County against Persons appealed by Approvers, and proceed against them, &c.*

Sect. 9. It is made a Doubt in *Dyer's Reports*, by what Warrant Justices of Assise hold Plea of an Appeal of Robbery; and it is there holden, That they do it by Virtue of the Commission of Gaol-Delivery: But it seems, that it ought not to be intended to be the Meaning of this Report, That Justices of Assise have no Jurisdiction as to an Appeal of Robbery, without an express Commission of Gaol-Delivery; for since Justices of Assise, as such, have Power by the abovementioned Statute *De finibus* to deliver Gaols of all Manner of Prisoners, after the Form of the Gaol-Deliveries of the Shires wherein they sit, why should they not by Force of those general Words, deliver such Gaols of Persons proceeded against by Way of Appeal commenced before them, as well as of those proceeded against by Way of Indictment, as it seems to be taken for granted in other Books that they may? And therefore it seems to be reasonable to take the abovementioned Report of *Dyer* in this Sense, That Justices of Assise may hold Plea of Appeals of Robbery by the Commission of Gaol-Delivery, given them implicitly by the said Statute *De finibus*, in respect whereof they seem to have all the Power of Justices of Gaol-Delivery, whether given them by the Common Law or by Statute, as fully appears from what immediately follows the abovementioned Passage in the said Report, wherein it is said, That the Statute of 2 or 3 *H. 7.* gives Justices of Assise the Power by express Words as to Appeals of Death; but it is certain, that the said Statute of *H. 7.* does not expressly mention Justices of Assise, but saith only, That the Wife, &c. may commence an Appeal before the Sheriff and Coroners, or before the King in his Bench, or Justices of Gaol-Delivery; and yet it is holden in the said Report, That this Statute expressly extends to Justices of Assise; from which it seems manifestly to follow, That such Justices are taken to be included under the general Notion of Justices of Gaol-Delivery.

Sect. 10. As to the fourth Particular, *viz.* The Power of Justices of Assise in Relation to Conspirators, Maintainers, and other Offenders of the like Nature, it is enacted by 28 *Ed. 1.* commonly called *Articuli super chartas*, ch. 10. That Justices assigned to take Assises, when they come into the Country to do their Office, shall, upon every Complaint made unto them of Conspirators, false Informers, and evil Procurers of Dozens, Assises, Inquests, and Juries, award Inquest thereupon without Writ, and shall do Right to the Plaintiffs without Delay. And it is farther enacted by 4 *Ed. 3.* 11. That the Justices of Assise, whensoever they come to hold their Sessions, or to take Inquests upon Nisi Prius, shall inquire, hear and determine, as well at the Suit of the King as at the Suit of the Party, of Maintainers, Bearers, Conspirators, &c. And the like is ordained by 20 *Ed. 3.* 6. by which it is enacted, That such Justices shall have Commissions to inquire of Maintainers and common Embraceors, &c.

Sect. 11. Also it is enacted by 5 *Ed. 3.* 10. That the Justices before whom any Assise, Inquest or Jury shall pass, may inquire and determine the Offence of any Juror in taking Money of either Party, &c.

Sect. 12. But it is ordained by 38 *Ed. 3.* 12. That no Justice, &c. inquire of Offences of the said Offence, but only at the Suit of the Party, or of other, &c.

Sect. 13. And it is farther enacted by 32 *H. 8.* ch. 9. That the Justices of Assise of every Circuit within this Realm, and elsewhere within the King's Dominions. shall in every County within their Circuits, twice in the Year cause open Proclamation to be made, as well of the said Statute as of all others made against unlawful Maintenance, Champerty, Embracery, &c.

Sect. 14. As to the fifth Particular, *viz.* The Power of Justices of Assise

Assise in Relation to the Offences of Sheriffs, Gaolers, and other Officers, it is enacted by 20 Ed. 3. 6. *That Justices of Assise shall have Commissions sufficient to inquire of Sheriffs, Escheators, Bailiffs of Franchises and their Ministers, and of the Gifts which they take to execute their Office, &c.*

Sect. 15. Also it is enacted by 22 H. 6. 10. *That Justices of Assises in their Sessions, shall have Power to inquire, hear and determine of Office without special Commission, of and upon all Sheriffs, Under Sheriffs, Clerks, Bailiffs, Gaolers, Coroners, Stewards, Bailiffs of Franchises, or any other Officer or Minister doing contrary to the said Statute, as by extorting Money for the omitting of an Arrest, or shewing Ease or Favour to those who shall be arrested, or by admitting Persons to Bail, or denying them the Benefit of it, contrary to the Form of the said Statute.*

Sect. 16. Also it is enacted by 1 H. 8. 7. *That Justices of Assise and of the Peace, shall have Authority to inquire of and determine, as well by Examination as by Presentment, the Default of Coroners in not taking an Inquest without Fee or Reward, on the View of the Body of any Person slain by Misadventure.*

Sect. 17. As to the sixth Particular, viz. the Power of Justices of Assise, in Relation to capital Offences tried by Writ of Nisi Prius, it is enacted by 14 H. 6. 1. *That the Justices before whom Inquisitions, Inquests and Juries, shall be taken by the King's Writ of Nisi Prius, shall have Power in all the Cases of Felony and Treason, to give their Judgments, as well where a Man is acquit of Felony or of Treason, as where he is thereof attainted, the Day and Place where the said Inquisitions, Inquests, and Juries be so taken, and then from thenceforth to award Execution to be made by Force of the same Judgments.* Raym 367.

Sect. 18. In the Construction of this Statute it hath been holden, That if the Plaintiff in Appeal be nonsuited before Justices of Nisi Prius, they have no Power to arraign the Defendant at the Suit of the King on the Declaration in the Appeal, as Justices before whom an Appeal is originally commenced may do: And the Reason of this Construction seems to be this, because the Statute only mentioning that Justices of Nisi Prius shall give Judgment where the Defendant is acquitted or attainted, leaves their Jurisdiction upon a Nonsuit as it was before. But it seems certain, That on the Acquittal of an Appellee such Justices have Power to inquire of the Abettors, and also of the Sufficiency of the Plaintiff to answer the Damages; for since the Statute of Westm. 2. Ch. 12. gives such Power to the Justices before whom an Appeal shall be heard and determined; and now by Force of 14 H. 6. it may be heard and determined before Justices of Nisi Prius, it seems necessarily to follow, That Justices of Nisi Prius shall have such Power since the said Statute of 14 H. 6. And from the same reasoning it seems also to follow. That such Justices may give Judgment for the Damages; but constant Experience hath over-ruled it to the contrary. 22 Ed 4 19.2.

Sect. 19. As to the seventh Particular, viz. for what Counties Justices of Assise may be commissioned, it is enacted by 8 Ric. 2. 2. *That no Man of Law shall be from thenceforth Justices of Assises, or of the common Deliverance of Gaols, in his own Country.* Dyer 130. pl 12. Gram. Jur. 213. 4 Inst. 160. 22 Ed. 4. 19. 1. 10 Ed. 4. 12. b. 2 Inst 386. Bro. Nisi Prius 27.

Sect. 20. Also it is enacted by 33 H. 8. Ch. 21. *That no Justice, nor other Man learned in the Laws of this Realm, shall use, nor exercise the Office of Justice of Assise within any County where the said Justice was born, or doth inhabit, on Pain of 100 l. &c. Provided that the said Act shall not extend to any Person who shall be Clerk of Assises, and Associate to any Justice of Assise, nor to any Mayor, Sheriff, Recorder, Steward, Bailiff, Sewter, or other Officer being born or dwelling within any City, Borough or Town within this Realm of England, &c. Nor to Justices of either Bench for taking, hearing, or determining Assises in the one Bench or the other, nor to the Justices, Justice-Clerks, or Clerk of Assises, in the Dutchy and County Palatine of Lancaster.* CHAP.

C H A P. VIII.

Of the Court of Sessions of Justices of Peace.

BEFORE I come to consider the Nature of the Court of Sessions of Justices of Peace, I shall premise.

1. In what Manner Conservators of the Peace were provided by the Common Law.
2. In what Manner Justices of Peace have been ordained by the several Statutes concerning them.
3. How they are to be commissioned in Pursuance of those Statutes.
4. What is most observable from the said Statutes and Commissions.

As to the first Point it seems, that Conservators of the Peace by the Common Law, were of two Sorts;

1. Those who in Respect of their Offices had Power to keep the Peace, but were not simply called by the Name of Conservators of the Peace, but by the Name of such Offices.
2. Those who were constituted for this Purpose only, and were simply called by the Name of Conservators or Wardens of the Peace.

^a Lamb. B. 1.
Ch. 3.
Dalt. Ch. 1.
^b Bro Recognizance 14.
19.
Dalt. Ch. 1.
^c Lamb. B. 1.
Ch. 3.

Señ. 1. And first of those of the first Sort, of which the King's ^a Majesty is certainly the Principal, from whom all Authority of this Kind was originally derived, and who still continues to have the same in his own Person; yet it is said, ^b That he cannot take a Recognizance for the Keeping the Peace, because it is a Rule in Law, That no one can take any Recognizance, who is not either a Justice of Record, or by Commission; also it seems certain, That ^c no Duke, Earl or Baron, as such, have any greater Authority to keep the Peace than mere private Persons.

^d Dalt. Ch. 1.
Lamb B. 1.
Ch. 3.
Crompt. 6 b.

Señ. 2. The ^d Lord Chancellor or Lord Keeper of the Great Seal, the Lord High Steward of *England*, the Lord Marshal, and Lord High Constable of *England*, and every Justice of the King's Bench, and, as some say, the Lord Treasurer have, as incident to their Offices, a general Authority to keep the Peace throughout all the Realm, and to award Process for the Surety of the Peace, and to take Recognizances for it. And the Master of the Rolls hath also the like Power, either as incident to his Office, or at least by Prescription.

^e 10 H. 6 7 b.
Lamb. b. 1.
Ch. 3.

Señ. 3. Also every ^e Court of Record, as such, hath Power to keep the Peace within its own Precinct, as hath been more fully shewn, *Ch. 1. Señ. 15.* And the Justices of Gaol-Delivery may take Surety of the Peace from a Prisoner before them, who was committed for not finding such Surety.

Señ. 4. Also every Sheriff is a principal ^a Conservator of the Peace within his County, and may without Doubt, *ex Officio*, award Procefs of the Peace, and take Surety for it; and it seems the better ^b Opinion, That the Security so taken by him is by the Common Law looked on as a Recognizance or Matter of Record, and not as a common Obligation, or Matter *in Pais* only; for that it is taken by him by Virtue of the King's Commission, by which he is intrusted with the Custody of the County, and consequently has by it an implied Power of keeping the Peace within such County; and it is a general ^c Rule. That whatsoever is done by Virtue of the King's Commission ought to be taken as a Matter of Record.

Señ. 5. Also every ^d Coroner is another principal Conservator of the Peace within the County of which he is a Coroner, and may certainly bind any Person to the Peace who makes an Affray in his Presence: But it seems the Better Opinion, That he has no Authority to grant Procefs for the Peace; and it seems clear, That the Security taken by him for the keeping of the Peace, (except only where it is taken by him as Judge of his own Court for an Affray done in such Court,) is not to be looked on as a Recognizance, but as an Obligation; because it is not taken by one who acts as a Judge of Record, or by the King's Commission, as all ^e Recognizances ought to be.

Señ. 6. Also every High and Petit Constable are by the Common Law Conservators of the Peace within their several Limits, and may take such Order for the keeping of the same, as hath been more fully shewn, *B. 1. Ch. 63. S. 13, 14, &c.*

Secondly, Conservators of the Peace by the Common Law, who were constituted for that Purpose only, and were simply called by the Name of Conservators or Keepers of the Peace, were of two Kinds:

1. Ordinary.
2. Extraordinary.

Those of the first Kind were either,

1. By Tenure, or
2. By Election, or
3. By Prescription.

Señ. 7. Conservators of the Peace by Tenure were those who held Lands of the King by this Service, among others, of being Conservators of the Peace, within such a District.

Señ. 8. Conservators of the Peace by Election, were those who were chosen to such Office in Pursuance of the King's Writ to such Purpose, (as all Sheriffs anciently were, and as Coroners still are) by the Freeholders of a County in the County-Court; after which Election it was usual for the King to send another Writ to the Persons so chosen, commanding them diligently to attend their said Office till they should receive a Command from the King to the contrary.

Señ. 9. Conservators of the Peace by Prescription, were those who claimed such Power from an immemorial Usage in themselves and their Predecessors or Ancestors, or those whose Estate they had in certain Lands, to exercise the like Power, which wholly depended upon such Usage both as to its Extent, and the Manner in which it was to be exercised.

^a Lamb. B. 1.

Ch. 3.

^b 12 H. 7. 17 b.

Bro. Peace 33.

Cro. Car. 26.

^c Bro. Recognizance 5.

F. N. B. 81. d.

82.

Dalt. ch. 11.

Lamb. B. 1.

Ch. 13.

^d Quere Bro.

Recognizance 5, 14,

16, 18.

^e See the Books

above cited.

^f E. 4. 36. b.

31. a.

^d Crompt. 6.

Lamb. B. 1.

Ch. 3.

^e See the Books

cited S. 1.

Letter b. and

S. 4. Letter b.

Crompt. 6. b.

^a 21 Ed. 4.
67 a.

^b Co. Lit.
114. b.
Doct. 1. and
Student B. 1.
Ch. 7.

^c Dalt. B. 1.
fol. 3.
Crompt 6. b

Lamb. B. 1.
Ch. 3.

Señ. 10. It is ^a questioned indeed by some, Whether any such Power can be claimed by Usage? Yet if the Power of holding Pleas and even Courts of Record, which are of so high a Nature, and imply a Power of keeping the Peace within their own Precincts, may be claimed by Usage, as it seems to be ^b certain, that they may; it seems strange that the bare Authority of keeping the Peace in a certain District may not as well be claimed by such Usage.

Señ. 11. It ^c seems, That the Power of such Conservators of the Peace, whether by Tenure, Election, or Prescription, was no greater than that of Constables at this Day, unless it were enlarged by some special Grant or Prescription.

Señ. 12. The extraordinary Conservators of the Peace were Persons specially commissioned, in Times of imminent Danger either from Rebels or foreign Invaders, to take care of and defend such a particular District committed to their Charge, and to preserve the Peace within the Limits of it; and these had Power to command the Sheriff with his whole *Power* to aid and assist them.

Señ. 13. And now I am in the second Place to shew, in what Manner Justices of Peace have been ordained by the several Statutes concerning them, the first whereof is 1 Ed. 3. Ch. 16. which is in the following Words, *For the better keeping and Maintenance of the Peace, the King willeth that in every County, good Men and lawful, which be no Maintainers of Evil, or Barretors in the Country, shall be assigned to keep the Peace.*

Señ. 14. And it is farther enacted by 4 Ed. 3. 2. *That there shall be assigned good and lawful Men in every County to keep the Peace; and at the Time of the Assignments Mention shall be made, that such as shall be indicted or taken by the said Keepers of the Peace, shall not be let to Mainprise by the Sheriffs, nor by none other Ministers, if they be not mainpernable by the Law; nor that such as shall be indicted, shall not be delivered but at the Common Law. And the Justices assigned to deliver the Gaols, shall have Power to deliver the same Gaols of those that shall be indicted before the Keepers of the Peace; and that the said Keepers shall send their Indictments before the Justices, &c.*

Señ. 15. And it is farther enacted by 18. Ed. 3. 2. *That two or three of the best Reputation in the Counties, shall be assigned Keepers of the Peace by the King's Commission And at what Time need shall be, the same with other wise and learned in the Law shall be assigned by the King's Commission, to hear and determine Felonies and Trespasses done against the Peace in the same Counties, and to inflict Punishment reasonably according to the Law and Reason, and the Manner of the Deed.*

Señ. 16. And it is farther enacted by 34 Ed. 3. 1. *That in every County of England, shall be assigned for the keeping of the Peace, one Lord, and with him three or four of the most worthy in the County, with some Learned in the Law, and they shall have Power to restrain the Offenders, Rioters, and all other Barretors, and to pursue, arrest, take and chastise them according to their Trespass or Offence; and to cause them to be imprisoned and duly punished according to the Law and Customs of the Realm, and according to that which to them shall seem best to do by their Discretion and good Adviseement; and also to inform them, and to inquire of all those that have been Pillors and Robbers in the Parts beyond the Sea, and be now come again, and go wandering, and will not labour as they were wont in Times past; and to take and arrest all those that they may find by Indictment, or by Suspicion, and to put them in Prison, and to take of all them that be not of good Fame, where they shall be found, sufficient Surety and Mainprise of their good Behaviour towards the King and his People, and the other duty to punish, to the Intent that the People be not by such Rioters or Rebels troubled nor endamaged,*
nor

nor the Peace blemished, nor Merchants nor other passing by the Highways of the Realm disturbed, nor put in the Peril which may happen of such Offenders; and also to hear and determine at the King's Suit, all Manner of Felonies and Trespasses done in the same County, according to the Laws and Customs aforesaid.

Señt. 17 And it is enacted by 17 R. 2. 10. That in every Commission of the Peace through the Realm, where need shall be, two Men of Law of the same County where such Commission shall be made, shall be assigned to go and proceed to the Deliverance of Thieves and Felons, as often as they shall think it expedient.

Señt. 18. And it is farther enacted by 2 H. 5. Stat. 1. Ch. 4. That the Justices of Peace in every Shire named of the Quorum, (except Lords, and the Justices of either Bench, and the Chief Baron, and Serjeants at Law, and the King's Attorney for the Time that they shall be occupied in the King's Service,) shall be resident in the same Shire, and shall make their Sessions four Times by the Year, viz. in the first Week after Michaelmas, Epiphany, Easter, and the Translation of St. Thomas the Martyr, and oftner if Need be, and that the same Justices hold their Sessions throughout England in the same Weeks every Year.

36 Ed. 3. 12
Lambert B. 4.
Ch. 19.
Crompt. 123.

Señt. 19. Also it is enacted by 2 H. 5. Stat. 2. Ch. 1. That Justices of Peace shall be made in the Counties of England, of most sufficient Persons dwelling in the same Counties, by the Advice of the Chancellor and of the King's Counsel, without taking other Persons dwelling in foreign Counties to execute such Office, except the Lords and the Justices of Assises to be named by the King and his Counsel; and except all the King's Chief Stewards of the Lands and Seignories of the Duchy of Lancaster, in the North Parts, and in the South, for the Time being.

Señt. 20. Also it is enacted by 1 Mar. Señt. 2. Ch. 8. That no Person having or using the Office of a Sheriff of any County, shall use or exercise the Office of a Justice of Peace, by Force of any Commission or otherwise, in any County where he shall be Sheriff, during the Time only that he shall exercise the said Office, or Sheriffrick: And that all Acts done by such Sheriff by Authority of any Commission of the Peace, during the Time aforesaid, shall be void.

Crompt. 121.

Señt. 21. Also there are many other Statutes concerning the Power of Justices of Peace, all of which it would be endless to enumerate; therefore I have only taken Notice of those which concern their Authority in general; and for those which concern the particular Branches of it, I shall refer the Reader to the Books which treat principally of this Subject.

Señt. 22. As to the third Point, viz. In what Manner Justices of the Peace are to be commissioned in Pursuance of the several Statutes concerning them; it is observable, That the Commission of the Peace hath often been altered in several Reigns, and that the present Form of it was settled by the Judges above the thirty third Year of Queen Elizabeth, and is in Substance as followeth:

4 Inst. 171.
Lamb. B. 1.
Ch. 9.

Señt. 23. Beginning with a Salutation from the King to the several Persons named in it, it afterwards assigns them and every one of them, jointly and severally the King's Justices, to keep the Peace in such a County; and to cause to be kept all Statutes made for the Good of the Peace and quiet Government of the People, as well within Liberties as without; and to punish all those who shall offend against any of the said Statutes; and to cause all those to come before them, or some of them, who shall threaten any of the People as to their Persons, or the burning of their Houses, in order to compel them to find Surety for the Peace or Good Behaviour; and if they shall refuse to find such Surety, to cause them to be safely kept in Prison till they shall find it.

Señt. 24 Then it goes on and assigns them, and every two or more of them, (of which Number either such or such a particular Person among them is specially required to be) Justices to inquire by the Oath of good and law-
ful

ful Men of the same County, of all Felonies, Witchcrafts, Inchantments, Sorceries, Magick Art, Trespasses, Forestallers, Regrators, Ingrossers, and Extortions whatsoever, and of all other Offences of which Justices of the Peace may lawfully inquire; also of all those who shall go or ride armed, &c. or in Companies, to the Disturbance of the Peace; and also of all Inholders and others who shall offend in the Abuse of Weights or Measures, or selling of Victuals, &c. and also of all Sheriffs, Bailiffs, Stewards, Constables, Gaolers, and other Officers, who shall be faulty in the Execution of their Offices; and to inspect all Indictments taken before them, or any of them, or other former Justices of the Peace for the same County; and to make and continue Process against all the Persons so indicted, till they shall be taken, or render themselves, or be outlawed; and to hear and determine all the Felonies, and other Offences aforesaid: Provided, that if a Case of Difficulty shall arise, they shall not proceed to give Judgment, except in the Presence of some Justice of one of the Benches or of Assize.

Señ. 25. And then it commands them to make Inquires of the Premises, and to hear and determine the same at certain Days and Places, which they or any such two or more of them shall appoint.

Señ. 26. And then it goes on and commands the Sheriff of the County to return before them at certain Days and Places to be made known to him by them, such and so many lawful Men of his Bailiwick, by whom the Truth of the Premises may be best known and inquired.

Señ. 27. And then concludes, by assigning some one of them Keeper of the Rolls of the Peace in the same County; and commanding him to cause to be brought before himself and his Fellows, at the said Days and Places, the Writs, Precepts, Processes and Indictments aforesaid.

And now I am in the fourth Place to shew, What is most observable from the said Statutes and Commissions; in order to which I shall endeavour to shew.

1. What Statutes concerning the Peace may be executed by such Justices.
2. How far the Justices of Peace for a County may act out of it, or within a Liberty.
3. What Commissions of this Kind require a special Suit to the King for the granting of them.
4. How far such Justices have Power to proceed on Indictments not taken before themselves.
5. By what name they are to be described.
6. What Authority they have in Relation to Felonies.
7. What in relation to Treason, *Præmunire*, and Misprision of Treason.
8. What in relation to inferior Offences.

Lamb. B. 1.
Ch. 9.
Dalc. Ch. 5.
Crompt. 7, 8.

Señ. 28. As to the first Point, *viz.* What Statutes concerning the Peace may be executed by such Justices, it seems certain, That by Virtue of the said Commission they may execute all Statutes whatsoever, made for the better keeping of the Peace, and consequently those of *Winchester* and *Westminster*, and all others concerning the Peace, made before the Reign of *Edward* the Third, in whose Time Justices of Peace were first instituted; for all those Statutes were expressly mentioned in the ancient Commissions of the Peace, and have always been undoubtedly taken to be included in the general Words of the present Commission; and yet none of the Statutes which ordain the Office of Justices of Peace, say any Thing concerning

ing the Execution of the said former Statutes, so that the Power of Justices of Peace in Relation to those Statutes, seems intirely to depend on the King's Commission, and yet hath always been unquestionably allowed; from whence it appears, That regularly the King by his Commission, may authorize whom he pleases to execute an Act of Parliament.

As to the second Point, *viz.* How far the Justices of Peace for a County may act out of it or within a Liberty; it is said, That they have no coercive Power when out of the County; and therefore that an Order of Bastardy, or for Payment of Labourers Wages made by them out of the County, is not binding; yet it is said, That Recognizances and Informations voluntarily taken before them in any Place, are good: And it is to be observed.

Señ. 29. That the Justices of Peace for a County have, by their Commission, an express Authority as well within Liberties as without; from whence it seems clearly to follow, That they may execute their Office within a Town, which has a special Commission of the Peace for its own Limits, unless such Commission have a Clause, that no other Justices, except those named in it, shall any way concern themselves in the keeping of the Peace within the Liberties of such Town; and it may be questioned, whether such a special Clause in such a Commission, do absolutely make void the Act of any County-Justice within such Town? Since the Commission for the County seems as fully to give those named in it a Jurisdiction over all such Towns within the Precinct of it, as such Commission for a Town doth exclude them: And the Justices for the County seem to be under no Necessity of informing themselves of the Contents of a Commission, which they have nothing to do with; yet if they have express Notice given them of such a restraining Clause, and proceed to act within such Town in Defiance of it, they may perhaps be punishable for their Contempt of the King's Prohibition; and yet perhaps it may be questioned whether their Acts be void, for the Reasons above-mentioned.

Señ. 30. As to the third Point, *viz.* What Commissions of this Kind require a special Suit to the King for granting of them; it seems agreed, That notwithstanding all such Commissions must be in the King's Name, as hath been more fully shewn, *Ch. 5. Señ. 1.* yet there is not any need of a special Suit or Application to, or Warrant from the King, for the granting of them; for this is only requisite for such as are of a particular Nature, as constituting the Mayor of such a Town, and his Successors, perpetual Justices of the Peace within their Liberties, &c. which Commissions are neither revocable by the King, nor determinable by his Death, as the common Commission for the Peace is, which is made of Course by the Lord Chancellor, according to his Discretion.

Señ. 31. As to the fourth Point, *viz.* How far Justices of Peace have Power to proceed on Indictments not taken before themselves, it is certain, That subsequent Justices of Peace may proceed upon Indictments taken before their Predecessors, but this seems chiefly to depend upon *11 H. 6. 6.* which, reciting the Inconvenience that Pleas and Processess upon Indictments before Justices of Peace had often been discontinued by making of new Commissions of the Peace, to the great Loss of the King, &c. ordains that such Pleas, Suits, and Processess before Justices of the Peace, shall not be discontinued by new Commissions of the Peace, but stand in Force: And that the new Justices, after that they have the Records of the same Pleas and Processess before them, may continue, and finally hear and determine the same, &c. And this is farther confirmed by *1 Ed. 6. 7. Par. 6.* But it is certain that they cannot

Cro. Car. 211. 212.

Lamb. B. 1. Ch. 9. Lamb. B. 1. Ch. 9. Cont. Crompt. 8. 10 H. 7. 6, 7, 8.

Lamb. B. 1. Ch. 5. Brook Commission 5. Dalt. Ch. 3. 1 Lev. 219.

Crompt. 2 9.

Crompt. 9. H. P. C. 166, 167.

proceed on an Indictment taken before a Coroner, or Justices of Oyer and Terminer, or Gaol-Delivery, nor deliver Persons suspected by Proclamation: But by 1 Ed. 4. 2. they are enabled to proceed on Indictments taken before the Sheriff at his Torn.

^{1 Rol Ab. 95.} Sect. 32. As to the fifth Point, By what Name such Justices are to be described, it is observable, That they are expressly commissioned by the Name of Justices of Peace; and in no Part of their Commission are called by the Name of Keepers of the Peace; yet, inasmuch as by 18 E. 3. 2. which is one of the first Statutes made concerning their Institution, they are expressly called Keepers of the Peace; and the principal End of their Office is for the keeping of the Peace, and their usual Description in *Certiorari's* is by the Name of Keepers of the Peace; it hath been adjudged, That the Caption of an Indictment, (whereof Justices of Peace have Cognisance,) *coram A. B. & C. D. Custodibus Pacis & Justiciariis Domini Regis* in such a Place, is good, without expressly naming them Justices of Peace. Also it hath been resolved, That the Description of Justices of Peace by the Name of *Justiciarii Domini Regis ad pacem conservandam*, &c. is good without saying, *ad pacem Domini Regis*, for that it is necessarily implied.

*The King and
Hawkins,
Mich. 3 Geor.*

^a Cramp. 120. b.
^b S. P. C. 53. a.
^c 58. and 96.
^d Letter E.
^e H. P. C. 165, 207.
^f Brook Indictment 32, 59.

^g Cro. Jac. 32.
^h Yelv. 46.
ⁱ 2 Roll. Rep. 151.
^j Dy. 69. pl. 29.

Sect. 33. As to the sixth Point, viz. What Authority Justices of Peace have in relation to Felonies, it is observable, That such of the said Justices as are of the *Quorum* only, are expressly authorized to inquire of, and hear and determine Felonies and Trespasses, and that the abovementioned Statute of 18 E. 3. after it hath ordained, *That some Persons shall be assigned Keepers of the Peace by the King's Commission*, saith in another distinct Clause, *That at what Time need shall be, the same shall be assigned by the King's Commissions to hear and determine Felonies and Trespasses*, &c. From whence it is inferred, That Justices of Peace have no Power to hear and determine Felonies, unless they be authorized so to do by the express Words of their Commission: And this Opinion is farther confirmed by the Authority of the Year-Books of ^b 2 R. 3. 9. a. b. and 12 H. 7. 25. a. wherein it is adjudged, That a *Certiorari* to remove certain Indictments taken before Justices of Peace was not good, because it named them only Justices of Peace, without adding that they were also assigned to hear and determine Felonies, &c. Yet it seems, That it may probably be argued for the contrary Opinion, that the Statute of 34 E. 3. 1. is express, that the Persons assigned for the keeping of the Peace, shall have Power among other Things to hear and determine Felonies and Trespasses, &c. And this seems to be the principal Ground of the Resolution in the Case of *Barnes and Constantine*, wherein it is adjudged, That the setting forth of an Indictment in a Declaration as taken before Justices of Peace, being also assigned to hear and determine Felonies, &c. was well justified upon Oyer of the Record, wherein it was entred as taken before Justices of Peace, without adding, That they were assigned to hear and determine Felonies, &c. And as to the Authority of *Staundford* and *Hale*, it may be answered, That their Opinion is expressly grounded on the Wording of the Statute of 18 E. 3. And it does not appear that they considered the Purport of 34 E. 3. As to the Authority of 2 R. 3. 9. it may be answered, That the *Certiorari* therein mentioned, was for the Removal of an Indictment for counterfeiting Coin, and that the Power of Justices of Peace to take such an Indictment, depends wholly upon the Statute of 3 H. 5. 7. whereby it is enacted, *That the Justices of Peace throughout the Realm, shall have Power by the King's Commissions to inquire of the said Offence*. And as to what is said in 12 H. 7. 25. it may be answered, that the *Certiorari* therein mentioned was to remove certain Indictments, but it doth not appear from the Book what those Indictments were; so that it is possible

sible they might be of a special Nature, not within the general Purview of 34 E. 3. *sed Quare*. However it is certain, That such a Clause in the Commission of Justices to hear and determine Felonies, &c. gives them no Jurisdiction over an Offence, which by Statute, is specially appointed to be determined by Justices of Oyer and Terminer, because such Justices shall be intended to mean such Justices of Oyer and Terminer only, which properly and usually are so called, and not those who are distinctly known by another Name. And from hence it follows, That Justices of Peace have no Power to take an Indictment upon the Statute of 5 Eliz. 14. concerning Forgery, nor on the 2 & 3 Ed. 6. 24. against Accessories in one County to Felonies in another, nor on any other Statute which specially limits the Jurisdiction of determining any other Felony to other Justices of a particular Denomination. Yet inasmuch as all Felonies include in them a Breach of the Peace, and 2 & 3 Ph. & Mar. 10. which directs Justices of Peace to take the Examinations of all such Persons as shall be committed by them for Felony, seems to suppose them to have a general Power of committing all Persons accused of any Kind of Felony; and the general Practice has always been agreeable hereto; it is said, That Justices of Peace may take the Examination of Persons brought before them for any Kind of Felony, and commit them to Prison; and also take the Information of the Prosecutors upon Oath, and bind them over to prosecute; and to commit those who shall refuse to be so bound, if it appear that they can give material Evidence. Also inasmuch as the said Statute of 2 & 3 Ph. & Mar. 10. and also 1 & 2 Ph. & Mar. 13. direct Justices of Peace, in Case of Homicide and other Felonies, to take the Examination of the Offenders, and the Information of others, and to certify the same to the Justices of Gaol-Delivery; it hath been generally thought adviseable for Justices of Peace to proceed no farther in Relation to any Felonies, though within their Commission, except only Petit Larcenies.

Sett. 34. As to the seventh Point, *viz.* What Authority Justices of Peace have in Relation to Treason, *Premunire*, and Misprision of Treason; it seems to be agreed, That notwithstanding none of these Offences are within the Letter of their Commission; yet inasmuch as they are against the Peace of the King, and of the Realm, any Justice of Peace may, either upon his own Knowledge, or the Complaint of others, cause any Person to be apprehended for any such Offence. And it is the Opinion both of Dalton and Sir Matthew Hale, That such Justice may take the Examination of the Person so apprehended, and the Information of all those who can give material Evidence against him, and put the same in Writing; and also bind over such who are able to give any such Evidence to the King's Bench, or Gaol-Delivery; and certify his Proceedings to the same Court, to which he shall bind over such Informers. And this Opinion seems to be agreeable to constant Practice, especially since the Statutes of 1 & 2 Ph. & Mar. 13. and 2 & 3 Ph. & Mar. 10. which directing Justices of Peace to proceed in this Manner against Persons brought before them for Felony, seem to give them a discretionary Power of proceeding in like Manner against Persons accused of the abovementioned Offences.

Sett. 35. Also by 3 H. 5. Ch. 7. Justices of Peace shall have Power by the King's Commissions to inquire of Counterfeiting, Clipping, Washing, and other Falsity of Money of the Land, and thereupon to make Process by Capias only, against those who before them shall be thereof indicted.

Sett. 36. And by 5 El. 1. Sett. 3. Justices of Peace may inquire of the Offence of maintaining the Pope's Power, and shall certify every Presentment made

H. P. C. 163.
9 Co. 118 b.
Cro. El. 87.
601. 697.
2 Roll. Abt.
96. pl. 2.

Dal on Ch.
20.
H. P. C. 157,
163.

H. P. C. 169.

Lamb. 116.

Dalt. Ch. 90.
H. P. C. 163.

made before them of any such Offence, into the King's Bench, within forty Days after it shall be made, &c.

1 Leon. 239. Sect. 27. And by 23 E. 1. Sect. 8. They may inquire of all Offences against that Act, or against the Acts of the first, fifth, or thirteenth Years of the said Queen's Reign touching acknowledging of the King's supreme Government in Causes Ecclesiastical, or other Matters touching the Service of God, or coming to Church, or Establishment of true Religion in this Realm, within one Year and a Day after every such Offence committed.

Sect. 38. As to the eighth Point, viz. What Authority Justices of Peace have in Relation to inferior Offences, it would be endless to enumerate all the Offences within their Jurisdiction, concerning which there have been such great Numbers of Statutes; and therefore I shall content my self in this Place with observing, that by the abovementioned Statute of 34 Ed. 3. 1. and also by the express Words of their Commission, they are impowered to hear and determine all Trespasses, which is a Word of a very general Extent, and in a large Sense not only comprehends all inferior Offences, which are properly and directly against the Peace, as Assaults and Batteries, and such like, but also all others which are so only by Construction; as all Breaches of the Law in general are ^a said to be: Yet it hath been of late settled, that Justices of Peace have no Jurisdiction over ^b Forgery or Perjury at the Common Law, the principal Reason of which Resolution as I apprehended, was, that inasmuch as the chief End of the Institution of the Office of these Justices, was for the Preservation of the Peace against personal Wrongs, and open Violence; and the Word Trespass in its most proper and natural Sense, is taken for such kind of Injuries, it shall be understood in that Sense only in the said Statute and Commission, or at the most to extend to such other Offences only as have a direct and immediate Tendency to cause such Breaches of the Peace, ^c as Libels, and such like, which on this Account have been adjudged indictable before Justices of Peace: And for this Reason, principally as I apprehended, the Court of the King's Bench in the Case of one *Pitt*, since the abovementioned Resolution concerning Perjury and Forgery, refused to quash an Indictment found at a Session of the Peace for a Libel, but ordered the Defendant to demur to it, if he thought fit. ^d And upon the like Reason perhaps the former Opinion, That one may be indicted before Justices of Peace for being a common Night-Walker and Haunter of Bawdy-Houses, may not be thought to contradict the abovementioned Resolution.

Cro Jac. 32. Yelv. 46. Con. 2 Roll. Rep. 151. Sect. 39. And Justices of Peace by Virtue of the abovementioned Statute of 24 Ed. 3. 1. seem to have a Jurisdiction over Barretors, and such like Offenders whether they be mentioned in their Commission or not. And it seems clear, That Justices of Peace have Jurisdiction of all inferior Crimes within their Commission, whether such Crimes be mentioned in any Statute concerning them or not; for that all such Crimes are either directly, or at least by Consequence, and Judgment of Law, against the Peace, and upon this Ground principally, as I apprehended, it was lately resolved, That they may take an Indictment of Extortion.

King and Loggin. Sect. 40. And now I am to consider the Nature of the Court of these Justices Sessions, by which we understand an Assembly of two or more of them, whereof one is of the *Quorum*, at a certain Day and Place before appointed, in order to inquire, hear and determine, in Pursuance of their Commission, of any Causes or Matters therein contained. And for the better Understanding hereof, I shall consider the following Particulars:

1. By whom, and in what Manner such Court is to be summoned and appointed.
2. What Persons are bound to give their Attendance at it.
3. Whether it have any Power over its own Members.
4. The Difference between general and special, and Quarter-Sessions.

Señ. 41. As to the first Point, It seems clear from the express Words of the Commission, That any two such Justices, whereof one is of the *Quorum*, may hold such Court at such Days and Places as shall be appointed by them, and that the Sheriff is bound to return proper Juries, and that the *Custos Rotulorum* ought to bring the Rolls of the Peace before them, &c.

Lamb. b. 4.
ch. 2, & 28.

Señ. 42. And from hence it seems to follow, That any two such Justices may direct their Precept under their *Teste* to the Sheriff, for the Summons of the Session of the Peace, thereby commanding him to return a Grand Jury before them, or their Fellow Justices at a certain Day and Place, and to give Notice to all Stewards, Constables and Bailiffs of Liberties, to be present and do their Duties at such Day and Place, and to proclaim in proper Places throughout his Bailiwick, that such Sessions will be holden at such Day and Place, and to attend there himself to his Duty, &c.

Lamb. B. 4.
ch. 20.

Señ. 43. And it is said, That such a Precept by any two such Justices, cannot be superseded by any of their Fellows, but only by Writ out of Chancery.

Lamb. B. 4.
ch. 2.
Crompt. 122.
b.

Señ. 44. It is said, That such Justices may hold such a Session without any such Summons, which seems to be a well grounded Opinion, as to their proceeding on Indictments before taken before themselves or others, or on other particular Occasions, for which there is no need either for the Attendance of Grand-Jurors, or Officers, &c.

Lamb. b. 4.
ch. 2.

Señ. 45. As to the second Point, *viz.* What Persons are bound to give their Attendance at the Court of Sessions, there is no Doubt but that the Sheriff, (who is bound both to return his Precept, and also to take the Charge of all the Prisoners who shall be committed to him) and also all Constables of Hundreds, who are to make their Presentments required by several Statutes, (as that of Hue and Cry, and those relating to Highways and Ale-Houses, &c. and also all Bailiffs of Franchises, and all Persons returned on a Jury, and the * Keeper of the House of Correction, &c. are bound to attend on every such Summons as is abovementioned, on Pain of being amerced for their Default at the Discretion of the Court, &c.

Lamb. b. 4.
ch. 3.

See the Statute
of Winchester,
and B. 1.
ch. 78. S. 22.
and ch. 76.
Señ. 45.
* Vide 7 Jac.
ch. 4.

Señ. 46. As to the third Point, *viz.* Whether the Court of Sessions have any Power over its own Members; it seems certain, That it hath no Authority to amerce any Justice of Peace for his Non-Attendance at any such Court, as the Justices of Assize may for the Absence of any such Justice at the Gaol Delivery; for it is a general Rule, That *inter pares non est potestas*, it being reasonable rather to refer the Punishment of Persons in a judicial Office, in Relation to their Behaviour in such Office, to other Judges of a superior Station, than to those of the same Rank with themselves; and therefore it seems to have been holden, That if a Justice of Peace at the Sessions who is not of the *Quorum*, shall use such Expressions towards another who is of the *Quorum*, for which if he were a private Person, he might be committed or bound to his Good Behaviour; yet the Sessions hath no Authority to commit him, or to bind him to his Good Behaviour: And yet it seems to be agreed, that if a Justice of Peace give just Cause

Lamb. b. 4.
ch. 3.

Crompt. 122.
a.
Fitz Justices
de Peace 3.
Lamb. B. 4.
ch. 3.

Crompt. 122.
a.

to any Person to demand the Surety of the Peace against him, he may be compelled by any other Justice to find such Security, as hath been shewn in the first Book; for the publick Peace requires an immediate Remedy in all such Cases.

Sect. 47. As to the fourth Point, *viz.* The Difference between General and Special and Quarter-Sessions, Mr. *Lambard* seems to make no Distinction between General and Quarter-Sessions, but to take them as synonymous Terms. But it seems the better Opinion, That Quarter-Sessions are a Species only of General-Sessions, and that such Sessions only are properly called General Quarter-Sessions, which are holden in the four Quarters of the Year in Pursuance of the abovementioned Statute of 2 H. 5. 4. set forth more at large in the fifteenth Section of this Chapter; and that any other Sessions holden at any other Time for the general Execution of the Authority of Justices of Peace, which by the abovementioned Statute, Justices of the Peace are authorized to hold oftner than at the Times therein specified, if Need be, may be properly called General Sessions; and that those holden on a special Occasion for the Execution of some particular Branch of their Authority, may properly be called Special Sessions.

Ch. 60. f. 2. 5.

Lamb. B. 4.
ch. 19.Lamb. b. 4.
ch. 20.Salk. 474.
pl. 11. 476.
pl. 14. 480.
pl. 29. 482.
pl. 34.

C H A P. IX.

Of the Court of the Coroner.

Sect. 1. CORONERS are ^a ancient Officers by the Common Law; so ^b called, because they deal principally with the Pleas of the Crown, and ^c were of old Time the principal Conservators of the Peace within their County; and there still ought to be a certain Number of them in every County; in ^d some more, in others less, according as the Usage hath been.

^a 2 Inst. 3.
S. P. C. 48.
49.
^b 4 Inst. 271.
^c 2 Inst. 31.
^d Ch. 8. f. 2.
3.
^e F. N. B.
397.
^f 4 Inst. 271.
^g 2 Inst. 175.

Before I come to the particular Consideration of their Duty and Authority, it may not be improper to premise the following Particulars:

1. What Persons are qualified to be Coroners.
2. In what Manners they are to be placed in their Office.
3. How they may be discharged.

Sect. 2. As to the first Point, it is enacted by the Statute of *Westm. 1.* Ch. 10. in the following Words, *Forasmuch as mean Persons and indiscreet, now of late are commonly chosen to the Office of Coroners, where it is requisite, that Persons honest, loyal and wise, shall occupy such Offices: It is provided, That through all Shires sufficient Men shall be chosen to be Coroners of the most loyal and most wise Knights, which know, will, and may best attend upon such Offices, and which lawfully shall attach and present Pleas of the Crown.*

Sect. 3. It is observable, That this Statute seems expressly to require that none under the Degree of Knighthood shall be chosen a Coroner, and that the Statute of *Merton*, Chapter the Third, which was made near forty Years before, seems to suppose, That all Coroners were Knights: And it is farther remarkable, that in the Writ *de Coronatore exonerando*, it is mentioned as a sufficient Cause for the Discharge of a Coroner, that he is

¹ 2 Aff. pl. 7.
² 4 Inst. 271.
Register 177.
³ b.
F. N. B. 164.

not

not a Knight; yet in as much as the principal Intent of putting those Words into the Statute, was to prevent the Choosing of Persons of mean Ability, which is sufficiently answered, by choosing Men of good Substance and Credit: And it has been generally found impracticable to find Knights enough in any County willing to undertake this Office, and the constant Usage of many late Ages, which is the best Interpreter of Laws, hath suffered Persons of good Ability, under the Degree of Knights, to be chosen and continue Coroners, without any Objection against them on this Account; it seems certain, That at this Day it is no good Cause to remove a Coroner, that he is not a Knight. For why should not such Usage be as well allowed to make such an Explanation of the Law concerning Coroners, as it unquestionably hath done of that relating to the Representatives of a County in Parliament, who by the Writ for their Election are expressly required to be *duo Milites gladio cincti*, and yet may certainly be well chosen in Pursuance of that Writ, though they be under the Degree of Knights?

S. P. C. 48. b.
2 Leon. 160.
161.
E. N. B. 164.
2 Inst. 176.

Co. Lit. 109.
b.

Sett. 4. It is further enacted by 14 E. 3. 8. That no Coroner be chosen, unless he have Land in Fee sufficient in the same County, whereof he may answer to all Manner of People.

Sett. 5. As to the second Point, viz. In what Manner Coroners are to be placed in their Office, it is observable, That they do not receive their Authority from the King's Commission, but from the Election of the County, in Pursuance of the King's Writ, issuing out of, and afterwards returned into the Chancery: And this is the Reason why their Authority does not determine by the Demise of the King, as that of all Judges, acting by the the King's Commission only, regularly does, as hath been more fully shewn, *Ch. 1. Sett. 11.*

Sett. 6. The abovementioned Writ for the Election of a Coroner is in this Form: First it recites the Death or Discharge of one or more former Coroners, and then commands the Sheriff to cause one other or more, as the Case is, to be chosen, in a full County-Court, by the Assent of the County, according to the Form of the Statute in that Case made and provided; who having taken his Oath in the usual Manner, may do all Things which belong to the Office of a Coroner, &c. and then it concludes with commanding the Sheriff to certify to the Court the Name of the Person chosen, &c.

See the Form
of such Certi-
ficate in Ra-
stall's Entries
133.

Sett. 7. A Coroner, being chosen by Virtue of such Writ, shall be sworn by the Sheriff, that he will lawfully do what belongs to the Office of a Coroner, &c.

S. P. C. 49. d.
E. N. B. 163.
M.

Sett. 8. And inasmuch as he is chosen by the County, if he be insufficient, and not able to answer such Fines, and other Duties in respect of his Office, as he ought, the County, as his Superior, shall answer for him.

4 Inst. 271.

2 Inst. 174.
175.

Sett. 9. And it is enacted by 28 E. 3. 6. That all Coroners of the Counties, shall be chosen in the full Counties by the Commons of the same Counties, of the most meet and lawful People, that shall be found in the same Counties, to execute the said Office: Saved always to the King and other Lords, who ought to make such Coroners, their Seignories and Franchises.

From this Statute the two following Points are observable.

Sett. 10. First, That all such Elections are appointed by it to be made by the Commons of the Counties, without mentioning Freeholders; and yet inasmuch as the said Statute was made in Affirmance of the Common Law, and none but Freeholders are Suitors to the County-

E. N. B. 164.
S. P. C. 19. B.
2 Inst. 99.
2 Rol Abr.
121. E.

Court,

Court, and the Usage hath always been, both before and since the said Statute, for such only to vote, it is certain, that none but Freeholders have a Voice at any such Election.

Sect. 11. Secondly, That it is clearly supposed by the said Statute, that not only the King, but also other Lords have the Franchise of making Coroners: From whence it seems reasonable to infer, That the King may lawfully claim such Franchise by Prescription, and that other Lords may claim it by Grant from the Crown; but it is a Privilege of so high a Nature, that no Subject can well intitle himself to it by Prescription only.

Co. Lit. 114.
a.

Register 177.
a. b.

F. N. B. 163.
164.

S. P. C. 48.
Letter E.

8 Co. 41. b.

2 Inst. 12.

Register 177.

b. 178. a.
F. N. B. 164. d.

S. P. C. 49

Sect. 12. As to the third Point, *viz.* In what Manner Coroners may be discharged from their Office; it is certain, That if any of them be so far engaged in any other publick Business in the County, that he cannot have Leisure enough to attend the Office of a Coroner; or if he be chosen Verderor of a Forest, or if he have not sufficient Lands in the same County, whereon to live according to his State and Degree, or if he be disabled either by old Age, or any inveterate Disease, as the Palsy, or the like, to execute his Office, as he ought, and as some say, if he follow any common Trade, he may be discharged by the Writ *De Coronatore exonerando*, which being directed to the Sheriff, after a Recital of the particular Cause of the Discharge of such Coroner, commands him to cause another to be chosen in his Room.

Sect. 13. But if any Writ of this Kind be grounded on an untrue Suggestion, the Coroner may procure a Commission from the Chancery to inquire of the Truth of it, and to return the Inquiry before the King into the Chancery; and if upon such Commission the Suggestion be disproved, the King may make a *Superfedeas* to the Sheriff, that he do not remove such Coroner; or if he have removed him, That he suffer him to execute the Office as he did before.

And now I am particularly to consider the Duty and Authority of a Coroner; for the better Understanding whereof, I shall examine the following Points:

1. In what Places he hath a Jurisdiction.
2. How far he is impowered, and in what Manner he ought to take an Inquisition.
3. How far to receive and proceed on a Bill of Appeal.
4. How far to receive and proceed on the Appeal of an Approver.
5. How far to take the Abjuration of a Felon.
6. How far the Act of any one of them shall be as effectual as if it had been done by all.
7. In what Cases he may lawfully take a Fee for the Execution of his Office.
8. In what Cases a Matter recorded by, or found before him, admits of no Traverse.

As to the first Point, *viz.* In what Places a Coroner hath Jurisdiction, I shall consider:

1. How far he hath a Jurisdiction of Offences committed on the Sea.
2. How far a Coroner of the County may intermeddle with Offences done within the Verge of the Court, and *vice versa*.

* Owen 121.
Moor 892.
pl. 1215.
H. P. C. 171
S. P. C. 51.
Letter K.

Sect. 14. As to the first Particular, it is laid down as a general Rule by * some, That he may inquire of a Felony committed on the Arms of the Sea, where a Man may see from the one Side to the other; but by others

thers, who seem to be more accurate, his ^a Power is confined to such Parts of the Sea, where a Man standing on the one Side, may see what is done on the other: But it seems to be ^b agreed, That he hath no Jurisdiction of Offences committed in the open Sea, between the high and low Water-Mark when the Tide is in; but that he hath an Authority over Offences committed in such Places when the Tide is out.

Señ. 15. As to the second Particular, &c. How far a Coroner of the County may intermeddle with Offences done within the Verge of the Court, & *vice versa*: it is said, That at the Common Law, as the Coroner of the King's House had nothing to do with an Offence committed in the County out of the Verge, so neither had the Coroner of the County any Thing to do with an Offence committed within the Verge. And therefore it seems, That before the Statute of *Articuli super Chartas*, if a Person had been killed any where within the Verge of the Court, and the King had removed his Court before the Coroner of the King's House had taken an Indictment, no Coroner at all had any Jurisdiction of the Fact; not the Coroner of the County, because he had nothing to do with what happened within the Verge of the Court; not the Coroner of the King's House, because his Authority ceased when the Place where the Matter happened, ceased to be within the Verge of the Court; and this seems to be confirmed by the Statute of *Articuli super Chartas*, Ch. 3. whereby it is recited, that before the making of that Act, *Many Felonies committed within the Verge had been unpunished, because the Coroners of the County had not been authorized to inquire of Felonies done within the Verge, but the Coroner of the King's House, which never continued in one Place; by Reason whereof there can be no Trial made in due Manner, nor the Felons put in Exigent, nor outlawed, nor any Thing presented in the Circuit, the which had been to the great Damage of the King, and nothing to the Preservation of the Peace:* And thereupon it is ordained, *That from thenceforth in Cases of the Death of Men, whereof the Coroners Office is to make View and Inquest, it shall be commanded to the Coroner of the County, that he with the Coroner of the King's House, shall do as belongeth to his Office, and enroll it, &c.* It is said indeed by Sir Edward Coke, That if a Murder had been committed within the Verge, and the King had removed before any Indictment taken by the Coroner of the Verge, the Coroner of the County might have inquired of the same at the Common Law, *ne maleficia remanerent impunita*: But since no Authority is cited by him for the Maintenance of this Opinion, and the Argument brought to prove it is founded on a mistaken Supposition, inasmuch as it doth by no Means follow, That such Offences would be punishable if they could not be inquired of by the Coroner of the County, since they might certainly be indicted before Justices of Oyer and Terminer, or of the Peace, who have a general Jurisdiction throughout the whole County; the contrary Opinion seems rather the more Plausible, as being more agreeable to the Purport of the said Statute, and the general Tenor of our Law Books.

Señ. 16. But it is certain, That an Indictment taken before the Coroner of the County, and the Coroner of the King's House, of an Offence not appearing by the Indictment it self, to have happened within the Verge of the Court, is insufficient; for that every material Part of an Indictment ought to be found by the Oaths of the Indictors, and cannot be supplied with any Averment; and it doth not appear by the Indictment, that the Coroner of the King's House had any Authority to take it, and it shall not be said to be void, and *coram non judice*, as to the Coroner of the King's House, and good as to the Coroner of the County, inasmuch as the Record is entire, and the Indictment was taken entirely

^a Fitz. Coron. 399.
^b Inst. 140.
^c Rol. Abr. 169 pl. 7.
^d 3 Inst. 113.
^e Co. 107.
^f 2 Leon. 160.
^g Co. 46. b.
^h 2 Leon. 160.
ⁱ Co. 46. b.

² Inst. 550.

² Inst. 549.

⁴ Co. 46. b.

⁴⁷ 2.

⁴ Co. 47.

⁴ Co. 47.

² Inst. 550.

before both; and peradventure the Jury was directed principally by the Coroner of the House, and the Witnesses examined and sworn by him.

4 Co. 46. 2.
3 Inst. 134.
2 Leon. 160.
the same Case,
but no Refolu-
sion.

Señ. 17. It hath been resolved, That if the same Person be Coroner of the County, and also of the King's House, an Indictment of Death taken before him as Coroner both of the King's House, and of the County, is good, because the Mischief expressed in the Statute, is remedied as well when both Offices are in the same Persons as when they are in divers.

Señ. 18. Also it is enacted by 33 H. 8. 12. Par. 1. & 2. *That all Inquisitions upon the View of Persons slain within any of the King's Palaces or Houses, or any other House or Houses, at such Time as his Majesty shall happen to be there demurrant or abiding in his Royal Person, shall be taken by the Coroner for the Time being of the King's Household, without any adjoining or assisting of another Coroner of any Shire within this Realm, by the Oath of twelve or more of the Yeoman, Officers of the King's Household, returned by the two Clerks Controllers, the Clerks of the Check, and the Clerks Marshals, or one of them, for the Time being, of the said Household, to whom the said Coroner of the same Household shall direct his Precept, which Coroner shall be from Time to Time appointed by the Lord Great Master, or Lord Steward for the Time being; and that the said Coroner shall certify under his Seal, and the Seals of such Persons as shall be sworn before him, all such Inquisitions before the said Lord Master or Lord Steward, &c.*

As to the second general Point, *viz.* How far a Coroner is impowered, and in what Manner he ought to take an Inquisition, I shall consider his Authority of this Kind,

1. In Relation to Death.
2. In Relation to other Matters

As to his Authority to take an Inquisition of Death, I shall examine,

1. In what Cases and in what Manner he ought to take such Inquisition.
2. What farther Care must be taken by him for the Prosecution of the Offender, after taking the Inquisition.
3. What high Credit the Law gives to it.

Brañ. 121.
Fleta B. 1.
Ch. 25.

Señ. 19. As to the first of these Particulars, it is enacted by 4 E. 1. commonly called the Statute *de officio Coronatoris*, *That the Coroner upon Information, shall go to the Places where any be slain, or suddenly dead or wounded, and shall forthwith command four of the next Towns, or five or six, to appear before him in such a Place; and when they are come thither, the Coroner upon the Oath of them shall inquire in this Manner; that is to wit, if they know where the Person was slain, whether it were in any House, Field, Bed, Tavern, or Company, and who were there. Likewise it is to be inquired who were culpable, either of the Act, or of the Force, and who were present, either Men or Women, and of what Age soever they be, (if they can speak or have any Discretion.) And how many soever be found culpable by Inquisition in any of the Manners aforesaid, they shall be taken and delivered to the Sheriff, and shall be committed to the Gaol: And such as be founden, and be not culpable, shall be attached until the Coming of the Justices, and their Names shall be written in the Coroners Rolls. If it fortune any such Man be slain, which is found in the Fields, or in the Woods, first it is to be inquired whether he were slain in the same Place or not. And if he were brought and laid there, they shall do as much as they can, to follow*

low their Steps that brought the Body thither, whether he were brought upon a Horse, or in a Cart. It shall be inquired also, if the dead Person were known, or else a Stranger, and where he lay the Night before, and if any be found culpable of the Murder, the Coroner shall immediately go unto his House, and shall inquire what Goods he hath, and what Corn he hath in his Grange; and if he be a Freeman, they shall inquire how much Land he hath, and what it is worth yearly, and further, what Corn he hath upon the Ground. And when they have thus inquired upon every Thing, they shall cause all the Land, Corn, and Goods to be valued, in like Manner as if they should be sold incontinently, and thereupon they shall be delivered to the whole Township, which shall be answerable before the Justices for all. And likewise of his Freehold, how much it is worth yearly over and above the Service due to the Lords of the Fee, and the Land shall remain in the King's Hands, until the Lords of the Fee have made Fine for it. And immediately upon these Things being inquired, the Bodies of such Persons being dead or slain shall be buried. In like Manner it is to be inquired of them that be drowned, or suddenly dead, and after such Bodies are to be seen, whether they were so drowned or slain, or strangled by the Sign of a Cord tied strait about their Necks, or about any of their Members, or upon any other Hurt found upon their Bodies, whereupon they shall proceed in the Form aforesaid; and if they were not slain, then ought the Coroner to attach the Finders, and all other in Company.

SECT. 20. Also all Wounds ought to be viewed, the Length, Breadth, and Deepness, and with what Weapons, and in what Part of the Body the Wound or Hurt is, and how many be culpable, and how many Wounds there be, and who gave the Wound; all which Things must be inrolled in the Roll of the Coroners. Also Horses, Boats, Carts, &c. whereby any are slain, that properly are called Deodands, shall be valued and delivered unto the Towns as before is said.

SECT. 21. It is observable, That this Statute being wholly Directory and in Affirmance of the Common Law, doth neither restrain the Coroner from any Branch of his Power, nor excuse him from the Execution of any Part of his Duty not mentioned in it, which was incident to his Office before; and from hence it follows, That though the Statute mention only his Taking Inquiries of the Death of Persons slain or drowned or suddenly dead, yet he may and ought to inquire of the Death of all Persons whatsoever who die in Prison, to the End that the Publick may be satisfied, whether such Persons came to their End by the common Course of Nature, or by some unlawful Violence, or unreasonable Hardships put on them by those under whose Power they were confined.

SECT. 22. And the like Reason also seems to be the best Ground of the Resolution which we find in some ^a Books, That there is no Necessity that it appear in a Coroner's Inquest, that it was taken by the Oaths of Persons of the next adjacent Towns, but that it is sufficient to say, That it was taken by the Oaths of lawful Persons of the County, inasmuch as such Inquisitions being good before the said Statute, which is wholly Declaratory, must needs be so still; but it ^b seems, That it ought to appear in every such Inquisition, at what Place, and by what Jurors by Name it was taken, and that such Jurors were sworn, and that the Reason given in some Books that such Inquests shall be intended to have been taken by the Men of the next Towns seems very harsh, if it be supposed necessary to be taken by such Persons; for that such Intendment would be contrary to the general Rule of the Law, which will not suffer any material Part of an Indictment to be taken by Intendment.

Fitz. Coron.
421.
3 Inst. 52, 91.
Bro. Coron.
168.
S. P. C. 51.

^a 1 Sid. 204.
1 Kcb. 723.
743, 745.
Con. Latch.
166.
Poph. 210.
Co. Ent. 354.
^b Cro. El. 31.

1 Sid. 204.
1 Kcb. 745.

SECT. 23.

Sec. 23. Also it is farther remarkable, that the Statute doth not expressly say, That the Coroner shall take his Inquest on the View of the dead Body, and that an Inquest otherwise taken by him, shall be void: And yet it is clearly agreed by all the ^a Books, That a Coroner has no Manner of Power to take an Inquisition of Death without a View of the Body, and that any such Inquest taken by him without such View, is meerly void. And for this Reason it hath been ^b adjudged, That if a dead Body, in a Prison, or other Place, whereupon an Inquest ought to be taken, be interred, or suffered to lie so long, that it putrify before the Coroner hath viewed it, the Gaoler or Township shall be amerced. Also it hath been ^c resolved, That a Coroner may lawfully within convenient Time, as the Space of fourteen Days after the Death, take up a dead Body out of the Grave in order to view it, not only for the taking of an Inquest where none hath been taken before; but also for the taking of a good one, where an insufficient one hath been taken before. But if the Body cannot be ^d found, or have lain so long before the Coroner hath viewed it, that he can be no Way assisted from the View in the taking of his Inquest; or if there be Danger of infecting People in digging of it up, the Inquest ought not to be taken by the Coroner, (unless he have a special Writ or Commission for that Purpose) but by Justices of Peace, or other Justices authorized to inquire of, hear and determine Felonies, &c. who shall take the Inquest on the Testimony of Witnesses; but none can take an Inquest on View in any Case, but the Coroner.

Sec. 24. If a ^e Coroner take an Inquest after a Body hath been so long buried, that it may reasonably be presumed, that the View of it could be of no Manner of Use for the Information of the Jurors, the Court into which the Inquisition is returned will in Discretion refuse to receive or file it, upon Affidavit of the whole Circumstances of the Proceeding.

Sec. 25. ^f Yet it is not necessary, That the Inquisition be taken in the very same Place where the Body was viewed; for it hath been resolved, That an Inquisition taken at *D.* on the View of a Body lying dead at *L.* may be good.

Sec. 26. As the Coroner hath no Power from the said Statute, nor from 3 *H. 7. 1.* to inquire of any Accessaries to a Felony after the Fact; so neither hath he any such Power by the ^g Common Law; for he has nothing to do with any but those who some Way or other caused the Party's Death: And therefore it hath been resolved, That an Indictment of *J. S.* before a Coroner for having received and comforted one who had been guilty of a Murder, is void.

Sec. 27. But it is certain, That a Coroner may inquire of the Accessories before the Fact, as well as of the Principals; and that he ^h also may inquire, whether any in such Manner found to have been guilty, did fly for the Offence; for which Flight they forfeit all their Goods and Chattels.

Sec. 28. Also it is ⁱ certain, That a Coroner may and ought to inquire of all the Circumstances of the Party's Death, and also of all Things which occasioned it; and ^k therefore it is said, That if it be found by his Inquest, that the Person deceased was killed by a Fall from a Bridge into a River, and that the Bridge was out of Repair by the Default of the Inhabitants of such a Town, and that those Inhabitants are bound to repair it, the Township shall be amerced.

^a Fitz. Coron. 107.
^b S. P. C. 51 G.
^c Levin. 141.
^d Litch. 166.
^e Noy 87.
^f 2 R. 3. 2. pl. 5.
^g 21 Ed. 4. 70. b.
^h H. P. C. 170.
ⁱ Poph. 209.
^j Fitz. Coron. 329, 339, 421.
^k H. P. C. 170.
^l S. P. C. 51.
^m 1 Keb. 273.
ⁿ pl. 74.
^o 21 Ed. 4. 70. b.
^p 2 R. 3. 2. pl. 5.
^q S. P. C. 51.
^r H. P. C. 170.
^s Bro. Coron. 167, 173.
^t 4 S. P. C. 51.
^u H. P. C. 170.
^v 2 Lev. 141.
^w Litch. 166.
^x 1 Vent. 351.
^y Poph. 209.
^z Salk. 190, 377.
^{aa} Noy 87.
^{ab} 2 Rol. Abr. 96. pl. 3.
^{ac} 1 Rol. Rep. 2.
^{ad} 7.
^{ae} The King and Cawsey, Hilary 3 Georg.

^{af} Litch. 166.
^{ag} See Poph. 209.

^{ah} 4 H. 7. 18 b.
^{ai} Fitz. Forfeiture 80.
^{aj} S. P. C. 183.
^{ak} Letter D.
^{al} Keilw. 67.
^{am} Dalif. 32.
^{an} Moore 29. pl. 95.

^{ao} S. P. C. 183.
^{ap} Letters C. D.
^{aq} 2 Lev. 141.
^{ar} 152.
^{as} Keilw. 68 b.
^{at} H. P. C. 170.
^{au} Bro. Coron. 151.

^{av} 8 Ed. 4. 4. a.
^{aw} vide infra Section.

^{ax} Keilw. 67.

^{ay} Aley 51.

Sect. 29. Also it is agreed, That if a Coroner be remifs in coming to do his Office when he is sent for, &c. he shall be amerced, by Virtue of the abovementioned Statute *De coronatoribus*. Also it is farther enacted by 3 H. 7. 1. That if any Person be slain or murdered in the Day, and the Murderer escape untaken, the Township where the said Deed is so done, shall be amerced for the said Escape, and that the Coroner have Authority to inquire thereof upon the View of the Body dead: And that if any Coroner be remifs and make not Inquisitions upon the View of the Body dead, he shall forfeit for every Default an hundred Shillings.

S. P. C. 51. H.
Salk. 377.
Fitz. Coron.
292.
H. P. C. 170.

Sect. 30. As to the second Particular, viz. What farther Care must be taken by a Coroner for the Prosecution of the Offender, after taking Inquisition of Death against him, it is farther enacted by the said Statute of 3 H. 7. 1. That after the Felony found, the Coroners deliver their Inquisition afore the Justices of the next general Gaol-Delivery, in the Shire where the Inquisition is taken, the same Justices to proceed against such Murderers if they be in the Gaol, or else the same Justices to put the same Inquisitions afore the King in his Bench. And if any Coroner do not in such Manner certify his Inquisition, he shall forfeit an hundred Shillings.

Sect. 31. Also it is enacted by 1 & 2 Ph. & Mar. 13. That every Coroner, upon any Inquisition before him found, whereby any Person or Persons shall be indicted for Murder or Manslaughter, or as Accessary or Accessaries to the same, before the Murder or Manslaughter committed, shall put in Writing the Effect of the Evidence given to the Jury before him, being material: And shall bind all such by Recognizance or Obligation, as do declare any Thing material to prove the same, to appear at the next general Gaol Delivery to be holden within the County, City, or Town-Corporate where the Trial thereof shall be, then and there to give Evidence against the Party so indicted at the Time of the Trial, and shall certify as well the same Evidence, as such Bond or Bonds in Writing, as he shall take, together with the Inquisition or Indictment before him taken and found, at or before the Time of his said Trial thereof to be had or made: And in Case any Coroner shall offend in any Thing contrary to the true Intent and Meaning of this Act, the Justices of Gaol-Delivery of the Shire, City, Town, or Place where such Offence shall happen to be committed, upon due Proof thereof, by Examination before them, shall for every such Offence set such Fine on every such Coroner, as they shall think meet, and estreat the same as other Fines and Amerciaments assessed before Justices of Gaol-Delivery ought to be.

Sect. 32. And it is enacted by 1 H. 8. 7. That if any Coroner shall not endeavour himself to do his Office upon any Person dead by Misadventure, he shall forfeit forty Shillings.

Sect. 33. As to the third Particular, viz. What high Credit the Law gives to an Inquisition of Death found before a Coroner, it seems ^a certain, That anciently the Judges would not receive a Verdict, acquitting a Person of the Death of a Man found against him by a Coroner's Inquest, unless the Jury so acquitting the Defendant, had found at the same Time what other Person did the Fact, or by what other Means the Party came to his Death; because it appeared by the Coroner's View upon Record, that a Person was killed: But it is ^b agreed, That the Judges cannot compel a Jury to make such farther Inquiry on an Acquittal of a Defendant from any other Indictment, because it doth not in such Manner appear of Record by any such Inquisition, that a Person is dead: And it seems hard to reconcile the said Practice of compelling a Jury to find such farther Matter with Reason in any Case, unless it appear in the Course of the Evidence by what other Means, nor mentioned in the Indictment, the Party lost his Life; for it seems strange, That a Jury should

^a 13 E. 4. 30.
pl. 7.
37 Aff. pl. 13.
¹ H. 4. 93.
pl. 51.
14 H. 7. 2.
pl. 7.
Fitz. Coron.
213.
Keilway 686.
S. P. C. 181.
Letters B. C.
Finch of
Law 415.
Brook Appeal, 42, 122.
Bro. Indictment 10, 35.
Bro. Coron.
32, 39, 52,
117
^b See the Books
above cited.

be in any Case compelled to find a Matter upon their Oaths, which they have no Evidence to support; and therefore if it no Way appear to them, by what other Means the Death in Question was occasioned, it seems difficult to maintain that it shall not be sufficient for them to declare so to the Court.

Señ. 34. How high a Credit is given by the Law to a Coroner's Inquisition of Self-Murder, or of the Flight of a Person indicted for the Death of another, will be more fully shewn in the three last Sections of this Chapter.

Señ. 35. As to the second general Point, viz. What Authority a Coroner hath to take an Indictment of other Matters, it is expressly said in some ^a Books, That a Coroner hath no Power *Ex officio* to inquire of any Felony, but only of the Death of a Man upon View. And both ^b *Staundford* and ^c *Hale* seem to speak doubtfully of this Matter, upon the Authority of those Books; and ^d Sir *Edward Coke* seems expressly to declare his Opinion, That a Coroner hath no Power to take an Indictment in any other Case: Yet since it is expressly declared by the abovementioned ^e Statute *De officio Coronatoris*, That a Coroner ought to inquire of the Breakers of Houses; and it is said by ^f *Britton*, That he may inquire of Rape, and of the Breach of a Prison; and such Power hath never been expressly taken from him; it seems hard to say, That he may not still make such Inquiries, if he please; for as to the Authority of 27 *Aff. 55. & 35 H. 6. 27. b.* which are cited for the Maintenance of the contrary Opinion, it may be answered, That this Point is not resolved in either of those Books, but only spoken of incidentally; for the very Point resolved in 27 of *Affizes*, seems to be no more than this, That a Coroner hath no Power to take an Indictment of an Accessary after the Fact; and that which is said in 35 *H. 6.* concerning this Matter is only brought in by Way of Argument concerning a Point of a quite different Nature.

Señ. 36. However there seems to be no Doubt but that the Coroner may and ought to inquire of Treasure-trove, concerning which it is enacted by the said Statute of 4 *E. 1. De officio Coronatoris*, That a Coroner being certified by the King's Bailiffs, or other honest Men of the Country, shall go to the Places where Treasure is said to be found. And it is farther enacted in the following Part of the same Statute in these Words, A Coroner ought also to inquire of Treasure that is found, who were the Finders, and likewise who is suspected thereof: And that may be well perceived where one liveth riotously, haunting Taverns, and hath done so of long Time; hereupon he may be attached for this Suspicion by four or six, or more Pledges, if he may be found.

Señ. 37. It is also said, That a Coroner may inquire of Royal Fishes, as Sturgeons, Whales.

Señ. 38. As to the third general Point, viz. How far a Coroner is empowered to receive and proceed on a Bill of Appeal, I shall endeavour to shew,

1. How far he is authorized to receive such Appeal.
2. How far to proceed upon it.
3. In what Manner it may be removed by *Certiorari*.

^a See the Statute at large.
^b *Brañ. 122. a. b. 147.*
^c *Fleta, lib. 1. cap. 25.*
^d *Britton, fol. 5.*
^e *S. P. C. 64. 22 Aff. 97. 98.*
^f *Finch 321.*

Señ. 39. As to the first of these Particulars, it appears clearly from the abovementioned ^a Statute of 4 *E. 1. De officio Coronatoris*, and also from our ancient ^b Law-Books, That a Coroner in the County-Court may receive an Appeal of any Felony or Maihem, upon the Plaintiff's finding

finding sufficient Pledges to the Sheriff for the Prosecution of the Suit. And it is observable, That the said Books generally mention the Coroner as the Person before whom such Appeal is to be commenced, without joining any other with him; from whence it seems clearly to be intimated, That the Coroner is the ^b only Person who hath a Jurisdiction in this Matter; and that at Common Law he might ^c receive such Appeal without the Concurrence of any other, as he certainly may the Appeal of an Approver, &c. But it being provided by the Statute of *Westminster* 1. cap. 10. That the Sheriff shall have Counter-Rolls with the Coroners, it seems, That no Appeal since that Statute is well commenced before the Coroner, ^d unless the Sheriff be also present, in order to take a Counter-Roll of the Proceeding: But it seems, That the Sheriff by Virtue of this Statute, is no more a Judge of the Matter than he was before; and therefore where it is said by the Statute of 3 H. 7. 1. That an Appeal of Felony may be commenced before the Sheriff and Coroners of the County where it was done, it seems reasonable to intend the Meaning of the Statute to be, that it may be commenced before them in the same Manner as before, and not without express ^e Words to make any Alteration of the Jurisdiction given them by the Common Law.

Sett. 40. But it is ^f certain, That a Coroner hath no Power to receive a Bill of Appeal of any Offence done out of the County whereof he is Coroner, because the Offender cannot be tried by the County: But it is ^f agreed, That he may receive the Appeal of an Approver, or take the Abjuration of one, who acknowledges a Felony done by him in any County, because that after such Confessions there is no Need of any Trial.

Sett. 41. As to the second Particular, viz. How far a Coroner may proceed upon such Appeal, it seems ^g probable, That before the Statute of *Magna Charta*, cap. 17, Coroners might try Offenders as well as receive Accusations against them; but it is ^h agreed, That they cannot proceed so far since that Statute, by which it is enacted, *That no Sheriff, Constable, Coroner, or other Bailiff of the King, shall hold Pleas of the Crown.* Also it is agreed, ⁱ That Process may be awarded in the County-Court on such Appeals till the Exigent; but ^k it seems questionable, whether such Process may properly be said to be awarded by the Sheriff and Coroner jointly, since the Coroner being the only Judge, as I have endeavoured to prove, *Sett.* 38, it seems to be most proper that the Process be awarded by him only: Neither doth it seem clear, That the abovementioned Statute of *Magna Charta*, doth restrain the Coroner from awarding an Exigent, and thereon outlawing an Appellee; for since, as it is agreed by all, an Offender might become attainted by an Abjuration of a Felony made before a Coroner; why not as well by an Outlawry pronounced by him? And accordingly we find it taken for granted in some of the ^l old Books of the best Authority since this Statute, that Appellees may be outlawed for not appearing on Process before the Coroner.

Sett. 42. As to the third Particular, viz. In what Manner an Appeal before the Coroner may be removed by *Certiorari*, there ^m is no Doubt but that it may be removed either into the King's Bench or Chancery, by *Certiorari* directed to the Coroners and Sheriff. But it hath been ⁿ resolved That it cannot be removed by such Writ directed to the Sheriff only, because the Coroner is the Judge, and the Sheriff hath only a Counter-Roll by Virtue of the above-mentioned Statute of *Westm.* 1. cap. 10.

^a Con. 17 Aff.
pl. 5.
Bro. Appeal.
56.
H. P. C. 171.
S. P. C. 52 D.
64. Letter B.
^b 2 Inst. 176.
^c H. 6. 16. a.
Bro. Appeal.
44.
^d H. P. C. 172.

^e 39 H. 6.
41. a.
^f H. 6. 16. a.
Contra Bro.
Appeal. 44.

^g *Quere* S. P.
C. 64 b.

^h H. P. C. 171.
172.
S. P. C. 52. D.
53.
Fitz. Coron.
437.
ⁱ See Dalton's
Sheriff, cap.
106.

^j 22 Aff. 97.
95.
Brañ. 147. a.
Fleta, lib. 1.
cap. 25.
^k 2 Inst. 30, 31,
32.
Bro. Appeal.

56, 62.
Coron. 82.
^l S. P. C. 64.
H. P. C. 171.
^m Contra
S. P. C. 64.
H. P. 171.
ⁿ 27 Aff. 47.
22 Aff. 97.
Fitz. Coron.

184.
Con. Bro.
Appeal. 82.
Quere Bro.
Appeal. 109.
S. P. C. 64.
H. P. C. 171.
^o S. P. C. 64.
Letter B. 70.

Letter C.
H. P. C. 171.
172.
^p 2 Inst. 176.
^q 14 H. 4.
^r 15 b. 16. a.
Bro. Appeal.
44.
^s 2 Inst. 176.
S. P. C. 64.
Letter B. 70.

Sett. Letter C.

^aH.P.C. 172. *Señ. 43.* As to the fourth general Point, *viz.* How far a Coroner is authorized to receive and proceed on the Appeal of an Approver, there is no Doubt but that the Coroner alone may receive such Appeal, ^a whether the Offence were committed in the same or in any other County, and may also award Procefs to the Sheriff against the Appellee, being in the same County, till it come to the Exigent; and it ^b seems, That it may be probably argued, that he may award Procefs even to an Outlawry, as hath been more fully shewn in the forty-first Section of this Chapter: But it is certain, That he cannot award any Procefs against an Appellee in a foreign County, but must leave it to the ^c Justices of Gaol-Delivery, or others, before whom the Appeal is afterwards recorded, who shall award Procefs against such Appellees in such Manner, as shall be more fully set forth in the Chapter concerning *Approvers*.

Señ. 44. As to the fifth general Point, *viz.* How far a Coroner is authorized to take the Confession and Abjuration of a Felon, there seems to be no Doubt but that he may record the Confession of the Breach of Prison by any Felon, &c. and also the ^d Confession of any Felony by an Approver; but the Law relating to these Matters being in great Measure obsolete, it seems needless over nicely to inquire into it; also it is certain that he might take an Abjuration, but this not having been in Use since 21 *Jac. 1.* 28. *Sect. 6 7.* by which it is enacted, *That no Sanctuary or Privilege of Sanctuary, shall be admitted or allowed in any Case, 1* shall only touch upon it, and take Notice, That at the Common Law, if a Person accused of any Felony (except ^e Sacrilege,) ^f whether in the same or any other County, for which he was liable to Judgment of Death, and not charged with ^h High Treason, nor (as ⁱ some say) with Petit Treason, had fled to any ^k Church or Church-yard, and within ^l forty Days confessed himself guilty before the Coroner, and declared all the particular ^m Circumstances of the Offence, and thereupon taken the Oath in that Case provided, (the ⁿ Substance whereof was that he abjured the Realm, and would depart as soon as possible, at the Port which should be assigned him, and never return without Leave from the King, &c.) he saved his Life, if he observed the Terms of the Oath, by going with all ^o convenient Speed the nearest Way to the Port assigned, &c. but he was ^p attainted of the Felony by such Abjuration without more, and consequently forfeited his Lands and Goods, &c.

Señ. 45. As to the sixth general Point, *viz.* How far the Act of any one Coroner is as effectual as if it were done by all, it seems clear, That ^q where ever Coroners are authorized to act as Judges, as in the taking of an ^r Inquisition of Death, or receiving an Appeal of Felony, &c. the Act of any one of them, who first proceeds in the Matter, is of the same Force as if all had joined in it but it is said, That after ^s such Proceeding by one of them, the Act of any other will be void: Also it seems certain, That where Coroners are impowered only to act ^t ministerially, as in the Execution of Procefs directed to them upon the Default or Incapacity of the Sheriff, all their Acts will be void wherein they do not all join.

Señ. 46. As to the seventh general Point, *viz.* In what Cases a Coroner may lawfully take a Fee for the Execution of his Office, it is enacted by the Statute of *Westm. 1. cap. 10.* which was made in Affirmance of the Common Law, 2 *Inst. 176.* ^u *That no Coroner demand or take any Thing of any Man to do his Office, upon pain of great Forfeiture to the King.*

Sect. 47.

^aH.P.C. 172.
^bS.P.C. 53.
^cSee *S. Eton* 40.
^dS.P.C. 73.
^eH.P.C. 172.
^fS.P.C. 53, 73.
^gH.P.C. 172.
^hFitz. Co. 462.
ⁱ29 Ed. 3. 42.
^jVid. *Señ.*
^k36 & 49.
^lFitz. Co.
^m100. 420.
ⁿS.P.C. 117.
^oLetter B.
^p3 *Inst.* 115.
^qSup *Señ* 40.
^rBro. Coron.
^s181.
^tS.P.C. 123.
^uLetter A.
^vFinch of
^wLaw 388, 389.
^xBro. Coron.
^y181.
^zS.P.C. 116. G.
^{aa}Finch of
^{ab}Law. 388.
^{ac}S.P.C. 116.
^{ad}Letter G.
^{ae}117. Letter A.
^{af}Bro. Coron.
^{ag}181.
^{ah}Finch 388.
^{ai}S.P.C. 116.
^{aj}Letter F.
^{ak}3 *Inst.* 115.
^{al}Finch of
^{am}Law 388.
^{an}S.P.C.
^{ao}117, 118.
^{ap}3 *Inst.* 117.
^{aq}S.P.C.
^{ar}117. Letter E.
^{as}Fitz. Co. 54.
^{at}3 *H. 7.* 12.
^{au}pl. 6.
^{av}S.P.C. 119.
^{aw}120.
^{ax}Finch of
^{ay}Law 389.
^{az}7 *H. 7.* 7.
^{ba}pl. 11.
^{bb}Bro. Coron.
^{bc}145.
^{bd}S.P.C. 121.
^{be}Fitz. Coron.
^{bf}435.
^{bg}S.P.C. 122. c.
^{bh}Finch of
^{bi}Law 389.
^{bj}3 *Inst.* 217.
^{bk}S.P.C. 53. a.
^{bl}14 *H. 4.* 34. b.
^{bm}Vid. *supra*.
^{bn}Ch. 1. S. 10.
^{bo}Fitz. Co. 107.
^{bp}S.P.C. 52. A.
^{bq}H.P.C. 172.
^{br}S.P.C. 53.
^{bs}14 *H. 4.* 34.
^{bt}35. a.
^{bu}39 *H. 6.* 40. b.
^{bv}41, 42.
^{bw}See Book 1.
^{bx}Ch. 68.

Sett. 47. But it is enacted by 3 H. 7. 1. That a Coroner have for his Fee upon every Inquisition taken upon the View of a Body slain 13 s. 4 d. of the Goods and Chattels of the Slayer and Murderer, if he have any Goods; and if he have no Goods, of such Amerciaments as shall fortune any Township to be amerced for the Escape of the Murderer, &c.

Sett. 48. But the Coroners endeavouring to extend this Statute to Persons slain by Misadventure, it was enacted by 1 H. 8. 7. That upon a Request made to a Coroner to come and inquire upon the View of any Person slain, drowned, or otherwise dead by Misadventure, the said Coroner shall diligently do his Office, without taking any Thing therefore, upon Pain to every Coroner that will not endeavour himself to do his Office, (as afore is said) or that taketh any Thing for doing of his Office upon every Person dead by Misadventure, for every Time forty Shillings.

As to the eighth general Point, viz. In what Cases a Matter recorded by, or found before a Coroner, admits of no Traverse, I shall consider the same in Relation,

1. To Abjurations or Confessions made before him.
2. To Escapes.
3. To Flights.
4. To Self-Murders.

Sett. 49. As to the first Particular, it is said, That his Record of an * Abjuration, or of the Confession of ^b breaking a Prison, or of the Confession of a Felony by an ^c Approver, is of so great Authority, as not only to estop the Party from taking any Traverse to his having made such Confession, but also from alledging that what was said by him was extorted by Durefs, or other unfair Means. Also it seems that if the Party plead, That he is not the same Person who abjured, &c. and the ^d Coroner record that he is the same Person, such Record is conclusive, &c. But in these ^e Cases it seems, That the Judge for the better Information of his Conscience, may in his Discretion, if he think fit, take an Inquiry from the People living next to the Place, of the whole Circumstances of the Matter, &c.

Sett. 50. As to the second Particular, viz. That relating to Escapes found before a Coroner, it is ^f said, That if it be found by a Coroner's Inquest, that a Murder was committed in such a Town, and that the Murderer escaped untaken, the Township cannot traverse such Escape, because it makes them only liable to an Amercement, & *de minimis non curat Lex*.

Sett. 51. As to the third Particular, viz. That relating to a Flight found before a Coroner, it seems, That if a Person indicted of a Murder by a Coroner's Inquest, be also found to have fled for it, and afterwards upon his Trial be ^g acquitted of the Murder, and also found not to have fled for it; yet he shall forfeit his Goods, because such a finding that he did not fly by a Jury, who as some say, had nothing to do with it, and ought not to have been charged with such Inquiry, shall not controul the Coroner's Inquest, which is of such Authority, that immediately upon the Flight, the Party's Goods shall be delivered to the Township, which shall be answerable for them. Also it seems ^h generally to be taken for granted, That the Party has no Remedy whatsoever to traverse such Flight found against him by a Coroner's Inquest; for that such Inquest is of very great Authority, ⁱ inasmuch as all Persons of the neighbouring

^a H. P. C. 171.
Fitz. Co. 124.
S. P. C. 52.
Letter B.
^b S. P. C. 33.
Letter H. 52.
Letter B.

^c E. 3. 42.
pl. 35.
Fitz. Coron.
134, 243, 435.
^e Fitz. Coron.
118, 169.
^d Affises, pl.
29.
^f Fitz. Coron.
124.
S. P. C. 52.
Letter B.
^g Fitz. Coron.
118, 124, 169.
^h Aff. 29.
Bro. Coron.
75.

ⁱ S. P. C. 34.
Letters A. B.
35. Letter F.
183. Letter D.
See Fitz. 352.
^k 13 H. 4. 13.
pl. 6.
Fitz. Forfeiture 29, 32,
35.

^l Co. 109 b.
Dyer 238.
pl. 36.
H. P. C. 271.
^m Bro. Coron.
151.
ⁿ E. 4. 4. 2.
2 Lev. 141.
Bro. Traverse
per fins cco,
229.
3 Keb. 564,
566.
^o 2 Inst. 147,
148.
3 Keb. 366.

Towns, above the Age of twelve Years, are bound to attend at the taking of it; and yet I cannot find any direct Resolution settling this Point; but on the contrary it is certain, That Sir William Staundford makes a Query of it, and the Reason abovementioned, which is brought to support the great Credit of such Inquests, holds as strongly against the Traversing them as to the Point of the Offence, in which respect it is at this Day generally holden that they may be traversed, as will be more fully shewn in the next Section. And surely the other Reason which is given for this Opinion, That the Party only forfeits his Chattels by such finding, and therefore shall not traverse it, because the Law reckons Chattels among those *minima de quibus non curat Lex*, is very harsh and unaccountable; and it is very hard to say, That a Man shall be liable to forfeit all his Goods, which may perhaps be all that he is worth, by an Inquest taken in his Absence, without either hearing him, or giving him an Opportunity of defending himself.

^a 3 Inst. 55.
^b Lev. 141.
 H. P. C. 29.
^c Vent. 181.
 182.
^d 8 Ed. 4. 4. 2.
 Bro. Coran.
 151.
^e Lev. 141.
 152.
^f Keb. 859.
^g Jon. 198.
^h Vent. 278.
ⁱ Keb. 564.
 566. 604. 800.
^j See the Books
 above cited.
^k Cro. El. 371.
^l Keb. 800.
 856.
^m Mod. 82.
 Salkeld 190.
ⁿ Keb. 859.
^o Vent. 181.
 182. 352.
^p Mod. 80.
 100. 138.
 Con. 2 Jones
 198.
^q 2 Rol. Abr.
 32. pl. 5.
^r Ed. 4. 70. b.
 Salkeld 190.

Sett. 52 As to the fourth Particular, *viz.* That relating to Self-Murder found before a Coroner, it is strongly holden in some ^b Books, that no Inquest of this Kind admits of any Traverse; but the contrary Opinion being also holden by ^b Books of as great Authority, and seeming also to be more agreeable to the general Tenor of the Law in other Cases; it seems to be the better Opinion, That such Inquest being moved into the King's Bench by *Certiorari*, may be there traversed by the Executor or Administrator of the Person deceased, and perhaps also ^c by the King or the Lord of the Manor, &c.

Sett. 53. Also if it ^d appear, That a Coroner hath been guilty of any corrupt Practice in the taking of an Inquisition, it seems that a *Melius inquirendum* shall be awarded for the taking a new one by special Commissioners, who shall not proceed on the View of the Body, but on the Testimony of Witnesses; and the Coroner shall have nothing to do in the taking such new Inquest, because it appears from his former Misbehaviour, that he is not fit to be trusted; but ^e where his Inquisition is quashed for a Defect in Point of Form only, he may and ought to take a new one, in like Manner as if he had not taken any before.

C H A P. X.

Of the Sheriff's Torn.

Sett. 1. **T**HE Sheriff's Torn is the King's Court of Record, holden before the Sheriff for redressing of common Grievances within the County; for the better Understanding of the Nature whereof I shall examine the following Points.

Finch 241.
F. N. B. 82.

1. The original Institution of this Court.
2. At what Time and in what Place it must be holden.
3. What Persons owe Suit to it.
4. What Authority the Sheriff (or his Steward) hath as Judge of it.
5. What Kind of Offences are inquirable in it.
6. Within what Place such Offences must arise.
7. By what Jurors and in what Manner Indictments in it ought to be found.
8. In what Manner they are to be proceeded upon.
9. In what Manner they are to be traversed and determined.

Sett. 2. As to the first Point it is observable, That by the ^a Common Law, every Sheriff ought to make his Torn or Circuit throughout every Hundred in his County twice in the Year, in order to hold a Court in every such Hundred for the Reformation of common Grievances, and the Preservation of the Peace and good Government of the Kingdom. For which Purpose all the ^b Inhabitants of such Hundreds, being above the Age of twelve Years, and not specially privileged, (in such Manner as shall be more fully set forth under the third Point,) are bound to attend at such Courts, in order to make Inquiries of all such Offences; and also to give Security to the Publick for their good Behaviour, by taking an Oath to be faithful to the King, and to observe his Laws, and also by incorporating themselves into some Free-Pledge or Tithing, which formerly signified a certain Number of Families living together in the same Precinct, the Masters whereof were every one of them mutually bound for each other, and punishable for the Default of any Member of any such Family, in not appearing to answer for himself on any Accusation made against him.

^a Co. 9. Pro.
face.
Dalton's She.
riff 385.
Magna Char.
ta 35.
^a Inst. 70, 71.
73, 122.
Bro. Lect 42.
Britton 71.
^b See the Books
above cited.
Fleta B. 1.
Ch. 27.
Bract. 124. b.
^a Inst. 121.
Lambard of
Constables. 8.
Keilw. 145. a.

Sett. 3. And the better enforcing of this Order seems anciently to have been the principal End of holding this Court, the Style whereof even to this Day, must be *Curia visus franci plegii Domini Regis tenta apud C. coram vicecomite in turno suo tali die, &c.* But it hath been resolved, That the Law doth not take Notice of any such Court, under the Style of *Turni Vicecomi tent. tali die*; for the Word *Torn* properly taken, doth not signify the Sheriff's Court, but his Perambulation.

^a Inst. 71, 72.
Dalt. Sheriff
385, 391.
Fitz. Lect
11.

Sett. 4. As to the second Point, viz. At what Time, and in what Place, this Court is to be holden, it is said, That at the Common Law, it might be holden at any Place within the Hundred, and as often as the Sheriff thought fit: But this having been found to give the Sheriff too great a Power of oppressing the People, by holding his Court at such

6 H. 7. 2. b.
Dalt. Sheriff
390.
Contra Co.
Lit. 115.
Kirchin 44. b.
Dalt. Sheriff

Times and Places at which they could not conveniently attend, in order thereby for his own Advantage, to increase the Number of his Amercements, it was enacted by the Statute of *Magna Charta* 35. *That no Sheriff or his Bailiff, shall make his Torn through a Hundred but twice in a Year, and at the Place accustomed, viz. once after Easter, and again after the Feast of St. Michael; and that the View of Frankpledge shall be at the Term of St. Michael.*

Sett. 5. And it is farther enacted by 31 E. 3. Ch. 15. *That every Sheriff shall make his Torn yearly, one Time within the Month after Easter, and another Time within the Month after St. Michael; and if they hold them in other Manner, that then they shall lose their Torn for the Time.*

Sett. 6. And it seems ^a certain, That since these Statutes, the Sheriff is indictable for holding this Court at another Time, than what is therein limited, or at an unusual Place.

Sett. 7. Also it hath been ^b resolved, That an Indictment found at a Sheriff's Torn, appearing to have been holden at another Time, is void.

Sett. 8. But it is observable, That neither of these Statutes do expressly mention a Court-Leet, and therefore it is said in some ^c Books, That they do not extend to it; neither do I find any Resolution, that an ancient Court-Leet holden at any other Time, or at an unusual Place, is void: But on the contrary it is ^d said, That a Court-Leet may be holden at any Place within the Precinct which the Lord thinks fitting. And it seems to be ^e agreed, That a Prescription to hold such Court oftner than twice in the Year is good; which seems hardly reconcileable with the general Rule of Law, That no Prescription can stand good against a Statute which has negative Words, if a Court-Leet be construed to be within the Purview of the abovementioned Statutes. It is true indeed, That both Sir *Edward Coke*, and *Kitchin*, endeavour to solve this Difficulty, by offering a Distinction that the said Rule extends not to Statutes made in Affirmance of the Common Law; but it is questionable how far this will amount to a good Answer, since it seems to be holden by ^f others of good Authority, that the said Statutes were not made in Affirmance of the old Law, but are introductory of a new one; yet it is certainly safest to hold a Court-Leet at the Times accustomed, for it is ^g said, That if it be holden at an unusual Time it is void. And it ^h seems, That no Court-Leet granted since the Statute, can be holden at any other Time than what is limited by it, because every such Court is derived out of the Torn, to which the Statute certainly did extend.

Sett. 9. It hath been ⁱ holden, That in every Caption of an Indictment taken in a Sheriff's Torn, or Court-Leet, the Day whereon it was taken ought to be set forth, that it may appear not to have been on a Sunday.

Sett. 10. As to the third Point, viz. What ^k Persons owe Suit to the Sheriff's Torn, it is certain, That regularly all Persons above the Age of twelve Years, are by the Common Law bound to appear at this Court in their proper Persons, and that no Persons so bound to appear, are within the Benefit of the Statute of ^l *Merton*, Ch. 10. which allows Suit-Service to be performed by Attorney. And that not only Masters of Families, but also all their Servants are bound to pay such Suit, and that every ^m Master may be amerced for suffering a Servant to continue with him a Year and a Day, without being put into the Decennary, &c.

^a Dy. 151.

pl. 4.

Keilw. 197.

Dalt. Sheriff,

390, 391.

^b 38 H. 6. 7. a.

^c H. 7. 2. b. 3. a.

S. P. C. 84.

See 2 Danv.

Ab. 256. pl.

14.

^d Inst. 71.

^e Saund. 290.

^f Bro. Leet

23.

^g Leon. 74.

^h Rol. Rep.

201.

ⁱ 8 H. 7. 4. b.

^j Kitchin 44. b.

Owen 35.

Dalif. 61.

^k Co. Lit.

115. a.

^l Kitchin 8. 44.

^m Cro. El. 125.

245.

ⁿ Rol. Rep.

201.

^o Dalt. She-

riff 390.

^p H. 7. 2. b.

^q 38 H. 6. 7. a.

^r Fitz. Leet 2.

^s Bro. Leet 32.

^t Saund. 291.

^u Cro. El. 245.

^v Con. 2 Inst.

72.

^w Saund. 291.

^x 2 Keb. 731.

^y Vent. 107.

^z Saund. 290.

^{aa}

^{ab} See *Sett.* 2.

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Sect. 11. But ^a Tenants in Ancient Demefne are privileged by the Common Law from coming to this Court, unless they and their Ancestors have Time out of Mind used to come to it: Also ^b Parsons of Churches have the like Privilege by the Common Law; and all ^c Peers of the Realm, and Women have the same Privilege by the Statute of *Marlebridge*, cap. 10, (and perhaps by the Common Law) unless their Presence be especially required for some particular Cause.

Sect. 12. Also it seems ^d clear, That by the Common Law, as well as the said Statute of *Marlebridge*, cap. 10, no Man can be obliged to do Suit to any such Court, within the Precincts whereof he doth not reside, in respect of any Lands which he may have within the Jurisdiction of it; for that no Suit of this Kind is due in respect of the Tenure of any Lands, but only in Respect of the personal Residence of the Party. And ^e if a Man have a House which stands upon the Precincts of two Leets, it is said, That he shall do his Suit to the Court within the Jurisdiction of which his Bed-Chamber lies: And if ^f one have a House and Family in two Leets, it seems that he ought to do his Suit to that, wherein for the most Part he personally resides, but no Man can be of two Leets, and therefore one who lives within a ^g private Leet, cannot be obliged to do Suit to the Sheriff's Torn, or to any other grand Leet, unless such private Leet, for some Default of the Lord, be seized into the King's Hands, or ^h unless the Lord of the Leet neglect to hold his Court.

As to the fourth Point, *viz.* What Authority the Sheriff (or his ⁱ Steward) hath as Judge of this Court, I shall consider the same in Relation,

1. To Indictments.
2. To Fines and Amercements in general.
3. To the Appointment of Constables.

Sect. 13. As to the first of these Points, it seems, That by the Common Law he might proceed to ^k hear and determine any Offence within his Jurisdiction, being indicted before him and requiring a Trial. But it is clear, that he is restrained from this Power by the Statute of *Magna Charta*, cap. 17. By which it is enacted, *That no Sheriff, Constable, or other Bailiff of the King, shall hold Pleas of the Crown:* And it seems, That this Statute also extends to the ^l Stewards of Courts-Leet, who cannot deliver any Persons indicted before them of Felony, but must refer them to the Justices of Gaol-Delivery; neither can they try any Person indicted before them of any other Offence, and therefore there is no Remedy to avoid such Presentments before them as are traversable, but ^m by removing them into the King's Bench, &c. as will be more fully shewn under the ninth Point.

Sect. 14. But it is certain, That the abovementioned Statute of *Magna Charta* 17. doth neither restrain the Sheriff's Torn, nor the Court-Leet, from taking ⁿ Indictments or Presentments, or awarding Process thereon in the same Manner as before; but this Power of awarding such Process, having been abused by the Sheriffs in their Torns, was taken from all of them, (except those of *London*,) but not from any Court-Leet, by ^o 1 E. 4. 2. which is more fully set forth under the eighth general Point of this Chapter.

^a F.N.B. 161.
Letter C.
Dalt. Sheriff
387.
^b Inst. 121.
Quer. Bro.
Leet 38.
^c F.N.B. 160.
c.
^d Inst. 121.
Regist. 175.
^e 2 Inst. 120.
121.
Regist. 175.
F.N.B. 160.
161.
Dalt. Sheriff
186.
Bract. 124.b.
^f Regist. 175.
F.N.B. 160.
Dalt. Sheriff
387.
^g 2 Inst. 122.
Dalt. Sheriff
387.
^h 2 Inst. 122.
Dalt. Sheriff
387.
ⁱ 2 Inst. 122.
See 19 H. 6. 1.
31 H. 6. 9.
^j Cro. Jac.
584.
Finch 246.
Dalt. Sheriff
388.
See the next
Chapter,
Sect. 3.
^k Dalt. Sheriff
388.

^l Dalt. Sher.
riff 400.
^m 2 Inst. 32.
Dalt. Sheriff
400.
ⁿ 8 H. 4. 17.4.
Bro. Lect. 11.
27 H. 8. 2.
Kitch. 22, 23.
H.P.C. 175.
^o Ed. 3. ch.
17.

^p Kitchin 42.
b.
Finch 386.
^q Ed. 3. ch.
17.
^r Dalt. Sher.
400, 401.

As to the second Point, *viz.* The Sheriff's Authority in his Torn in Relation to Fines, and Amercements, I shall consider,

1. In what Cases he may, and in what Manner he ought to impose a Fine.
2. In what Cases he ought to award an Amercement.
3. In what Manner such Amercement is to be awarded and affected.
4. In what Manner such Fine or Amercement is to be recovered.
5. What farther Penalty may be added to such Fine or Amercement.

^a See Book 1.
ch. 21. Sect.
11. and the
first Chapter
of this Book,
Sect. 15.

^b Fitz. Leet.
11.

Dalt. Sheriff
400.

^a Inst. 142,
143.

⁴⁴ E. 3. 19. b.
⁶⁷ H. 7. 12.

⁶¹⁰ H. 6. 7. b.
⁸ Co. 38. b.

^a See 8 Co.
38. b. 39. a.

Dalt. Sheriff
401.

Dy. 211. b.
¹⁸ Co. 38.

Dalt. Sheriff
400.

⁸¹ Rel. Rep.
33. 73.

¹¹ Co. 42. b.
43. b.

Dyer 211. b.
^a Dalt. Sher-

riffs 400.
Fitz. Leet 11.

See 8 Co. 39,
40.

Kirchin 43. b.
¹ Bro. Leet

Keilw. 66.
Finch. 468.

Kirchin 51,
52.

^k Fitz. Torn.
4.

⁸ E. 4. 5. pl.
25.

Dalt. Sheriff
401.

¹⁸ Ed. 4. 5.
pl. 15.

^m Jones
301.

Cro. Car. 275.
⁸ Co. 38. b.

40. b.

Sect. 15. As to the first Particular, it seems clear, That the Sheriff's Power in this Court is still the same as anciently it was, in all Cases not within either of the abovementioned Statutes of *Magna Charta* or 1 E. 4. from whence it follows, That he still continues a Judge of Record, and may impose a Fine on all such as are guilty of ^a any Contempt in the Face of the Court; also there seems to be no Doubt, but that he may impose what reasonable Fine he shall think fitting, upon a ^b Suitor refusing to be sworn, or upon a ^c Bailiff refusing to make a Panel, &c. or upon a ^d Tithingman neglecting to make his Presentment, or upon one of the Jury ^e refusing to present the Articles wherewith they are charged, or upon a Person duly chosen ^f Constable, refusing to be sworn.

Sect. 16. But it hath been ^g resolved, That all such Fines ought to be severally imposed on each particular Offender, and not jointly upon all of them, except where a whole Vill is to be fined; in which Case, for the Necessity of the Thing, a joint Fine upon all is good.

Sect. 17. As to the second Particular, *viz.* In what Cases the Sheriff in his Torn ought to award an Amercement, it seems that he hath a discretionary Power ^h either to award a Fine or Amercement for Contempts to the Court, as for a Suitor's refusing to be sworn, &c. Also there seems to be no Doubt, but that at the common Law he might, as the Steward of a Court-Leet still may, award an ⁱ Amercement of any Person indicted for an Offence not Capital within his Jurisdiction, without any farther Proceeding or Trial: And it seems to be taken for granted in ^k some Books, That he might in such Cases impose a Fine on the Offender, if he thought fit; and the Statute of Ed. 4. 2. which restrains him from levying any Fines or Amercements on Indictments found before him, clearly supposes him to have had a Power of imposing such Fines; from all which it seems probable, that in such Cases he had, and that the Steward of a Court-Leet still hath, a Power, either to amerce or fine the Offender, especially if the ^l Crime were any Way enormous, as an Affray accompanied with wounding, &c.

Sect. 18. As to the third Particular, *viz.* In what Manner such Amercement is to be awarded and affected, it seems, That if by an Amercement be meant the Judgment, that the Party shall be *in misericordia Domini Regis*, this being a ^m judicial Act, ought to be the Act of the Court only, and requires not the Concurrence or Assent of the Jury or any other, as appears from the constant Form of all Entries: Neither do I see any Reason why such an Award of a *Misericordia* by a Judge of a Court-Leet, should express any certain Sum for which the Party should be *in Misericordia*, except in such Cases only where no other Person is afterwards to affect it; for in other Cases the Award of a *Misericordia* is only in order to authorize others to fix the Sum, which the Party

Party is to pay to the King for his Default; and in such ^a Cases the Courts of *Westminster-Hall*, never do more than award that the Party be *in Misericordia*, without mentioning any Sum in certain; and there seems no Reason, why the Judge of a Court-Leet should not follow the same Rule; and accordingly I find the Opinion of the Lord Chief Justice ^b *Hobart*, which is the Chief Ground of a Resolution in ^c *Levinz's* third Report, That every such Award of an Amercement must express a certain Sum, ^{*} over-ruled of late by Court of King's Bench.

Sett. 19. But if by an Amercement be meant, the Taxing or Reducing to a Certainty, the Sum to be paid by the Party to the King, upon the Award of his being *in Misericordia*; it ^d seems, That if it be for an Offence indicted, it ought to be done by certain Officers called Affeerors, being specially chosen and sworn for this Purpose. It is true ^e indeed, That the common Entry of an Amercement upon a Presentment in a Court Leet is, that the Party is amerced, or *in Misericordia* to such a Sum, without distinguishing between the Award of the *Misericordia*, and the Assessment of the Amercement, or shewing by whom they are made; yet in Judgment of Law the Award of the *Misericordia* is the Act of the Court only, and the Assessment of the Sum to be paid, the Act of the Affeerors, and so it ought to be pleaded. But if the ^f Amercement be for a Contempt to the Court, it may be settled by the Judge himself, and needs no other Affeerment; for the ^g Judge of every Court of Record is the most proper Judge of all Contempts offered to such Court; and an Amercement of this Kind is in ^h Nature of a Fine, and called so in some ⁱ Books; and it seems to be a general ^k Rule That no Fine for a Contempt is within the Statutes which require that Amercements be affeered.

Sett. 20. As to the fourth Particular, *viz.* In what Manner such ^l Fines and Amercements are to be recovered; it seems, That the King or Lord have an Election of common Right, either to distrain for them, or to bring an Action of Debt; for the better Understanding of the Nature of which Remedies, I shall first lay down some Rules concerning both of them in common, and then descend to each of them in particular.

As to what concerns the said Remedies in common, I shall lay down the following Rules:

Sett. 21. First, That it is safest in every Avowry, or Declaration of this Kind, expressly to ^m shew that the Offence was committed within the Jurisdiction of the Court: For if it were not, all the Proceedings were *coram non Judice*; and a Court shall not be presumed to have a Jurisdiction, where it doth not appear to have one. But perhaps it is not necessary to alledge in the Presentment it self, That ⁿ the Offence arose within the Jurisdiction of the Court; yet it is certainly advisable to have such an Allegation, and that ^o perhaps may supply the Want of the Averment of Jurisdiction in the Pleadings.

Sett. 22. Secondly, That it is ^p advisable expressly to alledge, that the Offence was committed as well as that it was presented, *&c.* yet I cannot find any express Opinion to this Purpose; but on the contrary it is observable, that the ^r Precedents of Pleadings of this Kind in the best Authors, do not expressly aver that the Offence was committed, but only that it was presented, and that it arose in such a Place within the Jurisdiction of the Court, *&c.* It is true indeed, that it hath been generally ^s holden, That in an Avowry or Declaration for an Amercement

^a 8 Co. 40. b.
^b See Rastal's
 Entries 553.
^c a. b. 606.
^d F.N.B. 76.
^e Letter A.
^f Hobart 129.
^g Rol. Abr.
^h 542. pl. 5.
ⁱ 3 Lev. 276.
^j 3 Mod. 138.
^k Salk. 56.
^l 8 Co. 40. b.
^m 3 Lev. 206.
ⁿ See Rastal's
 Entries 606.
^o a. b.
^p Kirchin 46.
^q See Kailw
 66. a.
^r 3 Keb. 362.
^s Kirchin 51.
^t 52. 53.
^u Rastal's En-
 tries 151. b.
^v 7 H. 6. 12. b.
^w 10 H. 6. 7.
^x 88 C. 42.
^y 41.
^z 2 Leon. 242.
^{aa} 3 Mod. 138.
^{ab} Brook A-
 mercement
 50.
^{ac} Savil 93.
^{ad} Co. Entries
 572.
^{ae} 8 Co. 38. b.
^{af} Rast. Entr. 553.
^{ag} 8 Co. 38. *&c.*
^{ah} 2 Inst. 196.
^{ai} 2 Mag. 12.
^{aj} Chaita 14.
^{ak} W. 1. 18.
^{al} R. Astl's Entr.
 151. 553. 606.
^{am} 2 H. 4. 24. b.
^{an} 10 H. 6. 7.
^{ao} Cro. E. 581.
^{ap} Raym. 68.
^{aq} Savil 93. 94.
^{ar} Hob. 129.
^{as} See Rastal's
 Entr. 553. a. b.
^{at} Co. Entr. 572.
^{au} 572.
^{av} Hob. 129.
^{aw} See Rastal's
 Entr. 606.
^{ax} 2 Rol. Rep.
 40.
^{ay} Raym. 337.
^{az} Salk. 107.
^{ba} 109.
^{bb} Rastal's En-
 tries 151.
^{bc} 553. 606.
^{bd} Co. Entr. 571.
^{be} Moor 75.
^{bf} Cro. Jac. 581.
^{bg} Cro. El. 748.
^{bh} 885. 886.
^{bi} 3 Leon. 7. 8.
^{bj} 1 Leon. 242.

^a Keilw. 66. a. in a Court-Baron, it is as necessary to alledge that the Offence was committed, as that it was presented: But to this it may be answered, That a Court-Baron is not a Court of Record, and consequently not of so high Authority as the Sheriff's Torn or a Court-Leet; neither are Presentments in a Court-Baron, nor even in any other Court whatsoever, so highly credited by the Law as those made in a Torn or Leet, which admit of no Traverse to the Truth of them, except in some special Cases, as will be more fully shewn under the ninth general Point of this Chapter.

^a *Sett.* 23. Thirdly, That it is safest in ^a setting forth a Presentment, or an Affeerment of an Amercement, to shew the Names of the Presentors and Affeerors; yet I cannot find this done in any of ^b *Rastal's* Precedents; and some have said, That it is necessary to set forth the Names of the Presentors in an Action of Debt, but not in Replevin.

^c *Sett.* 24. Fourthly, That it is adviseable to shew, that proper Notice was given of the Holding of this Court, yet this I find omitted in some ^d Precedents; and perhaps the contrary Opinion may be the better, for that every Court of Record shall be presumed to observe all necessary previous Incidents for the Holding of it, and all Persons within its Jurisdiction shall be intended to have Notice of it. And for the like Reason perhaps, it is not necessary in an Avowry for a ^e Distress for such Fine or Amercement, to shew that the Party had previous Notice what it was.

As to the Recovery of such Fines and Amercements by Way of Distress, I shall observe,

^f *Sett.* 25. First, That it seems to be settled at this Day, That a Distress is incident of common Right to every Fine and Amercement in a Sheriff's Torn or Court Leet, whether the same belong to the King or to a Subject, if the Offence for which they were imposed be of common Right incident to the Jurisdiction of such Courts; but ^g if such Offence were only the Neglect of a Duty created by Custom, it is questionable whether it do not require the like Custom for a Distress, though the Duty be of a publick Nature; but if it be for the ^h private Benefit of a Subject, it seems clear, That no Distress is incident to it without a special Custom.

ⁱ *Sett.* 26. Secondly, That the Sheriff, or Lord of a Leet, may for such Fines or Amercements distrain the Goods of the Offender in ^j any Lands within the County or Precinct of the Leet, of whomsoever they shall be holden, except ^k only in such Lands which shall be in the King's Hands; for that all such Lands, while they continue in the King's Possession, are wholly out of the Jurisdiction of such Courts.

^l *Sett.* 27. Thirdly, That such a Distress may lawfully be taken in the Highway; for that the Statute of *Marlebridge*, cap. 15. which prohibits the Taking of a Distress there, is to be intended only of Distresses taken for Services due by Way of Tenure of Lands.

^m *Sett.* 28. Fourthly, That such Fines and Amercements being for a personal Offence, no ⁿ Stranger's Beasts can lawfully be distrained for them, though they have been levant and couchant on the Lands of the Offender.

^o *Sett.* 29. Fifthly, That it seems to be agreed, That where any such Court is in the King's Hands, the Goods distrained for such Fines and Amercements may lawfully be sold, after they have been kept a reasonable Time, as the Space of sixteen ^p Days; and it seems the better

^a Opinion

^a Opinion, That where any such Court is in the Hands of a common Person, if the Goods were distrained for an Offence of a publick Nature, they may be sold of common Right, without any special Custom for that Purpose.

Sect. 30. Sixthly, That no Bailiff can lawfully distrain for any such Fine or Amercement, without a special ^b Warrant for so doing, which must be set forth by him in an Avowry or Justification of such a Distress.

Sect. 31. As to the Recovery of such Fines and Amercements by Action of Debt, being scarce able to find any Thing remarkable concerning this Matter, except what hath been already taken Notice of, I shall content my self with this one Observation, That the Defendant shall ^c not be suffered to wage his Law in any such Action, because it is grounded on the Act of a Court of Record.

Se^ct. 32. As to the fifth Particular, *viz.* What farther Penalty may be added to such Fines and Amercements, there seems to be no Doubt, but that upon a Presentment of a common Nuisance in a Torn or Leet, the Sheriff or Steward may either amerce the Person presented, and ^d also order him to remove the Nuisance by such a Day, under Pain of forfeiting a certain Sum, or may order him to remove it under such a Pain ^e without amercing him at all. But it seems doubtful, Whether such Person be bound at his Peril, to take Notice of and obey such Order, being made in his ^f Absence, unless express Notice be given him of it; but if he have such Notice it seems clear, That he shall forfeit the Pain upon a Presentment at another Court, that he hath not removed such Nuisance, ^g without any farther Proceeding: Also it seems, That no such Pain can be affeered to any ^h lesser Sum than what is at first set; and it is said, That every such Pain when forfeited, may be recovered ⁱ either by Distress or Action of Debt, in the same Manner as a Fine or Amercement may be: And this Point seeming to be agreed by most of the Books cited in the Murgent, it seems probable, That the Reason of the Judgment is mistaken in *Fletcher and Ingram's Case*, as reported by Mr. Serjeant ^k *Salkeld*, wherein the contrary Opinion is said to have been holden.

Before I come to the Third Point, *viz.* The Authority of the Sheriff as Judge of the Torn, in Relation to the Appointment of Constables, I shall in brief premise some Considerations concerning the Antiquity and Nature of the Office of a Constable.

Se^ct. 33. And first, as to the Antiquity of the Office of a Constable, it ^l seems to be the better Opinion, That both Constables of Hundreds, which are commonly called High Constables, and also Constables of Tythings, which are at this Day commonly called Petit Constables or Tythingmen, and were anciently called Chief Pledges, were by the Common Law, and not first ordained by the Statute of *Winchester, cap. 6.* as it is holden by ^m some that they were; for that Statute doth not say, That there shall be such Officers constituted, but clearly seems to suppose that there were such before the making of it.

Sect. 34. As to the Nature of this Office, there seems to be no Doubt but that the ⁿ original Institution of it was for the better Preservation of the Peace; for which Purpose a Constable is said to be authorized by the Common Law to ^o arrest Felons, and also all suspicious Persons that go abroad in the Night, and sleep by Day, or resort to Bawdy-

R

Houses

^a 3 H. 7. 4. 6. b.
8 Co. 41. b.
1 Rol. Rep. 76.
Noy. 17.
Query Hat. 62.
1 Bull. 53.
11 H. 7. 14. a.
21 H. 7. 40. b.
^b 3 Mod. 138.
Cro. El. 698,
748.
Moor 574.
pl. 789, 607.
pl. 839.
^c 2 Keb. 745.
Salk. 108.
^d 10 H. 6. 7.
Co. Lit. 295.
Fit. Ley. 3. 43.
2 Rol. Abr.
106 pl. 1, 2, 8.
^e See Kitchin
51, 52, 53.
^f See Kitchin
51, 52, 53.
Co. Entr. 573.
1 Rol. Abr.
468. pl. 6.
Cro. Jac. 382.
^g 1 Rol. Abr.
468. pl. 6.
2 Rol. Abr.
136.
1 Rol. Re. 201.
Aleya 78.
5 Mod. 139,
131.
6 Co. Ent. 573.
^h 3 Leon. 7. 8.
Moor 75. pl.
205.
Co. Ent. 573.
Bro. Leet 37.
18 Co. 41. b.
Keilw 66 b.
Cro. Jac 382.
1 Rol. Rep.
201.
1 Rol. Abr.
468. pl. 6.
Contra Bro.
Leet 37.
ⁱ Salk. 131.
See 5 Mod. 96,
130, 131.
1 Salk. 175,
381.
12 H. 7. 18. a.
Owen 105.
Finch 336.
Kitch. 47, 48.
^j Inst. 265.
Poph. 13.
Contra Cro.
El. 375, 376.
Lamb. Con-
stables, 9, 10.
6 Co. 77. b.
^k Lamb. Con-
stable, 5.
4 Inst. 267.
^l See the Books
cited, Sect 31.
^m See Ch. 12.
ⁿ Kitchin 48.
13 H. 7. 10. b.

^a B. 1 Ch. 63. Houses, or keep suspicious Company, and to suppress ^{*} Affrays: And to the same End also it ^a seems, That he ought by the ancient Common Law, to present at the Torn or Leet all those within his Precinct, who have not been admitted into some Tything and sworn to the King's Allegiance; and it seems that he still ought by the Law in ^b use at this Day, to present all Offences inquirable in the Torn or Leet; yet in the Oath set down by *Kitchin*, he only swears to present all Bloodsheds, Outcries, Affrays, and Rescous done within his Office.

^c Salk. 380, 381. *Sett.* 35. Also it is ^c said, That a Constable was at the Common Law a subordinate Officer to the Conservators of the Peace: and consequently since the Office of such Conservators hath been disused, and Justices of Peace constituted in their Stead, it hath been always holden, That the Constable is the proper Officer to a Justice of Peace, and bound to execute his Warrants; and therefore it hath been ^d resolved, That where a Statute authorizes a Justice of Peace to convict a Man of a Crime, and to levy the Penalty by Warrant of Distress, without saying to whom such Warrant shall be directed, or by whom it shall be executed, the Constable is the proper ^e Officer to serve such Warrant, and indictable for disobeying it.

^d 5 Mod. 130. Salk. 175. *Sett.* 36. Yet in as much as the Office of a Constable is wholly ministerial and no way Judicial, it seems, That he may appoint a Deputy to execute a ^f Warrant directed to him, when by Reason of Sickness, Absence, or otherwise, he cannot do it himself. For the Publick Good requires, That there should be always some Officer ready at Hand to execute such Warrants, and the too rigorous Restraint of the Service of them to the proper Officer, could not but sometimes Cause a Failure of Justice; yet I do not find it settled, That a Constable can make a Deputy without some such special Cause.

^e Salk. 381. ² Rol. Rep. 78. ^f 1 Rol. Abr. 391. A. Moor 845. Crompt. 222. 3 Bull. 77. Dist. cap. 1. 1 Rol. Rep. 274. 1 Sid. 355. 1 Lev. 233. March 30. Query 2 Kcb. 309. 1 Sid. 355. For the better Understanding of the Authority of the Sheriff, as Judge of the Torn, in Relation to the Appointment of Constables, I shall consider the following Particulars:

1. Whether the Sheriff in his Torn hath Power to make or remove a Constable.
2. What Persons are privileged from being Constables.
3. In what Manner Persons duly chosen Constables, may be punished for refusing to be sworn.
4. What Remedy Persons having a Right to this Office, or to be discharged, may have to be admitted into, or restored to it, or discharged of it.
5. What Power Justices of Peace have in Relation to these Matters.

^g Dalt Sheriff 400. ¹ Rol Rep. 34. ^h Jones 212. Lamb. Constable 8. Salk. 175. *Sett.* 37. As to the first Particular, viz. Whether the Sheriff in his Torn, hath Power to make or remove a Constable, it being said in some Books, That both High and Petit Constables are to be chosen and appointed by the Sheriff in his Torn; and by ^h others, that they are to be chosen by the Decennary, it seems difficult to determine to whom this Power doth of common Right belong; yet it seems clear, That whether a Constable be to be chosen by the Sheriff or Decennary, yet he is to be sworn and placed in his Office by the Sheriff, as being judge of the Court. Also it seems certain, That a Custom for choosing a Constable either Way, is good; and it seems to have been the Opinion of the Makers of ¹³ ¹⁴ Car. 2. 12. That the Lords of the Courts-Leet have this Power of Common

Common Right; for the said Statute, on the Neglect of such Lords to appoint a Constable, gives to Justices of Peace the sole Power of making one; from whence it seems probable, That the Makers of that Statute thought that the like Power did originally belong of common Right to such Lords, and consequently to the Sheriff in his Torn, where there is no Court Leet: But ^a it hath been said, That a Custom in a Town that the Inhabitants shall serve the Office of a Constable by Turns, according to the Situation of their several Houses, is not good; for that by such a Course it may come to a Woman's Turn to be Constable, as Inhabitant of one of those Houses; yet we find such Customs allowed to be good in later Books; and it seems, That the Consequence of the Reasoning abovementioned may well be denied, since such Woman in such Case may procure another to serve for her.

Sett. 38. However it seems clear, That the Sheriff or Steward having Power to place a ^b Constable in his Office, have by Consequence a Power ^b Bullst. 174. of removing him.

Sett. 39. As to the second Particular, *viz.* What persons are privileged from being Constables, it ^c seems certain, That if a sworn Attorney or other Officer of any of the Courts of *Westminster-hall* be chosen into this Office, he may have a Writ of Privilege for his Discharge; for that all such Officers, being bound to give their personal Attendance to such Courts, shall be privileged from all such inferior Offices, which it is apparent that for the most Part they cannot personally execute: And it hath been resolved, That such Officers shall have this Privilege, not only where there is no special Custom concerning the Election of Constables, but ^d also where they are chosen by a particular Custom, in respect of their Estates or otherwise; for that no such Custom shall be intended to be more ancient than the Usages of those Courts, and therefore shall give way to them: And upon the like Reasons I find it ^e taken for granted, That practising Barristers at Law, and the Servants of Members of Parliament, have the same Privilege, but I know not of any Resolution to this Purpose.

Sett. 40. Also it hath been resolved, That an ^f Alderman of *London* is not compellable to be a Constable, for that as an Alderman he is bound to be present in the City for the good Government of it.

Sett. 41. But ^g it hath been holden, That a Captain of the King's Guards, being presented to serve as Constable, in Pursuance of a Custom in respect of his Lands in a Town, cannot claim this Privilege; for that notwithstanding he be bound by his Office to personal Attendance on the King's Person, yet such Office being of late Institution, shall not prevail against an ancient Custom: Also it ^h seems, That a practising Physician being chosen Constable in Pursuance of such Custom, has no Remedy for his Discharge; for that there are no Precedents of this Kind, and his Calling is private; yet if such an Officer, or a ⁱ Gentleman of Quality who hath no such Office, or a practising Physician, be chosen Constable of a Town, which has sufficient Persons besides to execute this Office, and no special Custom concerning it, perhaps he may be relieved by the King's Bench: But it ^k seems, That even a Custom cannot exempt fitting Persons from serving the Office of Constable, where there are not sufficient besides them to execute it. Yet this Points seem not to be settled, as appears by the various Opinions in the Books concerning this Matter which are very differently reported.

Señ. 42. It is alledged in the Petition of the *London Surgeons*, whereon the Statute of 5 H. 8. cap. 6. is made, *That the Wardens and Fellowship of the Craft and Mystery of Surgeons infranchised in the City of London, not passing in Number twelve Persons, for the continual Service and Attendance that they at all Hours and Times give to the King's People, have been exempted and discharged from all Offices and Business, wherein they should use or bear any Manner of Armour or Weapon, &c.* And thereupon it is enacted and established, *That from thenceforth the said Wardens and Fellowship be discharged, and not chargeable of Constableness, Watch, and all manner of Office bearing any Armour, &c. and also that the said Act extend to all Barber-Surgeons admitted and approved to exercise the said Mystery of Surgeons, according to the Form of the Statute made in that Behalf, so that they exceed not, nor be at any Time above the Number of twelve Persons.*

2 Keb. 578. *Señ. 43.* And it seems, That by the Equity of this Statute, and the ancient Custom of the Realm, all Surgeons have been allowed the like Privilege.

Señ. 44. Also it is enacted by 32 H. 8. 40. *That the President of the Commonalty and Fellowship of the Science and Faculty of Physick in London, and the Commons and Fellows of the same, shall not be chosen Constables in the City of London or Suburbs of the same, &c.* Yet it seems to have been holden, That the Equity of this Act doth not extend to other Physicians not mentioned in it; perhaps for this Reason, because Physicians have no such special Custom for their Discharge as Surgeons are said to have.

Vide supra
Señ. 41.

Señ. 45. Also it is enacted 6 W. 3. 4. which hath been continued by subsequent Statutes, *That all Persons using the Art of an Apothecary, who have been brought up and served as Apprentices in the said Art for seven Years, according to the Statute of 5 Eliz. shall be freed and exempted from the Office of Constable, in the Counties and Places where they live, for so long as they use and exercise the said Art.*

Señ. 46. As to the third Particular, viz. In what Manner Persons duly chosen Constables may be punished for refusing to be sworn, it seems, that no Person can lawfully be committed for such Refusal without more; but it is said, That if the Party be present in the Court he may be fined, and that if he be absent, and have a certain Time and Place appointed him for the taking of the Oath before a Justice of Peace, and have also express Notice of such Appointment, and be presented at the next Court, for having refused to take it accordingly, he may be amerced: Also it seems, That in either Case he may be indicted either at the Sessions of the Peace, or before Justices of Oyer and Terminer: And it is advisable in all Pleadings in any Action concerning such a Fine or Amercement, and in all Indictments for such Refusal, specially and expressly to set forth the Manner of every such Election, Appointment, Notice, and Refusal, and ^a before whom the Court was holden: And it hath been adjudged, That it is insufficient to say in general, that the Party was ^b *Debito modo electus* or *Legitime electus*, or that he had ^c Notice thereof, without setting forth the special Circumstances of such Notice, &c. Also it is ^d said to have been adjudged, That an Indictment for not finding a sufficient Person to serve the Office of Constable, without shewing that the Party refused to serve it himself, is insufficient; and it is said not to be sufficient to shew, That a Man was presented and returned to be a Chief Pledge, without shewing that there were other inferior Pledges.

Cro. Car 567.
Co. Ent. 572.
5 Mod. 130.
Salk. 175.
8 Co. 38.

^a 1 Mod. 24.
^b 5 Mod. 96,
129.

^c Aleyn 78.
^d 5 Mod. 96,
129, 130, 131.
1 Keb. 418.
Vide supra.
fol. 66.

^e 1 Keb. 416.
6 Co. 77. b.

Sett. 47. As to the fourth Particular, *viz.* What Remedy Persons having a Right to be Constables or to be discharged, may have to be admitted into or restored to their Office, or discharged of it; it seems clear at this Day, That the Court of King's Bench having the supreme Controll of all inferior Jurisdictions, may upon the Complaint of any Person apprehending himself to be unjustly aggrieved in any such Respect, award a Writ to the Judge of the Court, thereby commanding him to swear, restore, or discharge the Party as the Case shall be; whereupon if such Judge do not obey such Writ, nor an *Alias* and *Pluries* to the same Purpose, nor return a sufficient Cause to the Court to justify his not obeying it, the Court will at last award a peremptory *Mandamus*.

1 Rol. Abr.
535 Letter I.
541. pl. 5, 6.
2 Rol. Rep 82.
Con. 1 Bull.
174.

Sett. 48. Also it hath been holden, That a Person duly chosen Constable at a Court-Leet, and refused to be sworn by the Steward, may be relieved by the Sessions of the Peace; but this Point shall be more fully considered in the next Section.

2 Jon. 212.

Sett. 49. As to the fifth Particular, *viz.* What Power Justices of Peace have in Relation to these Matters, it is observable, That the Constable being a principal Peace-Officer, and it being necessary for the Preservation of the Peace, that every Vill should be furnished with one; the Justices of Peace have ever since the Institution of their Office, taken upon them as Conservators of the Peace, not only to swear Constables which have been chosen at a Torn or Leet, but also to nominate and swear those who have not been chosen at any such Court, on the Neglect of the Sheriffs or Lords to hold their Courts, or to take Care that such Officers are appointed in them; also it seems, That such Justices have always used for good Cause to displace such Officers which have been so chosen and sworn by them; and this Power of Justices of Peace having been confirmed by the uninterrupted Usage of many Ages shall not now be disputed, but shall be presumed to have been grounded on sufficient Authority. And some have carried this Point so far, as to allow the Justices at their Sessions to swear one who was chosen at the Leet, and unduly rejected by the Steward, who had sworn another in his Place.

Salk. 175. pl.
1. 2. 176.
1 Mod. 13.
2 Jon. 212.
1 Bull. 174.
Alecyn 78.
Dalt. Ch. 121.
fol. 366, 367.
1 Bull. 174.

Sett. 50. However it is certain, That Justices of Peace had Power to nominate and swear Constables on the Default of the Torn or Leet, before the Statute of 13 & 14 Car. 2. 12. Par. 15. and therefore, that they have such Authority in some Cases not mentioned in that Statute, which reciting, *That the Laws and Statutes for apprehending Rogues and Vagabonds had not been duly executed, sometimes for want of Officers, by Reason Lords of Manors do not keep Court-Leets every Year for the making of them; doth enact, That in Case any Constable, Headborough, or Tythingman shall die or go out of the Parish, any two Justices of Peace may make and swear a new Constable, Headborough, or Tythingman, until the said Lord shall hold a Court, or until next Quarter-Sessions, who shall approve of the said Officers so made and sworn as aforesaid, or appoint others, as they shall think fit; and if any Officer shall continue above a Year in his or their Office, that then in such Case the Justices of Peace in their Quarter-Sessions may discharge such Officers, and may put another fit Person in his or their Place until the Lord of the said Manor shall hold a Court as aforesaid.*

Salk. 176.
Bon. 1 Bull.
174.

See the Books
cited in the
precedent Se-
ction.

As to the fifth general Point of this Chapter, *viz.* What Kind of Offences are inquirable in the Sheriff's Torn, I shall premise the following Observations,

4 Inst. 261.
Cromp. 213.

Fitz Torn, 5.
inf. Sect. 52.

Keilw. 66. b.

1. That it is no certain Rule, That such Offences as are omitted in 18 E. 2. concerning the View of Frank-Pledge are not within the Jurisdiction of the Torn or Leet.
2. That Offences made Treason or Felony or in any other Manner, having a Restraint by Statute superadded to that of the Common Law, are not inquirable here in respect of any such Statute, but only as Offences at the Common Law; for that the Jurisdiction of these Courts is wholly confined to Offences at Common Law
3. That no Offence whatsoever is cognisable in any such Court, unless it arose since the holding of the last Court.

Offences inquirable in this Court are either,

1. Capital, or
2. Not Capital.

The Capital are either,

1. Treasons, or
2. Felonies.

^a Cromp.

212. b.
Dalt. Sheriff
292.

7 H. 6. 12. b.
10 H. 6. 7. a.
Quere Bro.

Leet 26.

^b 9 H. 6. 44. b.

^c Inf. Sect. 58.

^d Kitchen 8.

9. 22.

H. P. C. 173.

6 H. 7. 4. b.

5. a

See the next

Section.

^e 10 H. 6. 7. a.

Kitchen 9.

10.

Cromp. 212.

Dalt. Sheriff

392.

^f 9 H. 44. b.

22 E. 4. 22. b

7 H. 6. 12.

Fitz. Torn. 5.

5.

40 Aff. 30.

Bro. Leet. 18.

26.

Finch 241.

Kitchen 22.

^g Kitchen 22.

18 E. 2 View

of Frank-

pledge.

2 Inst. 181.

22 E. 4. 22.

6 H. 7. 4. b. 5. a.

Fitz. Torn.

5 Leet 3.

Sect. 51. And first as to Treasons, it is said in ^a some Books, That the Sheriff in his Torn may inquire of them all in general, and in ^b others, that he may inquire of all which are not against the King's Person; but I can find no Reason given for this Distinction: And since it is a general Rule, That Offences are inquirable in this Court, in Respect of their being of a publick Nature, on which Account the lowest Offences against the King, as ^c Mortmains and Purprestures, and such like, are inquirable in it; it seems strange, That the highest should be exempted. However it is ^d clear, That the Sheriff has no Power to inquire of any Offence made Treason by Statute, as of a Treason, but only as it was an Offence at Common Law.

Sect. 52. Secondly, As to Felonies, it is also generally said in ^e some Books, That the Sheriff in his Torn may inquire of all Kinds of Felonies, and in ^f others, That he may inquire of all except of the Death of a Man, or Rape, of the first of which it is said, That he cannot inquire, because it is not a common Nuisance, but only a Wrong to a single Person: But if this Reasoning be the only Foundation of this Opinion, it seems difficult to maintain it; for if an Assault and Battery of a single Person being accompanied with Bloodshed or Robbery, be inquirable in this Court, in respect of the Enormity of the Offence, and the Danger to the Publick from suffering such Offenders to go unrestrained, it seems strange if such an Assault proceed to Murder, that it should not be inquirable in it also: But it is ^g said, That the Sheriff cannot inquire of Rape as of a Felony, because it is made a Felony by the Statute of *Westminster* 2. 24. by which it is enacted, That he who ravishes a Woman, shall have Judgment of Life and Member: But if this Statute had only repealed the 13th of *Westminster* 1. (by which this Offence, which was a Felony at Common Law, was made a Trespass only,) it seems that it would

would have restored the Jurisdiction of the Sheriff's Torn over it as a Felony, because then it would have been a Felony by the Common Law again; but now it being a Felony only by the Statute, it is inquirable as a Trespass only in this Court.

Offences not Capital inquirable in the Sheriff's Torn, are either,

1. Such as amount to an actual Trespass, or
2. Such as do not amount to such a Trespass.

Sett. 53 And first, as to such Offences amounting to an actual Trespass it is agreed, * That an Assault and Battery is inquirable here if there be any Bloodshed in it, but otherwise not; because in such Case it is not looked on as a common Grievance, but as an Injury to a particular Person.

Sett. 54. Secondly, That all ^b Affrays are also inquirable here, for that they are *in terrorem Populi*.

Sett. 55. Thirdly, that the common ^c Breaking of Hedges, Walls, or Dykes, may also be inquired of in this Court, but not the Breaking of any particular Hedge, for that it is no common Grievance.

Sett. 56. Fourthly, Also it is commonly said, that all ^d Pound Breaches may be inquired of in this Court, as being common Grievances, in direct Contempt of the Authority of the Law, by which Pounds are provided for the legal Detainment of Distresses till they shall be delivered by due Course of Law.

Sett. 57. Offences under the Degree of Capital, not amounting to an actual Trespass, and inquirable in this Court, either immediately concern the King's Interest or do not.

Sett. 58. As to those which immediately concern the King's Interest, it seems to be agreed, That all ^e Purprestures or Incroachments upon the King, and ^f Alienations in Mortmain, and Seisures of Treasure-trove, or of ^h Waifs or ^h Estrays, or Goods ^h wrecked, belonging to the King, may be inquired of in this Court: But it seems ⁱ questionable, Whether a Prescription in a Court-Leet to inquire of the Seisure of such Things belonging to the Lord of it, being a Subject, be good or not, since it is against the general ^k Rule of the Law, for the Court-Leet to take Consuance of Trespases done to the private Damage of the Lord, because that would make his own Judge.

Sett. 59. As to Offences of this Kind, which do not immediately concern the King's Interest, it seems to be a general ^l Rule, That all common Nuisances are indictable in this Court; as all Annoyances to common Bridges or Highways, ^m Bawdy-houses, &c. and also all other such like Offences, as ⁿ Selling corrupt Victuals or Exposing them to Sale, ^o Breaking the Assise of Beer and Ale, Neglecting to hold a ^p Fair or Market in Pursuance of a Grant or Prescription: Also it seems, That the Keeping of ^q false Weights or Measures is indictable in this Court, whether it appear that they were actually made Use of or not: Also it is said, that all common Disturbers of the Peace may be here indicted, as ^r Barretors, ^r common Scolds, ^r Evils droppers, and also all common Oppressors, as ^s Usurers, &c. and also all ^t dangerous and suspicious Persons as Vagabonds; or those who go abroad in the Night, and sleep in the Day, or those who inordinately haunt Taverns, having no visible Means to live by, &c. And also all ^u Suitors to the Court who shall make Default, &c. And ^x also all those who shall levy a Fine and Cry without Cause, or shall neglect to levy one where they ought, or to pursue one rightely levied.

Sett.

^a 8 E. 4. 5. b.
Dy. 233. pl.
14.
^c R. 3. 1. a.
^d H. 6. 18.
^e 18 E. 2 View
of Frank-
pledge.
Kitch. 37. 38.
^f 4 H. 6. 10. a.
^g R. 3. 1. a.
Bro. Leet 15.
Kitchin 11.
^h Kitch. 11.
Bro. Leet 26.
ⁱ 22 E. 4. 23.
Finch 241.
^j Dlt. She-
riff 394.
Kitch. 11. 37.
Contra 4.
Leon. 12.
^k Dlt. She-
riff 393.
^l Kitch. 23.
38. 39.
^m Kitch. 40.
ⁿ 18 E. 2 View
of Frank-
pledge.
^o Kitch. 12.
13. 23. 40.
Dlt. Sheriff
393.
Crompt. 213.
^p 44 E. 3. 19.
pl. 14.
^q 1 Saunders
135.
Raym. 160.
^r 12 H. 4. 8. b.
^s R. 3. 1.
^t 4 H. 6. 10.
^u 22 E. 4. 22. 23.
^v Rol. Abr.
54. 542. 5. 3.
^w Kitch. 11.
^x R. 3. 1.
Bro. Leet 1.
^y 4 Inst. 261.
Kitch. 11. 23.
^z 2 Inst. 72.
^{aa} 4 E. 4. 24.
^{ab} 4 Inst. 262.
^{ac} Rol. Ab. 543.
^{ad} Crompt. 213.
^{ae} 18 E. 2 View
of Frank-
pledge.
Con. Kitch.
11. b.
Dlt. Sh. 395.
^{af} Kitch. 11.
Hob. 246.
^{ag} Crompt. 212.
Dlt. Sh. 394.
^{ah} 18 E. 2 View
of Frank-
pledge.
Kitch. 11.
^{ai} Kitch. 10. b.
^{aj} Dlt. She-
riff 394.
^{ak} 18 E. 2 View
of Frank-
pledge.

* Kirch. 13.
See the next
Chapter.

^b See Kirch.

12.

² Danv. Ab.

291.

^c 1 Rol. Abr.

541.

² Rol. Abr.

83 pl. 7.

^d 1 Rol. Ab.

542. pl. 11.

12.

Lane 55. 56.

^a 11 H. 7. 14.

² 11 H. 7. 40. b.

³ Co. 63.

Hob. 212.

Kirch. 45.

^f 1 Danv.

735. pl. 10.

737. pl. 1, 2, 3.

Kirch. 73.

^g See Ch. 11.

Sett. 6.

^h Dalton's

Sheriff 385.

Finch 241.

242.

Cro. Jac 551.

seems contrary

ⁱ Comp. 212.

Dalt. Sheriff

388.

^k 2 Inst. 120.

122.

^l 1 Rol. Ab.

543 Letter D.

Crumpt. 212.

a.]

Co. Lit. 168 b.

Bro. Prelemt-

ment 1.

Dalt. Sheriff

395. 396.

³ Keb. 230.

^m See the Books

above cited,

and 10 H. 4.

4. a.

12 H. 7. 18.

Mo. 607.

Finch 246.

Cro. Jac. 584.

551.

Cont. 4 Inst.

261.

ⁿ Cro. Jac.

551.

² Inst. 387.

Sett. 60. Also ^a it is said, That every Vill within the Precinct of a Torn, is indictable in it for not having a Pair of Stocks, and shall forfeit five Pounds.

Sett. 61. Also by ^b Statute, many other Offences are inquirable in this Court, which it would be too long to enumerate in this Place.

Sett. 62. But it hath been ^c resolved, That a Man cannot be amerced in a Court-Leet for surcharging a Common, because this only concerns the private Interest of the Inhabitants.

Sett. 63. Yet it hath been ^d holden, That if there be a By-Law made in a Court-Leet, in Pursuance of a Custom to make By-Laws, That no one shall receive a poor Man to be his Tenant, who shall be chargeable to the Town, under a certain Penalty; and afterwards an Inhabitant offend against such By-Law, he may be presented at the Court Leet and compelled to pay such Penalty: But if such By-Laws be valid, it seems clear, That they depend entirely on the Custom, and are not binding of common Right; for that the Court-Leet, as such, hath nothing to do with such Matters of a private Nature: And how far any such Court may receive, from a special Custom, a new collateral Power of a different Nature from what naturally belongs to it, may deserve to be considered; but it ^e seems, That of common Right any Court-Leet, with the Assent of the Tenants, may make By-Laws under certain Penalties, in Relation to Matters properly within the Consuance of such Court, as the Reparation of the Highways, &c. Also there ^f seems to be no Doubt, but that by Custom a Court-Baron may make By-Laws, for the well regulating of Commons and such like private Matters; and therefore where a Court-Leet and Baron are holden together at the same Place, as they usually are, it seems, That what is transacted therein in Relation to publick Matters, shall be applied to the ^g Jurisdiction of the Court-Leet, and what is done in Relation to private Matters, shall be intended to be done by the Court-Baron.

Sett. 64. As to the sixth general Point of this Chapter, viz. Within what Place Offences indictable in the Sheriff's Torn must arise, it seemeth that it is not material, Whether such ^h Offences did arise within the Hundred in which the Torn is holden, or not; for though the Sheriff ought to hold his Torn in every particular Hundred, yet it seems, That in each of them he holds it for the whole County; and it is certain, That he hath a general Jurisdiction throughout the whole; yet it seems, That the Jurors shall not be charged on their ⁱ Oaths to prevent any Offences, but those arising within their particular Hundreds: Also it is provided by the Statute of *Marlbridge*, cap. 10. That those who have Tenements in different ^k Hundreds, shall not be compelled to come to any Torn, but only in the Bailiwick wherein they shall be conversant: Also it ^l seems clear, That no Offence arising within the Precincts of a Leet is inquirable in the Torn, unless there hath been a Neglect to present it in the Leet: But after such a Neglect it seems the better ^m Opinion, That it is inquirable in the Torn, least otherwise there should be a Failure of Justice: Yet it seems certain, That in pleading you ⁿ cannot justify the Proceedings of the Sheriff's Torn against any Offence arising within a Leet, without expressly alledging that the Leet had neglected to inquire of it; for that such a Neglect is not to be presumed, where it doth not appear.

Sett. 65. As to the seventh general Point of this Chapter, viz. By what Jurors, and in what Manner, Indictments in the Sheriff's Torn ought to be found, it is enacted by the Statute of *Westminster*, 2. 13. That the Sheriff shall take no Inquest either ex Officio, or by Virtue of the King's Writ,

Writ, but by twelve lawful Men at the least, who shall put their Seals to such Inquisitions; and the same is also provided as to Bailiffs of Franchises.

Señ. 66. In the Construction of this Statute it hath been holden, That if there be more than twelve Jurors, and all agree to the Inquisition, all must set their Seals to it; but that it is sufficient, if twelve of them only agree, for those twelve to set their Seals. Dalt. Sheriff 389.

Señ. 67. And it is farther enacted by 1 R. 3. cap. 4. *That no Officer return or impanel any Person to be taken or put in any Inquiry in any Sheriff's Torn, but such as be of good Name and Fame, and having Freehold to the yearly Value of 20 s. or Copyhold to the yearly Value of 26 s. 8 d. on Pain of 40 s. &c. And that every such Indictment before any Sheriff in his Torn otherwise taken, shall be void.*

Señ. 68. And Note, That Courts-Leet seem to be within the Letter of the said Statute of Westminster 2. and are said by some to be within the Equity of the said Statute of 1 R. 3. but this seems questionable; for it is said, by some Books, That any Person happening to be present at a Court-Leet, or to be riding by the Place where it is holden, may for the want of Jurors be compelled by the Steward to be sworn, whether he be Resident within the Precincts of the Leet or not; by which it seems to be implied, That any Person whatsoever is capable of being put upon the Jury in a Court-Leet. 2 Inst. 388.
S. P. C. 85. b.
7 H. 6. 13. a.
12 H. 7. 18. b.
Bro. Leet 14.
3 H. 7. 4. b.

Señ. 69. And to prevent the Altering or Imbezilling of any such Indictment, it is enacted by 1 E. 3. Stat. 2. Ch. 17. *That the Sheriffs and Bailiffs of Franchises, and all other that do take Indictments in their Torns, or elsewhere, where Indictments ought to be made, shall take such Indictment by Roll indented, whereof the one Part shall remain with the Indictors, and the other Part with him that taketh the Inquest; so that the Indictments shall not be imbezilled as they have been in Times past; and so that one of the Inquests may shew the one Part of the Indenture to the Justices, when they come to make Deliverance.* 2 Inst. 388.
S. P. C. 85. a.

Señ. 70. And there is no Doubt, but that this Statute extends as well to Courts-Leet, as to the Sheriff's Torn.

Señ. 71. Also there are many particular Customs and Usages in Relation to the Taking of Indictments in these Courts; but it seems to have been anciently the most general Course, to impanel not only a Grand Jury, but also a Jury of twelve Men, which was commonly called the Petit Jury; and that all Offences were first presented by the Headboroughs, and the Presentments affirmed by the Petit Jury, before they were brought to the Grand Jury: However it seems, That no Exception can be taken to any such Indictment, in Respect of the Non-observance of any such Custom or Usage; for that no Averment lies against the Acts of a Court of Record, and every Judge of such Court shall be presumed to act according to the Rules of it. Keilw. 141. a.
148. a.
Dalt. Sheriff 388, 389.
Crompt. 212.
213.
Keilw. 66. b.
9 H. 6. 44. b.

Señ. 72. What is above said concerning Indictments taken before the Sheriff in his Torn, is to be intended of such only as are taken before him *ex Officio*; for that he is restrained to take any such Indictment, by Virtue of any Writ or Commission by 28 E. 3. 9. *Which reciting that the People had suffered many Mischiefs, for that Sheriffs of divers Counties, by Virtue of Commissions and general Writs granted to them at their own Suit, for their singular Profit to gain of the People, had made and taken divers Inquests, to cause to indict the People at their Will, and had taken Fine and Ransom of them to their own Use, and had delivered them; whereas such Persons indicted were not brought before the King's Justices to have Deliverance, doth thereupon enact, for to eschew all such Mischief, that all such Commissions and Writs before made, be utterly repealed, and that from thenceforth no such Commissions nor Writs shall be granted.*

F. N. B. 92. c.
144. i. 250. A.
Cro. E. 371.
Salk. 190.
2 Inst. 388.
H. P. C. 103,
104, 171.
S. P. C. 77. E.
G. 84. A.
Dalt. Sheriff,
388 389.
3 Mod. 238.
Book 1. Ch.
29. Sect. 20,
34.

Sect. 73. Yet it seemeth not to be clearly settled, Whether by Virtue of this Statute, all such Writs and Commissions, and the Proceedings thereon, be made wholly void or not.

Sect. 74. As to the eighth general Point of this Chapter, viz. In what Manner Indictments in the Sheriff's Turn are to be proceeded upon, it is recited by 1 E. 4. 2. *That many of the King's People by inordinate and infinite Indictments and Presentments of Felonies and other Offences, taken before Sheriffs at their Torns or Law-Days, (which were oftentimes affirmed by Jurors having no Conscience, nor any Freehold, and often by the Sheriff's menial Servants) had been arrested and imprisoned, and constrained to make grievous Fines and Ransoms, after which they had been enlarged out of Prison, and the said Indictments and Presentments imbezilled and withdrawn. And thereupon it is enacted, That all Indictments and Presentments before any of the King's Sheriffs in his Counties, except in London, their Under-Sheriffs, Clerks, Bailiffs or Ministers at their Torns or Law-Days, they nor any of them shall have Power to attach, arrest, or put in Prison, or to levy or take any Fine or Amercement of any Person so indicted or presented, by Reason of any such Indictment or Presentment, but that the said Sheriffs and Under-Sheriffs, Clerks or Bailiffs, and their Ministers, shall deliver all such Indictments and Presentments to the Justices of Peace, at their next County Sessions, on Pain of 40 l. And that the said Justices of Peace shall have Power to award Process upon all such Indictments and Presentments as the Law doth require, and in like Form as if the said Indictments and Presentments were taken before the said Justices of Peace; and also to arraign and deliver all such Persons so indicted and presented before the said Sheriffs, &c. And such Persons which shall be indicted or presented of Trespass, shall make such a Fine as shall seem lawful by their Discretions. And the Estreats of the said Fines and Amercements shall be inrolled, and by Indenture be delivered to the said Sheriffs, Under-Sheriffs, their Clerks, Bailiffs, or Ministers, or some of them, to the Use and Profit of him that was Sheriff at the Time of such Indictments or Presentments taken. And if any of the said Sheriffs, their Under-Sheriffs, Clerks, Bailiffs, or their Ministers, do arrest, attach, or put in Prison, or cause any Fine or Ransom to be taken, or levy any Amercement, of any Person or Persons so indicted or presented, by Reason or Colour of any such Indictment or Presentment taken before them, at their Torns or Law-Days above rehearsed, before that they have Process from the said Justices of Peace, or Estreats delivered out, of the said Indictments or Presentments so brought, delivered, and presented to them, that then the Sheriffs which so do, shall forfeit an Hundred Pounds.*

S. P. C. 87. D.
4 E. 4. 31. a
Fitz. Torn 3.

1 Jon. 301.
Cro. Ca. 275.

Sect. 75. It is observable, That by the Words of this Statute, Justices of Peace may award Process on any such Indictments, in like Manner as if they had been taken before themselves; and yet it is clear, That if the Sheriff's Turn had no Authority to take the Indictment removed before such Justices, they have no Power to proceed upon it, as they might have done, if it had been taken before themselves; for the Statute in giving them such Power to proceed upon Indictments in the Sheriff's Turn, must be intended to mean such only as were there lawfully taken, not those which were void *ab initio*, as being taken *coram non Judice*; nor is there the least Intimation in the Statute, of an Intent to enlarge the Sheriff's Power in taking Indictments, but the whole Purport of it is to restrain him from proceeding on them. And to this Purpose it hath been so largely construed, That not only the Judge of the Court is punishable for awarding such Process, but also the Officer for obeying it.

Señ. 76. As to the ninth general Point of this Chapter, viz. In what Manner Indictments in the Sheriff's Torn are to be traversed and determined; it seems to be ^a agreed, That a Presentment by ^b twelve or more in a Torn or Leet, of any Offence within the Jurisdiction of the Court, being neither Capital nor concerning any Freehold, subjects the Party to a Fine or Amercement without any farther Proceeding, and binds him for ever after the Day on which it is found, and admits of no Traverse to the Truth of it; but ^c some say, That the Party may have a Writ of false Presentment against the Jurors, the same Day on which the Indictment is found; yet it seems agreed, That no Instance can be shewn of any such Writ being actually brought: But if the Presentment concern the Party's Life or ^d Freehold, as if it charge him with not repairing such a Highway, which he is charged to be bound to repair by the Tenure of his Land; it seems clear, That he may remove it into the King's Bench and traverse it; but not if it barely charge his Person, as for digging a Ditch in the Highway, or not cutting the Branches of his Trees hanging over it, &c. Also it ^e seems, That a Man may in like Manner traverse an Indictment of an Offence wholly out of the Jurisdiction of a Court-Leet; as of an Affray or Nuisance done out of the Precinct of it, or of the Non-Appearance of a Person at a Leet, who lives out of the Precinct of it. But if the Affray or Nuisance were within the Precinct of the Leet, it seems, That no one can traverse it in Respect of his own not living in it; and that a Person who lives within the Precinct of a Leet, shall have no Traverse to a Presentment for not appearing at it.

Señ. 77. But it seems certain, That at this Day, neither the Torn nor Leet, have any Power to try any Traverse whatsoever, as hath been more fully shewn, *Señ. 13.* But it is certain, That the Justices of Peace may by Force of the abovementioned Statute of 1 E. 4. try a Man indicted of Felony before the Sheriff in his Torn: Also it seems, That they may try a Person upon any other Indictment in the Torn, which is traversable at Common Law, but that they have no Power to take any Traverse of any other Indictment in the Torn; for that the Words of the Statute are only, *That they may award Process on any such Indictments, as if they had been taken before themselves, and also arraign and deliver the Persons indicted, which must be intended of those indicted of Felony, who only are said to be arraigned, And that Persons indicted of Trespass, shall make Fines, &c. by their Discretion, without saying, That they shall be tried; by which it seems to be implied, That Persons so indicted shall be fined, as they usually were before in the Torn, and still are in the Leet, and that in some Cases without any farther Trial, as is more fully shewn in the precedent Section.*

^a Finch 386.
Keilw. 52. a.
66. b.

^b Mod. 138.
Dyer 13. pl.

^c Keilw. 147.
^d 45 E. 3. 26.
b. 27. a.

^e Fitz. Bar.
271.
Keilw. 66. b.
41 Ed. 3. 28.

^f 5 H. 7. 4. a.
Br. Trav. 183.
Keilw. 52, 65,
67.
Dy. 13. pl. 64.

^g Keilw. 66,
67
41 E. 3. 27.

C H A P. XI.

Of the Court-Leet.

Sett. 1. **A** Court-Leet is a Court of Record, having the same Jurisdiction within some particular Precinct, which the Sheriff's Törn hath in the County: And therefore since it hath been shewn in the precedent Chapter, at what ^a Time and in what Place the Sheriff's Törn is to be holden, and what Persons owe Suit to it, and ^b what Authority the Judge of it hath in Relation to his Proceeding on ^c Indictments, and also in Relation to ^d Fines and Amercements, and the ^e Appointment of Constables; and having also shewn what ^f Kind of Offences are inquirable in this Court, and within what ^g Place such Offences must arise, and by what ^h Jurors, and in what Manner, Indictments in it are to be found, and in what Manner they are to be ⁱ proceeded upon, traversed and determined; and since the Court-Leet hath regularly the very same Jurisdiction with the Sheriff's Törn as to all these Points, except in some special Cases, which have been already taken Notice of in the Chapter concerning the Sheriff's Törn; I shall refer the Reader to the said Chapter for all these Particulars, and shall only consider in this Place,

1. The End of instituting the Court-Leet.
2. How far it exempts those who live within its Precincts from the Törn.
3. How far it is subject to the Oversight of the Törn.
4. For what Causes it may be forfeited.
5. What ought to be the Form of a Caption of an Indictment in it.

Sett. 2. As to the first Point it seems, That anciently all People who now owe Suit to any Court-Leet, were bound to come to the Sheriff's Törn, in order there to take the Oath of Allegiance to the King, and to be incorporated into some Tithing, and for such other Purposes as are set forth more at large in the precedent Chapter, *Sect.* 2. But it being more for the Ease of the People, to have Courts of this Kind holden in their own Townships or Manors; by Degrees, Grants of such Courts were obtained from the King for most Manors and Towns, not only by the Lords of Manors, but also by other Persons, who had no Lands in the Places for which they obtained such Grants: And for a Recompence to such Grantees, for the Charge and Trouble they were supposed to have been at in procuring such Grants, it was usual for the Inhabitants who had the Benefit of them, to agree to pay a certain Sum of Money, called Capitage, or *certum Letæ, &c.* at every such Court-Leet; and for the Non-payment of this Duty or Refusal to present it, such Grantees may prescribe to amerce the Defaulters, and to distrain for the Amercement; but no such Prescription shall be allowed for any other Matter whatsoever of a private Nature.

Señ. 3. As to the second Point, *viz.* How far a Court-Leet exempts those who live within the Precincts of it from the Törn, it seems to be a general ^a Rule, That no Man can be within two Leets at the same Time, and in the same Respect; from whence it follows, That he who resides within the Precincts of a Leet, the Lord whereof doth duly hold his Court, cannot be compelled to come to the Törn, or any other superior Leet, for the Taking the Oath of Allegiance, or any other such like Purpose, which may be as well answered by his Attendance at his own Leet: Yet if such private Leet have not the general Jurisdiction of the Törn, but be ^b specially granted for two or three Articles of it only; it seems, That the Inhabitants within its Precinct must attend the Sheriff's Törn for all such Matters of which such private Leet hath no Jurisdiction: Also it ^c seems to be a good Prescription for a Grand Leet, (to which other inferior Leets may be subordinate in the same Manner as that is to the Törn,) to oblige the Chief Pledges, and a certain Number of the Inhabitants of every Town within its Precinct, to appear at every such Grand Leet to inquire of such Offences as have not been inquired of in the inferior Leets.

Señ. 4. As to the Third Point, *viz.* How far the Court-Leet is subject to the Oversight of the Törn; it is said, That the Sheriff's Törn as an ^d Overseer of this Court, is to inquire whether the Tithings be whole or no, and to present Defaults that are not redressed in the Leet; and it seems also, That it may of common Right inquire of the Concealment of Offences inquirable in Leets, and of the Defaults of the Lords of such Courts: However it ^e seems clear, That a Prescription to this Purpose is good. And there is no Doubt, but that if a Leet be ^f seised into the King's Hands, all those who owed Suit to it ought to come to the Törn.

Señ. 5. As to the Fourth Point, *viz.* For what Causes a Court-Leet may be forfeited, it seems, That this being a Franchise not intended to be granted for the private Benefit of the Grantee, but for the Good of the Publick, from the more easy and convenient Administration of Justice, shall not only be forfeited by Acts of gross and palpable Oppression and Injustice, ^g but also by bare Omissions, in not making it answer the End of its Institution; as in the not ^h punishing Offenders in the same Manner as the Law requires, or in ⁱ neglecting to hold a Court when it ought to be holden, (at least if such Neglects be often repeated, and without a reasonable Excuse,) or in not ^k providing an able Steward to discharge the Office, or in not taking Care to have such other Officers, or other Things as are necessary for the Execution of Justice, as Constables and Ale-Tasters, &c. and ^l Pillory and Tumbrel; but it is ^m said, That a Vill may be bound by Prescription to provide a Pillory and Tumbrel, and ⁿ that every Vill is bound of common Right to provide a Pair of Stocks. *Quere.*

Señ. 6. As to the fifth Point, *viz.* What ought to be the Form of the Caption of an Indictment in a Court-Leet, it hath been ^o resolved, 1. That the Caption of an Indictment, *ad Cur. Vis. Franc. Pleg. cum Cur. Baron. &c.* is good; for that the Words *cum Cur. Baron.* shall be rejected; and it cannot but be intended that the Indictment was taken by that Court, which alone hath the Colour of Authority to take it.

Señ. 7. 2. That the not Setting forth in the Caption, whether such Court be holden by Grant or Prescription, is helped by the Multitude of Precedents.

^a Dalt. She.
riff 402, 403
¹ Jun. 283.
⁶ Co. 77. b.
¹⁸ H. 6. 13.
^{Fitz} Leet. 1.
^{Cro.} Jac. 584.
^{See} Ch. 10.
^{Señ.} 12.
^{Con.} Kirch.
34.
¹ Rol. Abr.
541. b.
² Keilw. 141.
¹ 142. a.
² Rol. Abr.
203. pl. 7.
^{Cro.} Jac. 583.
^{Raym.} 204.
^{Cro.} Car. 75.
76.
^{See} Ch. 10.
^{Señ.} 12, 64.

⁴ Finch 246.
^{See} Ch. 10.
^{Señ.} 64.
^{Dalt.} Sheriff
287, 391.
^{Cro.} Jac. 584.
¹ 2 Rol. Abr.
203. pl. 7.
^{Finch} 246.

⁸ Co. Lic.
233. a.
^{Kirch.} 33.
^{Cro.} Jac. 155.
⁹ Co. 50.
² Rol. Abr.
155. O.
¹¹ Ed. 4. 1.
² H. 7. 11. b.
³ 1 Jon. 383.
^{Keilw.} 148. b.
152. a.
¹ Kirch. 33.
¹ 1 Jon. 283.
¹ Fitz Leet. 2.
^{Cro.} Eliz.
125, 698.
^{Mo.} 573, 574.
607.
¹ Jon. 283.
² Cro. Eliz.
698.
^{Mo.} 607.
² Kirch. 13. a.
^{Carter} 29.
^{Con.} Moor.
374, 573.
¹ Jon. 283.
⁹ Vide *supr*
ch. 10. ^{Señ.} 9.
^{Salk.} 195.
^{Salk.} 200.

C H A P. XII.

Of Arrests by private Persons.

HAVING thus endeavoured to shew the Nature of the Courts which have Jurisdiction over criminal Offences, I am now to shew in what Manner Offenders are to be proceeded against by such Courts; and in Order hereto I shall consider,

1. How they are to be apprehended.
2. In what Manner and in what Cases they are to be bailed.
3. In what Cases and in what Manner they are to be committed to Prison.
4. How far they and their Assistants are punishable for an Hindrance in bringing them to publick Justice.

As to the first of these Points I shall consider,

1. In what Manner such Offenders are to be apprehended by private Persons.
2. In what Manner by publick Officers.
3. In what Cases it is lawful to break open Doors in Order to apprehend them.

As to Arrests of such Offenders by private Persons, I shall examine,

1. Where Arrests of this Kind are commanded and enjoined by Law.
2. Where they are permitted by Law.
3. Where they are rewarded.

^a 3 Inst. 53.
139. 152.
H. P. C. 89.
90.
3 H. 7. cap. 1.
2 Inst. 52.
Fitz. Coron.
293.
^b Fitz. Coron.

Sect. 1. As to the first Point it seems clear, That ^a all Persons whatsoever who are present when a Felony is committed, or a dangerous Wound given, are bound to apprehend the Offender, on Pain of being fined and imprisoned for their Neglect, ^b unless they were under Age at the Time.

Sect. 2. And for this ^c Cause, by the Common Law if any Homicide be committed, or dangerous Wound given, whether with or without Malice, or even by ^d Misadventure or Self-Defence, in any Town or in the ^e Lanes or Fields thereof, in the Day-time, and the Offender escape, the Town shall be amerced, and if out of a Town, the ^f Hundred shall be amerced.

Sect. 3. And since the Statute of *Winchester*, cap. 5. which ordains that ^g walled Towns shall be kept shut from Sun-setting to Sun-rising, if the Fact happen in any such Town by Night or by Day, and the Offender escape, the Town shall be amerced.

395.
^c H. P. C. 89.
90.
3 H. 7. cap. 1.
3 Inst. 53.
4 Inst. 183.
Cro. Car. 252.
3 Leon. 207.
Fitz. Coron.
238, 293, 299.
352, 425.
Cont. 1 Leon.
107.
^d 2 Inst. 315.
Fitz. Coron.
302.
^e Dyer 210.
pl. 25.
^f S. P. C. 34.
E. P.
^g S. P. C. 34a.
3 Inst. 53.
7 Co. 6. b. 7. a.

Sett. 4. And as all ^a private Persons are bound to apprehend all those, who shall be guilty of any of the Crimes abovementioned in their View; ^a H. P. C. 90. ³ Inst. 117. so also are they with the utmost Diligence to pursue, and endeavour to ² Inst. 172. take all those who shall be guilty thereof out of their View, upon a Hue and Cry levied against them.

Sett. 5. ^b Hue and Cry is the Pursuit of an Offender from Town to Town till he be taken, which all who are present when a Felony is committed, or a dangerous Wound given, are by the common Law as well as by Statute, bound to raise against the Offenders who escape, on Pain of Fine and Imprisonment: Also it ^c seems certain, That a Man may lawfully raise it against one who sets upon him in the Highway to rob him: Also it is enacted by the Statute of ^d Winchester, cap. 4. That Hue and Cry shall be levied upon any Stranger who shall not obey the Arrest of the Watch in the Night-time; and ^e 21 E. 1. which was made against Trespassers in Forests, Chases, Parks and Warrens, seems to allow the Levying thereof upon any such Offenders. But if a Man take upon him to ^f levy a Hue and Cry without sufficient Cause, he shall be punished as a Disturber of the Peace. ^b 3 Inst. 116, 117. ^d Hist. Justice, ch. 28. 109. ² Inst. 172. ^f Fitz. Coron. 395. ^c 9 E. 4. 16. b. ^d 13 Ed. 1. ^e Keble's Statutes, fol. 59. ^f 29 E. 3. 39. ^f Fitz. Tresp. 352. ^c Crompt. 179. ^a 1 H. 7. 28. a. ³ Inst. 117. ^d Hist. Justice esp. 28. 109. ^e H. P. C. 91. ^f Crompt. 178, 179.

Sect. 6. In Order rightly to raise a Hue and Cry, you ought to go to the Constable of the next Town, and declare the Fact, and ⁸ describe the Offender, and the Way he is gone; whereupon the Constable ought immediately, whether it be Night or Day, to raise his own Town, and make a Search for the Offender: And upon the not Finding him, to send the like Notice with the utmost Expedition, by Horsemen as well as Footmen, to the Constables of all the neighbouring Towns, who ought in like Manner to search for the Offender, and also to give Notice to their neighbouring Constables, and they to the next, till the Offender be found.

Sett. 7. Also every ^b private Person is bound to assist an Officer demanding his Help for the Taking of a Felon, or the Suppressing an Affray, or Apprehending the Affrayers, &c. ^b Ch. 13. ^f &c. 5.

Arrests of Offenders by private Persons permitted by Law, are either,

1. By their own Authority: Or,
2. By a Warrant from a Justice of Peace.

Arrests of this Kind by their own Authority, are either,

1. In Respect of Treason or Felony: Or,
2. In Respect of inferior Offences.

Arrests of this Kind in Respect of Treason or Felony, are either,

1. For the Suspicion of such Crimes already done, or supposed to have been done: Or,
2. To prevent their being done.

As to such Arrests for such Suspicion, I shall endeavour to shew,

1. What are sufficient Causes of Suspicion.
2. By whom the Person arrested must be suspected.
3. Whether any such Cause will justify an Arrest, where no Treason or Felony at all hath been committed, &c.
4. In what Manner an Arrest for such Suspicion is to be justified in Pleading. *Sett.*

- Sett.* 8. As to the first Particular, *viz.* What are sufficient Causes of Suspicion, I shall take Notice of some of the Principal of them, which are generally agreed to justify the Arrest of an innocent Person for Felony, as
- Sett.* 9. 1. The common ^a Fame of the Country, But it ^b seems, That it ought to appear upon Evidence, in an Action brought for such an Arrest, that such Fame had some probable Ground.
- Sett.* 10. 2. The ^c living a vagrant, idle and disorderly Life, without having any visible Means to support it.
- Sett.* 11. 3. The being in ^d Company with one known to be an Offender, at the Time of the Offence; or ^e generally at other Times keeping Company with Persons of scandalous Reputations.
- Sett.* 12. 4. The being found in such Circumstances as induce a strong Presumption of Guilt; as ^f coming out of a House wherein Murder has been committed, with a bloody Knife in one's Hand; or being found in ^g Possession of any Part of Goods stolen, without being able to give a probable Account of coming honestly by them.
- Sett.* 13. 5. The Behaving one's self in such Manner as betrays a Consciousness of Guilt; as ^h where a Man being charged with a Treason or Felony, says nothing to it, but seems tacitly by his Silence to own himself guilty; or where a Man accused of any such Crime, upon hearing that a Warrant is taken out against him, doth abscond.
- Sett.* 14. 6. The being ⁱ pursued by an Hue and Cry.
- Sett.* 15. As to the second Particular, *viz.* By whom the Person must be suspected, upon such an Arrest for Suspicion; it seems to be ^k agreed, That the Law hath so tender a Regard to the Liberty and Reputation of every Person, That no Causes of Suspicion whatsoever, let the Number and Probability of them be ever so great, will justify the Arrest of an innocent Man, by one who is not himself induced by them to suspect him to be guilty, whether he make such Arrest of his own Head, or in Obedience to the Commands of a private Person, or even of a ^l Constable.
- Sett.* 16. As to the third Particular, *viz.* Whether any such Cause of Suspicion will justify an Arrest where no Treason or Felony at all hath been committed, or dangerous Wound given: It is holden in some ^m Books, That none of the abovementioned Causes will in any Case justify the Arresting a Man for the Suspicion of a Crime, where in Truth no such Crime hath been committed either by him or any other Person whatsoever. But howsoever this Rule may in general be true, it seems very hardly maintainable in the Case of an Arrest of an innocent Person upon a Hue and Cry levied against him, in such a Place where his Character is unknown, and with such other Circumstances, that the People of the County have no Reason to presume it groundless; for in such Cases, it would be a great Inconvenience to discourage Persons from following a Hue and Cry, with that Vigour and Diligence, which the Law expects, and the Publick Good requires, by making them liable to an Action if it should in the Event prove to have been levied without sufficient Cause, which they cannot take Time to examine without delaying their Pursuit: And since the Person injur'd by such an ill-grounded Hue and Cry, has a good Action against him that raised it, there seems to be no Necessity, that he should also have a Remedy against another. And this Opinion seems to be the more plausible, for that among the ⁿ Books ^o cited to maintain the contrary, ^p that which alone doth directly affirm it, seems to go upon an Argument manifestly inconclusive; for it says, That an Hue and Cry is not a sufficient Authority to arrest a Man unless a Felony be done, because the Words of

the

the Statute of *Westminster* 1. cap. 9. are, That all Men shall be ready upon Hue and Cry to arrest Felons; but where no Felony is done, there can be no Felon, &c. to which it may be replied, That this Argument, if it prove any Thing, proves that none but Felons can be arrested on a Hue and Cry, which seems to be manifestly false; for it is agreed by all the Books, That if a Felony be actually committed, an innocent Person on whom a Hue and Cry for it is levied, may lawfully be arrested: Also there seems to be no Doubt, but that he who barely attempts to rob a Man, or who dangerously wounds him, may safely be pursued and taken by a Hue and Cry, and yet there is no Pretence to call such a Person a Felon.

Vide supra.
Sect. 41. 5.

Sect. 17. And if it be granted lawful to arrest a Man on an Hue and Cry where no Felony hath been committed; from the like Grounds it seems also to follow, That it is lawful to arrest a Man on the Warrant of a Justice of Peace, where no Felony hath been committed; but this Point shall be more fully considered in the next Chapter.

Sect. 18. As to the fourth Particular, viz. In what Manner an Arrest for such Suspicion is to be justified in Pleading; it seems to be certain, That whoever would justify the Arrest of an innocent Person, by Reason of any such Suspicion, must not only shew that he suspected the Party a himself, but must also set forth the b Cause which induced him to have such a Suspicion, that it may appear to the Court to have been a sufficient Ground for his Proceeding: Also it seems c certain, That regularly he ought expressly to shew, that the very same Crime for which he made the Arrest, was actually committed. But d if a Man have several Causes of such Suspicion, he is not bound to insist upon some one of them only, but may alledge them all; for that the Replication *De son tort Demesne*, answers the whole. A e where a Man arrests another, who is actually guilty of the Crime for which he is arrested, it seems, That he needs not in justifying it, set forth any special Cause of his Suspicion, but may say in general, that the Party feloniously did such a Fact, for which he arrested him, &c.

a *Vide supra*
Sect. 15.
b 2 Inst. 52.
Finch 340.
17 E. 4. 5. a. b.
1 E. 4. 20. a.
Bridgm. 62.
7 H. 4. 35.
c 8 E. 4. 3. b.
27 H. 8. 23. a.
Cro. Jac. 194.
Finch 340.
d 7 E. 4. 20. a.
17 E. 4. 5. a. b.
Bridgm. 61.
Finch 394.
4 H. 7. 1. b.
2. a.
e 10 E. 4. 17. b.
Fitz. Fux
Imprisonm.
f 9 E. 26. b.
See B. 1 Ch.
60. Sect. 23.
g Popham 12.
13.
Owen 98.
Moor 284.

Sect. 19. As to the arresting of Offenders by private Persons of their own Authority, permitted by Law for the Prevention of Treason or Felony only intended to be done; it f seems, that any one may lawfully lay hold on another, whom he shall see upon the Point of committing a Treason or Felony, or doing any act which would manifestly endanger the Life of another, and may detain him so long till it may reasonably be presumed, that he hath changed his Purpose; and upon this Ground it g seemeth to be the better Opinion, That not only a Constable, but any private Person, who shall see another expose an Infant in the Street, and refuse to take it away, may lawfully apprehend and detain him, till he shall consent to take Care of it.

Sect. 20. As to the Arrest of Offenders by private Persons of their own Authority, permitted by Law, for inferior Offences; it h seems clear, That regularly no private Person can of his own Authority arrest another for a bare Breach of the Peace after it is over; for if an Officer cannot justify such an Arrest, without a Warrant from a Magistrate, surely a fortiori a private Person cannot: Yet it is holden by i some, that any private Person may lawfully arrest a suspicious Night-walker, and detain him till he make it appear, that he is a Person of good Reputation. Also it hath been k adjudged, That any one may lawfully apprehend a common notorious Cheat, going about the Country with false Dice, and being actually caught playing with them, in order to have him before a Justice of Peace; for the publick good requires the utmost Discouragement

h See B. 1. Ch.
63. Sect. 13.
14. 17.
i Latch. 173.
4 H. 7. 18. b.
Poph. 208.
Quere 4 H. 7.
1. b. 2. a.
5 H. 7. 5. a.
2 Inst. 52.
k 1 Jon. 249.
Cro. Ca. 234.
2 Rol. Abr.
545. C. 2.

of all such Persons, and the Restraining of private Persons from arresting them without a Warrant from a Magistrate, would often give them an Opportunity of escaping: And from the Reason of this Case it seems to follow, That the Arrest of any other Offenders by private Persons, for Offences in like Manner scandalous and prejudicial to the Publick, may be justified.

Cromp. 147.
14 H. 8. 16. a.

Sect. 21. As to Arrests of such Offenders by private Persons, having a Warrant from a Justice of Peace permitted by Law, there is no Doubt but that where the Law authorizes Justices of Peace to direct there Warrants to such Persons, it doth implicitly authorize the Execution of them by them.

As to the third general Point of this Chapter, *viz.* In what Cases the Arrests of Offenders by private Persons are rewarded by Law, I shall give a short Account of the Statutes concerning this Matter, in Relation,

1. To Robbers in Highways.
2. To Counterfeiters and Clippers of the Coin.
3. To Shoplifters, and other Offenders of like Nature.
4. To Burglars and felonious Breakers of Houses.

Sect. 22. And first as to Robbers in Highways it is enacted by 4 & 5 W. & M. 8. That whoever shall apprehend and take one or more Thief or Robber in any Highway or Road in England or Wales, and prosecute him or them till he or they be convicted of any Robbery, committed in or upon any High-way, Passage, Field, or open Place, shall receive from the Sheriff of the County where such Robbery and Conviction shall be, without paying any Fee for the same, for every such Offender so convicted 40 l. within one Month after such Conviction and Demand thereof made, by tendering a Certificate to the said Sheriff under the Hand or Hands of the Judge or Justices before whom such Felon or Felons shall be convicted; and in Case any Dispute shall arise, between the Persons so apprehending any the said Thieves und Robbers touching their Right to the said Reward, That then the said Judge or Justices so respectively certifying, shall by their said Certificate direct and appoint the said Reward to be paid in such Shares and Proportions as to them shall seem just and reasonable. And if any such Sheriff shall die or be removed before the Expiration of one Month after such Conviction and Demand made, That then the next Sheriff shall pay the same within one Month after Demand and Certificate brought as aforesaid: And the Sheriff making Default in paying the said Sum, shall forfeit double as much.

Sect. 23. And it is farther enacted, That if any Person shall be killed by any such Robber in endeavouring to apprehend, or making Pursuit after him, the Executors or Administrators, &c. of such Person, shall receive 40 l. from the Sheriff, &c. upon Certificate delivered under the Hands and Seals of the Judge or Justices of Assize for the County where the Fact was done, or the two next Justices of the Peace, of such Person being so killed, which Certificate the said Judge or Justices, upon sufficient Proof before them made, are immediately required to give without Fee or Reward.

Sect. 24. And it is farther enacted, That every Person who shall so take, apprehend, prosecute, or convict such Robber as aforesaid, shall have as a farther Reward, the Horse, Furniture and Arms, Money and other Goods of such Robber, that shall be taken with him; any their Majesties Right or Title, Bodies Politick or Corporate, or the Right or Title thereunto of the Lord of any Manor or Franchise, or of him or them lending or letting the same to Hire to any such Robber notwithstanding: Provided, That this shall not be extended to take away the Right of any Person to such Horses, Furniture and Arms, Money or other Goods, from whom the same were before feloniously taken.

Sect. 25. Secondly as to Counterfeiters and Clippers of the Coin, it is enacted by 6 & 7 Gul. 3. 17. That whoever shall apprehend any Person who shall counterfeit any of the current Coin of this Realm, or for Lucre clip, wash, file, or otherwise diminish the same, or shall cause to be brought into the Kingdom any clipped, false, or counterfeit Coin, and prosecute such Person to Conviction, shall have from the Sheriff of the County where such Conviction shall be, forty Pounds upon the Judge's Certificate, &c.

Sect. 26. Thirdly, As to Shoplifters, &c. it is enacted by 10 & 11 W. 3. 23. That whosoever shall take and prosecute to Conviction, any Person who by Night or Day, shall in any Shop, Warehouse, Coach-house or Stable, privately and feloniously steal any Goods, Wares, or Merchandizes, of the Value of 5 s. (though such Shop, &c. were not broken, and though no Person were in such Shop, &c.) or shall assist, hire, or command any Person to commit such Offence, shall have a Certificate thereof Gratis from the Judge or Justices, expressing the Parish or Place where such Felony was committed; and if any Dispute shall happen about the Right to such Certificate, the Judge or Justices shall direct and appoint the said Certificate into so many Shares, to be divided among the Persons therein concerned, as to the said Judge, &c. shall seem reasonable, which Certificate (before any Benefit has been made of it) may be once assigned over, and no more, and the original Proprietor or Assignee shall by Virtue thereof, be discharged from all Parish and Ward Offices, within the Parish or Ward wherein the Felony was committed; and the said Certificate shall be enrolled by the Clerk of the Peace of the County, for the Fee of one Shilling: And in Case any Person happen to be slain by any such Felons by endeavouring to apprehend them, his Executors, &c. shall have the like Reward, &c.

Sect. 27. Fourthly, As to Burglars and felonious Breakers of Houses, it is enacted by 5 Annæ 31. That every Person who shall take any one guilty of Burglary, or the felonious breaking and entring any House in the Day-time, and prosecute them to Conviction, shall receive above the Reward given by the above-mentioned Statute of 10 & 11 W. 3. the Sum of 40 l. within one Month after such Conviction; concerning which the same Rules in Effect are prescribed, as are provided by the abovementioned Statute of 4 & 5 W. 3. 8. concerning the Reward of 40 l. to be paid to those who shall apprehend a Highway-man.

C H A P. XIII.

Of Arrests by publick Officers.

ARRESTS of Offenders by publick Officers, are either by Virtue of Process from some Court of Record, or without such Process.

Arrests of this Kind by Virtue of such Process, shall be considered hereafter in their proper Place.

Arrests by publick Officers without such Process, are either

1. By Watchmen.
2. By Constables.
3. By Bailiffs of Towns, or
4. By Justices of Peace.

Sect. I.

Señ. 1. But before I consider the Nature of each of these in particular, I shall take it for granted, That where-ever any such Arrest may be justified by a private Person, in every such Case, *a fortiori* it may be justified by any such Officer. As to Arrests by Watchmen, I shall first premise in what Manner Watch is to be kept in every Town, and then shall shew the Power of the Watchmen.

Señ. 2. And first as to the keeping Watch in every Town, it is enacted by the Statute of Winchester, Ch. 4. *That from thenceforth all Towns be kept as it had been used in Times passed, That is to wit, from the Day of Ascension unto the Day of St. Michael, in every City six Men shall keep at every Gate, in every Borough twelve Men, in every Town six or four, according to the Number of Inhabitants of the Town, and shall watch the Town continually all Night, from the Sun setting to the Sun-rising.*

Sect. 3. And it is farther enacted by 5 H. 4. 3. *That the Watch to be made upon the Sea-Coasts through the Realm, shall be made by the Number of the People in the Places, and in Manner and Form as they were wont to be made in Times past, and that in the same Case the Statute of Winchester be observed and kept; and that in the Commissions of the Peace this Article be put in, That the Justices of Peace have Power thereof to make Inquiry in their Sessions from Time to Time, and to punish them which be found in Default after the Tenor of the said Statute.*

Señ. 4. It hath been resolved, That a Stranger who is not an Inhabitant of a Town, ^a cannot be compelled by Virtue of the said Statute of Winchester to keep Watch in it; but it seems to be agreed, That every Inhabitant is bound to keep it in his Turn, or to ^b find another sufficient Person to keep it for him; from whence it follows, That he is indictable for a Refusal: But it is ^c not agreed, That he may be committed by the Constable till he consent to do his Duty.

^a Cro. El. 204.

^b Vide Co. Lit. 70. a.

^c Cro. El. 204.

Señ. 5. As to the Power of Watchmen, it is farther enacted by the said Statute of Winchester, Ch. 4. *That if any Stranger do pass by the Watch, he shall be arrested until Morning. And if no Suspicion be found, he shall go quit; and if they find Cause of Suspicion, they shall forthwith deliver him to the Sheriff, and the Sheriff may receive him without Damage, and shall keep him safely until he be acquitted in due Manner. And if they will not obey the Arrest, they shall levy Hue and Cry upon them, and such as keep the Town shall follow with Hue and Cry with all the Town and the Towns near, and so Hue and Cry shall be made from Town to Town, until that they be taken, and delivered to the Sheriff as before is said: And for the Arrestments of such Strangers none shall be punished.*

Poph 208.
Larch. 173.

Señ. 6. It is holden, That this Statute was made in Affirmance of the Common Law, and that every private Person may by the Common Law arrest any suspicious Night-walker, and detain him till he give a good Account of himself, as hath been more fully shewn in the precedent Chapter, Section 20.

Secondly, As to such Arrests by Constables, I shall endeavour to shew,

1. How far they may be justified by their own Authority.
2. How far by Virtue of a Warrant from a Justice of Peace.

Sect. 7. And first, as to the Justifying of such Arrests by the Constable's own Authority; it seems difficult to find any Case, wherein a Constable is impowered to arrest a Man for a Felony committed or attempted in which a private Person might not as well be justified in doing it: But the chief

chief Difference between the Power and Duty of a Constable and a private Person, in Respect of such Arrests, seems to be this, That the ^a former has the greater Authority to demand the Assistance of others, and is liable to the severer Fine for any Neglect of this Kind, and has no sure Way to discharge himself of the Arrest of any Person apprehended by him for Felony, ^b without bringing him before a Justice of Peace in order to be examined, as shall be more fully shewn in the 16th Chapter; whereas a private Person having made such an Arrest, needs only to deliver his Prisoner into the Hands of the Constable.

^a 3 Inst. 158.
Lamb Constable 12.
17 E. 4. 5 a b.
3 H. 7. 1. a.
2 H. 7. 15. b.
H. P. C. 91.
112.
10 E. 4. 17. b.

Sect. 8. But it is said, That a Constable hath Authority not only to arrest those whom he shall see actually engaged in an Affray, but also to detain them till they find Sureties of the Peace, as hath been more fully shewn in the ^c first Books; whereas a private Person seems to have no other Power in a bare Affray, not attended with the Danger of Life, but only to stay the ^d Affrayers till the Heat be over, and then deliver them to the Constable, and also to stop those whom he shall see coming to join either Party: but it is difficult to find any Instance wherein a Constable hath any greater Power than a private Person over a Breach of the Peace out of his View; and it seems clear, That he cannot justify an Arrest for any such Offence, without a Warrant from a Justice of Peace, &c.

^c Ch. 63.
Sect. 14, 17.
^d B. 1. ch. 63.
Sect. 11, 12.

Sect. 9. As to the Justifying such Arrests by Constables, by Virtue of a Warrant from a Justice of Peace, it seems ^e clear, That such an Arrest unlawfully made by a Constable without a Warrant, cannot be made good by a Warrant taken out afterwards; also it hath been ^f holden, That if a Constable after he hath arrested the Party by Force of any such Warrant suffer him to go at large, upon his Promise to come again at such a Time and find Sureties, he cannot afterwards arrest him by Force of the same Warrant: However, if the Party return and put himself again under the Custody of the Constable, it seems, that it may be probably argued, That the Constable may lawfully detain him, and bring him before the Justice in Pursuance of the Warrant; for if a Person taken by Virtue of a civil Process, and voluntarily suffered by the Sheriff to escape, may afterwards upon his Return to the Prison be kept by the Sheriff by Virtue of the same Process, unless the Plaintiff rather chuse to take Advantage of the Escape against the Sheriff; surely *a fortiori* upon an Arrest for a Crime, in which Case it is to be presumed, that the Publick Good requires that the Party be brought to Justice; it shall likewise be lawful to detain a Person returning to the Officer after such an Escape: However as the Law seems ^g not to be settled in Relation to such an Escape after an Arrest by Virtue of civil Process; so neither doth it seem to be clear in Relation to an Escape after an Arrest by Force of such a Warrant from a Justice of Peace.

^e Dy. 244.
pl. 61.
Fitz Bar. 248.
Crompt.
149. a.
2 Keb. 705.
Dalt. cap. 117.
fol. 338.
^f Crom. 148.
2 Keb. 206.
Dalt. ch. 117.
13 E. 4. 9. a.

Sect. 10. But it seems clear, That a Constable cannot justify any Arrest by ^h Force of a Warrant from a Justice of Peace, which expressly appears in the Face of it, to be for an Offence whereof a Justice of Peace hath no Jurisdiction, or to bring the ⁱ Party before him at a Place out of the County for which he is a Justice. But it seems, That he both may and ought to execute a general Warrant to bring a Person before a Justice of Peace, to answer such Matters as shall be objected against him on the Part of the King; for that the Officer ought to presume, That the Justice hath a Jurisdiction of the Matter, which he takes ^k Conusance of, unless the contrary appear; and it may often endanger the Escape of the Party to

^g See 1 Danv.
Abr. 633.
pl. 4. 635.
pl. 17.
Hob. 202.
1 Lev. 21.
Cro. Ca. 75.
2 Keb. 206.
^h 14 H. 8. 16.
Crompt. 147.
148.
ⁱ Crompt.
149. b.
^k Dalt. ch.
117.

Dalt. ch. 117.
 Crompt. 147.
 148.
 Cro. Jac. 81.
 H. P. C. 93.
 1 Inst. 177.
See a Pre-
cedent of this
Kind, Dalt.
 114.
 Dalt. ch. 117.
 Crompt. 147.
 148.
 Dalt. Justice,
 cap. 118.
 14 H. 8. 16.
 See ch. 12.
 18. 15.
 Cont. 4 Inst.
 177.
 H. P. C. 93,
 94.

Dalt. ch. 118,
 121.
 6 Mod. 179.
 Cro. E. 130.
 1 Leon. 187.

^a 4 Inst. 177
¹⁴ H. 8. 6
^b 6 Mod. 179.
^c 14 H. 8. 16.
 Bro. Faux
 Imprison-
 ment 33.
^d 2 H. 7. 3. pl.
 9. 15. pl. 1.
⁴ 11. 7. 2. a.
⁵ H. 7. 4. 5.
 19 H. 7. 17
 20 H. 7. 12.
 7 E. 4. 20.
 8 E. 4. 3. b.
 9 E. 4. 26. b.
 10 E. 4. 17. b.
 11 E. 4. 4. b.
 13 E. 4. 9. a.
 17 E. 4. 5.
 7 E. 4. 35.
 Dyer 236.

^e 10 H. 7. 17.
^f 21. 4. 7. 15.

make known the Crime he is accused of. But it seems to be very questionable, Whether a Constable can justify the Execution of a general Warrant to search for Felons or stolen Goods, because such Warrant seems to be illegal in the very Face of it; for that it would be extremely hard to leave it to the Discretion of a common Officer to arrest what Persons, and search what Houses he thinks fit: And if a Justice cannot legally grant a blank Warrant for the Arrest of a single Person, leaving it to the Party to fill it up, surely he cannot grant such a general Warrant, which might have the Effect of an Hundred blank Warrants.

Sect. 11. Yet perhaps it is the better Opinion at this Day, That any Constable, or even private Person, to whom a Warrant shall be directed from a Justice of Peace to arrest a particular Person for Felony, or any other Misdemeanour within his Jurisdiction, may lawfully execute it, whether the Person mentioned in it be in Truth guilty or innocent, and whether he were before indicted of the same Offence or not, and whether any Felony were in Truth committed or not; for however the Justice himself may be punishable for granting such a Warrant without sufficient Grounds, it is reasonable that he alone be answerable for it, and not the Officer, who is not to examine or dispute the Reasonableness of his Proceeding; and therefore it seems that the old Books, (cited in the foregoing Chapter, Sect. 15, 16.) which say generally, That no one can justify an Arrest upon a Suspicion of Felony, unless he himself suspect the Party, and unless the Felony were in Truth committed, ought to be intended only of Arrests made by a Person of his own Head, or in Obedience to the Command of a Constable, or other such like ministerial Officer, and not of such as are made in Pursuance of the Warrant of a Justice of Peace; for inasmuch as it seems to have been the constant and allowed Practice of late, to make out Warrants on the Suspicion of Felony, before any Indictment hath been found against the Person suspected; and the same seems to be countenanced by 1 & 2 Ph. & Mar. 13. and 2 & 3 Ph. & Mar. 10. which direct in what Manner Persons brought before Justices of Peace upon Suspicion, shall be examined in Order to their being committed or bailed; and since the ancient ^a Opinion, That a Justice of Peace cannot make out a Warrant against a Man for Felony, who has not been indicted before, hath been ^b contradicted by constant Experience; and since in the very same ^c Report in which this Rule is laid down, That a Justice of Peace cannot make a Warrant against a Person who has not been indicted; it seems nevertheless to be agreed, That such a Warrant is a good Justification for the Officer; and since none of the ^d Books cited by Sir Edward Coke to maintain the contrary Opinion, mention the Case of an Arrest by Force of a Warrant from a Justice of Peace, but generally relate only to Arrests by private Persons of their own Authority, or by the Command of a Constable; and since too, the ^e Case, which is fullest to the Purpose, wherein it is resolved, That an Arrest of a Person by the Command of a Bishop for saying, That he was not bound to pay Tithes, could not be justified by Force of the ^f Statute, which authorized Bishops to arrest Persons for Heresy, for which this Reason is given among others, That the Bishop himself could not justify such an Arrest, and consequently could not authorize another to make it; it may be answered, That the Resolution in that case doth not wholly depend upon this Reason, but rather perhaps upon these, that the Bishop's Command was by Parol only, and not by Writing, and that the Statute gave him no Jurisdiction over Points not Heretical; and that the Power of Imprisoning Persons

Persons for meer Matters of Opinion ought to be strictly construed: And farther, since the Person injured by an Arrest on a Justice's Warrant, hath a good Action against the Justice who granted it, if he did it maliciously of his own Hand, in Order to oppress or defame the Party, without any probable Ground of Suspicion; and therefore there is no Necessity of giving a farther Remedy against the Officer who obeys the Warrant: And farther, since it is in general a great Discouragement to Officers, to subject them to Actions for endeavouring to serve the Publick, by paying Obedience to the Precepts of those whose Officers they are; it would certainly be very difficult at this Day, to maintain an Action against them for any Arrest of this Kind, unless the Warrant appear to be for a Matter whereof the Justice has no Jurisdiction. It seems indeed to be holden in *Broucher's Case* in *Croke's second Report*, That where an Officer arrests a Man by Force of a Warrant from a Magistrate, *pro certis Causis*, without shewing any Cause in particular, he cannot justify himself in an Action brought against him for such Arrest, without setting forth the particular Cause in his Plea; and yet in this very Report it seems to be allowed, That such a general Warrant is good; and if so, it seems strange, That the Officer should not be justified by setting forth the Truth of his Case; since if there were no good Cause to justify the Granting of the Warrant, the Magistrate ought to answer for it, not the Officer.

*Cro. El. 130.
1 Leon. 187.*

Cro. Jac. 81.

Seç. 12. Thirdly, As to such Arrests by Bailiffs of Towns, it is enacted by the abovementioned Statute of *Winchester*, Ch. 4. *That in great Towns being walled, The Gates shall be closed from the Sun setting until the Sun rising, and that no Man do lodge in the Suburbs, nor in any Place out of the Town, from nine of the Clock until Day, without his Host will answer for him: And the Bailiffs of Towns every Week, or at the least every fifteenth Day, shall make Inquiry of all Persons being lodged in the Suburbs, or in foreign Places of the Towns; and if they do find any that have lodged or received any Strangers or suspicious Persons against the Peace, the Bailiffs shall do Right therein.* And surely it cannot be doubted, but that by Force hereof such Bailiffs may lawfully arrest and detain any such Stranger, being found under probable Circumstances of Suspicion, till he shall give a good Account of himself.

Seç. 13. Fourthly as to such Arrests by Justices of Peace, I shall first take it for granted, That where-ever an Arrest of this Kind by a private Person, or inferior Officer acting of their own Authority, is either permitted or enjoined by the Law, in every such Case, *a fortiori*, such an Arrest by a Justice of Peace in Person, is also permitted or enjoined.

H.P.C. 93.

Arrests by the Command of Justices of Peace, as such, are either,

1. By Parol.
2. By Warrant.

Seç. 14. And first, As to such Arrests by Parol, it seems, That any such Justice may lawfully, by Word of Mouth, authorize any one to arrest another, who shall be guilty of any actual Breach of the Peace in his Presence, or shall be engaged in a Riot in his Absence, as hath been more fully shewn in the first Book, Ch. 65. *Seç. 16.*

Distr. ch. 117.

As to such Arrests by the Warrant of a Justice of Peace, I shall endeavour to shew,

1. In what Cases a Warrant for such an Arrest may lawfully be made by such a Justice.
2. In what Form it ought to be made.
3. How it is to be executed.

As to the first Point, I shall consider,

1. For what Offences such a Warrant may be granted.
2. Upon what Evidence.

Seçt. 15. And first as to the Offences for which such a Warrant may be granted, there seems to be no Doubt, but that it may be lawfully granted by any Justice of Peace for Treason, Felony or *Premunire*, or any other Offence against the Peace, as hath been more fully shewn in the Chapter concerning *Justices of Peace*: Also it seems clear, That where-ever a Statute gives to any one Justice of Peace a Jurisdiction over any Offence, or a Power to require any Person to do a certain Thing ordained by such Statute, it impliedly gives a Power to every such Justice to make out a Warrant to bring before him any Person accused of such Offence, or compellable to do the Thing ordained by such Statute; for it cannot but be intended, that a Statute giving a Person Jurisdiction over an Offence, doth mean also to give him the Power incident to all Courts, of compelling the Party to come before him. And it would be to little Purpose to authorize a Man to require another to do a Thing, if it were to be understood that the Person authorized had no Power to compel the Party to come before him.

*Supra ch. 8.
Seçt. 33, 34.*

*Dalt. ch. 117.
12 Co. 130,
131.*

*Dalt. ch. 117.
Bro. Peace 6.*

6 Mod. 178.

*H. P. C. 93.
4 Inst. 177. b.*

*6 Mod. 179.
Quere Dalt.
117.
Con. 14. 11. 8.
15.*

Seçt. 16. But it seems, That anciently no one Justice of Peace would legally make out a Warrant for an Offence against a penal Statute, or other Misdemeanour, cognizable only by a Sessions of two or more Justices; for that one single Justice of Peace hath no Jurisdiction of such Offence, and regularly those only who have a Jurisdiction over a Cause can award Process concerning it. Yet the long, constant, universal and uncontrolled Practice of Justices of Peace seems to have altered the Law in this Particular, and to have given them an Authority in Relation to such Arrests, not now to be disputed.

Seçt. 17. But I do not find any good Authority, That a Justice can justify Sending a general Warrant to search all suspected Houses in general for stolen Goods, as hath been more fully shewn, *Seçt. 10.*

Seçt. 18. Secondly, As to the Evidence on which such a Warrant is to be granted, it seems probable, That the Practice of Justices of Peace in Relation to this Matter also, is now become a Law, and that any Justice of Peace may justify the Granting of a Warrant for the Arrest of any Person upon strong Grounds of Suspicion for a Felony or other Misdemeanour, before any Indictment hath been found against him. Yet inasmuch Justices of Peace claim this Power rather by Connivance, than any express Warrant of Law, and since the undue Execution of it may prove so highly prejudicial to the Reputation as well as the Liberty of the Party, a Justice of Peace cannot well be too tender in his Proceedings of this Kind, and seems to be punishable not only at the Suit of the King, but also of the Party grieved; if he grant any such Warrant

groundlessly

groundlessly and maliciously, without such a probable Cause, as might induce a candid and impartial Man to suspect the Party to be guilty.

Sett. 19. And since both *Coke* and *Hale* seem to disapprove of such Warrants granted upon Suspicion, and the old Books seem generally to disallow all Arrests for the Suspicion of Felony made by any other Person whatsoever except the very Person who hath the Suspicion; it is certainly a safe Way of Proceeding for him, who hath the Suspicion to make the Arrest in his proper Person, and to get a Warrant from a Justice of Peace to the Constable to keep the Peace.

Sett. 20. And perhaps there may be this Difference between the Warrant of a Justice of Peace, for such Causes which he has not Authority to hear and determine as Judge without the Concurrence of others, and such Warrant for an Offence which he may so determine, without the Concurrence of any other: That in the former Case, inasmuch as he rather proceeds ministerially than judicially, if he act corruptly, he is liable to an Action at the Suit of the Party, as well as to an Information at the Suit of the King: But in the later Case he is punishable only at the Suit of the King, for that regularly no Man is liable to an Action for what he doth as Judge.

As to the second Point, *viz.* In what Form such a Warrant is to be made; I shall lay down the following Rules:

Sett. 21. 1. That ^a it ought to be under the Hand and Seal of the Justice who makes it out.

Sect. 22. 2. That it ^b ought to set forth the Year and Day wherein it is made, That in an Action brought upon an Arrest made by Virtue of it, it may appear to have been prior to such Arrest.

Sect. 23. 3. That it is ^c safe, but perhaps not necessary, in the Body of the Warrant to shew the Place where it was made; yet it seems necessary to set forth the County in the Margin, at least if it be not set forth in the Body.

Sett. 24. 4. That it may be made either in the Name of the King, or of the Justice himself, as appears from the Precedents above referred to.

Sett. 25. 5. ^d That if it be for the Peace or Good Behaviour, it is advisable to set forth the special Cause upon which it is granted; but if it be for Treason or Felony, or other Offence of an enormous Nature, it is said, That it is not necessary to set it forth; and it seems to be rather discretionary, than necessary to set it forth in any Case.

Sett. 26. 6. ^a That such a Warrant may be either general, to bring the Party before any Justice of Peace of the County, or special, to bring him before the Justice only who granted it.

Sett. 27. 7. ^b That it may be directed to the Sheriff, Bailiff, Constable, or to any indifferent Person by Name, who is no Officer; for that the Justice may authorize any one to be his Officer, whom he pleases to make such, yet it is most advisable to direct it to the Constable of the Precinct wherein it is to be executed; ^c for that no other Constable, and *a fortiori* no private Person, is compellable to serve it.

As to the third Point, *viz.* In what Manner such Warrant is to be executed, I shall lay down the following Rules,

Sett. 28. 1. That a Bailiff or a Constable, if they be sworn and commonly known to be Officers, and act within their own Precincts, need

Gro. El. 130.
1 Leon. 187.

4 Inst. 177.
H. P. C. 93.
Supr. fct. 16.
ch 12. fct. 15.

Gro. E. 130.
1 Leon. 187.

1 Danv. Abr.
179 pl. 1, 2, 6.

^a Dalt. cap.
117.

³ Inst. 76.
14 H. 8. 16.

^b Dalt. cap.
117.

See the Precedents in Dalt.
cap. 121.

^c Dalt. cap.
117, 221.

Lamb. 85, 86.
Crompt. 147.

232, &c.
^d Dalt. c. 117.

Supra fct. 102.

^a Dalt. cap.
117.

¹ Rol. Rep.
375.

⁵ Co. 59. b.
Bro. Peace 9.

^b Dalt. cap.
117.

Crompt. 147.
14 H. 8. 16.

Bro. Peace 6.
Salk. 176.

^c Salk. 176.

8 E. 4. 14. a. need not shew their Warrant to the Party, notwithstanding he demand
 14 H. 7. 9 b. the Sight of it; but that these and all other Persons whatsoever making an
 6 Co. 54. Arrest, ought to acquaint the Party with the Substance of their Warrants,
 9 Co. 69. and that all private Persons to whom such Warrants shall be directed, and
 even Officers, if they be not sworn and commonly known, and even these, if
 they act out of their own Precincts must shew their Warrants, if demanded.

Sect. 29. 2. That the Sheriff having such Warrant directed to him,
 Dalt. cap. 117. may authorize others to execute it; but that every other Person to whom
 8 E. 4. 14. a. it is directed, must personally execute it; yet it seems, That any one
 may lawfully assist him.

Sect. 30. 3. That if a Warrant be generally directed to all Constables,
 Salk. 176. no one can execute it out of his own Precinct; but if it be directed
 to a particular Constable by Name, he may execute it any where within
 the Jurisdiction of the Justice.

C H A P. XIV.

Where Doors may be broken open in Order to make an Arrest.

Sect. 1. **A**ND now I am to consider in what Cases it is lawful to
 break open Doors, in Order to apprehend Offenders;
 and to this Purpose I shall premise, That the Law doth never allow of
 such * Extremities but in Cases of Necessity; and therefore, That no one
 can justify the Breaking open another's Doors to make an Arrest, unless
 he first signify to those in the House the Cause of his Coming and re-
 quest them to give him Admittance.

* 27 Aff 35.
 4 Inst. 177.
 25 Co. 91, 92.
 Dalt. cap 78.
 H. P. C. 90.
 Fitz. Execu-
 tion 252.

Sect. 2. But where a Person authorized to arrest another who is shel-
 tered in a House, is denied quietly to enter into it, in Order to take him;
 it seems generally to be agreed, That he may justify Breaking open the
 Doors in the following Instances.

Sect. 3. 1. Upon a ^a *Capias* grounded on an Indictment for any Crime
 whatsoever, or upon a ^b *Capias* from the ^c King's Bench or Chancery, to
 compel a Man to find Sureties for the Peace or Good Behaviour, or even
 upon a Warrant from a Justice of Peace for such Purpose.

* 27 Aff 35.
 12 Co. 131.
 4 Inst. 131.
 Moor 606,
 668.
 Dalt. cap. 78.
 Crom. 170 b.
 Moor 609,
 668.
 Cro. El. 908.
 Yelv. 28.
 Dalt. cap. 78.
 Jones 233,
 234.

Sect. 4. 2. Upon a ^d *Capias ut legatum*, or *Capias pro fine*, in any Ac-
 tion whatsoever.

Sect. 5. 3. Upon the ^e Warrant of a Justice of Peace, for the Le-
 vying of a Forfeiture in Execution of a Judgment or Conviction for it
 grounded on any Statute which gives the Whole, or but Part of such
 Forfeiture to the King, and authorizes the Justice of Peace to give such
 Judgment or Conviction for it.

Sect. 6. 4. Where a ^f forcible Entry or Detainer is either found by
 Inquisition before Justices of Peace, or appears upon their View.

Sect. 7. 5. ^g Where one known to have committed a Treason or Fe-
 lony, or ^h to have given another a dangerous Wound, is pursued either
 with or without a Warrant, by a Constable or private Person: But where
 one lies under a probable Suspicion only, and is not indicted, it seems the
 better

^f Dalt. cap.
 22 & 78.
^g H. P. C. 90,
 93.
 Dalt. cap. 78.
 13 E. 4. 9. a.
 13 E. 3. 7 b.

better ^a Opinion at this Day, That no one can justify the Breaking open Doors in Order to apprehend him.

Sett. 8. 6. Where an ^b Affray is made in an House in the View or Hearing of a Constable; or where those who have made an Affray in his Presence fly to a House, and are immediately pursued by him, and he is not suffered to enter; in Order to suppress the Affray in the first Case, or to apprehend the Affrayers in either Case.

Sect. 9. 7. Where-ever a ^c Person is lawfully arrested for any Cause and afterwards escapes, and shelters him in a House.

Sett. 10. Also it is enacted by 3 & 4 Jac. 1. Par. 35. That upon any lawful Writ, Warrant or Process awarded to any Sheriff or other Officer, for the Taking of any Popish Recusant, standing excommunicated for such Recusancy, it shall be lawful, if need be, to break open any House.

Sett. 11. But it hath been resolved, That where Justices of Peace are, by Virtue of a Statute, authorized to require Persons to come before them, to take certain Oaths prescribed by such Statute, the Officer cannot lawfully break open the Doors of the Persons who shall be named in any Warrant made in Pursuance of such Statute, in Order to be brought before the Justices to take such Oath, because such Warrant is not grounded on a precedent Offence; neither doth it appear, That the Party either is or will be guilty of any: But it seems clear, That if an Officer enter into any House to serve any such Warrant, and the Doors of the House be locked upon him, being in such House, he or his Friends may justify Breaking them open, in Order to regain his Liberty; for that even in the Execution of civil Process, the Law allows of the Breaking open Doors in the like Circumstances.

^a H. P. C. 91.
⁴ Inst. 117.
 Con. 13 E. 9. 1.
 Bro. Coron.
 159.
 Dalt. cap. 78.
 Fitz. Bar. 110.
^b H. P. C. 134,
 135.
 Crom. 170. b.
 Dalt. cap. 78.
 Bro. Faux.
 Imprison-
 ment 6.
^c 6 Mod. 173,
 174.

Palm. 52, 53.
 Cro. Jac. 55.

C H A P. XV.

Of Bail.

Sect. 1. **A**ND now I am to consider in what Manner, and in what Cases Offenders are to be bailed; as to which it is to be observed, That where-ever a Person is brought before a Justice of Peace upon an Accusation of Treason or Felony, he must be either bailed or committed, unless it manifestly appear that no such Crime was committed, or that the Cause for which alone the Party was suspected, was totally groundless; in which Cases only it is lawful to discharge him without Bail.

H. P. C. 98.
 Crompt. 154.

For the better Understanding of the Nature of Bail, I shall consider the following Points :

1. The Nature of Bail and Mainprize in general.
2. What shall be said to be sufficient Bail.
3. The Offence of taking insufficient Bail.
4. The Offence of granting it where it ought to be denied.

5. The

5. The Offence of denying, delaying or obstructing it, where it ought to be granted.
6. In what Cases it is grantable.
7. In what Form it is to be taken.
8. What shall forfeit the Recognizance.

And first, As to the Nature of Bail and Mainprife in general, I shall endeavour to shew,

^a Dalt. cap.
114.

Lomb. 340.

⁴ Inst. 180.

⁶ Ric. 3. 3.

3 H. 7. 3.

1 & 2 Ph. &

Mar. 13.

^c H. P. C. 96.

Dalt. cap. 114.

^d 4 Inst. 179.

180.

^e Fitz. Main-

prife 12, 13.

Bro. Main-

prife 89.

Croke, Bail &

Mainprife,

Ch. 3. and the

Books cited un-

der Letter f.

g. h.

Cont. 4 H. 6.

8. pl. 21.

32 H. 6. 4.

pl. 3.

^f H. P. C. 98.

Fitz. Main-

prife 12, 13.

^g S. P. C. 64. D.

21 H. 7. 33. pl.

26.

22 H. 6. 59.

pl. 13.

39 H. 6. 27.

pl. 39.

32 H. 6. 4.

pl. 3.

Supra ch. 6.

sect. 4.

^h Fitz. Main-

prife 12, 13.

Dalt. cap. 114.

Brook Main-

prife 99.

ⁱ H. P. C. 96.

Dalt. cap. 114.

^k H. P. C. 97.

Dalt. cap. 114.

Serico Co. 101.

^l Strile's Pra-

ctical Regi-

ster 110.

^m Dalt. cap.

70 & 114.

H. P. C. 97.

ⁿ Dalt. cap.

114.

H. P. C. 97.

^o Dalt. cap.

114.

Crompt. 194.

1. In what Respects they agree.
2. In what they differ.

Sect. 2. As to the first Particular it seems, That the Words Bail and Mainprife, are often used promiscuously in our ^a Law-Books and ^b Acts of Parliament, as signifying one and the same Thing; and it is ^c certain, That Bail and Mainprife agree in this Notion, that they save a Man from Imprisonment in the common Gaol, by his Friends undertaking for him before certain Persons for that Purpose authorized, that he shall appear at a certain Day, and answer the Crime with which he is charged, and be justified by Law.

Sect. 3. As to the second Particular, The chief, if not the ^d only, Difference between Bail and Mainprife seems to be this, That a Man's Mainpernors are ^e barely his Sureties, and cannot justify the Detaining or Imprisoning of him themselves, in Order to secure his Appearance: But that a Man's Bail are looked upon as his ^f Gaolers of his own Choosing and that the ^g Person bailed is in the Eye of the Law for many Purposes, esteemed to be as much in the Prison of the Court by which he is bailed, as if he were in the actual Custody of the proper Gaoler. But I do not find this Point clearly settled in Relation to any other Court besides the King's Bench, as hath been more fully shewn *Ch. 6. Sect. 4.* However it seems certain in every Bailment, That if the Party bailed be ^h suspected by his Bail as likely to deceive them, he may be detained by them, and enforced to appear according to the Condition of the Recognizance, or may be ⁱ brought by them before the Justice of Peace, by whom he shall be committed, unless he find new Sureties.

Sect. 4. As to the second Point, *viz.* What shall be said to be sufficient Bail, it seems to be ^k agreed, That no Person ought in any Case to be bailed for Felony by less than two; and it is ^l said to be the Practice of the King's Bench, not to admit any Person to bail upon a *Habeas Corpus* on a Commitment for Treason or Felony without four Sureties: Also ^m it seems to have been anciently an established Rule, That none under the Degree of Subsidy-men, should be admitted to bail any Person for a capital Crime: But the Manner of granting Taxes by Way of Subsidy having been of late for many Years disused, this Rule at present seems to be of little Use: But the only sure Way of proceeding in this Case, is to take Care that every one of the Bail be of Ability sufficient to answer the Sum in which they are bound, which ⁿ ought never to be less than forty Pounds for a capital Crime, but may be as much higher as the Justices in Discretion shall think fit to require, upon Consideration of the Ability and Quality of the Prisoner, and the Nature of the Offence: And if it shall seem doubtful, whether the Persons who offer themselves to be Sureties, be able to answer such Sum; it is ^o said, That the Person who is to take the Bail, may examine them on their Oaths concerning their Sufficiency: And if a Person who has Power to take Bail be so far imposed

posed upon as to suffer a Prisoner to be bailed by insufficient Persons, it is said, That either he, or any other Person who hath Power to bail him, may require the Party to find better Sureties, and to enter into a new Recognizance with them, and may commit him on his Refusal, for that insufficient Sureties are as no Sureties.

H. P. C. 96.
Dalt. cap. 70.
& 114.

Seç. 5. But Justices must take Care, That under Pretence of demanding sufficient Surety, they do not make so excessive a Demand, as in effect amounts to a Denial of Bail; for this is looked on as a great Grievance, and is complained of as such by 1 *W. & M. Seç. 2.* by which it is declared, *That Excessive Bail ought not to be required.*

Seç. 6. As to the third Point, *viz.* the Offence of taking insufficient Bail, it seems clear; That where-ever a Sheriff, in Pursuance of the Statute of *Westminster, cap. 15.* Or Justices of Peace in Pursuance of the subsequent Statutes, grounded on the said Statute of *Westminster 1.* and set forth more at large in the following Part of this Chapter, shall admit any Person to bail for Felony, with insufficient Sureties, who shall not afterwards appear according to the Condition of the Recognizance, the Justices of Assize may, by force of 27 *Ed. 1. chap. 3.* commonly called the Statute *de finibus levatis*, impose such Fine on such Sheriff or Justices of Peace, as to such Justices of Assize in their Discretion shall seem proper. But if a Prisoner, who is bailed by insufficient Sureties, do appear according to the Condition of the Recognizance, it seems that those who admitted him to bail are safe, inasmuch as the End of the Law is answered, and the Appearance of the Prisoner as effectually procured by such Sureties, as if they had been never so sufficient.

Vide Supra,
cap. 6. Seç. 10, 11, &c.
Dalt. cap. 114.
H. P. C. 97.

Seç. 7. As to the fourth Point, *viz.* The Offence of granting Bail where it ought to be denied: There is no Doubt but that the Bailing of a Person who is not bailable by Law, is punishable either at Common Law, as a negligent Escape, as shall be more fully shewn in the Chapter concerning Escapes, or as an Offence against the several Statutes concerning Bail.

S. P. C. 33
F. 77. A. 25.
E. 3. 39 Pl.
22.
Fitz. Escape
4 Coro. 246.
H. P. C. 97.
113.

Seç. 8. And first it is enacted by the Statute of *Westminster 1. 15.* *That if the Sheriff, or any other, let any go at large by Surety, that is not replevisable, if he be Sheriff, or Constable, or any other Bailiff of Fee, which hath keeping of Prisons, and be thereof attainted, he shall lose his Fee and Office for ever. And if the Under-Sheriff, Constable, or Bailiff of such as have Fee for keeping of Prisons, do it contrary to the Will of his Lord, or any other Bailiff being not of Fee, they shall have three Years Imprisonment, and make Fine at the King's Pleasure.*

Seç. 9. Also it is enacted by 27 *Ed. 1.* commonly called the Statute *de finibus levatis, cap. 3.* *That the Justices assigned to take Assizes, &c. when they deliver the Gaols, &c. shall inquire if Sheriffs, or any other, have let out by Replevin Prisoners not replevisable, or have offended in any Thing contrary to the Form of the said Statute of Westminster 1. and whom they shall find Guilty they shall chasten and punish in all Things, according to the Form of the said Statute.*

Vide Supra,
Chap. 6.
Seç. 10, 11,
&c.

Seç. 10. And it is farther enacted by 4 *Ed. 3. 2.* *That at the Time of the Assignment of Keepers of the Peace, Mention shall be made, That such as shall be indicted, or taken by them, shall not be let to Mainprise by the Sheriffs, nor by none other Ministers, if they be not mainpernable by Law; nor that none who are indicted shall be delivered but by the Common Law. And that the Justices assigned to deliver the Gaols, shall have Power to inquire of Sheriffs, Gaolers, and others, in whose Ward such Persons indicted shall be, if they make Deliv-*

Vide Supra,
Cap. 6.
Seç. 12, 13.

verance, or let to Mainprife, any so indicted, which be not mainpernable; and to punish the said Sheriffs, Gaolers, and others, if they do any thing against the said Act.

Señt. 11. And it is enacted by 1 & 2 Ph. & Mar. 13. That no Justice or Justices of Peace, shall let to Bail or Mainprife any Person or Persons, which, for any Offence or Offences, by them, or any of them committed, be declared not to be replevifed or bailed, or be forbidden to be replevifed or bailed, by the above-mentioned Statute of Westminster the first, cap. 15. And that the Justices of Gaol-Delivery of the Place where such Justices of the Peace shall be guilty of such Offence, upon due Proof thereof, by Examination before them, shall for every such Offence set such Fine on every such Justice, as the same Justices of Gaol-Delivery shall think meet, &c.

Poph. 96.
Dalt. cap. 114.

Señt. 12. It hath been resolved, That it is no Excuse for Justices of Peace admitting a Person to Bail, who was in Truth committed for a Cause notailable by Law, that they did not know that he was committed for such Cause; and that no other Cause of his Commitment was mentioned in his *Mittimus* but the Suspicion of Felony; for that they ought, at their Peril, to have informed themselves of the Cause for which the Party was committed, that they might be satisfied that he wasailable by Law.

Vide 14 H.
7. 7. Pl. 19.
H. P. C. 97.
Dalt. cap. 114.

Señt. 13. As to the fifth Point, viz. The Offence of denying, delaying, or obstructing Bail where it ought to be granted; this seems to be a Misdemeanour, not only by the Statute, but also by the Common Law, and punishable thereby as an Offence against the Liberty of the Subject, not only by Action at the Suit of the Party wrongfully imprisoned, but also by Indictment at the Suit of the King.

H. P. C. 97.
Dalt. cap. 114.
14 H. 7. 10. 2.
Bro. Peace, 7.
Mainprife,
39.

Señt. 14. But it seems clear, That he who has Power to bail another is not bound to demand of him to find Sureties, and to forbear committing him 'till he shall refuse to find them; but may well justify his Commitment, unless the Party himself shall offer his Sureties.

Señt. 15. The principal Statutes relating to this Offence, are the above-mentioned Statute of Westminster 1. 15. and the Statute *de finibus*, cap. 3. and 31 Car. 2. cap. 2. commonly called the Habeas Corpus Act: By the first whereof it is enacted, That if any withhold Prisoners replevifable, after that they have offered sufficient Surety, he shall pay a grievous Amerciament to the King. And if he take any Reward for the Deliverance of such, he shall pay double to the Prisoner, and also shall be in the great Mercy of the King. And by the later of the said Statutes it is enacted, That Justices of Assize shall inquire if Sheriffs, or any other, have offended in any Thing contrary to the said Statute of Westminster, and whom they shall find Guilty they shall punish in all Things according to the Form of the said Statute.

Señt. 16. Also it is recited by the above mentioned Statute of 31 Car. 2. That great Delays had been used by Sheriffs, Gaolers, and other Officers, to whose Custody the King's Subjects had been committed for criminal, or supposed criminal Matters; in making Return of Writs of Habeas Corpus, by standing out an Alias and Pluries, and sometimes more, and by other Shifts to avoid their yielding Obedience to such Writs, contrary to their Duty, and the known Laws of the Land, whereby many Subjects had been long detained in Prison, in such Cases where by Law they wereailable, &c. And thereupon it is enacted, That whensoever any Person shall bring any Habeas Corpus directed unto any Person whatsoever, for any Person in his Custody, and the said Writ shall be served upon the said Officer, or left at the Gaol or Prison with any of the Under-Officers, Under-Keepers, or Deputy of the said Officers or Keepers, that the said Officer or Officers, his or their Under-Officers, Under-Keepers, or Deputies, shall, within three Days after

after such Service thereof (unless the Commitment were for Treason or Felony plainly and specially expressed in the Warrant of Commitment) upon Payment or Tender of the Charges of bringing the said Prisoner, to be ascertained by the Judge or Court that awarded the same, and endorsed on the said Writ, not exceeding 12d. per Mile, and on Security given by his own Bond, to pay the Charges of carrying back the Prisoner, if he should be remanded, and that he will not make any Escape by the Way, make Return of such Writ, and bring, or cause to be brought, the Body of the Party so committed, or restrained, unto or before the Lord Chancellor, or Lord Keeper, or the Judges or Barons of the Court from which the said Writ shall issue, or such other Persons before whom the said Writ is made returnable, according to the Command thereof; and shall then likewise certify the true Causes of his Detainer or Imprisonment, unless the Commitment be in a Place beyond twenty Miles Distance, &c. and if beyond the Distance of twenty, and not above one hundred Miles, then within the Space of ten Days, and if beyond the Distance of one hundred Miles, then within the Space of twenty Days.

Sett. 17. And it is further enacted, Par. 3. That all such Writs shall be marked in this Manner, Per Statutum tricesimo primo Caroli Secundi Regis; and shall be signed by the Person that awards the same. And if any Person shall be, or stand committed or detained as aforesaid, for any Crime, unless for Treason or Felony, plainly expressed in the Warrant of Commitment, in the Vacation-time, it shall be lawful for such Person so committed or detained (other than Persons Convicted, or in Execution by legal process) or any one on his Behalf, to complain to the Lord Chancellor, or Lord Keeper, or any Justice of either Bench, or Baron of the Exchequer of the Degree of the Coif; and the said Lord Chancellor, &c. Justice or Baron, on View of the Copy of the Warrant of the Commitment, or otherwise on Oath that it was denied, are authorized and required, on Request in Writing by such Person, or any in his Behalf, attested and subscribed by two Witnesses, who were present at the Delivery of the same, to grant an Habeas Corpus under the Seal of the Court whereof he shall be one of the Judges, to be directed to the Officer in whose Custody the Party shall be returnable immediate before the said Lord Chancellor, &c. Justice or Baron; and on Service thereof as aforesaid, the Officer, &c. in whose Custody the Party is, shall within the Times respectively before limited, bring him before the said Lord Chancellor, Justice or Baron before whom the said Writ is returnable; and in Case of his Absence, before any other of them, with the Return of such Writ, and the true Causes of the Commitment and Detainer. And thereupon, within two Days after the Party shall be brought before them, the said Lord Chancellor, Justice or Baron, before whom the Prisoner shall be brought as aforesaid, shall discharge the said Prisoner from his Imprisonment, taking his Recognizance, with one or more Sureties, in any Sum according to their Discretions, having Regard to the Quality of the Prisoner and Nature of the Offence, for his Appearance in the King's Bench the Term following, or in such other Court wherein the Offence is properly cognisable, as the Case shall require; and then shall certify the said Writ with the Return thereof, and the Recognizance, into such Court; unless it be made appear to the said Lord Chancellor, &c. that the Party so committed is detained upon a Legal Process, Order or Warrant, out of some Court that hath Jurisdiction of criminal Matters; or by some Warrant signed and sealed with the Hand and Seal of any of the said Justices or Barons, or some Justice or Justices of the Peace, for such Matters or Offences, for the which by Law the Prisoner is not bailable.

Sett. 18. But it is provided, Par. 4. That if any Person shall have willfully neglected by the Space of two whole Terms after his Imprisonment, to pray a Habeas Corpus for his Enlargement, he shall not have a Habeas Corpus to be granted in Vacation-time, in Pursuance of this Act.

Sect. 19. And it is farther enacted, Par. 5. *That if any Officer, &c. shall neglect or refuse to make the Returns aforesaid, or to bring the Body of the Prisoner according to the Command of the said Writ, within the respective Times aforesaid, or shall not within six Hours after Demand deliver a true Copy of the Commitment, &c. he shall forfeit for the first Offence 100 l. for the second 200 l. and be made incapable to hold his Office, &c.*

Sect. 20. And it is farther enacted, Par. 6. *That no Person who shall be set at large upon any Habeas Corpus, shall be again imprisoned for the same Offence by any Person whatsoever, other than by the legal Order and Process of such Court wherein he shall be bound by Recognizance to appear, or other Court having Jurisdiction of the Cause, on Pain of 500 l.*

Sect. 21. And it is farther enacted, Par. 7. *That if any Person who shall be committed for Treason or Felony, plainly and specially expressed in the Warrant of Commitment; upon his Prayer or Petition in open Court the first Week of the Term, or the first Day of the Sessions of Oyer and Terminer, or general Gaol-Delivery, to be brought to his Trial, shall not be indicted some time in the next Term, Sessions of Oyer and Terminer, or general Gaol-Delivery after such Commitment, the Justices of the said Courts shall, upon Motion in open Court, the last Day of the Term, or Sessions, set at Liberty the Prisoner upon Bail; unless it appear upon Oath, that the Witnesses for the King could not be produced the same Term, &c. And if such Prisoner, upon his Prayer, &c. shall not be indicted and tried the second Term, or Sessions, he shall be discharged from his Imprisonment.*

Sect. 22. And it is farther enacted, Par. 10. *That it shall be lawful for any Prisoner, as aforesaid, to move and obtain his Habeas Corpus as well out of the Chancery or Exchequer, as the King's Bench or Common Pleas: And if the said Lord Chancellor or Lord Keeper, or any Judge or Judges, Baron or Barons for the Time being, of the Degree of the Coif, of any of the Courts aforesaid, in the Vacation-time, upon View of the Copy of a Warrant of Commitment or Detainer, or on Oath made that such Copy was denied, shall deny any Writ of Habeas Corpus, by this Act required to be granted, being moved for as aforesaid, they shall severally forfeit to the Party grieved, the Sum of 500 l.*

Sect. 23. But it is provided, Par. 18. *That after the Assises proclaimed for that County where the Prisoner is detained, no Person shall be removed from the common Gaol upon any Habeas Corpus granted in Pursuance of this Act; but upon such Habeas Corpus shall be brought before the Judge of Assise in open Court, who thereupon shall do what to Justice shall appertain. But it is provided nevertheless, Par. 19. That after the Assises are ended, any Person detained may have his Habeas Corpus according to the Direction of this Act.*

Sect. 24. It is observable, that this Statute makes the Judges liable to an Action at the Suit of the Party grieved in one Case only, which is the refusing to award a Habeas Corpus in Vacation-time; and seems to leave it to their Discretion in all other Cases, to pursue its Directions in the same manner as they ought to execute all other Laws, without making them subject to the Action of the Party, or to any other express Penalty or Forfeiture: And this is most agreeable to the general Reason of the Law, which regularly will not suffer a Judge to be liable to an Action for what he does as Judge.

B. 1. ch. 72.
S. 6. & B. 2.
ch. 1. S. 17.

As to the fifth Point, *viz.* In what Cases Bail is grantable, I shall endeavour to shew,

1. Where it is grantable by a Sheriff.
2. Where by a Justice of Peace.
3. Where by Justices of Gaol-Delivery.
4. Where by the Courts of Westminster Hall.

As

As to the first Point, I shall first consider, where Bail is grantable by a Sheriff *ex Officio*; and secondly, where by Virtue of a Writ.

Señ. 25. As to the first Particular, it is holden by ^a some, That by the Common Law the Sheriff might, by Virtue of his Office, as principal Conservator of the Peace, bail any Person arrested on Suspicion of Felony, or for any other Offence which is bailable.

Señ. 26. Also it hath been holden, ^b that a Constable had the like Power by the common Law: And it may ^c probably be inferred from the Recitals of the Writs of Mainprise in the Register, that by the common Law the Sheriff had Power to bail Persons indicted of Larceny in a ^d Court-Leet, and also Persons indicted as ^d Accessories to a Felon, and Persons appealed by ^e Approvers, after the Death of the Approvers, &c. But it seems that the Sheriff ^f had no Power *ex Officio*, to bail any Person indicted of any Crime before Justices of Peace. And it is certain, ^g that neither the Sheriff, nor Constable could, in any of the Cases abovementioned, take Bail by Recognisance, but only by Obligation. And some ^h have holden, That the Statutes which impower Justices of Peace to admit Persons to Bail, on an Accusation of Felony, and particularly prescribe in what Manner they shall do it, have taken away all Power of this Kind from the Sheriff and Constable; yet others seem to be of another Opinion, because the said Statutes are wholly in the Affirmative.

Señ. 27. But it seems certain, ⁱ That by the Common Law, the Sheriff might bail any Person who was indicted before him at his Torn, for Felony, or any other Crime that is bailable; because he might both award Process, and also give Judgment against the Person so indicted: And it is a general ^k Rule, That whosoever is Judge of the Offence, may bail the Offender. But it is holden, ^l That at this Day the Sheriff has lost his Power, by Reason of ¹ *Ed. 4. cap. 2.* set forth more at large *cap. 10. señ. 74.* by which it is enacted, That the Sheriff shall not proceed on any such Indictment, but shall remove it to the next Sessions of Peace.

As to the second Particular, it seems, That Bail is grantable by a Sheriff by Virtue of the following Writs.

1. That of *Odio & Atia.*
2. That of Mainprise.
3. That of *Homine replegiando.*

Señ. 28. But having already, in *Book. 1. Cap. 29. Señ. 20* and *24.* incidentally shewn the Nature of the first of these Writs, which seems to be in great Measure obsolete at this Day, I shall refer the Reader to what is there said concerning it.

Sect. 29. Secondly, Of the Writ of Mainprise little Notice is taken in the late Books; yet the Law relating to it seems to be still in Force in many Cases; and consequently in such Cases, those who are bailable, and have been refused the Benefit of Bail, may still by Virtue thereof be delivered out of Prison (upon their Finding Sureties ^m to the Sheriff that they will appear and answer to the Crimes alledged against them, before the Justices in the Writ mentioned, &c.) as those ⁿ who are imprisoned for a slight Suspicion of Felony, or indicted of Larceny ^o before Steward of a Leet, or of Trespass ^p before Justices of Peace, and many other ^q Persons, all which it will be needless to enumerate.

^a Dalison 11.
^{See the Pre-}
^{amble of 13}
^{Ed. 1. cap.}
^{15.}
^{Register,}
^{83. b. 169.}
^{S. P. C. 74.}
^{Letter D.}
^{Fitz. Coron.}
^{297. contra}
^{2 Inst. 190.}
^{b Dalison 11.}
^{Contra 2 Inst.}
^{190.}
^{c Register}
^{269. a.}
^{d Register}
^{270.}
^{e Register}
^{269. b.}
^{Register}
^{133. b. 170. b.}
^{271. a. b.}
^{f Supra cap.}
^{8. sect. 4. 5.}
^{Dalison 11.}
^{h Dalison 11.}
^{i H. P. C.}
^{106.}
^{2 Inst. 190.}
^{Register 269.}
^{l Lamb. 342.}
^{348.}
^{S. P. C. 74.}
^{Letter E.}
^{2 Inst. 190.}
^{H. P. C.}
^{106.}

^{m Register}
^{269. 270.}
^{n F. N. B.}
^{250. b.}
^{Register}
^{269. a.}
^{o F. N. B.}
^{250. C.}
^{Register}
^{269. a.}
^{2 Inst. 190.}
^{p F. N. B.}
^{250. G. 251.}
^{C.}
^{Register}
^{133. b. 270.}
^{b. 271. b.}
^{q F. N. B.}
^{250. 251.}
^{Register}
^{269. &c.}

^a H. P. C.
104.
^b 2 Inst. 190.
^c F. N. B.
250. A.
^d Inst. 182.
Coke, Bail
and Main-
prife, cap. 10.
Vide *supra*
cap. 10. feft.
72, 74.

F. N. B. 66,
67, 68.
Register
78, 79.

Register 79 a.
F. N. B. 68.
C.

Vide *supra*
Section 26.

1 Sid. 110.

^a Inst. 190.

Sect. 30. But as to that which is said in general, both by Sir Matthew Hale ^a and Sir Edward Coke, ^b in Relation to this Matter, from which it may seem to have been the Opinion of those Authors, That no Writ of Mainprife is grantable at this Day; it may be answered, That this is to be understood ^c only of the Writ of Mainprife, for Persons indicted before the Sheriff in his Torn, in Relation to whom he has no judicial Power at this Day, and consequently no Power to bail them *ex officio*; from whence it follows, That the Writ of Mainprife for such Persons, being grounded on a Suggestion that the Sheriff had unjustly refused before to admit them to Bail, cannot now be proper, because he cannot be said to have unjustly refused to do a Thing which he had no Power to do. But this can be no Manner of Reason why the Writ of Mainprife should not be still grantable in other Cases.

Sect. 31. Thirdly, As to the Writ of *Homine replegiando*, there seems to be no Doubt but that at the common Law the Sheriff might deliver any Persons out of Prison by Virtue of this Writ, except in those special Cases mentioned in the Statute of *Westminster* 1. cap. 15. which is set forth more at large in the next Section: And if he had returned, that the Plaintiff had been eloigned out of the County by the Defendant, he might afterward, by Virtue of a *Capias in Withernam* against such Defendant, whether he were a Peer or Commoner, have taken and imprisoned him till the Plaintiff could be replevied. But the Writ of *Homine replegiando* has been much disused of late, in such Cases wherein Justices of Peace have been authorized to admit Persons to Bail; yet whether the Statutes which gave such Authority to Justices of Peace, being wholly in the Affirmative, do take away the Sheriff's Power in the Cases mentioned in those Statutes, may deserve to be considered. However there can be no Doubt but that in other Cases the Writ of *Homine replegiando*, and *Capias in Withernam* are very proper and effectual Remedies.

Sect. 32. But for the better Understanding the Sheriff's Power in this Particular, I shall set down, and endeavour to explain so much of the said Statute of *Westminster* 1. Cap. 15. as relates to it, which is enacted as followeth. *Forasmuch as Sheriffs, and others who have taken and kept in Prison Persons detected of Felony, and incontinent have let out by Replevin such as were not replevisable, and have kept in Prison such as were replevisable, because they would gain of one Party, and grieve the other: And forasmuch as before this Time it was not determined which Persons were replevisable, and which not; but only those that were taken for the Death of a Man, or by Commandment of the King, or of the Justices, or for the Forest: It is provided, and by the King commanded, that such Prisoners as before were outlawed, and they which have abjured the Realm, Provors, and such as be taken with the Manner, and those which have broken the King's Prison, Thieves openly defamed and known, and such as be appealed by Provors, so long as the Provors be living (if they be not of good Name) and such as be taken for House-burning feloniously done, or for false Money, or for counterfeiting the King's Seal, or Persons excommunicate, taken at the Request of the Bishop, or for manifest Offences, or for Treason touching the King himself, shall be in no wise replevisable by the common Writ, nor without Writ: But such as be indicted of Larceny by Enquests taken before Sheriffs, or Bailiffs by their Office, or of light Suspicion, or for Petit Larceny, that amounteth not above the Value of twelve Pence, if they were not accused of some other Larceny aforetime, or accused of Receipt of Thieves or Felons, or of Commandment, or Force, or of Aid in Felony done, or accused of some other Trespass, for which one ought not to lose Life or Member, and a Man approved*

proved by a Provor, after the Death of the Provor (if he be no common Thief, nor defamed) shall be henceforth let out by sufficient Surety, whereof the Sheriff will be answerable, and that without giving ought of their Goods.

For the better Exposition hereof, I shall distinctly consider,

1. That Part of the Preamble which declares, what Persons had always been agreed not to be replevifable.
2. That Part of the Purview which shews what other Persons shall not be replevifable.
3. That which shews what Persons shall be replevifable.

Of those who by Preamble are declared to have always been agreed to be irreplevifable, there are four Kinds.

1. Those who are taken for the Death of a Man.
2. Those who are taken by the Commandment of the King.
3. Those who are taken by the Commandment of the Justices.
4. Those who are taken for the Forest.

Self. 33. As to the first of these Particulars, it is observable that the Statute declares generally, That those imprisoned for the Death of a Man have always been taken to be irreplevifable, without making any Distinction between such Homicide as is malicious, and that which happens by Misadventure, or in Self-Defence. And it is further to be observed, that the Statute of Gloucester, cap. 9. provides, *That where a Man kills another by Misfortune, or in his Defence, or in other Manner without Felony, he shall be put in Prison 'till the next Coming of the Justices in Eyre, or Justices assigned to the Gaol-Delivery, &c.* And agreeably hereto we find, That all Persons in general, who are taken for the Death of a Man, are excepted out of the Writ *a de Homine replegiando*: And that even the superior ^a Courts, which are not restrained by these Statutes, have yet been always cautious of bailing Persons imprisoned for any Homicide, except in such special Cases as shall be set forth more at large in the following Part of this Chapter.

Self. 34. Also it seems agreed, That Justices of Peace, who have Power at this Day to bail a Man arrested for a light Suspicion of Homicide, cannot bail any such Person for Manslaughter, or even excusable Homicide, if it manifestly appear that he was guilty of the Fact, let it be ever so plain that it cannot amount to Murder, as shall be shewn more at large in the following Part of this Chapter.

Self. 35. And it is enacted by 3 H. 7. 1. *That if it happen, that any Person named as Principal or Accessary, be acquitted of any Murder at the King's Suit, within the Year and Day, that then the same Justices before whom he is acquitted, shall not suffer him to go at large, but either remit him to Prison, or bail him, after their Discretion, 'till the Year and Day be passed.*

Sect. 36. As to the second Particular, viz. That concerning those who are taken by the Commandment of the King, it seems, That the Words of the Statute concerning them are to be understood of such only as are imprisoned either by the King's personal Command, or by the Command of his Privy Council, which is looked upon to be as it were incorporated with him and to speak with his Mouth; and accordingly we find the Exception in the Writ of *Homine replegiando*, relating to Persons imprisoned by the King, thus expressed in the Register, *Nisi capti sunt per speciale preceptum nostrum*; by which it seems to be implied, That this Exception is

^a Inst. 186.

^a Inst. 315.

^a Register

77. b.

F. F. B. 66. E.

^b 25 Ed. 3. 42.

pl. 27.

41 Aff. pl. 14.

37 Aff. pl. 12.

29 Aff. 44.

1 Ro. Re.

268.

44 Ed. 3. 38.

pl. 34.

21 Ed. 4. 71.

^a.

^a Inst. 186.

187.

S. P. C. 72. E.

1 Ro. Rep.

114.

D. It. ch. 114.

Register 77.

^b.

S.P.C. 72 E.

* 1 And. 298.

1 Rol. Rep.

134, 192. pl.

31, 32, 219.

1 Leon. 70.

Bro. Main.

p. 116, 37.

Contra Moor

839.

1 And. 158.

b Register,

77. b.

c EN B 66 E.

d S. P. C. 73.

e 2 Inst. 187.

f Dalt. cap.

114.

S. P. C. 73.

Dalt. ch. 114.

F. N. B. 251.

B.

S. P. C. 73.

Dalt. ch. 114.

24 Ed. 3. 53.

pl. 25.

1 Rol. Rep.

131.

* Register, 77.

b.

4 Inst. 314.

b Vide 1 Inst.

2. a. 233 a.

c Register,

80. b.

F. N. B. 67.

D.

Vide Plowd.

Com. 124. a.

d 2 H. 3. 10.

& 16.

e 34 Ed. 1.

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not to be applied generally to every Command whatsoever of the King: To which it may added, That if it were to be understood in so large a Sense, it would extend even to those who are taken by a *Capias* in a personal Action, for that every such *Capias* is the Commandment of the King; but it seems certain, That a Defendant taken by such a *Capias* is replevisable by the Common Law. But Persons imprisoned by the special Command of the King, or of his Privy Council, are so far from being replevisable by the Sheriff, that they have formerly ^a been adjudged not to be bailable even by the Court of King's Bench: However at this Day the Law is otherwise declared and settled by Parliament, as shall be shewn more at large in the following Part of this Chapter.

Sec. 37. As to the third Particular, *viz.* That concerning Persons imprisoned by the Command of the Justices, it is observable, That the Exception in the Writ of *Homine replegiando*, in the Register, ^b concerning Persons so imprisoned, is restrained to those who are taken by the special Command of the King's Chief Justice. But by *Fitzherbert* ^c and *Stauford* ^d and *Coke* ^e and *Dalton*, ^f the Words of the Statute relating to Persons so imprisoned, seem to be understood in a large Sense, of any of the King's Justices in general, as of those of Assise, as well as of those of the Courts of *Westminster-Hall*. But it seems that they are not to be understood generally of Persons imprisoned by any Command whatsoever of such Justices, for that those who are imprisoned by their ordinary Command, not by Way of Punishment, but in Order only to be safely kept, are said to be replevisable by the Sheriff, in Cases not prohibited by the Statute; and therefore it seems, That they must be taken in a more restrained Sense, of those only who are imprisoned by the absolute Command of such Justices by Way of Punishment, as for a Misdemeanour done in their Presence, or for other Contempts, or such like Matters, which lie rather in their Discretion than in their ordinary Power; and it seems that a Commitment by the Chief Justice, without shewing any Cause whatsoever, shall be intended to be for some such Matter; and there can be no Doubt but that a Person under such a Commitment is irreplevisable by the Sheriff. Also it hath been holden, That a Person so committed is not bailable upon a *Habeas Corpus*: But how far Persons committed by the absolute Command of one Court, are bailable by another, shall be more fully considered in the following Part of this Chapter.

Sec. 38. As to the fourth Particular, *viz.* That concerning those who are imprisoned for the Forest, who also are excepted out of the Writ ^a of *Homine replegiando*; it seems that the said Exception is to be understood as well of Forests in the Hands of Subjects, ^b as of those in the Hands of the King; but it seems, that it is to be understood strictly of proper Forests only, and not to be extended ^c by Equity to Chases or Parks. And as to Imprisonments for Offences in Forests, the Law has been much mitigated by later Statutes; for it is recited by 1 Ed. 3. cap. 8. *That divers Persons had been undone by the Chief Keepers of Forests, &c. against the Form of the Great Charter* ^d *of the Forest, and against the Declaration* ^e *made by King Edward 1. by which he granted, That Trespasses done, in his Forest, of Vert and Venison, should be presented at the next Swainmote, before the Foresters, &c. and that such Presentments made before such Foresters, &c. should by the Oaths of Knights, and other discreet and lawful Men, &c. by the common Assent of all the said Ministers, be solemnly written, and with their Seals ensealed: And that if any Indictment should be in any other Manner made, that the same should be void.* And thereupon it is ordained, *That from thenceforth no Man shall be taken nor imprisoned for Vert or Venison, unless he be taken with the Manner,*

or else indicted after the Form before specified: And then the chief Warden shall let him to mainprise 'till the Eyre of the Forest, without any Thing taken for his Deliverance. And if the said Warden will not so do, he shall have a ^c Writ out of the Chancery &c. to be at Mainprise 'till the Eyre. And if the Warden shall not obey such Writ, the Plaintiff shall have a ⁱ Writ to the Sheriff to attach the said Warden before the King, at a certain Day, &c. And the Sheriff (the Verders being called to him) shall deliver him that is so taken, by good Mainprise, in the Presence of the Verders, and shall deliver the Names of the Mainpernors to the same Verders, to answer in the Eyre before the Justices, &c. And it is farther enacted, by 7 R. 2. 4. That no Man shall be imprisoned by any Officer of the Forest without due Indictment, or being taken with the Manner, or trespassing in the Forest, &c.

Sect. 39. And Note, That Persons so indicted, or taken with the Manner, being imprison'd by such Officers, have their Election either to be mainprized by twelve Mainpernors, by Virtue of the Writ of *Homine replegiando*, given by the said Statute of 1 Ed. 3. 9. or to be bailed upon a *Habeas Corpus*, by the Judges of Westminster Hall, &c. And if a Person be imprisoned for any Offence relating to the Forest, without having been first indicted for it, or taken with the Manner, there seems to be no Doubt but that he may have an Action of false Imprisonment, and may also be mainprised or bailed in the Manner abovementioned.

And now I am to consider that Part of the Purview of the above recited Statute of Westminster, 1. 15. which shews what other Persons are not repleviable, of which there are two Sorts.

1. Such as are excluded from the Benefit of a Replevin, in respect of the Notoriety of their Offence.

2. Such as are excluded from it in respect of the Hainousness of the Crime alledged against them.

Persons excluded from the Benefit of a Replevin, in respect of the Notoriety of their Offence, are of two Kinds.

1. Those who by an exprefs or implied Judgment, Sentence or Conviction, or their own Confession, appear to be Guilty.

2. Those who are under violent Presumptions of Guilt.

Sect. 40. And first, Of those who by Judgment, Sentence, Conviction or Confession, appear to be Guilty, some are excluded from the Benefit of a Replevin by the exprefs Words of the Statute, as *Those who are outlawed, or have abjured the Realm; Persons excommunicate, taken at the Request of the Bishop, and Provors.* And all other ^a Persons who are condemned, or convicted of Felony, or any other ^b heinous Crime whatsoever, whether by their own Confession, or by Verdict General or Special; ^c and also all those ^d who on their Examination own themselves guilty of a Felony alledged against them, and are charged in their *Mittimus* with the Felony so confessed, seem to be excluded from it by Parity of Reason, and the manifest Intent of the Statute; for ^e Bail is only proper where it stands indifferent whether the Party be Guilty or Innocent of the Accusation against him, as it often does before his Trial; but where that Indifferency is removed, it would, generally speaking, be absurd to bail him: And agreeably hereto the Statute of 2 H. 5. cap. 2. provides, even as to civil Causes, *That if upon a Writ of Certiorari, or Corpus cum causa, out of Chancery, it shall be returned that the Prisoner is*

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condemned

^c F. N. B. 67.

^a Register, 80.

^b F. N. B. 67.

ⁱ Register, 80.

^b F. N. B. 67.

^a Register, 80.

^b F. N. B. 67.

^a Register, 80.

^b F. N. B. 67.

^a Register, 80.

^b F. N. B. 67.

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^b F. N. B. 67.

^a Register, 80.

^b F. N. B. 67.

condemned by Judgment given against him, he shall be remanded, &c. Also 23 H. 6 cap. 10. which ordains, That Sheriffs, &c. shall let out of Prison Persons in their Custody by Force of any Writ, &c. in Personal Actions, or on Indictments of Trespafs, by sufficient Sureties, &c. expressly excepts *All such as shall be in their Ward by Condemnation, Execution, &c.* And therefore it cannot but be reasonable to intend, That the said Statute of Westminster 1. put the Cases of Persons outlawed and excommunicate as Examples only; meaning thereby to intimate, That all other Persons under the like Circumstances, should be in like Manner irreplevifable: Yet it is certain, that the Court of King's Bench may, in their Discretion, in some special Cases, bail a Person upon an Outlawry of Felony; as ^a where he pleads that he is not of the same Name, and therefore not the same Person with him that was outlawed; or alledges ^b any other Error in the Proceedings. Also it seems, That the Court of King's Bench, or Justices of Gaol-Delivery, may bail ^c a Person convicted of Manslaughter, or, as some say, of any other Felony, for which he afterwards gets the King's Pardon. And ^d there seems to be no Doubt at this Day, but that they may also bail any Person who is found guilty before them of Homicide in Self-defence, or by Misadventure. Also it is certain, That if a Person appear to be imprisoned for an Excommunication, in a Cause of which the Spiritual Court hath no Conusance, he may be delivered either upon a *Habeas Corpus*, or by quashing or superseding the Writ of *Excommunicato capiendo*.

See the Books
above cited.

H. P. C. 101.
S. P. C. 74.
Letter A.
2 Inst. 188.
^a 5 H. 7. 16.
pl. 7.
^b 19 H. 6. 22.
Book Main-
prife, 94.
H. P. C. 101.
105.
^d H. P. C. 101.
105.
F. N. B. 246.
c.
Contra Fitz.
Coron. 297.
354
Quare S. P. L.
74. D.

Secondly, Of those who are under violent Presumptions of Guilt, and in that respect are excluded by the Statute from the Benefit of a Replevin, there are several Kinds.

Sect. 41. I. *Those who are taken with the Manner* (or rather the Mainer, that is, with the thing stolen, as it were, in their Hands) and by Parity of Reason, those who are taken freshly upon a Hue and Cry.

Sect. 42. II. *Those who have broken the King's Prison*, and by the same Reason those who have broken any other Prison, which the Law presumes that no Innocent Person will do.

Sect. 43. III. *Those who are appealed by Provers*, who regularly are not bailable, because the Approver, by confessing his own Guilt, induces a strong Presumption against those whom he accuses of the same Crime of which he owns himself guilty; yet by the express Words of the Statute, *If the Person appealed by an Approver be of good Reputation, he may be bailed, even in the Life of the Approver; and, unless he be a notorius Felon, he may be bailed after his Death.* And by Parity of Reason, he may also be bailed, if the Approver waive ^a his Appeal, or be vanquished, ^b unless there be some other Cause to detain him in Prison, as the appeal of some other Approver, &c. And if a Person disabled by Law to become an Approver, as one attainted, ^c &c. Appeal another of High Treason, it seems that the Person so appealed ought to be bound ^d to his Good Behaviour towards the King: But ^e if such Person had appealed him of Felony only, it seems that he ought to have been wholly discharged, if there had been no other Accusation against him.

Sect. 44. IV. *Thieves openly known and notorious*, who, as it seems, ought not to be bailed for any fresh Felony, whereof there is probable Evidence against them. But how far Persons accused of any Crime, shall be so far esteemed likely to have committed it, from their former scandalous Behaviour, as to be presumed guilty upon slight Evidence, seems in great measure to be left to the Discretion ^f of the Person who hath Power to bail them; who, upon Consideration of the Circumstances of the whole Mat-

^a 25 Ed. 3.
42. pl. 27.
H. P. C. 102.
Fitz. Main-
prife, 1.
2 Inst. 188.
^b 25 Ed. 3.
42. pl. 31.
Fitz. Main-
prife, 2.
^c H. P. C.
192.
^d Fitz. Coron.
387.
^e Bro Coron
81. 211.
17 Aff. pl. 4.
11 Aff. pl. 27.
^f H. P. C. 102.

ter, and the Probabilities of both Sides, if he find it reasonable strongly to presume them to be guilty, ought not to bail but commit them.

Señ. 45. V. Persons taken for open and manifest Offences, which seems to be understood of inferior Crimes of an enormous Nature, under the degree of Felony, as dangerous Riots, ^a favouring of High Treason, ^b scandalous Extortions, Conspiracies, ^c by Justices, &c. violent and exorbitant Rescous ^d of Persons arrested by Virtue of the King's Writs, Misprision ^e of Treason, *Præmunire*, ^f Maim, and such like heinous Offences, whereof no one who is notoriously Guilty, seems to be bailable by the Intent of this Statute; for notwithstanding in the later Part of it, it be said generally, That those who are accused of a Trespass, for which a Man shall not lose Life or Member, are repleviable; yet upon the Construction of the whole it seems reasonable to qualify the Generality of that Expression with this Limitation, that such Accusation ought to be either on a light Suspicion; or if it be on plain and unquestionable Evidence, that the Offence ought to be inconsiderable, for if all Persons whatsoever shall be repleviable for Offences not touching Life or Member, let their Guilt be never so notorious, the abovementioned general unlimited Clause, that those who are taken for open Offences shall be irrepleviable, must be restrained to Felonies and Offences touching Member, which seems contrary to the most obvious reasonable Purport of it, and also to common Practice, and that allowed general Rule, That Bail is only then proper where it stands indifferent whether the Party were Guilty or Innocent; *sed quære*. Yet it seems to be in great measure left to the Discretion of the Person who has Power to admit others to Bail, to judge in what Cases their Crime is so flagrant and enormous, that they ought not to have the Benefit of it.

Of those who are excluded by the Purview of the said Statute from the Benefit of a Replevin, in respect of the heinousness of the Crime alleged against them, there are four kinds.

1. *Those who are taken for Arson,*
2. *Those who are taken for false Money.*
3. *Those who are taken for falsifying the King's Seal.*
4. *Those who are taken for Treason, which touches the King himself.*

Señ. 46. And all such Persons being expressly declared to be irrepleviable, it seems clear, That they can in no Case be delivered out of Prison by the Sheriff, either by Virtue of the said Writ of *Homine replegiando*, or without it: Yet if a Person at large be accused before a Sheriff, on a light Suspicion of any of these, or of any other of the abovementioned Crimes, which always have been agreed to be irrepleviable, as of Homicide, &c. it seems by no means to follow either from the Words or Intention of the Statute, That the Sheriff is bound to keep him in prison 'till he be delivered by due Course of Law; but in such a Case it seems to be more reasonable, that he take Surety of him to appear in a proper Court to answer such Accusation; for it seems extremely harsh, and contrary to the first Principles of the Law, which favours nothing more than the Liberty of the Subject, to put an Officer under a Necessity of depriving a Man of his Liberty upon every Accusation of such a Crime, be it never so weakly grounded. And the Words of the Statute, declaring Persons to be irrepleviable for such Crimes, seem clearly applicable to such only as are under an actual Imprisonment, and not to those who are barely accused; for that none can be properly said

to

^a Dalt. cap. 114.
^b Bro. Mainprise 62.
^c 42 Aff. pl. 5.
^d Coke Bail & Mainprise, Ch. 5.
^e 27 Aff. pl. 12.
^f Keilw. 165. b.
 Fitz. Execution 47.
 13 H. 7. 24. b.
 Rastal 380. pl. 6.
^g H. P. C. 168.
 6 H. 7. 1. b.

Supr. Señ. 44.

to be replevied, but those who being actually imprisoned, are, upon finding Pledges, delivered out of Custody; from which it follows, That Persons not imprisoned are not within the Statute: Nay, the Law is so far from obliging a Sheriff to imprison a Man on every Accusation whatsoever of such Crimes, that it subjects him, as well as any other Person, to an Action of False Imprisonment, if he does it without a reasonable Ground; as hath been more fully shewn in the Chapters concerning Arrests. But if a Person be actually under an Arrest, either of a Magistrate or private Person, for any of the abovementioned Crimes, it seems clear from the express Words of the Statute, that the Sheriff cannot replevy him; and it seems, that at the Common Law he ought to have safely detained the Party so arrested 'till he could have obtained his legal Deliverance, and that the Person so arrested had no Remedy but by Indictment or Action of False Imprisonment against those who arrested and delivered him to the Sheriff, on a groundless Suspicion. But how far the Law may at this Day be altered in this Point, by the universal and allowed Practice of Sheriffs receiving no Person into their Custody, for any Crime, without the Warrant of some Magistrate, shall be more fully considered in the next Chapter.

1 Inst. 189.
40 Aff. 33.

Señ. 47. It is certain, That the Court of King's Bench still may, and always might, bail Persons in Custody for any of these Crimes, notwithstanding this Statute: yet in Discretion it seldom uses this Power but in very special Cases, as shall be shewn in the following Part of this Chapter.

And now I am to consider that Part of the Purview of the said Statute, which shews what Persons are repleviable; for the better Understanding whereof, I shall endeavour to explain.

1. The Branch relating to Persons accused as Principals.
2. That which concerns those who are charged as Accessories.

2 Inst. 190.

S. P. C. 74
Letter C.
H. P. C. 106.
Dalt. cap. 114.
29 Aff. pl.
44.
16 Ed. 4. f.
pl. 4.
Coke Bail &
Mainprise,
cap. 5.

Register 270.
b. 2. l.

Señ. 48. As to the first Branch, First, *Those who are indicted of Larceny by Inquests taken before Sheriffs, or Bailiffs, by their Office*, that is, before Sheriffs in their Torns, and Lords in their Leets are expressly declared to be repleviable; and according to some Opinions, those who are indicted or appealed in any other Court, of any other Felony, not expressly declared by the Statute to be irrepleviable, as Robbery or Burglary, &c. are repleviable by the Sheriff, *ex officio*, without Writ, within the Equity of this Clause: Yet the Authorities which are brought to warrant this Opinion, relate only to the Bailment of Persons by superior Courts, upon Indictments or Appeals of such Crimes before such Courts, and do by no means prove that such Persons are repleviable by the Sheriff *ex officio*, without Writ: And it is observable, that the Writs of Mainprise in the Register, for Persons indicted only of Trespas, before Justices of Peace, expressly declare, That such Persons cannot be delivered out of Prison without the King's special Command; from whence it seems to follow, That such Persons are not within the common Benefit of a Replevin by the Sheriff, without some such special Command. And if Persons indicted of Trespas only, before Justices of Peace, are not within the ordinary Remedy of a Replevin by the Sheriff without a Writ, surely it cannot be thought, that Persons indicted of higher Crimes, and before Superior Courts, can be any way intitled to it: However, inasmuch as the said Statute of *Westminster* 1. expressly allows Persons indicted of

Larceny

Larceny before the Sheriff the ordinary Remedy of a Replevin, and expressly excludes some other particular Felonies, and says nothing of others, it seems a reasonable Construction of the Statute, That the Sheriff might by Virtue of it, either with or without Writ, replevy those who were indicted before himself, or at a Court-Leet, of those other Felonies not expressly excepted, as well as those indicted of Larceny only. And the Statute leaving such a Latitude to the Sheriff in Relation to the Persons so indicted before himself, or at a Court-Leet, it hath been usual for Superior Courts, (who though they be not within the Statute, have yet always had a great Regard to the Rules prescribed by it) to use the same Liberty in Relation to such Crimes, and sometimes greater, for such special Reasons, and in such special Cases, as shall be set forth more at large in the following Part of this Chapter. Yet notwithstanding the Statute seems generally to allow the Benefit of a Replevin to all those who are indicted of Larceny, &c. without any Limitation; yet it hath been always construed to intend only that such Persons indicted of a Grand Larceny, as are of a good Reputation, shall be repleviable; and therefore if there be strong Presumptions of their Guilt, it seems that they ought not to be bailed; but this is in great Measure to be left to Discretion.

Sect. 49. Secondly, *Those who are imprisoned for a light Suspicion*, are likewise declared by the Statute to be repleviable; yet notwithstanding the Words are general, it hath always been taken to be the Intent of them, That the Persons so imprisoned ought to be of a good Reputation: Also it seems clear, That the Statute means only such Persons as are imprisoned for Crimes not expressly excepted by it from the Benefit of a Replevin; and therefore that this Branch cannot extend to Persons imprisoned for the Treasons mentioned in the Statute, Arson, or Homicide, but only to those taken for Larceny, Robbery, Burglary, and such like Felonies, &c.

Sect. 50. Thirdly, *Those who are imprisoned for Petit Larceny, which does not amount above the Value of 12 d.* are also declared by the Statute to be repleviable, *if they have not been accused of some other Larceny before*: And it seems to be agreed, That there is no Necessity that such Persons be of good Reputation; yet upon the Construction of the whole Statute, if such Persons be taken with the Manner, or confess the Fact, &c. or their Crime be otherwise open and manifest, it seems that they ought not to be bailed; but if there be any Colour of Probability for their Innocence, it seems most agreeable to the Intention of the Statute to bail them.

Sect. 51. Fourthly, *Persons accused of other Trespasts, for which a Man ought not to lose Life or Member*, are declared by the Statute to be repleviable; yet perhaps the Generality of this Clause is restrained by that other Clause which declares, That Persons taken for open and manifest Offences shall not be replevied, as hath been more fully shewn *Sect. 45.*

Sect. 52. Fifthly, The Appellee of an Approver is also expressly declared to be bailable after the Death of the Approver, unless he be a notorious Felon. But having already incidentally shewn *Sect. 43.* in what Cases such an Appellee is repleviable, I shall refer the Reader, for this Matter, to what is there said concerning it.

Sect. 53. Secondly, As to the Branch concerning those who are charged as Accessories, which is in the following Words, *Those who are accused of the Receipt of Thieves or Felons, or of Commandment, or of Force*

Register,
269.
2 Inst. 790.
H. P. C. 100.
16 Ed. 4. 5.
S. P. L. 74 c.

Register, 83.
b. 269.
F. N. B. 250.
C.
2 Inst. 190.

2 Inst. 190.
Register,
269. b.
F. N. B. 250.
C.
Vide supra
Sect. 45.

^a Register, 270.
^b S. P. C. 71.
^c F. N. B. 250.
^d E.
^e H. P. C. 100.
^f S. P. C. 71.
^g Bro. Main-
 prise, 6, 71,
 22, 54, 58.
^h H. P. C. 100.
ⁱ Coke Bail &
 Mainprise,
 Chap. 5.
^j Dyer 120.
^k Pl. 10.
^l 25 Ed. 3. 42.
^m Pl. 14.
ⁿ 40 Ed. 42.
^o Pl. 21.
^p 50 Ed. 3. 154.
^q 29 Aff. 41.
^r 40 Aff. 8.
^s S. P. C. 71.
^t H. P. C. 100.
^u Bro. Main-
 prise, 53, 64.
^v 40 Ed. 3. 42.
^w Pl. 22.
^x 43 Ed. 3. 17.
^y 40 Aff. 8.
^z Cont. 27 Ed.
^{aa} 3. 94 pl. 3.
^{ab} Fitz. Co-
 ron. 135.
^{ac} 21 Ed. 4.
^{ad} 71.
^{ae} Bro. Main-
 prise, 73.
^{af} Register,
 270.
^{ag} F. N. B.
 250. E.
^{ah} Dalt. chap.
 114.
^{ai} *Supra* S. & C.
 40.

or of Aid of Felony done, shall be replevisable, &c. it is observable, That notwithstanding the Statute mentions only those who are Accessory by receiving Felons, or by Commandment, Force or Aid, yet all those who are accessory to a Felony any ^a other Way, as by Persuasion or any other Procurement, or Abetment, have always been taken to be within the Equity of it; and most ^b of the Books relating to this Matter seem generally to hold, That all Accessories whether to Homicide or any other Felony, are bailable 'till the Principal be convicted, or attainted; and that they are bailable even after such Conviction or Attainder, upon their ^c pleading to the Indictment, and do not express any Limitation or Restriction, that they be of good Fame, or but slightly suspected, &c. And in the Case ^e of 25 Ed. 3. 44. pl. 14. wherein a Person appealed of Murder, as having holden the deceased in his Arms while the other killed him, was not let to Mainprise, the Reason given for it by the Reporter is, because the Defendant was in a Manner a Principal; for that otherwise being an Accessory only, he ought to have been let to Mainprise by the Intent of the Statute. Yet I find it made a *Quere* in the Year-Book of 21 ^f Ed. 4. Whether Accessories are to be let to Bail of Course? And perhaps it may be more reasonable to intend, in the above cited Case of 25 Ed. 3. That such Person was denied the Benefit of Mainprise by Reason of the Notoriety of his Guilt; for it seems clear, both from the ^g Register, ^h Fitzherbert, and ⁱ Dalton, That Accessories to Felonies are not to be bailed unless they be of good Reputation; and if the Want of a good Reputation, which is at most but a very slight Inducement to presume them guilty of a particular Crime, be a good Cause to exclude them from the Benefit of Mainprise, which is given them by the general Words of the Statute, it seems strange, the strong and unquestionable Evidence of their Guilt should not much more exclude them from it; especially considering, that it is an allowed Rule, ^k That Bail is only proper where it stands indifferent whether the Person accused were guilty or innocent. And since later Statutes have, in many Cases, excluded Accessories before the Fact from the Benefit of the Clergy, it seems absurd to say, That Persons notoriously guilty of being Accessory to the Crimes which exclude them from the Benefit of the Clergy, shall be admitted to Bail; whereas if they had been committed to Prison on the like Evidence of Guilt, as Principals, for Felonies within the Benefit of the Clergy, or even for inferior Offences of an enormous Nature, they could not have had the like Privilege: And therefore, since the general Words of the Statute concerning the Replevising of Accessories, are agreed to receive the above mentioned Limitations, That they ought to be of a good Reputation, and also to plead first to the Indictment, if the Principal be attainted; why should it not be reasonable to admit this farther Restriction, That their Guilt be not notorious? Which seems admitted to be implied in most of the other Clauses of the Statute, which yet are penned in as general Words as that relating to Accessories. But this Matter seems at this Day to be put beyond all Question, by 31 Car. 2. cap. 2. Par. 21. By which it is recited, *That many Times Persons charged with Petit Treason, or Felony, or as Accessories thereunto, are committed on Suspicion only, whereupon they are bailable or not, according as the Circumstances making out that Suspicion, are more or less weighty, &c.* And thereupon it is enacted, *That no Person so charged, shall be removed or bailed by Virtue of that Act, in other Manner than he might before.* From which it seems clearly to follow, That where there are strong Presumptions of Guilt, against a Person so charged, he neither was bailable before that Statute, nor is now bailable by Virtue of it.

As

As to the second Point, *viz.* In what Cases Bail is grantable by a Justice of Peace, I shall endeavour to shew,

1. How far it is grantable by Construction of the Statutes and Commission, which give Justices of Peace a Jurisdiction over certain Crimes, without saying any Thing concerning the Power of granting Bail.

2. How far it is grantable by the Statutes specially relating to the Power of granting Bail.

Sect. 54. As to the first Point it seems, That where-ever Justices of Peace have Jurisdiction of a Crime, they may bail the Person indicted before them of such Crime, upon such Circumstances for which other Courts may bail the Person so indicted before them; for that it seems to be a good general Rule, That so far as any Persons are Judges of any Crime, so far they have Power of bailing a Person indicted before them of such Crime: And upon this Ground it seems clear, That any two Justices of Peace, whereof one is of the *Quorum*, may, of common Right, bail Persons indicted before the Sessions of Justices of Peace, for that any two such Justices may hear and determine the Indictment. * Also it hath been holden, That any one Justice of Peace hath the like Power in Relation to Persons so indicted, because every such Justice being a Judge of the Court which is to determine the Offence, seems consequently to have a discretionary Power of Judging whether it be bailable, and of admitting the Party to Bail. And this seems to be implied by the Statute of 1 Ric. 3. cap. 3. which giving one Justice of Peace Power of bailing Persons arrested for Felony, *in like Form as if such Persons had been indicted at Sessions*, clearly supposes, that if such Persons had been indicted at Sessions, they might have been bailed by any one Justice: And if any one Justice of Peace had such Power of bailing the Persons so indicted at Sessions, before the Statutes specially relating to the Power of Justices of Peace in granting Bail, it seems, That he still has the same Power in Relation to Persons so indicted of any bailable Crime under the Degree of Felony, because the said Statutes seem not to restrain him in any such Case, under the Degree of Felony, from any Power which he lawfully might claim before. Also it seems to be agreed; That any one Justice of Peace might always in his Discretion either bail or imprison one who has given another a dangerous Wound, according as it shall appear from the whole Circumstances, that the Party is most likely to live or die, for that every such Justice being a principal Conservator of the Peace, the Offence at present being only an enormous Breach thereof, and no Felony, seems properly to come under his Consuance.

Sect. 55. As to the second Point, *viz.* How far Bail is grantable by Justices of Peace, by Virtue of the Statutes specially relating to their Power of granting Bail, it is recited by 1 R. 3. cap. 3. *That divers Persons had been daily arrested and imprisoned for Suspicion of Felony, sometime of Malice, and sometime of a light Suspicion, and so kept in Prison, without Bail or Mainprise, to their great Vexation and Trouble: And thereupon it is enacted, That every Justice of Peace in every Shire, City or Town, may, by his or their Discretion, let such Prisoners and Persons so arrested to Bail or Mainprise, in like Form as though the same Prisoners, or Persons, were indicted thereof of Record, before the same Justices at their Sessions.*

Sect. 56. But it is recited by 3 H. 7. cap. 3. *That by Colour of the said Statute of 1 R. 3. divers Persons which were not mainpernable, were oftentimes let to Bail and Mainprise by Justices of Peace, against the due Form of Law, whereby*

H. P. C. 105,
106
Coke Bail &
Mainprise,
Chap. 6.
Lamb. 347,
348.
*See the Books
above cited.*
Crompt. 197,
274, 275.
H. P. C. 105.

B. 1. Chap.
63. Sect. 19.

whereby many Felons had escaped, to the great Displeasure of the King, and Annoyance of his Liege People; and thereupon it is enacted, That the Justices of Peace in every Shire, City, and Town, or two of them at least, whereof one to be of the Quorum, have Authority and Power to let any such Prisoners, or Persons mainpernable by Law that have been imprisoned within their several Counties, City or Town, to Bail or Mainprise, unto their next general Sessions, or unto their next general Gaol-Delivery of the same Gaols, in every Shire, City, or Town, as well within Franchises as without, where any Gaols be, or hereafter shall be: And that the said Justices of Peace, or one of them, so taking any such Bail or Mainprise, do certify the same at the next general Sessions of the Peace, or the next general Gaol-Delivery of any such Gaol, in every such County, City or Town, next following after any such Bail or Mainprise so taken, on Pain to forfeit to the King for every Default thereupon recorded, 10 l. And that the aforesaid Act, giving Authority and Power in the Premises, to any Justice of the Peace by himself, be in that Behalf utterly void, and of none Effect.

Sect. 57. And it is recited by 1 & 2 Ph. & M. 12. That since the said Statute of 3 H. 7. one Justice of Peace, in the Name of himself, and one other of the Justices his Companion, not making the said Justice Party nor Privy unto the Case wherefore the Prisoner should be bailed, had oftentimes by sinister Labour and Means, set at large the greatest and notablest Offenders, such as be not replevisable by the Laws of this Realm; and yet the rather to hide their Affections in that Behalf, had signified the Cause of their Apprehension to be only for Suspicion of Felony, whereby the said Offenders had and did daily escape Punishment, &c. And thereupon it is enacted, That from the first Day of April then next coming, no Justice or Justices of Peace, shall let to Bail or Mainprise any such Person or Persons, who for any Offence or Offences, by them or any of them committed, be declared not to be replevised, or be forbidden to be replevised or bailed by the abovementioned Statute of Westminster 1.

Sect. 58. And it is further enacted, Par. 2. That any Person or Persons arrested for Manslaughter or Felony, or Suspicion of Manslaughter or Felony, being bailable by the Law, shall not be let to Bail or Mainprise by any Justices of Peace, if it be not in open Sessions, except it be by two Justices of Peace at the least, whereof one to be of the Quorum, and the same Justices to be present together at the Time of the said Bailment or Mainprise; which Bailment or Mainprise they shall certify in Writing subscribed or signed with their own Hands, at the next general Gaol-Delivery to be holden within the County where the said Person or Persons shall be arrested or suspected.

Sect. 59. And it is farther enacted, Par. 4. That the said Justices, or one of them, being of the Quorum, when any such Prisoner is brought before them for any Manslaughter or Felony, before any Bailment or Mainprise, shall take the Examination of the said Prisoner, and Information of them that bring him, of the Fact and Circumstances thereof, and the same, or as much thereof as shall be material to prove the Felony, shall put in Writing before they make the same Bailment; which said Examination, together with the said Bailment, the said Justices shall certify at the next general Gaol-Delivery, to be holden within the Limits of their Commission.

Sect. 60. And it is farther enacted, Par. 5. That the said Justices shall have Authority to bind all such by Recognisance or Obligation, as do declare any Thing material, to prove the said Offences or Felonies, to appear at the next general Gaol-Delivery to be holden within the County, City, or Town-Corporate where the Trial thereof shall be, and then and there to give Evidence against the Party at the Time of his Trial, and shall certify as well the same Evidence, as such Bond or Bonds in writing as he shall take, at or before the Time of his said Trial thereof to be had or made. And in Case any Justice of Peace of Quorum,

shall

shall offend in any thing, contrary to the true Intent and Meaning of this Act; the Justices of Gaol-Delivery, where such Offence shall happen to be committed, upon due Proof thereof, by Examination before them, shall for every such Offence, set such Fine on every of the same Justices, as the same Justices of Gaol-Delivery shall think meet, &c.

Se^t. 61. But it is provided, Par. 6. that Justices of Peace, and Coroners, within the City of London, and the County of Middlesex, and in other Cities, Boroughs, and Towns Corporate, shall within their several Jurisdictions, have Authority to let to bail Felons and Prisoners, in such Manner and Form as they had been before accustomed; and also shall take Examinations and Bonds, as is aforesaid, upon every Bailment by them made, and certify every such Bailment, Bond and Examination, at the next general Gaol-Delivery, &c.

From these Statutes the following Particulars appear most observable.

Se^t. 62. First, That it seems clearly to be imply'd by the above mentioned Statute of 1 R. 3. 3 which authorized any one Justice of Peace to bail a Person on a slight Suspicion of Felony, in like Manner as if such Person had been indicted at Sessions, That before that Statute, Justices of Peace could bail those only for Felony, who had been indicted of it before them. And by Parity of Reason it seems also to follow, That they had no Power to bail Persons for any other Crime before such Indictment, unless it were an Offence directly tending to the Breach of the Peace, the Bailing of Persons for which seems properly to come under their Consuance as Conservators of the Peace: And therefore it seems difficult to maintain the Power of one Justice of the Peace to bail a Person for any other Crime, unless it be by some Statute limited to the Consuance of one Justice, or the Party have been indicted for it at Sessions, because the Commission in giving a Justice a general Jurisdiction over any Crime, shall be construed so far only to give him a Power to bail a Person accused of it, as it makes him a Judge of it, which he cannot be till it come regularly before him by Indictment; and the Statutes abovementioned specially relating to the Power of Justices of Peace, in granting Bail, expressly require the Consuance of two Justices.

Se^t. 63. Secondly, That Justices of Peace have no Power to bail any Person not repleviable by the abovementioned Statute of *Westminster* 1. 15. from whence it seems to follow, That a Person under the actual Commitment or Arrest of any other Magistrate, or even of a private Person, for any Crime declared to be irrepleviable by that Statute, as Treason against the King's Person, Arson, &c. cannot be delivered from his Imprisonment by the Bailment of any Justice of Peace. Yet if a Person at large be only accused of any such Crime, on a slight Suspicion, before a Justice of Peace, it seems that the Justice ought not to commit him, but to take Surety of him to appear before a proper Court, as hath been more fully shewn in Relation to the Sheriff, Se^t. 46. And inasmuch as the abovementioned Statute of 1 & 2 Ph. & M. 13. expressly mentions the Bailing of Persons for Manslaughter, as well as for other Felonies, there can be no Doubt, but that Justices of Peace may, by Force thereof, safely bail any Person imprisoned on a slight Suspicion of a Fact, clearly appearing to be no higher an Offence than Manslaughter, and much more if it appear to amount to no more than Homicide by Misadventure, or in Self-defence. Yet it seems to be agreed, That such Justices must, at their Peril, take care that the Offence in Truth amounted not to Murder; and that they ought in no Case to bail any Person who manifestly appears to

Coke, Bail and Main-prise, cap 6.

Supra, Se^t. 54.

Vide Supra, Section, 33, 34.

1 Rol. Rep. 268
Dalt cap. 114.
H. P. C. 99.

Lamb. 346, 347. have been guilty of any of the Homicides abovementioned, either by his own Confession, or the Notoriety of the Fact, not only because the abovementioned Statute of *Westminster* 1. 15. which is the Pattern prescribed by 1 & 2 Ph & M. for the Direction of Justices of Peace in Relation to bail, expressly excludes all Persons from the Benefit of it which are guilty of open and manifest Offences; but also because the Statute of *Glocester*, cap. 9. is express, That all Persons who are guilty of Homicide, by Misadventure or in Self-defence, shall be kept in Prison 'till the next coming of the Justices Itinerant, or of Gaol-Delivery.

Supra Sect. 44, 45.
2 Inst. 314,
315.

Sect. 64. Thirdly, That the chief Import of these Statutes is to shew in what Manner Persons are to be bailed by Justices of Peace, and not to declare what Persons areailable by them; in relation to which Matter, the old Rules of the Statute of *Westminster* 1. are generally still to be followed, which extending only to criminal Offences punishable in the ordinary way by Indictment before the Sheriff, &c. give no Power to bail Persons taken on Process in Civil Actions, or for Contempts to Superior Courts, as by Process of Rebellion out of Chancery. And therefore by a reasonable Construction of all these Statutes, Justices of Peace have no Power in any such Cases to admit any Person to Bail.

Dalt cap. 114.
Crompt. 152.
H. P. C. 105.

Sect. 65. As to the third Point, viz. Where Bail is grantable by the Justices of Gaol-Delivery, it seems to be clearly settled ^a at this Day, That such Justices may bail any Person convicted before them of Homicide by Misadventure, or in Self-defence, the better to enable him to purchase his Pardon: And if a Person convicted of Manslaughter before such Justices, purchase his Pardon, it seems, that they may ^b bail him, even after their Sessions is determined, 'till the next Sessions of Gaol-Delivery, that he may come in then and plead his Pardon, for that the Power of such Justices seems ^c to continue for such Purposes after their Sessions. Also ^d if a Man be convicted of Manslaughter before such Justices, against plain Evidence, it is said that they may bail him till the next Sessions of Gaol-Delivery, in order to purchase his Pardon in the mean Time. But it seems, ^e That Justices of Peace have no Power to bail a Man in any of these Cases, because they are tied up for the most Part to the Rules prescribed by the abovementioned Statute of *Westminster* 1. But this Statute not ^f extending to Justices of Gaol-Delivery, seems to leave them a discretionary Power in those Cases, wherein it restrains the Sheriff from admitting Persons to Bail. And therefore if a Defendant in an Appeal of Death, plead an Excommunication in Disability of the Plaintiff, it seems to be holden by *Staundford*, ^g That such Justices may bail the Defendant from Day to Day, till the Plaintiff shall be absolved, for that otherwise the Defendant might lie in Prison for ever, without any Opportunity of coming to his Trial. But it is observable, That the Books ^h which are cited for the Maintenance of this Opinion, speak only of an Appeal of Robbery: Yet if Justices of Gaol-Delivery have such Power of Bailing Persons in the Case of Death, on the Circumstances abovementioned, as it seems agreed in the Cases above-cited that they have, I do not find any Reason why they may not as well upon other such like Circumstances, bail Persons indicted or appealed before them of any other Crime, in such Manner as the Court of King's Bench may do, as shall be more fully shewn under the next Point.

^a *Crompt.* 154. a.
H. P. C. 101,
104, 105.
Fitz. Coron. 361.
Dalt cap. 114.
F. N. B. 246 c.
S. P. C. 15.
C. 16. D.
Con. 25 Ed.
3. 42.
pl. 27.
S. P. C. 74. D.
Fitz. Coron. 354.
Mainprife, 1.
^b *Crompt.* 153. b.
Bro. Mainprife, 94.
H. P. C. 101.
^c *Vide Supra.*
cap. 6. *Sect.* 7.
^d *Crompt.* 154. a.
^e *H. P. C.* 104, 105.
Vide Supra.
Sect. 63. *Cont.*
Dalt cap. 114.
^f 2 *Inst.* 185.
186.
^g *S. P. C.* 72. f.
^h *Fitz. Mainprife*, 6.
3 *Ass. pl.* 12.
Salk. 61.
seems contrary.

As to the Fourth Point, viz. Where Bail is grantable by the Courts of *Westminster-Hall*, I shall endeavour to shew.

1. Where it is grantable by the Court of King's Bench.
2. Where by the other Courts of *Westminster-Hall*.

As to the first of these Points I shall consider,

1. Where Bail is grantable by the Court of King's Bench, to a Person imprisoned by the King's special Command, or by the Order of his Privy Council.

2. Where to a Person committed by either House of Parliament.
3. Where to one committed by the Court of Chancery.
4. Where to one committed by an Inferior Court of Record.
5. Where to one expressly excluded by the abovementioned Statute of *Westminster* 1. Chap. 15. from the common Benefit of a Replevin by the Sheriff.

Sett. 66. As to the first of these Particulars, *viz.* Where Bail is grantable by the Court of King's Bench to a Person imprisoned by the King's special Command, or by the Order of the Privy Council; I do not find but that where-ever ^a a Commitment by the Privy Council hath specially expressed the Crime for which the Party hath been committed, this Court has always admitted him to Bail, on the like Circumstances on which, in Discretion, it will grant Bail on other Commitments: ^b And where-ever it has appeared, that Persons have been imprisoned by Colour of an usurped Authority, pretended to be derived from any Patent whatsoever, contrary to Law, it seems that the said Court hath always discharged the Persons so imprisoned, without Bail. But there have been formerly many Opinions ^c That Persons committed by the special Command of the King, or of his Privy Council, without expressing any other Cause of the Commitment, were not bailable by any Court whatsoever, without some Intimation of the King's Consent to such Bailment, by Letter from the Privy Council, or otherwise. And a Distinction ^d was taken by some between a Commitment by one of the Privy Council, and a Commitment by the whole Body; and that the former ought indeed to set forth some other Cause of the Commitment besides the Command of the Person who made it; but that the later needed not any.

Sett. 67. But this Matter came afterwards to be very solemnly debated in the famous Case ^e of Sir *John Corbet* and others, who being imprisoned by a Warrant from the Privy Council, about the third Year of the Reign of King *Charles* the first, moved the Court of King's Bench to admit them to Bail upon their *Habeas Corpus*; whereupon it was returned, that they were detained in the Prison of the *Fleet* by the special Command of the King, signified to the Warden by a Warrant of some of the Members of the Privy Council, in which Warrant no other Cause of the Imprisonment was contained but such Special Command: And it was strongly urged on the Behalf of the Prisoners, That such Imprisonment is against the Statute of *Magna Charta*, cap. 29. which provides, *That no Freeman shall be taken or imprisoned, and that the King will not pass upon him, nor condemn him, but by the Judgment of his Peers, or the Law of the Land*; and also against many other Statutes ^f made in Affirmance of *Magna Charta*, by which it is ordained, *That no Man shall be taken by Petition, or Suggestion, made to the King or to his Council, unless it be by Indictment or Presentment, or by Process by Original Writ; and that no Man shall be imprisoned, &c. without being brought to answer by due Process of Law; nor be put to answer without Presentment before Justices, or Matter of Record, or by due Process, and Writ Original.*

^a 5 Mod. 78.

^b 1 Syd. 143.

^c 1. And. 297.

^d 298.

^e 1 Leon. 70.

^f Palm. 559.

^g 1 Leon. 70.

^h 1. And. 297.

ⁱ 33 H. 6. 28. b.

^j 1. And. 298.

^k 1 Rol. Rep.

^l 134. 192.

^m pl. 31, 32,

ⁿ 219.

^o pl. 22.

^p Con. Mo. 839

^q 1 And. 158.

^r See the Ar-

^s guments on

^t the *Habeas*

^u *Corpus* con-

^v cerning

^w Loans, 81,

^x 82, &c.

^y 1 Leon. 70.

^z 71.

^{aa} See the Ar-

^{ab} guments on

^{ac} the *Habeas*

^{ad} *Corpus* con-

^{ae} cerning

^{af} Loans, &

^{ag} Rushworth's

^{ah} Collections,

^{ai} 1 Part. Fol.

^{aj} 458, &c.

^{ak} 25 Ed. 3. 4.

^{al} 28 Ed. 3. 3.

^{am} 42 Ed. 3. 3.

Original. And it was argued, That the Liberty of the Subject would be precarious, and lie at the King's Mercy, if Persons who happen to incur his Displeasure, for what perhaps the Law esteems no Crime, should by Means of such a Commitment be liable to be for ever imprisoned, without any Possibility of Redress; and that it seems inconsistent with natural Justice to expose a Man to so severe a Punishment for a supposed Crime alledged against him, without giving him an Opportunity of clearing himself by a lawful Trial. And it was farther urged, That, according to the Opinion of Sir *John Markham*, in the Time of King *Edward* the Fourth, the King could not so much as arrest a Man upon Suspicion of Treason or Felony, as any of his Subjects may; for that if the King should do Wrong, the Party could have no Action against him. Also it was insisted, That the Preamble of the Statute of *Westminster* 1. 15. which declares, That Persons imprisoned by the King's Command have always been taken to be irrepleviable, must be intended only of a Replevin by the common Writ *de Homine replegiando*, or by the Sheriff, *ex officio*, without Writ, for that it speaks only of a Replevin by Sheriffs and others; and therefore shall not be taken to extend to superior Courts: And it was never thought, that the Court of King's Bench was restrained by it from Bailing Persons imprisoned for Homicide; and yet all such are equally declared by the Statute to be irrepleviable: Also many Precedents were alledged, whereby it appeared, That Persons committed by the King's special Command had been discharged upon Writs of *Habeas Corpus*.

1 H. 7. 4. b.

Vide Supra
Sect. 36.

Vide Supra
Sect. 66.
^a S. P. C. 72,
73.
F. N. B. 66.
E.

Russworth's
Collections,
Part 1. fol.
510.

Sect. 67. But on the other Side it was argued, That such Commitments could not reasonably be intended to be against the Purview of the Statutes above-cited, inasmuch as the said Statute of *Westminster* 1. 15. which was made in the very next Reign after that in which the Statute of *Magna Charta* was made, it was declared to be a settled and undoubted Point, That Persons committed by the Command of the King (which, as it seems to be agreed, is to be understood of the King's special, absolute, and extrajudicial Command) are not repleviable: and it cannot be imagined that so high a Regard should be paid to such a Commitment, if it were thought to be illegal, and contrary to *Magna Charta*. And it was insisted, That Commitments of this Kind have often been allowed by the Courts ^a of Justice and are mentioned by Authors ^b of the best Credit since the above-cited Statutes, without any the least Objection to their Legality, and as depriving the Party imprisoned by them from the common Benefit of the Writ of Replevin. And it was also strongly urged, That there are often secret Causes not fit to be divulged, which may make it necessary for the Safety of the State, in some particular Circumstances, to restrain some Persons from their Liberty for a certain Time, and that the King, who is entirely entrusted with the Management of State-Affairs, shall be presumed always to act for the Publick Good; and that it is immodest for any of his Courts to question the Justice of his Proceedings of this Kind, which the Law seems wholly to have left to his Wisdom, or to suffer a Suggestion that he abuses his Prerogative to cover Oppression; and that the Subject is in no Danger of perpetual Imprisonment on this Account, for that the Court of King's Bench hath always used a discretionary Power over such Commitments, as well as all others, and therefore upon special Circumstances of Hardship, may admit Persons under such Commitments to Bail; but that where there was nothing extraordinary in the Case, it had been the general Course of the Court not to do it without a special Order from the Council for it, as appeared

appeared from the Examination of most of the Precedents relating to this Matter. And therefore in the Case abovementioned the Court of King's Bench was unanimous in Opinion, That Sir John Corbet, and the other Gentlemen so committed by the King's Special Command, as is abovementioned, had no Right, *primo facie*, to demand the Benefit of Bail, without the Consent of the Council, and therefore remanded them.

1 Rol. Rep.
219
See the Arguments
abovementioned,
pag. 81.

Sett. 68. But this Matter being afterwards considered in Parliament, and it being the general Opinion, That the chief Reason why those Gentlemen incurred the King's Displeasure was their Refusal to pay the Loans, which, as they insisted, were demanded of them without sufficient Authority; and it being evident, That if there were no certain legal Remedy for the Liberty of the Subject against such a Strain of the Prerogative, no Man could be safe in Maintaining his Property, either in Parliament, or out of it, against a disputed Demand from the Crown, but would be liable to a discretionary Imprisonment, and that under Colour of Law, without any certain Redress from the Law; it was thought necessary on this Occasion to draw up the famous Petition of Right, which was afterwards assented to by the King, wherein, among other Things, the Lords and Commons complain to the King, *That against the Tenor of the above * cited Statutes, divers Subjects had then of late been imprisoned, without any Cause shewed; and when for their Deliverance they had been brought before Justices by Writs of Habeas Corpus, there to undergo and receive as the Court should order; and their Keepers commanded to certify the Causes of their Detainer, no Cause had been certified, but that they were detained by his Majesty's special Command signified by the Lords of his Privy Council, and yet were returned back to several Prisons, without being charged with any Thing to which they might make Answer according to the Law: And thereupon the said Lords and Commons, among other Things, humbly pray, That no Freeman, in any such Manner as is before mentioned, be imprisoned, or detained, &c.*

Rushworth's
Collections
1 Part, 428,
473, 499, &c.

Rushworth's
Collections
Part. 1. Fol.
613.
* *Supra*
Section 66.

Sett. 69. And it seems to have been generally agreed, since the Time of this Petition, That where-ever any Commitment by the Privy Council hath not expressed, with some convenient Certainty, the Crime alleged against the Party, he ought to be bailed upon his *Habeas Corpus*.

Vide Cro.
Car. 507,
579, 593

Sett. 70. And for the greater Security of the Liberty of the Subject, against Commitments by the Command of the King, or of his Privy Council, it is farther provided and enacted, by 16 Car. 1. cap. 10. Par. 8. *That if any Person shall be committed, restrained of his Liberty, or suffer Imprisonment by the Command or Warrant of the King's Majesty, in his own Person, or by the Command or Warrant of the Council-Board, or of any of the Lords or others of his Majesty's Privy Council; That in every such Case, every such Person upon Demand or Motion to the Judges of the King's Bench or Common Pleas, in open Court, shall without Delay, upon any Pretence whatsoever, for the ordinary Fees usually paid for the same, have forthwith granted unto him a Writ of Habeas Corpus, to be directed generally unto all and every Sheriff, Gaoler, Minister, Officer, or other Person in whose Custody the Party committed or restrained shall be, and such Sheriff, &c. shall, at the Return of the said Writ, and according to the Command thereof, on due and convenient Notice thereof given unto him, at the Charge of the Party who requires or procures such Writ, and on Security by his own Bond given, to pay the Charges of carrying back the Prisoner, if he shall be remanded by the Court, &c. which Charges shall be ordered by the Court, bring or cause to be brought the Body of the Party before the Judges of the Court, from whence the same Writ shall issue, in open Court, and shall then likewise certify the true Cause of such his Detainer or Imprisonment, and thereupon*

* See 1 Syd.
28.
1 Keb. 305.
pl. 15, 17.

the Court, within three Court-Days after such Return made and delivered ^a in open Court, shall proceed to examine and determine whether the Cause of such Commitment, appearing upon the said Return, be just and legal or not, and shall thereupon do what to Justice shall appertain, either by delivering, bailing, or remanding the Prisoner: And if any Thing shall be otherwise wilfully done, or omitted to be done by any Judge, Justice, Officer or other Person aforementioned, contrary to the true Meaning hereof, That then such Person so offending shall forfeit to the Party grieved, his treble Damages, &c.

Sect. 71. But it is provided Par. 9. That the above-recited Clause shall extend only to the Warrants and Directions of the Council-Board, and to the Commitments, Restraints and Imprisonments of any Person or Persons, made, commanded or awarded, by the King's Majesty, his Heirs or Successors, in their own Person, or by the Lords and others of the Privy Council, and every one of them.

Sect. 72. As to the second Particular, viz. Where Bail is grantable by the Court of King's Bench, to a Person imprisoned by either House of Parliament, There can be no Doubt but that the highest Regard is to be paid to all the Proceedings of either of those Houses, and that where-ever the Contrary does not plainly and expressly appear, it shall be presumed that they act within their Jurisdiction, and agreeably to the Usages of Parliament, and the Rules of Law and Justice: And therefore, where-ever it stands indifferent upon the Return of a *Habeas Corpus*, whether a Commitment by either of those Houses were strictly legal or not, and the Parliament be still sitting, I can find no Precedent that the Prisoner hath been bailed by the Court of King's Bench. And it cannot but be expected, that those Houses would be apt to resent an Attempt of this Kind, which might seem to carry with it an implicit Reflection on their Honour, as unjustly depriving a Subject of his Liberty, and putting him under a Necessity of demanding Justice from another Court, by unreasonably refusing to restore him to it; which surely shall never be intended, where their Proceedings are capable of a more favourable Construction. And therefore in the Lord *Shaftsbury's* Case, who, upon his *Habeas Corpus* in the King's Bench, was returned to have been committed by the House of Lords for his high Contempt committed against that House, the Court would not take Notice of any Exceptions against the Form of the Commitment, as that it was too general, and did not express the Nature of the Contempt, or in what Place it was committed, &c. for that it shall be presumed, That it was such for which the Lords might lawfully make such an Order, and no other Court shall prescribe to them in what Form they ought to make it. But if it be demanded, in Case a Subject should be committed by either of those Houses, for a Matter manifestly out of their Jurisdiction, what Remedy can he have? I answer, That it cannot well be imagined that the Law, which favours nothing more than the Liberty of the Subject, should give us a Remedy against Commitments by the King himself, appearing to be illegal, and yet give us no Manner of Redress against a Commitment by our Fellow Subjects, equally appearing to be unwarranted. But as this is a Case, which, I am persuaded, will never happen, it seems needless over nicely to examine it.

1 Mod. 144.
145.

Sect. 73. However it seems agreed, That a Person committed for a Contempt, by the Order of either House of Parliament, may be discharged by the Court of King's Bench after a Dissolution, or Prorogation of the Parliament, whether he were committed during the Sessions, or afterwards; for that all the Orders of Parliament are determined by a

Dissolution

Diffolution, or Prorogation; and all Matters before either House, must be commenced a-new at the next Parliament, except only in the Case of a Writ of Error: And if the Subject should be deprived of his Liberty 'till the next Parliament, which perhaps may not meet again in many Years, no one could say when his Imprisonment would end.

Sect. 74. But it is holden in *Shower's Reports*, That a Lord committed by the House of Lords, on an Impeachment of Treason, and afterwards pardoned, cannot be discharged by the Court of King's Bench, because the Impeachment being in a Superior Court, the Pardon must be pleaded there; and the Commitment being by the Lords, the King's Bench cannot take Cognisance of it. Yet it seems to have been taken for granted in the Lord *Stafford's Case*, That the Court of King's Bench may, in their Discretion, bail a Lord upon an Impeachment of High Treason, which in that Case they refused to do, not as a Matter out of their Power, but as a Thing which they were not bound to do, and improper on Consideration of the whole Circumstance. And though Reasons above cited from *Shower's Reports*, seem proper to prove, That the Court of King's Bench cannot discharge a Prisoner from any Impeachment in Parliament whatsoever; yet they seem by no Means to prove, that they cannot bail him. But it is observable, That it doth not clearly appear, from either of the abovementioned Reports, whether any Parliament were sitting at the Time of the Motions for such Discharge and Bailment, or not; but it is certainly most likely to prevail in such a Motion, when no Parliament is sitting, nor likely soon to sit, and after the Party hath been long in Prison; because, in such a Case, if he should not be bailed, he might be perpetually imprisoned for a Crime, without any Opportunity of making his Defence.

Sect. 75. As to the third Particular, *viz.* Where Bail is grantable by the King's Bench, to a Person committed by the Court of Chancery, little is said in the Books, except in the Reign of King *James the first*, at the Time when Sir *Edward Coke* was Chief Justice, when this Matter was very much litigated, and occasion'd good Heats between the two Courts, and several Persons committed to the *Fleet* by the Chancellor, were bailed by the Court of King's Bench, upon Exceptions to the Generality of the Form of the Commitments, as ^a not shewing the Time of the Commitment, or setting ^b forth only the Command of the Lord Chancellor as the Ground of the Imprisonment, without mentioning any Crime at all, or mentioning the Crime in ^c general Terms, as for a Contempt to the Court of Chancery, without shewing what the Contempt was, or at what Time committed: And one ^d *Glanvil*, who was generally committed by the Command of the Lord Chancellor, without setting forth any Cause of such Command, seems to have been bailed upon Examination of the Merits of the Decree, for disobeying whereof he was in Truth committed; whereby it appeared that the Decree related to a Matter before adjudged at the Common Law, which was thought contrary to the Purport of the ^e Statutes of 27 *Ed. 3.* 1. & 4 *H. 4.* 23. But this Proceeding being resentent by the Lord Chancellor, the said *Glanvil* was afterwards recommitted by him for the same Matter, and yet was afterwards, on another *Habeas Corpus*, bailed the second Time by the Court of King's Bench: But I have not met with any Precedent of this Kind of late Years; and how far the long Disuse of such like Proceedings may have lessened the Authority of the Cases above mentioned, may deserve to be considered. However, it cannot but be expected,

That

1 Keb. 871,
887, 889.
1 Syd. 245.
1 Lev. 165.
2 Mod. 155,
157.

Shower 100

Raymond,
381.

a 1 Rol. Rep.
192. pl. 32.
218. pl. 19.
b Moor 839.
1 Rol. Rep.
219. pl. 21.
c 1 Rol. Rep.
192. pl. 31,
32. 218. pl.
19, 20. 219.
pl. 23.
d 1 Rol. Rep.
111, 219.
Moor, 838.
2 Bulst. 307.
e Gro. Jac. 343.
like Case
3 Bulst. 115.
1 Rol. Rep.
277.
1 Vint. Rep.
Rep. 277.
3 Bulst. 115.
Dalison 84.
3 Leon. 18.

Vaughan,
130, 140.
seems contra-
ry.

Vide Book I.
Ch. 19. Sect.
17.

1 Mod. 155.
Moor, 840.
pl. 1133.

Vaughan,
157.
Vide 6 Mod.
73. &c.

See Bushell's
Case in
Vaughan's
Reports.

2 Bulst. 139,
140.

* See the prece-
dent Section,
and Cro. Jac
219. &
Vaughan
139, 140.

^b Cro. Car.
579.

^c 1 Sid. 144,
286, 320.

That the Superior Courts will pay the highest Regard to one another's Proceedings, and be ready to presume, That they are agreeable to Law, unless the Contrary appear, or the Case be very particular and extraordinary, which may perhaps reasonably induce them, in some Circumstances, to make Exceptions from those general Rules, which in common Cases usually govern their Discretion. But what Case in particular may be said to be of so extraordinary a Nature, it would be needless and presumptuous for me to endeavour to examine. But as to the Case abovementioned, which was formerly so much litigated, concerning the Chancery's giving Relief against a Judgment of Law, since it seems to be settled at this Day, That the Chancery may, in some Cases, give Relief against the unequivocal Use of such a Judgment, especially as to a Point not relievable by Law; whenever it stands indifferent, whether the Matter examined by Chancery, after a Judgment at Law, be of such a Nature as is proper for Relief in Chancery, or not; it is not probable, That any other Court of *Westminster-Hall* will easily presume that it is not, when the Chancellor, who is the proper Judge, hath determined that it is: And agreeably hereto it hath been adjudged, That a Commitment from Chancery, for Disobedience to a Decree, is good, without shewing what the Decree was.

Sect. 76. As to the fourth Particular, *viz.* Where Bail is grantable by the Court of King's Bench to one committed by an inferior Court of Record; it seems, That this Court, having the Supreme Controul of all inferior Courts, may, in Discretion, on Consideration of the whole Circumstances of any Cases whatsoever, bail any Person who shall appear to have been unjustly or hardly deprived of his Liberty by any inferior Court. And therefore, wherever it shall clearly and expressly appear, that a Person hath been committed by any such Court, for a Matter which either is in Truth no Crime at all, or, if it be a Crime, is not within the Jurisdiction of such Court, there can be no Doubt but that it is a proper Motion to the King's Bench to bail him. But in what other Cases in particular one may hope for the like Success in a Motion of this Kind, it seems difficult to determine; for that every such Case depends upon its particular Circumstances, which have great Weight with the Court in its Determinations of this Kind, in which it is in great Measure left to its Discretion. And therefore, tho' perhaps it may bail a Man on a Commitment by a Mayor of a Town, or a Justice of Peace, or other inferior Magistrate, for a Contempt, without shewing the particular Nature of it; yet it cannot be expected, that it will with like Readiness bail a Man on such a general Commitment by a Court of a higher ^a Dignity, as a Court of *Oyer and Terminer*, or any other Court of *Westminster-Hall*; to the Honour of whose Proceedings the greatest Regard is always to be given; and on this Ground chiefly, as I suppose, where a Person on a *Habeas Corpus*, was returned to have been committed by an Order of the Exchequer, for not paying a Fine of 50 *l.* by the Ecclesiastical Commissioners imposed upon him, the Court of King's Bench ^b refused to bail him, though it was not shewn wherefore the said Fine was imposed. And as a great Regard is always paid to the Dignity of the Court by which the Party is committed; so is it likewise to the Notoriety of the Offence; and therefore, where a Person convicted of buying and selling old Money, before Justices of *Oyer and Terminer*, was committed in Execution for the Fine, by an Order of the Court, not strictly formal, yet the Court of King's Bench refused ^c to bail him, for this Reason chiefly, because he was in Execution, and his Commitment

ment was defective only in Point of Form. Also where Persons taken in Execution for their Fines to the King, set on them by a Sessions of Justices of Peace, have not only brought their *Habeas Corpus*, but also their Writ of Error in the King's Bench, and assigned Errors, yet the Court has refused to bail them. But I take it for granted, in those Cases which are but briefly reported, That it appeared upon the whole Record, That such Fines were legally imposed. Also it seems, That the said Court has sometimes been induced to deny Persons committed by other Courts, by Warrants not strictly formal, the Benefit of Bail, for the Enormity, dangerous Tendency, or Obstinacy ^a of their Offence, which if it had been attended with less aggravating Circumstances might not have excluded them from it. Also the said Court, in determining whether it be proper to bail a Man committed by another Court, usually considers all the other Circumstances of the Case, as the Length ^b and Hardship ^c of the Imprisonment, and such like, in order to give such a Determination upon the whole, as may be most agreeable to the Honour and Prerogative of the Crown, and the Liberty and Safety of the Subject.

Sett. 77. But it seems to be agreed, That no one can in any Case controvert the Truth of the Return to a *Habeas Corpus*, or plead or suggest any Matter repugnant to it: Yet it hath been holden, That a Man may confess and avoid such a Return, by admitting the Truth of the Matters contained in it, and suggesting others not repugnant, which take off the Effect of them. And upon this Ground, where one *Swallow*, a Citizen of *London*, was committed for refusing to accept the Office of an Alderman of the said City to which he had been elected, and the Custom of the City justifying a Commitment for such a Refusal, and the Election and Refusal were set forth in the Return to the *Habeas Corpus*; he filed a Suggestion in the Crown-Office, That he was an Officer of the King's Mint, and that all such Officers were exempted from all City-Offices, both by Prescription and by the King's Charter; and thereupon the Patent of the Grant of his Office, and also the Patent of the Exemption being inrolled in the Court, he was discharged.

Sett. 78. Also the Court will sometimes examine by Affidavit, the Circumstances of a Fact on which a Prisoner brought before them by an *Habeas Corpus* hath been indicted, in order to inform themselves, on Examination of the whole Matter, whether it be reasonable to bail him or not. And agreeably hereto, where one *Jackson*, who had been indicted of Piracy before the Sessions of Admiralty, on a malicious Prosecution, brought his *Habeas Corpus* in the said Court in order to be bailed; the Court examined the whole Circumstances of the Fact by Affidavits, upon which it appeared, That the Prosecutor himself, if any one, was Guilty, and carry'd on the present Prosecution to skreen himself; and thereupon the Court, in Consideration of the Unreasonableness of the Prosecution, and the Uncertainty of the Time when another Sessions of Admiralty might be holden, admitted the said *Jackson* to Bail, and committed the Prosecutor till he should find Bail to answer the Facts contained in the Affidavits.

Sett. 79. As to the fifth Particular, *viz.* Where Bail is grantable by the Court of King's Bench, to one excluded by the abovementioned Statute of *Westminster* 1. chap. 15. from the common Benefit of a Replevin by the Sheriff; It cannot be doubted, but that notwithstanding neither ^d the Judges of this, nor of any other Superior Court of Justice, are strictly

Salk. 348.
 5 Mod. 19.
 20 8c.
 Vide March,
 52. 53.
 1 Sid. 288.
 289.
 1 Sid. 320.
 pl. 10. 144.
 1 Bull.
 from 48 to
 54.
 1 Rol. Rep.
 220. pl. 14.
 337. pl. 52.
 411. pl. 54.
 1 Rol. Rep.
 228. pl. 19.
 337. pl. 51.
 2 Bull. 140.
 Latch. 12.

1 Sid. 287.
 288.

5 Mod. 323.
 454. 455.
 2 Jo. 222.

Trin. 4.
 Georg.

4 2 Inst. 185,
 186. 189.
 H. P. C. 104.
 Salk. 61.

^a 3 Bulst.
¹ 113.
¹ Rol. Rep.
¹ 168.
Supra. Sect.
³³.
¹ Latch. 12.
¹ S. P. C. 74.
⁷⁵.
⁵ Mod. 454.
⁴⁵⁵.
⁶ Kelyng, 90.
^c Dyer. 79.
^{pl. 42}.
¹ Bulst. 87.
⁸⁸.
^d 1 Rol. Rep.
²⁶⁸.
³ Bulst. 113.
¹¹⁴.
Vide Supra.
^{Sect. 33}.
^e 5 H. 7. 16.
^{pl. 7}.
³ Inst. 188.
^{H. P. C. 101}.
¹ S. P. C. 74.
^{Letter A}.
^f 19 H. 6. 2.
^a.
¹ S. P. C. 74.
^{Letter A}.
² Inst. 188.
¹ Sid. 316.
⁸ Crompton's
^{Justice, 154}.
^{pl. 22}.
^b 5 Mod.
^{554, 445}.
¹ Sid. 78.
¹ Bulst. 85.
^{Palm. 558}.
⁵⁵⁹.
¹ Keb. 305.
³⁰⁶.
⁴⁸ Ed. 3.
^{22. a}.
¹ 3 Aff. pl.
¹².
¹³ Ed. 4. 8.
^{pl. 3}.
^{Bro. Main-}
^{prife, 48 73}.
¹ S. P. C. 72.
^{Letter B}.
¹ Latch 12.
^{Cro. Jac. 356}.
^{Co. Lic. 289}.
^a.
¹ 2 Inst. 53.
^{55, 615}.
⁴ Inst. 290.
^{Vaughan,}
^{154, 155, 156,}
¹⁵⁷.
³ And. 297.
^{Dalison, 81}.
³ Leon. 18.
¹ Jo. 13, 14.
¹⁷.
² Mod. 198.
³⁰⁶.

within the Purview of that Statute; yet ^a they will always, in their Discretion, pay a due Regard to the Rules prescribed by it, and not admit a Person to Bail who is expressly declared by it to be irreplevisable, without some particular Circumstance in his Favour: And therefore it seems difficult to find an Instance where Persons attainted ^b of Felony, or but convicted thereof by Verdict general or ^c special, or notoriously ^d guilty of Treason or Manslaughter, &c. by their own Confession or otherwise, have been admitted to the Benefit of Bail, without some special Motive to induce the Court to grant it: As where ^e a Person taken by a *Capias utlagatum*, on an Appeal of Felony by the Name of J. S. Gentleman, pleads that his Name is J. S. Yeoman, and not Gentleman, and so he is not the same Person who was outlawed, in which Case the Court in Discretion may bail him; for until the Plea be determined, it appears not whether he were the Person intended, or not. Or where ^f a Person outlawed alleges an Error in the Record, in which Case also the Court, *ex gratia*, may bail him, especially if the Error be apparent. Or where a Man is convicted ^g of Felony, upon Evidence by which it plainly appears to the Court that he is not guilty of it; in which Case even the Justices of Gaol-Delivery may bail him. Or where ^h it appears to the Court that the Prosecutor of an Indictment, or the Plaintiff in an Appeal, hath unreasonably delayed his Prosecution; as where two *Nihil* are returned upon two Writs of *Scire facias*, awarded against a Plaintiff in an Appeal, removed by *Certiorari* into the King's Bench, and the Prisoner hath lain a long Time under Confinement. Or where ⁱ the Defendant in an Appeal hath pleaded an Excommunication in Disability of the Plaintiff, in which Case it is apparent, that the Plaintiff cannot proceed at present; and if the Defendant should be kept in Prison till the Plaintiff be absolved, he might be a Prisoner for Life. Or where ^k it appears to the Court, That the Defendant may be in Danger of losing his Life, either by Famine, or a dangerous Distemper, &c. if he continue longer in Prison.

As to the second Point, *viz.* In what Cases Bail is grantable by the other Courts of *Westminster-Hall*: I shall consider,

1. How far it is grantable by such Courts, or Persons committed for Causes under the Degree of Treason or Felony.
2. How far to Persons committed for Treason or Felony.

Sect. 80. As to the first Point, *viz.* How far Bail is grantable by the said Courts, to Persons committed for Causes under the Degree of Treason or Felony, it seems, ¹ That the Courts of Common Pleas and Exchequer, at any Time during Term, and the Court of Chancery, either in Term or Vacation, may award a *Habeas Corpus* by the Common Law, for any Person committed for any such Cause, and thereupon discharge him, if it shall clearly appear by the Return, That the Commitment was against Law (as being made by one who had no Jurisdiction of the Cause, or for a Matter for which by Law no Man ought to be punished) or bail him, if it shall be doubtful whether the Commitment were legal or not, &c. However it is certain at this Day, That by Force of the *Habeas Corpus Act*, Par. 3. & 10. set forth more at large *Sect. 17 & 22*. any of the said Courts, in Term-time, and any Judge of either Bench, or Baron of the Exchequer, being of the Degree of the Coif, in the Vacation,

tion, may award a *Habeas Corpus* for any Prisoner whatsoever, who is bailable by the Intent of that Act, and thereupon bail him.

Sect. 81. As to the second Point, *viz.* How far Bail is grantable by the said Courts to Persons committed for Treason or Felony, it is observable, That the abovementioned Clauses of the said *Habeas Corpus* Act extend not to Persons committed for Treason or Felony, plainly and specially expressed in the Warrant of Commitment; neither do I find any printed Case, wherein Persons committed for such Crimes have been bailed either by the Courts of Common Pleas or Exchequer. However it is certain, That in some Cases Persons committed for Felony are bailable by the Court of Chancery. But our Law-Books being generally silent in Relation to these Matters, I shall refer the Reader for the more accurate Knowledge of them, to Observation and Experience.

Sect. 82. As to the seventh general Point of this Chapter, *viz.* In what Form Bail is to be taken; it seems to be the Practice of the Court of King's Bench in admitting a Person to Bail, who is actually present ^a in Court, upon an Indictment or Appeal ^b of Felony, or other Crime, punishable with Loss ^c of Member, to take ^d a several Recognizance to the King in a certain Sum from each of the Bail, that the Prisoner shall appear at a certain Day, &c. and also, That the Bail shall be liable for the Default of such Appearance, &c. Body for Body. And ^e it seems to be left to the Discretion of Justices of Peace, in admitting any Person to Bail for Felony, to take the Recognizance either in a certain Sum, or else Body for Body. But ^f where a Person is bailed by the Court of King's Bench, before the Return of a *Capias* awarded against him for Felony, or (as it seems to be implied in the Book cited in the Margin that he may be,) or by any Court for a Crime of an Inferior Nature, it seems, That the Recognizance ought to be only in a certain Sum of Money, and not Body for Body. However it is certain ^g at this Day That Persons bound Body for Body, are not liable on the Forfeiture of the Recognizance, to such Punishment to which the Principal is to be adjudged, if found Guilty, but only to be fined, &c.

Sect. 83. As to the eighth general Point of this Chapter, *viz.* What shall forfeit the Recognizance: If on a Bailment for Felony the usual ^h Form, *ad Standum recto de feloniam predictam, et ad respondendum Domino Regi*, be made use of, and at the Trial the Party stand obstinately mute, it may reasonably be argued, that in Strictness the Recognizance is forfeited, for ⁱ that the Expressions abovementioned seem to import at least thus much, That the Prisoner shall make some Answer; and at the Common Law, before the Statute ^k of *Malebridge chap. 28.* if a Person under Bail had insisted on his Privilege as a Clerk, and refused to answer to the Crime alledged against him, his Sureties were to be amerced; and though the said Statute have in that Case excused the Bail, yet an obstinate Refusal to answer in other Cases may perhaps remain as it was at the Common Law. Mr. Dalton ^l indeed seems to be of another Opinion, because the Words abovementioned are always used of Course: But it seems strange, That Words should be looked on as idle and insignificant because they are most usual and proper. However, if late Practice and Experience have been agreeable to the abovementioned Opinion of Mr. Dalton, as I apprehend that they have, they will certainly be of great Force to maintain it: And indeed it must be confessed, That if a Man's Bail, who are his Gaolers of his own Choosing, do as effectually secure his Appearance, and put him as much under the Power of the Court as if he had been in the Custody of the proper Officer, they seem

See Vaughan
156, 157.
2 Jo. 14.
Register,
271. a b.

^a 1 Bulk. 45.
^b 2 Jon. 210.
^c Lev. 106.
Contra,
^d Sid. 211.
^e 4 Inst. 178.
^f Bull. 45.
^g 21 H. 7. 20.
^h Pl. 3.
ⁱ Con. 1 Sid.
210.
^j *Fide* 2 Jo.
222.
^k H. P. C.
97.
^l *Crompt.*
Justice 335.
^m 4 Inst. 178.
ⁿ *Dalt. cap. 127.*
^o *seems contrary*
^p 1 Bull. 45.
^q 4 Inst. 178.
^r S. P. C. 65.
^s *Fitz. Main-*
prize, 13.
^t 21 H. 7. 20.
^u Pl. 3.
^v H. P. C. 97.
^w *Contra Fitz.*
Mainprize.
12.
^x *Dalt. cap.*
127.
^y S. P. L. 77.
^z *Letter C.*
^{aa} 4 Inst. 178.
^{ab} S. P. C. 77.
^{ac} C.
^{ad} 2 Inst. 178.
^{ae} 4 Inst. 178.
^{af} *Dalt. cap.*
127.

Queen and
Redpath, 11
Ann.

to have answered the End of the Law, and to have done all that can be reasonably required of them: But howsoever the Law may stand in Relation to this Case, it is certain, That if Persons be bound by Recognisance, that J. S. shall appear in the King's Bench the first Day of such a Term, to answer to such an Information against him, and not depart till he shall be discharged by the Court, and afterwards the Attorney General enter a *Nolle prosequi* as to that Information, and exhibit another, on which the Defendant is convicted, and refuses to appear in Court after personal Notice, the Recognisance is forfeited; for being express that the Party shall not depart till he be discharged by the Court, it cannot be satisfy'd unless he be forth-coming, and ready to answer to any other Information exhibited against him whilst he continues not discharged, as much as to that which he was particularly bound to answer to. But in such Case it seems, That the Recognisance shall not be forfeited by the Party's not appearing in Court the first Day of every Term, after he hath pleaded to the Information, as it may be before he hath pleaded.

C H A P. XVI.

Of Commitments.

AND now I am to consider in what Cases, and in what Manner, Offenders are to be committed, for the better Understanding whereof I shall examine,

1. What Kinds of Offenders are to be committed.
2. By whom.
3. To what Prison.
4. What is to be done previous to their Commitment.
5. What ought to be the Form of it.
6. At whose Charges they are to be sent to Prison.
7. To what Court the Commitment is to be certified.
8. By what Means the Party may be discharged from such Commitment.

Sect. 1. As to the first Point, There is no Doubt but that Persons apprehended for Offences which are not bailable; and also all Persons who neglect to offer Bail for Offences which are bailable, must be committed.

Sect. 2. And it is said, That wheresoever a Justice of Peace is empowered by any Statute to bind a Person over, or to cause him to do a certain Thing, and such Person being in his Presence shall refuse to be bound, or to do such Thing, the Justice may commit him to the Gaol, to remain there till he shall comply.

Sect. 3. As to the second Point, viz. by whom such Persons are to be committed, it seems to be agreed by all the Old ^a Books, That wheresoever a Constable, or private Person, may justify the Arresting another for a Felony or Treason, he may also justify the Sending or Bringing

^a 10 H. 4. 7. a.
7 Ed. 4. 20. a.
3 Ed. 4. 26. b.
27. a.
20 Ed. 4. 6. b.
10 Ed. 4. 17.
b. 18. a.
5 H. 7. 4. b.
5. a.
2 H. 7. 3. b.
11 Ed. 4. 4.
b.

bringing him to the common Gaol, and that every Private Person has as much Authority in cases of this Kind as the Sheriff, or any other Officer, and may justify such Imprisonment by his ^a own Authority, but not by the Command of another. But ^b inasmuch as it is certain, That a Person lawfully making such an Arrest may justify Bringing the Party to the Constable, in order to be carried by him before a Justice of Peace; and inasmuch as the Statutes of 1 & 2 Ph. & M. 13. and 2 & 3 Ph. & M. 10. which direct in what Manner Persons brought before a Justice of Peace for Felony shall be examined by him in order to their being committed or bailed, seem clearly to suppose, That all such Persons are to be brought before such Justice for such Purpose; and inasmuch as the Statute of 31 Car. 2. commonly called the *Habeas Corpus Act*, seems to suppose, That all Persons who are committed to Prison, are there detained by Virtue of some Warrant in Writing, which seems to be intended of a Commitment by some Magistrate; and the constant Tenour of the late Books, Practice and Opinions, are agreeable hereto: It is certainly most advisable at this Day, for any Private Person who arrests another for Felony, to cause him to be brought, as soon as conveniently he may, before some Justice of Peace, that he may be committed or bailed by him.

Sett 4. But it is certain, ^c That the Privy Council, or any one or two of them, or a Secretary of State, may lawfully commit Persons for Treason, and for other Offences against the State, as in all Ages they have done.

As to the third Point, *viz.* To what Prison such Offenders are to be committed, I shall observe,

1. That the Prison ought to be in the Realm of *England*.
2. That regularly it ought to be a Common Prison.

Sett 5. As to the first of these Particulars, it is enacted by 31 Car. 2. 12. That no Subject of this Realm, being an Inhabitant, or Resident of this Kingdom of England, Dominion of Wales, or Town of Berwick upon Tweed, shall or may be sent Prisoner into Scotland, Ireland, Jersey, Guernsey, Tangier, or into Parts, Garrisons, Islands, or Places beyond the Seas, which then were, or at any Time hereafter should be, within or without the Dominions of his Majesty, his Heirs or Successors; and that every such Imprisonment is by the said Statute enacted and adjudged to be illegal, and that every Subject so imprisoned, shall have an Action of False Imprisonment, &c. and recover treble Costs, and no less Damages than five Hundred Pounds against the Person making such Warrant, who shall also incur a *Præmunire*.

Sett 6. As to the second of the abovementioned Particulars, It is enacted by 14 Ed. 3. 10. as followeth, In the right of the Gaols which were wont to be in Ward of the Sheriffs, and annexed to their Bailiwicks; it is assented and accorded, That they shall be rejoined to the Sheriffs, and the Sheriffs shall have the Custody of the same Gaols, as before this Time they were wont to have; and they shall put in such Under-keepers for whom they will answer. And this is confirmed by 19 H. 7. chap. 10. Also it is recited by 5 H. 4. 10. That divers Constables of Castles, within the Realm, being assigned Justices of Peace by the King's Commission, had by Colour of such Commission, used to take People to whom they bore evil Will, and imprison them within the said Castles, till they had made Fine and Ransom with the said Constables for their Deliverance. And thereupon it is enacted, That none be imprisoned by any Justice of

^a 5 H. 7. 4.
^b 5 a.
Fitz. False
Impris 84
^c 9 Ed. 4.
26. b. 27. a.
19 Ed. 4.
17. b.
H. P. C. 91,
112.

H. P. C. 91,
112.
Dalc. cap. 118.

^c 1 And. 298.
Palm. 558.
1 Sid. 78
1 Leon. 70,
71.
Sir William
Wyndham's
Case, Trin.
2 Georg.
Sal. 347.

the Peace, but only in the Common Gaol; saving to Lords and others which have Gaols their Franchise in this Case.

See 1 And. *345.* *Cro. El. 829.* *830.* *9 Co. 119. b.* *Sal. 343.* *H. P. C. 93.* *Dalt. cap. 118.* *Comp. 172.* *b. 173. a.* *Dalt. cap. 118.* *Crompt. 72. b.* *H. P. C. 92.* *93.* *11 Ed. 4. 4.* *b. 5. a.* *12 Ed. 4. 8.* *b. 9. a.* *Pl. Com. 37. a.* *Keilw. 45. b.* *Contra.* *2 Bullst. 264.* *11 Ed. 4. 7.* *a. b.* *d Keilw. 45. b.* *11 Ed. 4. 5. a.* *e 11 Ed. 4.* *4 b. 5. a. 7.* *a. b.* *f Keilw. 45. b.* *22 Ed. 4. 34. b.* *H. P. C. 114.* *10 H. 4. 7. pl. 2.* *Fitz. Escape, 8.* *Dalt. cap. 118.* *Bro. faux. Imprisonment. 25.* *h 20 Ed. 4. 6. b.* *Bro. faux. Imprisonment. 21, 27.* *14 Ed. 4. 7. a. b.* *12 Ed. 4. 8. b.* *11 Ed. 4. 4. b. 5. a.* *Sal 347.*

Sect. 7. And it ^a seems, That the King's Grant since this Statute to private Persons to have the Custody of Prisoners committed by Justices of Peace, is void. And it is said, That none can claim a Prison as a Franchise, unless he have also a Gaol-delivery.

Sect. 8. It seems to be ^b agreed, That if ^a a Person be arrested in one County, for a Crime done in it, and fly into another, and be re-taken there, he may be brought before a Justice of the County where the Offence was done, and be committed by him to the Gaol of such County. But it seems to be the stronger ^c Opinion, That if one who hath committed an Offence in one County, fly into another before he be taken, and be pursued and arrested in such County, he ought to be brought before a Justice of the County where he is taken, and be committed by him to the common Gaol of the same County, ^d whether it lie in such County or another; ^e unless there be some special Reason to the Contrary, as an apparent Danger that the Party may be rescued from such Prison by Rebels, &c. And it seems to be laid down as a Rule, by some Books, ^f That any Offender may be committed to the Gaol next to the Place where he was taken, whether it lie in the same County or not.

Sect. 9. It is ^g said, That if a Constable bring a Felon to Gaol, and the Gaoler refuse to receive him, the Town where he is Constable ought to keep him till the next Gaol-Delivery. But ^h in other Cases it seems, That regularly no one can justify the Detaining a Prisoner in Custody out of the common Gaol, unless there be some particular Reason for so doing; as if the Party be so dangerously ⁱ sick that it would apparently hazard his Life to send him to the Gaol, ^k or there be evident Danger of a Rescue from Rebels, &c. Yet constant Practice seems to authorise a Commitment to a Messenger; and it is ^l said, That it shall be intended to have been made in order for the carrying of the Party to Gaol.

Sect. 10. As Prisoners ought to be committed at first to the proper Prison, so ought they not to be removed from thence, except in some special Cases. And to this Purpose it is enacted by 31 Car. 2. chap. 2. Par. 9. *That if any Subject of this Realm, shall be committed to any Prison, or in Custody of any Officer or Officers whatsoever, for any criminal, or supposed criminal Matter; that the said Person shall not be removed from the said Prison and Custody, into the Custody of any other Officer or Officers, unless it be by Habeas Corpus, or some other legal Writ; or where the Prisoner is delivered to the Constable, or other inferior Officer, to carry such Prisoner to some Common Gaol; or where any Person is sent by Order of any Judge of Assize, or Justice of the Peace, to any common Workhouse, or House of Correction; or where the Prisoner is removed from one Prison or Place to another, within the same County, in order to a Trial, or Discharge by due Course of Law; or in case of sudden Fire, or Infection, or other Necessity; upon Pain that he who makes out Signs or Counter-signs, or obeys or executes such Warrant, shall forfeit to the Party grieved one Hundred Pounds for the first Offence, two Hundred Pounds for the second, &c.*

Sect. 11. As to the fourth Point, viz. What ought to be done previous to the Commitment of such Offenders, it is enacted by 2 & 3 Ph. & M. 10. *That every Justice or Justices, before whom any Person shall be brought for Manslaughter, or Felony, or for Suspicion thereof, before he or they shall commit or send such Prisoner to Ward, shall take the Examination of such Prisoner, and Information of those that bring him, of the Fact and Circumstances thereof; and the same, or as much thereof as shall be material to prove the Felony, shall*

shall put in writing within two Days after the said Examination, and the same shall certify in such Manner and Form, and at such Time, as they should and ought to do, if such Prisoner, so committed or sent to Ward, had been bailed, or let to Mainprize, upon such Pain as in 1 & 2 Ph. & M. 13, is limited and appointed, for not taking or not certifying such Examinations, &c. And it is further enacted, That the said Justices shall have Authority to bind all such by Recognisance or Obligation, as do declare any thing material to prove the said Manslaughter, or Felony, to appear at the next General Gaol-Delivery to be holden within the County, City, or Town Corporate, where the Trial of the said Manslaughter, or Felony, shall be, then and there to give Evidence against the Party; and that the said Justices shall certify the said Bonds taken before them, in like manner as they ought to certify the Bonds mentioned in the said former Act, &c.

Señ. 12. It seems that a Justice of Peace ought not to detain a Prisoner by Virtue of this Statute, in order to examine him, any longer than is necessary for such Purpose, for which it is said, That the Space of three Days is a reasonable Time.

As to the fifth Point, *viz.* What ought to be the Form of a Commitment, the following Rules are to be observed.

Señ. 13. 1. It must be in Writing, under the Hand and Seal of the Person by whom it is made and expressing his Office, or Authority, and the Time and Place at which it is made, and must be directed to the Gaoler, or the Keeper of the Prison.

Señ. 14. 2. It may be made either in the Name of the King, and only tested by the Person who makes it, or it may be made by such Person in his own Name.

Señ. 15. 3. It may command the ^a Gaoler to keep the Party in safe and close Custody; for if every Gaoler be bound ^b by the Law to keep his Prisoner in such Custody, surely it can be no Fault in a *Mittimus* to command him so to do.

Señ. 16. 4. It ought to set forth the Crime alledged against the Party with convenient ^c Certainty, whether the Commitment be by the Privy ^d Council, or any other Authority; otherwise the Officer ^e is not punishable, by Reason of such *Mittimus*, for suffering the Party to escape: And the Court, before whom he is removed by *Habeas Corpus*, ought to discharge or bail him: And this doth not only hold where ^f no Cause at all is expressed in the Commitment, but also where it is so loosely set forth, that the Court cannot adjudge whether it where a reasonable Ground of Imprisonment; as ^g where one was committed for manifold Contumacy to the High Commission-Court, or for ^h refusing to answer before them to certain Articles, or ⁱ for insolent Behaviour and Words spoken at the Council-Table, &c. And it is holden by Sir ^k Edward Coke, in his second Institute, That a Commitment for High Treason, or Felony in general, without shewing the Species of the Offence, is not good; yet in ^l another Part of the same Book, such general Commitments seem to be allowed by him to be good: And there are Precedents of Commitments for Felony in general, in good ^m Authours. And ⁿ it hath been resolved, That Commitments for High Treason in general are good.

& Lawton's Case. Palmer, 558. ^a 1 Rol. Rep. 245. ^b 1 Rol. Rep. 220, 245. ^c Cro. Car. 133. 579. ^d Bull. 139. 140. ^e 2 Inst. 591. ^f 5 Mod. 85. ^g 2 Inst. 52. ^h Crompt. 233. ⁱ b. Dalt. cap. 125. ^j 1 Sid. 78. ^k 1 And. 298. ^l 1 K. b. 305. Palmer, 558. Sir William Wyndham's Case, Trin. 2 Georg.

Señ. 17.

* Sir William Wyndham's Case, Trin. 2 Geor. Dalt. cap. 125. Cromp. 233. b.
 2 Inst. 52. Palm. 558. 559.
 2 Inst. 52. 591.
 H. P. C. 94. Cromp. 233. b.
 Dalt. cap. 124. c. 1 Lev. 230. contra Cro. Car. 558.
 6 Mod. 73. 74.
 2 Inst. 52. 591.
 1 Rol. Rep. 220.
 1 Lev. 230. Cro. Car. 579.
 con. 3 Bulst. 48. 49.
 1 Rol. Rep. 410.

Señ. 17. 5. It is safe to set forth, That the Party is charged upon Oath; but this is not necessary, for it hath been ^a resolved, That a Commitment for Treason, or for Suspicion of it, without setting forth any particular Accusation, or Ground of the Suspicion, is good.

Señ. 18. 6. Every such *Mittimus* ought to have a lawful Conclusion, ^b viz. That the Party be safely kept till he be delivered by Law, or by Order of Law, or by due Course of Law; or that he be kept till farther ^c Order, (which shall be intended of the Order of Law,) or to the like Effect. And if the Party be committed only for want of Bail, it seems ^d to be a good Conclusion of the Commitment, that he be kept till he find Bail. But a Commitment, ^e till the Person who makes it shall take further Order, seems not to be good. And it seems, that the Party committed by such, or any other irregular *Mittimus*, may be bailed.

Señ. 19. As to the sixth Point, viz. At whose Charge Offenders are to be sent to Prison, it is enacted by 3 Jac. 1. 10. *That every Person and Persons, that shall be committed to the common or usual Gaol within any County or Liberty within this Realm, by any Justice or Justices of the Peace, for any Offence or Misdemeanor, having Means or Ability thereunto, shall bear their own reasonable Charges, for so conveying or sending them to the said Gaol, and the Charges also of such as shall be appointed to guard them to such Gaol, and shall so guard them thither. And if any such Person or Persons so to be committed, shall refuse at the Time of their Commitment and Sending to the said Gaol, to defray the said Charges, or shall not then pay or bear the same, that then such Justice or Justices of the Peace, shall and may by Writing under his or their Hand and Seal, or Hands and Seals, give Warrant to the Constable or Constables of the Hundred, or Constable or Tythingman of the Tything, or Township where such Person or Persons shall be dwelling and inhabit, or from whence he or they shall be committed, or where he or they shall have any Goods within the County or Liberty, to sell such, and so much of the Goods and Chattels of the said Persons, as by the Discretion of the said Justice, or Justices of the Peace, shall satisfy and pay the Charges of such his or their Conveying or Sending to the said Gaol; the Appraisement to be made by four of the honest Inhabitants of the Parish or Tything where such Goods or Chattels shall remain and be; and the Overplus of the Money which shall be made thereof, to be delivered to the Party to whom the said Goods shall belong.*

Señ. 20. And it is farther enacted, *That if the said Persons shall not have, or be known to have, any Goods or Chattels, which may be sold for the Purpose aforesaid, within the County or Liberty; an indifferent Assessment shall be made by the Constables and Church-Wardens, and two or three other the honest Inhabitants of the Parish, or Tything, where such Offenders shall be taken or apprehended, the said Taxation being allowed under the Hand of one or more Justice or Justices of the Peace, if there be such Constables or Church-Wardens there inhabiting; and in Default of them, by four of the principal Inhabitants of the said Parish, Township or Tything, where such Offenders shall be taken or apprehended: And if any so assessed shall refuse to pay their said Taxation, then the Justice or Justices of Peace by whom the said Offenders shall be committed to Prison, or any Justice of Peace near adjoining, shall and may give Warrant as aforesaid, to the Constable, Tythingman, or other Officer there, to distrain the Goods of any so assessed, which shall refuse to pay the same, and to sell the same; and that such Person or Persons so authorised, shall have full Power so to distrain, and by Appraisement of four substantial Inhabitants of the said Place, to sell a sufficient Quantity of the Goods and Chattels of the said Person so refusing, for the levying of the said Taxation; and if any Overplus of the Money come by the Sale thereof, the same to be delivered to the Owner.*

Sect. 21. As to the seventh Point, viz. To what Court such Commitments are to be certified, it is enacted by 3 H. 7. 3. *That every Sheriff, Bailiff of Franchise, and every other Person, having Authority or Power of keeping of Gaol, or of Prisoners for Felony, do certify the Names of every such Prisoner in their Keeping, and of every Prisoner to them committed for any such Cause, at the next general Gaol-Delivery, in every County or Franchise where any such Gaol shall be, there to be calendered before the Justices of the Deliverance of the same Gaol, whereby they may, as well, for the King as for the Party, proceed to make Deliverance of such Prisoners according to Law, on Pain to forfeit to the King for every Default there recorded, one hundred Shillings.*

Sect. 22. As to the eight Point, viz. By what Means a Person under such a Commitment may be discharged, it seems, That a Person legally committed for a Crime, certainly appearing to have been done by some one or other, cannot be lawfully discharged by any one but by the King, till he be acquitted on his Trial, or have an *Ignoramus* found by the Grand Jury, or none to prosecute him, on a Proclamation for that Purpose by the Justices of Gaol-Delivery. But if a Person be committed on a bare Suspicion, without any Appeal or Indictment, for a supposed Crime, where afterwards it appears that there was none, as for the Murder of a Person thought to be dead, who afterwards is found to be alive; it hath been holden, That he may be safely dismissed without any farther Proceeding, for that he who suffers him to escape is properly punishable only as an Accessory to his supposed Offence; and it is impossible that there should be an Accessory where there can be no Principal; and it would be hard to punish one for a Contempt, in disregarding a Commitment founded on a Suspicion, appearing in so uncontested a Manner to be groundless.

Keilw. 34.
3 Inst. 209.
210.
H. P. C. 94.
95.

Keilw. 34.
H. P. C. 109.
110, 114.

C H A P. XVII.

Of Hindrances in bringing Offenders to publick Justice, &c.

HAVING shewn in what Manner Criminals are to be arrested, bailed or committed, I am now to consider in what Manner they and their Assistants are punishable for an Hindrance in bringing them to publick Justice. And in Order hereto I shall examine,

1. How far they are punishable for an Offence of this Kind, before an Arrest made.
2. How far after an Arrest.

Sect. 1. As to the first Point, It is ^a certainly an Offence of a very high Nature, to oppose one who lawfully endeavours to arrest another for Treason, or Felony. And some ^b have said, That the Person who so opposes an Arrest for Treason, whereof he knows the Party to have been guilty, is thereby guilty of the Treason; and that he who so opposes an Arrest for Felony, is an Accessory to the Felony. And if it be

^a H. P. C. 116.
^b S. P. C. 31.
Letter B.
Crompt. 38. b
26 Ayl. 47.
Fitz. Justice
of Peace.
114. 231.
Contra
H. P. C. 116.
Fitz. Coron.
333.
^a Inst. 590.

^a H. P. C.
218, 219.
² Inst. 183.
Moor 8.
pl. 29.
S. P. C. 41.
Letter E.

a general ^a Rule, That whoever knowing a Person to have committed any such Crime, receives and comforts him, and endeavours to favour and aid him in the Making his Escape, thereby becomes a Principal in the Case of Treason, and an Accessory in the Case of Felony, though he use no Force in giving such Assistance to the Offender; it seems strange that he who so far takes Part with him as to fight in his Defence from Justice, should not be at least equally guilty. And therefore it seems reasonable to understand the Books above cited, which seem to contradict this Opinion, to intend no more than that it is not Felony in the Party himself, who is attacked in Order to be arrested, to save himself from the Arrest by such Resistance.

^b S. P. L. 32.
Letter I.
⁹ H. 4. 1.
pl. 3.
²⁶ Aff. 47.

Señ. 2. ^b But if a Person, knowing another to have been guilty of such a Crime, barely receive him, and permit him to escape, without giving him any Manner of Advice, Assistance or Encouragement in it, as by directing him how to do it in the safest Manner, or furnishing him with Money, Provisions, or other Necessaries, it seems he is guilty of a high Misdemeanour only, but no capital Offence.

H. P. C. 111.
271.

Señ. 3. Also it is certain, That the Party himself who flies from such an Arrest, is not thereby guilty of a capital Offence, but only liable to forfeit his Goods, when such Flight is found against him, in such Manner as hath been already shewn, *Chap. 9. Señ. 51.* and shall be also more fully considered hereafter.

Señ. 4. How far a Vill, which suffers one who has been guilty of Homicide to escape, is liable to be amerced, hath been already shewn, *Chap. 12. Señ. 2, 3.*

Offences of this Kind, after an Arrest made, may be considered in Relation either,

1. To the Party under such an Arrest. Or,
2. To others.

Such Offences by the Party himself are either without or with Force.

H. P. C. 108.
² Inst. 589.
590.

Señ. 5. And first, As to such Offences by the Party himself, without Force, which seem properly to come under the Notion of Escapes, there is little remarkable in the Books; and therefore I shall content my self with taking Notice, That as all Persons are bound to submit themselves to the Judgment of the Law, and to be ready to be justified by it; whoever, in any Case, refuses to undergo that Imprisonment which the Law thinks fit to put upon him, and frees himself from it by any Artifice, before such Time as he is delivered by due Course of Law, is guilty of a high Contempt, punishable with Fine and Imprisonment. And if it

Cro. Car. 210.

be so great a Crime for one not arrested to fly, in Order to save himself from Imprisonment for a capital Offence, surely it must be at least as great a Crime, for one who is actually under the Custody of the Law for any such Crime, by any indirect Means to free himself from it. And some ^c have holden, That such an Escape amounts to Felony: But this Opinion seems to be over severe, and not to be maintained by the ^d Book cited to prove it.

¹ Aff. pl. 6.
^c S. P. C. 31.
Letter A.
^d 2 Ed. 3. 2.
pl. 4.
Fitz. Coron
149.