CHAP. XXVII.

Of Proceſs.

AND now I am come to ſuch Proceſs as is to be awarded upon an Appeal, Indictment, or Information; for the better Underſtanding the Nature whereof, (having premiſed that it ſeems plain, from the Nature of the Thing, that there can be [a] no Need of it where the Defendant is preſent in Court, but only where he is abſent, I ſhall conſider it,

[a] Lamb. B 4. Ch. 8 Dalt. Ch. 132. Cromp. 150. a.

1. In General; without any particular Regard to Proceſs of Outlawry.
2. In Particular; with Regard to ſuch Proceſs only.

And *Firſt*, I ſhall examine the Nature of ſuch Proceſs in general, without any particular Regard to Proceſs of Outlawry, under the following Particulars;

1. Where it is well awarded into a County different from that wherein the Court ſits from which it is awarded.
2. What Kind of Proceſs ſhall iſſue on an Indictment, Appeal, and Information.
3. In what Manner it is to be executed.
4. What is required by Statute, in Relation to Proceſs on Informations.
5. What is the proper Proceſs on a Default.
6. What after a Removal by *Certiorari*.
7. Where it ſhall be ſaid to be diſcontinued, or miſcontinued, or put without Day.
8. How far an Error in Proceſs is fatal.

Sect. 1. As to the firſt Particular, *viz.* Where ſuch Proceſs is well awarded into a County different from that wherein the Court ſits from which it is awarded: It ſeems [b] to be a good general Rule, That no Proceſs without Writ can be well awarded on any Indictment, or Appeal, *&c.* from any Court, out of the County wherein it ſits: But it ſeems agreed, [c] That ſuch Proceſs by Writ may, by the Common Law, be well awarded into any County of *England*, either by the Court of King's Bench, or by Juſtices of *Eyre*, upon an Indictment, *&c.* before them. Alſo it is clear, That Juſtices of *Oyer* and *Terminer* have the ſame Power, in Relation to Perſons indicted or appealed before them of Felony, by Force of 5 *Ed.* 3. 11. whereby it is recited, *That in Times paſt ſome Perſons appealed or indicted of divers Felonies in one County, or outlawed in the ſame County, had been dwelling, or received in another County, whereby ſuch felonious Perſons indicted and outlawed, had been encouraged in their Miſchief, becauſe they might*

[b] 19 Aſs. pl. 6. Fitz. Barr. 279. Bro. Juriſ. 105. *Vide* Fitz. Aſſiſe, 446.
[c] S.P.C. 146. a. H. P.C. 196. *Vide ſupra*, Ch. 24 Sect. 22.

not be attached in another County; and thereupon it is enacted, *That Juſtices aſſigned to hear and determine ſuch Felonies ſhall direct their Writs to all the Counties of* England, *where need ſhall be to take ſuch Perſons indicted.*

Sect. 2. It is obſervable, That the Miſchief complained of in the Preamble of this Statute relates as well to Perſons appealed, as to thoſe who are indicted; and therefore it ſeems reaſonable to conſtrue them alſo to be within the Meaning of the Purview, though they be not within the Letter of it, which extends only to Perſons indicted.

[a] *Vide* Crom. Juſtice, 149. b. Lamb. B. 4. Ch. 8.
[b] *Vide ſupra*, Ch. 8. S. 8. 32.

Sect. 3. It ſeems queſtionable, [a] Whether Juſtices of Peace, being aſſigned [b] by their Commiſſion to hear and determine Felonies, are as well within the Meaning as Letter of this Statute? For, as on the other Side it may be argued, That this being a remedial Law, ought to receive as favourable and large an Interpretation as the Words will admit; ſo on the other Side it may be ſaid, That the Preamble of the Statute making Mention as well of Perſons appealed, as of thoſe who are indicted, cannot be thought to have any manner of Regard to Juſtices of the Peace, before whom no Appeal lies; and nothing can be more reaſonable than to conſtrue one Part of a Statute by another.

Sect. 4. But by 22 *H.* 8. 5. Par. 5. *Juſtices of Peace of the Shire*, &c. *wherein any decayed Bridge ſhall be*, &c. *ſhall make Proceſs into every Shire within this Realm, againſt any Perſons who ought to amend ſuch Bridge, being preſented before them to be decayed*, &c. Alſo they have the like Power by other Statutes in many other Caſes, for which, not being ſo proper for this Treatiſe, I ſhall refer the Reader to the [c] Authors which more particularly treat of the *Office of a Juſtice of Peace.*

[c] Crompton's Juſtice, 151, 152. Lamb. B. 4. Ch. 8.

As to the ſecond Particular, *viz.* What Kind of Proceſs ſhall iſſue on an Appeal, Indictment, and Information; I ſhall endeavour to ſhew,

Firſt, Where ſuch Proceſs ought to have the Clauſe of *Non omittas.*

Secondly, In whoſe Name, and under what *Teſte*, it is to be made.

Thirdly, What is the proper Proceſs on Indictments for Crimes of an Inferior Nature.

Fourthly, What is the proper Proceſs on Informations.

Fifthly, What is the proper Proceſs on Appeals, and on Indictments of Treaſon, Felony and Mayhem.

Sixthly, How many Days there ought to be between the *Teſte* and Return of ſuch Proceſs.

Sect. 5. As to the firſt Point, *viz.* Where ſuch Proceſs ought to have the Clauſe of *Non omittas:* It is laid [d] down in ſome Books as a general Rule, That in every Suit, to which the King is a Party, the Proceſs ought to have the Clauſe, *Non omittas propter aliquam libertatem, &c.*

[d] Crompton's Juſt. 149 b. Lamb. B. 4. Ch. 8. Dalt. Ch. 132, 41 Aſs. 17. Bro. Franc. 18. Proceſs, 102. Fitz. Prerog. 21. *Vide infra*, Sect. 17.

Sect. 6. But I do not find this Rule obſerved as to all Kinds of Suits by the King, in the beſt Precedents; for tho' the ſaid Clauſe is mentioned in every Award of Proceſs on [e] Indictments (except only [f] one) and even on [g] Informations *qui tam*, in *Coke*'s *Entries*; yet it is omitted in all the Awards of Proceſs I can find on Informations of [h] Intruſion on the King's Lands, or of [i] Trover and Converſion of his Goods; and yet theſe are at leaſt as much, if not more properly, the Suits of the King, than the former.

[e] Coke's Ent. from 352, to 363. [f] Co. Ent. 358. b. [g] Co. Ent. 365, a. 366, a. 367, a. 368. a. [h] Co. Entr. 372, a. 376, a. 379, a. 381, a. 387. b. [i] Co. 16, 17. [l] Coke's Entr. 390. b.

Sect. 7. As to the ſecond Point, *viz.* in whoſe Name, and under what *Teſte* ſuch Proceſs is to be made. It is expreſly [a] enacted by 27 *H.* 8. 24. *Par.* 2. *That all manner of Proceſs upon Indictments of Treaſon, Felony, or Treſpaſs to be made in every County-Palatine, and other Liberty, ſhall be made only in the Name of the King; and that every Perſon having ſuch County Palatine, or any other ſuch Liberty, to make Proceſs,* &c. *ſhall make the* Teſte *in the Name of the Perſon that hath ſuch County-Palatine,* &c.

[a] *Vide* 4 Inſt. 205.

Sect. 8. And as to Proceſs on Indictments in any other Courts, there can be no [b] Doubt but that it ought alſo to be in the Name of the King: And if it iſſue from the Court of King's Bench, it ſeems [c] clear, That it ought to be under the *Teſte* of the Chief Juſtice, or of the Senior Judge of the Court, if there be no Chief Juſtice; and if it iſſue from any other Court, there ſeems to be the ſame Reaſon that it ought to be under the *Teſte* of the firſt in the Commiſſion; and that ſuch a *Teſte* will be ſufficient. It is holden indeed by [d] *Lambard*, That every Proceſs on an Indictment before Juſtices of Peace, ought to be under the *Teſte* of ſome two Juſtices: But there are Precedents to the contrary in [e] *Crompton*; and even in [f] *Lambard*. Neither do the [g] Authorities cited by *Lambard* ſeem to come up fully to his Point; for they ſeem to amount to no more than this, That one Juſtice of the Peace cannot award Proceſs on an Indictment, but that two of them at the leaſt muſt do it, and that ſitting the Court in the Seſſions: And indeed it ſeems plainly to appear, from the * Commiſſion itſelf, That one Juſtice has no Authority either to take an Indictment, or to proceed upon it: But I do not ſee the Conſequence, That becauſe an Indictment cannot be taken, nor proceeded upon, by leſs than two, therefore the Proceſs cannot be teſted by leſs than two.

[b] *Vide* Lamb. B. 4. Ch. 8. Dalt. Juſt. Ch. 132.
[c] Finch of Law, 436. Cro. Ca. 193.
[d] Lamb. B. 4. Ch. 8. *See* Dalt. Juſt. Ch. 132.
[e] Crompton, 232, 233.
[f] *See* the printed Precedents in the End of his Eirenarcha.
[g] Bro. Peace, 6, 7. *Vide* 14 H. 7. 8. b. Crompt. 151. b.
* *Vide ſupra*, Ch. 8. Sect. 24, 25.

Sect. 9. As to the third Point, *viz.* What is the proper Proceſs on Indictment or Crimes of an inferior Nature. It ſeems clear, both from the [h] Books which ſpeak of this Matter, and the conſtant Courſe of [i] Precedents, That a *Venire facias* (which is but in Nature of a Summons to cauſe the Party to appear) is a proper Proceſs to be firſt awarded on an Indictment for any Crime (whether againſt the Common Law, or Statute under the Degree of Treaſon, Felony, or [k] Maihem, except in ſuch Caſes wherein other [l] Proceſs is directed by ſome Statute. Alſo ſuch a *Venire* ſeems to be the firſt proper Proceſs on an [m] Information in the Crown-Office, for a Debt claimed by the King, as having been forfeited by a *felo de ſe*.

Dalt. Ch. 132.
[h] Crompt. 150, b. 151. Dalt. ch. 132. Lamb B. 4. Ch. 8. Firz. Aſſiſe, 17. 32 H. 6. 10. b.
[i] Co. Entr. 358, pl. 10. 362, pl. 17, 18. 363. a.
[k] Finch of Law, 356.
[l] *Vide ſupra*, Ch. 23. Sect. 151. Ra. Ent. 263. pl. 11.
[m] 1 Saund.

Sect. 10. If it appear by the [n] Return to ſuch *Venire*, that the Party has Lands in the County whereby he may be diſtrained, the [o] Diſtreſs infinite ſhall be awarded from Time to Time, till he do appear, and by Force hereof he ſhall [p] forfeit on every Default ſo much as the Sheriff ſhall return upon him in Iſſues. But if a *Nihil* be returned on ſuch a *Venire*, a [q] *Capias*, *alias* and *pluries*, ſhall iſſue, *&c.*

[n] Crompt. 150, 151. Lambert, b. 4 Ch. 8. Dalt. Juſt. Ch. 132. Dalt. Sheriff, Ch. 34, 78.
[o] Regiſter Judicial, 1. Finch, 352, 353.

Sect. 11. It is ſaid in *Fitzherbert*'s [r] *Abridgment*, *That in* Oyer *and* Terminer, *if the Party at the firſt Day make Default, a Man may have a* Venire Facias, *or a* Pone per vadios, &c. *at his Election*; the Meaning whereof perhaps may be this, That if the Defendant, being ſummoned on the *Venire*, do not appear, the Proſecutor may either take out a ſecond *Venire*, or a [s] *Pone per vadios, &c.* But I cannot [t] find any expreſs Authority, or Precedent, to juſtify the Making either a *Pone per vadios, &c.* or a *Ca-*

Dalton's Sheriff, Ch. 34, 78. Dalt. Juſtice, Ch. 132. [r] *Vide* 2 Danv. Ab. 296, f. 5. 2 Inſt. 453, 454. [q] Lamb. B. 4. ch. 8. Crompt. 150, 151. Fitz. Treſpaſs, 232. Dalt. Juſt. ch. 132. 11 H. 6. 4. a. Finch of Law. 352. [s] Fitz Proceſs, 188. [t] *Vide* Finch of Law, 353. [s] *Vide ſupra*, Sect. 9, 10. Fitz. Pro. 213. Treſ. 232. 29 Ed. 4. 18. a. b.

pias,

pias, the firſt Proceſs on any Indictment under the Degree of Maihem, or Felony, *&c.* except only where ſuch Proceſs is expreſly given by ſome Statute.

Sect. 12. As to the fourth Point, *viz.* What is the proper Proceſs on Informations: It ſeems, That a *Capias* againſt a [a] Commoner, and a [b] *Diſtringas* againſt a Peer, are the firſt proper Proceſſes on an Information for an Intruſion on the King's Lands, or for a [c] Trover and Converſion of his Goods: And either an * Attachment or [d] *Subpœna*, at the Election of the Informer, were by the Common Law proper Proceſſes on all Informations *qui tam* on Popular Statutes. And ſo was a [e] Summons in all Originals in Debt on ſuch Statutes, in the ſame Manner as in an Action of Debt at [f] Common Law; and an [g] Attachment or *Pone per vadios*, *&c.* in other Actions on ſuch Statutes, in the ſame Manner as in Actions upon the Caſe, and in Actions of Treſpaſs at [h] Common Law.

Sect. 13. And it is enacted by 21 *Jac.* 1. 4. By which all Popular Suits on penal Statutes are reſtrained to their proper Counties, as is ſhewn at Large in the precedent [i] Chapter of Informations, *That the like Proceſs in every Popular Action, Bill, Plaint, Information, or Suit, to be commenced, ſued or proſecuted, by Force of, or according to the Purport of the ſaid Act, be had and awarded, to all Intents and Purpoſes, as in an Action of Treſpaſs* Vi & Armis *at the Common Law.* And [k] conſequently the Proceſs in all ſuch Suits muſt now be by Attachment or *Pone per vadios*, *&c.* and after by Diſtreſs infinite, where by the Return, the Party appears to be ſufficient, [l] otherwiſe by *Capias*.

Sect. 14. It is as I take it the uſual Practice of the Crown-Office, on a Criminal Information, firſt, to award a *Subpœna*; and after the Return thereof, if no Appearance be entered in four Days, and an Affidavit be made of the Service of the *Subpœna*, to make out a *Capias* of Courſe, where the Defendants are informed againſt in their private Capacity, and a [m] *Diſtringas*, where they are ſued as a Corporation aggregate.

Sect. 15. As to the fifth Point, *viz.* What is the proper Proceſs on Appeals, and on Indictments of Treaſon, Felony and Maihem: It ſeems certain, That a *Capias* is the firſt Proceſs in all Indictments of [n] Treaſon or Felony, and in [o] all Appeals, whether of Maihem or Felony; from whence it ſeems reaſonable to conclude, That it ought alſo to be the firſt Proceſs in an Indictment of Maihem, as well as of Felony or Treaſon.

Sect 16. As to the ſixth Point, *viz.* How many Days there muſt be between the *Teſte* and Return of all ſuch Proceſs: It ſeems agreed, That there ought to be at leaſt fifteen Days between the *Teſte* and Return of every Proceſs awarded from the King's Bench into any [p] Foreign County: But that this is not required in Proceſs awarded into the ſame County wherein the Court ſits.

Sect. 17. As to the third Particular, *viz.* In what Manner ſuch Proceſs is to be executed: It is laid down as a [q] general Rule, That wherever the King is a Party to the Suit, (as he certainly is to all Informations and Indictments) the Proceſs ought to be executed by the Sheriff himſelf, and not by the Bailiff of any Franchiſe, [r] whether it have the Clauſe *Non omittas*, *&c.* or not, and whether the Defendant be within a Franchiſe, or in the County at large; for the King's Prerogative ſhall be preferred to any Franchiſe: But it is ſaid, [s] That this is to be intended only where in the Grant of the Franchiſe, no Mention is made of Cauſes to which the King is a Party.

[a] Coke's Ent. 372, a. 367, a. 379, a. 381. a
[b] Co. 16. b.
[c] Co. Ent. 387. b.
[d] Co Ent. 390. b.
* Coke's Ent. 365. a. 366. a. 367, a. 368.
[e] Co. Ent. 370, b. 371, b. 395, a.
[f] And 48.
[g] Co. Entr. 158, a. 164, b. 166 a. Ra. Entr. 599. pl. 2, 3.
[h] Finch of Law, 352.
[i] Co. Entr. 43, b. 44 pl. 3. 46, a. 348, a. 349, a. 350, a. 351. a. Ra. Ent. 406. a. b.
[k] Finch of Law, 355.
[l] *Vide* Ch. 26. Sect 31. to Sect. 38.
[m] *See* Finch of Law, 345, 352, 355.
[n] 1 Rol. Abr. 463 pl 11 780. pl 6 793, pl. 4. the ſame Caſe. Palm. 449 1 Keb. 159, pl. 109 2 Rol. Abr. 277. D.
[o] *Vide* Salk. 174. pl. 15.
[p] 3 Mod 265.
[q] Co. Ent. 50. pl. 1. Fitz. Exigent 28. Fin. of Law, 246. 351. Ra. Ent. 45. pl. 1. there is a Precedent ſeemingly contrary.
[r] Co Litt. 134, b. Salk. 174. pl. 15. 1 Lev. 61 9 Co 218. b.
[s] Dalt. Ch. 132. Bro. Franchiſe, 18. 41 Aſs. 17. Bro. Proceſs, 102. Fitz. Prerog 21. Bro Prereg 109. Franch. 31.

Sect. 18. As to the fourth Particular, *viz.* What is required by Statute in Relation to Proceſs on Informations: It is enacted by 4 & 5 *Will. & M.* 18. That no Proceſs ſhall iſſue on any Information to be exhibited by the Maſter of the Crown-Office, till the Proſecutor have given ſuch a [a] Recognizance as by the ſaid Act is directed. Alſo it is enacted by 18 *El.* 5. That [b] no Proceſs ſhall iſſue on any Information on a penal Statute, till a ſpecial Note be made of the Time when ſuch Information was exhibited, *&c.* But theſe Matters having been already handled in the Chapter of *Informations*, in the Places cited in the Margin, I ſhall refer the Reader thither, for the fuller Conſideration of them.

[a] *Vide ſupra*, Ch. 26. Sect. 5, 6, 10.
[b] *Vide ſupra*, Ch. 26. Sect. 39, 40, 41, 43, 44, 46, 47.

Sect. 19. As to the fifth Particular, *viz.* What is the proper Proceſs upon a Default: It ſeems, That if a Defendant appear to an [c] Indictment or [d] Appeal of Felony, and afterwards, before Iſſue joined, make an Eſcape, whether from his [e] Bail, or from an actual [f] Priſon, the Common *Capias*, *alias* and *pluries*, *&c.* ſhall be awarded againſt him, unleſs there had been an Exigent before, in which Caſe a new [g] Exigent ſhall be immediately awarded. And if a Defendant, againſt whom no Exigent had been before awarded, make ſuch Default after Iſſue joined, and an Inqueſt awarded to try it, it ſeems [h] that a *Capias*, *&c.* ſhall be awarded againſt him *ad audiendum juratam*, *&c.* and, as I take it, the ſame Day on which the *Capias* is returnable, ſhall be given to the Inqueſt, (for it ſeems [i] agreed, That the Inqueſt ſhall never be taken by Default in the Caſe of Felony, as it may for an inferior Crime.) But in ſuch Caſe, if the Exigent had before been awarded, it [k] ſeems, That a new Exigent in the Common Form ſhall be awarded; and that thereby both the Iſſue and Inqueſt are without Day. And it is ſaid in ſome [l] Books, That ſuch Exigent ſhall be *Ad audiendum judicium*: But this ſeems queſtionable; ſince it ſeems to be [m] agreed, That the Defendant may ſave himſelf from Judgment by a Render at any Time before the Return of the Exigent.

[c] H.P.C. 211.
[d] 16 Aſſ. pl. 13. 26 Aſſ. pl. 51.
[e] 16 Aſſ. pl. 13. Fitz. Exigent 10.
[g] But this is made a Query. Crompt. 150. b.
[f] 26 Aſſ. pl. 51.
[h] 19 H. 8. 1. pl. 1. Bro. Proceſs, 1. ſeems to be contrary.
[k] S. P. C. 70. Lett. E. F. Bro. waiver *de choſes*, 39. Fitz. Exigent 10. Proceſs, 113, 127.
[l] S. P. C. 70. Letter E. Fitz Exigent 10. Coro. 173. Bro. waiver *de choſes*, 39. 16 Aſſ. pl. 13. Bro. Appeal, 54.
[m] 26 Aſſ. pl. 51. S. P. C. 70. Letters E. F. H. P. C. 211. Bro. waiver *de choſes*, 39. Fitz. Exigent 10. Coro. 196. Crompt. 150. b. Fitz. Croro. 196. Fitz. Exigent, 10. Bro. waiver *de choſes*, 39. Coro. 192. H. P. C. 211.

Sect. 20. It is ſaid [n] by Sir *Mathew Hale*, That the Defendant in ſuch Caſe appearing on the Exigent, ſhall plead *de novo*, becauſe the Iſſue and Inqueſt are *ſine die* by the Award of the Exigent; but this ſeems to be made a Query by [o] *Staundforde*, and the [p] Authorities whereon it ſeems to be chiefly founded, are very obſcure; and as it ſeems, may well be underſtood in this [q] Senſe, That the Court may cauſe the ſame Inqueſt to come to try the ſame Iſſue, which (according to [r] *Brook*) tho' it be put without Day by the Exigent, is not waived by it, unleſs the Defendant fail to render himſelf before the Return of it.

Sect. 21. Before I proceed to the ſixth Particular, *viz.* What is the proper Proceſs to be awarded after a Removal by *Certiorari*, it may not be improper to premiſe ſome Things concerning the Nature of a *Certiorari*; as,

1. To what Courts it lies.
2. Where the Court of King's Bench uſes a Diſcretionary Power in granting, denying, and filing it.
3. What Reſtraints are put upon it by Statute.
4. How the *Fiat* for it is to be ſigned.
5. To whom it ought to be directed.

[n] H. P. C. 211. [o] S. P. C. 70. Letters E. F. [p] Fitz. Exigent 10. 16 Aſſ. pl. 13. [q] *Vide* Fitz. Coro. 173. [r] Bro. waiver *de choſes*, 39. Proceſs, 148. Exigent 67.

6. Where a Record may be removed into the Court of King's Bench without it.
7. What is to be done by a Defendant before the Allowance of it.
8. How far it is a *Superſedeas* to the Court below.
9. In what Manner it is to be returned.
10. Where a Record is removed by it.
11. What is to be done by the Court above, where the Record is not removed.

As to the firſt Point, *viz.* To what Courts a *Certiorari* lies: I ſhall endeavour to ſhew,

1. Whether it lie to all inferior Courts in general.
2. Whether to thoſe of the *Cinque-Ports.*
3. Whether to thoſe of *Wales.*
4. Whether to thoſe of *London.*

Sect. 22. As to the firſt Point, *viz.* Whether regularly it lie to all inferior Courts in general: It ſeems agreed at this Day, That regularly the Court of King's Bench having a general [a] Superintendency over all other Courts of Criminal Juriſdiction, whether they be of an antient or [b] newly created Juriſdiction, may award a *Certiorari* as well as the Court of Chancery, to remove the Proceedings before any ſuch Courts, unleſs the Statute or [c] Chapter which erects them, expreſly give them an abſolute Judicature, exempt from ſuch Superintendency; as the [d] Statutes concerning the Commiſſioners of the *Cambridgſhire Fens, &c.* are ſaid by ſome to have done.

Sect. 23. And accordingly it ſeems to be agreed, That ſuch a *Certiorari* lies to [e] Juſtices in *Eyre,* and alſo to thoſe of [f] Gaol-Delivery, or of a [g] County-Palatine, and to the [h] College of Phyſicians, having a ſpecial Power by Statute to fine and impriſon for certain Offences; and to Juſtices of Peace, *&c.* even in ſuch [i] Caſes which they are impowered by Statute finally to hear and determine, and alſo to [k] Commiſſioners of Sewers, notwithſtanding the Clauſe in 13 *El.* 9. *Par.* 5. *That the ſaid Commiſſioners ſhall not be compelled to make any Certificate or Return of their Commiſſions, or of their Ordinances, Laws, or Doings,* &c. For it hath been adjudged, [l] That this is intended to exempt them from returning their Orders into Chancery, as by the Statute of *H.* 8. they were obliged to do, and ſhall not be conſtrued to take away the Superintendency of the Court of King's Bench, without expreſs Words.

Sect. 24. As to the ſecond Point, *viz.* Whether a *Certiorari* lie to the Courts of the *Cinque-Ports?* It hath been adjudged, That ſuch a *Certiorari* lies to ſuch Courts to remove an [m] Indictment of Sodomy there found, or an [n] Order made by the Juſtices of Peace at a Seſſion there holden. It is ſaid indeed, by [o] *Rolle,* That the Reaſon why ſuch an Indictment may be removed is, becauſe the Offence is made Felony by a late Statute, and therefore the Courts of the *Cinque-Ports* cannot hold Plea of it without a new Charter; by which it ſeems to be implied, That in his Opinion Indictments in ſuch Courts of Crimes whereof they have Juriſdiction, are not removeable. But the other Books above cited, ſeem to ſpeak generally of all Indictments, and to lay it down as a Rule, That the Pri-

[a] S. P. C. 70. 1 Salk 144, pl. 3. 146. pl. 7. 148. 2 Lev. 86. 1 Lev. 312. Contr. 4 Inſt. pl. 22. Br. Coron. 193. *Certiorari,* 8.
[b] 1 Salk. 144. pl. 3.
[c] Cro Ca. 265. 3 Mod. 93, 94.
[d] 1 Sid. 296 *Contra* 1 Keb. 43. pl. 87. 2 Keb. 722. pl. 124.
[e] 1 Sid. 226. 2 Keb. 81, 12. 4 Inſt. 294, 295.
[f] 1 Salk. 144. pl. 2.
[g] 3 Mod. 229. 230. 2 Lev. 223. 1 Salk. 146, pl. 7. 148.
[h] 1 Rol. Abr. 395. pl. 4, 5. Aleyn, 49. 5 & 6 Guil. & Mar. 11. Par. 5.
[i] 1 Salk. 144. pl. 3.
[k] 3 Mod. 93, 94.
[l] 1 Salk. 145. pl. 6. 1 Keb. 129 pl. 85. March, 196. 197, 199. Raym 186.
[m] Cro. Ca. 252, 253, 264, 291. 1 Rol. Abr. 395. pl. 6. Style 14.
[n] 2 Lev. 86. Sid. 1356. 3 Keb. 154.
[o] 1 Rol. Abr. 395. pl 6.

vilege

vilege of the Courts of the *Cinque-Ports*, uſed Time out of Mind, that the King's Writ doth not run there, is to be intended only of Civil [a] Cauſes between Party and Party.

Sect. 25. As to the third Point, *viz.* Whether a *Certiorari* lie to the Courts of *Wales?* It ſeems to be ſettled, That ſuch a *Certiorari* lies to remove any Indictment taken in *Wales* for a Crime not capital, either at the [b] Grand Seſſions, or at a [c] Seſſions of the Peace: But it is [d] ſaid, That it hath never been granted to remove an Appeal from *Wales*; [e] neither doth it ſeem to be clearly ſettled, That it lies to remove an Indictment of Felony from thence; for ſuch Indictments are never [f] quaſhed, as Indictments for inferior Crimes are. Neither do I find it agreed [g] in what Manner the King's Bench ſhall proceed on any Indictment removed from *Wales*. But it is ſaid, That an Indictment of Felony ſo removed, may be tried in the next [h] *Engliſh* County, by force of [i] 26 *H.* 8. But it ſeems [k] agreed, That this Statute extends not to Appeals.

Sect. 26. As to the fourth Point, *viz.* Whether a *Certiorari* lie to the Courts of *London?* It ſeems to be admitted in the late [l] Reports, That a *Certiorari* may be granted to remove any Indictment from *London* or *Middleſex*; but it is [m] ſaid, That he who prays it ought to give three Days Notice to the other Side: Alſo it is ſaid, [n] That by a *Certiorari* to *London*, the Tenour of the Indictment only ſhall be removed by the City-Charters. And it ſeems, [o] That anciently that City inſiſted on a Privilege, That all Indictments and Proceedings for any Cauſe, except Felony, ſhould be tried and determined there, and not elſewhere.

Sect. 27. As to the ſecond Particular, *viz.* Where the Court of King's Bench uſes a Diſcretionary Power, in granting, denying and filing a *Certiorari*. It hath been [p] adjudged, That where-ever a *Certiorari* is by Law grantable for an Indictment, the Court is bound of Right to award it at the Inſtance of the King, becauſe every Indictment is the Suit of the King, and he has a Prerogative of ſuing in what Court he pleaſes. But it ſeems to be agreed, That it is left to the Diſcretion of the Court either to grant or deny it at the Prayer of the Defendant: And agreeably hereto, it is laid * down as a general Rule, That the Court will never grant it for the Removal of an Indictment before Juſtices of Gaol-Delivery, without ſome ſpecial Cauſe; [q] as where there is juſt Reaſon to apprehend that the Court below may be unreaſonably prejudiced againſt the Defendant; [r] or where there is ſo much Difficulty in the Caſe, that the Judge below deſires that it may be determined in the King's Bench, [s] or where the King himſelf gives a ſpecial Direction that the Cauſe ſhall be removed; or where the [t] Proſecution appears to be for a Matter not properly criminal.

Sect. 28. It ſeems, [u] That the Court will not ordinarily, at the Prayer of the Defendant, grant a *Certiorari* for the Removal of an Indictment of Perjury, or Forgery, or other heinous Miſdemeanor; for ſuch Crimes deſerve all poſſible Diſcountenance, and the *Certiorari* might delay, if not wholly diſcourage their Proſecution.

Sect. 29. Alſo it is ſaid, [x] That the Court of King's Bench will never grant a *Certiorari* for a Conviction of Recuſancy upon a Default at Seſſions; be-

[a] *Vide* Cro. El. 910, 911. Palm. 54, 55, 56, 96. Cro. Jac. 531. 1 Sid. 432. pl. 21. Hardr. 475, 476.
[b] 1 Rol. Abr. 394. pl. 1, 2. 2 Ro. Re. 28, 29. Cro. Jac. 484. Poph. 144. 2 Keb. 471. pl. 63.
[c] 1 Salk. 146. pl. 7.
[d] Cro. Jac. 248. 2 Keb. 797, 798.
[e] 1 Mod. 64, 68. 2 Keb. 685, pl. 8. 725. Cro. Ca. 331, 332.
[f] 1 Rol. Abr. 394. pl. 3. 1 Ventr. 93, 146.
[g] *Vide* Ch. 25. Sect. 148.
[h] *Vide* 1 Rol. Abr. 394. B. 1, 2, 3. 2 Keb. 685. pl. 8. 724.
[i] 2 Keb. 798. 799. 1 Vent. 146. *Quare* 1 Rol. Abr. 394, 395.
[k] *Supra*, Ch. 25. Sect. 39, 40.
[l] Cro. Ca. 248. 2 Keb. 797, 798. 1 Vent. 146. *See* B. 1. Ch. 31. Sect. 41. 1 Raym. 74. 1 Keb. 352. pl. 20. 3 Mod. 230, &c. Hardr. 409, 410.
[m] *Vide Supra*, Ch. 25. Sect. 90.
[n] Cro. Ca. 128, 265.
[o] Term. Paſch. 5 George. *Vide* 1 Vent. 63. 1 Mod. 41.
[p] 1 Keb. 4.
[q] 1 Salk. 150. pl. 18.
[r] 1 Salk. 149 pl. 15.
[s] 1 Vent. 63. 1 Mod. 41.
[t] 1 Salk. 151. pl. 20.
[u] 1 Sid. 54. pl. 19.
[x] Salk. 145. pl. 5.

6 Mod. 246. *Vide* 5 & 6 W. & M. 11.
* Raym. 74.

cauſe

cauſe by the * Statute ſuch Convictions are to be removed into the Exchequer, and from thence Proceſs is to be awarded upon them. But the Court of King's Bench cannot proceed upon them, and therefore will not ſuffer them to come thither, leſt the Statute ſhould be evaded.

* 3 Jac. 1 4. Par. 9. *Vide* B. 1. Ch. 10. Sect. 23.

Sect. 30. It ſeems from the *Year-Book* of 16 *E.* 4. That it is a good Objection againſt the granting a *Certiorari*, that Iſſue is joined in the Court below, and a *Venire* awarded for the Trial of it; for it appears by that [a] Book, where a *Certiorari* had been granted in ſuch a Caſe, that the Court being afterwards appriſed of the Matter, remanded the Cauſe.

[a] 16 Ed. 4, 5. pl. 3. Bro. Coro. 162.

Sect. 31. It ſeems [b] agreed, That a *Certiorari* ſhall never be granted to remove an Indictment or Appeal after a Conviction, unleſs for ſome ſpecial Cauſe; as where the Judge below is doubtful what Judgment is proper to be given; for unleſs there be ſome ſuch Reaſon, the Judge who tried the Cauſe, ſhall not be prevented from giving Judgment in it; for it cannot be intended but that he is beſt acquainted with the Circumſtances of it, and conſequently beſt able to judge what Fine, or other Puniſhment is proper for it.

[b] 1 Salk. 149. pl. 15. 6 Mod. 17.

Sect. 32. But it hath been adjudged, [c] That a *Certiorari* for the Removal of a Preſentment before Juſtices in *Eyre*, of a Matter which is inquirable and puniſhable by the Foreſt Law only, ſhall not be granted before, but only after Conviction; for if it ſhould be granted before, the Offence would be diſpuniſhed; but it may be granted after Conviction, in order to give the Party, the Right of whoſe Freehold is concerned in it, an Opportunity ſo far to [d] traverſe it.

[c] 1 Sid. 296. 2 Keb. 81, 82.

[d] *Vide* Fitz. Aſſ. 442. 4 Inſt. 294, 295.

Sect. 33. The Court has [e] refuſed to grant a *Certiorari* to remove a Recognizance of Appearance before Juſtices of *Oyer* and *Terminer*, *&c.* becauſe the Court below is moſt proper to judge, upon the whole Circumſtances of the Caſe, which are equitably to be conſidered, whether it ought to be eſtreated or not.

[e] 21 Ed. 3 48. pl. 70. Bro. Foreſt 3. 1 Sid. 296. 2 Keb. 81, 82.

Sect. 34. There is a Rule in the Court of King's Bench, That no Order of Commiſſioners of Sewers ought to be filed without Notice given to the Parties concerned. Alſo it is every [f] Day's Practice of that Court, before it will ſuffer the Return of a *Certiorari* for the Removal of the Orders of ſuch Commiſſioners to be filed, to hear Affidavits concerning the Facts whereon they are grounded; and if the Matter ſhall ſtill appear doubtful, to direct the Trial of feigned Iſſues, and either to file the Return, or ſuperſede the *Certiorari*, and grant a *Procedendo*, as ſhall appear to be moſt reaſonable for the Trial of ſuch Iſſues, and to give [g] Coſts againſt the Proſecutor of the *Certiorari*, if it appear to have been groundleſs.

[d] Dominus Rex *verſus* Combs. Hill. 1 *Georgii*.

[f] *Vide* 1 Salk. 145. pl. 5. 2 Keb. 137. pl. 1. ſeems contrary.

[g] *Vide* 2 Keb. 500. pl. 63.

Sect. 35. As to the third Particular, *viz.* What Reſtraints have been put by Statute upon the granting a *Certiorari*. It is enacted by 1 *&* 2 *Ph. & M.* 13. pl. 7. *That no Writs of* Habeas Corpus, *or* Certiorari, *ſhall be granted to remove any Priſoner out of any Gaol, or to remove any Recognizance, except the ſame Writs be* [h] *ſigned with the proper Hands of the Chief Juſtice, or in his Abſence, of one of the Juſtices of the Court out of which the ſame Writ ſhall be awarded or made, upon Pain that he that writeth any ſuch Writs, not being ſigned, as is aforeſaid, to forfeit for every ſuch Writ five Pounds.*

[h] *Vide* Salk. 150. pl. 19.

Sect. 36. Alſo it is enacted by 5 *&* 6 *Will. & Ma.* 11. *That in Term-Time, no Writ of* Certiorari *whatſoever, at the Proſecution of any Party indicted, be granted out of the King's Bench, to remove any Indictment or Preſentment from any General or Quarter-Seſſions, before Trial, but upon Motion of Counſel, and by Rule of Court made in open Court.* But it is provided, *That*

in Vacation ſuch Writ may be granted by any Juſtices of the ſaid Court, whoſe Names ſhall be endorſed thereon, and alſo the Name of the Perſon at whoſe Inſtance it is granted.

Sect. 37. It is enacted by 22 *Ca.* 2. 12. Par. 4. *That all Defects of Repairs of Cauſeys, Pavements, Highways, or Bridges, ſhall be preſented in the County only where ſuch Cauſeys,* &c. *lie, and not elſewhere; and that no Indictment or Preſentment ſhall be removed by* Certiorari, *or otherwiſe out of the ſaid County, till ſuch Indictment or Preſentment ſhall be traverſed, and Judgment thereupon given.* And it is farther enacted by 3 *&* 4 *W. & M.* 11. *That all Matters concerning Highways,* &c. *ſhall be determined in the County where they lie, and not elſewhere; and that no Preſentment, Indictment, or Order made by Virtue of that Act ſhall be removed by* Certiorari, &c. But it is enacted by 5 *&* 6 *W. & M.* 11. *That if the Right or Title to repair ſuch Cauſeys,* &c. *may come in Queſtion, upon Suggeſtion and Affidavit of the Truth thereof, a* Certiorari *may be granted to remove ſuch Indictment or Preſentment into the King's Bench,* &c. upon the like Recognizance as is required by the ſaid Statute as to other [a] *Certiorari's*, for the Removal of Indictments from Seſſions, for which I ſhall refer the Reader to the forty ſixth and following Sections. Alſo it hath been adjudged, That if the Seſſions manifeſtly exceed their Authority, in making Orders concerning Highways, ſuch [b] Orders may be removed by *Certiorari* into the King's Bench, and quaſhed.

[a] See the Statute of 13 & 14 Car. 2. 6. Par. 16.

[b] *See* B. 1. Ch. 67. Sect. 10.

Sect. 38. It is enacted by 7 *&* 8 *Will. & Ma.* 6. Made for the Recovery of ſmall Tithes before Juſtices of Peace, *That no Proceedings or Judgment by Virtue thereof ſhall be removed or ſuperſeded by any Writ of* Certiorari *out of any Court whatſoever, unleſs the Title of the Tithes,* &c. *ſhall come in Queſtion.* And in the Conſtruction hereof, it hath been adjudged, [c] That if the Party inſiſt on any Matter of Law before the Juſtice of Peace, which is any way doubtful, as on a Cuſtom in a Pariſh to be diſcharged of a certain Kind of Tithe, *&c.* the Order may be removed within the Intent of the Statute.

[c] *Dominus Rex ver.* Furnace. *Termino Hill. ſexto Georgii.*

Sect. 39. And it is enacted by 12 *Car.* 2. 23. Concerning the Exciſe, *Par.* 35. *That no Writ of* Certiorari *ſhall ſuperſede Execution or other Proceedings, upon any Order by Juſtices of Peace in purſuance of that Statute, but that Execution, and other Proceedings, ſhall and may be had thereupon, any ſuch Writ, or Allowance thereof notwithſtanding.* And the like is generally enacted by other Statutes concerning the Revenue; for which I ſhall refer the Reader to the ſeveral Statutes.

Vide 1 Keb. 818. pl. 19.

Sect. 40. As to the fourth Point, *viz.* How the *Fiat* for a *Certiorari* is to be ſigned: It is ſaid, [d] That if a *Certiorari* be taken out in Vacation, and teſted of the precedent Term, the *Fiat* for it muſt be ſigned by ſome Judge of the Court, ſome Time before the Eſſoin-Day of the ſubſequent Term, otherwiſe it is irregular, and the Court upon Motion will order a *Procedendo*. But it is ſaid, That there is no Need for any Judge to ſign the Writ of *Certiorari* it ſelf, but only in ſuch Caſes wherein it is required by Statute.

[d] 1 Salk. 150. pl. 19.

Sect. 41. As to the fifth Point, *viz.* To whom the Writ of *Certiorari* is to be directed. It ſeems, That notwithſtanding [e] regularly it ought to be directed to the Judge of the inferior Court, yet in ſome Caſes it may be directed to the proper [f] Officer known to have the Cuſtody of the Record to be removed, and in ſome other Caſes to [g] others, as ſhall be moſt agreeable to the uſual Courſe of approved Precedents, which [h] ſeems to be the beſt Guide whereby to judge of this Matter. And ac-

[e] 3 Keb. 13. pl. 17. 4 H. 6. 15. b. 16. a. S. P. C. 64. Letter B. Hob. 135. [f] Dalt. ch. 134.

Style 371. Raſt. Entr. 110. pl. 4. [g] See the Caſes cited to the other Parts of this Section. [h] Dyer 163. pl. 56. 2 Lev. 223.

cordingly it ſeems, That for an Indictment or Confeſſion of an Approver before a Coroner, it ſhall be directed to the Coroner alone [a], and for an Appeal, both [b] to the Sheriff and Coroner; and for an Indictment in the *Cinque Ports*, to the [c] Mayor and Jurats; and for an Indictment at an Aſſiſe in a County Palatine, to the Chancellor of ſuch [d] County, who ſhall ſend for it to the Juſtices of Aſſiſe.

Sect. 42. If the Perſon who ought to certify a Record, as a Juſtice of [e] Peace, *&c.* who hath taken a Recogniſance, *&c.* or a [f] Judge of *Niſi Prius*, who hath taken a Verdict, or a [g] Coroner, who hath taken an Inqueſt, *&c.* happen to die, having ſuch a Record in his Cuſtody, it ſeems, That a *Certiorari* may be directed to his Executor or Adminiſtrator to certify it. [h] Alſo it hath been adjudged, That it may be directed to a Juſtice of Aſſiſe to certify a Record of Aſſiſe taken before his Companion in his Abſence.

Sect. 43. All the Precedents, I am able to find, of *Certiorari's* for the Removal either of [i] Indictments, or * Recogniſances from Seſſions, are directed either to the Juſtices of Peace for the County generally, or to ſome of them in particular by Name, and not to the *Cuſtos Rotulorum*; and according to [k] *Lambard*, they are never directed to him: Yet it is taken for granted in the [l] *Year-Book* of *H.* 7. That after a Recogniſance for the Peace is brought in to the *Cuſtos Rotulorum*, it ſhall be certified by him. But ſurely, if the *Certiorari* be directed generally to the Juſtices of the County, or any one of them, it may be as well returned by any of them, as by the *Cuſtos Rotulorum*. And I queſtion whether it can be well [m] returned by him, unleſs he do it as Juſtice of Peace, naming himſelf ſuch? But if there are ſufficient Precedents to warrant the directing the *Certiorari* to him as *Cuſtos Rotulorum*, there can be no Doubt but that a Return by him as ſuch will be good.

Sect. 44. As to the ſixth Point, *viz.* Where a Record may be removed into the Court of King's Bench without any Writ of *Certiorari*: It ſeems agreed, † That if a Juſtice of Peace, or other Judge of Record, having taken a Recogniſance, or Inquiſition, or recorded a Riot, or done any other executory Matter, within his Juriſdiction, have ſtill continued in the ſame Commiſſion, *&c.* without any Interruption, the Court of King's Bench ſhall receive ſuch Record from his Hands, without any Writ of *Certiorari*. Alſo it ſeems to be [n] agreed, That upon the Death of both the Juſtices of Aſſiſe, the Clerk of Aſſiſe may, without any *Certiorari*, bring in the Records of the Verdicts of *Niſi Prius*: But that the [o] Executors or Adminiſtrators of a Judge, can in no Caſe bring in a Record without a Writ to authoriſe them to do it. Alſo it ſeems to be [p] agreed, That no Record which is executed, as by Acquittal, *&c.* can be brought into a higher Court without a Writ. And it ſeems to be the ſtronger [q] Opinion, That neither a Juſtice who is out of Commiſſion at the Time, nor one who has been out of Commiſſion, but is afterwards reſtored, can certify any Record without a Writ of *Certiorari*.

Sect. 45. As to the ſeventh Point, *viz.* What is to be done by a Defendant before the Allowance of a *Certiorari*: It is enacted by 21 *Jac.* 8. *Par.* 7, 8. *That all Writs of* Certiorari *for the Removal of any Indictment of Riot, Forcible Entry, or of Aſſault and Battery, at any Quarter-Seſſions of the Peace, or otherwiſe, ſhall be delivered at ſome Quarter-Seſſions of the Peace in*

[a] Regiſter Judic. 74. b. 78. a. Raſt. Ent. 55. a. 263. b.
[b] Regiſter Judic. 76. *Supra*, Ch. 9. Sect 42.
[c] Cro. Ca. 252, 253, 264.
[d] 2 Lev. 223. 3 Keb. 279.
[e] 2 Keb. 750 pl. 4. 8 H. 4 3, a. 5. b. Cro. Jac. 669. 21 H. 7. 21. pl. 4.
[f] Dyer 163. pl. 54, 55, 56. Raſt. Entr. 439. pl. 14. 2 Inſt. 424.
[g] 2 Rol. Abr. 629. Lett. S. 8 Bro. *Certiorari*, 9. Indictment, 23. 43 Aſſ. pl. 40.
[h] Bro. Rec. 81. 11 H. 7. 5. pl. 21.
[i] Regiſter Judic. 76. b. 77. a. Raſt. Ent. 263. b. Regiſter Origin. 90. F.N.B. 81 c.
[k] Lamb. B. 4. Ch. 7.
[l] 2 H. 7. 1. pl. 2.
[m] *Vide* Hob. 135.
† Dalt. Ch. 134. Lamb. B. 4. Ch. 7. 8 Ed. 4. 18. pl. 28. Bro. Record, 17. 64. 8 H. 4. 4. a. 5. b. Crompt. 132, 133. b.
[n] Dyer 163. pl. 54, 55, 56. 2 Inſt. 424. *See* March 112, 113.

[o] 1 Dyer, 163. pl. 54, 55, 56. Raſtal's Entr. 439. pl. 14. 8 H. 4. 4. a. [p] 8 Ed. 4. 18. pl. 28 Lamb. B. 4 Ch. 7. f. 517. Crompt. 133. b. [q] Dalt. Ch. 134. 8 H. 4. 4. a. 5. b. Bro. Garrantie d'Attorney, 9. Bro. Record, 17, 64. Bro. *Certiorari*, 9. Dyer, 163. pl. 54. Raſt. Ent. 438. a. b.

open

open Court; and that the Party indicted ſhall before the Allowance thereof, become bound to the Proſecutor in 10 *l. with ſuch ſufficient Sureties as the Juſtices of Peace, at their Quarter-Seſſions, ſhall think fit, with Condition to pay unto ſuch Proſecutor within one Month after Conviction, ſuch reaſonable Coſts and Damages as the ſaid Juſtices of Peace of ſuch Counties where ſuch Indictments ſhall be found in the ſaid Seſſions of the Peace, ſhall aſſeſs or allow; and in Default thereof, it ſhall be lawful for the ſaid Juſtices to proceed to Trial of ſuch Indictments, any ſuch Writs of* Certiorari *notwithſtanding.*

Sect. 46. And the like Recognizance in the Sum of 40 *l.* is required by 13 & 14 *Car.* 2. 6. *Par.* 16. concerning the Highways, on the Removal of every Indictment, *&c.* on that Statute.

Sect. 47. It is obſervable, That theſe Statutes do not [a] extend to all Indictments at Seſſions in general, but only to thoſe particular Ones therein mentioned: But this Defect was in a great Meaſure [b] ſupplied by the Rules of the Court of King's Bench, which, upon the Removal of an Indictment from *London* or *Middleſex*, required a Recogniſance from the Defendant to carry down the Record to Trial the ſame Term on which the *Certiorari* was returnable, or the Sittings after; and on the Removal of an Indictment from other Counties [c] required ſuch Recognizance for a Trial at the next Aſſiſes.

[a] 1 Keb. 225. pl. 38. 727. pl. 69.
[b] *Vide* 1 Keb. 33. pl. 88. 6 Mod. 246. 2 Salk. 526. pl. 3.
[c] Show. Rep. 336.

Sect. 48. And agreeably hereto, it is enacted by 5 & 6 *W. & M.* 11. and 8 & 9 *Guil.* 3. 33. *That all the Parties indicted at a General or Quarter-Seſſions of the Peace, proſecuting a* Certiorari, *before the Allowance thereof, ſhall find two ſufficient Mainucaptors, who ſhall enter into a Recognizance in the Sum of* 20 *l. before one or more Juſtices of the Peace of the County or Place, (or* [d] *elſe before one of the Judges of the King's Bench, in which Caſe ſuch Judge ſhall make Mention of it under his Hand, on the Back of the Writ) and the Recognizance ſhall be with Condition, at the Return of ſuch Writ, to appear and plead to the Indictment or Preſentment in the Court of King's Bench, and at his own Coſts to procure the Iſſue that ſhall be joined upon the ſaid Indictment or Preſentment, or any Plea relating thereto, to be tried at the next Aſſiſes for the County wherein the Indictment was found after ſuch* Certiorari *ſhall be returnable, if not in* London, Weſtminſter, *or* Middleſex; *and if there, then to cauſe it to be tried the next Term after wherein ſuch* Certiorari *ſhall be granted, or at the Sitting after the ſaid Term, if the Court of King's Bench ſhall not appoint any other Time for the Trial thereof: And if any other Time ſhall be appointed by the Court, then at ſuch other Time, and to give due Notice of ſuch Trial to the Proſecutor, or his Clerk, in Court; and* [e] *alſo, That the Party or Parties, proſecuting ſuch* Certiorari, *ſhall appear from Day to Day in the ſaid Court of King's Bench, and not depart until he or they ſhall be diſcharged by the ſaid Court: And ſuch Recognizances,* Certiorari's, *and Indictments, ſhall be filed in the King's Bench, and the Name of the Proſecutor (if he be the Party grieved or injured) or ſome Publick Officer, endorſed on the Back of the Indictment; and if the Perſon proſecuting ſuch* Certiorari, *being the Defendant, ſhall not, before Allowance thereof, procure ſuch Mainucaptors to be found as aforeſaid, the Juſtices of Peace ſhall, and may proceed to Trial of the Indictment notwithſtanding ſuch* Certiorari.

[d] *Viz.* by Force of 8 & 9 Guil. 3. 33.
[e] *Viz.* by 8 & 9 Guil. 3. 33.

Sect. 49. And it is farther enacted by the ſaid Statute of 5 & 6 *W. & M.* 11. *That if the Defendant proſecuting ſuch* Certiorari, *be convicted, the King's Bench ſhall give reaſonable Coſts to the Proſecutor, if he be the Party grieved or injured, or be a Civil Officer who ſhall proſecute on Account of any Fact that concerned him as Officer to proſecute or preſent; which Coſts ſhall be taxed according to the Courſe of the ſaid Court; and the Proſecutor for the Recovery of ſuch*

ſuch Coſts, ſhall within ten Days after Demand made of the Defendant, and Refuſal of Payment on Oath, have an Attachment granted againſt the Defendant by the ſaid Court for ſuch his Contempt; and the ſaid Recognizance ſhall not be diſcharged till the Coſts ſo taxed ſhall be paid.

[a] See the fifth Parag.

Sect. 50. And the like in Effect is [a] enacted by the ſaid Statute of 5 *& 6 W. & M.* 11. concerning the Removal of Indictments by *Certiorari* within the Counties Palatine of *Cheſter*, *Lancaſter* and *Durham*.

In the Conſtruction of theſe Statutes, the following Points ſeem moſt remarkable.

Sect. 51. *Firſt*, That notwithſtanding by the expreſs Words, Juſtices of Peace may proceed to Trial of the Indictments, notwithſtanding the *Certiorari*, if a proper Recognizance be not given; yet they will be in Contempt to the Court that awarded the *Certiorari*, if they make no [b] Return to it; for all Writs muſt be obeyed unleſs good Cauſe be ſhewn to the contrary; and the proper way of ſhewing it is to return it.

[b] 1 Keb. 225, pl. 38, 231, pl. 51. 598, pl. 68. 903, pl. 1. 1 Sid. 70.

Sect. 52. *Secondly*, That it appears from the manifeſt Purport of theſe Statutes, That they extend only to *Certiorari's* procured by Perſons indicted; from whence it follows, That thoſe, which are procured by the Proſecutor of an Indictment, remain as they were at [c] Common Law.

[c] 6 Mod. 246. [d] 2 Salk. 564. pl. 3.

Sect. 53. *Thirdly*, That [d] theſe Statutes, being in the Affirmative, as to the Taking of Recognizances, do not take away the Power which the Juſtices of the King's Bench have by the Common Law of taking Recognizances upon their granting *Certiorari's*, from whence it follows, That if any ſuch Juſtice, granting a *Certiorari*, ſhall take a Recognizance variant from that preſcribed by the Act, either as to the Sum or Condition, *&c.* Such Recognizance will have the ſame Force as it would have had, if theſe Statutes had not been made; but it is ſaid, That the *Certiorari*, if procured by the Defendant, will not in ſuch Caſe be a *Superſedeas* to the Proceedings below, as it would have been at the Common Law; for the Statutes ſeem to be expreſs, That the Seſſions may proceed notwithſtanding any *Certiorari* procured by a Defendant whereon ſuch Recognizance is not given, as is expreſly preſcribed.

Sect. 54. *Fourthly*, That if the Perſons offering to be Sureties, appear to be worth 20 *l.* the Juſtices [e] cannot refuſe them.

[e] March, 27.

Sect. 55. *Fifthly*, That if divers be indicted [f] in the ſame Indictment, and ſome of them find Sureties, and others not, the Indictment ought to be removed as to thoſe who find Sureties, (becauſe they ſhall not be prejudiced by the Default of the others.) And, as [g] ſome ſay, It ſhall be removed as to the others alſo.

[f] March, 27.

[g] 1 Keb. 231. pl. 51.

Sect. 56. *Sixthly*, [h] That the Maſter of the Crown-Office, in taxing the Coſts, ought only to conſider thoſe which are ſubſequent to the *Certiorari*.

Vide 6 Ed. 4. 5. a. March, 111. [h] 1 Salk. 55. pl. 5.

Sect. 57. *Seventhly*, That the Proſecutor, by accepting the Coſts ſo taxed, is not reſtrained from aggravating the Fine to be ſet on the Defendant, becauſe he has a Right to ſuch Coſts by the expreſs Words of the Statute; and therefore the Defendant can claim no Indulgence from having paid them: But in other Caſes, after a Proſecutor has accepted Coſts from a Defendant, he cannot by the Rules of the Court, aggravate his Fine; becauſe in ſuch Caſes, having no Right to demand Coſts, if he take them at all, he muſt take them by way of Satisfaction of the Wrong, after which it is unreaſonable in him to harraſs the Defendant. And this I take to be a common Practice; tho' in [i] *Salkeld's Reports* there ſeem to be a Note to the contrary.

[i] 1 Salk. 55. pl. 5.

Sect. 58.

Sect. 58. *Eighthly*, [a] That notwithſtanding the Condition of the Recognizance ſeem to be expreſs, That the Defendant ſhall procure a Trial at the next Aſſiſes, *&c.* yet it ſhall not be forfeited, unleſs the Proſecutor of the Indictment give Rules according to the Courſe of the Court.

[a] 1 Salk. 370. pl. 4.

Sect. 59. *Ninthly*, That after ſuch [b] Recognizance is forfeited by the Defendant's not procuring a Trial according to the Purport of the Condition, the Court will not hear any Motion to quaſh the Indictment, or *Certiorari*.

[b] 1 Salk. 380. pl. 16. *Dominus Rex verſus* Somers. *Mich.* 6 *Geo.*

Sect. 60. It is enacted by 3 *&* 4 *W. & M.* 10. againſt Deer-ſtealers, *That no* Certiorari *ſhall be allowed to remove any Proceedings on that Act, unleſs the Party convict ſhall become bound, with good Sureties, in* 5 *l. to pay full Coſts and Damages within one Month after the Conviction ſhall be confirmed, or a* Procedendo *granted.*

Sect. 61. And the like in Effect is enacted by 4 *&* 5 *W & M.* 23. and 5 *Anne Seſſ* 2. *Ch.* 14. in Relation to Convictions, on thoſe Acts of Offences concerning the Game.

Sect. 62. As to the eighth Point, *viz.* How far a *Certiorari* is a *Superſedeas* to the Court below: It is [c] agreed by all the Books, That after it is allowed by ſuch Court, it makes all its ſubſequent Proceedings on the Record, that is removed by it, erroneous. Alſo it ſeems to be generally [d] agreed, That a *Certiorari*, for the Removal of an Indictment of Forcible Entry found at a Seſſions of the Peace, being delivered to any one Juſtice of Peace of the ſame Place, before the Statute of 21 *Jac.* 1. ſet forth more at Large *Sect.* 45. which requires, That every ſuch *Certiorari* ſhall be delivered at ſome Quarter-Seſſions in open Court, did (by ſuch Delivery without more) ſo far ſuperſede the Power of the Seſſions, that all its ſubſequent Proceedings thereon, and even an Execution of a prior Award on the ſame Indictment, would have been erroneous. And it ſeems to be generally [e] agreed, That any one ſuch Juſtice, to whom ſuch *Certiorari* ſhould be delivered, might and ought thereupon immediately to have awarded a *Superſedeas* to the Sheriff in order to have ſtopped the Execution of any prior Award of ſuch Court upon ſuch Indictment.

[c] Cro. Car. 261, 262. 1 Salk. 148, 149.
[d] Cro. El. 915, 916. 2 Keb. 306, pl. 5. Moor 677. pl. 921. 1 Salk. 151. pl. 22.
[e] Cro El. 915, 916. Moore, 677. pl. 921.

Sect. 63. It ſeems to be the better [f] Opinion, That a *Superſedeas* on ſuch a *Certiorari*, being delivered to the Sheriff before he hath begun to put a Proceſs in Execution, will make his ſubſequent Execution of it wholly void; becauſe it is a miniſterial Act, and not a judicial one. But if ſuch *Superſedeas* be not delivered to the Sheriff till after he have in Part executed ſuch Award, it [g] ſeems, That he may afterwards be authoriſed to go through with it by a Writ of *Venditioni exponas*, in the ſame Manner as he may in the like Caſe after a Writ of Error; but I [h] queſtion, Whether he can lawfully proceed after ſuch *Superſedeas* actually delivered to him, without the Writ of *Venditioni exponas*?

This ſeems to be a *Quære*. F. N. B. 237. Lett. E. Dale Ch 134.
[f] Cro. El. 915, 916. Moore, 677. pl 921.
[g] Dy. 98. pl. 57. Yel. 6. Cro. Eliz. 597. pl. 2. 1 Rol. Abr. 593. N. 4. 2 Rol. Abr. 491. D. 5, 6. 3 Keb. 169. pl. 4. 174. pl 9. 309. pl. 51.

Sect. 64. It ſeems to be the ſtronger Opinion, That a *Certiorari*, being once delivered, makes all ſubſequent Proceedings on the Record that ought to be removed by it, [i] erroneous, by Force of thoſe Words, *Coram nobis terminari volumus, & non alibi*, whether ſuch Proceedings are before or after its Return; and notwithſtanding the Party who proſecuted it, never make any other Suit to have the Record certified, but only by cauſing the *Certiorari* to be delivered. And in this Reſpect a *Certiorari* hath a ſtronger Force than a Writ of Error; for that becomes [k] of no Effect,

[h] See the Books next above cited, and Moor, 542. pl 718. 1 Salk 147.

pl 12. [i] Yel 32. Dy. 245. pl. 63. 6 H. 7. 15. b. 16. a. Bro. Recordare, 8. Dale. Ch 134. Lamb. B. 2. Ch. 7. fol 516. Cont. Crompt. 132 b 133. a. [k] Dyer 245. pl. 63. 1 Keb. 14. pl. 35. 54. pl. 12. 117 pl 171. 118. pl. 25 1 Sid. 268. pl. 20. 2 Rol. Abr. 491 pl. 7.

[a] Moor 73 pl. 199. 1 Keb. 93. pl. 79. [b] Dy. 222, 223. Mo. 73. pl. 199. 1 Inſt. 128. b. * Cro. Jac. 282. pl. 2. *Vide ſupra*, Ch. 5. S. 7, 8, 9, 10. Cro. El. 152. pl. 29. 915, 916. Cro. Jac. 43. pl. 10. Yelv. 52, 57, 121. Cro. Ca. 79. 2 Jon. 209. [c] 1 Salk. 144. pl. 1. 150 pl. 17. [d] 1 Keb 944. pl. 3. [e] *Vide ſupra*, Sect. 45 to 62. † 2 R. A. 492. Lett. F. pl. 12. Dalt. Ch. 75. [f] Cro. Jac. 282. Yel. 207. 1 Bulſt. 155, 156. [g] 16 Ed. 4. 5. pl. 3. *Vide* Bro. Diſcontinuance de Proceſs, 52. [h] Raym. 186. 1 Vent. 66. 1 Salk. 144, 145. [i] Agreed by the Court of King's Bench, in the Caſe of the King againſt Whitlow. Hil. 6 Geo. [k] Lamb. B. 2. Ch. 2. 107, 108. [l] Dalt. Ch. 73. and 134. [m] Cro. El. 821. pl. 17. [n] 1 Lev. 311. § 2 Salk. 479. * 1 Rol. Ab. 752. pl. 27. 754. pl. 14. 2 Keb. 385. pl. 56. †Cited 2 Keb. 385. pl. 56. [p] 1 Sid. 64. 1 Lev. 50. 2 Salk. 452. 1 Keb. 165. pl. 120. 187. pl. 168. [q] Yel. 212. Cro. Jac. 254, 255. 1 Sid. 349. 1 Keb. 941. pl. 62. 2 Keb. 385. pl. 56. [r] Rol. Abr. 753, 754.

if the Party who proſecuted it, neglect to get the Record certified in a reaſonable Time. Alſo it ſeems to be holden in ſome [a] Book, That the very Iſſuing of a *Certiorari* is of itſelf a *Superſedeas* to the inferior Court, whether the *Certiorari* be ever delivered or not: In the ſame Manner as an Appearance in the Court above, and a *Superſedeas* purchaſed there, will avoid [b] an Outlawry pronounced after, tho' ſuch *Superſedeas* were not delivered to the Sheriff before the *quinto exactus*; but the Contrary hereto, in Relation to a *Certiorari*, ſeems more agreeable to the general Tenor of the * Books, and the Reaſon of the Thing. And it hath been [c] adjudged, That if a *Certiorari* for the Removal of an Indictment before Juſtices of Peace be not delivered, before the Jury be ſworn for the Trial of it, the Juſtices may proceed. Alſo it hath been [d] holden, That a *Certiorari* is of no Effect, unleſs it be delivered before its Return is expired. And it is certain that by Force of the Statute it cannot at this Time be any [e] *Superſedeas* to the Proceedings on an Indictment at Seſſions, without a proper Recognizance, *&c.*

Sect. 65. It hath been † holden, That a *Certiorari* for the Removal of a Recognizance for the Good Behaviour, or for an Appearance at Seſſions, will ſuperſede its Obligation. But this would be highly inconvenient; and the contrary Opinion ſeems to be ſupported by the better [f] Authority.

Sect. 66. It [g] ſeems, That if an Indictment be removed by *Certiorari* after Iſſue joined, and afterwards remanded, the Inferior Court ſhall proceed to Trial, in the ſame Manner as it would have done, if no *Certiorari* had been granted.

Sect. 67. I ſhall take it for [h] granted, That inferior Courts proceeding after a *Certiorari* delivered, where by Law they ought not, are puniſhable for a Contempt; as hath been more fully ſhewn, *Chap.* 22. *Sect.* 28.

Sect. 68. Alſo it ſeems, That by the Common Law if a *Certiorari* be once filed, the Proceeding below can [i] never be revived by any *Procedendo*.

Sect. 69. As to the ninth Point, *viz.* In what Manner a *Certiorari* is to be returned: I ſhall refer the Reader to the Form in which it is to be done, to [k] *Lambard* and [l] *Dalton*, and ſhall farther take Notice only of theſe following Particulars;

Sect. 70. *Firſt*, That every ſuch Return ought to be under the Seal [m] of the inferior Court, or of the Juſtice, or Juſtices to whom it is directed; and if ſuch Court have no proper Seal, it ſeems, [n] That the Return may be well made under any other.

Sect. 71. *Secondly*, That every ſuch Return muſt be made by the very ſame Perſon to whom the *Certiorari* is directed; for if it be directed to the Juſtices of Peace of ſuch a Place, and the § Clerk of the Peace only return it; or to the Conſtable, or to the Recorder of *B.* and the * Deputy Conſtable, or Deputy Recorder, return it, (without ſhewing in the Return that the Principal had Power to make a Deputy); or to the Steward of St. *Paul's*, and the Steward of the Church of St. *Peter* and St. *Paul* return it, nothing is removed. Yet it is [p] certain, That if it be directed to the Juſtice of *Cheſter*, it may be returned by *A. B.* Chief Juſtice; for the ſame Officer is known to be meant, in the Writ and Return, and his Deſcription in both is in Subſtance the ſame. Alſo it is [q] ſaid, That if a Writ of Error be

directed to ſeveral Juſtices, and returned by Part of them only; yet if it [a] truly recite the Record, it ſo far removes it, that a new Writ of Error lies, *de recordo quod coram nobis reſidet, &c.* And [b] *Quære* how the Court ſhall proceed upon the like Miſ-return of a *Certiorari?*

Sect. 72. *Thirdly*, That [c] regularly a Recognizance taken by a Juſtice of Peace, whether it ſtill actually continue in the Hands of ſuch Juſtice, or [d] have been ſent by him to the Clerk of the Peace, ought to be certified on a *Certiorari* for the Removal of it by ſuch Juſtice only, until it be made a Record of the Seſſions, [e] after which it ſhall be certified in the ſame Manner as the other Records thereof ſhall be.

Sect. 73. *Fourthly*, That it is [f] adviſeable, That a Return to a *Certiorari* directed to Juſtices of Peace, for the Removal of an Indictment taken before them, have the Clauſe *Necnon ad diverſas Felonias, &c.* as well in the [g] Deſcription of the Juſtices who make the Certificate, as of thoſe before whom the Indictment is ſaid to be taken in the Caption; which Matter hath been already conſidered, *Chap.* 8. *Sect.* 33, and *Chap.* 25. *Sect.* 123, 124, 125.

Sect. 74. *Fifthly*, [h] That the Perſon to whom a *Certiorari* is directed, may make what Return to it he pleaſes; and the Court will not ſtop the Filing of it on Affidavits of its Falſity, except only where the Publick Good requires it, (as in the Caſe of the [i] Commiſſioners of Sewers) or for ſome other ſpecial Reaſon: But regularly the [k] only Remedy againſt ſuch a Falſe Return, is an Action on the Caſe at the Suit of the Party injured by it, and an Information, *&c.* at the Suit of the King.

Sect. 75. *Sixthly*, [l] That whatſoever Matters are put into the Return of a *Certiorari*, by way of Explanation or otherwiſe, beſides thoſe which are expreſly ordered to be certified, are put in without any Warrant or Authority, and conſequently ſhall be no more regarded by the Court above, than if they had been wholly omitted.

Sect. 76. *Seventhly*, That [m] generally the Return to a *Certiorari* ought to certify the Record itſelf, or the Tenour of it, or the [n] Tenour of the Tenour, [o] according as the Writ requires: And agreeably hereto it hath been [p] adjudged, That if on a *Certiorari* to return an Order of Juſtices of Peace, the Tenour of ſuch Order be certified, the Return is naught; yet a Return of the Tenour of an Indictment from *London* on a *Certiorari* to remove the Indictment itſelf, is good by the City-Charter, as hath been already ſhewn, *Sect.* 26. Alſo, it [q] ſeems to have been generally holden, That where-ever the Purport of a *Certiorari* is not to proceed upon the Record to be removed, but only to try an Iſſue of *Nul tiel Record*; it is ſufficient to certify the Tenour of the Record, whether the *Certiorari* require a Certificate of the Record itſelf, or of the Tenour of it only. However, I take it to be clear, That if the Court which awards ſuch a *Certiorari*, have no Juriſdiction to proceed on the Record thereby ordered to be removed; as where the Court of [r] Common Pleas award a *Certiorari* for the Removal of an Indictment on the Iſſue of *Nul tiel Record*, concerning ſuch Indictment, the Court below ought only to certify the Tenour of it, leſt there ſhould be a Failure of Juſtice.

Sect. 77. As to the tenth Point, *viz.* Where a Record is removed by a *Certiorari*: Having premiſed that nothing can be removed by it where it is improperly [s] directed, or [t] returned, for which I ſhall refer the Reader to the foregoing Parts of this Chapter; I ſhall in this Place obſerve only the following Particulars;

[a] *Vide* Yelv. 6, 7. 28 H. 6. 12. pl. 24. 1 Rol. Abr. 753. Lett. Q. 754.
[b] *Vide* F. N. B. 71. Letter d.
[c] 21 H. 7. 21. pl. 4. Cro. Jac. 569.
[d] 2 H. 7. 1. pl. 2. *Supra* Sect. 43. *Domina Regina verſus* Randal, *Paſ.* 13 *Anne*
[e] *Vide ſupra* Sect. 43. Regiſter Origin. 90, 151, b. 283, b. 284, &c. F. N. B. 81. Letter c. 2 H. 7. pl. 2. B. o. Peace, 11. Dalt. Ch. 130. Crompton, 131, b. 132. a. Lamb. B. 4. Ch. 7. fol. 516, 517. Dalt. Ch. 134. 22 Ed. 4. 12, b. 13. a. 12 H. 7. 25. pl. 3. 2 R. 3. 9 pl. 20. Bro. Indictment, 32. 50. Clauſe a Remover Plea, 27.
[f] *Vide* 1 Keb. 263 pl. 48.
[g] 6 Mod. 90. *Domina Regina verſus* Norton, *Paſ.* 11 *Anne.*
[h] *Supra* Sect. 34.
[i] 6 Mod. 90. 12 Salk. 492, 493.
[k] Regiſter Origin. 151, a. 169. a. b. F. N. B. 245. Letter B.
[l] F. N. B. 245. Lett. B. 3 Keb. 13. pl. 17.
[m] F. N. B. 245. Lett. B.

Crompt. 131. b. Dalt. Ch. 134. Lamb. B. 4. Ch. 7. f. 515. [n] 1 Salk. 147. pl. 10. 2 Salk. 492, 493. [o] 3. Keb. 13. pl. 17. Dyer. 187. pl. 4. 1 Keb. 107. pl. 127. [p] 1 Rol. Ab. 394, pl. 2. 395. pl. 1, 2. Hob. 135. [q] *Vide ſupra* Sect. 41, 42, 43. [r] *Vide ſupra* Sect. 69, *&c.*

Sect. 78. *First*, That it ſeems to be ſettled at this Day, That as a Writ of [a] Error may remove a Judgment given; and a [b] *Recordare* may remove a Plaint entered, after its *Teſte* and before its Return: So likewiſe a [c] *Certiorari* may remove a Record that ſhall come within its Deſcription before the Time of its Return, tho' there were no ſuch Record *in eſſe* at the Time of its *Teſte*, [d] nor at the Time when it was firſt delivered to the Court below.

Sect. 79. *Secondly*, That as a *Recordare* will remove a Plaint that was [e] diſcontinued below, becauſe the Court above will proceed only on the Plaint, and all the other Proceedings thereon below are to no Purpoſe; there ſeems to be the like Reaſon that a *Certiorari* alſo may remove an Indictment which was diſcontinued below.

Sect. 80. *Thirdly*, That as a Writ of Error can remove no Record which materially varies from the Deſcription ſet forth in ſuch Writ, ſo neither can a *Certiorari*, as in the following Inſtances;

Sect. 81. *First*, Where the Writ deſcribes an Indictment or other Record, taken before *A. B.* and eight others, and that certified appears to have been taken before [f] *A. B.* and ſeven others only, or [g] before him and the other eight mentioned, and others alſo beſides them; or where the Writ deſcribes a Record, [h] *coram A. & B. & ſociis ſuis*, and the Record certified appears to have been taken *coram C. D. & ſociis ſuis*; or [i] where the Writ calls the Juſtices, before whom the Record is taken, *Juſticiarios noſtros*, and in the Record certified they appear to have taken it as Juſtices of a former King.

Sect. 82. *Secondly*, Where the Writ deſcribes an Indictment for ſtealing [k] two Horſes, and that certified is for ſtealing one Horſe only.

Sect. 83. *Thirdly*, [l] Where the Writ deſcribes an Order concerning Foreign Salt, and that certified is concerning Salt in general.

Sect. 84. *Fourthly*, [m] Where the Writ deſcribes an Order concerning the Town of *Needham-Market*, or concerning the Manor of *Anſly*, and an Order concerning the Town of *Needham*, or the Manor of *Anſly*, is returned, without ſhewing in the Return that they are both the ſame Town.

Sect. 85. *Fifthly*, Where the Writ mentions only [o] Orders againſt *A. B. & C.* or Indictments wherein *A. B. & C.* are indicted, and thoſe certified are againſt *A.* only, or againſt *A. & B.* only. Yet [p] it is taken for granted in many Books, neither do I find it any where denied, That a *Certiorari* for the Removal of all Indictments againſt *A.* may remove one wherein the ſaid *A.* is indicted, together with twenty others, ſo far as it concerns him; becauſe in Judgment of Law it is a ſeveral Indictment as to every one of the Perſons indicted. But I do not find it [q] agreed, Whether in ſuch a Caſe the Indictment ſhall be removed ſo far as it concerns the other twenty?

Sect. 86. *Sixthly*, Where there is a [r] material Variance between the Writ, and the Record certified, in the Names or Additions of the Parties; as where the Writ gives the Defendant the Surname of [s] *Giggure*, and the Record certified that of *Giggeer*; or where the Writ commands the Removal of all Convictions againſt [t] *Henry*, Coachman, *quocunque no-*

[a] R. 3. 4. pl. 8. Bro. Recordare, 9. 1 Mod. 112. 3 Keb. 308. pl. 51. Cont. Noy, 54. 1 Rol. Abr. 749. M. 1.
[b] 1 R. 3. 4. pl. 8. Bro. Recordare, 9.
[c] 1 R. 3. 4. pl. 8. Dy. 222. pl. 23. 1 Vent. 63. Bro. Recor 9. 1 Mod. 41. 1 Salk. 149. pl. 3. Lamb. B. 4. Ch. 7. fol. 517. Crompt. 132. b. Dalt. Ch. 134. 1 Mod. 112. Yelv. 32. Cont. 1 Sid. 317. 2 Keb. 141. pl. 13. 142. pl. 15. Noy 54. 1 Rol. Abr. 749. M. 1.
[d] 1 Rol. Abr. 795. B. 1.
[e] 3 H. 6. 30. pl. 17. F. N. B. 71. Lett. A. Fitz. Recordare, 2.
[f] Cro. Jac. 254, 255. Yelv. 42. Plow. Com. 392.
[g] *Vide* Bro. Error, 13. 28 H. 6. 11. pl. 24. 1 Keb. 129. pl. 51. 282. pl. 86. 102. pl. 106.
[h] 1 Sid. 448. Parallel Caſe, 1 Rol. Abr. 753. pl. 14.
[i] 1 Rol. Abr. 753. pl. 3.
[k] 1 Rol. Abr. 754. pl. 7, 13. Dyer 105. pl. 6. Yelv. 212.
[l] 2 Aſſ. pl. 3. S. P. C. 70. Lett. C. Bro. Variance, 62. Lamb. B. 4. Ch. 7. fol. 518. Bro. Croro. 69. Crompt. 132. b.
[m] 1 Bulſt. 155. 1 Salk. 145. pl. 4.
[o] 2 Salk. 452. *See* Cro. El. 882. pl. 14.
[p] 12 Aſſ. pl. 2. Bro. Variance, 66.
[q] 1 Salk. 146. pl. 9. 151. pl. 21. *Domina Regina, v. Hotſpurr, Hill.* 12 *Anne. Cont.* 1 Rol. A. 395. B. 2. 6 Ed. 4. 5. pl. 13. Record Bro. 57. Lamb. B. 4. Ch. 7. f. 517. Crompt. 132. a. Dalt. Ch. 134. March, 112.
[r] Affirmed 6 Ed. 4. 5. pl. 13. Record Bro. 57. Lamb. B. 4. Ch. 7. f. 517. Crompt. 132. a. Dalt. Ch. 134. Denied, March, 112. 1 Keb. 231. pl. 51.
[s] *Vide* 1 Rol. Abr. 754. pl. 5, 6.
[t] Salk. 264. pl. 8.
[u] Adjudged *Mich. tenno Georgii.*

mine cenſeatur, and thoſe certified are againſt *Henry Munton*, Coachman; or where the Writ calls the Defendant *John* [a] *of Stiles*, and the Record *John Stiles*; or where the one calls him [b] Knight and Baronet, and the other Baronet only; or the one [c] *Garret Maines*, and the other *Gerrard Malines*; or the one *J. S.* [d] *nuper de B.* and the other *J. S. nuper de C.* or the one *J. S.* of *B.* * *Sadler*, and the other *J. S.* of *B. Salter*. Yet if the Variance be only in the Spelling, and the Words have the very ſame Sound either Way, as [e] *Bird* and *Burd*, [f] *Shelbury* and *Shelbery*, it ſeems that it will not be material; becauſe it appears not by any Record of the Court, but that the Name in the *Certiorari* may be the true Name, and the Record certified deſcribing one by a Name of the ſame Sound, ſhall be intended to mean the ſame Perſon. Alſo, if a *Certiorari* name the Party without any Addition, and the Record certified, name him with an Addition; yet it ſeems that it may be probably argued, that the Record may be well removed by ſuch Writ, in the ſame Manner as it may be by a Writ of [g] Error, which has the like Variance. But if a Writ of Error deſcribe a Perſon with an Addition, which is omitted in the Record certified, it hath been [h] lately adjudged contrary to the Opinion in Sir *Edward Coke*'s [i] Third Report to the contrary (which ſeems to be rather contradicted than ſupported by the [k] Authorities cited to maintain it) that it cannot remove the Record; and the Reaſon ſeems to be the ſame in Reſpect of a *Certiorari*.

Sect. 87. As to the eleventh Point, *viz.* What is to be done by the Court above, where the Record mentioned in a *Certiorari* is not removed by it: It is [m] ſaid, That ſuch Court cannot in ſuch Caſe proceed upon the Record; becauſe in Judgment of Law it ſtill remains in the Court below, but will either [n] quaſh the Writ, and [o] award a new one, or ſuffer the Court below to proceed in the Cauſe, and take ſuch [p] Order in Relation to the Defendant's Appearance either in the one Court, or the other, to anſwer the farther Proſecution of the Cauſe againſt him, as ſhall in Diſcretion appear to be moſt proper.

Sect. 88. And now I ſhall conſider the ſixth Particular, *viz.* What Proceſs is to be awarded after the Removal of a Record by *Certiorari* into a ſuperior Court: As to which I take it to be agreed, That, after ſuch Removal, if the Defendant do not appear in the Court of King's Bench, the ſame [q] Kind of Proceſs lies againſt him as if the Cauſe had been originally commenced there. Alſo I take it to be [r] agreed, That ſeeing by ſuch Removal the Cauſe below is wholly put without Day, there is no Way to nonſuit the Plaintiff, before he hath appeared in the Court of King's Bench, but by taking out a *Scire facias* to warn him to proſecute his Appeal in that Court; whereupon if the Sheriff return a *Scire feci*, he ſhall be nonſuit. And if the Sheriff return a *Nihil*, a *Scire facias ſicut alias* ſhall be awarded; whereon, if the Sheriff return a ſecond *Nihil*, I do not find it [s] agreed what ought farther to be done.

Sect. 89. As to the ſeventh Particular, *viz.* Where the Proceſs on an Appeal, Indictment, or Information ſhall be ſaid to be diſcontinued, or miſcontinued, or put without Day; having premiſed, that it ſeems

[a] 26 Aſſ. pl. 31. [b] Cro. Ja. 633. [c] *Vide* Cro. Ja. 477. [d] 2 Rol. Abr. 329. pl. 17. * Such a Variance between a Protection and the Writ adjudged fatal. [e] Adjuded in a Writ of Error between Ainſworth and Wilſon. Hil. Geo. Par. Caſe, 1. Sid. 193. pl. 23. [f] Dy. 173. pl. 16. [g] 1 Rol. Abr. 753. pl. 4. [h] Cro El. 172. pl. 14. *Cont.* 25 Ed. 3. 43. pl. 3. [i] *Vide* Cro. El. 172. pl. 14. [k] 1 Rol. Abr. 797. Lett. H. 2 Rol. Ab. 329. pl. 14. [l] 1 Sid. 193. pl. 23. [m] 9 H. 6. 1. pl. 3. Dyer 25. pl. 161. [n] Shute and Carr, adjudged *Hill. Tertio Georgii.* [o] 9 H. 6. 1. pl. 13. Bro. Variance, 6. *Vide* Dy. 25. pl. 161. [p] *Cont.* 1 Sid. 104. [q] 2 Rol. Abr. 328, 329. [r] 3 Co. 2. a. 1 Rol. Abr. 752. a. [s] 9 H. 6. 1. 7 Aſſ. pl. 5. 26 Aſſ. pl. 31. [t] 12 H. 7. 25. pl. 3. 2 R. 3. 9. pl. 20. Bro. Indictment, 50. Bro. Coro. 69. 2 Keb. 142. pl. 15. Lamb. B. 4. Ch. 7. f. 518. *Supra*, Ch. 25. Sect. 11. 9 S. P. C. 70. Lett. D. E. H. P. C. 211. [u] S. P. C. 70 Lett. D. H. P. C. 211. 48 Ed. 3. 22. pl. 2. 48 Aſſ. pl. 3. 1 Salk. 61. 62. 6 Mod. 246. Bro. Appeal, 15, 140. Fitz. Coro. 105. [x] *Vide* S. P. C. 70. Lett. D. E. 72. Lett. A. 48 Ed. 3. 22. pl. 2. 48 Aſſ. pl. 3. Bro. Appeal, 15, 140. Fitz. Coro. 105.

to be agreed, That every Suit, whether Civil or Criminal, and alſo every Proceſs in ſuch Suit againſt Jurors, ought to be properly continued from Day to Day, from its Commencement to its Concluſion, without any the leaſt Gap or Chaſm; and that the Suffering any ſuch Gap or Chaſm, is properly [a] called a Diſcontinuance; and the continuing of the Suit by [b] improper Proceſs, (as by a *Capias* inſtead of a *Diſtringas*) or by giving the Parties an [c] illegal Day, is properly called a Miſcontinuance: I ſhall for the more diſtinct Underſtanding of the Learning of this Kind, endeavour more particularly to ſhew;

First, In what particular Inſtances Proceſs is generally ſaid to be diſcontinued.

Secondly, Where to be miſcontinued.

Thirdly, Where to be put without Day.

And firſt, Proceſs is generally ſaid to be diſcontinued in the following Inſtances,

Sect. 90. *First*, Where the ſecond is not teſted on the very ſame [d] Day on which the firſt is returnable; as where a *Venire facias* is returnable on the 23 of *January*, and the *Diſtringas* is teſted on the 24th, or any other ſubſequent Day.

Sect. 91. *Secondly*, Where there is a Term intervening between the *Teſte* and Return of a [e] *Capias*; for the Law will not ſuffer any ſuch *Capias*, leſt thereby the Defendant ſhould be impriſoned an unreaſonable Time; but an Original may be continued by any [f] other Proceſs, except a *Capias*, tho' it have a Term or more intervening between its *Teſte* and Return. [g] Neither is it any Objection to an Exigent, That it is not made returnable on the next Term after its *Teſte*, becauſe it muſt allow Time enough for five Counties to be holden between its *Teſte* and Return.

Sect. 92. *Thirdly*, [h] Where, after Iſſue or Demurrer, the Court give the Parties a Day to a diſtant Term, without making any Continuance to that immediately following.

Sect. 93. *Fourthly*, Where the Term to which the Suit is continued is adjourned, and the Suit is [i] not adjourned accordingly.

Sect. 94. *Fifthly*, Where any of the Parties are deſcribed in any Continuance of the Suit, whether on the [k] Roll, or by [l] Proceſs, by a Name or Addition variant from thoſe in the Original, *&c.* tho' [m] only in one Letter.

Sect. 95. *Sixthly*, Where after Iſſue joined the Proceſs is [n] not continued from Time to Time againſt the Jurors, returnable on the ſame Days to which the Suit is continued on the Roll againſt the Parties.

Sect. 96. *Seventhly*, Where [o] a joint *Venire* is firſt awarded for the Trial of all the Defendants together, and afterwards ſeveral *Venires* for the Trial of each of them.

Sect. 97. *Eighthly*, Where [p] a *Venire* omits Part of the Iſſue, or Iſſues to be tried.

[a] Fitz. Judgment 12, Finch of Law 431, Co. Litt. 325, a. Bro. Amend. 17. Fitz. Proceſs, 124 127. 1 H. 7. 2. b. 22 E. 3. 2. pl. 12. 22 E. 4. 3. pl. 12. 12 H. 4. 3. pl. 5.

[b] 21 H. 7. 16. pl. 27.

[c] Bro. Diſcontinuance de Proceſs, 23. 21 H. 7. 16. pl. 27.

[d] 1 Bulſt. 141, 142, 143. Yelv. 204, 205. Cro. Jac 283, 284. 6 Mod. 281, 282, 283. 1 Salk. 51.

[e] 8 Ed. 4. 13. pl. 10. Dy. 175. pl. 23. Cro El. 467. the firſt. Fitz. Continuance, 3.

8 H. 6. 29 pl. 24 12 H. 4 3. pl. 5. 10 H. 7. 21. pl. 15. Keilw. 36. Finch of Law 431, 432. Co. Litt. 325. Bro. Diſcontinuance de Proceſs, 11. 23, 50, 57, 61. 12 H. 4. 18. pl. 15. *Cont.* 40 E. 3. 16. pl. 5. Fitz. Amend. 12.

[f] 8 Ed. 4. 13. pl. 10. Daliſ. 108. Dyer 175. pl. 23. *Quære* Bro. Diſcontinuance de Proceſs, 23. 21 H. 7. 16. pl 27. [g] Daliſ. 108. 1 Rol. Abr. 484. pl. 1. 3. [h] Cro Jac. 236. Yelv. 169. 21 H. 7. 16. pl. 27. 1 Rol. Abr. 484. pl. 8, 9, 10. *Cont.* 1 Bulſt. 144. 3 Bulſt. 233. [i] *Vide* 1 Danv. Abr. 243. 4 E. 4. 40 Fitz Diſcontinuance, 27. [k] Fitz Diſcontinuance, 1. Bro. Amendm. 22. 4 H. 6. 6. pl. 17. 40 E. 3. 18. pl. 10. [l] Fitz. Amendm. 13, 17, 21, 27, 69. 77. Diſcontinuance, 7, 12, 17, 40, 42. Error, 15. Bro. Diſcontinuance de Proceſs, 46. Amendm. 50. 38 E 3 22. b. 39 E. 3. 21. a. 40 E 3. 31. pl. 9. 34. pl. 18. 8 H. 5. 2. pl. 9. 7 H. 6 27. pl. 20. 9 H. 6. 39. a. [m] *Quære* 4 H. 6. 6. b. Bro. Amendm. 45. Fitz. Amendm. 21. [n] 21 Ed. 4 20. pl. 27. Bro. Diſcontinuance de Proceſs, 53. Continuance, 82. [o] *Quære*, 22 H. 6. 3. b. 4. a. Fitz Diſcontinuance, 11. *Vide* 7 H. 6. 27. pl. 19. [p] Fitz. Diſcontinuance, 14, 35. 2 H. 5. 3. pl. 16. *Vide* Bro. Diſcontinuance de Proceſs, 63. *Quære* Cro. El. 622. pl. 14.

Sect. 98. *Ninthly*, † Where a *Venire* omits any of the Parties.

Sect. 99. *Tenthly*, Where a Juror is named in the *Habeas Corpora*, by a Name [a] different from that in the Panel returned on the *Venire*; or where a Juror returned on ſuch a Panel is wholly omitted in the *Habeas Corpora*; but in theſe Caſes, if the Juror ſo miſnamed, or * omitted, be not ſworn at the Trial of the Cauſe, it is [b] queſtionable, Whether there be any Diſcontinuance at all?

Sect. 100. *Eleventhly*, Where a *Venire* or *Diſtringas* are iſſued without any [c] Award on the Roll to warrant them.

Sect. 101. It [d] ſeems, That before the Making of the Statutes of 11 *H.* 6. 6, and 1 *E.* 6. 7. all Pleas and Proceſſes before Juſtices of Aſſiſe, Gaol-Delivery, *Oyer* and *Terminer*, or *Peace*, or other the King's Commiſſioners, were diſcontinued by the Making a new Commiſſion, or Aſſociation, or by altering the Names of the Juſtices or Commiſſioners; but this Miſchief is fully remedied by thoſe Statutes.

Sect. 102. If an [f] Indictment be removed by *Certiorari*, after Iſſue joined, and Proceſs awarded for the Trial; *Quære*, If it ſhall be diſcontinued, if not remanded before the Return of ſuch Proceſs?

Sect. 103. As to the ſecond Point, *viz.* Where Proceſs is generally ſaid to be miſcontinued: It ſeems, That where ever an Error in Proceſs doth not amount to a Diſcontinuance, it is generally called a Miſcontinuance; and this ſeems agreeable to the proper Notion of the Word; for as a Cauſe may then properly be ſaid to be diſcontinued, when there is either nothing at all done to continue it, or nothing but what is as to this Purpoſe merely void in Law; ſo it ſeems to be properly ſaid to be miſcontinued, where it is continued amiſs, or by an [g] erroneous and not void Continuance. And agreeably hereto, the Books which ſpeak of Errors in Proceſs, ſeem generally to include them all, without [h] Exception, under the general Heads of Miſcontinuance and Diſcontinuance. And this, as I apprehend, was alſo the Opinion of the greater Part of the Court of King's Bench, in the late Caſe of [i] *Wriddington* and *Charleton*.

Sect. 104. As to the third Particular, *viz.* Where Proceſs ſhall be ſaid to be put without Day: It ſeems [k] agreed, That by the Common Law all Proceedings upon any Indictment, Information, or Popular Action, whereon no Judgment had been given, were wholly determined by the Demiſe of the King, and that nothing remained but the Indictment or Information, Original Writ, or Bill, which were put without Day till re-continued by Re-attachment to bring in the Defendants to plead *de novo*. But this is fully [l] provided for by 4 & 5 *W.* 3. 18, and 1 *Annæ* 8. By which it is enacted, That ſuch Proceſs, *&c.* ſhall continue in the ſame Force after the King's Demiſe, as it would have had if he had lived.

Sect. 105. As for Appeals, [m] I do not find it any where ſaid, That the Pleas, and other Proceedings therein, being put without Day by the Demiſe of the King might not be revived by a ſpecial Re-attachment, in the ſame Manner as in any other Action: However it is certain at this Day, That by Force of 1 *Ed.* 6. 7, and 1 *Annæ* 8. neither the Writ nor Bill, nor any Plea, nor Proceedings therein, ſhall be any way diſcontinued or put without Day by ſuch Demiſe.

† Fitz. Diſcontinuance, 10, 35.
[a] 1 Rol. Re. 22. pl. 30. 3 Bulſt. 311. Winch, 73. Br. Amendm. 50.
[b] 39 E. 3. 21. a
[c] Fitz. Repleader. 4. Amendm. 26. 4 H. 6, 7, 8. pl. 20. 19 H. 6. 39. a.
[d] 9 Ed. 4. 13. pl. 7. 27 H. 6. 5. pl. 33. Bro. Diſcontinuance, 47. *Vide* 1 Danv. Ab. 330, 331.
[f] 5 Co. 42. a. b.
[g] Fitz. Amendm. 57 37 H. 6. 12. a. b. Br. Amendm. 51.
[h] 1 Sid. 66. 1 Keb. 182, 191, 198, 215 6 Mod. 285. Fitz. Diſcontinuance, 4. ſeem to make it no Diſcontinuance. But 19 H. 6. 39. a 34 H. 6. 20. pl. 39. 27 H. 6. 5. pl. 33. Fitz Enqueſt, 18. 5 Co. 36. b. 37. a. Fitz. Diſc. 37, 38. Br. Amendm. 10, 37, 92. are to the contrary. *Vide* Cro. E. 586. pl. 17.
[i] Fitz Error, 16 7 H. 6 28.
[k] *Vide ſupra*, Ch. 5. Sect. 5, 6, 7, 8, 9, 10, 11, 12. Ra. Ent. 77. pl. 2, 3.
[l] *Vide* Bro. Diſcontinuance de Proceſs, 52. 15 Ed. 4, 5. pl. 3. *Supra*, Sect. 66. [m] *Vide* Finch of Law, 431. Sup. Sect. 89. 21 H. 7. 16 pl. 27. 39 E. 3. 20. b. [n] 21 H. 7. 16. pl. 27. Bro. Diſcontinuance de Proceſs, 11, 47, 50, 57. Amendment, 17. Cro. Jac. 283, 284. 1 Bulſt. 142, 143. [o] *Trin.* 11 *Annæ*, [p] 7 Co. 30, 31. Cro. Jac. 14. Moore 748. [q] *Vide Supra*, Ch. 1. Sect. 12, 13. [r] *Vide* 7 Co. 30.

Sect. 106. It ſeems to be holden by [a] ſome, That all Cauſes, whether Civil or Criminal, are diſcontinued; and by [b] others, who ſeem to ſpeak more accurately, That they are put without Day, by the Juſtices before whom they were depending, not coming on the Day to which they are continued, whether ſuch Abſence were occaſioned by [c] Death, or any other Cauſe. But it ſeems to be agreed by all, That a Cauſe ſo diſcontinued, or put without Day, cannot be revived without a Re-ſummons, or Re-attachment; which if they are [d] Special, may revive the whole Proceedings; but if general, the original Record only. Nor do I find that any Statute hath remedied this Miſchief, except in the Caſe of Aſſiſes, and *Juris utrum*, which are provided for by 1 *E.* 6, 7.

Sect. 107. As to the eighth Particular, *viz.* How far Errors in Proceſs are fatal: It ſeems to be generally taken [e] as an undoubted Principle, That a Diſcontinuance, by ſuffering a total Chaſm in the Proceedings, whether on the Roll or in the Proceſs, by not giving a freſh Continuance *inſtanter* upon the Determination of the Precedent, ſhall never be aided by an Appearance and pleading over: And the Book [f] of 9 *H.* 5. 2. *pl.* 7. ſeems to have an Opinion, That the Miſreturn of a Sheriff, as where he returns a *Cepi* on the Award of an Exigent, is not ſaved by the Defendant's Pleading over; but this is [g] queſtioned by *Staundforde*, and ſeems contrary to the general Tenour of the other [h] Books, and contradicted both by [i] *Brook* and [k] *Fitzherbert*, in their Abridgment of this very Caſe. And in all Probability the Book is miſ-printed; for as it ſtands at preſent, it is hardly Senſe, or reconcileable with [l] itſelf. But if a Defendant appearing on erroneous Proceſs, expreſly except to it before he have pleaded over, there have been many [m] Authorities, that he ought to be diſcharged, and that [n] new Proceſs ſhall iſſue where the Defect firſt happened. But there is a greater [o] Number of Authorities to the contrary; by which it appears, That if the Original be good, and the Defendant preſent in Court, he ſhall be compelled to anſwer it, let the Proceſs whereon he came in, or the Execution of it, be never ſo erroneous, or defective, ſo that it never were diſcontinued; for the End of Proceſs is to compel an Appearance; and that End being ſerved, and a legal Charge appearing againſt the Defendant no way diſcontinued, the Law will not ſo far regard a Slip in the Proceſs, as to let the Defendant out of Court in order only to have him brought in again in better Form. And therefore where a Defendant hath excepted to the Proceſs whereon he hath appeared, that he was [p] never ſerved with it, or that [q] no ſuch Proceſs lies in the Caſe, or that it bore [r] *Teſte* before the Original, or that

Dy. 226 pl. 38. Keil. 2. pl. 3. Cro. E. 12. pl. 1. Bro. Diſcontinuance de Proceſs, 29. 25 Aſſ. pl. 5. *Vide* 1 Co. 38.

[b] Co. Litt. 135. b. Finch of Law 432. 433. Ra. Ent. 77. pl. 1. Fitz. Diſcontinuance, 19. Re-attachment, 1, 17, 23, 24. 9 H. 6. 40. 2. 24 E. 3. 23. pl. 17. 28 Aſſ. pl. 42. 30 Aſſ. pl. 39. Bro. Diſcontinuance de Proceſs, 2.

[c] *Vide* Bro. Re-attachment, 18. 4 H. 7. 7. pl. 6. F. N. B. 111. d. 187, b. 188. a.

[d] 7 Co. 29. b. Fitz. Re-attachment, 1.

[e] 1 Bulſt. 143. Yelv. 204. Cro. Ja. 283, 284. 8 H. 6. 29 pl. 24. 21 H. 6. 16. pl. 27. 12 H. 4. 17. pl. 15. 34 H. 6. 20. pl. 39. 18 H. 6. 15. a. b. Co. Litt. 325. a. Bro. Diſcontinuance de Proceſs, 4, 11, 47. Amendment, 17. Fitz. Proceſs 127. Diſcontinuance, 40. Amendment, 27. 38 E. 3. 22. b. 19 H. 6. 39. a. *See* Bro. Error, 3. Repleader 2. and Diſc. 1. Where the contrary Opinion is ſaid to have been holden; but this ſeems not to be warranted by the Caſe at Large in the Year-Book.

[f] *Vide Supra*, Ch. 23. S. 141.

[g] S. P. C. 169. b.

[h] 5 Co. 45. a. Fitz. Coro. 444. Co Litt. 325. a. Salk. 59. pl. 2. 1 Sid. 260. pl. 7. 1 Rol. Abr. 779 Lett. L. 780. Yelv. 158. Cro. El. 582. pl. 6. Cro. Jac. 311. pl. 10. *See* the Books cited to the other Parts of this Section. In 1 Rol. Abr. 380. pl. 6. Notice is taken of three Reſolutions that a *Capias* where it lies not, is not aided by an Appearance and pleading over, and of a ſubſequent one contradicting them.

[i] Bro. Reſtitution, 8.

[k] Fitz. Coro. 68. But in another Part of his Book he abridges this Caſe, without taking any Exception to it. Fitz. Damage, 50.

[l] Alſo it is cited in Yelv. 204. Cro. Jac. 284. 1 Bulſt. 142. for the Proof of the contrary Opinion.

[m] 40 E. 31. pl. 10. 47 Ed. 3. 14. pl. 16. 18 H. 6. 15. a. b. 3 H. 6. 9. a. Fitz. Repleader, 1 Amendm. 14. Proceſs, 154. Error, 82. Bro. Diſcontinuance de Proceſs, 50, 57. Default and Appearance, 11. 1 Rol. Abr. 779. L. 3. 3 Mod. 265. But the Year-Book of 8 H. 6. 29. b. from which the above-cited Authority in Brook Diſcontinuance, 50. is taken, ſeems rather to contradict than warrant it.

[n] 8 H. 6. 29. pl. 24. 12 H. 6. 18. pl. 15. 18 H. 6. 15. b. 47 E. 3. 14. pl. 16 Bro. Diſconti. de Proceſs, 11, 50, 57. Fitz. Proceſs, 127. Diſcontinuance, 17.

[o] 21 H. 7. 16. pl. 27. Fitz. Error, 47. 46 E. 3. 30. pl. 28. Bro. Error, 28. Reſponder, 12. Faux Judgment, 4. 10 H. 7. 21. pl. 15. Yelv. 158. 1 Sid. 100. pl. 10. 260. pl. 7 and ſee the other Books under cited.

[p] Fitz. Diſcontinuance, 36. 9 H. 5. 3. pl 8. 1 Rol. Abr. 779. L. 1, 2. 46 Ed. 3. 30. pl. 28. Bro. Faux Judgment, 4.

[q] 10 H. 7. 21. pl. 15. 12 H. 4. 18. pl. Bro. Error, 109. Proceſs 173. Jour. 36, 54. 21 H. 7. 16. pl. 27. 8 H. 6. 29. pl. 24. Fitz. Proceſs, 127.

[r] 1 Sid. 406. pl. 16.

it was not awarded into the * proper County, or that it was † not returnable at a proper Day, or that it was § directed to one who was no Officer, or that it had not ſo many Days as it ought * between its *Teſte* and Return, or for any ‖ other ſuch like Defect; yet he hath been compelled to anſwer the Original. And agreeably hereto it was lately [a] reſolved, upon great Deliberation by the Court of King's Bench, againſt the Opinion of Mr. Juſtice *Powell*, That the Defendant in an Appeal of Death, coming in upon an Exigent, which was erroneous for want of the Words *de morte viri, &c.* had ſalved the Error by his Appearance, notwithſtanding he had done all he could to take Advantage of it, by craving *Oyer* of the Proceſs, and then demurring. And [b] *Note*, That in all the *Year-Books* above cited to this Point, except † one, it is ſaid generally, That ſuch Errors are ſalved by an Appearance, without any Mention of any Amendment: But in that one it is ſaid, That they ſhall be amended. Alſo it ſeems, that where-ever Proceſs is awarded [c] *inſtanter* from Time to Time, without any the leaſt Break or Chaſm, and the Parties have [d] always a Day upon the Roll, all other Kinds of Errors whatſoever that come under the Name of Diſcontinuances, are [e] ſalved by an Appearance, for there are [f] Caſes by which it appears, That Defendants appearing, and taking Exceptions to ſuch Errors, have been compelled to anſwer to the Original, which they would not have been, if ſuch Original had been taken to have been diſcontinued by ſuch Errors, as they certainly are by an Error, in ſuffering a total Chaſm in the Continuance. And if the Original be not diſcontinued by ſuch Errors, Why ſhould they not be as much ſalved by an Appearance, as any of the other Errors above-mentioned? For would it not be altogether as trifling in this, as in any other Caſe, to diſmiſs a Perſon only in order to ſend for him again? And in Criminal Caſes this cou'd not but be of the utmoſt ill Conſequence, by giving the Defendant, who is actually in the Power of the Court, an Opportunity of eſcaping.

Sect. 108. But it ſeems agreed by all the [g] Books, That any other Diſcontinuance in the Proceſs againſt Jurors, ſhall have the ſame Effect as a Diſcontinuance in ſuffering a Chaſm in the Proceſs; but it ſeems, That no ſuch [h] Diſcontinuance, whether in the Proceſs or in the Roll, ſhall in any Caſe diſcontinue or abate the Original Suit; but if it appear before Trial, ſhall cauſe [i] new Proceſs to be awarded where the firſt Fault happened; and if after Trial, a new [k] *Venire* to have the whole [l] Iſſue tried over again; becauſe the firſt *Venire* was executed, and the whole Trial unwarranted. But [m] if Judgment be given on a Verdict by Jurors appearing on a Proceſs any way erroneous, it will be totally erroneous; becauſe the Trial was wholly unwarranted, and conſequently the Iſſue miſ-tried.

Sect. 109. Alſo, as I apprehend, any other Error in the Proceſs againſt the Jurors, who actually try a Cauſe, will make a [n] Miſ-trial, as much as thoſe which are called Diſcontinuances; as where ſuch Proceſs of this Kind is awarded which is not [o] proper in the Caſe, or where it is directed to a [p] wrong Officer, or has a [q] wrong Viſne, or [r] miſrecites the

* 38 E. 3. 22. b
† 29 E. 3. 31. Fitz. Diſcontinuance, 39. † 21 H. 7. 18. pl. 47. *Cont.* 40 E. 3. 31. pl. 10. Fitz. Amendment, 14. § Cro. El. 582. pl. 6.
[a] Bro. Jour. 36, 54. Diſcontinuance, 23. Error, 169. Amendment, 60. Fitz. Jour. 37, 38.
[b] 14 E. 4. 11. pl. 1. 9 E. 4. 18. pl. 20. 21 H. 7. 11. pl. 11.
[c] Fitz. Diſcontinuance, 51. 3 H. 4. 10. pl. 10. 4 Witherington v. Charlton. *Trin.* 11. *Anne. Vide* 1 Salk. 56, 60.
[d] *Vide* 40 E. 3. 31. pl. 10. Fitz. Amendment, 14.
[e] † 2 H. 7. 59. pl. 11.
[f] *Vide* 1 Bulſt. 141, 142, 143. Yelv. 204, 205. 6 Mod. 281, 282, 283, 285, 286. 1 Salk. 51. Cro. Jac. 284.
[g] 1 Rol. Abr. 779. L. 3. 12 H. 4. 28. pl. 15. 21 H. 7. 16. pl. 27. 38 E. 3. 20. b. 12 H. 4. 3. pl. 5. Bro. Diſcontinuance *de* Proceſs, 11. Fitz. Diſcontinuance, 39. [h] Cro. Jac. 311. pl. 10. [i] 38 E. 3. 22. b. Fitz. Diſcont. 40. 19 H. 6. 39. a. Amendment, 27. Bro. Repleader, 2. Diſcontinuance *de* Proceſs, 11. Error, 3. 3 H. 6. 9. a. [k] Fitz. Amendment, 26. Bro. Amendment, 10, 92. Diſcontinuance *de* Proceſs, 4. 19 H. 6. 39. a. 27 H. 6. 5. pl. 33. 3 H. 6. 20. pl. 39. [l] 30 Aſſ. pl. 36. *Cont.* Bro. Diſcontinuance, 47. But his Note is not warranted by the Books at Large, which are 27 H. 6. 5. pl. 33, and 34 H. 6. 20. pl. 39. [l] 19 H. 6. 39. a. 34 H. 6. 20. pl. 39. Fitz. Amendment, 26, 57. Enqueſt. 18. 29 E. 3. 31. Bro. Amendm. 10. Diſcontinuance, 30. 30 Aſſ. pl. 36. [k] 6 Mod. 286, 287. Fitz. Diſcontinuance, 24, 38. 22 H. 6. 3. b. 4. a. [l] 2 H. 5. 3. pl. 16. Fitz. Diſc. 35. *Vide* 9 H. 4. 7. b. Bro. Enqueſt, 98. [m] Faux Judgment, 12. Error, 16. 22 E. 3. 2. pl. 12. 7 H. 6. 28. 29 E. 3. 31 a. [n] *Vide* 1 Danv. Abr. 334, 335, 352, 357, 455, 456. [o] 7 H. 6. 28. Fitz. Error, 16. [p] 1 Brow. 134. Cro. El. 574. pl. 15. 586. pl. 16. Moor 356. pl. 482. Yelv. 15. 5 Co. 36. b. [q] Cro. El. 468. the firſt. *Vide ſupra*, Ch. 24. Sect. 92. 2 D. Abr. 455, 456. 21 Jac. Ch. 13. 16, and 17 Car. 2. 8. [r] Cro. Jac. 89. pl. 15.

former Proceſs, or is [a] miſreturned, or [b] not returned at all, *&c.* For if Errors of this Kind have ſuch Effect even in Civil Actions, where they are not within ſome of the Statutes of *Amendments* or *Jeofails*, as it ſeems to be admitted that they have, it plainly follows, That they muſt always have it in Criminal Proceedings, ſince [c] no ſuch Proceedings are within the Benefit of any of thoſe Statutes. But if an Error of this Kind, owing wholly to the Miſpriſion of the Clerk, be diſcovered before Trial, and the Amendment of it will ſet the whole Matter right, perhaps it may be [d] amended by the Common Law. And it hath been [e] holden clearly, That even a Diſcontinuance of Proceſs may be amended by Conſent of the Parties.

Sect. 110. Howſoever an Error may be ſo far ſalved by the Party's Appearance, that he ſhall be as much compellable to anſwer the Original, as if there had been no ſuch Error: Yet if he were ſubject to any Diſadvantage in Reſpect of having ſuch Proceſs awarded againſt him; as to the Loſs of his Goods upon an Exigent, or to the Forfeiture of the Privilege of Appearance by Attorney upon a *Pluries*, he [f] ſhall wholly avoid ſuch Diſadvantage when ſuch Award, which ſhould have cauſed it, appears to be any way erroneous, whether in Reſpect of a Diſcontinuance, or Miſcontinuance, or otherwiſe.

Sect. 111. Alſo, for the like Reaſon, it ſeems to be [g] agreed, That if a Man be outlawed, or condemned by Default, for not appearing to Proceſs, which is any way erroneous, he may take Advantage of the Error in Avoidance of ſuch Outlawry, or other Condemnation; for no one ſhall be condemned barely for not appearing, where that which ſhou'd have compelled him to have appeared is defective. But it [h] ſeems, That a Defect in Proceſs in an Outlawry, may be ſalved by the Defendant's Purchaſing a Pardon, and Shewing it to the Court; for that ſuppoſes that there was ſuch an Outlawry againſt him, as needed a Pardon, which, if it were erroneous, it would not do.

Sect. 112. How far a Diſcontinuance of one Appeal will be a Bar to another, hath been already conſidered, *Chap* 23. *Sect.* 130.

And now I am in the ſecond Place particularly to conſider the Nature of Proceſs on a Criminal Accuſation, with a particular Regard to Proceſs of Outlawry only; and for the better Underſtanding thereof, ſhall conſider the following Points;

1. Whether Proceſs of Outlawry lie in all Criminal Caſes?
2. In what Manner it is to be awarded in general
3. What is particularly required in the Award of it againſt the Principal and Acceſſory.

Sect. 113. As to the firſt Point, *viz.* Whether Proceſs of Outlawry lie in all Criminal Caſes: I take it to be certain, That it lies in all Appeals, [i] whether of Felony or Maihem and in all Indictments of Treaſon or Felony, and on all [k] Returns of a Reſcous; and alſo in all Indictments of [l] Treſpaſs *Vi & Armis*. Alſo it ſeems probable, That it lies on an Indictment of [m] Conſpiracy, or [n] Deceit, or any other Crime of a higher Nature than a Treſpaſs with Force and Arms, but [o] not on any Indictment for a Crime of an inferior Nature.

[a] Cro Jac. 467. pl. 14. 1 Danv. Abr. 354. 355. 357
[b] *Vide* 21 Jac. 13. 1 Danv. Ab. 140. pl 2, 3. 141. pl. 4. 5. 8 Co. 163. a. 6 Mod. 283, 284, 285. 1 Salk. 51.
[c] Long quint. E. 4. 140. Bro. Amend. 10, 17, 66, 92. Diſcontinuance de Proceſs, 4. 47.
[d] *Vide* Fitz. Amendment, 59, 75. 29 E. 3. 32.
[e] 21 H. 7. 40. pl. 65. Fitz. Amendment, 78.
[f] 10 H. 7. 21. pl. 15. 12 H. 4. 18. pl. 15. 19 H. 6. 29. a. 3 H. 4. 10. pl. 10. S. P. C. 184. Letter D. *Vide* Bro. Att. 82, 84. Exigent, 20. H. P. C. 271. Fitz. Amendment, 27. Diſcontinuance, 40, 51. Error, 82. But 8 H. 5. 2. pl. 9
[g] 43 E. 3. 17. b. 18. a. 34 pl 47. Fitz. Amendment, 77. Bro. Appeal, 7. ſeem contrary 63 H. 7. 8. b. 9. a. Fitz Replead. 1 Error, 47. Diſcontinuance de Proceſs, 17. 1 Sid. 100. pl. 3. 260. pl. 7. Bro. Reſtitution, 8. Amendment, 60. 9 E. 4. 18. pl. 20.
[h] 3 H. 7. 10. pl. 10. Fitz. Charter, 25. Diſcontinuance 51. Finch of Law, 346. Theloal digeſt of Writs, B. 1. ch. 15. pl 1. 35 H. 6, 6. pl. 9.
[i] 13. H. 7. 21. pl. 5 2 Inſt. 665. *Cont.* Fitz. Proceſs, 56, 213. 29 E. 3. 18. a. b. 22 Fitz. Pro. 89. Bro. Exigent, 25, 28, 46. S. P. C. 172.
[k] 22 E. 4. 11. pl. 31. Finch of Law, 355. Bro. Exigent, 51. 35 H. 6. 6. pl. 9.
[l] 22 E. 4. 11. pl. 31. 35 H. 6. 6. pl. 9. *Cont.* 8 H. 6. 9. pl. 21. Theloal B. 1. Ch. 15.
[m] 8 H. 6. 9. pl. 22. 35 H. 6, 6. pl. 9.
[n] *Vide* Sect. 114.
[o]

Sect. 114. It ſeems [a] agreed, That it lies not on any Action on a Statute, unleſs it be given by ſuch Statute, either expreſſly, as in the Caſe of a [b] *Præmunire*, and many other Caſes; or impliedly, as where a Recovery is given by an Action wherein ſuch Proceſs lay before. And agreeably hereto it hath been adjudged, That it lies not in an Action on the Statutes of [c] Liveries, or of [d] Maintenance, nor in a [e] *decies tantum*, and that it lay not in a Writ of [f] Entry on 5 *Ric.* 2, 7. till it was given by 23 *H.* 8. 14. But that it lies on a Writ of Treſpaſs for a [g] Forcible Entry on 8 *H.* 6. 9. becauſe the Statute expreſſly gives a Recovery by ſuch Writ, and ſuch Proceſs lies in it by the Common Law. It ſeems to be holden in the [h] *Year-Book* 8 *H.* 6. That it lies on all Indictments on Statutes; but the contrary is adjudged in [i] 22 *E.* 4. as to the Statutes againſt *Foreſtalling*; and it is there laid down as a general Rule, That it lies not on an Indictment any more than in an Action on a Statute, unleſs it be expreſſly or impliedly given by ſuch Statute.

As to the ſecond Point, *viz.* In what Manner Proceſs of Outlawry is to be awarded in general: I ſhall obſerve the following Particulars;

Sect. 115. *Firſt*, That it ſeems to be agreed [k] That in every Indictment or Appeal, for any Crime under the Degree of Capital, there muſt be three *Capias's* to the Sheriff of the ſame County wherein the Proſecution is commenced, before the Exigent ſhall be awarded, unleſs it be after [l] Judgment; in which Caſe one *Capias* is ſufficient. And [m] *Quære*, If three *Capias's* be not ſtill neceſſary in an Appeal of Rape, as they were at the Common Law, notwithſtanding it be made [n] Felony by Statute?

Sect. 116. *Secondly*, That it ſeems to be [o] agreed, That one *Capias*, before the Award of the Exigent, hath always been ſufficient in an Indictment or Appeal of Death, or High Treaſon; but that it ſeems [p] doubtful, whether two *Capias's* were not required by the Common Law, in all Indictments and Appeals of any other Felony. However it is certain, That they are required in all Indictments of any other Felony, by 25 *E.* 3. 14. by which it is recorded, *That if after any Man be indicted of Felony, before the Juſtices in their Seſſions, to hear and determine, it ſhall be commanded to the Sheriff, to attach his Body by Writ or Precept, which is called a* Capias; *and if the Sheriff return that the Body is not found, another ſhall be incontinently made, returnable at three Weeks after, wherein it ſhall be compriſed, that the Sheriff ſhall cauſe to be ſeiſed his Chattels, and ſafely to keep them till the Day of the Writ or Precept returned. And if the Sheriff return, That the Body is not found, and the Indictee cometh not, the Exigent ſhall be awarded, and the Chattels ſhall be forfeit, as the Law of the Crown ordaineth. But if he come and yield himſelf, or be taken by the Sheriff, or by other Miniſter, before the Return of the ſecond* Capias, *then the Goods and Chattels ſhall be ſaved.* It ſeems to have been the general [q] Opinion, That this Statute extends to Appeals as well as Indictments, tho' it mention only the latter; but that it extends not to any Indictment or Appeal of Death, tho' it ſpeak of Felony in general.

Sect. 117. *Thirdly*, [r] That after the Sheriff hath returned a *Cepi*, if he have not the Body at the Day, the Court will not award an Exigent on the Suggeſtion of an Eſcape, unleſs the Sheriff will return one.

[a] 22 E. 4. 11. b. 8 H. 6. 9. pl. 21. Fitz. Proceſs, 81. Bro. Proceſs, 57. Exigent, 25. [b] Fitz. Proceſs, 106. 9 E. 4. 2 pl. 8. *See* the Statute againſt Proviſors, 27 E. 3. [c] 8 H. 6. 9. pl. 21. [d] 22 E. 4. 11. b. *Cont.* Fitz. Proceſs, 89. 22 H. 6. 7. pl. 11. *Quære* Bro. Exigent, 28. [e] 8 H. 6. 9. pl. 21. 35 H. 6. 6. pl. 9. Bro. Proceſs, 145. [f] 35 H. 6. 6. pl. 9. Fitz. Proceſs, 101. Bro. Proceſs, 16. [g] Bro. Exigent 35. 37 H. 6. 23. pl. 11. [h] 8 H. 6. 9. pl. 21. Fitz. Proceſs, 81. [i] 22 E. 4. 11. b. Bro. Exigent. 51. *Vide* 35 H. 6. 6. pl. 9. 37 H. 6. 23. pl. 11. [k] Finch of Law, 351, 355. Raſt. Entr. 188, pl. 18. 302. pl. 1, 2, 3. 26 E. 3. 72. pl. 13. Fitz. Exigent 30. Utlagary 17. Error 82. *Vide* 3 H. 6. 9. a. 3 H. 4 11. pl. 10. [l] 40 E. 3. 25. pl. 28. Exigent 7 27. Finch 476. [m] 1 *Vide* 16 Aſſ. pl. 13. Fitz. Exigent 10. Coro. 193. Bro. Proceſs, 148. Exigent, 67. [n] *Vide* Stat. Ch. 23. Sect. 59. to 70. [o] S. P. C. 67. a. H. P. C. 209. Fitz. Coro. 234. 1 H. 5. 5. pl. 8. Finch [illegible] [p] Fitz. Coro. 184. 234. 22 Aſſ. pl. 97. *Cont.* 8 H. 5. 6. pl. 25. Fitz. Exigent, 3. [q] S. P. C. 67. H. P. C. 209. *Vide* Fitz. Exigent, 3. 28, 30 Proceſs 226. 9 H. 5. 6. pl. 25. 1 H. 5. 6. pl. 8. [r] S. P. C. [illegible] Cat. G. Fitz. Exigent, 25. 30 Aſſ. pl. 23.

Sect. 118.

Sect. 118. *Fourthly*, That if there be ſeveral Appellees, ſome of which appear, and others make Default, and thoſe who appear plead a Plea in Abatement of the Writ, or any ſuch Plea in Bar as goes to the Whole, the Suit [a] ſhall be continued againſt thoſe who made Default by *Capias* only, and no Exigent ſhall iſſue till ſuch Plea or Pleas ſhall be determined.

[a] 2 H. P. C. 210. S. P. C. 70. Lett. B.

Sect. 119. *Fifthly*, That an Exigent ſhall [b] never be awarded to the Sheriff of any other County than that wherein the Offence is laid; and that by the [c] Common Law there was no [d] Neceſſity of a *Capias* to the Sheriff of any other County. But the Law relating to this Matter, having been altered by ſeveral Statutes, I ſhall ſet forth thoſe Statutes in particular, and endeavour to ſhew how they are to be underſtood.

[b] Fitz. Exigent, 26 Default 10, 97. 22 E. 3. 11, pl. 4. 30 H. 6. 2. pl. 7. 11 H. 4. 72. pl. 6.

[c] Fitz. Proceſs, 4, 34. See the Preamble of 6 H. 6. 1, and 8 H. 6. 10.

[d] *Vide* Fitz. Proceſs, 1, 3, 34. 155, 164. 22 E. 3. 11. pl. 4. 47 Ed. 3. 4. pl. 7. Dyer 295. pl. 18. 30 H. 6. 2 pl. 7. 11 H. 4. 72. pl. 6.

Sect. 120. And firſt it is enacted by 6 *H.* 6. 1. *That before any Exigent be awarded againſt Perſons indicted in the King's Bench, of Treaſon or Felony, Writs of* Capias *ſhall be directed as well to the Sheriff or Sheriffs of the County wherein they be indicted, as to the Sheriff or Sheriffs of the County whereof they be named in the Indictments, the ſame* Capias *having the Space of ſix Weeks at the leaſt, or longer Time, by the Diſcretion of the ſaid Juſtices, if the Caſe require it, before the Return of the ſame; which Writs ſo returned, the Juſtices ſhall proceed in the Manner as they had done before the Statute: And if any Exigent be awarded or any Outlawry pronounced againſt ſuch Perſons before the Return of the ſaid Writs, the ſame Exigent, ſo awarded, with the Outlawry thereof pronounced, ſhall be void, and holden for none.*

Sect. 121. And it is farther enacted by 8 *H.* 6. 10. *That upon every Indictment or Appeal, by the which any Subject dwelling in other Counties than where ſuch Indictment or Appeal ſhall be taken, of Treaſon, Felony, and Treſpaſs, before the Juſtices of Peace, or before any other, having Power to take ſuch Indictments or Appeals, or other Commiſſioners or Juſtices, in any County, Franchiſe or Liberty of* England, *before any Exigent awarded, preſently after the firſt Writ of* Capias *returned, another Writ of* Capias *ſhall be awarded, directed to the Sheriff of the County whereof he, who is ſo indicted, is or was ſuppoſed to be converſant by the ſame Indictment returnable before the ſame Juſtices, before whom he is indicted, or appealed, at a certain Day, containing the Space of three Months, from the Date of the ſaid laſt Writ, where the Counties be holden from Month to Month; and where the Counties be holden from ſix Weeks to ſix Weeks, the Space of four Months, until the Day of the Return of the ſaid Writ; by which Writ of ſecond* Capias, *the Sheriff ſhall be commanded to take him which is ſo indicted or appealed, by his Body, if he can be found within his Bailiwick: And if he cannot be found within his Bailiwick, to make Proclamation in two Counties before the Return of the ſame Writ, that he which is ſo indicted or appealed, ſhall appear before the ſaid Juſtices,* &c. *at the Day contained in the ſaid Writ, to anſwer,* &c. *After which Writ ſo ſerved and returned, if he which is ſo indicted or appealed, come not at the Day of ſuch Writ returned, the Exigent ſhall be awarded. And that every Exigent and Outlawry otherwiſe awarded, or pronounced, ſhall be holden for none, and void.*

Sect. 122. But it is expreſly provided, *That the above-recited Statute, concerning Proceſs to be made before the King in his Bench, ſtand in force. And that this preſent Statute ſhall not extend to Indictments or Appeals taken within the County of* Cheſter. *And that if any Perſons ſhall be indicted or appealed of Felony or Treaſon, and at the Time of the ſame Felony or Treaſon ſuppoſed, was converſant within the County, whereof the Indictment or Appeal makes mention, the like Proceſs be made againſt them as was uſed before.*

Sect. 123. And it is farther enacted by 10 *H.* 6. 6. *That ſuch ſecond* Capias, *as is required by* 8 H. 6. 10. *ſhall be awarded upon Indictments or Appeals, removed into the King's Bench, or elſewhere, by* Certiorari *or otherwiſe.*

Sect. 124. It is obſervable that it ſeems to be holden generally in many [a] Books, That every Outlawry whatever, on an Indictment or Appeal againſt a Perſon living in a County different from that wherein the Court ſits, is erroneous, if no ſuch *Capias*, with a Command to the Sheriff to make Proclamation, as is given by 8 *H.* 6. were awarded to the Sheriff of the County wherein the Party is ſuppoſed to be converſant, before the Award of the Exigent: And there are [b] Precedents wherein Outlawries in Appeals, originally commenced in the King's Bench, have been reverſed for want of ſuch a *Capias*. Yet it ſeems, That on the other Side it may be probably argued, That Indictments of Treaſon or Felony, originally commenced in the King's Bench, are expreſly provided for by the [c] Statute of 6 *H.* 6. which requires, That a *Capias*, having the Space of ſix Weeks or more, ſhall be awarded to the Sheriff of the County whereof the Indictee ſhall be named; and this Statute is taken Notice of by that of 8 *H* 6. which expreſly enacts, That it ſhall ſtand in its full Force, and therefore cannot well be imagined to intend either to ſuperſede or repeal it. Eſpecially, conſidering that it begins with Juſtices of Peace, and makes no expreſs Mention of the King's Bench; And it is a [d] general Rule, in the Conſtruction of Statutes, That where Things of an inferior Degree are firſt mentioned, thoſe of a higher Dignity ſhall not be included under ſubſequent general Words. Alſo it appears from the Preamble of 10 *H.* 6. 6. That neither Indictments nor Appeals, removed into the King's Bench by *Certiorari*, were within the Benefit of 8 *H.* 6. 10. before the Making of that Statute, which expreſly provides for Indictments and Appeals ſo removed; and there ſeems at leaſt as good Reaſon, that Indictments and Appeals, originally commenced in the King's Bench, ſhall not be taken to be within the Benefit of it. To which may be added, That it ſeems to have been admitted in the *Year-Book* of [e] 31 *H.* 6. that an Appeal, originally commenced in the King's Bench, is within the Equity of 6 *H.* 6. 1. and that an Outlawry thereon is erroneous, if there were no *Capias* containing the Space of ſix Weeks, directed to the Sheriff of the County whereof the Appellee is named, as that Statute requires; by which it ſeems to be implied, That ſuch an Appeal is not within the 8 but 6 *H.* 6. and that the ſame is ſtill in Force.

[a] 1 E. 4. 1. pl. 3. 19 H. 6. 2. pl. 2. S. P. C. 67, 68, 69. H. P. C. 209. Fitz Proceſs, 103. 39 H. 6. 1. pl. 2.

[b] Ra. Entr. 304 pl. 2, 3 *Vide* 19 H. 6. 2. pl. 2. Fitz Error. 26. Ra. Ent. 52. pl. 1, 2.

[c] *Vide ſupra*, Sect. 122.

[d] 2 Co. 46. b.

[e] 31 H. 6 11. pl. 8.

Sect. 125. It ſeems to have been [f] agreed, That by Force of theſe Statutes, a *Capias* ſhall be awarded into a County Palatine, where the Defendant is named of any Place in ſuch County, in any Indictment or Appeal; and it ſeems, That ſuch *Capias* ſhall be directed to, and returned by the [g] Chancellor of ſuch County; and it hath been [h] ſaid, That if he will not return it, the Exigent may be awarded as well as if he had returned it; becauſe the Court cannot compel him to return it, and the Proſecution might be unreaſonably delayed, if the Proceedings were to be ſtayed till he ſhould return it. But [i] *Staundeforde* makes a *Quære*, Whether the Court of King's Bench may not enforce a Return of the Writ?

[f] S. P. C. 68. Letter D. H. P. C. 209, 210. 19 H. 6. 2. 31 H. 6. 11. pl. 11. Fitz. Cor. 19. Bro. Cinque-Ports, 22. *Sed vide* 1 H. 6. 10.

[g] Ra. Entr. 52. pl. 1. 2. 19 H. 6. 2. 31 H. 6. 11. Cont. S. P. C. 68. Lett. D. Fitz Proceſs, 197. Bro. Cinque-Port, 23.

Sect. 126. If a Defendant be expreſly named of the ſame County wherein he is indicted or appealed, and be alſo named under an *alias dictus* of another, it hath been [k] adjudged, That there is no Need of any *Capias*,

[h] 31 H 6 11. pl 8. [i] S. P. C. 69. a. *Vide* Cro. Car. 252, 253. [k] 1 E. 4. 1. pl. 3. Fitz Proceſs, 163. Dyer 214. pl. 44. Bro. Proclamation, 5 S. P. C. 68. b.

with a Command for Proclamation, according to 8 *H.* 6. becauſe that which comes under the *alias dictus* is [a] no way traverſable nor material. Alſo if a Defendant be named of *B.* and late of *C.* there is [b] no Need of any *Capias* to the Sheriff of the County wherein *C.* lies, becauſe it appears that the Defendant is at preſent converſant at *B.* But if a Defendant be named of no certain Place at preſent, but only late of B. and late of C. and late of *D. &c.* being all of them in Counties different from that wherein the Proſecution is commenced, a *Capias* ſhall go to the Sheriff of [c] every one of thoſe Counties.

[a] *Supra* Ch. 25. Sect. 72.
[b] S. P. C. 68. Lett. B. Fitz. Proceſs, 192. Crompton, 152.
[c] H.P.C. 210.

Sect. 127. Notwithſtanding the Words are expreſs, That any Outlawry pronounced contrary to the Directions of the Statutes, ſhall be void: Yet it ſeems to be agreed, [d] That it is not to be taken to be utterly void, but only voidable by the Writ of Error.

[d] 39 H. 6. 1. pl. 2. Bro. Utlagary. 34 Error, 16. 19 H. 6. 2. pl. 2. Fitz. Error, 26. Cro. El. 179. pl. 10. 3 Co. 59. b. Plow. Com. 137. b.

Sect. 128. As to the third Point, *viz.* What is particularly required in the Award of Proceſs of Outlawry againſt the Principal and Acceſſary, it is recited by the Statute of *Weſtminſter*, 1. 14. *That it had been uſed in ſome Counties to outlaw Perſons being appealed of Commandment, Force, Aid or Receipt, within the ſame Time that he which is appealed for the Deed is outlawed: And thereupon it is provided, That none be outlawed upon Appeal of Commandment, Force, Aid or Receipt, unleſs he that is appealed of the Deed be attainted: So that one like Law be uſed therein thro' the Realm; nevertheleſs, he that will ſo appeal, ſhall not, by Reaſon of this, intermit or leave off to commence his Appeal at the next County againſt them, no more than againſt their Principals, which be appealed of the Deed, but their Exigent ſhall remain, until ſuch as be appealed of the Deed be attainted by Outlawry or otherwiſe.*

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

Sect. 129. *Firſt*; That it ſeems to be [e] agreed, That it extends as well to Indictments as to Appeals, not only becauſe the Word [f] Appeal in the Statute may, in a large Senſe, be taken for any Accuſation in general; but becauſe Indictments are certainly as much within the Reaſon of the Statute, as Appeals; and the Common Law, for the [g] Settling whereof this Statute was made, did [h] not make any Diſtinction in this Reſpect between Appeals and Indictments.

[e] H. P. C. 216. 2 Inſt. 183. S. P. C. 46, 69. Lett. A. [f] 9 Co. 119. a. [g] S. P. C. 44. Lett. G. 46. Lett. A. 69. Lett. B.
[h] Bract. f. 127. b. 128. a. *See* Britt. f. 5. 2 Inſt. 183.

Sect. 130. *Secondly*, That it ſeems alſo to be [i] agreed, That wherever ſome of the Defendants are expreſly charged as Principals, and others as Acceſſories, before the Award of this Exigent, the Outlawry thereon of thoſe charged as Acceſſories, cannot but be reverſible; becauſe it appears upon the Record, That the Exigent iſſued contrary to the Directions of the Statute. But if ſeveral be outlawed on a Writ of Appeal, which [k] chargeth them all alike, without any Diſtinction, I [l] ſee not how any Advantage can be taken of the Appellant's not having purſued the Statute, ſince it appears not but that he might have charged them all as Principals.

[i] 43 E. 3. 17. b. 18. a. 34. pl. 47. 44 Aſſ. pl. 16. Ra. Entr. 48. b.
[k] *Vide* H.P.C. 210. 2 Inſt. 183. S. P. C. 46. Lett B. 70. Lett. A. 148. Lett. A.
[l] *Vide* 43 E. 3. 17. b. 18. a. 34. pl. 47. 44 Aſſ. pl. 16. Bro. Appeal, 7. 79. Bro. Exigent, 44. Fitz. Forfeiture, 14.

Sect. 131. *Thirdly*, That it is holden both by [m] *Staundforde*, [n] *Coke*, and [o] *Hale*, That if an Appellant take out the Exigent at the ſame Time againſt all the Defendants, he muſt, when they appear, count againſt them all as Principals, and ſhall be concluded to count againſt ſome as

[m] S. P. C. 46. Lett B. 70. Lett. A.
[n] 2 Inſt. 183.
[o] H. P. C. 210. The Principal Authorities in the Old Books for the Maintenance of his Opinion ſeem to be 7 H. 4. 27. Fitz. Coro. 80. 20 E. 3. 7. b.

Principals

Principals, and others as Acceſſories, becauſe he has taken out ſuch Proceſs againſt them which is erroneous, where all are not Principals. But granting that an Exigent taken out at the ſame Time againſt all the Defendants, appear to have been erroneous, when by the Declaration it appears that ſome of the Defendants are accuſed only as Acceſſories, and therefore ought not to have had an Exigent awarded againſt them, till the Principal had been attainted. Yet ſeeing this is only an Error in the Proceſs to bring in the Defendant, and all ſuch Errors are ſalved by an Appearance, as the Law ſeems to be now ſettled, and hath been more fully ſhewn, *Sections* 107, *&c.* It ſeems [a] queſtionable at this Day, Whether an Appellant may not be at Liberty to declare as he pleaſes againſt Defendants appearing on ſuch an Exigent? However it is certainly ſafeſt, [b] and moſt adviſable for an Appellant when he comes to the Exigent to ſhew which of the Defendants he intends to charge as Principals, and which of them as Acceſſories, and to take out the Exigent againſt the former only, and a *Capias* againſt the others.

Sect. 132. *Fourthly*, That it ſeems the better [c] Opinion, That where there are more than one Principal, the Exigent ought not to iſſue till all of them are attainted.

[a] *See* 40 Aſſ. pl. 25. where it appears that Perſons appealled as Acceſſaries, and brought in by Exigent were ſtill proceeded againſt as Acceſſaries. *See* alſo 43 E. 3. 17. b. 18. a. 35. pl. 47.

44 Aſſ. pl. 16. Bro. Appeal, 7. Exigent, 44. Fitz Forfeiture, 14. [b] Bro. Appeal, 107. 20 E. 3. 7. b. [c] 2 Inſt. 183. Plowd. Com. 29 a. *dubitatur* 7. H. 4. 36. pl. 5. Bro. Appeal, 22. Contr. Fitz. Exigent, 4.

CHAP. XXVIII.

Of Arraignment in general.

HAving ſhewn in what Manner a Perſon under a Criminal Accuſation is to be brought into Court; I ſhall in the next Place endeavour to ſhew in what Manner he is to be arraigned or put upon his Trial; and this I conſider,

Firſt, As it relates to all Criminals in general.
Secondly, As it relates to Principal and Acceſſories in particular.

And firſt, As to the Arraignment of all Criminals in general: Having already ſhewn in the Twenty-fifth [d] Chapter, That regularly the Court will not arraign a Man upon an Indictment while an Appeal for the ſame Crime is depending againſt him; I ſhall here conſider only the following Particulars;

[d] Sect. 15.

Firſt, In what Manner a Criminal is to be arraigned.
Secondly, Whether the Omiſſion of it will be Error.
Thirdly, Where a Perſon ſhall be arraigned upon ſeveral Appeals or Indictments.

As to the firſt Particular, *viz.* In what Manner a Criminal is to be arraigned, I ſhall obſerve,

Sect. 1. *Firſt*, That every Perſon, at the Time of his Arraignment, ought to be uſed with all the [a] Humanity and Gentleneſs which is conſiſtent with the Nature of the Thing, and under no other Terror or Uneaſineſs than what proceeds from a Senſe of his Guilt, and the Misfortune of his preſent Circumſtances; and therefore ought not to be brought to the Bar in a contumelious Manner; as with his [b] Hands tied together, or any other Mark of Ignominy and Reproach: nor even with Fetters on [c] his Feet, unleſs there be ſome Danger of a Reſcous or Eſcape. It ſeems indeed to have been holden by [d] ſome, That this is a particular Privilege of Perſons in Holy Orders. But it ſeems the [e] better Opinion, That the Law makes no Diſtinction in this Reſpect, between them and Laymen.

Sect. 2. *Secondly*, That there is no Neceſſity that a Priſoner at the Time of his Arraignment hold up his Hand at the Bar, or be commanded ſo to do; for this is [f] only a Ceremony for making known the Perſon of the Offender to the Court; and if he anſwer that he is the ſame Perſon, it is all one.

Sect. 3. *Thirdly*, That on every Indictment the Arraignment muſt be in *Engliſh*, by Virtue of 37 *E.* 3. 15, by which it is enacted, *That all Pleas which ſhall be pleaded in any Courts whatſoever, before any of the King's Juſtices whatſoever, or in his other Places, or before any of his other Miniſters whatſoever, or in the Courts and Places of any other Lords whatſoever within the Realm, ſhall be pleaded, ſhewed, defended, anſwered, debated, and judged in the* Engliſh *Tongue, and entred and inrolled in* Latin. But it ſeems to have been always taken, That Appeals are not within this Statute, but that they are to be arraigned, and the Plea of the Defendant to be read, in [g] *French*, in the ſame Manner as anciently; and thus I have often known it done in my own [h] Experience; but upon what Reaſon this Difference between Appeals and all other Proſecutions is grounded, I have never heard.

Sect. 4. *Fourthly*, [i] That an Appeal in the King's Bench ought to be arraigned on the Plea ſide, unleſs it come in by *Certiorari*, in which Caſe it is ſaid, That it ought to be arraigned on the Crown-ſide.

Sect. 5. *Fifthly*, That where a Writ of Appeal is abated, the Priſoner ſhall not [k] be arraigned on the Count, at the Suit of the Party, becauſe the Count depends upon the Writ, and that being determined, all [l] falls to the Ground. Yet it ſeems certain, That if the Writ were good, the Appellee may in many Caſes be arraigned at the Suit of the King upon the Count, as hath been more fully ſhewn, *Ch.* 23. *Sect.* 7, 8, 9, 10, 11, 12, 13.

Sect. 6. As to the ſecond Particular, *viz.* Whether the Omiſſion of an Arraignment will be Error: It is ſaid in the Third [m] *Modern Report*, That an Attainder of High Treaſon was reverſed for this and other Errors. Neither do I find any Precedent of an Attainder in *Coke's Entries*, on an

[a] 3 Inſt. 34, 35. 2 Inſt. 315, 316.
[b] Bracton, 137. p. 3. Britton. 14, 17. Fleta *Lib.* 1. cap. 31.
[c] Bracton, 137 pl. 3. 3 Inſt. 34, 35. H. P. C. 212. Kely. 10.
[d] Fitz. Coro. 432. S. P. C. 133. Lett H.
[e] 3 Inſt. 34, 35. H. P. C. 212. 2 Inſt. 315. Britton, 14, 17. Bracton, 137. pl. 3. S. P. C 133. Letters E. G. Kely. 10.
[f] Agreed by all the Judges in the Lord Stafford's Caſe. Raym. 408.
[g] 1 Sid. 324. pl. 4. 2 Jon. 210. Cro. El. 69. pl. 22. 1 Salk. 61.
[h] As in the Caſe of Smith and Bowen, Mich. 7. *Ann.* And that of Widdington and Charlton. Trin. 11 *Anne.* And that of Reeve and Trundal, Paſch. 3 *Geo.*
[i] 2 Jon. 210. 1 Sid. 324. pl. 4. 1 Salk. 62.
[k] Style's Rep. 7. [l] Bro. App. 44. 4 H. 6. 16. *Vide ſupra*, Ch. 23. Sect. 10.
[m] 3 Mod. 265. *Vide* Raym. 408.

Indictment of [n] Treason or * Felony, in which it is not expressed either in these Words, *Ad barram hic dictus in propria persona sua committitur mareschallo, &c. & statim de præmissis* (in Case of Felony, or *de altis proditionibus*, in Case of High Treason) *ei superius impositis allocutus qualiter se velit inde acquietare dicit, &c.* or in Words [a] tantamount. And therefore it is certainly safest to express it in every Record of such Attainder, where the Party appears and is condemned, whether upon Confession or Verdict, or standing Mute, *&c.* Yet I find it wholly omitted in every Attainder upon an [b] Appeal in *Coke's Entries*, and much oftner [c] omitted than expressed [d] in such Attainders in *Rastal.*

[n] Coke's Ent. 360. pl. 14. 361. pl. 15, 16.

[a] Coke's Entr 352. pl. 2, 3 354. b. 355. pl. 7, 8, 356. pl. 9. 358. pl. 11, 360. pl. 13.

Sect. 7. As to the third Particular, *viz.* Where a Person shall be arraigned upon several Appeals or Indictments: It seems, that by the Common Law, if a Man be appealed of divers Robberies at the Suit of divers Persons, he may be severally [e] arraigned on each Appeal, and then severally tried on each, that each Appellant may be equally intitled to the Restitution of his Goods, upon the Conviction of the Appellee. And in like Manner at this Day a Person charged with several [f] Indictments of Robbery at the Prosecution of several Persons, may be severally arraigned and tried on each Indictment; becaufe the Prosecutor since the Statute of 21 *H.* 8. 11. is intitled to a Restitution of his Goods upon a Conviction on such an Indictment, in the same Manner as the Plaintiff is upon a Conviction in an Appeal. And it is holden both by [g] *Staundforde* and [h] *Hale*, that even a Person attainted of Robbery at the Suit of one Person, may be arraigned and tried at the Suit of another, if such Suit were commenced before the Attainder: But *Quære*: For of the Authorities cited for the Maintenance of this Opinion two [i] seem to be directly against it; and the [k] other, which seems most to the Point, does not come up to it.

[b] *See* Coke's Entr. from f. 53 to 60.

[c] *See* Ra. Ent. 47. a. b. 48. a. b. 49 a. b. 50. a. b. 52. a. 54. a. 55. b.

[d] *See* Rast. Ent. 42. pl. 2. 53. pl. 6.

Sect. 8. It is made a *Quære* by [l] *Staundforde*, Whether a Prisoner before his Attainder shall answer to divers Appeals of Death or Rape, in the same Manner as in Case of Robbery?

[e] 4 E. 4. 11. pl. 18.

[f] S. P. C. 60. Letter E. H. P. C. 212.

[g] S. P. C. 66. a. b.

[n] H. P. C. 212, 228. [b] Fitz. Coro. 379. 7 H. 4. 31. pl. 16. Abridged, Fitz. Coro. 81. [k] 4 Ed. 4. 11. pl. 18. Abridged, Fitz. Coro. 26, 27. *See* 44 E. 4. 44. pl. 57. Abridged, Fitz. Coro. 95. *See* also Chap. 23. Sect. 52. and the Chapter concerning the Plea of Autrefoits convict and attaint. [l] S. P. C. 66. Lett. C.

CHAP. XXIX.

Of the Arraignment of the Principal and Acceſſary.

AND now I am in the ſecond Place to conſider the Nature of Arraignment, ſo far as it particularly relates to Principals and Acceſſaries; for the better Underſtanding whereof, it may not be improper to conſider,

1. In what Caſes, in Judgment of Law, a Man ſhall be ſaid to be a Principal, and in what Caſes he ſhall be ſaid to be an Acceſſary.
2. Where he ſhall be adjudged an Acceſſary before.
3. Where an Acceſſary.

Sect. 1. And 1ſt, For the better Underſtanding in what Caſes a Man ſhall be ſaid to be a Principal, and in what an Acceſſary; having premiſed, that where a Felony is committed by divers Perſons, the [a] ſame Man may be a Principal and Acceſſary in it, and ſo charged in the[b] ſame Indictment or Appeal; as where *A.* commands *B.* to kill *C.* and afterwards actually joins with him in the Fact. And having alſo farther premiſed, that it is agreed by all the Books, that a Man may be an Acceſſary after the Fact, by [c] receiving one who was an Acceſſary before, as well as by receiving a Principal; and that there ſeems to be the ſame [d] Reaſon, that a Man may be an Acceſſary before the Fact, by procuring another to be in ſuch Manner an Acceſſary to the Principal, I ſhall endeavour to ſhew,

1. In what Offences there can be no Acceſſaries, but all muſt be Principals, if any way guilty:
2. Where thoſe who only abet a Fact, ſhall be eſteemed as much Principals in it as thoſe who actually do it.
3. Where thoſe who are actually abſent when a Fact is committed may be eſteemed Principals in it.
4. Where one ſhall be adjudged a Principal in an Offence againſt a Statute.
5. Whether the Offence of an Acceſſary can ever riſe higher than that of the Principal.

Sect. 2. As to the firſt Particular, *viz.* In what Offences there can be no Acceſſaries, but all muſt be Principals, if any way guilty: It ſeems to have been always an uncontroverted Maxim, that there can be no Acceſſaries in [e] High Treaſon, or [f] Treſpaſs. Alſo it ſeems to have been always agreed, That whatſoever will make a Man an Acceſſary before in

[a] H. P. C. 219. 3 Inſt. 139. Keilw. 107. Fitz. Coro. 80.
[b] 7 H. 4. 27. pl. 4. Fitz. Coro. 80. *Vide* Fitz. Coro. 176, 285.
[c] Lamb. B. 2. Ch. 7. f. 291. 26 Aſſ. pl. 52. Bro. Coro. 104 Fitz. Coro. 196. Crompt. Juſt. 42 pl. 24. S. P. C. 43. Letter D.
[d] *See* the Books above cited, and H. P. C. 219.
[e] 3 Inſt. 20, 21, 138. Dalis. 16. pl. 11. H. P. C. 215. 12 Co. 81, 82. 2 Inſt. 183. Bro. Treaſon, 19. 3 H. 7. 10. pl. 2. Fitz. Coro. 55. 19 H. 6. 47. pl. 103. S. P. C. 3. Lett. A. 40. Lett. C. Bro. Coro 135. Dalt. Ch. 108. Crompt. 42. pl. 19. Co. Litt. 57.
[f] 12 Co. 81, 82. 2 Inſt. 183. Bro. Rape, 3. Co. Litt. 57.

Felony, will make him a Principal in [a] High Treaſon and Treſpaſs; as [b] Battery, [c] Riot, Rout, [d] Forcible Entry, and even in [e] Forgery and [f] Petit Larceny. And therefore, where-ever a Man commands another to commit a Treſpaſs, who afterwards commits it in Purſuance of ſuch Command, he [g] ſeems by neceſſary Conſequence to be as guilty of it, as if he had done it himſelf; from whence it follows, that being in Judgment of Law a Principal Offender, he may be tried and found [h] Guilty, before any Trial of the Perſon who actually did the Fact.

Sect. 3. It was formerly a [i] Queſtion, Whether the ſame Receipt of an Offender, which will make the Receiver an Acceſſary after the Fact in the Caſe of Felony, will make him a Principal in High Treaſon, as it ſeems to be [k] ſettled at this Day that it will? For if it ſhou'd be adjudged a Miſpriſion only, as [l] ſome have contended, a Man would be ſubject to a leſs Puniſhment for receiving a Traitor than for receiving a Felon; for he who receives a Felon is certainly liable to Judgment of Death, as being an Acceſſary to the Felony, but he who receives a Traitor would be liable only to Fine and Impriſonment, as being guilty of a Miſpriſion only.

Sect. 4. It ſeems [m] agreed, That whoſoever agrees to a Treſpaſs on Lands or Goods done to his Uſe, thereby becomes a Principal in it. But that no one can become a Principal in a Treſpaſs on the Perſon of a Man by any ſuch Agreement. Alſo it ſeems [n] agreed, that no one ſhall be adjudged a Principal in any common Treſpaſs, or inferior Crime of the like Nature, for barely receiving, comforting and concealing the Offender, tho' he know him to have been guilty, and that there is a Warrant out againſt him, which by Reaſon of ſuch Concealment, cannot be executed. And if he cannot be puniſhed as a Principal, it is certain that he cannot be puniſhed as an Acceſſary; becauſe in ſuch Offences, all who are puniſhed as Partakers of the Guilt of him who did the Fact, muſt be puniſhed as Principals in it, or not at all. Yet if a Man knowing that there is a Warrant againſt ſuch Offender, adviſe and perſwade him to abſent himſelf, [o] perhaps he may be indictable for a Contempt of the Law in hindring the due Courſe of Juſtice.

Sect 5. It is certain, That in [p] Petit Treaſon, and alſo ſuch Felony as ſhall have [q] Judgment of Death, there may be Acceſſaries both before and after the Fact, who muſt be proceeded againſt as ſuch, and not as Principals, as ſhall be more fully ſhewn in the following Part of this Chapter. Alſo it ſeems, [r] that there may be Acceſſaries before the Fact in Mayhem, but that the Appellant hath his [s] Election to proceed againſt them either as Principals, or as Acceſſaries. [t] But I find it no where holden, that there can be Acceſſaries in Mayhem after the Fact.

Sect. 6. I do not find it agreed, [u] Whether there can be any Acceſſaries in *Præmunire?*

Sect. 7. As to the ſecond Particular, *viz.* Where thoſe who only abet a Fact, ſhall be eſteemed as much Principals in it as thoſe who actually do it: It ſeems to have been [x] anciently the more prevailing Opinion, that

[a] 19 H. 6. 47. pl. 103. Bro. Treaſon, 9. Fitz Coro 8. [b] 3 Inſt. 138. 38 Aſſ. pl. 9. Keilw. 55. pl. 4. [c] Co. Litt. 57. [d] B 1. Ch. 64. S. 22. Co. Litt. 57. Fitz. Gard. 99. [e] Moor 666. pl. 913. *Vide* 1 Sid. 312. pl. 25. [f] Cro. E. 750. pl. 4. 2 Inſt. 183. 12 Co. 81. *Cont.* H. P. C. 223. [g] Moor 787. H. P. C. 217. Pl. Com. 475. *Vide Infra*, Sect 7. Fitz. Coro. 314, 433. S. P. C. 41. Lett. D. *Quare* Moor, 53 pl. 155. [h] Bro. Treſ. 256. [i] Lev. 124. 29 Aſſ pl. 59. Fitz Aſſ. 191. *Cont.* 27 Aſſ. pl. 4. *Quare* Vaugh. 115. 116. [k] Dyer 296. pl. 21. 12 Co. 81, 82. 3 Inſt. 138. Dalt. Ch. 89. 108. Crompt. 42. pl. 19. *Vide* 3 H. 7. 10. pl. 2. S. P. C. 3. Lett. A. [l] H. P. C. 215. 3 Inſt. 138. Dalt Ch. 108. Crompt. 42. pl. 19. *Vide ſupra*, Sect 2. and B. 1. Ch. 20.

Sect. 3, 4. S. P. C. 3. Lett. A. Bro. Treaſon, 19. Bro. Coro. 135. [t] Dyer 296. pl. 21. [m] Cro El. 824 38 Aſſ. pl. 9. Bro. Diſſeiſor 98 Bro. *ejectione Cuſtodiæ*, 8. Bro. Treſpaſs, 256. 38 E. 3. 18 a. b. Co. Litt. 180. b. Fitz. Gard. 89. [n] Popham 134. 2 Rol. Abr. 75. Lett. A. pl. 3. [o] 2 Rol Ab 75. Lett. A. pl. 4. [p] Daliſ. 16. pl. 11. 3 Inſt. 20, 21. Crompton. 42 pl. 19. S. P. C. 40. Lett. C. B. 1. Ch 32. Sect. 5, 6. [q] 12 Co 81, 82. Cro. El. 750. pl. 4. 2 Inſt. 183. [r] *See* the Citations to the next Letter. *Cont.* Bro. Appeal, 154. [s] *Vide ſupra*, Ch. 23. Sect. 19. 22 Aſſ. pl. 82. Fitz. Coro. 11, 182, 215. 221. *Cont.* 40 Aſſ. pl. 1. Bro. Appeal, 71, 154. [t] *Vide Supra*, Sect. 4. [u] *Vide* S. P. C. 44. Lett. F. Dalt. ch. 108. Bro. *Præmunire*, 4, 62. Pl. Com. 97. b. [x] Pl. Com. 99. b. Fitz. Coro. 90, 216. 40 Aſſ pl. 8 & 25. Bro. Coro. 11. 40 E. 3. 42. pl. 22 S. P. C. 48. Lett. G. H. 41. Lett. A. B. 44 E. 3. 38. pl. 35. *See* Bract. B 3. Ch. 12. Sect 10, 11, 13. Ch. 19. S. 11. Ch 25. Sect. 8, 10, 11. Lamb. B. 2 ch. 7. fol. 283. Stat of Weſt. 1. ch 14. *Cont* Fitz. Coro. 433.

thoſe

thoſe only were to be adjudged Principals in Felony who actually did the Fact; as in Murder, thoſe only who gave the mortal Blow; in Rape, thoſe only who actually raviſhed the Party, *&c.* and that thoſe in the Company who were only preſent and abetted and encouraged the Doing it, were to be eſteemed Acceſſaries; or at moſt Principals in the [a] ſecond Degree only. But I take it to be ſettled at this Day that all thoſe who [b] aſſemble themſelves together with a felonious Intent, the Execution whereof cauſes either the Felony intended, or any other to be committed, or with an Intent to commit a [c] Treſpaſs, the Execution whereof cauſes a Felony to be committed, and continue together abetting one another till they have actually put their Deſign in Execution; and alſo all thoſe who are [d] preſent when a Felony is committed, and abet the Doing of it as by holding the [e] Party while another ſtrikes him; or by * delivering a Weapon to him that ſtrikes, or by moving [f] him to ſtrike, are Principals in the higheſt [g] Degree, in Reſpect of ſuch Abetment, as much as the Perſon who does the Fact, which in Judgment of Law is as [h] much the Act of them all, as if they had all actually done it; [i] and if there were Malice in the Abettor, and none in the Perſon who ſtruck the Party, it will be Murder as to the Abettor, and Manſlaughter only as to the other.

[a] Pl. Com. 97.
[b] 11 H. 4. 13. pl. 30. Fitz. Coro. 86, 228. Bro. Appeal, 32. Moor 53 pl. 155. 9 Co. 67. b. Kely. 47. Pl. Com. 97, 98. 4 Co. 42.
[c] *See* the Caſes cited to the other Parts of this and the next Section.
[d] And B. 1. ch. 31. Sect. 31. ch. 32. Sect. 9. and ch. 41. Sect. 6.
[e] B. 1. ch. 31. Sect. 46. H. P. C. 216, 217. Fitz. Coro. 60, 314, 350, 433 Bro. Coro. 172. Keil. 161. Kely. 47. Salk. 334, 335. S. P. C 40. Lett. D. E.
[f] *See* B. 1. ch 32. Sect 6. Moor 53. pl. 155. 2 Inſt. 182. 3 Inſt. 138. 59. Bro. Appeal, 19, 132. Bro. Coro 19, 167, 188. S. P. C. 40. Lett. D. 44. Lett. B. C. 41 Lett. B.

Sect. 8. It doth not ſeem neceſſary to the Making an Abettor a Principal, that the Perſon on whom the Felony is committed ſhou'd be under any [k] Terror from the Abetment, and by Reaſon thereof diſcouraged from making that Defence which otherwiſe he might have made; but it ſeems to be ſufficient for this Purpoſe, that the Perſon who does the Fact is encouraged and emboldened in it from the Hopes of preſent and immediate Aſſiſtance from the Abettor, whether he be within View of the Fact, or [l] not. And upon this Ground it hath been adjudged, [m] That where Perſons combine together, to ſtand by one another in a Breach of the Peace, with a general Reſolution to reſiſt all Oppoſers, and in the Execution of their Deſign a Murder is committed, all of the Company are equally Principals, tho at the Time of the Fact ſome of them were at ſuch a Diſtance as to be out of View. Alſo upon the ſame Reaſon it hath been adjudged, [n] That where a Company of Rogues aſſault a Man in the Highway, who eſcapes from them, and then one of them rides from the reſt, in the ſame Highway, and robs another out of the View of his Companions, and then returns to them, they are all of them equally Principals. And the like hath been [o] adjudged in Relation to all thoſe who accompany one another with an Intent to commit a Burglary, in the Execution whereof ſome ſtand to watch only in the adjacent Places, and the reſt actually break, and enter the Houſe.

[k] But this ſeems required in Pl. Com. 98.
[l] Fitz Coro, 60. H. P. C. 216, 217. 4 H. 7. 18. pl. 10. Salk. 334. 335. B. 1. ch. 35. Sect. 7. ch. 38. Sect. 8.
[m] *See* B. 1. ch 31. Sect. 46. H. P. C. 216, 217. Bro. Coro. 172. Salk. 334, 335. Keilw. 161. a. Fitz. Coro. 60, 314, 350, 433. S. P. C. 40. Lett. D E. *Vide Kely.* 47.
[n] B. 1. ch. 3. Sect. 7. *Vide* Moor 53. pl. 155. S. P. C. 40. Lett. D. E.
[o] B. 1. ch. 38. Sect. 8, 9. 11 H. 4. 13. 30. *Vide* Moor, 53. pl. 155.

Sect. 9. But [p] where divers Perſons accompany one another in the doing of a lawful Act, and one of them happens to kill a Man, he that gives the Wound is only guilty of the Homicide, and the reſt of the Company ſhall neither be eſteemed Principals nor Acceſſories. [q] Alſo if

[p] Keilw. 161. a.
[q] Kely. 47.

[a] 10 E. 4. 14. pl. 1. H. P. C. 215, 216. Fitz. Coro. 99. 309, 433. Dalt. ch. 108. Lamb. B. 2. ch. 7. fol 283. 7 H. 4. 27. pl. 4 Preſence holden not to be neceſſary for this Purpoſe. Fitz. Coro. 60. 4 H. 7. 18. pl 10. [e] H. P. C. 216. Fitz. Coro. 135. S. P. C. 40. Lett. F. 13 H. 7. 10. pl. 7. * H. P. C. 216. 2 Inſt. 41, 82. [f] Fitz Coro. 60. S. P. C. 40. Lett. D. H. P. C. 216. 4 H. 7. 18. pl. 10. Bro. Coro. 141, Bro. Appeal, 85. [g] H. P. C. 215, 216. Pl. Com. 98 *Supra.* ch. 23. Sect. 76. ch. 25. Sect. 66. [h] Pl. Com. 98, 100. Fitz. Coro. 60. Bro Coro. 141. Bro. Appeal, 85 4 H. 7 18. pl. 10. 9 Co. 67. b. [i] B. 1. ch. 31. Sect. 49 to Sect. 54.

the Act intended tho' unlawful, were a bare Treſpaſs, and one of the Company be guilty of Larceny, it is a Felony in ſuch Offender only, becauſe it is a Crime of a Nature entirely different from that intended, and not cauſed by the Execution of it.

Sect. 10. Alſo thoſe who by Accident are barely preſent when a Felony is committed, and are merely paſſive, and neither any Way encourage it, nor endeavour to hinder it, nor to apprehend the Offenders, ſhall [a] neither be adjudged Principals nor Acceſſaries; [b] yet if they be of full Age, they are highly puniſhable by Fine and Impriſonment for their Negligence, both in not endeavouring to [c] prevent the Felony, and in not endeavouring to [d] apprehend the Offender. And [e] if they any way ſhewed an Aſſent to the Felony, it ſeems That they may be puniſhed as Principals in it; becauſe the Shewing ſuch an Aſſent could not but give Encouragement to it.

Sect. 11. As to the third Particular, *viz.* Where thoſe who are actually abſent when a Felony is committed may be eſteemed Principals in it: I take it to be a ſettled Rule, That where ever a Man procures a Felony to be committed, and is abſent at the Time when it is committed, and no other Perſon but himſelf can be adjudged a Principal in it, he ſhall be eſteemed as much a Principal as if he had been preſent; for no one can be [f] puniſhed as a Felon, but either as a Principal or as an Acceſſary; and therefore where the Procurer of a Felony cannot be puniſhed as an Acceſſary, becauſe there is no other to whom he can be an Acceſſary, he muſt be puniſhed as a Principal, or not at all. And upon this Ground, it ſeems to be clear, That if a Man [g] perſuade another to drink a Poiſonous Liquor, under the Notion of a Medicine who afterwards drinks it in his Abſence; [h] or if *A.* intending to poiſon *B.* put Poiſon into a Thing, and deliver it to *C.* who knows nothing of the Matter, to be by him delivered to *B.* and *C.* innocently deliver it accordingly in the Abſence of *A.* or if one [i] incite a Madman to kill another, who afterwards kills him in the Abſence of the Perſon that incited him; In all theſe, and the like Caſes, the Procurer of the Felony is as much a Principal as if he had been preſent when it was done. And ſo [k] likewiſe all thoſe ſeem to be, who were preſent when the Poiſon was infuſed, and privy to, and conſenting to the Deſign. But [l] thoſe who only abetted their Crime by their Command, Counſel or Advice, but were abſent when the Poiſon was infuſed, are Acceſſaries, and not Principals. Alſo if *A.* intending to poiſon *B.* deliver a poiſonous Thing to *C.* to be by him delivered to *B.* and *C.* knowing it to be poiſoned delivered it to *B.* in the Abſence of *A.* In this Caſe *C.* [m] only is a Principal in the Felony, and *A.* an Acceſſary.

Sect. 12. By force of 3 *H.* 7. 2. All thoſe who are Acceſſaries before to the forcible Taking away of a Woman, made Felony by that Statute, whether they were preſent or abſent at the Time of the Taking, or Acceſſaries after, by wittingly receiving the Woman ſo taken away, ſhall be puniſhed as [n] Principals; but this depends on the expreſs Words of the Statute, and not on any Conſtruction from the Reaſon of the Common Law.

[a] S. P. C. 40. Lett. D. E. H. P. C. 216. Fitz. Coro. 92, 197, 395. Bro. Indict. 5. 14 H. 7. 31. pl. 7. Cont. Firz. Coro. 314, 197. Lamb. B. 2. ch. 7. f. 289. *Vide ſupra.* Ch. 23. Sect. 66.

[b] S. P. C. 40. Lett. E. Fitz. Coro. 395.

[c] Noy, 50. Dalt. Ch. 108.

[d] *Supra*, Ch. 12. Sect. 1, 2, 3, 4.

[e] *Vide infra*, Sect. 15.

S. P. C. 40. Lett. D. E. H. P. C. 217. Fitz. Coro. 150. Dalt. ch. 108. Lamb. B. 2. ch. 7. f. 282. My Pleas of the Crown, B. 1. Ch. 20. Sect. 3.

But Fitz. Co. 10. 92. and Crompt. 41. pl. 7, 8. ſeems contrary.

[f] 4 C. 44. b. Pult. 122. a.

[g] 4 Co. 44 b. 2 Inſt. 183. Crompt. 44. pl. 43. H. P. C. 216. Pult. 122. a. Dalt. ch. 108.

[h] 9 Co. 81. 3 Inſt. 138.

[i] H. P. C. 218. 9 Co. 81. Kely. 52, 53.

[k] H. P. C. 216. [l] 4 Co. 44 b. Crompt. 44. pl. 43. [m] Kely. 52, 53. [n] *See* B. 1. ch. 42. Sect. 8, 9. and H. P. C. 217.

Sect. 13. As to the fourth Particular, *viz.* Where a Man ſhall be adjudged a Principal in an Offence againſt a Statute: It ſeems to have been always [o] generally agreed, That notwithſtanding all penal Statutes are to be conſtrued ſtrictly; yet where ever a Statute ordains, That thoſe who are guilty of the Thing prohibited by it, ſhall be adjudged Traitors or Felons, it by a neceſſary Implication makes all the Procurers and Abettors of it Principals or Acceſſories before, upon the ſame Circumſtances which will make them ſuch in a Treaſon or Felony at Common Law; becauſe ſuch Perſons may properly be ſaid to have done the Thing in ſuch a Manner cauſed by them, and conſequently to come within the very Words of the Statute. And therefore it ſeems to have been generally unqueſtionable. That thoſe who procure the [a] Clipping of the King's Coin, or other Offence, made High Treaſon by Statute, in ſuch a Manner as will make them principal Traitors in a Treaſon at Common Law, ſhall be adjudged principal Traitors by the Statute. And that thoſe who abet a [b] Petit Treaſon, or a Felony by Statute; as a [c] Rape, or [d] Buggery, *&c.* ſhall be adjudged Principals if preſent when it was committed, and Acceſſaries if abſent, in the ſame Manner as in Felonies at Common Law, unleſs the Statute expreſly provide otherwiſe; as that of 3 *H.* 7. 2. does, as hath been ſhewn in the foregoing Section.

Sect. 14. But there [e] ſeems to have been formerly ſome Opinions, That the Receivers of a Felon by Statute, ſhall not be adjudged Acceſſaries to the Felony after the Fact, in the ſame Manner as the Receivers of a Felon at Common Law; becauſe ſuch Perſons can in no Propriety of Speech be ſaid to have done the Thing prohibited, as the Procurers of it may be ſaid to have done: But this [f] ſeems to have been more ſtrongly holden in Reſpect of thoſe Statutes which expreſly provide that Acceſſories before to the Offence prohibited, ſhall be puniſhed as Felons, *&c.* but ſay nothing of Acceſſaries after; from which Words it may be argued, That they muſt be either intended to exclude Acceſſaries after the Fact, or have no manner of Effect. Yet I take it to be ſettled at this Day, That in theſe, and all other Caſes, where a Statute makes any Offence [g] Treaſon or [h] Felony, it involves the Receiver of the Offender in the ſame Guilt with himſelf, in the ſame Manner as in Treaſon or Felony at Common Law, unleſs there be an expreſs Proviſion to the contrary. For ſince it is agreed, That ſuch new Treaſon or Felony ſhall have the ſame Conſtruction with a Treaſon or Felony at Common Law to all other [i] Intents and Purpoſes, Why ſhould it not alſo have the ſame in Relation to thoſe who are to be eſteemed Principals and Acceſſories in it? And as to the Objection, That the Receivers of the Offender cannot thereby be ſo properly ſaid to have done the Offence, as the Acceſſaries before, it may be anſwered, That they may properly enough be ſaid to be Partakers in the Guilt of the Offender; and what Crime ſuch a Partaking ſhall be adjudged to amount to, is moſt reaſonably determined by the Rules of Law in other Caſes of like Nature. And as to the Objection, That a Statute by expreſſing Acceſſaries before, muſt be intended to exclude Acceſſaries after, or to have no manner of Effect, it may be anſwered, That nothing is more common than for Statutes to expreſs thoſe Things which the Law would have implied, in which Caſes it ſeems a very reaſonable Conſtruction, That *Expreſſio eorum quæ tacite inſunt nihil operatur.*

[o] S. P. C. 44. Lett. A B C. 19 H. 6. 47. pl. 103. 3 Inſt. 45, 59, 72. B. 1. ch. 40. Sect. 4. Crompt. 42. pl. 13. Dalt. ch 108. Lamb. B. 2. ch. 7. f. 286, 287. Dalif. 11. pl. 22. 22. pl. 3. H. P. C. 215. *Quære*, Dy. 88. pl. 105. Dalif. 11. pl. 12. H. P. C. 223, in the Additions printed in the ſecond Edition.

[a] *Vide ſupra*, Sect. 2. B. 1. ch. 17. S. 55. 19 H. 7. 47. pl. 103. S. P. C. 3. Lett. A. H. P. C. 18.

[b] *See* B. 1. ch. 32. Sect. 5, 6.

[c] H. P. C. 187, 215. *See* B. 1. ch. 41. Sect. 6. S. P. C. 44. Lett. B. 11 H. 4. 13. Dalif. 22. pl. 3. Fitz. Coro. 86, 228. Bro. Rape, 2, 3.

[d] 3 Inſt. 59. H. P. C. 215 *See* B. 1. ch. 38. Sect. 18.

[e] *Vide* S. P. C. 44. Lett. C. and *ſupra*, Sect. 3.

[f] *Vide* S. 1. C. 44. Lett. C. Lamb. B. 2. ch. 7. fol. 284, 285.

[g] *Vide ſupra*, Sect. 3. Bro. Treaſon, 19. S. P. C. 3. Lett. A. 3 H. 7. 10. pl. 2.

[h] H. P. C. 215. Dalif. 22. pl. 3. Lamb. B. 2. ch. 7. f. 284. 285. 3 Inſt. 45, 61, 72, 73.

[i] *See* B. 1. ch. 40. S. 4. *Supra*, ch. 18. Sect. 12. S. P. C. 168. Lett. D. H. P. C. 230, 231.

Sect. 15. As to the fifth Particular, *viz.* Whether the Offence of the Acceſſary can ever riſe higher than that of the Principal: I take it to be an uncontroverted [a] Rule, That it never ſhall; it ſeeming incongruous and abſurd that he who is puniſhed only as a Partaker of the Guilt of another, ſhould be adjudged guilty of a higher Crime than the other. And therefore it ſeems clear, [b] That if a Wife or Servant cauſe a Stranger to murder the Husband or Maſter, and are abſent when the Murder is committed, they cannot be ſaid to be Acceſſaries to Petit Treaſon, but to Murder only, becauſe the Offence of the Principal is but Murder. But if ſuch Wife or Servant had been [c] preſent when the Murder was committed, they would have been guilty of Petit Treaſon, and the Stranger of Murder; becauſe in Reſpect of ſuch [d] Preſence they would have been Principals in killing, as hath been more fully ſhewn *B.* 1, in the Chapter of *Petit Treaſon*, *Sect.* 6.

[a] 3 Inſt. 29. 139. H. P. C. 215. Bro. Coro. 119. *Vide* Keilw. 34. pl. 9 and *inf.* S. 21, 22. [b] 3 Inſt. 29. Dalif. 16. pl. 11. Dyer, 254. pl. 103, 332. pl. 25. 128. pl. 57. H. P. C. 24, 25, 215. Crompt. 19. pl. 8. Bro. Coro. 119. But 40 Aſſ. 25. whereof this Note in Brook is an Abridgment, ſeems contrary. *See* alſo Fitz. Coro. 216. which is an Abridgment of the ſame Caſe.

Sect. 16. As to the ſecond Point, *viz.* In what Caſes a Man ſhall be adjudged an Acceſſary before: It ſeems to be [e] agreed, That thoſe who by Hire, Command, Counſel or Conſpiracy; and it ſeems to be generally [f] holden, That thoſe who by ſhewing an expreſs Liking, Approbation or Aſſent to another's felonious Deſign of committing a Felony, abet and encourage him to commit it, but are ſo far [g] abſent when he actually commits it, that he could not be encouraged by the Hopes of any immediate Help or Aſſiſtance from them, are all of them Acceſſaries before the Fact, both to the Felony intended, and to all other Felonies which ſhall happen in and by the Execution of it, if they do not [h] expreſly retract and countermand their Encouragement, before it is actually committed.

[c] 3 Inſt. 29. H. P. C. 24, 25. Dy. 128. pl. 57. 254. pl. 103, 332. pl. 25. Crompt. 19. pl. 8. Moore 91. pl. 227. Dalif. 16. pl. 11.

Sect. 17. But it doth not ſeem neceſſary in any Indictment or Appeal againſt a Man as Acceſſary before the Fact, to ſet forth the Special Manner by which he abetted it, but only to charge him [i] generally, *Quod Felonice, &c. abettavit, incitavit & procuravit, &c.* Alſo the like general Way of ſetting forth the Aid given to a Felon, ſeems to be ſufficient both as to thoſe who are * Principals, by being preſent when the Felony is committed, and alſo as to thoſe who are † Acceſſaries after.

[d] *Vide ſupra*, Sect. 7. [e] 2 Inſt. 182. Dalt. ch. 108. Lamb. B. 2. ch. 7.

Sect. 18. It cannot be doubted, But that if a Man adviſe a Woman to kill her Child as ſoon as it ſhall be born, and ſhe kill it in Purſuance of ſuch Advice, he is an [k] Acceſſary to the Murder, tho' at the Time of the Advice, the [l] Child not being born, no Murder could be committed of it; for the Influence of the felonious Advice continuing till the Child was born, makes the Adviſer as much a Felon as if had given his Advice after the Birth. Alſo it ſeems [m] agreed, That if I command another to beat a Man, and he beat him in ſuch a Manner that he dies thereof, I am an Acceſſary before to the Felony; [n] becauſe it happened in the Execution of a Command, which naturally tended to endanger the Life of the other. And [o] *a fortiori* therefore it follows, That if a Man Commands another to rob a Man, and he in robbing him kill him; or to burn the Houſe of *J. S.* and he by burning it, burn alſo the Houſe of *J. N.* the Commander is as much an Acceſſary to the ſubſequent Felony, as to that which was directly commanded. Alſo it is ſaid, [p] That if I command

S. P. C. 40. Lett. D. Crompt. 41. pl. 1, 7, 8. H. P. C. 217. [f] 2 Inſt. 182. Dalt. ch 108. Lamb B. 2. ch. 7. f. 286. H. P. C. 217. Pl. Com. 475. b.

4[1]. pl. 7, 8. [g] *Vide ſupra*, Sect. 7, 8 S P. C. 40 Lett. D E *See* Bro. Appeal, 19. Bro. Coro. 188. [h] 3 Inſt. 51. Crompt. 42 pl 16. H P. C. 217, 218 Lamb. B 2 ch. 7. f. 289. Dalt ch. 108 Pl. Com. 475, a. 476. b. [i] Coke's Ent. 56. pl. 5 57 pl 6. Ra Ent. 51. pl. 6. Fitz Coro. 533. ſeems ſomewhat contrary. * 4 Co. 41. Co Ent. 57. pl. 6. † Co. Ent. 56. pl. 5. Ra. Ent. 48 pl. 4 52. pl. 15. [k] Dyer, 186. 3 Inſt. 51. Dalt. ch. 108. Lamb. B 2. ch. 7. f. 286. Crompt. 41. pl. 2. [l] *See* B. 1. ch. 31. Sect. 16, 17. [m] H. P. C. 217. Pl. Com. 475. b. Lamb. B. 2. ch. 7. fol. 385. Pl. Com 475 [n] S. P. C. 41 Lett. D Fitz. Coro. 314. *Vide* pl. Com. 475. b. Dalt. ch. 108. Crompt. 43. pl. 35. [o] Pl. Com. 475. b. [p] Pl. Com 475 a. b. Dalt. ch. 108. Lamb. B. 2 ch 7 f. 286. Crompt. 42 pl 34, 35.

a Man to rob another, and he kill him in the Attempt, but do not rob him, I am guilty of the Murder, becauſe it was the direct and immediate Effect of an Act done in Execution of my Command to commit a Felony. But if I perſuade *A.* to Poiſon *B.* and *A.* accordingly give Poiſon to *B.* who eats Part of it, and gives the reſt to *C.* who is killed by it, I am guilty of a great Miſdemeanor only in Reſpect of *C.* but not [a] an Acceſſary to his Murder, becauſe it was not the direct and immediate Effect of the Act done in Purſuance of my Command, but happened accidentally thro' the Act of *B.* to which I being no way Privy, cannot be made Acceſſory by Reaſon of it. Yet in this Caſe *A.* is certainly guilty of the Murder of *C.* as hath been more fully ſhewn, *Book* 1. *Chap.* 31. *Sect.* 42, 43.

[a] Pl. Com. 474, 475. Dalton, ch 108 Lambart, B. 2. ch. 7. f. 288. Crompt. 42. pl. 10.

Sect. 19. It ſeems to be holden generally in ſome * Books, That whereever a Felony enſues, and follows upon any unlawful Act commanded by another, and executed in the ſame Manner as it was commanded, the Commander is an Acceſſary to the Felony. But this [b] ſeems to be too large a Rule, and liable to great Difficulties, unleſs limited by ſome Diſtinctions; but finding little in the Books concerning this Matter, I ſhall leave it to be farther conſidered by others.

* Plow. Com. 475. a. Moore, 487. Dalt. ch 108. 3 Inſt. 51.

[b] S. P. C. 41. Lett. D. Fitz. Coro. 314. Dalt. ch. 108. Moore, 53. pl. 155.

Sect. 20. It ſeems to be [c] agreed, That if the Felony committed be the ſame in Subſtance with that which was intended, and variant only in ſome Circumſtance, as in Reſpect of the Time or Place, at which, or the Mean whereby it was effected, the Abettor of the Intent is altogether as much an Acceſſary as if there had been no Variance at all between it and the Execution of it; as where a Man adviſes another to kill ſuch an one in the Night, and he kills him in the Day, or to kill him in the Fields, and he kills him in the Town, or to poiſon him, and he ſtabs or ſhoots him.

[c] Pl. Com. 475. b. H. P. C. 217. Lamb. B 2. ch. 7. f. 287. 3 Inſt. 51. Crompt. 42. pl. 14. Dalt. ch. 108.

Sect. 21. But if a Man command another to commit a Felony on a particular Perſon or Thing, and he do it on [d] another; as to kill *A.* and he kill *B.* or to burn the Houſe of *A.* and he burn the Houſe of *B.* or to ſteal an Ox, and he ſteal an Horſe; or to ſteal ſuch an Horſe, and he ſteal another; or to commit a Felony of one Kind, and he commit another [e] of a quite different Nature; as to rob *J. S.* of his Plate as he is going to Market, and he break open his Houſe in the Night, and there ſteal the Plate; it is ſaid, That the Commander is not an Acceſſary, becauſe the Act done varies in Subſtance from that which was commanded.

[d] H. P. C. 217. Pl. Com. 475. Dalt. ch. 108. Lamb. B. 2. ch. 7. f. 287. Crompt. 42. pl. 11.

[e] Pl. Com. 475. 3 Inſt. 51. Dalt. ch. 108. Lambard, B. 2. ch. 7. fol. 287, 288. Crompt. 42. pl. 11.

Sect. 22. But it is obſervable, That [f] *Plowden*, in his Report of *Saunder's* Caſe, which ſeems to be the chief Foundation of what is ſaid by others concerning theſe Points, in putting the Caſe of a Command to burn the Houſe of *A.* which ſhall not make the Commander an Acceſſary to the Burning the Houſe of *B.* unleſs it were cauſed by burning that of *A.* ſtates it in this [g] Manner, *If I command a Man to burn the Houſe of ſuch an one, which he wells knows, and he burn the Houſe of another, there I ſhall not be Acceſſary, becauſe it is another diſtinct Thing, to which I did not give Aſſent*, &c. By which it ſeems to be implied, That it is a neceſſary Ingredient in ſuch a Caſe to make *B.* no Acceſſary, that he knew the Houſe which he was commanded to burn; for if he did not know it, but miſtook another for it, and intending only to burn the Houſe which he was commanded to burn, happen by ſuch Miſtake to burn the other, it may probably be argued, That the Commander ought to be eſteemed an Acceſſory to ſuch Burning, becauſe it was the direct and immediate Effect

[f] Pl. Com. 475. b. But this Caſe is not ſtated in this Manner, either by Lambard, Dalton or Crompton.

[g] Lamb. B. 2. ch. 7. fol. 287. Dalt. ch. 108. Crompt. 42. pl. 36.

Effect of an Act wholly influenced by his Cammand, and intended to have purſued it.

Sect. 23. It ſeems to be genetally agreed, [a] That he who barely conceals a Felony, which he knows to be intended, is guilty only of a Miſpriſion [b] of Felony, and ſhall not be adjudged an Acceſſary.

Sect. 24. It ſeems to be certain, That no one can be any [c] way puniſhed as an Acceſſary to Homicide *per infortunium*, or *ſe defendendo*, becauſe they are not Felonies; from whence it follows, That if he who is indicted or appealed, as a Principal in Murder, be found guilty of ſuch Homicide only, thoſe who are only charged as his Acceſſaries before or after, ſhall be diſcharged. [d] And ſo alſo ſhall thoſe who are charged only as Acceſſaries before, where the Principal is found guilty of Manſlaughter; becauſe that neceſſarily ſuppoſes the Fact to have happened on a ſudden; for if it had been done upon Premeditation, it would have been Murder. And *Quære*, If they who are charged as Acceſſaries [e] after, ſhould not alſo be diſcharged at Common Law, where the Principal was found guilty of Manſlaughter, and admitted to the Benefit of his Clergy, becauſe in ſuch Caſe it could not appear by any Judgment that there was a Principal; but the Law in this Reſpect ſeems to be altered by 1 *Annæ* 9. ſet forth more at large in the following Part of this Chapter, which makes a Conviction equivalent as to this Purpoſe to an Attainder.

Sect. 25. Before the Statute of 11 & 12 *W.* 3. Acceſſaries to Piracy were not within the Purview of 28 *H.* 8. by which Piracy is triable according to the Courſe of the Common Law; but for this I ſhall refer the Reader to *B.* 1. *Ch.* 37.

As to the third Point, *viz.* In what Caſes a Man ſhall be adjudged an Acceſſary after: I ſhall endeavour to ſhew,

1. What Kind of Receipt of a Felon will make the Receiver ſuch an Acceſſary.
2. Whether it be neceſſary that ſuch Receiver know of the Felony.
3. Where the Receivers of a Felon ſhall be excuſed in Reſpect of the Relation they bear to him.
4. How far the Felony muſt be complete at the Time of the Receipt, to make the Receiver an Acceſſary.

Sect. 26. As to the firſt Particular, *viz.* What Kind of Receipt of a Felon will make the Receiver an Acceſſary after the Fact: It ſeems agreed, [f] That generally any Aſſiſtance whatſoever given to one known to be a Felon, in order to hinder his being apprehended or tried, or ſuffering the Puniſhment to which he is condemned, is a ſufficient Receipt for this Purpoſe; as where one aſſiſts him with a [g] Horſe to ride away with, or with Money or Victuals to ſupport him in his Eſcape; or where one harbours and [h] conceals in his Houſe a Felon under Purſuit, by Reaſon whereof the Purſuers cannot find him; and much more, where one harbours in his Houſe, and openly [i] protects ſuch a Felon, by Reaſon whereof the Purſuers dare not take him.

[a] Lamb. B. 2 ch. 8. f. 289. Moore 8. pl. 29. S. P. C. 37. Letter C. H. P. C. 129. 3 Inſt. 139, 140. 2 Inſt. 183. But this is made a *Quære* by Dalton, ch. 108.
[b] *See* B. 1. ch. 59.
[c] Fitz. Coro. 116, 172. Bro. Coro. 33, 80. 15 Aſſ. pl. 7. 11 H. 4. 93. pl. 53. Crompt. 43. pl. 38. Bro. Forfeiture, 13.
[d] 4 Co. 43, 44. H. P. C. 217. Moore 461. pl. 645. Cro. El. 540. pl. 4. Crompt. 43. pl. 40. Dalt. ch. 108. *See* B. 1. ch. 30.
[e] *Vide* Crom. Juſt. 43. pl. 41. 3 Inſt. 55. Moore 461. pl. 645. Cro. El. 540. pl. 4.
[f] 2 Inſt. 183. S. P. C. 41. Letter E. Dalt. ch. 108. Lamb. B. 2. ch. 7. f. 289, &c. H. P. C. 218. Dalt. ch. 108. Crompt. 43. pl. 39.
[g] H. P. C. 218. Dalt. ch. 108. Crompt. 43. pl. 39.
[h] Dalt. ch. 108. Fitz. Coro 427. Lamb. B. 2 ch. 7. f. 291. S. P. C. 43. Letter C. Crompt. 42. Aſſ. pl. 47. Adjudged, Bro. Coro. 130. Fitz. Coro. 195.
[i] 26 pl. 20.

Sect. 27. Alſo I take it to be ſettled at this Day, That whoever [a] reſcues a Felon from an Arreſt for the Felony, or voluntarily [b] ſuffers him to eſcape, is an Acceſſary to the Felony: [c] Alſo ſome have ſaid, That all thoſe are in like Manner guilty who oppoſe the Apprehending of a Felon; but for theſe Matters I ſhall refer the Reader to the former Part of this Book, wherein they are more fully handled.

Sect. 28. It ſeems to be holden both by [d] *Brook* and [e] *Staundforde*, That the bare Receiving into one's Houſe a Perſon known to be a Felon, is ſufficient without any farther Circumſtances to make a Man an Acceſſary to the Felony: And this ſeems to be favoured by the *Year-Books* of [f] 25 *E.* 3. and [g] 7 *H.* 6. Alſo it ſeems to be holden both by [h] *Staundforde* and [i] *Dalton*, That not only ſuch a Receipt of ſuch a Felon into one's Houſe, but any other Favour or Aid voluntarily afforded him, as by relieving him with Money, Meat or Drink, is ſufficient for this Purpoſe. But it is obſervable, That the Caſe in the Book of [l] *Aſſiſes*, whereon *Dalton* ſeems chiefly to ground his Opinion, and which is more accurate than any other *Year-Book* I met with on this Subject, is of one who was indicted *for having received a Felon, and for that no one by Reaſon of him dared to take him:* Whereupon it is ſaid by *Shard*, *If one receive a Felon in Favour and Aid of the Felony, I hold ſuch, a one an Acceſſary to the Felony.* Alſo it is farther obſervable, That the *Year-Book* of 9 [m] *H.* 4. on which the above-mentioned Opinion of *Brook* ſeems to be grounded, ſeems to prove only that every Receiver of a Felon, knowing him to be ſuch, is indictable, but not that he is indictable for Felony; and the chief Purport of the Caſe is to ſhew, That one who having a Felon in his Houſe, voluntarily ſuffers him to go at Large, is not guilty of a felonious Eſcape, unleſs he had arreſted him. To which may be added, That [n] *Lambard* doth not ſay generally, That all thoſe who receive a Felon, knowing him to be ſuch, are Acceſſaries after; but all thoſe who feloniouſly, and with an evil Mind, receive a Felon, *&c.* And Sir *Edward Coke*, in his [o] *Second Inſtitute*, deſcribes ſuch Acceſſaries, as thoſe who knowing a Felony receive the Felon, and not only conceal his Offence, but favour and aid him, that he be not known. And in his [p] *Third Inſtitute* he ſaith, If one receive a Thief, and aid and maintain him in his Felony, he is an Acceſſary; by which Expreſſions it ſeems to be implied, That there ought to be ſome other Circumſtance beſides that of the bare Suffering of a Perſon known to be a Felon to be in one's Houſe, to make a Man an Acceſſary.

Sect. 29. However it ſeems to be [q] agreed, That no one ſhall be adjudged an Acceſſary to a Felony for receiving into his Houſe a Perſon under Bail for ſuch Crime, or for relieving with Money or Victuals a Perſon ſo bailed, or in Priſon; and the Reaſon given by [r] *Dalton* is, becauſe the Felony cannot be concealed, nor the Trial hindred by it. And if this be a ſufficient Reaſon, Why may not any other Receipt or Relief of a Felon, whereby the Felony is not concealed, nor the Trial, *&c.* hindred, come under the like Rule? As it ſeems [s] agreed That the Sending a Letter to procure the Deliverance of a Felon, or the Inſtructing him to [t] read, in order to entitle him to the Benefit of the Clergy, ſhall do; and even the [u] Adviſing his Friends to perſuade Witneſſes not to come againſt him at

[a] *Supra*, ch. 21 S. & 7, 8. Fitz. Coro. 158. 433. H. P. C. 116. Cout. Fitz. Coro. 48. S. P. C. 43. Lett D. Dalt. ch. 108.
[b] 1 H. 7. 6 pl. 2. Bro. Coro. 130.
[c] *Supra*, ch. 19. Sect. 10, 22, 26.
[d] *Supra*, Sect 16. and Ch. 18. Sect. 1. Bro. Eſcape, 43.
[e] S. P. C. 41. Lett. E.
[f] 25 E. 3. 39. pl. 2. Abrid. Fitz. Coro. 126.
[g] 7 H. 6. 42. pl. 18. Abrid. Bro. Indictm 4. Fitz. Indict. 11.
[h] S P. C. 41. Lett. E.
[i] Dalt. ch. 108. See alſo Crom. 42. pl. 25.
[l] 26 Aſſ. pl. 47. Abrid. Bro. Coro. 103. Fitz. Coro. 195.
[m] 9 H. 4. 1. pl. 3. Abrid Fitz. Coro. 76. Bro. Coro 26. Bro. Eſcape, 43.
[n] Lamb. B. 2. ch. 7. f. 289.
[o] Page 183.
[p] Page 134.
[q] H. P. C. 218. Dalton ch. 108. Crompt. 42. pl. 25.
[r] Dalt. ch. 108, Crompt. 42. pl. 25. and Lamb. B. 2. fol. 289. are to the ſame Purpoſe.
[s] 3 Inſt. 139. H. P. C 219.
[t] 26 Aſſ. pl. 47. Bro. Coro. 103. Fitz. Coro. 195. S. P. C. 41. Lett. E. H. P. C. 219. Lamb. B. 2. ch. 7. fol. 289, 219.
[u] 3 Inſt. 139. H. P. C. 219.
[a] 3 Inſt. 139.

his

his Trial; and alſo the [a] Labouring of Witneſſes in Purſuance of ſuch Advice. And yet the two laſt of theſe Practices are certainly very highly criminal; and though they do not tend totally to prevent the Trial, yet are the moſt likely Means to make it fruitleſs and ineffectual. Alſo it ſeems to be agreed, That the Suffering a Felon to eſcape [b] without arreſting him, [c] or the bare Concealment of a Felony, tho' they are Crimes of a very high Nature, do not make a Man an Acceſſary.

[a] 3 Inſt. 139.

[b] H. P. C. 219. *Supra*, Sect. 10. and 27. Moore 8. pl. 29.

[c] *Supra*, Sect. 10. and 27. B. 1. ch 59. 1 Aleyn. 57. Style, 91. Cro. El. 838. pl. 1. Yelv. 4, 5. Lamb. B. 2. ch. 7. f. 290, 291. 1 Rol. Abr. 68. pl. 29. H. P. C. 218. 25 E. 3. 39. pl. 2. Abrid. Fitz. Coro. 126. 27 Aſſ. 69. Abrid. Fitz. Coro. 208. Bro. Coro. 114. Cont. Cromp. 42. pl. 3. 43 pl. 37, 39. It is made a *Quære*, Crom. 42. pl. 17. and S. P. C. 43. Lett. C.

Sect. 30. Alſo I take it to have been generally agreed, before the Statute of 3 & 4 *W. & M.* 9. That neither the Receiving of [d] other Mens Goods, known to have been ſtolen, nor the Taking of one's *own Goods again, from one that had ſtolen them, on an Agreement not to proſecute him, nor the Taking of any other [e] Reward on ſuch an Agreement, did make a Man an Acceſſary to the Felony, unleſs he alſo had received the Thief. But now it is enacted by that Statute, *That if any Perſon or Perſons ſhall buy or receive any Goods or Chattel that ſhall be feloniouſly taken or ſtolen from any other Perſon, knowing the ſame to be ſtolen, he or they ſhall be taken and deemed an Aaceſſary, or Acceſſaries, to ſuch Felony, after the Fact, and ſhall incur the ſame Puniſhment as an Acceſſary or Acceſſaries to the Felony, after the Felony committed.* And it is farther enacted by 1 *Annæ* 9. That ſuch Perſons may be proſecuted for a Miſdemeanor, before the Principal ſhall be convicted, as ſhall be ſhewn more at large in the following Part of this Chapter.

[d] Dalt. ch. 108. Moore 8. pl. 29. Crompt. 41. pl. 5. 42. pl. 23. Lamb. B. 2. Ch. 7. fol. 209. 1 Rol. Ab. 67. pl. 27. Cro. El. 486. pl. 3. *Vide* Noy. 90.

[e] H P. C. 130. 3 Inſt. 134, 138. B. 1. ch. 59.

Sect. 31. It doth not ſeem to be ſettled, [f] Whether the Receipt of a Felon, who is pardoned by the King, but ſtill liable to an Appeal, may not make the Receiver an Acceſſary.

[f] *Vide* Pl. Com. 476. Dalt. ch. 108.

Sect. 32. As to the ſecond Particular, *viz.* Whether it be neceſſary that a Man know of the Felony, in order to make him an Acceſſary by receiving the Felon: There can be no Doubt but that it is neceſſary that ſuch Receiver have [g] Notice of the Felony either expreſs or implied; and therefore it is the ſettled Form of all [h] Indictments and Appeals [i] againſt Acceſſaries after the Fact, expreſly to charge them with having known that the Perſon received by them, had committed the Principal Felony.

[g] S. P. C. 41. Lett. E. H P. C. 218.

[h] 7 H. 6. 42. pl. 13. Abridged, Bro. Indict 4. 3 H. 7. 10. pl. 2. Bro. Coro 150. Fitz. Cor. 55, 285, 429. 22 Aſſ. pl. 55. H. P. C. 218.

[i] Ra Ent. 43 b. 54. pl. 3 4. 51. pl. 15. Coke's E it. 56 pl. 5. 57. pl. 6.

Sect. 33. But it is not clearly ſettled, Whether in ſome Caſes an implied Notice of the Felony be not ſufficient for this Purpoſe? As where a Man receives a Perſon attainted of Felony, in the ſame County wherein he is attainted, in which Caſe it hath been [k] holden, That he is an Acceſſary to the Felony, whether he had actually Notice of the Attainder or not; becauſe it appears by Matter of Record in the ſame County, whereof every Man is ſaid to be conuſant. But to this it may be anſwered, That Felony implies in it ſomething of Wilfulneſs and Baſeneſs; ſomething [l] *felleo animo perpetratum*; and that it would be extremely hard, by ſuch a forced way of Reaſoning, to preſume a Man guilty of it, who probably may be entirely innocent: And to this Opinion the greater Number of [m] Authorities ſeem to incline.

[k] S. P. C. 41. Letter, E. Dalt. ch. 108. Lamb. B. 2. ch. 7. f. 293 H. P. C. 218.

[l] Co. Litt. 391. a.

[m] S. P. C. 41, Letter, E. Dalt. ch. 108 Lamb. B. 2.

Sect 5, 6, 7. Cont. Crompt. 41. pl. 4, 5. Lamb. B. 2. ch. 7. f. 290. 2 And. pl. 35. It is made a *Quære*, Moore, 8. pl. 29. and Dalt. ch. 108.

Sect. 34. As to the third Particular, *viz.* Where the Receivers of a Felon ſhall be excuſed in Reſpect of the Relation they bear to him: It ſeems agreed, [a] That the Law hath ſuch a Regard to that Duty, Love, and Tenderneſs, which a Wife owes to her Husband, as not to make her an Acceſſary to Felony by any Receipt whatſoever given to her Husband; yet if ſhe be any way guilty of [b] procuring her Husband to commit it, it ſeems to make her an Acceſſary before the Fact in the ſame Manner as if ſhe had been Sole. Alſo it ſeems agreed, That no other Relation beſides that of a Wife to her Husband, will exempt the Receiver of a Felon from being an [c] Acceſſary to the Felony; from whence it follows, That if a Maſter receive a Servant, or a Servant a Maſter, or a Brother a Brother, or even a Husband a Wife, they are Acceſſaries in the Manner as if they had been mere Strangers to one another.

[a] Lamb. B. 2. ch. 9. Bract. B. 3. ch. 32. S. 9. Dalt. ch. 108. H. P. C. 219. Crompt. 42. Sect. 22. S. P. C. 26. *See* B. 1. ch. 1. Sect. 9, 10.

[b] Bract. Lib. 3. ca. 32. Sect. 9 10. Dalt. ch. 108. *See* B. 1. ch. 1. Sect. 11, 12. Fitz. Coro. 383.

Sect. 35. As to the fourth Particular, *viz.* How far the Felony muſt be complete at the Time of the Receipt, to make the Receiver an Acceſſary: It ſeems to be clearly agreed, [d] That a Man ſhall never be conſtrued an Acceſſary to a Felony, in Reſpect of the Receipt of an Offender, who at the Time of the Receipt was not a Felon, but afterwards becomes ſuch by Matter ſubſequent; as where one receives another who has wounded a Perſon dangerouſly, that happens to die after ſuch Receipt; for tho' the Offender be for ſpecial Reaſons adjudged to ſome Purpoſes guilty of Homicide *ab initio*, yet he ſhall not be ſo eſteemed in Reſpect of any others but himſelf; for Fictions of Law ſhall never be carried farther than the Reaſons which introduce them neceſſarily require.

[c] Dalt. ch. 108. Crompt. 42. Sect. 22. H. P. C. 219. S. P. C. 26. Lett. C.

[d] 21 H. 7. 34. pl. 34. *See* Bro. Coro. 62. H. P. C. 219. Crompt. 42. pl. 15. Dalt. ch. 108. Lamb. B. 2. ch. 7.

Having thus ſhewn who are to be eſteemed Principals, and who Acceſſaries; I am now to ſhew in what Manner they are to be arraigned, and ſhall endeavour to ſhew,

[e] *Supra*, ch. 18. Sect. 13. ch. 19. S. 25.

1. How far it is neceſſary that the Principal be actually attainted or convicted before the Acceſſary ſhall be proceeded againſt.

2. Whether the Acceſſary ſhall in any Caſe be arraigned or tried before any Principal hath appeared.

3. Whether a Perſon charged as Acceſſary to more than one, may be tried before all the Principals have appeared.

4. Whether the Principal and Acceſſary may be both tried by the ſame Inqueſt, and in what Manner they are to be tried.

5. In what Manner the Acceſſary ſhall be tried, where his Offence ariſes in a different County from that of the Principal.

Sect. 36. As to the firſt Point, *viz.* How far it is neceſſary that the Principal be actually attainted [f] or convicted before the Acceſſary ſhall be proceeded againſt: It ſeems clear, That whatſoever the Nature of the Felony be, if the Principal be in ſuch Manner [g] acquitted of it, [h] whether at the Suit of the King, or of the Party, that he may plead ſuch Acquittal in [i] Bar of any ſubſequent Proſecution for the ſame Felony, the Acceſſary ſhall not be arraigned, but ſhall be diſcharged, according to the Rule, *Ubi factum* [k] *nullum, ibi fortia nulla.*

[f] *Vide* 9 Aſſ. pl. 5. Bract 128. pl. 13, 14. and the Notes to the fourth of theſe Points.

[g] Fitz. Aſſ. 291. Conſpira. 4. H. P. C. 221. S. P. C. 47.

Lett. F. 48. Lett. A. *Supra*, ch 23. Sect. 140. Fitz. Coro. 222. 33 H. 6. 1. pl. 6. 29 Aſſ. pl. 59. Ra. Ent. 57. pl. 6. Raym. 477. Fitz. Office de Court, 23. [h] Fitz. Coro. 277. [i] *Vide ſupra*, ch. 23. Sect. 140. [k] 4 Co. 43. b. S. P. C. 47. Lett. F.

Sect. 37. How far the Acceſſary ſhall be diſcharged upon the Principal's being found guilty of Manſlaughter, *&c.* hath been already ſhewn *Section*, 24.

Sect. 38. It is certain that the Exigent ſhall not be awarded againſt the Acceſſary before the Principal is attainted, as hath been more fully ſhewn, *Ch.* 27. *Sect.* 128, *&c.*

Sect. 39. It ſeems alſo to be clear, That where the Law requires the Attainder or Conviction of the Principal before the Acceſſary ſhall be convicted, it requires that ſuch Attainder and Conviction of the Principal be on the [a] ſame Suit, and for the ſame Crime, of which the Acceſſary is to be convicted; for it is agreed, That an Attainder of the Principal at the Suit of the [b] King no way helps the Proceedings againſt the Acceſſary at the Suit of the Party, and *ſic e converſo:* Alſo it ſeems to be agreed, That the Attainder of the Principal of one Felony is no way [c] material as to the Proceedings againſt the Acceſſary for another.

Sect. 40. But where the Principal is actually attainted, tho erroneouſly, of the ſame Felony with which the Acceſſary is charged, it ſeems [d] agreed, That ſuch Attainder, while it ſtands unreverſed, is as ſufficient for this Purpoſe as it would have been if there had been no Error in it. Yet it ſeems [e] certain, That if the Principal be attainted, and then the Acceſſary, the Reverſal of the Attainder of the Principal, *ipſo facto* reverſes the Attainder of the Acceſſary; and that the Heir may have an Aſſiſe of *Mortdanceſtor* againſt the Lord of the Fee, having entred into the Lands of ſuch an Acceſſary, as having eſcheated to him by Reaſon of the Attainder.

Sect. 41. It ſeems to have been in a great Meaſure ſettled [f] before the Statute of 1 *Annæ* 9. notwithſtanding the great Variety of Opinions in the *Old Books* concerning this Matter, That where-ever the Attainder of the Principal was prevented by his [g] Death, or [h] ſtanding Mute, or challenging [i] peremptorily above the Number allowed him by Law, or being admitted [k] to the Benefit of the Clergy, or [l] pardoned, whether before or after his Conviction, the Acceſſary ſhould not be arraigned.

Sect. 42. But it ſeems to have been generally always agreed, [m] That after the Principal is actually attainted, whether after a Conviction by Verdict, or by [n] Outlawry, *&c.* his Death or Pardon, *&c.* ſubſequent, will no way avail the Acceſſary.

[a] Bro. App 19.
[b] 2 Inſt. 184. Plowd. 98, b. 99. a. H. P. C. 221. S. P. C. 47. Lett. A. Bro. Coro. 19. 7 H. 4. 27. *Vide* Dyer, 133. pl. 4.
[c] 40 Aſſ. pl. 25. H. P. C. 221. 22 Aſſ. pl. 40.
[d] Fitz. Coro. 58. 2 R. 3. 21. b. 22. a. H. P. C. 222, 223.
[e] 2 Inſt. 184. Crompt. 43. pl. 29. Bro. Coro. 164 or 5. 174 or 5. S. P. C. 47. Lett. D. 7 H. 4. 16. pl. 5. 9 Co. 68. b. 119.
[f] H. P. C. 164. 270. Bro. Coro. 18 E. 4. 9 pl. 16.

Crompton's Juſtice, 41. pl. 9. 1 Rol. Ab. 777. pl. 10. 9 Co. 119. b. Fitz. Mortdanceſter, 46. [f] *See* the Preamble of 1 *Annæ*, 9. [g] Bro. Appeal, 19. Coro. 86. 7 H. 4. 27. pl. 4. Fitz. Coro. 378. Conſpiracy, 4. Reſponder, 35. F. N. B. 115. Lett. F. H. P. C. 221. 44 E. 3. 7. pl. 6. 33 H. 6. 1. 2 pl. 6. 21 H. 7. 31. pl. 15. 22 Aſſ. pl. 40. [h] H. P. C. 221. 2 Inſt. 184. *Cont.* Fitz. Coro. 58. this is made a *Quære* S. P. C. 47. Lett. C. [i] *See* the Statute of 1 *Annæ* 9. But this is made a *Quære* S. P. C. 47. Letter C. Fitz. Coro. 51. 3 H. 7. 12. pl. 5, 8. [k] Cro. El. 541. 4 Co. 43. b. 44. a. H. P. C. 221. 3 Inſt. 114. 139. 3 H. 7. 1. pl. 3. Cro. Ca. 566, 567. Crompton's Juſtice, 43. pl. 26, 44 pl. 42. Raym. 477. Fitz. Coro. 145, 176, 193, 252, 376, 450. Bro. Coro. 18, 70, 71, 83, 84, 101, 131 or 132, 137 or 138. 18 Aſſ. pl. 13. 26 Aſſ. pl. 27. 5 Aſſiſe pl. 5. 7 H. 4. 16. pl. 5. Bro. Clergy, 15. *Cont.* Fitz. Coro. 58, 53, 270, 466. Crompton's Juſtice, 42. pl. 26. 10 H. 4. 5. pl. 17. Bro. Coro. 157 or 158. *Quære* 3 H. 7. 12. pl. 10. S. P. C. 47. H. 48. A. [l] H. P. C. 221. F. N. B. 115. Lett. F. Cro. El. 541. Fitz. Coro. 53. Fitz. Conſpiracy, 4. 33 H. 6. 1 pl. 6. Bro. Coro. 18. 4 Co. 43. b. 44. a. 3 Inſt. 139. Crompt. Juſtice, 44. pl. 42. 3 H. 7. 12. pl. 10. 7 H. 4. 16. pl. 5. Raym. 477. This is made a *Quære*, Crompton's Juſtice, 42. pl. 26, and S. P. C. 47. G. *Cont.* Fitz. Coro. 151, 260. Bro. Coro. 70. 3 Aſſiſe, pl. 14. *Vide* Dyer, 88. pl. 105. [m] Cro. Eliz. 541. 4 Co. 43. b. 44. a. H. P. C. 221. Raym. 477. *Cont.* Fitz. Cor. 450. [n] 4 Co. 43. b. Dyer 120. pl. 10. Fitz. Coro. 58, 93. 40 Aſſiſe pl. 8. 43 E. 3. 17. pl. 21. 3 H. 7. 1. pl. 3. 9 H. 4. 8. b. 9. a. Bro. Coro. 164 or 5. 174 or 5. Bro. Mainpriſe, 58. *Cont.* as to Abjuration, 7 H. 4. 16. pl. 5. Bro. Coro. 18.

Sect. 43. And it is enacted by the ſaid Statute of 1 *Annæ* 9. Par. 1. *That if any principal Offender ſhall be convicted of any Felony, or ſhall ſtand Mute, or ſhall peremptorily challenge above the Number of twenty Perſons, returned to ſerve on the Jury, it ſhall and may be lawful to proceed againſt any Acceſſary, either before or after the Fact, in the ſame Manner as if ſuch principal Felon had been attainted thereof notwithſtanding any ſuch principal Felon ſhall be admitted to the Benefit of his Clergy, pardoned, or otherwiſe delivered before his Attainder; and ſuch Acceſſary ſhall ſuffer the ſame Puniſhment, if he or ſhe ſhall be convicted, or ſhall ſtand Mute, or peremptorily challenge above the Number of twenty Perſons returned to ſerve on the Jury, as he or ſhe ſhould have ſuffered if the Principal had been attainted.*

Sect. 44. And it is recited by the ſame Statute, Par. 2. *That the Buyers and Receivers of ſtolen Goods had oftentimes conveyed away and concealed the Principal Felons, ſo that they could not be convicted of ſuch principal Felony, and thereby ſuch Buyers and Receivers had eſcaped all Manner of Puniſhment, which had greatly encouraged the Buying and Receiving of ſuch ſtolen Goods*; and thereupon it is enacted, *That it ſhall and may be lawful to proſecute and puniſh every ſuch Perſon or Perſons buying or receiving any ſtolen Goods, knowing the ſame to be ſtolen, as for a Miſdemeanor, to be puniſhed by Fine and Impriſonment, altho' the principal Felon be not convicted before of the ſaid Felony, which ſhall exempt the Offender from being puniſhed as Acceſſary, if the Principal ſhall be afterwards convicted.*

Sect. 45. As to the ſecond Point, *viz.* Whether the Acceſſary ſhall in any Caſe be arraigned or tried before any Principal hath appeared: Notwithſtanding the numerous [a] Authorities in the Old Books, that an Acceſſary ſhall not be compelled to anſwer before the Principal have appeared and anſwered, I take the contrary Opinion to be in a great Meaſure [b] ſettled at this Day. And yet it ſeems to have been always agreed, [c] That his Plea cannot be tried before ſuch Appearance or Attainder, [d] unleſs he deſire it himſelf; in which Caſe it is agreed, That he may be tried without the Principal, according to the Rule that *Quilibet poteſt renunciare juri pro ſe introducto.*

Sect. 46. As to the third Point, *viz.* Whether a Perſon charged as Acceſſary to more than one Principal, may be tried before all of them have appeared: It ſeems to be holden by Sir [e] *Matthew Hale*, agreeably to what ſeems to be the ſtronger [f] Opinion in *Plowden*, That if a Man be indicted as Acceſſary to more than one, and one of the Principals appear and be convict, the Court may, if they pleaſe, try the Acceſſary, as being Acceſſary to ſuch Principal, and alſo condemn him, if the Iſſue be found againſt him; and if it be found for him, may afterwards arraign and try him as Acceſſary to the other when they ſhall appear. But the contrary Opinion is certainly ſupported by great [g] Authorities; neither do I find any Inſtance in the Books wherein the Court hath actually proceeded to the Trial of an Acceſſary in ſuch a Caſe before all the Principals have either appeared, or been attainted: And [h] unleſs there be ſome very particular Circumſtances in the Caſe, it cannot be doubted but that it will be a weighty Motive to induce the Court in Diſcretion to reſpite the Trial of an Acceſſary, to ſhew that ſome of thoſe to whom he is charged as an Acceſſary, are neither attainted, nor have appeared; for

[a] Bro. Coro. 11, 20, 118. 9 H. 7. 19. pl. 14. Bract. 128 pl. 11, 139. pl. 11, 142, pl. 8. 148. pl. 4. Fitz. Reſponder, 35, 36. Coro. 33, 82, 90, 135, 136, 216, 350. Treſpaſs 199. 44 E. 3. 38, pl. 35. 9 E. 4. 48. pl. 1. 40 E. 3. 42. pl. 22. 44 E. 3. 7. pl. 6. 25 E. 3. 44. pl. 14. 40 Aſſ. pl. 8. 25. Bro. Appeal, 9. 189. 2 R. 3. 21. pl. 10. Bro. Mainpriſe, 58. S. P. C. 46 D. 'Tis ſaid that the Law was ſo anciently but that it is nowchanged. Yet Dalton ch. 108. ſeems to be for the o'd Opinion. [b] H. P. C. 222. 9 H. 4. 3. a. Fitz. Coro. 77. Bro. Appeal 28. S. P. C. 46. Lett. D. [c] H. P. C. 222. Bro. Appeal, 28. 9 H. 4. 3. a Fitz. Coro. 77. S. P. C. 46. Letter D. 1 And. 109. [d] Fitz. Coro. 12, 124, 463. H. P. C. 222. S. P. C. 46. Letter D. [e] H. P. C. 222. [f] Plowd. Com. 98, b. 99. [g] S. P. C. 46. G. *See* the Books cited to Section 47. 7 H. 4. 36. pl. 5. *Quære* Bro. Appeal, 22. 7 H. 4. 36, pl. 5. Keil. 107. [h] Plow Com. 99. b. 7 H. 4. 36 pl. 5.

it muſt be owned, That it is a ſtrong Objection againſt the Trying him immediately, as Acceſſary to thoſe who do appear, that thereby the Country may be ſubject to the Trouble of attending two Trials where one might do as well; and the Perſon tried may be ſubject to the Hardſhip and Hazard of two Trials for his Life, which is contrary to the general Courſe of the Law, (as ſhall be more fully ſhewn under the Chapter concerning the Plea of *Autrefoits acquit*,) whereas if the Trial ſhould be deferred till all the Principals be attainted or appear, he would be tried but once. [a] But if there be ſeveral Principals, and a Perſon be charged as Acceſſary to one of them only, it ſeems clear, That it is no Objection againſt his being tried as Acceſſary to ſuch a Principal, that the others have not yet appeared, nor are attainted, *&c*

[a] S. P. C. 46. Lett. G.

Sect. 47. As to the fourth Point, *viz.* Whether the Principal and Acceſſary may be both tried by the ſame Inqueſt, and in what Manner they are to be ſo tried: It ſeems [b] to be ſettled at this Day, That if the Principal and Acceſſary appear together, and the Principal plead the general Iſſue, the Acceſſary ſhall be put to plead alſo; and that if he likewiſe plead the general Iſſue, both may be tried by [c] one Inqueſt; but that the Principal muſt be [d] firſt convicted; and that the Jury ſhall be charged, that if they find the Principal not guilty, they ſhall find the Acceſſary not guilty. But it ſeems agreed, That if the Principal plead a Plea in Bar, or to the Writ, the Acceſſary ſhall not [e] be driven to anſwer till ſuch Plea be determined.

[b] I. P. C. 222. Dy. 120. p. 10. 2 Inſt. 184. 28 E. 3. 94. pl. 3. Fitz. Coro. 10, 17. S. P. C. 46. Lett. E. Raſt. Ent. 50. pl. 18. 52. a. pl. 16. 54. pl. 5. Fitz. Exigent, 4. Mainprize, 3. *Cont.* Bract. 128. pl. 13. 139. pl. 11, 142. pl. 8, 148. pl. 4. 40 E. 3. 7 pl. 6. Fitz. Coro. 82. 90. 135. 216, 350. Treſpaſs 199. 40 E. 3. 42. pl. 22. 25 E. 3. 44. pl. 14. 40 Aſſ. pl. 8. 25. 44 E. 3. 8. pl. 35. Bro. Appeal, 9. Coro. 15, 118. Mainprize, 68. 2 R. 3. 21. pl. 50.

Sect. 48. As to the fifth Point, *viz.* In what Manner the Acceſſary ſhall be tried, where his Offence ariſes in a different County from that of the Principal: It ſeems to have been [f] agreed antiently, That by the Common Law, if a Town extended into more than one County, and a Felony were committed in that Part of it which lay in one County, and there were Acceſſaries in that Part of it which lay in another County, an Appeal might be brought againſt the Acceſſaries as well as the Principals, in that County in which the principal Felony was committed; and where the Counties were at a Diſtance, it ſeems that it may be probably argued, [g] That an Appeal might be brought in like Manner againſt all in the County wherein the principal Felony was committed; becauſe in an Appeal the Trial may be by a Jury returned from each County. But where one of the Counties can not join with any other in taking an Inqueſt; as that of *London*, *&c.* it [h] hath been adjudged, That an Appeal againſt the Acceſſary could not be brought in either. Alſo, becauſe there can be no [i] Joinder of Counties for the finding of an Indictment, it ſeems to have been very [k] doubtful at the Common Law, where the Offence of the Acceſſary aroſe in a different County from that of the Principal, whether it could be indicted at all; becauſe the County in which it aroſe could

In all which Books it ſeems to be holden, That the Acceſſary is not compellable to anſwer till all the Principals be convict. [c] *See* the Books cited to Letter b. *Cont.* Fitz. Coro. 10, 77, 82. 9 H. 4. 3. a. 7 H. 4. 36. pl. 5. Dyer 120. pl. 10, 11. S. P. C. 46. Lett. D. E. F. G. [d] H. P. C. 222. Fitz. Coro. 10. Raſt. Entr. 50, b. 51. a. 32, pl. 15. 54. b. 9 Co. 117. [e] Bro. Peremptory, 43. 2 Inſt. 184. S. P. C. 46. Lett. F. [f] 44 Aſſ. pl. 16. 43 E. 3. 17. pl. 21, and f. 34 b. Fitz. Coro 93. Bro. Coro 125. 45 Aſſ. pl. 9. Bro Appeal, 80. But S. P. C. 63. Lett. H. this Caſe ſeems to be cited with ſome Doubt. [g] 3 H. 7. 12 pl. 4. *See* B. 1. ch. 31. Sect. 18, and Dyer 38, 39, 40. 7 Co. 2. b. But Fitz. Coro. 93, and Bro. Coro. 125 or 6. and Bro. Appeal, 7. and 45 Aſſ. pl 9. S. P. C 63. Lett. H. ſeems to be contrary. And in S. P. C. 65. Lett. D. there is an Opinion, That in this Caſe there ſhall be ſeveral Appeals in the ſeveral Counties. But now one Appeal is ſufficient, in the Caſe of Murder, by Force of 2 & 3 Ed 6. 24. ſet forth more at large in the next Section. *See* H. P. C. 188. *Quere* 44 Aſſ. pl. 16. 43 E. 3. 17. pl. 21, and f. 34 b. [h] Dyer 38, 39, 40. 7 Co. 2. b. [i] Finch of Law, 411. B. 1. ch. 31. Sect. 13. [k] Kielw. 67. the Acceſſary in ſuch Caſe is ſaid to be indictable in the County in which the principal Felony was committed. But in the Year-Book of 9 E. 4. 48. pl 1. Abridged Fitz. Coro. 33, and Brook Indictm. 52. the Acceſſary was indicted in the County in which he was Acceſſary, and the Court wrote to the Juſtices of the County wherein the principal Felony was committed, to certify whether the Principal were indicted before them. And in S. P. C. 90. Lett. C. this Caſe is holden to be Law. *See* alſo 3 Inſt. 49, 135. but in S. P. C. 63. Lett. H. It is ſaid, That there was no Remedy at Common Law againſt the Acceſſary where his Offence was in a different County from that of the Principal.

not

not take Conuſance of the principal Felony ariſing in another County, without which they could not find that of the Acceſſary.

Sect. 49. But theſe Matters are fully cleared by the Statute of 2 & 3 E. 6. 24. by which it is enacted, *Par.* 3. *That an Appeal of Murder may be ſued in the ſame County where the Party feloniouſly ſtriken or poiſoned ſhall die, as well againſt the Principals as Acceſſaries, in whatſoever County or Place the Acceſſaries ſhall be guilty; and the Juſtices before whom any ſuch Appeal ſhall be commenced, ſued and taken, within the Year and Day after ſuch Murder and Manſlaughter committed and done, ſhall proceed againſt ſuch Acceſſaries in the ſame County where ſuch Appeal ſhall be ſo taken, in like Manner and Form, as if the ſame Offence of Acceſſaries had been committed in the ſame County where ſuch Appeal ſhall be ſo taken, as well concerning the Trial by the Jurors, or twelve Men of ſuch County where ſuch Appeal ſhall be taken upon the Plea of not guilty, as otherwiſe.*

Sect. 50. And it is farther enacted, *Par.* 4. *That where any Murder or Felony ſhall be hereafter committed and done in one County, and another Perſon, or more, ſhall be Acceſſary or Acceſſaries in any Manner of wiſe, to any ſuch Murder or Felony in any other County, that then an Indictment found or taken againſt ſuch Acceſſary or Acceſſaries upon the Circumſtances of ſuch Matter before the Juſtices of the Peace, or other Juſtices or Commiſſioners, to enquire of Felonies in the County where ſuch Offences of Acceſſary or Acceſſaries in any manner of wiſe, ſhall be committed or done, ſhall be as good and effectual in the Law, as if the ſaid principal Offence had been committed or done in the ſame County where the ſame Indictment againſt ſuch Acceſſary ſhall be found: And that the Juſtices of Gaol-Delivery, of* Oyer *and* Terminer, *or two of them, of or in ſuch County where the Offence of any ſuch Acceſſary ſhall be hereafter committed and done, upon Suit to them made, ſhall write to the* Cuſtos Rotulorum, *or Keepers of the Records, where ſuch Principal ſhall be attainted or convict, to certify them whether ſuch Principal be attainted, convicted, or otherwiſe diſcharged of ſuch principal Felony; who upon ſuch writing to them, or any of them, directed, ſhall make ſufficient Certificate in Writing, under their Seal or Seals, to the ſaid Juſtices, whether ſuch Principal be attainted, convicted, or otherwiſe diſcharged, or not: And after they that ſo ſhall have the Cuſtody of ſuch Records, do certify that ſuch Principal is attainted, convicted, or otherwiſe diſcharged of ſuch Offence by the Law; that then the Juſtices of Gaol-Delivery, or of* Oyer *and* Terminer, *or other thereto authoriſed, ſhall proceed upon every ſuch Acceſſary, in the County where ſuch Acceſſary or Acceſſaries became Acceſſary, in ſuch Manner and Form, as if both the ſaid principal Offence and Acceſſary had been committed and done in the ſame County where the Offence of Acceſſary was, or ſhall be committed or done: And that every ſuch Acceſſary ſhall anſwer upon his Arraignment, and receive ſuch Trial, Judgment, Order and Execution, and ſuffer ſuch Forfeitures, Pains and Penalties, as is uſed in other Caſes of Felony; any Law or Cuſtom to the contrary before uſed in any wiſe notwithſtanding.*

In the Conſtruction of this Statute, the following Points ſeem moſt remarkable, *viz.*

[a] 8 Co. 118. a. *Vide ſupra*, ch. 25. Sect. 62.

Sect. 51. *Firſt*, An Indictment againſt an Acceſſary, in Purſuance of this Statute, in the County wherein he was Acceſſary, ought expreſly to recite that the Principal did the Felony in the other County, and not barely that he was indicted for it; for that is only an Argument, and no direct Affirmation that he did it.

Sect. 52. *Secondly*, The Court of [a] King's Bench, in Relation to a Perſon, there indicted, as an Acceſſary in the County wherein the ſaid Court happens to ſit, to a Felony in another County: And the Lord [b] High Steward, in Relation to a Peer to be tried before the Lords on an Indictment againſt him as Acceſſary in one County to a Felony in another, are within the Purview of the ſaid Statute; not only becauſe it is a remedial Law, and made to ſupply a very miſchievous Defect of the Common Law, which oftentimes neceſſarily occaſioned a Failer of Juſtice, and therefore ought to have a beneficial Conſtruction: But alſo becauſe the Court of King's Bench being the [c] ſupreme Court of *Oyer* and *Terminer*, and Gaol-Delivery, may naturally be included in the very Words of a Statute which gives ſuch Juſtices any new Power; or if it be not thought to be ſtrictly within the Words, it is at leaſt within the Meaning of them, which otherwiſe would give a higher Privilege to an inferior Court than to a ſuperior: And the like in Effect may be ſaid in the Caſe of the Lord [d] Steward, who by the Words of his Commiſſion, as well as the Nature of the Thing, ſeems to be a Juſtice of *Oyer* and *Terminer*, and within the very Words of the Statute, or at leaſt within the Meaning. To which may be added that theſe Words in the latter Part of the Statute, *That then the Juſtices of Gaol Delivery, or of* Oyer *and* Terminer, *or other there authoriſed, ſhall proceed againſt ſuch Acceſſaries*, &c. ſeem plainly to imply, That ſuch other ſo authoriſed may alſo ſend for a Certificate of the Record relating to the Principal; for nothing can be more Natural than to expound one Part of the Statute by another. As to the Objection, That the Words of the Statute are, that the ſaid Juſtices, *or two of them*, ſhall write to the *Cuſtos Rotulorum*, *&c.* And therefore that the Lord Steward cannot do it, becauſe he is but one, it may be [e] anſwered, That thoſe Words are to be thus conſtrued, That where there are two or more ſuch Juſtices, they muſt write, *&c.* but not where there is but one.

[a] 3 Inſt. 49, 135. 9 Co. 118. H. P. C. 223. *See* the Notes to Sect. 48. under Lett. [a]

[b] 3 Inſt. 49. 135. H. P. C. 223.

[c] *Vid. ſupra*, Ch. 3 Sect. 1.

[d] 3 Inſt. 136.

[e] 3 Inſt. 136.

Sect. 53. *Thirdly*, Not only the Juſtices of the King's Bench, the Pleas before whom are properly ſtyled [f] *Placita coram Rege*, and not *coram Juſticiariis*, but any other Juſtices, writing for a Certificate in Purſuance of the Statute, ought to do it by Writ in the King's Name, and not by a Precept in their own Names, and under their own Seals; and the Reaſon given by *Dyer* is becauſe it is a Writing from Juſtices to Juſtices.

[f] Dyer 253. pl. 103, 254. a. 12 Co. 31. H. P. C. 223. But Sir Edw. Coke in 3 Inſt. 49. 135. ſeems to make it neceſſary for the Juſtices of the King's Bench only to write in the King's Name.

Sect. 54. *Fourthly*, Where ſome of thoſe ſuppoſed to have been Acceſſaries to a Felony in a different County, are proceeded againſt in the King's Bench, in Purſuance of the Statute, if there be a Likelihood that others will be in the ſame Manner proceeded againſt in another Court, it ſeems moſt adviſeable [g] to ſend for the Record relating to the Principal by a ſpecial Writ formed upon the Matter according to the Words of the Statute, and not by *Certiorari*, becauſe that would wholly [h] remove the Record from the Court below into the Court of King's Bench, which might cauſe a Doubt, whether either the Court below, or that of King's Bench could certify it upon a ſubſequent Writ; for as to the Court below, it might be objected, That being no longer a Record of that Court, it cannot be certified by it; and as to the King's Bench, it might be objected, That the Principal was neither attainted nor convicted there: Whereas the Words of the Statute are, *That the Juſtices ſhall write to the Keepers of the Records where ſuch Principal ſhall be attainted or convicted.* But theſe Doubts are avoided by [i] directing a ſpecial Writ to the Court below,

[g] 3 Inſt. 49. 136.

[h] *Vide ſupra*, Ch. 27. Sect. 62 to 69. and Sect 77 to 87.

[i] 3 Inſt. 49. 136. *Vid.* H. P. C. 223.

below, on which a ſpecial Certificate ſhall be made in Purſuance of the Statute, and the Record ſhall ſtill remain below, and conſequently may be certified from thence on a ſubſequent Writ.

CHAP. XXX.

Of ſtanding Mute.

HAVING ſhewn in what Manner a Priſoner is to be arraigned, I am in the next Place to examine in what Manner he is to be dealt with afterwards; and to that End ſhall endeavour to ſhew what is to be done with him,

1. Upon his ſtanding Mute.
2. Upon his Confeſſion.
3. Upon his Pleading.

And firſt, as to the Priſoner's ſtanding Mute, I ſhall conſider,

1. Where he ſhall be ſaid to ſtand Mute.
2. How it ſhall be tried whether he do ſo of Malice, or by the Act of God.
3. What ſhall be done where one is found to ſtand Mute by the Act of God.
4. Where he who ſtands Mute ſhall be awarded to the ſame Execution as if he had not ſtood Mute, and where he ſhall be adjudged to his Penance.
5. What is the Nature of ſuch Penance.
6. What he ſhall forfeit, and to whom.
7. Whether the Proſecutor of an Indictment or Appeal of Larceny be intituled to a Reſtitution of the Goods ſtolen, upon the Defendant's ſtanding Mute.
8. Where one that ſtands Mute ſhall have the Benefit of the Clergy.

Sect. 1. As to the firſt Point, *viz.* In what Caſes a Man ſhall be ſaid to ſtand Mute: I take it to be agreed, That he who anſwers impertinently, or ineffectually, or refuſes to put himſelf upon his Trial in ſuch Manner as the Law directs, may as properly be ſaid to ſtand Mute as he who makes no Anſwer at all; as where a Man [a] refuſes to plead a Plea in Chief, or the General Iſſue, but inſiſts on ſome frivolous Defence, or even to plead a good [b] dilatory Plea, and refuſes to plead over to the Felony, in which Caſe, after ſuch a Plea is found againſt him, he ſhall not [c] be admitted to plead in Chief, but ſhall be adjudged to his Penance in the ſame Manner as if he had made no Plea at all. And ſo ſhall he be who

[a] Dy. 49. 241. H. P. C. 226. S. P. C. 150 Letter, E.
[b] Keilw. 70 a. *Vide* Bro. Coro. 22.
[c] Keilw. 70 a.

who pleads a good Plea in Chief, or the General Iſſue, but [a] refuſeth to put himſelf upon the Inqueſt (that is, to be tried by God and his Country if a Commoner, or by God and his [b] Peers, if a Lord) or to wage Battle where ſuch Trial is [c] allowed.

Sect. 2. It ſeems to be holden in the [d] ſecond *Inſtitute*, and alſo in the later Part of Sir *Matthew Hale's Pleas of the* [e] *Crown*, That if a Priſoner on his Trial peremptorily challenge above the Number allowed him by Law, he ſhall not be dealt with as one that ſtands Mute, but ſhall be hanged: But this very Point is made a *Quære* in another [f] Part of *Hale's Pleas of the Crown*; and alſo in [g] *Kelynge*, and the contrary is holden in the third [h] *Inſtitute*: Neither does it ſeem eaſy to aſſign a Reaſon why he who challenges more Jurors than he ought, ſhall, in reſpect of an implied Refuſal of a legal Trial, be thought worthy of a greater Puniſhment than he who obſtinately, directly, and expreſly refuſes it. To which may be added, That there ſeems to be but one * full Authority in the Old Books for the Maintenance of this Opinion, whereas there is a great [i] Number of the other Side.

Sect. 3. But it is clear, [k] That he who demurs in Law to an Indictment or Appeal, ſhall not be eſteemed to ſtand Mute, nor be dealt with as ſuch, as having refuſed a Trial by his Country, for he puts himſelf upon a Trial by the Court, which is the proper Trial of a Matter in Law.

Sect. 4. Alſo it ſeems clear, That after a Man hath † confeſſed himſelf guilty, or pleaded, and put himſelf upon his [l] Country, he ſhall not afterwards be demeaſned as one that ſtands Mute, in reſpect of his ſubſequent Silence: But the Jury ſhall be charged, and the Trial ſhall proceed, and the like Judgment ſhall be given as in Common Caſes.

Sect. 5. As to the ſecond Point, *viz.* In what Caſes, and in what Manner it ſhall be tried, whether one who ſtands Mute do ſo of Malice, or of the Act of God: It ſeems agreed, [m] That where a Priſoner wholly ſtands Mute without making any Anſwer at all, the Court ſhall take an Inqueſt of Office by the Oath of any [n] twelve Perſons that [o] happen to be preſent, whether he do ſo of Malice, or by the Act of God. But [p] after an Iſſue hath been joined, if the Priſoner ſtand Mute when the Jury are in Court, if there be any Need for ſuch Inquiry, it ſhall be made by them, and not by an Inqueſt of Office.

Sect. 6. Where [q] a Man anſwers, but not effectually, it ſeems needleſs to make any Inquiry whether his Refuſal be owing to his Malice or not, becauſe it is apparent.

Sect. 7. As to the third Point, *viz.* What ſhall be done where one is found to ſtand Mute by the Act of God: It is agreed, [r] That in ſuch a Caſe, the Judges of the Court, (who are always to be of Counſel with the Priſoner, to ſee that he have Law and Juſtice) ſhall not only cauſe the Felony to be enquired of, but alſo whether the Priſoner be the ſame Perſon, and all other Matters which he might have pleaded in his Defence. And ſuch Inquiry ſhall be made, as I ſuppoſe, not by an Inqueſt of Office,

[a] Bro. Pain. 2, 14, 15. S. P. C. 150. Lett. E. Bro. App. 93. 2 Inſt. 178. H. C. P. 226. Fitz. Coro. 27, 30, 359. 4 E. 4. 11. pl. 18. 7 E. 4. 29 pl. 13. 14 E. 4. 7 pl. 10. 3 Inſt. 227. *Vide* Bro. Coro. 149. 8 E. 4. 3 pl. 6.

[b] Kely. 57.

[c] For that ſee Chapter of the Trial by Battle, and S. P. C. 81. Letter, E.

[d] 2 Inſt. 178.

[e] H. C. P. 259.

[f] H. P. C. 226. 8 Kely. 36.

[g] 3 Inſt. 227.

[h] 3 H. 7. 12. pl. 5. Abridged, Fitz. Coro. 56. And Bro. Cor. 135 or 6. And Bro. Pain 5.

[i] And *Note*, there is no other Authority cited for this Opinion by Coke, Hale, or Kelynge. 2 Inſt. 178. H. P. C. 259. Kely. 36.

[k] Fitz. Coro. 359. 3 H. 7. 12 pl. 8. Abridg Fitz. Coro. 51. and Bro. Clergy, 27. And *Note* that this Caſe is the more remarkable, becauſe of the very ſame Year with

the former, and ſubſequent to it. *Vide* Kely. 36. 3 H. 7. 2. pl. 5. the like is ſaid to be adjudged by all the Juſtices but Keble; and this Caſe is abridged, Bro. Appeal 82. Pain, 4. [l] *See* the next Chapter, Sect. 5. † S. P. C. 150. Lett. C. Same Point admitted 8 H. 4. 3. pl. 5. which is abridged, Bro. Pain, 2. but in theſe Books it is incidently holden, That where a Man does not confeſs, but pleads Not guilty, and after ſtands Mute, he ſhall be put to his Penance. [m] Kely. 36, 37. H. P. C. 225, 226. 15 E. 4. 33 pl. 19. Abridged, Bro. Penance, 9. and Bro. Coro. 51. Cont 8 H. 4. 3. pl. 5. for which ſee the Note next above. [n] H. P. C. 225. S. P. C. 150. Lett. C. 2 Inſt. 177, 178. 8 H. 4. 1. pl. 2. Fitz. Coro. 71, 225. 43 Aſſ. pl. 30. Bro Appeal, 24. [o] Ra. Ent. 385. pl. 3. [p] 8 H. 4. 1. pl. 2. Fitz. Coro. 71. Bro. Appeal. 24. [q] S. P. C. 150. Lett. D. from the Authority of 8 H. 4. 3. for which ſee the Notes to the precedent Section. [r] *Vide* H. P. C. 225. 226. S. P. C. 150. Lett. D. 2 Inſt. 177, 178. S. P. C. 150. Lett. D. 2 Inſt. 177, 178. H. P. C. 225.

but

but by a Jury returned by the Sheriff in the ſame Manner as if the Defendant had actually pleaded; for ſince it is no way his Fault that he did not ſo plead, there is no Reaſon why his Trial ſhould be in a more looſe and ſummary Manner, or any way leſs regular, or ſolemn, than if he had. To which may be added, That Sir *Matthew Hale* ſaith, [a] *That the Felony ſhall be enquired of*, &c. *in the ſame Manner as if the Priſoner had pleaded Not guilty*; from which Words it ſeems plain, That in his Opinion the Inquiry ought to be an Inqueſt returned by the Sheriff as in other Trials at the Miſe of the Parties, becauſe if the Defendant had pleaded, it muſt certainly have been ſo. And therefore it ſeems reaſonable, That where Sir *William Staundforde* [b] having ſpoken of ſuch Inquiry, adds immediately, That it is but an Inqueſt of Office, ought to be underſtood, not of the Inquiry of the Felony, whereof he had laſt ſpoken, but of the Inquiry whether the Priſoner ſtood Mute of Malice, or by the Act of God, whereof he had ſpoken in the Sentence next before. And I the rather incline to think that this is his Meaning, becauſe the Books cited by him, to this Point, relate to this Inquiry only.

[a] H. P. C. 225.

[b] S. P. C. 150. Lett. D.

[c] Fitz. Coro. 225. 43 Aſſ. pl. 30. 8 H. 4. 1. pl. 2.

As to the fourth Point, *viz.* In what Caſes he that ſtands Mute ſhall be awarded to the ſame Execution as if he had not ſtood Mute, and where he ſhall be adjudged to his Penance, I ſhall conſider,

1. What ſhall be done to him who ſtands Mute after an Attainder.
2. What to a Perſon arraigned for High Treaſon.
3. What to one arraigned for Petit Larceny.
4. What to one arraigned for a Felony by Statute.
5. What to one arraigned upon an Appeal.
6. What to one indicted of a Capital Felony, or Petit Treaſon.

Sect. 8. As to the firſt Particular, *viz.* What is to be done to him who ſtands Mute after an Attainder: It ſeems to be ſettled [d] at this Day, That where-ever one who is attainted, either by Judgment on a Verdict, or Confeſſion, or by Outlawry, or Abjuration, ſtands Mute to the Demand why Execution ſhould not go againſt him, he ſhall not be awarded to his Penance, but to the ſame Kind of Execution, if any, that would have been awarded, if he had not ſtood Mute. Yet there ſeems to be this Difference, That where one who hath always continued in Priſon, after an Attainder by Verdict or Confeſſion, ſtands Mute to the Demand why Execution ſhould not go, it ſhall be awarded [e] againſt him, without any Inquiry whether he ſtand Mute by Malice, or otherwiſe, or whether he be the ſame Perſon who is ſo attainted or not; becauſe it ſufficiently appears that he is the ſame Perſon, and that is ſufficient to juſtify an Award of Execution againſt him, where nothing appears to the contrary. But if a Perſon ſo attainted, be re-taken after an Eſcape; or if one be taken after an Outlawry or Abjuration, and ſtand Mute to the Demand, Why Execution ſhould not go againſt him? it ſhall be inquired whether he ſtand Mute of Malice, or of the Act of God; and if it be found of Malice, it ſeems that Execution ſhall be awarded without any farther inquiry: [f] But if it be found to be of the Act of God, it ſeems That it ought to be alſo inquired, whether he be the ſame Perſon or not, in the ſame Manner as where one ſtands Mute by the Act of God, when firſt brought upon his Trial.

[d] H. P. C. 216. Kely. 36. S. P. C. 150. Lett. C. D. So adjudged, 8 H. 4. 3. Pl. 5. Abridged, Bro. Pain, 2. Coro. 12, as to the Caſe of Abjuration or any other Attainder after a Confeſſion; but the contrary is inſinuated as to other Attainders. But in 26. Aſſ. pl. 19. Abridged, Fitz Coro. 191. Bro. Pain, 12. Coro. 99. one who had abjured ſtanding Mute, was put to his Penance, and not hanged.

[e] S. P. C. 150. Lett. C D. 10 E. 4. 19. pl. 26. Fitz. Coro. 36. Bro. Coro. 155.

[f] S. P. C. 150. Lett. C D. 10 E. 4. pl. 26. Fitz. Coro. 36. Bro. Coro. 155.

Sect. 9. As to the ſecond Point, *viz.* What is to be done to one who ſtands Mute to an Arraignment for High Treaſon: It is clearly ſettled [a] at this Day, That ſtanding Mute upon an Arraignment for High Treaſon is equivalent to a Conviction by Verdict, or Confeſſion, and conſequently ſubjects the Criminal to the ſame Kind of Judgment and Execution as ſuch a Conviction would do. But I take it for granted, That ſuch ſtanding Mute muſt in [b] like manner appear to be obſtinate; and that if it be found to be the Act of God, the whole Matter ſhall in like Manner [c] be inquired of, as hath been more fully ſhewn in the former Part of this Chapter. But where ſuch Perſon appear to ſtand obſtinately Mute, I do not find it any where holden, that there is any Neceſſity that he probably appear to be Guilty, or that any Evidence be examined to prove him ſo, before he ſhall be condemned or executed. But this is adviſeable, where one ſtands obſtinately Mute on an Arraignment for Felony by Statute, as ſhall be more fully ſhewn in the fourteenth and fifteenth *Sections*.

Sect. 10. As to the third Particular, *viz.* What is to be done to one who ſtands Mute to an Arraignment for Petit Larceny: I take it to be agreed, [d] That if a Man appear to ſtand obſtinately Mute on an Arraignment for Petit Larceny, he ſhall have the like Judgment, *&c.* as if he had confeſſed the Indictment.

Sect. 11. As to the fourth Particular, *viz.* What is to be done to thoſe who ſtand Mute to an Arraignment for Felony by Statute: It is expreſly enacted by 33 *H.* 8. 12. *Par.* 12. *That if a Perſon indicted, and arraigned of Treaſon, Miſpriſion of Treaſon, Murder, Manſlaughter, or Bloodſhed*, &c. *againſt that Act, within the Verge of the Court, ſhall obſtinately refuſe to anſwer directly, or ſhall ſtand Mute, he ſhall have the like Judgment*, &c. *as if he were found Guilty*, &c. But [e] where a Statute, as that of *Piracy &c.* ordains a Trial by the Common Courſe of the Law, it hath been adjudged, That the Criminal ſhall have Judgment of his Penance, *&c.* as in other Felonies.

Sect. 12. As to the fifth Particular, *viz.* What is to be done to one who ſtands Mute to an Arraignment on an Appeal: It is holden by Sir *Matthew Hale*. [f] That an Appellee of Felony ſtanding Mute ſhall not have Judgment of Penance, but to be hanged; but this is made a *Quære* in [g] *Staundforde*, and [h] *Brook*; and the contrary Opinion ſeems to be favoured by Sir [i] *Edward Coke*, and is expreſly holden by [k] *Kelynge*, and ſupported by ſeveral [l] Reſolutions in the Old Books. Whereas the *Year-Book* of 21 [m] *E.* 3 ſeems to be the only Reſolution in favour of the other Side; to which it may be anſwered, Not only that three of the above-cited Reſolutions to the contrary, are much later, but alſo that the Appellee in this Caſe appears to have been taken with the Manner, [n] which probably might be a Circumſtance of conſiderable Weight in the Judgment.

Sect. 12. As to the ſixth Particular *viz.* What is to be done to one who ſtands Mute to an Indictment of a Capital Felony, or a Petit Treaſon: It is enacted by the [o] above-mentioned Statute of *Weſtminſter*, 1. 12. *That notorious Felons which openly be of evil Fame, and will not put themſelves*

[a] H. P. C. 226. Savil. 56. pl 121. Kely. 57. Dyer 209. pl. 4. 1 Inſt. 177, 178. Bro. Pain. 19. Co. Litt. 391. 3 Inſt. 14. S. P. C. 150. Lett. C. Cont. Fitz. Coro. 283.

[b] *Vide ſupra*. S. C. 5, 6. 18 E. 3. pl. 26. S. P. C. 150. Lett. D.

[c] *Vide ſupra*, Sect. 7. S. P. C. 150. Lett. D.

[d] 2 Inſt. 177.

[e] Dy. 241. pl. 49. 3 Inſt. 214. B. 1. Ch. 37. pl. 9. S. P. C. 150. Lett. C. H. P. C. 226.

[f] H. P. C. 226.

[g] S. P. C. 150. Lett. B.

[h] Bro. Pain. 8, 19.

[i] 2 Inſt. 178, 179.

[k] Kely. 57.

[l] 18 H. 4. 1. pl. 2. Abrid. Bro. Pain. 1. Forfeiture, 11. Appeal, 24. Bro. Coro. 71. 4 E. 4. 11. pl. 18. Abridg. Fitz. Coro. 71.

[m] Bro. Appeal, 93. Pain. 14. 27 Aſſ. pl. 40. Abridged, Bro. Pain. 13. Appeal, 78. Coro. 123 or 124. Fitz. Coro. 225. 13 E. 4. 7. pl. 10. This Point is made a *Quære*; but in the very next Folio, pl. 17. abridged, Bro. Coro. 160 or 161. it is adjudged by all the Juſtices, That the Appellee in ſuch Caſe ſhould have his Penance. 21 E. 3. 18. pl. 26. Abridged, Bro. Pain. 8. Appeal, 40. Coro. 43. But neither Fitz. Coro. 56. nor 3 H. 7. 2. pl. 5. nor 3 H. 7. 12. pl. 5. cited by Staundforde, ſeem to come up to this Point, but rather to be Authorities of the other Side. *See* Bro. Coro. 81.

[n] *Vide ſupra* Ch. 15. 41.

[o] *Vide* 2 Inſt. 177, 178.

in Enqueſts of Felonies, that Men ſhall charge them with before the Juſtices at the King's Suit, ſhall have ſtrong and hard Impriſonment, as they which refuſe to ſtand to the Common Law of the Land. But this is not to be underſtood of ſuch Priſoners as be taken on light Suſpicion.

[a] 2 Inſt. 177. *Sect.* 14. Sir [a] *Edward Coke*, in the Conſtruction of this Statute, ſaith, That no Perſon ſhall be put to this Puniſhment, unleſs the Matter be evident, or probable, which it is the Duty of the Judge to look into; and Sir *William* [b] *Staundforde*, ſaith, That there ought to be evident or probable Matter to convince the Party of the Crime whereof he is arraigned, or otherwiſe that he be a notorious Felon, or openly of bad Fame; and therefore he adviſes the Judge, for the Satisfaction of this Statute, and Diſcharge of his Duty, to examine the Evidence which proves the Priſoner Guilty of the Fact, before he proceed to the Judgment of *Pain fort & dure*. Yet I cannot find any Book which takes Notice of any Examination of this Kind, or of any Entry that the Defendant appeared to be a notorious Felon, before ſuch Judgment given againſt him, upon his ſtanding Mute, whether upon an [c] Indictment or [d] Appeal: But all the Books cited in the Margin ſeem to intimate, That the ſtanding Mute is of itſelf a ſufficient Ground for ſuch Judgment. Yet all that can be inferred from thence ſeems to be this, That it is not neceſſary to make any thing of this Kind Part of the Record, it being a Matter left to the Diſcretion and Conſcience of the Judge, and to be preſumed where it is not expreſſed. But as to all Capital Appeals whatſoever, and all Indictments and Appeals of Petit Treaſon, perhaps it may be ſaid, That [e] not being within this Statute, but remaining as they were at the Common Law, the Obſtinacy of a Criminal in ſtanding Mute to them, may be of it ſelf, without more, a ſufficient Inducement to a Judge to award him to his Penance. But conſidering that ſuch Appeals and Indictments are within the ſame Reaſon with thoſe mentioned in the Statute; and it is uncertain how the Common Law ſtood in Relation to theſe Matters, as appears by the beſt Authors, [f] differing among themſelves concerning them; and ſeeing the Method preſcribed by the Statute is very juſt and equitable, it ſeems prudent at leaſt in a Judge to obſerve the ſame Rules in all Caſes of this Kind.

[b] S. P. C. 150. Letter A. *Vide* H. P. C. 226.

[c] Ra. Ent. 385 pl. 2, 3. Keilw. 70. a. 7 E. 4. 49. pl. 13. 3 H. 7. 12. pl. 5, 8.

[d] 8 H. 4. 1. pl. 2. 4 E. 4. 11. pl. 18 14 E. 4. 7. pl. 10. 43 Aſſ. pl. 30. 21 E. 3. 18. pl. 26. 3 H. 7. 2 pl. 5.

[e] S. P. C. 150. Lett. B. C. 2 Inſt. 177, 178, 179. And the Books cited, Sect. 12 under Lett.

[f] S. P. C. 149 Lett. F. 2 Inſt. 178, 179.

Sect. 15. I do not find it ſaid in any Book, what ſhall be done to a Priſoner who obſtinately ſtanding Mute to an Arraignment, ſhall appear to be charged upon very light Suſpicion; but I take it for granted, That he may be ſeverely fined and impriſoned for the Contempt.

Sect. 16. As to the fifth Point, *viz.* What is the Nature of the Penance to which a Priſoner is to be adjudged upon his obſtinately ſtanding Mute: It is obſervable, That the above-cited Statute of *Weſtm.* 1. ſays only in general, That Felons ſtanding Mute ſhall be put *in Priſon fort & dure*, without ſaying any Thing of the Manner of it, which it ſeems to leave as a known Thing to the uſual Practice in ſuch Caſes; which we ſhall beſt find from the Books of Entries, and other Law Books, all of which generally agree, That the Priſoner ſhall be remanded [g] to the Place from whence he came, and put [h] in ſome low dark Room, [i] and

[g] H. P. C. 227. S. P. C. 150. Lett. E. Keilw. 70. a. 4 E. 4. 11. pl. 18. 14 E. 4. 8. pl. 17. Abridged, Bro. Coro. 160. 2 Inſt. 178. Ra Ent. 385. pl. 17. 8 H. 4. 1. pl. 2. [h] This Cauſe is omitted in Keilw. 70. a. 4 E. 4. 11. pl. 18. but is mentioned in all the other Books above-cited, but with this Difference, That 14 E. 4. 11. pl. 17. ſays only that he ſhall be put in a Chamber, without adding that it ſhall be low or dark. [i] In this all the Books above-cited ſeem to agree. And 14 E. 4. 8 pl. 17. and S. P. C. 150. Lett. E. and 2 Inſt. 178. add, That he ſhall lie without any Litter or other Thing under him, and that one Arm ſhall be drawn to one quarter of the Room with a Cord, and the other to another, and that his Feet ſhall be uſed in the ſame Manner. But theſe Clauſes are wholly omitted in all the other Books above-cited, except H. P. C. which takes Notice of the later of them only. And Ra. Ent. 385. pl. 2. adds, That an Hole ſhall be made for the Head, and Keil. 70. a. ſays, That the Head ſhall not touch the Earth; but none of the other mention either of theſe Clauſes.

there

there laid on his Back, without any manner of Covering, except for the Privy Parts, and * that as many Weights ſhall be laid upon him as he can bear, and more, and that he ſhall have no Manner of Suſtenance but of the worſt [a] Bread and [b] Water, and that he ſhall [c] not eat the ſame Day in which he drinks, nor drink the ſame Day on which he eats; and that he ſhall ſo continue till he [d] die. But it is ſaid [e], That anciently the Judgment was not. That he ſhould ſo continue till he ſhould die, but till he ſhould anſwer, and that he might ſave himſelf from the Penance by putting himſelf on his Trial, which he cannot do at this Day after the Judgment of Penance is once given.

Sect. 17. It ſeems clear, [f] That Women upon ſtanding Mute, are liable to ſuch Penance as well as Men.

Sect. 18. It is ſaid [g] to be the conſtant Practice of *Newgate* Seſſions, where a Priſoner refuſes to plead, to endeavour to compel him to do it by tying his Thumbs together with Whipcord, and not to proceed to the Judgment and Penance, before all Methods of perſuading him to plead, are found ineffectual.

Sect. 19. As to the fifth Point, *viz.* What he who obſtinately ſtands Mute ſhall forfeit, and to whom: There is no Doubt but that in Caſe of [h] High Treaſon he ſhall forfeit both Lands and Goods, in the ſame Manner as if he had been attainted any other way. Alſo I take it for granted that in the Caſe of Felony and Petit Treaſon, where a Perſon by ſtanding Mute ſhall not avoid being attainted for ſuch Crimes, he ſhall forfeit his Lands and Goods in the ſame Manner as on other Attainders. But where-ever a Perſon ſtanding Mute is adjudged to his Penance, and thereby prevents that Attainder which otherwiſe he might have incurred it ſeems agreed, [i] That he forfeits his Chattels only, and not his Lands.

Sect. 20. It is agreed in the *Year-Book* of 8 [k] *H.* 4. That the Goods ſo forfeited ought not to be delivered to any Perſon claiming them under a Grant from the Crown, till he have ſhewed a good Title to them in the King's Court, by ſome Grant ſufficient to paſs them.

Sect 21. And it ſeems [l] That ſuch Goods will not paſs by Grant of all Felons Goods, having no Words ſpecially extending to the Goods of thoſe who ſtand Mute, *&c.* becauſe a Perſon adjudged to his Penance for ſtanding Mute, does not ſeem to ſuffer as a Felon, being neither attainted nor convicted of any Felony, but as a Perſon refuſing to ſtand to the Law of the Land. And it ſeems rather the ſtronger Opinion, [m] That they paſs not by the Grant of *all Goods of Felons and Fugitives of all Perſons within ſuch a Diſtrict; ſo that if ſuch Perſons for any Treſpaſs or other Fault ought to loſe Life or Member; or ſhall fly and refuſe to ſtand to Judgment, or do any other Treſpaſs for which they ought to loſe their Chattels.*

Sect. 22. As to the ſixth Point, *viz.* Whether the Proſecutor of an Indictment or Appeal of Larceny be intitled to a Reſtitution of the Goods ſtolen, upon the Defendant's ſtanding Mute: It ſeems agreed, [n] That by the Common Law, where a Perſon ſtands Mute to an Appeal of Larceny, it is proper to charge the ſame Inqueſt which is to enquire whether the ſtanding Mute be of Malice or not, to enquire alſo whether the Goods mentioned in the Appeal are the Goods of the Appellant, and whether the Defendant were taken upon a freſh Suit [o] made by ſuch Appellant,

' In this all the Books above-cited agree.

[a] But 14 E. 4. 8. pl. 17. S. P. C. 150. Lett. E. and 2 Inſt. 178 are, That he ſhall only have three Morſels of Barley Bread a Day. Keilw. 70. a. that he ſhall have only Rye Bread; and Ra. Ent. 385, pl. 2. and 2 H. 4. 2. pl. 2. generally that he ſhall have of the worſt Bread.

[b] 14 E. 4. 8. pl. 17. S. P. C. 150. Lett. E. 2 Inſt. 178. and 8 H. 4. 2. pl. 2. and Keilw. 70. a. are, That he ſhall have the Water next the Priſon, ſo that it be not current; but Ra. Ent. 385. pl. 5 is general, That he ſhall have the worſt Water.

[c] This is omitted in Keilw. 70. a. and in 8 H. 4. 2. pl. 2.

[d] This is omitted in none of the Books above-cited, except 14 E. 5. 11. and H. P. C. 227. but neither of theſe Books give the whole Judgment at Large

[e] S. P. C. 150. Lett. E. 151. Lett. E. Briton 11. 2 Inſt. 177. 8 Kely 27, 28.

[f] *See* the Books cited to Sect. 9. [g] 14 E. 4. 7. p. 10. H. P. C. 226, 227. Co. Litt. 391. Fitz. Eſc. 10. Coron. 51. Aſſ. 421. S. P. C. 151. 2. Bro. Forfeiture, 11, 64. Appeal, 24. 8 H. 4. 1. b. 2. a. b. 3 H. 7. 12. pl. 8. [h] 8 H. 4. 2. a. Bro. Appeal, 24. [i] Dy. 268 pl. 18. 8 H. 4. 2. a. b. Bro. Forfeiture, 11. [k] Dy. 268 pl. 18. 8 H. 4. 2. a. b. Bro. Forfeit. 11. [l] *Vide infra* Ch. 23. Sect. 53. Lett. F. 8 H. 4. 1. pl. 2. Abridged, Bro. Appeal, 24. S. P. C. 166. [m] *Vide* ch. 23. Sect. 50, 51, 52.

which

which Points being found [p] for him, he ſhall have an Award of Reſtitution to ſuch Goods, and to ſuch only, [q] in whoſe Hands ſoever [r] they are found. And it is ſaid in general in ſome Books, [a] That in an Appeal of Larceny there ſhall be a Reſtitution of the Goods, upon the Appellee's ſtanding Mute, without ſaying any thing of any Inquiry concerning the Property, or freſh Suit: But I take it for granted, That where it is ſo omitted, it is taken as a Thing known, and done of Courſe, and therefore needleſs to be expreſſly mentioned.

Sect. 23. But it ſeems queſtionable, Whether the Proſecutor of an Indictment of Larceny, be in like manner intitled to a Reſtitution, upon the Defendant's ſtanding Mute? Becauſe it ſeems agreed, [d] That by the Common Law there could be no ſuch Reſtitution upon any other Proſecution but an Appeal; and it is certain, That the Proſecutor of an Indictment is not intitled to a Reſtitution by the expreſs Words of 21 * *H.* 8. 11. which require, *That the Felon be found guilty, or otherwiſe attainted*, &c. And I do not know that he is intitled to it by any other Statute, or any equitable Conſtruction of this.

Sect. 24. As to the ſeventh Point, *viz.* Where one who ſtands Mute ſhall have the Benefit of his Clergy: It ſeems clear, [c] That unleſs it happen to be otherwiſe ſpecially provided by ſome Statute, where-ever he ſhall be allowed it upon a Conviction, by Verdict or Confeſſion, he ſhall have it upon his ſtanding Mute. Alſo I take it to be agreed, [d] That a Statute taking away the Benefit of the Clergy from thoſe who ſhall be convicted of a Crime, doth not thereby take it away from thoſe who ſtand Mute on an Indictment or Appeal for ſuch Crime. But it is enacted by 3 & 4 *W.* & *M.* 9. ſet forth more at large in the Chapter of *Clergy*, *That if any Perſon ſhall be indicted of any Offence, for which by Virtue of any former Statute, he is excluded from the Benefit of his Clergy, if he had been thereof convicted by Verdict or Confeſſion, if he ſtand Mute he ſhall not be admitted to it.* But Appeals, and Offences excluded from the Benefit of the Clergy by ſubſequent Statutes, ſeem not to be within the Purview of this Statute, for the fuller Conſideration whereof I ſhall refer the Reader to the Chapter of *Clergy*.

[p] *Supra*, Ch. 23 Sect. 53.
[q] *Supra*, Ch. 23. Sect 57.
[r] *Supra*, Ch. 23 Sect. 54.
[a] 21 E. 3. 18. pl. 26. Abrid. Bro. Appeal, 40. 41 Aſſ. pl. 3. Abrid. Bro. Appeal, 78. Coro. 123 or 124 Fitz. Coro. 225. *Vide* 40 Aſſ. pl. 39. Abrid Fitz. Coro. 217.
[b] *Supra*, Ch. 23 Sect 55, 56.
* Set forth more at large, Ch. 23. Sect. 55.
[c] Fitz. Coro 233, 283. Aſſ 421. 8 H. 4 3. pl. 5. H. P. C. 231. Moore 550. pl. 738. 3 H. 7. 12. pl. 8 Abrid. Bro. Clergy, 27. Fitz. Coro. 51. 3 H. 7. 12. pl. 10. Abrid. Fitz. Coro. 53. Fitz. Cor. 58
[d] ſeems contrary, but I cannot find any thing in 3 H. 7. 12. Which is the Year-Book cited to this Note to warrant this Opinion. [d] *ſee* H. P. C. 232 to 238.

CHAP.

CHAP. XXXI.

Of Confeſſion and Demurrer.

AND now I am to conſider what is to be done to a Priſoner upon his Confeſſion, which may be either,

1. Expreſs, or,
2. Implied.

Sect. 1. An expreſs Confeſſion is where a Perſon directly confeſſes [a] the Crime with which he is charged, which is the higheſt Conviction that can be, and may be received [b] after the Plea of Not guilty recorded, notwithſtanding the Repugnancy; for the Entry is, That the Defendant *poſtea*, or *relicta verificatione, cognovit indictamentum.*

Sect. 2. Such a Confeſſion carries with it ſo ſtrong a Preſumption of Guilt, that an Entry [c] on Record [d] *quod cognovit indictamentum, &c.* in an Indictment of Treſpaſs, eſtops the Defendant to plead Not guilty to an Action brought afterwards againſt him for the ſame Matter. But it ſeems queſtionable, Whether ſuch Entry of a Confeſſion of an Indictment of a Capital Crime, will in the like Manner eſtop a Defendant to plead Not guilty to an Appeal, becauſe in Caſe of Life, the Court will be very tender in going upon Preſumptions. And where a Perſon upon his Arraignment actually confeſſes [e] himſelf Guilty, or unadviſedly diſcloſes the Special Manner of the Fact, ſuppoſing that it doth not amount to Felony, where it doth, yet the Judges, upon probable Circumſtances, that ſuch Confeſſion may proceed from Fear, Menace, or Dureſs, or from Weakneſs or Ignorance, may refuſe to record ſuch Confeſſion, and ſuffer the Party to plead Not guilty.

Sect. 3. An implied Confeſſion is where a Defendant in a Caſe not Capital, doth not directly own himſelf Guilty, but in a Manner admits it by yielding to the King's Mercy, and deſiring to ſubmit to a ſmall Fine; in which Caſe, if the Court think fit to accept of ſuch Submiſſion, and make an Entry that the Defendant *poſuit ſe in gratiam Regis*, without putting him to a direct Confeſſion, or Plea, (which in ſuch Caſes ſeems to be left to Diſcretion) the Defendant ſhall [f] not be eſtopped to plead Not guilty to an Action for the ſame Fact, as he ſhall [g] be where the Entry is *quod cognovit indictamentum.*

Sect. 4. I take it for granted, That no Confeſſion whatever ſhall, before final [h] Judgment, deprive the Defendant of the Privilege of taking Exceptions in Arreſt of Judgment to Faults apparent in the Record; [i] for the Judges muſt *ex officio* take Notice of all ſuch Faults, and any one, as *amicus Curiæ*, may inform them of them.

[a] *Vide* S.P.C. 142. Lett. C. Lamb. B. 4. Ch. 9. Finch of Law 38.
[b] Kely. 11. *Quære* if the Law be the ſame in Civil Actions. Affirmed Cr. E. 114. pl. 3. Denied 2 Jon. 156.
[c] 9 H. 6. 60. a. Fitz. Eſtopp. 24. 102. 11 H. 6. 65. pl. 21. Lamb. B. 4. ch. 9. Trial *per Pais* 25.
[d] S.P.C. 141. Lett. C.
[e] 22 Aſſ. pl. 71. Abridged, Fitz. Coro. 180. 27 Aſſ. pl. 40.
[f] 9 H. 6. 60. a. Abridged Fitz. Eſtoppel, 24. 11 H. 4 65. pl. 21. Lamb. B. 4. Ch. 9.
[g] *Supra* § 2.
[h] 1 Salk. 77. 78.
[i] Finch of Law, 226. 2 Danv. Abr. 252. 2 Lev. 223.

Sect. 5. It ſeems to be taken for granted, both by [a] *Brook* and [b] *Staundforde*, [c] *Coke* and [d] *Hale*, ſpeaking as I ſuppoſe, of a general Demurrer, That it amounts ſo far to a Confeſſion of the Indictment as laid, that if the Indictment be good, Judgment and Execution ſhall go againſt the Priſoner. But it is obſervable, That no adjudged Caſe is cited for the Maintenance of this Opinion, nor any Authority from the old Books except the *Year-Book* of 14 *Ed.* 4. *pl.* 9. in which it is reported to have been ſaid by *Choke*, That if a Defendant demur to a Plea, he ſhall be hanged, *quod fuit conceſſum*. But to this it may be ſaid, That it was only ſpoken incidently, and not a Point adjudged; and beſides that it is ſo ſhort and obſcure that it is ſcarce intelligible, which appears by *Brook*'s Abridging it in different Senſes; for in one Place [e] he ſeems to underſtand it of a Demurrer by a Defendant to a Plea in Bar, which ſeems impoſſible; and in another [f] Place he ſeems to underſtand it in a different Senſe. And therefore perhaps the Meaning of it may be only this, That after a Defendant hath pleaded ſuch a Bar, as confeſſes the Fact, and concludes him to plead the General Iſſue afterwards, as ſome Pleas are ſaid [g] to do; if he afterwards demur to a Replication to ſuch Plea, he ſhall be condemned if the Demurrer be adjudged againſt him, and the Indictment or Appeal be good.

Sect. 6. But howſoever the Law may ſtand in Relation to a [h] General Demurrer concluding in Bar of an Appeal, or Indictment, as in Common Demurrers in Civil Actions, or a Demurrer to a Plea in Bar, [i] which admits the Fact, or to a * Replication to ſuch a Plea: It hath been adjudged, That if an Appellee demur in Law to an Appeal by Reaſon of the [k] Inſufficiency of the Declaration, or generally demur to the Declaration, with a [l] Concluſion *& petit judicium de narratione illa & quod narratio illa caſſetur*; or having prayed [m] *Oyer* of the Writ and Proceſs, demand Judgment of the Appeal, *quia dicit quod breve de appello prædict. & proceſſ. inde minus ſufficient' in lege exiſtunt ad ipſum W. C. ad dictum breve de Appello reſpondere compellend' & hoc parat. eſt verificare prout Cur', &c. unde petit judicium' de brevi de Appello prædict. & petit inde allocationem, & quod breve illud de Appello ceſſetur*; ſuch Demurrer ſhall not conclude him from pleading over to the Felony, either at the ſame Time [n] with the Demurrer, or [o] after it ſhall be adjudged againſt him.

Sect. 7. But it ſeems, That in Criminal Caſes not Capital, if the Defendant demur to an Indictment, *&c.* whether in Abatement or otherwiſe, the Court will not give Judgment againſt him to anſwer over, but final [p] Judgment; for it ſeems, That in ſuch Caſes there can be no Demurrer properly in Abatement, except [q] it be to a Plea in Abatement, or to a [r] Replication to ſuch a Plea.

Sect. 8. A Demurrer to an Appeal hath been [s] received after Iſſue joined: But it hath been adjudged, [t] That a Demurrer to an Indictment ought not to be received after Verdict.

[a] Bro. Peremptory, 86.
[b] S. P. C. 150. Lett. C.
[c] 2 Inſt. 178.
[d] H. P. C. 243.
[e] Bro. Demurrer, 17.
[f] Bro. Peremtory, 86
[g] *Vide ſupra*, Ch. 23. Sect. 135.
[h] See the precedent Sect.
[i] *Vide* Bro. Peremptory, 86. Fitz. Coro. 12.
* *Vide* Bro. Perempt. 86.
[k] Dyer 38. pl. 51. 39. pl 65. Cro. Eliz. 196 pl. 13.
[l] As it was done in the Caſe of Smith and Bowen, Mich. 7 Ann. *Vid.* Salk. 59. pl. 2.
[m] As it was done in the Caſe of Widdrington and Charlton. Hill. 10 Ann.
[n] Smith and Bowen, Mic. 7 *Anna*. In which Caſe the Demurrer was continued on the Record with a *Caſſet. triatio exitus, &c.* and after the Demurrer was determined againſt the Defendant, a *Venire* was awarded.
[o] Dyer. 38. pl. 51. Salk. 59, 60. Cro. E. 196. pl. 13.
[p] *Vide* Salk. 220.
[q] Salk. 218.
[r] Rs. Ent. 160. pl. 1, 2, 3. 611.
[s] Cro. E. 196. pl. 13.
[t] 1 Sid 228 wherein the Precedent in Co. Ent. 363. b. to the contrary is denied to be Law.

CHAP. XXXII.

Of Sanctuary.

BEFORE I conſider in the third Place, how a Priſoner is to be demeſned upon his Pleading; I ſhall examine the Nature of the ſeveral Kinds of Pleas in Criminal Caſes, which are either,

1. Dilatory, or,
2. In Chief.

Dilatory Pleas are either,

1. Declinatory, or,
2. In Abatement.

Declinatory Pleas are either,

1. Of the Privilege of Sanctuary, or,
2. Of the Benefit of the Clergy.

Sect. 1. As to the Plea of the Privilege of Sanctuary, the Learning relating to it being made in a great Meaſure uſeleſs by the Statute of 21 *Jac.* 1. 28. *Par.* 7. by which it is enacted, *That no Sanctuary or Privilege of Sanctuary ſhall after that Time be admitted or allowed in any Caſe.* I ſhall but briefly conſider it under the following Heads,

1. What was the Nature of the Privilege of Sanctuary.
2. What Authority was neceſſary for the creating it.
3. To what Matters it extended.
4. At what Time, and in what Manner it was to be pleaded.

Sect. 2. As to the firſt Point, *viz.* What was the Nature of the Privilege of Sanctuary: It ſeems to be agreed,[a] That ſo far as a Place was allowed to have it, it gave all thoſe who fled to it for Safeguard, and continued within its [b] Precincts, a Freedom from being apprehended, or compelled to anſwer in any Court of Juſtice, and a Right to be remanded, if taken out againſt their Will.

[a] Finch of Law, 374. S. P. C. 108. Lect. B.

[b] What thoſe precincts were. Keilw. 189. a. b. 191.

9 H. 7. 20. pl. 15. S. P. C. 113. a. Bro. Sanctuary, 10. [c] Keilw. 188, 189, 190, 191. 8 H. 6. 4. b. Abridged Fitz. Coro. 5. 1 H. 7. 23. b. Abridged, Fitz. Coro. 49. 9 E. 4. 28. b. Abridged, Fitz. Coro. 32. Keilw. 107, 188.

Sect. 3.

Sect. 3. As to the ſecond Point, *viz.* What Authority was neceſſary for the creating it: It ſeems, that it belonged of Common [a] Right to every Church and Churchyard, for the Space of forty Days, but could not be claimed for a longer Time, either by Force of any Bull from the [b] Pope, nor even by [c] Preſcription, ([d] eſpecially in the Caſe of High Treaſon) but only by a Grant [e] from the King, made, or at leaſt confirmed [f] or allowed [g] in *Eyre*, ſince the Time of Memory. But it is ſaid, That it did not gain * the Name of a Sanctuary till it had the Pope's Bull, tho' it had the † full Privilege of one, as to all Exemption from Temporal Courts, by the King's Grant only.

Sect. 4. As to the third Point, *viz.* To what Matters it extended. It ſeems agreed, That it never was any farther a Protection againſt any Action merely Civil, [h] than to ſave the Defendant from Execution of his Body. Alſo it ſeems to be generally agreed, That if it were granted by general Words, it extended not to [i] High Treaſon. But it ſeems agreed, [k] That in ſuch Caſe it extended to all Felonies except [l] Sacrilege, and to all inferior Crimes, except ſuch as were committed by a Sanctuary Man [m] within the Sanctuary, or even [n] out of it, *ſub ſpe redeundi.*

Sect. 5. As to the fourth Point, *viz.* At what Time, and in what Manner it was to be pleaded: It ſeems agreed, That the Defendant loſt the Benefit of it, unleſs he pleaded it before any [o] other Plea, and properly made out his Caſe; but for this Matter I ſhall wholly refer the Reader to the Old [p] Books.

Sect. 6. For the Learning of Abjuration, [q] depending much upon that of Sanctuaries, and ſeeming to be of very little Uſe at this Day, I ſhall refer to *Staundforde's Pleas of the Crown*, *Book* 2. *Chap.* 40. and to what hath been ſaid already concerning that Matter, in the Chapter concerning *Coroners*, *Sect.* 44.

[a] 32 H. 8 ch. 12. Finch of Law, 388. 3 H. 7. 12. pl. 6. Abrid. Fitz. Coro. 54. 21 E. 3. 17. pl. 21. Abridg. Bro. Sanctuary, 2. *Supra* Ch. 9. Sect. 44. Keilw. 189. a. Bro. Sanctu. 11, 14, 16. Raſt. Ent. 583. pl. 1, 2. [b] Keilw. 189, 190, 191. S. P. C. 110. b. 111. Lett. A. Bro. Sanctu. 6. 15. 5 Co. *de jure Regis eccl.* 26. [c] 1 Inſt. 144. Keilw. 188, *&c.* But *Quære* if ſuch Preſcription were confirmed by King, or allowed in Eyre ſince Time of Memory. Keilwey, 188, 189. 190, 191. [d] S. P. C. 112. a. 1 H. 7. 23, 25, 26 Abridged, Fitz. Coro. 49. Preſcription, 20. *Vide* Ra. Ent. 584 pl. 3, 4, 5. [e] S. P. C. 108. Lett. B 110, 111. 1 H. 7. 25. b. 26. Bro. Sanctuary, 7. Keilw. 189, 190, 191. [f] Keilw. 189. 190. [g] H 7. 23. 2 Rol. Abr. 268, 269. [h] Keilw. 189, 190 2 Rol. Abr. 268, 269. [i] H. 7. 23. Bro. Sanctuary, 7. 15. this is made a *Quære*. S. P. C. 112. * Finch of Law. 375. † Finch of Law, 374, 375. [k] Bro. Sanctuary, 3, 11. 7 H. 6 8. pl. 34. Abridged Fitz. Juriſdiction, 2. Dyer 295. pl. 11, 12. [l] 21 E. 3. 17. pl. 21. Denied, 29 Aſſ. pl. 24. Abridged, Fitz. Grant, 77. Bro. Sanctuary, 6. [m] H. 7. 23, 25, 26. Abridged, Fitz. Coro. 49. Preſcription, 20. Conc. Keilw. 190, 191. *Quære* Finch, 374. [n] *See* the Books cited to the other Parts of this Section. *Quære* if in ſuch Caſe it extended to Petit Treaſon. Bro. Sanctuary, 2. [o] 3 Inſt. 115. Fitz. 420. [p] Agreed by all the Canoniſts. Keilw. 191. b. [q] Denied by many of the Canoniſts, Keilw. 191. b. [r] S. P. C. 113. Lett. B. Fitz. Coron. 438. Bro. Sanctuary, 5. 21 E. 3. 17. pl. 21. Abridged, Bro. Sanctuary, 2. Fitz. Coro. 447. 9 E. 4. 28. b. Abridged, Fitz. Coro. 32. [s] Keilw 90, 107, 188, 189. S. P. C. 113. a. 1 H. 7. 23, 24, 25, 26. 9 H. 7. 20. pl. 15. Ra. Ent. 584. pl. 3, 4, 5. 683. pl. 3. [t] 3 Inſt. 115. Fitz. Aiel, 5.

CHAP.

CHAP. XXXIII.

Of Clergy

FOR the better Underſtanding the Nature of the Benefit of the Clergy, (or rather of the [a] Statute at this Day, I ſhall endeavour to ſhew,

[a] *See* the latter Part of this Chapter.

1. By what Kind of Perſons it is demandable.
2. For what Crimes.
3. At what Times.
4. Whether it ſhall be allowed where it is not demanded.
5. Who is to judge whether the Perſon who demands it have a Right to it or not.
6. How far the Ordinary was puniſhable at Law for demanding or refuſing a Clerk againſt Law.
7. In what Manner at the Common Law a Clerk was to be delivered to the Ordinary, and what is to be done to him afterwards.
8. What is to be done to him at this Day, and how far it ſhall be to his Benefit.

Sect. 1. As to the firſt Point, *viz.* By what Kind of Perſons the Benefit of the Clergy, (or rather of the Statute at this Day) is demandable: It may not be improper to look a little back into the Original of it, whereby we ſhall find, That anciently the Clergy [b] ſtrongly inſiſted, that by the Law of God their Perſons were ſo ſacred, that they could not, without a Violation of that Law, be convened before, and much leſs puniſhed with the Loſs of Life, or Member by any ſecular Judge, for any Crime whatſoever. But there ſeems to be ſo little [c] Colour for any Pretence of this Kind from Scripture, that I almoſt wonder how it was poſſible that any Perſons could be ſo far prejudiced, as ſeriouſly to be perſuaded that it is deducible from thence.

[b] Keilw. 181, 182, 183, 184, 185.

[c] Keilw. 181, *&c.*

Sect. 2. But it ſeems agreed, [d] That all Perſons in Holy Orders have this Privilege by the Canon Law; but this Law being no farther in [e] Force here than as it hath been received, and is conſiſtent with the Common or Statute Law; it will be proper to ſhew how far it hath

[d] *See* Lyndw. Book 2. in the Chapter *D. fore Competente* Kely. 99, 100 181. Keilw. 180, *de jure Regis*

&c. S. P. C. 123, 124. Finch of Law, 462, 463. [e] Keilw. 181. *&c.* Kely. 99, *&c.* 5 Co. *Rec.* 13, *&c.*

been received, and is conſiſtent with thoſe Laws; which I ſhall at preſent conſider under this Head, ſo far as it relates to the Perſons intitled to this Privilege; and ſhall farther conſider it as to other Matters, in the following Part of this Chapter.

Sect. 3. It ſeems agreed, That before the Statute of *Articuli cleri Ch.* 15. made in the ninth Year of *Ed.* 2. it was [a] generally denied to thoſe who had abjured, or who had any other way confeſſed themſelves Guilty: But by a favourable Interpretation of that Statute, which expreſly extends only to thoſe who fly to the Church for Safeguard it hath been allowed [b] to all thoſe who have confeſſed themſelves guilty, upon their Arraignment or otherwiſe, in the ſame Manner as if they had not confeſſed.

Sect. 4. Alſo it ſeems, That notwithſtanding the Clergy [c] contended That the Word *Clericus* (which is the Word generally uſed by the [d] Canon Law as well as ours, [e] to expreſs thoſe who are intitled to this Privilege) did include thoſe of the Inferior Orders, [*] as well as Biſhops, Prieſts and Deacons: Yet it ſeems, [f] That the Temporal Judges ſometimes denied it to thoſe in Inferior Orders, as well as to mere [g] Laymen, before the Statute of 25 *E.* 3. *ch.* 4. which reciting, *That the Prelates had grievouſly complained, That ſecular Clerks, as well Chaplains, as other Monks, and other People of Religion, had been drawn and hang'd by Award of the ſecular Juſtices, in Prejudice of the Franchiſe of Holy Church*, &c. *doth enact, That all Manner of Clerks, as well Secular as Religious*, &c. *ſhall freely enjoy the Privilege of Holy Church*, &c.

Sect. 5. It ſeems that by a favourable Interpretation of this Statute, which univerſally prevailed ſoon [h] after it was made, not only thoſe actually admitted into ſome inferior Order of the Clergy, [i] but alſo thoſe who were never qualified to be admitted into Orders, (which was tried [k] by putting them to read a Verſe) have been taken to have a [l] Right to this Privilege, as much as Perſons in Holy Orders, whether they were Perſons lawfully born, or † Baſtards, [m] Aliens or Denizens, in the Communion of the Church or [n] Excommunicate, within the Common Benefit of the Law, or ‖ Outlaws, *&c.* ſo that they were not [o] Hereticks convict, nor [p] Jews, Mahometans, nor Pagans; nor under [q] perpetual Diſability of going into Orders, admitting of no Diſpenſation, as [r] blind and maimed Perſons formerly were, and Women [s] ſtill are; nor liable to the Objection of Bigamy, *viz.* (of having [u] married two different Women ſucceſſively, or a Widow) which by a Conſtitution of the Council of *Lyons*, [x] received in this Kingdom, was a Bar to the Demand of the Privilege of the Clergy; and by Force of 18 *E.* 3. 2. was triable by the Certificate [y] of the Biſhop.

Sect. 6. But it is expreſly enacted by 1 *E.* 6. 12. *Par.* 16. *That any Perſon who by the Law of this Realm ought to have the Benefit of his Clergy, ſhall be admitted to it, altho' he have been divers Times married to any ſingle Woman*

[a] Fitz. Coro. 155. 11 Co. 29. b. S. P. C. 124. Lett. G. *Vide* Keilw. 186. b. Selden's *Ja. ut Anglor.* Ch. 10.

[b] Bro. Clergy, 3, 7, 8. 9 E. 4. 28. pl. 40. 5 H. 4. 3. pl. 5. 1 Aſſ. pl. 4. 27 H. 6. 7. b. Fitz. Coro. 191.

[c] Kely. 99, 100.

[d] Lyndw. B. 2. i. the Chapter *De foro competente.*

[e] *See* the Statute of Marlb. Ch. 28. and Weſtm. 1. Ch. 2. and *Articuli de i*, Ch. 15. and the Old Books cited, 2 Inſt. 633, 634, *&c.*

[*] Keilw. 181. Kely. 99, 100.

[f] Kely. 99, 100.

[g] Fitz. Coro. 233. But they ſometimes allowed it to mere Layman, being able to read, Fitz. Coro. 117.

[h] Yet it was holden the next Year after the Statute *quod litteratura non facit clericum niſi habeat ſacram tenſuram.* 26 Aſſ. pl. 19. Abridged, Fitz. Coro. 191. S. P. C. 124. Lett. B. [i] Kely. 100, 101, 102. Bro. Clergy, 7, 20. [k] Kely. 100, 101. Finch. 462, 463. S. P. C. 133. Letters A. B. C. D. 34 H. 6. 49. pl. 16. Fitz. Coro. 44. See the Caſes cited to the fourth general Point of this Chapter. [l] 9 E. 4. 28. pl. 40. Abridged Bro. Clergy, 7. † Bro. Clergy, 22. [m] Bro. Clergy, 20. [n] Bro. Clergy, 20. H. P. C. 229. 11 Co. 29. b. ‖ *See* 3 & 4 W. M. 9. 11 Co. 29. b. [o] S. P. C. 133. Lett. B. Bro Clergy, 20. 11 Co. 29. b. [p] Bro. Clergy, 20. 11 Co. 29. b. H. P. C. 229. [q] 11 Co. 29. b. [r] 11 Co. 29. b. H. P. C. 229. Cont. Bro. Clergy, 21. [s] Finch, 463. 11 Co. 29. b. *See* the Preambles of 21 Ja. 1 Ch. 6. and of 3 & 4 W. M. 9. Par. 7 Yet 'tis admitted, Fitz. Coro. 461 That a Woman might claim the Benefit of the Clergy. [u] S. P. C. 134, 135. Ra. Ent. 106. a. b. [x] *See* the Statute of Bigamy, 4 E. 1. Ch. 5. 5 Co. *De jure Regis conſuetudines*, 13. S. P. C. 125. Lett. F. [y] Ra. Ent. 160. a. b. S. P. C. 134. Lett. C. 135. a. 11 H. 4. 11. pl. 24. Abridged, Fitz. Coro. 85. 40 E. 3. 42. pl. 23. Abridged, Fitz. Attorney, 39.

or ſingle Women, or to any Widow or Widows, or to two Wives or more. But it hoſe ſome [z] Queſtion whether this Statute were not impliedly repealed by 1 & 2 *Ph. & Ma.* 8. while it ſtood in Force, *Which repealed all Clauſes,* &c. *againſt the See of* Rome.

[z] *Vide* S. P. C. 134. Dalis. 21. pl. 1. Dyer 201. pl. 67. Bro. Clergy, 20. H. P. C. 229.

Sect. 7. As to Women it is enacted by 21 *Jac.* 1. 6. *That on a Conviction of Grand Larceny under the Value of* 10s. *being no Burglary, nor Robbery in or near the Highway, nor a felonious private Taking from the Perſon,* &c. *but only ſuch an Offence for which a Man might have his Clergy, they ſhall be burnt in the Hand, and impriſoned,* &c.

Sect. 8. But it is enacted by 3 & 4 *W. & M.* 9. Par. 7. *That where a Man being convicted of any Felony may demand the Benefit of his Clergy; if a Woman be convicted for the ſame or the like Offence, upon her Prayer to have the Benefit of this Statute, Judgment of Death ſhall not be given againſt her upon ſuch Conviction, or Execution awarded upon any Outlawry for ſuch Offence, but ſhe ſhall ſuffer the ſame Puniſhment as a Man ſhould ſuffer, that has the Benefit of his Clergy allowed him in the like Caſe, that is to ſay, ſhall be burnt in the Hand by the Gaoler in open Court, and farther be kept in Priſon for ſuch a Time as the Juſtices in their Diſcretion ſhall think fit, ſo as the ſame do not exceed one Year's Impriſonment.*

Sect. 9. It ſeems, [a] That one who had been guilty of Sacrilege, or of breaking the Priſon of the Ordinary, had no Right to the Benefit of the Clergy, but at the [b] Diſcretion of the Ordinary.

[a] S. P. C. 31 Lett. F. 32. Lett. A. 125. Lett. D 124 Lett. A. 133 Lett. B. Fitz. Coro 112, 117, 120, 256, 257. 4 Inſt. 314. 12 Aſſ. 39. Abridg. Bro. Clergy, 10. 17 Aſſ. pl. 4. 17 E. 3. 13. pl. 47. Abridg Fitz. Coro 112. 9 E. 4. 28. pl. 40. Abridg. Bro. Clergy, 7. 27 Aſſ. 42. Abridged, Fitz. Coro. 205. Bro. Clergy, 13. 11 Co. 29 b.

Sect. 10. It ſeems clear, [c] That before the Statute of 4 *H.* 7. 12. He who had been admitted to the Benefit of the Clergy, might have it a ſecond Time as well as the firſt, unleſs he had broken the Priſon of the Ordinary, to which he was committed when the Clergy was firſt allowed him; in which Caſe it ſeems, [d] That he could not ſave himſelf from a ſecond Proſecution, tho' for the very ſame Felony for which he was before convicted, unleſs he could ſhew a Purgation.

Sect. 11. But it is enacted by 4 *H.* 7. 13. *That every Perſon, not being within Orders, who hath once been admitted to the Benefit of his Clergy, eſtſoons arraigned of any ſuch Offence, be not admitted to have the Benefit or Privilege of the Clergy,* &c. *And it is provided, That if any Perſon at the ſecond Time of asking his Clergy, becauſe he is within Orders, hath not there ready his Letters of his Orders, or a Certificate of his Ordinary, witneſſing the ſame That then the Juſtices afore whom he is ſo arraigned, ſhall give him a Day by their Diſcretion to bring in his ſaid Letter or Certificate; and if he fail, and bring not at ſuch a Day his ſaid Letters or Certificate, then the Perſon to loſe the Benefit of his Clergy as he ſhall do that is without Orders.*

[b] Yet it ſeems to be holden, 26 Aſſ. pl. 19. and 27. Abridged, Bro. Clergy, 11, 12. Fitz. Coro. 191, 193. That one who had been guilty of Sacrilege might demand it as well as any other. And it ſeems to be holden, Fitz. Co. 232, 250, 419. That one who had broken the Priſon of the Ordinary had no Manner of Right to it. *Vide* 12 Aſſ. 39. Abridged, Bro. Clergy, 10. This Point is made a *Quere* 9 E. 4. 28. pl. 40. Abridged, Bro. Clergy, 7. [c] H. P. C. 230. S. P. C. 31. Lett. F. 32 Letter A. 107. Letter B. 124. Letter C. 135. Letters B. D. See the Preamble of 4 H. 7. 13. But 17 Aſſ. pl. 4. 17 E. 3. 13. pl. 47 Abridged, Fitz. Coro. 112. It ſeems to have been doubted where the Clerk was attainted before he firſt had the Benefit of the Clergy. [d] Fitz. Coro. 232. and to the Books cited to Letter C. and to the former Section.

Sect. 12. But it is enacted by 28 *H.* 8. *Par.* 7. *That Perſons within Holy Orders, ſhall be under the ſame Pains and Dangers for the Offences referred to by that Statute, and be uſed and ordered to all Intents and Purpoſes, as other Perſons, not being within Holy Orders. And it is farther enacted by* 32 H. 8. 3. Par. 8. *That Perſons within Holy Orders who ſhall be admitted to their Clergy, ſhall be burnt in the Hand in like Manner as lay Clerks, and ſhall ſuffer and incur all ſuch Pains, Dangers, and Forfeitures, and be ordered and uſed for their Offences of Felony, to all Intents, Purpoſes and Conſtructions, as Lay Perſons admitted to their Clergy be, or ought to be,* &c.

Sect. 13. But it is enacted by 1 *E.* 6. 12. *par.* 10. That in all Caſes of Felony, other than thoſe in that Act mentioned, every Perſon who ſhall be found Guilty, or confeſs, or ſtand Mute, or not anſwer directly, ſhall have the Benefit of his Clergy, in like Manner and Form as before the firſt Year of King *Henry* VIII. And therefore it ſeems plain, That where Lay Perſons are not excluded from the Benefit of the Clergy the firſt Time; Perſons in Holy Orders may have it as often as they want it, in the ſame Manner as they might upon the Foot of the ſaid Statute of 4 *H.* 7. 13. [a] except they ſhall be outlawed, or challenge above the Number of twenty, in which Caſe they are not within the Purview of 1 *E.* 6. which extends only to thoſe who ſhall be found Guilty, or confeſs, or ſtand Mute, *&c.* But [b] where the Crime itſelf charged againſt a Perſon in Holy Orders, is by any Statute generally excluded from the Clergy, ſuch Perſon ſhall no more have the Benefit of it than if he were a mere Layman.

[a] H. P. C. 238, 239. S. P. C. 135. Lett. B.

[b] S. P. C. 135. Lee. D. 136. H. P. C. 235, 236.

Sect. 14. It is recited by 34 *&* 35 *H.* 8. 14. *That divers Perſons had been indicted and attainted, and ſome of them Clerks convict, and ſome of them Clerks attainted,* &c. *before Juſtices of Peace, Gaol-Delivery,* &c *within divers Cities, Counties and Franchiſes,* &c. *the Records of which Attainders and Convictions often, by Negligence of the Clerks,* &c. *having the Rule and Keeping thereof, had been imbezilled, and not ready to be objected againſt ſuch Perſons, being newly arraigned before other Juſtices,* &c. *And for that it had not been known certainly whether to reſort for the ſame Records, becauſe they were not certified into any Place certain, ſuch Offenders had often had the Benefit of the Clergy where they ought not,* &c. And thereupon it is enacted, *That the Clerk of the Crown, Clerks of the Peace, and Clerks of Aſſiſe, where any ſuch Attainder, or Conviction ſhall be ſo had, ſhall certify a Tranſcript, briefly containing the Effect of every ſuch Indictment,* &c. *and Clerk attainted,* &c. *that is to ſay, the Name, Surname, and Addition of every ſuch Perſon,* &c. *and the Certainty of the Offence,* &c. *and the Day and Place of his Attainder or Conviction,* &c. *and the Day and Place of his Offence,* &c. *before the King in his Bench at* Weſtminſter, *there to remain of Record for ever, within forty Days after ſuch Attainder,* &c. *if the Term be then, and if not, then within twenty Days after the next Term,* &c. *on Pain of* 40 s. &c. *And that the Clerk of the Crown in the King's Bench, ſhall receive the ſame without Fee, under the like Pain.*

Sect. 15. *Provided, That if there be more Perſons contained in any ſuch Indictment, other than ſuch Perſon ſo attainted or convicted, that then ſuch Clerk ſhall certify ſuch Tranſcript only* [c] *concerning the Perſon or Perſons ſo attainted or convicted, which ſhall be as effectual againſt ſuch Perſon and Perſons againſt whom it ſhall be ſo objected, alledged or pleaded, as if the very Record were preſent.*

[c] *Note,* That this is omitted in Keble's *Statutes.*

Sect. 16. And it is farther enacted, *That the ſaid Clerk of the Crown in the King's Bench, ſhall at all ſuch Times as the Juſtices of the Gaol-Delivery, or Juſtices of the Peace, in every County within this Realm of* England, *do write unto him for the Names of ſuch Perſons, which be ſo attainted, or convict, and certified in the ſaid Bench, ſhall incontinently certify the ſaid Names and Sirnames of the ſaid Perſons, with the Cauſes why and wherefore they were convicted or attainted, unto the Juſtices of Gaol-Delivery, or Juſtices of the Peace,* &c. *on Pain of* 40 s.

Sect. 17. But it is provided, *That this Act ſhall not extend to the Clerks of the Crown,* &c. *in* Wales, *or* Cheſter, *or Counties-Palatine of* Lancaſter *and* Durham, *to make any Tranſcript of any ſuch Attainder or Conviction, before the King's Juſtices of his Counties in* Wales, &c.

Sect. 18. It ſeems, [a] That the Juſtices may, by Force of this Act, write in their own Names to the Clerk of the Crown in the King's Bench, for a Certificate of the Tranſcript of an Attainder or Conviction, and need not do it by Writ in the King's Name under their *Teſte*, &c. which is reqsired [b] by the Conſtruction of 2 & 3 *E.* 6. 24. where the Juſtices of one County write to thoſe of another for the Certificate of the Attainder, or Acquittal of the Principal, in order to proceed againſt the Acceſſary. And the Reaſon of the Difference is, becauſe in this laſt Caſe Juſtices write to Juſtices, but in the former to an Officer only.

[a] Dy. 267. pl. 103.

[b] *Vide ſupra*, Ch. 29. Sect. 53.

Sect. 19. It is farther provided by 3 & 4 *W.* & *M.* 9. *Par.* 8. as followeth, *Foraſmuch as ſuch Men and Women who have once had their Clergy,* &c. *may happen to be indicted for an Offence committed afterwards in ſome other County, Be it therefore enacted, That the Clerk of the Crown, Clerk of the Peace, Clerk of the Aſſiſes where ſuch Man or Woman ſhall be convicted, ſhall, at the Requeſt of the Proſecutor, or any other in their Majeſties Behalf, certify a Tranſcript briefly, and in few Words, containing the Effect and Tenor of every Indictment and Conviction of ſuch Man or Woman, of his or her having the Benefit of the Clergy,* &c. *and Addition of every ſuch Perſon or Perſons, and the Certainty of the Felony and Conviction, to the Judges and Juſtices in ſuch other County where ſuch Man or Woman ſhall be indicted, which Certificate being produced in Court, ſhall be ſufficient Proof that ſuch Man or Woman have before had the Benefit of Clergy,* &c.

As to the ſecond Point, *viz.* For what Crimes the Benefit of the Clergy, or rather of the Statute may be demanded, I ſhall premiſe,

Sect. 20. *Firſt*, That it ſeems to be generally agreed, That by the Common Law it is demandable as well upon an [c] Appeal as Indictment, for any Crime whatſoever, which ſubjects the Offender to the [d] Loſs of Life or Member, except [e] High Treaſon, (whether againſt the King's Perſon or [f] not,) and Sacrilege; for the firſt of which the Common Law ſeems to give the Offender no manner of Right to the Benefit of his Clergy, and for the later to have it left to the Diſcretion of the Ordinary, as hath been more fully ſhewn, *Sect.* 9,

[c] 11 Co. 29. b.

[d] 1 S. P. C. 124. Lett. E. Bro. Clergy, 19 Finch of Law, 462, 463.

[e] S. P. C. 124. Lett. E. Fitz. Coro. 283. 19 H. 6. 47. pl. 103. Abridged, Fitz Coro 8. Bro. Clergy, 6 *Vide* 2 Inſt. 634.

[f] So it appears from the Books cited to Letter E. Yet H. P. C. 330. and 11 Co. 29 b. and Bro. Clergy, 25, 31. it ſeems to be holden, That by the Common Law Clergy was excluded from ſuch High Treaſon only as was againſt the Perſon of the King. But *Quære* upon what Ground this is holden. And ſee 25 E. 3. *De Clerg.* ch. 5.

Sect. 21. *Secondly*, That it ſeems to be doubtful, [a] whether it were demandable at the Common Law for Petit Treaſon; but this was ſettled by 25 *E.* 3, *de clero*, *Ch.* 4. which expreſly allows it for *any Treaſons, or Felonies, touching other Perſons than the King himſelf, or his Royal Majeſty.*

Sect. 22. *Thirdly*, That after this a Conſtruction [b] prevailed, That Clergy might be denied to Felons charged as *inſidiatores viarum*, & *depopulatores agrorum*, but this is remedied by 4 *H.* 4. 2.

From theſe Premiſſes it ſeems to be generally agreed, [c] That the following Concluſions neceſſarily follow;

Sect. 22. *Firſt*, So far as a Perſon, who in Reſpect of his Orders or Learning, or otherwiſe, is qualified to be admitted to the Benefit of the Clergy, is denied it in Reſpect of his [d] Crime, not amounting to High Treaſon or Sacrilege; ſuch Denial muſt be grounded on ſome Act of [e] Parliament, made ſince 25 *E.* 3.

Sect. 24. *Secondly*, Where ever an Offence is made Felony by Statute, it [f] ſhall have the Benefit of the Clergy, unleſs it be expreſly excluded from it.

Sect. 25. *Thirdly*, Where-ever a Perſon is denied the Benefit of the Clergy, in Reſpect of a Statute, excluding it from the Crime charged againſt him, the [g] Indictment or Appeal, and the [h] Evidence thereon, muſt expreſly bring his Caſe within the Words of ſuch Statute: And therefore, if a [i] Murder be not expreſly laid, and proved to have been done of Malice prepenſe; and the Offence of an Acceſſary [k] before, to have been done maliciouſly; and that of a [l] Cut-purſe *clam & ſecrete a perſona*, *&c.* the Offender ſhall have his Clergy. And agreeably hereto he hath been adjudged, [m] That an Indictment of Robbery *in quadam via Regia pedeſtri ducent' de* London *ad* Iſlington, ſhall not ouſt the Offender of the Benefit of his Clergy; becauſe the Words of the Statute [n] to this Purpoſe are *In, or about, or near the Highway.* Yet it hath been adjudged [o] That an Indictment againſt a Man as Acceſſary to Murder before the Fact, by the Words *malitioſe excitavit, movit, & procuravit, &c.* is ſufficient to out the Offender of the Benefit of the Clergy, by Force of 4 & 5 *Ph. & M.* the Words whereof are, *That all Perſons who ſhall maliciouſly command, hire, or counſel any Perſon*, &c. which are not expreſly purſued in ſuch Indictment. But the Counſelling another being neceſſarily included in the Moving, Procuring, and Exciting him, which therefore are tantamount in Senſe, and different only in the Manner of Expreſſion, ſuch an Indictment is as [p] much within the Statute as if it followed the very Words. Alſo it hath been [q] adjudged, That in order to ouſt a Man of the Benefit of the Clergy by Force of a Statute, which takes it away from a Capital Offence at Common Law, there is no Need that the Indictment or Appeal conclude *contra formam Statuti*, becauſe the Statute doth no way alter the Nature of the Offence, but only leaves it to its proper Judgment, and takes away a perſonal Privilege of Exemption from ſuch Judgment.

Sect. 26. *Fourthly*, A Statute excluding the Principals from the Benefit of the Clergy, doth [r] not thereby exclude the Acceſſaries before or after; Neither [s] doth a Statute, excluding the Acceſſaries, thereby exclude

[a] *Vide* S. P. C. 124. Lett. E. H. P. C. 230. Finch of Law, 463. 11 Co. 29 b.
[b] *Supra*, Ch. 25. S. 61. S. P. C. 124 Lett. D.
[c] H. P. C. 230, 231.
[d] S. P. C. 124, 125, *&c.* H. P. C. 232, 233, *&c.*
[e] H. P. C. 230.
[f] H. P. C. 230.
[g] H. P. C. 231. 11 Co. 37. S. P. C. 124 Lett. A. 130. Lett. B.
[h] S. P. C. 130. Lett. B. Dy. 261. pl. 26. 224. pl. 30.
[i] H. P. C. 231. S. P. C. 130. Lett. B. Dyer 261. pl. 26.
[k] 23 H. 8. Ch. 1. 1 E. 6. 12. par. 10.
[l] H. P. C. 231. 1 And. 195. 11 Co. 37. Dyer, 183. pl. 59.
[m] 4 & 5 Ph. & M. 4.
[n] H. P. C. 231. 8 El. ch. 4.
[o] Moore, 5. pl. 16.
[p] 23 H. 8. Ch. 1. Par. 3. 1 E. 6. Ch. 12. Par. 10. 4 & 4 Ph. & M. 4.
[q] 1 And. 195.
[r] See B. 1. Ch. 32. Sect. 3
[s] See B. 1. Ch. 30. Sect. 9 1 Vent. 13.
[r] See B. 1. Ch. 3. Sect. 4. Ch. 30. Sect. 7. H. P. C. 7, 58. 231. 11 Co. from 29 to 36. [s] And. 195. Dyer, 99 pl. 59. 183. pl. 59. See 4 & 5 Ph. & Ma. 4. [t] 11 Co. from 29 to 36. Sav. 46. pl. 98

the Principals. And it ſeems agreed, [a] That where a *Statute* excludes thoſe from the Clergy who ſhall be found guilty of Petit Treaſon, Murder, Burglary, Robbery, or any other Kind of Crimes, it ſhall be conſtrued to intend only to exclude the Principals, and not Acceſſaries before or after, notwithſtanding they are certainly in a high Degree Partakers in the Guilt of the Principal Offender, as hath been more fully ſhewn *Chap.* 29. *Sect.* 13, 14. Yet inaſmuch as ſuch Statutes taking away a Privilege of ſo high a Conſequence to the Subject, ought to receive the ſtricteſt Interpretation; and the Words of them may, without any manner of Strain, or Repugnance to the general Rules of Law, be taken in ſuch a Senſe as will include the Principals only; I do not know that they have ever been carried farther.

[a] 1 H. P. C. 58. 1 And. 19 c. Dy. 99. pl. 59, 183. pl. 59.

Sect. 27. *Fifthly*, Where Clergy is allowable, it ſhall be as much allowed to one who ſtands [b] Mute, or Challenges peremptorily [c] above the Number of twenty, or is [d] outlawed, *&c.* as to one who is convicted by Verdict or Confeſſion, *&c.*

[b] H. P. C. 231. 25 H. 8. 3. Pa. 2. *Supra*, ch. 30. Sect. 24. Moore, 550. pl. 738. Cont. Fitz. Corn. 283. [c] 3 H. 7. 12. pl. 8. Abrid. Bro. Clergy, 27. FitzGero 51. H. P. C. 231. 25 H. 8. 3. Par. 2. [d] 1 Co. 29. b.

Sect. 28 *Sixthly*, A Statute Taking the Benefit of the Clergy from thoſe who ſhall be found guilty, doth not [e] thereby take it from thoſe who ſtand Mute, or challenge peremptorily above the Number of twenty, or are outlawed, *&c.* But it ſeems [f] clear, That a Statute Taking it away from thoſe who ſhall be found Guilty, extends as well to thoſe who ſhall confeſs themſelves guilty upon Record, as to thoſe who ſhall be found guilty by Verdict; for as the later are found guilty by a Jury, ſo are the former by the Court, and their Conviction being from their own Mouths, is of the higheſt Nature poſſible.

[e] See 3 & 4 W. & M. 9. [f] See 25 H. 8. 3 Par. 2. 3 & 4 W. & M. 9. 1 Co. Pamlers Caſe 1 11 Co. 29 a.

Sect. 29. And now I ſhall endeavour to ſhew for what Crimes Perſons are excluded from the Benefit of the Clergy by Statutes made ſince 25 *E.* 3. which being ſomewhat perplexed and intricate. I ſhall, for the better clearing of this Matter, firſt take a general View of thoſe Statutes ſo far as they are in Force at this Day, and then ſhall more diſtinctly conſider them, as they particularly concern the ſeveral Kinds of Capital Crimes.

Sect. 30. The firſt of thoſe Statutes I ſhall take Notice of, is 23 *H.* 8. *Ch.* 1. by which it is enacted, *Par.* 3. *That no Perſon who ſhall be found guilty, after the Laws of this Land, for any manner of Petit Treaſon, or for any wilful Murder of Malice prepenſed, or for robbing any Churches, Chapels, or other Holy Places, or for robbing of any Perſon or Perſons, in their Dwelling Houſes, or Dwelling Place, the Owner or Dweller in the ſame Houſe, his Wife, his Children, or Servants, then being within, and put in Fear and Dread by the ſame, or for robbing of any Perſon or Perſons in or near about * the Highways, or for wilful burning of any Dwelling-Houſes or Barns, wherein any Grain of Corn ſhall happen to be; nor any Perſon or Perſons being found guilty of any Abetment, Procurement, Helping, Maintaining, or Counſelling of, or to any ſuch Petit Treaſons, Murders or Felonies, ſhall be admitted to his Clergy; ſuch as be within Holy Orders only excepted.*

* So Raſtal's Statutes; but Pulton omits the Word *about*, and Keble the Word *near*.

Sect. 31. *Note*, That this Statute extends [g] as well to Appeals as to Indictments, and to thoſe who ſhall confeſs [h], as much as thoſe who ſhall plead and be found Guilty; for the Words are general, *That no Perſon who ſhall be found guilty, after the Laws of this Realm*, &c. *ſhall be admitted to his Clergy*, &c. But it extends not [i] to Perſons outlawed, and was eaſily evaded [k] by Perſons brought to their Trials, by ſtanding Mute, or challenging peremptorily above the Number of twenty, whereby they prevented their being found guilty.

[g] 11 Co. 30. b. [h] *Supra*. Sect. 28 11 Co. 31. b. [i] See the Preamble of 25 H. 8. 4. And 11 Co. 30. b.

Sect. 32. But these two last Defects are provided for by 25 *H.* 8. *Ch.* 3. by which it is enacted, Par. 2. *That every Person who shall from thenceforth be indicted of Petit-Treason, willful burning of Houses, Murder, Robbery or Burglary, or other Felony, according to the Tenor and Meaning of* 23 H. 8. *and thereupon arraigned, and to stand Mute of Malice or froward Mind, or challenge peremptorily above the Number of twenty, or else will not, or do not answer directly to the same Indictment and Felony, whereupon he is so arraigned, shall from thenceforth lose the Benefit and Privilege of his Clergy, in like Manner and Form as if he had directly pleaded to the same Petit Treason, Murder, Robbery, Burglary, or other Felony, whereupon he is so arraigned, and thereupon had been found guilty, after the Laws of the Land.*

Sect. 33. But this Statute extends not [a] to those who are outlawed, any more than 23 *H.* 8. neither doth it extend to Appeals, nor to Accessaries before, both of which are included in 23 *H.* 8.

[a] 11 Co. 31, 32.

Sect. 34. After came the Statute of 1 *E.* 6. 12. Par. 10. *That no Person who shall be in due Form of the Laws attainted or convicted of Murder, of Malice prepensed, or of Poisoning, of Malice prepensed, or of breaking of any House by Day or by Night, any Person being then in the same House where the same Breaking shall be committed, and thereby put in Dread; or of robbing any Person in the Highway, or near the Highway; or for felonious stealing of Horses, Geldings, or Mares; or of felonious Taking of any Goods out of any Parish Church, or other Church or Chappel; or being indicted or appealed of any of the same Offences, and thereupon found guilty by Verdict of twelve Men, or shall confess the same upon his Arraignment; or will not answer directly according to the Laws of this Realm, or shall stand wilfully, or of Malice, Mute, shall not be admitted to the Benefit of his Clergy, And that in all other Cases of Felony, all Persons that shall be arraigned, or found guilty upon their Arraignment, or shall confess, or stand Mute, in Form aforesaid, or will not answer directly in Form aforesaid, shall have their Clergy in the same Manner as before the first Year of King* Henry VIII.

Sect. 35. *Note*, That this Statute extends as well to [b] Appeals as to Indictments, in which Respect it is more fully penned than 25 *H.* 8. And that it extends to Persons in Holy [c] Orders, as much as to Lay-men, and to all Persons attainted in general, and consequently to those who are outlawed, in which Respects it is more fully penned than either, [d] 23 or [e] 25 *H.* 8. Yet it hath several considerable Defects; as,

[b] 11 Co. 32.
[c] 11 Co. 31.
[d] Supra, Sect.
[e] Supra, Sect.

Sect. 36. *First*, In that it doth not exclude those from the Benefit of the Clergy, who challenge above the Number of twenty; so that it is easily made ineffectual [f] by taking such Challenges, as to Crimes excluded from the Benefit of the Clergy, by this Statute, and no other. But as to the Crimes within 25 *H.* 1. it [g] seems plain, That a Person that takes such Challenges might be excluded from his Clergy by force of that Statute even before it was revived by 5 & 6 *E.* 6. set forth more at Large *Sect.* 42, *&c.* because 1 *E.* 6. restores the Benefit of the Clergy, as it was before the Reign of *Henry* 8. to such only as shall be found guilty, or confess, or stand Mute, or not answer directly, and consequently [h] those who challenge above the Number of twenty, seem clearly to be excluded in the same Manner as if 1 *E.* 6. had never been made.

[f] 11 Co. 32. a. But S. P. C. 126. Lett. A. it is made a *Quære* whether those who challenge more than twenty, are not included under the Word Convict.

[g] But in 11 Co. 32. a. it seems to be otherwise holden. [h] *Vide* H. P. C. 239.

Sect. 37. *Secondly*, In that it omits Acceſſaries in the Clauſe which takes away Clergy, but includes them in that which reſtores it, which is general as to all Caſes of Felony, not mentioned in the Act, whereof any Perſon ſhall be found guilty, and conſequently as to Acceſſaries wholly takes off the Force of 23 *H.* 8. which extends [i] only to thoſe who ſhall be found guilty, and is the only Statute in this Reign which excludes Acceſſaries from the Clergy. And accordingly we find, [a] That after this Statute Acceſſaries were admitted to their Clergy, in the ſame Manner as before the Reign of *Henry* 8. till the making of 4 & 5 *Ph. & Mar.* ſet forth more at large *Sect.* 45.

[i] *Vide ſupra*, Sect. 30, 31. [a] 11 Co. 31. b. Dy. 133. pl. 4.

Sect. 38. *Thirdly*, In that it alſo omits Arſon in the Clauſe which takes away Clergy, but includes it in the general Words of that which reſtores it, and conſequently reintitled thoſe [b] Convict of it to the Clergy, in all Caſes but that of challenging more than twenty, till the making of 5 & 6 *E.* 6. as ſhall be more fully ſhewn hereafter.

[b] 11 Co. 31, 32 &c. *Vide ſupra*, Sect. 36.

Sect. 39. *Fourthly*, In that the Clauſe which ouſts Horſe-ſtealers of their Clergy is worded in ſuch a Manner as makes it doubtful whether it extend to thoſe who ſteal but one, which occaſioned the Making of 2 * & 3 *E.* 6. 33. which declares, *That a Perſon felonioufly ſtealing one Horſe, Gelding, or Mare, ſhall be put from his Clergy in the ſame Manner as if he had been indicted, or appealed for ſtealing of two*, &c.

* *Vide infra*, Sect. 61.

Sect. 40. *Fifthly*, In that the Clauſe which ouſts Houſe-breakers of their Clergy, is not worded in ſuch a Manner as fully brings their Offence under the Notion of Felony; for it is thus expreſſed, *Any perſon who ſhall be attainted*, &c. *of breaking any Houſe by Day or Night, any perſon being therein and put in Fear or Dread*, &c. But ſuch a Breaking, even in the Night is no Felony unleſs it be done with an Intent to commit a Felony, which makes it Burglary, neither can it be Felony, if done in the Day with any Intent whatſoever; for tho' a Felony follow, which may make the Houſe-breaking, done with an Intent to commit it, properly enough to be called felonious: Yet it ſeems, That it cannot make it become [c] a Felony, becauſe it is not reducible to any Species of Felony. And therefore the Statute muſt be ſupplied by a reaſonable Intendment, and [d] conſtrued to mean ſuch Houſe-breaking only as amounts to, or is attended with Felony.

[c] Yet *quære*, for this Matter is doubtfully expreſſed, S. P. C 126. Lett. A. and 11 Co. 31. b. 32. a. [d] S P.C. 125. Lett. D. 126. Lett. A. 11 Co. 31. b. 32 a.

Sect. 41. It is [e] holden by Sir *Edward Coke*, That Piracy was reſtored to the Benefit of the Clergy by this Statute; but as to Piracy on the High Sea, the contrary hath been ſolemnly * adjudged and confirmed by conſtant Experience, and is certainly agreeable to the [f] legal Notion of Piracy in other Caſes; which being a Capital Offence by the Civil Law only, (even after the Statute of 28 *H.* 8. 15. which altered not the Nature of the Offence, but only the Manner of the Trial) ſhall not be included in a Statute ſpeaking generally of Felonies, which ſhall be conſtrued only of thoſe Felonies which are ſuch by our Law; as thoſe Piracies are [g] which are committed in a Creek or Port within the Body of a County, but no other.

[e] 11 Co. 31. b * Moor 756, pl. 1044. *Vide* 3 Inſt. 111. [f] B. 1. ch. 37. ſect. 6, 7. [g] B. 1. ch. 37. ſect. 11.

Sect. 42. The next general Statute relating to theſe Matters, is 5 & 6 *E.* 6. 10 which firſt recites the above-mentioned [h] Clauſe of 23 *H.* 8. concerning Clergy, and takes Notice that it was defective in omitting thoſe who rob, *&c.* in one County, and remove the Thing taken into another, and there are tried, *&c* and that this Omiſſion was ſupplied by 25 *H.* 8. and that the ſaid Statute of 25 *H* 8. was in this Reſpect made ineffectual by 1 *E.* 6. 12. which reſtored Clergy as it ſtood before the Reign of *H.* 8. to all the Felonies not therein mentioned; and that by Rea-

[h] *Vide ſupra*, § 8.

ſon of the ſaid Statute of 1 *E.* 6. divers Perſons had committed Robberies, *&c.* in one County, and after had been taken, *&c.* and tried in another, and there had their Clergy, which they would not have had, if the ſaid Statute of 25 *H.* 8. had ſtood in Force; and then goes on in theſe Words, *For Redreſs whereof from henceforth to be had, be it enacted, &c. That the ſaid Act made in the ſaid 25th Year, touching the Putting of ſuch Offenders from their Clergy; and every Article, Clauſe and Sentence, contained in the ſame, touching Clergy, ſhall from henceforth, touching ſuch Offences, from henceforth to be committed and done, ſtand, remain and be in full Strength and Vertue, in ſuch Manner and Form, as it did before the Making of the ſaid Act in the firſt Year of the Reign of our Sovereign Lord the King that now is: Any Clauſe, Article, or Sentence compriſed therein to the contrary notwithſtanding.*

Sect. 43. It was for ſome Time a great Queſtion, Whether this Statute revived 25 H. 8. for the Whole, or only for ſuch Part of it which relates to Felons removing the Thing feloniouſly taken into a different County from that wherein they took it, and there tried, *&c.* And Sir [a] *William Staundforde* inclines to the later Opinion; becauſe the Words are, *That the ſaid Act made in the ſaid 25th Year, touching the putting ſuch Offenders from their Clergy, ſhall be revived,* &c. where the Word *ſuch* ſhall have Relation only to the Offenders mentioned before; which are thoſe who ſteal in one County, and remove the Thing ſtolen into another; and this Objection is ſtrengthned [b] by the Title of the Act, which is only this, *That ſuch as rob in one Shire and fly into another, ſhall not have their Clergy.* To which it may be added, That all Statutes which take away Clergy, are to be conſtrued ſtrickly *in favorem vitæ.* Yet it hath been adjudged [c], and is, as I take it, fully [d] ſettled, That this Statute revived 25 *H.* 8. as to every other Part of it, as well as that concerning Felons carrying the Thing ſtolen from one County into another; for granting that the Makers of the Statute of 5 *&* 6 *E.* 6. had the Caſe of ſuch Felons principally in their View; which appears pretty plainly, not only from the Title of the Statute, but alſo from the Preamble and Purview, for the Preamble expreſly takes Notice of no other Miſchief from the Repeal of 25 *H.* 8. but only this, That thereby many of ſuch Felons had their Clergy; and then follows the enacting Clauſe, which begins in theſe Words, *For Redreſs whereof* and then goes on, *be it enacted,* &c. *That* 25 *H.* 8. *touching ſuch Offenders, and ſuch Offences, remain in full Force.* Yet conſidering that the Statute of 5 *&* 6 *E.* 6. begins with a Recital of the whole Clauſe of 23 *H.* 8. wherein there are ſeveral other Offences contained, and that the Words, *Such Offenders and ſuch Offences* in the enacting Clauſe of 5 *&* 6 *E.* 6. may properly enough refer to them, as well as to the Offence of the Felons mentioned next immediately before: And farther conſidering that the Words, *Such Offenders and ſuch Offences,* may properly enough be taken to include *all ſuch in Miſchief, and ſuch in Inconvenience,* according to the received [e] Conſtruction of the Word *ſuch,* in ſome other Statutes, and *a fortiori,* thoſe in greater Miſchief and greater Inconvenience, as almoſt all the other Offences ſpecified in 25 *H.* 8. are; as for inſtance, Petit Treaſon, Murder, Arſon, *&c.* and it is a received [f] Conſtruction of penal Statutes, to extend them to all Caſes that come within the Meaning of the Words. And it would be abſurd to imagine that the Makers of the Statute intended to put thoſe who carried Goods ſtolen into a different County, in a worſe Caſe in ſuch County than in that wherein they ſtole them, as they muſt be, if 25 *H.* 8. were only revived againſt them where they carried the Thing ſtolen into a different

[a] S.P.C. 128. Letter A.

[b] *Vide* 11 Co. 33. a.

[c] 11 Co. 33, 34, 35.

[d] H. P. C. 232 to 237. *See* Raſtal's Statutes, Title Clergy, Par. 16.

[e] 11 Co. 33. b.

[f] 11 Co. 33, 34. *Vide ſupra,* ſect. 25. and 8 *r.* ch. 32. ſect. 3.

County; for by ſuch a Conſtruction they would have been excluded from the Clergy, in the County wherein they committed the Robbery by 1 *E.* 6. 12. only, which not extending to thoſe who challenge above the Number of twenty, might eaſily be evaded; whereas in a different County they would be excluded from it in ſuch Caſe by 25 *H.* 8. To which may be added, [a] That the firſt Sentence of the Purview of 5 & 6 *E.* 6. *viz. That the ſaid Act of* 25 *H.* 8. *touching the putting ſuch Offenders from their Clergy*, had been ſufficient, if no more had been intended but the Excluding thoſe who rob in one County and fly into another; and therefore it is moſt natural to intend that it was the Meaning of the Makers of the Statute, by adding thoſe farther Words, *That every Article, Clauſe, and Sentence in the ſame, touching Clergy, ſhall, touching ſuch Offences, remain*, &c. to revive the whole Statute ſo far as it related to Clergy.

[a] 11 Co. 34.

Sect. 44. And ſince the whole Statute of 25 *H.* 8. is revived, it follows by a neceſſary Conſequence, That ſo much of 23 *H.* 8. alſo as is expreſly affirmed by it, is revived alſo. And therefore ſince 25 *H.* 8. having recited the Clauſe of 23 *H.* 8. concerning Clergy, and the Miſchief that it extended only to thoſe who are found Guilty, expreſly enacts, *That whoever ſhall be indicted of Petit Treaſon, wilful burning of Houſes, Murder, Robbery or Burglary, or other Felony, according to the Tenour and Meaning of the ſaid Statute, and ſtand Mute, or challenge peremptorily above twenty*, &c. *ſhall loſe the Benefit of the Clergy, in like Manner as if he had pleaded, and been found guilty*; whereby it affirms and inforces the 23 *H.* 8. as to thoſe found guilty of ſuch Crimes; it follows by a neceſſary Conſequence, That Perſons not in Holy Orders found guilty of Petit Treaſon, or [b] Arſon, which were omitted by 1 *E.* 6. are excluded from the Clergy by 23 *H.* 8. thus affirmed and enforced by 25 *H.* 8. and conſequently revived by 5 & 6 *E.* 6.

[b] 11 Co. 34. b. 35 a. H. P. C. 232, 233. Com. Savil, 46. pl. 98. S. P. C. 125.

Sect. 45. But it is obſervable, That the ſaid Statute of 25 *H.* 8. wholly omits [c] Acceſſaries, as well as 1 *E.* 6. But to remedy this Defect, it is enacted by 4 & 5. *Ph. & M.* 4. *That every Perſon that ſhall maliciouſly command, hire, or counſel any Perſon or Perſons, to commit or do any Petit Treaſon, wilful Murder, or to do any Robbery in any Dwelling-Houſe or Houſes, or to commit or do any Robbery in or near the Highway in the Realm of* England, *or in any other the Queen's Dominions, or to commit or do any Robbery in any Place within the Marches of* England *againſt* Scotland, *or willfully to burn any Dwelling-Houſe, or any Part thereof, or any Barn then having Corn or Grain in the ſame, that then every ſuch Offender, being outlawed thereof or being thereof arraigned and found guilty by the Order of the Law, or being otherwiſe lawfully attainted or convicted of the ſame Offence; or being arraigned thereof, do ſtand Mute of Malice or froward Mind, or do challenge peremptorily above the Number of twenty Perſons, or will not anſwer directly to ſuch Offence, ſhall not have the Benefit of his Clergy.*

[c] *Vide ſupra*, Sect. 33.

Sect. 46. It is obſervable, 1. That this Statute is general as to all Robberies in any Dwelling-Houſe; Yet it ſeems to have been always taken as a [d] reaſonable Conſtruction, That it ſhall be reſtrained to ſuch Robberies of this Kind as were excluded from the Benefit of the Clergy, by ſome former Statute; for it cannot be well imagined that the Makers of this, or any other Statute, intended in any Caſe to take away Clergy from the Acceſſary, where the Principal is left to the full Benefit of it.

[d] 11 Co. 35, 36, 37. *Vide* H. P. C. 235, 236, 237. Com. Savil, 46. pl. 98.

Sect. 47.

Sect. 47. 2dly, That an Indictment, or Appeal, in order to ouſt an Acceſſary of his Clergy by force of this Statute, muſt expreſly purſue it, in Subſtance [a] at leaſt, as hath been already ſhewn, *Sect.* 25.

[a] *Vide* D. 186 pl. 2, 3. That the Word is *Wilful Murder*, in an Indictment on the Statute are ſufficiently purſued by laying the Murder done *ex malitia præcogitata*.

Sect. 48. It is farther enacted by 3 & 4 *W.* & M. 9. Par. 3. *That if any Perſon or Perſons whatſoever be indicted of any Offence, for which by Vertue of any former Statute, he or they are excluded from having the Benefit of his or their Clergy, if he or they had been thereof convicted by Verdict or Confeſſion, if he or they ſtand Mute, or will not anſwer directly to the Felony, or ſhall challenge peremtorily above the Number of twenty Perſons returned to be on the Jury, or ſhall be outlawed thereupon, ſhall not be admitted to the Benefit of his or their Clergy.*

Sect. 49. But *Note*, That this Statute extends not to Appeals, nor to Offences made Felonies by ſubſequent Statutes.

And now I am in the ſecond Place more diſtinctly to conſider the ſeveral Statutes which take away the Benefit of the Clergy, ſo far as they particularly relate to the ſeveral Kinds of Crimes; for the better Illuſtration whereof having referred the Reader, as to the Felonies made ſuch by Statute, to the ſeveral Chapters in the firſt Book wherein ſuch Felonies are handled, I ſhall here conſider the Statutes which take away Clergy from Capital Offences at the Common Law, under the following Heads, as they relate,

1. To Petit Treaſon.
2. To Homicide.
3. To Larceny.
4. To Sacrilege.
5. To Robbery.
6. To Burglary.
7. To Arſon.

Sect. 50. And firſt as to Petit Treaſon; It is certain, that by Force of 23 & 25 *H.* 8. revived [b] by 5 & 6 *E.* 6. the Principal not being a [c] Clerk in Holy Orders, is excluded from the Benefit of the Clergy, upon a [d] conviction, [e] ſtanding Mute, or Challenge of more than twenty, upon an [f] Indictment.

[b] *Vide ſupra*, ſect. 43, 44. H. P. C. 232.
[c] *Vide ſupra*, ſect. 13.
[d] *Vide ſupra*, ſect. 30, 31.
[e] *Vide ſupra*, 32, 33.
[f] *Vide ſupra*, ſect. 33.

Sect. 51. And Sir [g] *Matthew Hale* ſeems to be of opinion, That the Principal is likewiſe ouſted of his Clergy, by 23 *H.* 8. in appeal of Petit Treaſon, if he be convict by Verdict or Confeſſion, but not in other Caſes; But *Quære*, How this can be? For ſince ſo much [h] only of 23 *H.* 8. ſeems to be revived, as is affirmed and enforced by 25 *H.* 8. and that no way extends to Appeals but only to Indictments, it ſeems difficult to make out that any Part of 23 *H.* 8. ſo far as it relates to Appeals, is revived by 25 *H.* 8.

[g] H. P. C. 232.
[h] *Vide ſupra*, ſect. 43, 44.

Sect. 52. But I would rather incline to think that the Principal in an Appeal of Petit Treaſon may be excluded from his Clergy by 1 [i] *E.* 6. 12. in all Caſes except that of challenging above the Number of twenty, under the Words *Murder of Malice prepenſed* in that Statute; becauſe all Petit Treaſon, in the very Notion of it, neceſſary [k] includes ſuch Murder and more.

[i] *Vide ſupra*, ſect. 34, 35.

[k] B. 1. ch 2. ſect. 6.

Sect. 53. However the Makers of 4 [a] & 5 *Ph. & M.* 4. ſeem plainly to have been of Opinion, That the Principals in Petit Treaſon are excluded from the Clergy in all Caſes as well upon an Appeal as indictment; becauſe they have in all Caſes expreſly excluded the Acceſſaries maliciouſly before, as well upon an Appeal as Indictment; and [b] it cannot be well imagined that they intended to make the Law more ſevere againſt them than againſt the Principals.

[a] *Vide ſupra*, Sect. 45.

[b] *Vide* 11 Co. 35. a. And *ſupra* Sect. 46.

Sect. 54. *Secondly*, As to Homicide: It is certain that wilful Murder of Malice prepenſed is excluded from the Benefit of the Clergy upon Indictments in all Caſes by [c] 23 & [d] 25 *H.* 8. and by 1 [e] *E.* 6. 12.

[c] *Vide ſupra* S. 25, 30, 31.
[d] *Vide ſupra*, Sect. 32, 33.
[e] *Vide ſupra*, Sect. 34, &c.

Sect. 55. Alſo it ſeems [f] to be the Opinion of Sir [g] *Matthew Hale*, That it likewiſe is excluded from the Clergy in all Caſes as well upon Appeals as Indictments, but this ſeems queſtionable; for Appeals are certainly not [h] within 25 *H.* 8. and [h] therefore ſince ſo much only of 23 *H.* 8. is revived by 5 & 5 *E.* 6. as is affirmed and enforced by 25 *H.* 8. I do not ſee how it can be revived as to any Appeal. From whence it ſeems to follow, That the only Statute which expreſly excludes them is 1 *E.* 6. 12. which [i] omits the Caſe of challenging more than twenty. Neither is this Defect ſupplied by 3 & 4 *W & M.* 9. for this extends * only to Indictments.

[f] 1 H. P. C. 232.
[g] *Vide ſupra*, Sect. 42, 43, 51.
[h] *Vide ſupra*, Sect. 34, 36.
[i] *Vide ſupra*, Sect. 34, 36.
* *Supra* Sect. 48, 49.

Sect. 56. But Acceſſaries maliciouſly before to ſuch Murder are expreſly excluded from the Clergy in all Caſes, as well upon Appeals as Indictments by 4 & 5 *P. & M.* 4. and how far the Principal may † hereby in like manner be implicitly excluded alſo in all Caſes, I ſhall leave to be conſidered.

† *Vide* 11 Co. 35 a. and *ſupra*, Sect. 46, 53.

Sect. 57. By 1 *Jac.* 1. 8. He that ſhall be convicted by Verdict of twelve Men, or Confeſſion, or otherwiſe according to the Laws of this Realm, of Homicide, by ſtabbing, (but not thoſe who abet them, *&c.* for which I ſhall refer to *Book* 1. *Chap.* 30. *Sect.* 4, 5, *&c.*) ſhall be excluded from the Benefit of his Clergy, *&c.*

Sect. 58. And this Statute ſeems plainly to extend as well to Appeals as Indictments, but not to the Caſe of ſtanding Mute, or challenging above twenty, *&c.* But thoſe who are indicted of ſuch Manſlaughter are excluded from the Clergy in all ſuch Caſes, as well as on a Conviction, by 3 & 4 *W. & M.* 9.

Supra Sect. 48, 49.

Thirdly, Larceny is excluded from the Benefit of the Clergy in the following Caſes,

1. In that of a felonious ſecret Taking from the Perſon.
2. In that of Horſe-ſtealing.
3. In that of ſtealing from a Shop or Dwelling-Houſe, *&c.*
4. In that of ſtealing Woollen Manufactures from the Tenters.
5. In that of ſtealing the King's Naval Stores.

Sect. 59. And firſt, As to a felonious ſecret Taking from the Perſon: It is enacted by 8 *Eliz.* 4. *That no Perſon who ſhall be indicted or appealed for felonious Taking of any Money, Goods, or Chattels, from the Perſon of any other, privily without his Knowledge, in any Place whatſoever, and thereupon found guilty by Verdict of twelve Men, or ſhall confeſs the ſame upon his or their Arraignment, or will not anſwer directly to the ſame according to the Laws of the Realm, or ſhall ſtand wilfully or of Malice, or obſtinately Mute, or challenge peremptorily above the Number of twenty, or ſhall be upon ſuch Indictment or Appeal outlawed, ſhall be admitted to his Clergy*, &c.

Vide Sect. 26, 45, 46.

Sect. 60. But *Note*, That this Statute extends not to any Acceſſaries before or after.

Vide ſupra, Sect. 34, 39

Sect. 61. *Secondly*, As to Horſe ſtealers: It ſeems that they are [a] ouſted of their Clergy in all Caſes, as well upon Appeals as Indictments, by 1 *E.* 6. 12. and 2 & 3 *E.* 6. 33. by the later of which Statutes it is enacted, *That all Perſons feloniouſly Taking or Stealing any Horſe, Gelding, or Mare, ſhall not be admitted to the Privilege of the Clergy, but ſhall be put from the ſame, in like Manner and Form as though they had been indicted or appealed for felonious Stealing of two Horſes, two Geldings, or two Mares, of any other, and thereupon found guilty by Verdict of twelve Men, or confeſſed the ſame upon their Arraignment, or ſtand wilfully or of Malice Mute.*

[b] S. P. C. 125. Letters B C. H. P. C. 238

Sect. 62. It ſeems a reaſonable [b] Conſtruction of this Statute to extend it as well to thoſe who are outlawed, or challenge more than twenty, as to thoſe who are found guilty by Verdict, &c. becauſe it is general, That all ſuch Perſons *ſhall be put from their Clergy*, &c. *in ſuch Manner as if they had been found guilty*, &c. and if they had been found guilty, it is certain that they would have been ouſted of their Clergy by the expreſs Words of 1 *E.* 6. 12. *Par.* 10.

Supra, 34, &c.

[c] H. P. C. 238. *Vide ſupra*, Sect. 26, 45, 46.

Sect. 63. But I do not find that any [c] Statute excludes any Acceſſaries to this Offence from their Clergy.

Sect. 64. *Thirdly*, As to Larceny from a Dwelling-Houſe, Shop, &c. it is enacted by 10 & 11 *W.* 3. 23. *That all Perſons who by Night or Day, ſhall in any Shop, Ware-Houſe, Coach-Houſe, or Stable, privately and feloniouſly ſteal any Goods, Wares, or Merchandizes, of the Value of* 5 s. *or more, though ſuch Shop*, &c. *be not broke open, and tho' the Owner, or any other Perſon be not in ſuch Shop*, &c. *or that ſhall aſſiſt, hire or command any Perſon to commit ſuch Offence, being thereof convict, or attainted by Verdict or Confeſſion, or being indicted thereof ſhall ſtand Mute, or challenge above twenty of the Jury, ſhall be excluded from the Benefit of the Clergy.*

[d] *Vide* Sect. 26, 27, 28. [e] *Vide ſupra*, Sect. 26, 45, 46. [f] *Vide ſupra*, Sect. 48, 49.

Sect. 65. But this Statute ſeems defective in neither mentioning Perſons [d] outlawed, nor [e] Acceſſaries; neither is it help'd by 3 & 4 *W.* & *M.* 9. becauſe [f] it is ſubſequent to it.

Sect. 66. It is enacted by 12 *Annæ* 7. *That every Perſon who ſhall feloniouſly ſteal any Money, Goods, or Chattels, Wares, or Merchandizes of the Value of* 40 s. *or more, being in a Dwelling-Houſe, or Out-Houſe thereunto belonging, although ſuch Houſe or Out-Houſe be not actually broken by ſuch Offender, and altho' the Owner of ſuch Goods, or any other Perſon or Perſons be or be not in ſuch Houſe or Out-Houſe, or ſhall aſſiſt, or aid any Perſon or Perſons, to commit any ſuch Offence, being thereof convicted or attainted by Verdict or Confeſſion, or being indicted thereof ſhall ſtand Mute, or will not directly anſwer to the Indictment, or ſhall peremptorily challenge above the Number of twenty returned to be of the Jury, ſhall be abſolutely debarred of and from the Benefit of Clergy*, &c.

Sect. 67. But it is provided, *That nothing in this Act ſhall extend to Apprentices under the Age of fifteen Years, who ſhall rob their Maſters as aforeſaid.*

Vide Sect. 26, 27, 28, 64, 65.

Sect. 68. This Statute ſeems alſo defective like the former, as to Perſons outlawed, and Acceſſaries.

Sect. 69. *Fourthly*, As to thoſe who ſhall feloniouſly ſteal Woollen Manufactures from the Tenters: It is enacted by 22 *Car.* 2. 5. *That no Perſon who ſhall be indicted for feloniouſly cutting and taking, ſtealing or carrying away of any Cloth or Woollen Manufactures from the Rack or Tenter in the Night-Time, and thereupon found guilty by Verdict of twelve Men, or ſhall confeſs the ſame on Arraignment, or will not anſwer directly to the ſame, according to the Laws*

of the Realm, or ſhall ſtand wilfully of Malice Mute, or challenge peremptorily above the Number of twenty, or ſhall be upon ſuch Indictment outlawed, ſhall be admitted to the Benefit of the Clergy, &c.

Sect. 70. *Fifthly*, As to thoſe who ſteal Naval Stores: It is obſervable, That thoſe who *ſhall ſteal or imbezil any of his Majeſty's Sail, Cordage, or any other his Majeſty's Naval Stores*, are in the like Manner excluded from the Clergy by 22 *Car.* 2. 5. as thoſe who ſteal Woollen Manufactures from the Tenters, *&c.* *See* the preceedent Section.

Sect. 71. But *Note*, That this Statute extends neither to Appeals, nor to [a] Acceſſaries.

[a] *Vide* Sect. 26, & 45, 46.

Sect. 72. As to Sacrilege: It is obſervable, That all Perſons not in Holy Orders, who ſhall be indicted, whether in the ſame County wherein the Fact was committed, or in a [b] different County, of *robbing any Church Chapel, or other Holy Place*, are excluded from their Clergy by [c] 23 *H.* 8. 1. and 25 [d] *H.* 8. 3. revived [e] by 5 *&* 6 *E.* 6. 10. upon a Conviction, Standing Mute, or peremptory Challenge of more than twenty; and by 3 *&* [f] 4 *W. & M.* 9. upon an Outlawry.

[b] *Infra*, 80, 81, 82.
[c] *Vide ſupra*, Sect 30, 31.
[d] *Vide ſupra*, Sect. 33, 34.
[e] *Vide ſupra*, Sect. 42, 43, 44.
[f] *Vide ſupra*, Sect. 48, 49.

Sect. 73. But the Word *Robbing* [g] being always taken to carry with it ſome Force, as ſhall be more fully ſhewn, *Sections* 88, 92, 96; it ſeems that no Sacrilege is within any of theſe Statutes, which is not accompany'd with the actual Breaking of a Church, *&c.*

[g] Kely. 58, 69, 70. Dyer 224, pl. 30.

Sect. 74. But by 1 *E.* 6. 12. [h] *Par.* 10. all Perſons in general are ouſted of their Clergy for the *felonious Taking of any Goods out of any Pariſh Church, or other Church or Chapel*, in all Caſes, except that of challenging more than twenty; and by 3 *&* [i] 4 *W. & M.* 9. upon ſuch a Challenge, as well as upon a Conviction, *&c.* upon an Indictment, [k] whether in the ſame County wherein the Sacrilege was committed, or in a different one.

[h] *Vide ſupra*, Sect. 34, 35, 36, 37.
[i] *Vide ſupra*, Sect. 48, 49.
[k] *Infra*, 80, 81, 82.

Sect. 75 But it ſeems, That Acceſſaries to ſuch a Robbery, or felonious Taking are excluded from their Clergy by no Statute; for tho' they are expreſly mentioned by 23 *H.* 8. 1. yet ſince they are omitted by 25 *H.* 8. 3. and ſo much only [l] of 23 *H.* 8. 1. is revived as is affirmed and enforced by 25 *H.* 8. 3. they ſeem to remain in the ſame Caſe as if they had been wholly omitted by 23 *H.* 8. 1. which is the only Statute I know of which extends to them, except the Offence amount to Burglary, in which Caſe Acceſſaries before are ouſted of their Clergy by 3 *&* 4 *W. & M.* 9.

[l] *Vide ſupra*, Sect. 43, 44, 52, 55.

Sect. 76. But *Quære* if their be Need of any Statute to exclude them, ſince the Common Law ſeems to have given no Perſon whatſoever, any Right to Demand the Privelege of the Clergy for Sacrilege, but only at the Diſcretion of the Ordinary, as hath been more fully ſhewn, *Section* the ninth.

Fifthly, As to Robbery, I ſhall particularly conſider the Statutes excluding it from the Clergy, as they relate,

1. To Robbery in or near the Highway.
2. To Robbery in a Dwelling-Houſe, Booth or Tent.
3. To Robbery in general.

Sect. 77. And firſt, as to Robbery in or near the Highway: It is obſervable, That all Perſons, not in Holy Orders, who ſhall be indicted [m] of *Robbing any Perſon or Perſons in or about the Highways*, are ex-

[m] *Vide ſupra*, Sect. 33.

excluded from the Clergy by 23 [a] *H.* 8. 1. and 25 [b] *H.* 8. 3. revived [c] by 5 & 6 *E.* 6. 10 upon a Conviction, ſtanding Mute, or peremptory Challenge of more than twenty; and by 3 & 4 [d] *W.* & *M.* 9. upon an Outlawry.

[a] *Vide ſupra*, Sect. 30, 31.
[b] *Vide ſupra* Sect. 32, 33.
[c] *Vide ſupra* S. 42, 43, 44.
[d] *Vide ſupra* Sect. 48, 49.

Sect. 78. And *Note*, That all Perſons in general, *who ſhall be guilty of robbing any Perſon or Perſons in the Highway, or near to the Highway*, are excluded from the Clergy both upon an Appeal and Indictment by [†] 1 *E.* 6. 12. *Par.* 10. in all Caſes except that of challenging more than twenty; and by 3 & 4 *W.* & *M.* 9. upon ſuch a Challenge upon an Indictment.

[†] *Vide ſupra*, Sect. 34, 35, 36, 37.

Sect. 79 *Note*, That no Robbery is within theſe Statutes, but ſuch as is laid in the Indictment to have been committed in or near the [e] Highway, [f] and to have [g] put the Perſon robbed in Fear.

[e] *Vide ſupra*, S. 25.
[f] *Supra* Sect. 73. And Dy. 224. pl. 32. And B. 1 Ch. 25. S. 13.
[g] *Vide ſupra*, Sect. 43, 44.

Sect. 80. it it recited by 25 *H.* 8. 3. revived [g] by 5 & 6 *E.* 6. 10. *That divers Felons and Robbers that had committed many heinous Robberies and Burglaries in one Shire, and conveyed the Spoil and Robbery into another Shire, and had been there* [h] *taken, indicted and arraigned upon Felony and felonious taking of the ſame Goods, and not upon the ſame Robbery nor Burglary; for that it was not committed nor done in the ſame Shire where they had been ſo indicted and arraigned, and by Reaſon thereof the ſame Felons, Robbers, and Burglars had enjoyed the Privilege of their Clergy.* And thereupon it is enacted, *That if any Perſon or Perſons be indicted of Felony for ſtealing of any Goods or Chattels, in any County within this Realm of* England, *and thereupon arraigned and be found guilty, or ſtand Mute of Malice, or challenge peremptorily above the Number of twenty Perſons, or will not directly anſwer to the Law, ſhall loſe and be put from the Benefit of the Clergy, in like Manner and Form as they ſhould have been if they had been indicted and arraigned, and found guilty in the ſame County where the ſame Robbery or Burglary was done or committed; if it ſhall appear to the Juſtices before whom any ſuch Felons or Robbers be arraigned, by Evidence given before them, or by Examination that the ſame Felonies, whereupon they were ſo arraigned, had been ſuch Robberies or Burglaries, in the ſame Shire wherein ſuch Robberies or Burglaries were committed or done, by Reaſon whereof they ſhould have loſt the Benefit of their Clergy by Force of* 23 H. 8. *in Caſe they had been found guilty thereof in the ſame Shire where ſuch Robberies or Burglaries were ſo committed and done.*

[h] *Vide* B. 1. Ch. 33. S. 9.

Sect. 81. But *Note*, That this Statute extends [i] not to thoſe who are outlawed; nor to thoſe who are indicted out of the Realm of *England*; nor to thoſe who are indicted of ſuch Stealing as is excluded from the Clergy by ſubſequent Statutes; nor to Appellees; but the three firſt of theſe Defects are ſupplied by 3 & 4 *W.* & *M.* 9. by which it is enacted, *That if any Perſon or Perſons be indicted of Felony for ſtealing of any Goods or Chattels in any County within this Realm of* England, *Dominion of* Wales, *or Town of* Berwick *upon* Tweed, *and thereof be convicted or attainted, or upon his or their Arraignment ſhall ſtand Mute, or will not directly anſwer to the Indictment, or ſhall challenge peremptorily above the Number of twenty Perſons returned to be of the Jury, he or they ſhall be totally excluded from having the Benefit of his or their Clergy, if it appear upon Evidence or Examination before the Juſtices, that the ſaid Goods or Chattels were taken by Robbery or Burglary, or in any other Manner, in any other County, whereof if ſuch Perſon or Perſons had been convicted by a Jury of the ſaid other County, he or they are excluded by Vertue of this or any other Act from having the Benefit of his or their Clergy.*

[i] 11 Co. 31. a.

Sect. 82. *Note*, That [a] the Words *If it ſhall appear upon Evidence before the Juſtices*, &c. are to be intended where the Party pleads Not guilty, and is found guilty by the Jury, and the Words *If it ſhall appear upon Examination*, &c. are to be intended where he ſtands Mute, or challenges peremptorily above the Number of twenty, or is outlawed, or confeſſes [b], *&c.* And it hath been [c] adjudged, That there is no Need to make any Entry on the Record, that it appears by ſuch Evidence, or Examination, that the Felony was originally commenced in a different County, and was of ſuch a Nature that the Offender could not have his Clergy. But it is ſaid, [d] That it is uſual to write in the Margent of the Indictment, that it is for Robbery, *&c.* in another County.

[a] 11 Co. 31.

[b] *Vide ſupra*, Sect. 28, 31. 11 Co. 31. Cont. 1 And. 114.

[c] 1 And. 114.

[d] H. P. C. in the old Edition printed in the Year, 1678.

Sect. 83. It is ſaid to [e] have been holden by all the Juſtices, That if the Felony whereof a Man is found guilty in the County wherein he is indicted, be ſuch as doth not need the Benefit of the Clergy, as amounting only to Petit Larceny, *&c.* the Offender ſhall have only the proper Judgment for ſuch Offence, and no other, in Reſpect of the Robbery, *&c.* proved upon the Evidence, *&c.* in the firſt County, for being convicted of no Offence which will warrant a Judgment of Death, and conſequently having no Need to demand his Clergy, he cannot be hurt by being excluded from it.

[e] Mo. 550. pl. 335. H. P. C. 241.

Sect. 84. It is enacted by 3 *&* 4 [f] *Ph. & M.* 4. *That thoſe who ſhall maliciouſly command, hire or counſel any Perſon or Perſons to commit or do any Robbery in or near any Highway in this Realm of* England, *or in any other the Queen's Dominion, ſhall be ouſted of their Clergy, on a Conviction, ſtanding Mute, peremptory Challenge of more than twenty, or Outlawry.*

[f] *Vide ſupra*, Sect. 45, 46. How ſuch Offence muſt be laid in the Indictment.

Secondly, As to Robbery in a Dwelling-houſe, Booth or Tent, I ſhall conſider the Statutes concerning it as they relate.

Vide ſupra, Sect. 25.

1. To ſuch Robbery putting ſome Perſons in Fear.
2. To ſuch Robbery putting no Perſon in Fear.

Sect. 85. *Firſt*, As to ſuch Robbery putting ſome Perſon in Fear: It is obſervable, That all Perſons not in Holy Orders, *who ſhall rob any Perſon or Perſons in their Dwelling-houſes, or Dwelling-place, the Owner or Dweller in the ſame Houſe, his Wife, his Children or Servants then being within, and put in fear, and dread by the ſame*, and indicted, [g] are concluded from their Clergy by 23 *H.* 8. 1. and 25 *H.* 8. 3. revived by 5 *&* 6 *E.* 6. 10. upon a Conviction, ſtanding Mute, or peremptory Challenge of more than twenty, and by 3 *&* 4 *W. & M.* 9. upon an Outlawry.

[g] *Vide ſupra*, Sect. 30, 31, 32, 33, 42, 43, 44, 48, 49, 72, 77.

Sect. 86. And *Note*, * That by 25 *H.* 8. 3. and 3 *&* 4 *W. & M.* 9. they are excluded from their Clergy on an Indictment in a Foreign County. And their Acceſſaries before are excluded in all Caſes by 3 *&* 4 § *Ph. & Ma.* 4.

* *Vide ſupra*, Sect. 80, 81, 82, 83.

§ *Vide ſupra*, Sect. 45, 46.

Sect. 87. And by 1 † *Ed.* 6. 12. *Par.* 10. all Perſons in general who ſhall *break any Houſe by Day or by Night*, (*viz.*) [h] who ſhall break a Houſe burglariouſly, if in the Night, or ſhall break a Houſe and commit a Felony therein, if in the Day) [i] *any Perſon being then in the ſame Houſe where the ſame breaking ſhall be, and thereby put in Fear or Dread*, are concluded from their Clergy, as well upon an Appeal as an Indictment, in all Caſes, [k] except that of challenging more than twenty; and by 3 [l] *&* 4 *W. & M.* 9. upon ſuch a Challenge, as well as upon a Conviction, *&c.* upon an Indictment, whether in the ſame County wherein the Breaking and Felony

† *Vide ſupra*, Sect. 34, *&c.*

[h] *Vide ſupra*, Sect. 40. 11 Co. 36. 7 b.

[i] *Vide infra*, Sect. 93.

[k] *Vide ſupra*, Sect. 36.

[l] *Vide ſupra*, Sect. 48, 49.

was committed, or in a [a] different County; and the Acceſſaries before to ſuch a Breaking, if accompanied with ſtealing in a Dwelling-houſe, are ouſted of their Clergy in all * Caſes by 4 & 5 *Ph. & M.* 4. becauſe the felonious Taking being accompanied with a Breaking, ſeems properly [b] enough to come under the Notion of Robbery in a Dwelling-houſe, all Acceſſaries to which before the Fact are expreſly excluded from their Clergy by that Statute, as Acceſſaries before to Robbery in general are by 3 & † 4 *W. & M.* 9.

[a] *Vide ſupra*, Sect. 80, 81 82, 83.
* H. P. C. 236.
Supra Sect. 45, 46.
[b] *Vide ſupra*, Sect. 73. And *infra*, Sect. 81, 92, 96.
† *Supra*, Sect. 48, 49.

Sect. 88. But [c] no Breaking is within the Statute of 1 *E.* 6. which doth not amount to an actual Breaking of an Houſe, or of ſome Part of it; as of a Cupboard or Door, &c. fixed to the Freehold; and therefore the Breaking of a Trunk or Box, &c ſeem plainly not to be within the Statute. But by 3 & 4 *W. & M.* 9. *Every Perſon or Perſons that ſhall felonioufly Take away any Goods or Chattels, being in any Dwelling-houſe, the Owner, or any other Perſon being therein, and put in Fear, or ſhall comfort, aid, abet, aſſiſt, counſel, hire, or command any Perſon to commit ſuch Offence, being thereof convicted or attainted or indicted, and ſtanding Mute, or peremptorily challenging above twenty, ſhall be ouſted of the Benefit of their Clergy.*

[c] Kely. 58, 59. 70. *Supra*, Sect. 73, 87. *infra*, S. 92, 96. H. P. C. 237, 238.

Secondly, As to ſuch Robbery, putting no Perſon in Fear: I ſhall conſider the Statutes concerning it as they relate,

1. To ſuch Robbery in a Houſe, which ſome Perſon is in at the Time.
2. To ſuch Robbery in a Houſe, which no Perſon is in at the Time.

Sect. 89. As to the firſt of theſe, it is enacted by 5 & 6 *E.* 6. 9. *That if it happen any Perſon or Perſons to be found guilty according to the Laws of this Realm, for robbing of any Perſon or Perſons in any Part or Parcel of their Dwelling-houſes, or Dwelling places, the Owner or Dweller in the ſame Houſe, or his Wife, his Children or Servants being then within the ſame Houſe or Place where it ſhall happen the ſame Robbery and Felony to be committed and done, or in any other Place within the Precinct of the ſame Houſe or Dwelling-place, that ſuch Offenders ſhall in no wiſe be admitted to their Clergy, whether the Owner or Dweller in the ſame Houſe, his Wife or Children then and there being, ſhall be waking or ſleeping.*

Sect. 90. *And that no Perſon or Perſons which ſhall happen to be found guilty after the Laws of this Realm, of and for robbing any Perſon or Perſons, in any Booth or Tent, in any Fair or Market, the Owner, his Wife, his Children, or Servants or Servant then being within the Booth or Tent, ſhall not be admitted to the Benefit of his or their Clergy, but utterly be excluded thereof,* &c. *without having any Reſpect or Conſideration whether the Owner or Dweller in ſuch Booths and Tents, his Wife, Children or Servants being in the ſame Booths or Tents at the Time of ſuch Robberies and Felonies committed, ſhall be ſleeping or waking.*

Sect. 91. This Statute [d] ſeems plainly to extend to all who ſhall be convicted by Verdict or Confeſſion, whether upon an Appeal or Indictment; but not to thoſe who ſhall be outlawed, or ſtand Mute, or challenge peremptorily above twenty Jurors; but theſe Defects are ſupplied as to Indictments by 3 [e] & 4 *W. & M.* 9.

[d] H. P. C. 236, 237.
[e] *Vide ſupra*, Sect. 48, 49.

Sect. 92. It ſeems to be generally agreed, That no Robbery is within this Statute which is not accompanied with an actual [a] Breaking of an Houſe, or of ſome Part of it.

Sect. 93. Alſo it ſeems to be agreed, [b] That a Sojourner's Being in an Houſe at the Time of the Robbery doth not bring it within this Statute; for the Words are *The Owner or Dweller in the ſame Houſe, or his Wife, his Children, or Servants, being then within the ſame Houſe*, &c. Yet it is ſaid in [c] *Hale's Pleas of the Crown* to have been ruled by Advice of the Juſtices, That where one entered into the Lodging of Sir *H. Hungate*, being Parcel of *Whitehall*, and broke open a Chamber and took away his Goods, his Caſe was within this Statute, and that the Indictment ought to be for breaking the King's Houſe, called *Whitehall*, and for ſtealing the Goods of Sir *H. H.* divers Perſons being in the Houſe: But *Note*, That this Caſe is wholly omitted in the firſt Edition of *Hale's Pleas of the Crown*, and I cannot but think that it is miſprinted in the Second; becauſe ſuch a Robbery ſeems by no Means within the Purview of this Statute, which extends only to ſuch Robberies as are done to a Man in ſuch a Place as may be called *his Dwelling-houſe or Dwelling place, his Wife, Children, or Servants being at the ſame Time within the ſame.* But in the State of this Caſe it ſeems to be admitted, That *Whitehall*, wherein the Felony was committed, could not properly be called, nor ought to be laid in the Indictment as the Dwelling-houſe or Dwelling-place of the ſaid Sir *H. H.* who was the Perſon robbed, but of the King: Alſo it ſeems to be admitted, That it is ſufficient to ſet forth generally in the Indictment that divers Perſons were in the Houſe, without ſhewing that they were under any Relation to the Perſon robbed, as his Children or Servants, *&c.* which [d] ſeems to be neceſſarily required by 5 *&* 6 *E.* 6. 9. And therefore I take it, that the Statute here intended is not 5 *&* 6 *E.* 6. 9. but rather 1 *E.* 6. [e] 12. *Par.* 10. or 39 [f] *El.* 15. Yet *Quære*, for neither of theſe Statutes ſeem to extend to this Caſe as it is here put. However 3 *&* 4 *W. & M.* 9. ſeems fully to extend to it. By which it is enacted, *That all thoſe who ſhall rob any Dwelling houſe in the Day-time, any Perſon being therein, or ſhall comfort, aid, abet, aſſiſt, counſel, hire, or command any Perſon to commit ſuch Offence, being thereof convicted or attainted, or indicted, and ſtanding Mute, or challenging peremptorily above twenty, ſhall be ouſted of their Clergy.* But I do not [g] find that any Statute excludes thoſe from their Clergy who are Acceſſaries to a Robbery in a Booth or Tent, except it be from the Perſon of a Man, in which Caſe the Acceſſaries before the Fact ſeem to be excluded from their Clergy by 3 *&* 4 *W. & M.* 9. as ſhall be more fully ſhewn hereafter.

[a] For this *vide ſupra*, Sect 73, 87, 88, 96. H. P. C. 237, 238. Yet in Pop. 84 there is a Caſe ſeemingly contrary

[b] Hetley 64. S. P. C. 129. H. P. C. 236, 237. 11 Co. 36 b.

[c] Folio 237, 238.

[d] *Vide* Hetl. 64. H. P. C. 235, 236. 11 Co. 36 b. S.P.C. 129 b. Popham 84.

[e] *Vide ſupra*, Sect 87.

[f] *Vide infra*, S. 95, 96, 97.

[g] See the Statute of 3 *&* 4 Ph. *&* M. *ſupra*, Sect. 45, 46.

Sect. 94. It ſeems plain, That thoſe who are guilty of a Felony within theſe Statutes, are excluded from their Clergy by 3 *&* 4 *W. & M.* 9. on an Indictment in a Foreign County, in the ſame Manner as if they had been convicted in the firſt County, as hath been more fully ſhewn, *Sect.* 80, 81, 82, 83.

Sect. 95. *Secondly*, As to ſuch Robbery in a Houſe which no Perſon is in at the Time: It is recited by 39 *El.* 15. *That then of late divers lewd and felonious Perſons, underſtanding that the robbing of Houſes in the Day-time, no Perſon being therein at the Time, is not ſo penal as where ſome Perſon is therein, had been emboldened to take their Opportunity to commit many heinous Robberies, in breaking and entring divers Houſes*, &c. and thereupon it is enacted, *That if any Perſon ſhall be found guilty, and convicted by Verdict, Confeſſion, or otherwiſe, according to the Laws of this Realm, for the felonious taking away*

away in the Day-time, of any Money, Goods or Chattel, being of the Value of 5 *s. or upwards, in any Dwelling houſe or Houſes, or any Part thereof, or any Out-houſe or Out-houſes, belonging and uſed to and with any Dwelling-houſe or Houſes, altho' no Perſon ſhall be in the ſaid Houſe or Out-houſes at the Time of ſuch Felony committed, then ſuch Perſon ſhall not be admitted to the Benefit of his Clergy.*

Sect. 96. Notwithſtanding the Words of the Purview of this Statute ſeem plainly to include all felonious Takings to the Value of 5 *s.* out of an Houſe, *&c.* whether with or without Force; yet ſince the Miſchief complained of in the Preamble, and intended to be redreſſed is the frequent Committing of many *heinous Robberies in breaking and entring*, &c. and ſince all other [a] Statutes excluding the Benefit of the Clergy from Robberies in Houſes, have been conſtrued to extend to ſuch Larcenies only as are accompanied with a Breaking of a Houſe, or of ſome Part of it; it ſeems agreed, [b] That this Statute alſo ſhall extend only to ſuch a felonious Taking as is accompanied with the like Breaking.

Sect. 97. It ſeems agreed, [c] That a Chamber in one of the Inns of Court, wherein a Perſon uſually Lodges, is properly a Dwelling-houſe within this Statute, and may be ſo called in an Indictment, becauſe every Owner of ſuch a Chamber hath a ſeparate Intereſt in it. But that a Lodging in *Whitehall* or *Somerſet-houſe* is not [d] a Dwelling-houſe within this Statute; from whence it ſeems to follow, That a Robbery in ſuch a Lodging is not excluded from the Clergy by this Statute, if any Perſon were at the Time in any other Part of the Palace, becauſe the Whole is but one Dwelling-houſe.

Sect. 98. It ſeems agreed, [e] That no Acceſſary is ouſted of his Clergy by this Statute. Alſo it hath been adjudged, [f] That he who ſtands by and abets another while he breaks and enters the Houſe, and afterwards divides the Money with him, but doth not actually enter the Houſe himſelf, is not within the Statute, the Reaſon whereof ſeems to be this, That the Words, *If any Perſon ſhall be convicted*, &c. *of a felonious taking*, &c. *in a Dwelling-houſe*, &c. ſhall in ſo penal a Law be intended only of an actual Taking, and not of a conſtructive one. But this ſeems an extremely nice Caſe, and if it were a new Point, and not confirmed by Experience, the Authority of it might perhaps be juſtly queſtioned; for if the Perſon who only ſtood by and entred not the Houſe, had actually entred it, and the other only had taken the Money, and had not given him any Part of it till both had gone out of the Houſe; in this Caſe, as well as in the other, it might be ſaid, That he who actually received not any Part of the Money till he was gone out of the Houſe, was guilty only of a conſtructive Taking in the Houſe, and conſequently not within this Statute. But I cannot eaſily perſuade my ſelf but that in ſuch a Caſe both muſt be adjudged equally within the Statute; and why not as well in the other, it ſeeming an uncontroverted * Rule, That where divers are preſent and abet one another in committing any Felony, the Act of one ſhall be looked on as the Act of all. And upon this Ground, as I take it, it hath been always agreed, That thoſe who are preſent, and abetting, when a Murder is committed, are all of them equally excluded from their Clergy, whether they actually gave the ſtroke or took the Money or not; and yet the Statutes to this Purpoſe mention only thoſe who ſhall be found guilty of Murder or Robbing, *&c.* Nor do I find any Reſolution to the contrary on any other Statute concerning Clergy, except only the [g] Statute of *Stabbing*, whereon it hath been adjudged, [h] That the Perſon only who gives the Stab is within the

[a] *Supra*, Sect. 73, 87, 88, 92, 96.
[b] Kely. 30, 58. 69, 70. H. P. C. 237, 238. 11 Co. 36. b. Cro. Ca. 473, 474.
[c] Cro. Ca. 473, 474. 1 Jon. 394. H. P. C. 83, 237. Kely. 27, 52. *See* B. 1. ch. 38. Sect. 13.
[d] Kely. 27, 52. *Vide ſupra*, Sect. 93.
[e] H. P. C. 237. *Supra*, Sect. 45, 46.
[f] Cro. Ca. 473, 474. *Note*, That the ſame Caſe is in 1 Jon. 394. but this Point is not taken Notice of.
* *Vid. ſupra*, Ch. 29. Sect. 7, 8. 13.
[g] 1 Jac. 1 8.
[h] Aleyn 44. H. P. C. 58. B. 1. ch. 30. Sect. 71.

the Purview of it: But this ſeems plainly to depend on the particular Circumſtances of this Offence, which is excluded from the Clergy in Reſpect of the Cruelty and Bloody Mind of him who gives the Stab, which certainly is peculiar to himſelf.

Sect. 99. However it is certain at this Day, *That whoever ſhall comfort, aid, abet, aſſiſt, counſel, hire or command any Perſon or Perſons to break any Dwelling-houſe, Shop, or Ware-houſe thereunto belonging, or therewith uſed, in the Day-time, and feloniouſly take away any Money, Goods, or Chattel of the Value of* 5 s. *or upwards therein being, altho' no Perſon ſhall be within ſuch Dwelling-houſe, Shop or Ware-houſe, being convicted or attainted, or being indicted and ſtanding Mute, or challenging peremptorily above twenty, ſhall be excluded from their Clergy, by the expreſs Words of* 3 & 4 W. & M. 9.

Sect. 100. But *Note*, That this Clauſe mentioning only a felonious Taking in a Dwelling-houſe, Shop, or Ware-houſe thereunto belonging, and not mentioning Out-houſes in general, as 39 *El.* doth, ſeems to have done it with a View to leave Out-houſes to the ſame Conſtruction which prevailed before; and therefore I take it that an Aſſiſtant to ſuch a Felony in an Out-houſe, not being ſuch a Shop or Ware-houſe, without entring into it, is clearly intitled to the Benefit of his Clergy ſince this Statute, however it might be diſputed before. *Vide ſupra*, Sect. 98.

Sect. 101. *Note* alſo, That the Acceſſaries before to ſuch a Felony in any Out-houſe, not being ſuch a Shop or Ware-houſe, are ſtill intitled to the Benefit of their Clergy, becauſe the only [a] Law which excludes them is the [b] above-cited Clauſe of 3 & 4 *W. & M.* 9. which extends only to ſuch Felonies in a Dwelling-houſe, Shop or Ware-houſe thereunto belonging.

[a] H. P. C. 227.
[b] *Supra*, Sect. 99.

Sect. 102. But all Principals in any Felony within the ſaid Statute of 39 *El* are excluded from their Clergy by the ſame Statute upon any Conviction, whether upon an Indictment or Appeal; and by the ſaid Statute of 3 * & 4 *W. & M.* upon an Outlawry, ſtanding Mute, or peremptory Challenge of more than twenty, upon an Indictment, whether in the ſame County in which the Felony was firſt committed, or in a different [c] County.

* *Supra*, Sect. 48, 49.
[c] *Supra*, Sect. 81, 82, 83.

Sect. 103. *Thirdly*, As to Robbery in general, it is enacted by 3 & 4 *W. & M.* 9. *That all and every Perſon or Perſons that ſhall rob any other Perſon, or ſhall comfort, aid, abet, aſſiſt, counſel, hire or command any Perſon or Perſons to commit ſuch Offence, being thereof convicted or attainted, or being indicted and ſtanding Mute, or challenging peremptorily above twenty, ſhall not have the Benefit of his Clergy,*

Sect. 104. *Sixthly*, As to Burglary: [d] If any Perſon be in the Houſe at the Time of the Breaking, and thereby put in Fear, the Principal is excluded from his Clergy by 1 *E.* 6. 12 *Par.* 10. in all Caſes, except that of challenging more than twenty, and by 25 *H.* 8. revived [e] by 5 & 6 *E.* 6. or at leaſt by 3 & 4 *W. & M.* 9. upon ſuch a Challenge, upon an Indictment.

[d] *Vide* 11. Co. 35. b. 36. *Supra*, Sect. 34. 36, 40.
[e] *Vide ſupra*, Sect. 41, 43, 44.

Sect. 105. Alſo the Principal in every Burglary, whether [f] any Perſon were in the Houſe at the Time or not, is excluded from his Clergy by 18 *El.* 7. upon a [g] Conviction by Verdict, Outlawry, or Confeſſion; and by 3 & 4 *W. & M.* upon ſtanding Mute, or challenging peremptorily more than twenty upon an Indictment.

[f] Poph. 42, 52. 1 And. 302. Moore 660. 4 Co. 40. a. B. 1. ch. 38. Sect. 11.
[g] 11 Co. 35. b. H. P. C. 233.

Sect. 106. Alſo by [a] the ſame Statute of 3 & 4 *W. & M.* 9. *Every Perſon who ſhall counſel, hire or command any Perſon to commit any Burglary, being thereof convicted, or attainted, or being indicted, and ſtanding Mute, or challenging peremptorily above twenty, ſhall not have his Clergy.*

Sect. 107. *Seventhly.* As to Arſon: It hath been clearly [b] ſettled, ſince *Poulter's* Caſe, that the Principal [c] not being in Holy Orders, is excluded from the Clergy upon an Indictment in all Caſes, except Outlawry, by 23 *H.* 8. and 25 *H.* 8. as [d] revived by 5 & 6 *E.* 6. 10. And it is certain that he is excluded upon an Outlawry on an Indictment by 3 & 4 *W. & M.* 9.

Sect. 108. Alſo Acceſſaries to the Fact before, maliciouſly, are excluded in all Caſes by 3 * 4 *Ph. & M.* 4.

Sect. 109. *Note*, That by 1 *E.* 6. 12. *Par.* 14. [e] Every Lord of Parliament is allowed his Clergy in all Caſes, wherein others are excluded by that Act, except wilful Murder, and conſequently cannot be denied his Clergy for any other Felony wherein it was grantable at Common Law, unleſs it be ouſted by ſome Statute made ſince the firſt Year of *Edward* VI. or † revived by 5 & 6 *E.* 6. 10.

Sect. 110. As to the third general Point of this Chapter, *viz.* At what Time the Benefit of the Clergy is demandable: It ſeems, [f] That it might be demanded by the ancient Common Law as ſoon as the Priſoner was brought to the Bar, before any Indictment or other Proceeding againſt him; for it is plain, That anciently the Clergy claimed, and were in a great Meaſure indulged a Privilege of being wholly [g] free from ſecular Juriſdiction for Crimes puniſhable with Loſs of Life or Member. But after the Stat. of *Weſtm.* 1. *Ch.* 2. which ſtrictly enjoined the Ordinaries not to ſuffer Clerks who have been indicted by ſolemn Inqueſts to be delivered without due Purgation, the Judges ſoon made a ſettled Rule [h] not to deliver any Clerk to the Ordinary, before he had been firſt indicted and arraigned, and his Offence had been inquired of and found by an Inqueſt of Office, which was done both to the End that if the Priſoner were found guilty, he [i] might abſolutely forfeit his Goods, (which anciently were ſaved by a Purgation) and alſo that the Court might be apprized, whether it were proper from the Circumſtances of the Caſe, diſcloſed upon ſuch an Inquiry, to deliver the Clerk to the Ordinary generally, in which Caſe he was allowed to make his Purgation [k], or ſpecially, [l] *abſque purgatione faciendâ.* But this Practice being found inconvenient to Priſoners, becauſe they loſt their Goods, if found guilty by ſuch Inquiry, and yet could take no Challenge to any of the Jury, it being but an Inqueſt of Office; it hath been the general Practice [m] ever ſince the Reign of *H.* 6. to oblige thoſe who demand the Benefit of the Clergy to plead and put themſelves upon their Trial, under [n] Pain of being dealt with as thoſe that ſtand Mute, whereby they forfeit their Goods [o] without any Inquiry concerning their Crime; but yet [p] cannot be denied their Clergy, where they ſhould be intitled to it in caſe they were convicted, unleſs they be ſpecially excluded by ſome Statute. But after a Clerk hath put himſelf upon his Trial, and the Inqueſt are charged with him, it is ſaid that he [q] may, if he deſire it, be admitted to his Clergy, before the Jury come back; but ſhall not forfeit his Goods unleſs they find him guilty.

[a] *Vide* 11 Co. 36. a. H. P. C. 333, 334.
[b] H. P. C. 233. 11 Co. 29, *&c.*
[c] *Vide ſupra*, Sect. 10, 11, 12, 13, 30, 32.
[d] *Vide ſupra*, Sect. 43, 44.
* *Supra*, Sect. 25, 45.
[e] S.P.C. 130.
† *Supra*, Sect. 42, 43, 44.
[f] *See* the Statute of Merl. Ch. 28. Weſtm. 1. Ch. 2. *Articuli Cler.* Ch. 15. 2 Inſt. 150, 163, 164, 633. S. P. C. 123. Lett. C. 130, b. 131, a. 185. Bract. lib. 3. Ch. 9. *Supra*, Ch. 15. Sect. 83. Hob. 288, 289. Yet in Kely. 100. the contrary ſeems to be holden.
[g] *Vide* Bract. lib. 3. cap. 9. *Articuli Cleri*, ch. 15. S. P. C. 138. Lett. E. 139. Lett. A. 140.
[h] *Supra*, Sect. 1, 2. Fitz. Coro. 118. S. P.C. 131, 185.
[i] Inſt. 164, 633, 634. H. P. C. 239. Finch of Law, 463. Fitz. Coro. 376, 232, 382, 386. 417. But this ſeems to be doubtful, Fitz. Coro. 233.
[k] S. P. C. 131, 185. 5 Co. 110. Regiſt. 68. Pl. Com. 262. b. *Cont.* 40 Aſſ. 42 pl. 23. Abridged, Fitz. Coro. 91. Bro. Forfeiture 5. Hob. 289. 'tis holden, That the Goods are not forfeit without a Conviction.
[l] H. P. C. 240. Hob. 288, 289. S. P. C. 139. Lett. D. 5 Co. 109.
[m] *Vide* Fitz. Coro. 109. 417. H. P. C. 240. Raſt. Ent. 121. pl. 1. Hob. 288, 289. Kely. 100.
[n] H. P. C 239. 2 Inſt. 164 Fitz. Coro. 53, 58. S. P. C. 131. Salk. 61. Finch of Law, 463. Hob. 288.
[o] Fitz Coro. 58. ſo ſaid in a Note of a Caſe in 3 H. 7. 1. but I do not find it made out by the Books at large. But this is clearly holden 3 H. 7. 12. pl 10. Abridged, Fitz. Coro. 53.
[p] *Supra*, Ch. 30. Sect. 19.
[q] 8 H. 4. 3. pl. 5. Abridged, Fitz. Coro. 72. *Supra*, Ch. 30. Sect. 24.
[q] S. P. C. 131 a. b. Finch of Law, 463.

Sect. 111. Alſo I take it to be generally agreed in the later [a] Books, That a Perſon may demand his Clergy after a *Non legit* recorded; and alſo after Judgment given againſt him, whether of [b] Death, or of [c] *pain fort & dure*, or of [d] Outlawry, *&c.* as well as before Judgment, and even [e] under the Gallows, if there be a Judge there who has Power to allow it; as a Juſtice of the King's Bench, if the Party were condemned there; or a Juſtice of Gaol Delivery if he were condemned before him, and the Commiſſion of Gaol-Delivery be not [f] yet adjourned, and according to ſome [g] Opinions, even tho' the Commiſſion were adjourn'd.

Sect. 112. As to the fourth general Point of this Chapter, *viz.* Whether the Benefit of the Clergy ſhall be allowed where it is not demanded: I take it to be generally agreed, That notwithſtanding it was anciently the [h] uſual Method for the Ordinary to demand the Criminal as his Clerk, before the Court allowed him the Benefit of his Clergy; Yet there was no [i] Neceſſity that any ſuch Demand ſhould be made by the Ordinary; But the Court might without it admit a Perſon to the Benefit of his Clergy, upon ſufficient Evidence of his being a Clerk, as upon his producing Letters of Orders, or reading as a Clerk, *&c.* except he appears to have been guilty of Sacrilege, or of breaking the Priſon of the Ordinary, in which Caſes it is ſaid to have been in a great Meaſure left to the [k] Diſcretion of the Ordinary, whether he ſhould have his Clergy or not. And as there is no Neceſſity that the Ordinary ſhould demand the Benefit of the Clergy for a Clerk; ſo [l] neither doth there ſeem to be any that the Priſoner himſelf ſhould demand it, where it ſufficiently appeared to the Court that he has a Right to it in Reſpect of his being in Orders, *&c.* in which Caſe, if the Priſoner does not demand it, it ſeems to be left to the Diſcretion of the Judge, whether he will allow it him or not.

Sect. 113. As to the fifth general Point of this Chapter, *viz.* Who is to judge whether a Perſon who demands the Benefit of the Clergy, have a Right to it or not: I take it, That in all Caſes the Temporal Judge is to determine both, whether the Crime be within the Benefit of the Clergy, and alſo whether the Perſon who demands it be qualified to demand it or not; for notwithſtanding it had its [m] original Commencement from the Canon Law; yet it being no [n] otherwiſe to be allowed here than as it hath been received by, and is agreeable to the Common or Statute Law, whereof the Temporal Courts are the Judges, it ſeems very reaſonable that all Queſtions [o] of this Kind be determined by thoſe Courts. And therefore even in thoſe Caſes, wherein by the old Books the Ordinary ſeems to have been allowed a diſcretionary Power of demanding or refuſing a Clerk, as where he hath been guilty of [p] Sacrilege, and alſo in Caſes wherein it is ſaid generally, That a Priſoner hath no Right to his Clergy, as where he is convict of [q] Hereſy, *&c.* it ſeems to be taken as a Ground by *Staundforde*, That the temporal Judge, where the Ordinary refuſes a Priſoner, has a Power to determine whether ſtill he may be allowed his Clergy or not. And this ſeems to be ground-

[a] H. P. C. 239, 240. S. P. C. 132. Lett. B. Finch of Law, 363, 364. Fitz. Coro 99, 109. Dy. 205 pl. 6. This ſeems doubtful, 12. Aſſ pl. 15. Abrid. Fitz. Coro. 117. Cont. Fitz. Coro. 233.

[b] 40 Aſſ. 42. pl. 23. Abrid. Fitz. Coro. 91. Dy. 183. pl. 89. 34 H. 6. 49. pl. 16 Abrid. Fitz. Coro 20. Bro. Cler. 1.

[c] S. P. C. 239. *Sup.* a. ch. 30. Sect. 24.

[d] 9 E. 4. 28. 8 H. 43. pl. 5. Abrid. Fitz. Coro. 72.

[e] 34 H. 6. 49. pl. 16. Abrid. Fitz. Cor. 20. Bro Cler. 1. H. P. C. 239. 249. Dy. 205 pl. 5, 6. S P. C 132. Lett. B. Crompt. Juriſd. 126. a.

[f] S. P. C. 132. Lett B H P. C. 240. Cro Juriſd. 126. a.

[g] As it ſeems from Dy 205. pl. 5, 6.

[h] Bro. B. 3 c 9. Weſt. 1. ch. 2. 2 In. 163, 164. S P. C. 130. b. 9 E. 4. 28. 12 Aſſ pl 15. 34 H. 6. 49. pl 16. Kely 99.

[i] S. P. C 131. b. 132, 133.

Hob. 289, 290. Fitz. Coro. 117. Bro. Clergy, 1, 9. See the following Section. But this Matter ſeems to be left doubtful, 12 Aſſ. pl. 15. Abridged Bro. Clergy, 9. 34 H. 6 49. pl. 16. Kely. 99. Fitz. Coro. 44, 120, 191. 9 E. 4. 28. F. N. B. 66. Lett. B. [k] *Vide ſupra*, Sect. 9. Fitz. Coro. 112, 120. S. P. C. 133. b. 27 Aſſ. pl. 42. Abridged, Fitz. Coro. 205. [l] S. P. C. 131. b. Fitz. Coro. 191, 254. 26 Aſſ pl. 19. H. P. C. 239. [m] Bro. Clergy. 1, 9. Coro. 73. Hob. 288. 289. [n] *Vide ſupra*, Sect 2. Hob. 288. [o] *Vide ſupra*, Sect. 2, 110. Hob. 288. [p] *Vide* 1 E. 3. 13. pl. 8. [q] Aſſ pl. 4. Abridged, Fitz. Coro. 155. Bro. Cler. 8. Where the Court refuſed to deliver to the Ordinary a Clerk who had abjured, till he ſhould get the King's Pardon of his Return into the Land without Licence. *See* Kely. 28. [r] S. P. C. 133. Lett. B. *Supra*, Sect. 9 [s] S. P. C. 133. Lett B. But 21 E. 4. 21. pl. 1. Abridged, Bro Clergy, 18 9 E. 4. 28. pl. Abridged, Bro. Clergy, 7 ſeem to be contrary where the Ordinary aſſigns no particular Cauſe of Refuſal.

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ed on good Reaſon; for otherwiſe in ſuch Caſes the Ordinary by ſuch Pretences might have an abſolute Power of controlling the Temporal Courts in a Matter properly determinable by ſuch Courts. And therefore whatever Point it may turn upon, whether a Priſoner ought to have his Clergy or not, as the Validity of his Letters of Orders, or his being a Heretick convict, *&c.* howſoever the Temporal Courts may pay the higheſt Regard to the Certificate of the Ordinary; yet I take it to be generally [a] holden, That they only are finally to determine whether upon the Whole the Priſoner be well intitled to his Clergy, or not, becauſe the Ordinary is not in this Reſpect eſteemed as a Judge, but [b] only as a Miniſter to the Court. However it was certainly the [c] ſettled Practice (while the Method of trying the Priſoner's Capacity of receiving Orders was by putting him to read a Verſe,) for the Judges of the Common Law to over-rule the Ordinary as to the Point, Whether the Priſoner read as a Clerk or not; and to record a *Legit* or *Non legit*, according to their own Judgment.

[a] Hob. 290. *See* the Notes to the other Parts of this and the foregoing Section, 1 Sec 9 E. 4. 28. Abrid. Bro. Clergy, 7. This Matter ſeems to be left doubtful. *Vide* Fitz. Coro. 44. 8 N. B. 66. Letter B.

Sect. 114. But the Neceſſity of ſuch an Ability to read in the Caſe of a Peer, was taken away by 1 *E.* 6.* 12. *Par.* 15. by which it is enacted, *That in every Caſe where any of the King's Subjects ſhall upon his Prayer have the Privilege of his Clergy*, &c. *every Lord having Place and Voice in Parliament, ſhall by Virtue of that Act of Common Grace, upon his Requeſt or Prayer, alledging that he is a Lord or Peer of this Realm, and claiming the Benefit of this Act tho' he cannot read, without any burning in the Hand, loſs of Inheritance, or corruption of Blood, be adjudged, deemed, taken and uſed for the firſt Time only, to all Intents, Conſtructions and Purpoſes, as a Clerk convict, and ſhall be in Caſe of a Clerk convict, which may make Purgation, without any further or other Benefit or Privilege of Clergy, to any ſuch Lord or Peer from thenceforth, at any Time after, for any Cauſe to be allowed*, &c.

[b] 7 E. 4. 29. pl. 12. Abrid. Fitz. Fines, 24. Bro. Clergy, 17. Ordinary, 16. 34 H. 6. 49. pl. 16. Abrid Fitz. Fines, 19. Bro. Clergy, 1. 7 H. 4. 44. pl. 6. Abrid. Bro. Clergy, 2. Ordinary, 20. 15 H. 7. 9. pl. 8. Abrid. Fitz. Impriſonm. 28. Bro Ordinary, 11 Kely. 89, 51. Fin. of Law, 463, 464. S. P. C. 131. Lett. C. 132. Lett. A. B. C. D. 133. Lett. A. B. C. D. 141. Lett. B.

Sect. 115. The Neceſſity of ſuch reading is alſo taken away, as to every common Perſon, by 5 *Annæ* 6. by which it is enacted, *That if any Perſon convict of ſuch Felony, for which he ought to have the Benefit of Clergy, pray the Benefit of that Act, he ſhall not be required to read, but ſhall be puniſhed as a Clerk convict.*

Sect. 116. As to the ſixth general Point of this Chapter, *viz.* How far the Ordinary was puniſhable at Law for demanding or refuſing a Clerk againſt Law: It ſeems agreed, [d] That anciently this was ſuch a Contempt for which his Temporalities might be ſeiſed: But ſince the Statute of 25 *E.* 3. 6. which provides, *That Prelates ſhall be admitted to pay a reaſonable Fine for Contempts to Writs of* Quare non admiſit, *and ſuch like*, it ſeems to have been generally [e] agreed, That the Ordinary is liable only to be fined, but to no ſuch Seizure for a Contempt of this Kind, as in obſtinately [f] perſiſting to return that a Priſoner reads as a Clerk, or the contrary, *&c.* againſt the declared Senſe of the Court.

H. P. C. 240. 21 E. 4. 21. pl. 1. Abridged, Bro. Clergy, 18. [c] Kely. 28, 51. 9 E. 4. 28. pl. 41. Abridged, Fitz. Coro 32. Bro. Ordin. 12. *See* the Caſes cited to the precedent Letter. [*] *Vide ſupra*, Sect 109. S. P. C. 129, b. 130. [d] Fitz Coro. 32, 191, 233. 9 E. 4 28. pl. 41. *Vide* 21 E. 3. 3. pl 7. Bro. Contempt, 19. S. P. C. 132. Letter D. Hob. 290. 2 Inſt. 164. *See* the Notes under the next Letter. [e] 9 E 4. 28. a. Abridged, Fitz. Coro. 32. Bro. Clergy, 7. 7 E. 4. 29. pl. 12. Abridged, Fitz. Fines, 24. Bro. Clergy, 17 Ordinary, 16. 34 H. 6. 49. pl. 16. Abridged, Fitz. Fines, 19. Bro. Clergy, 1. 15 H. 7. 9. pl 8. Abridged, Fitz. Impriſonm. 28. Bro. Ordinary, 11. Kely, 28, 51. Finch of Law, 463. 2 Inſt. 164. Yet ſee the contrary holden the very next Year, 26 Aſſ. pl. 19. Abridged, Fitz. Coro. 191. And alſo 7 H. 4. 41. pl. 6. Abridged, Bro. Clergy, 2. Ordinary, 20. And S. P. C. 132. Lett. D. [f] *See* the Books cited to the other Parts of this Section.

Sect. 117. As to the ſeventh general Point of this Chapter, *viz.* In what Manner a Clerk was to be delivered to the Ordinary, and afterwards demeſned by the Common Law: It ſeems [a] plain, That anciently wherever a Clerk was delivered to the Ordinary by a temporal Judge, his Perſon ought to be kept in the Ordinary's Priſon, till [b] he had been tried before him by a Jury of twelve Clerks; for the Clergy never pretended to an abſolute Exemption from all kind of Puniſhment for their Crimes, but only to a Privilege of being tried only by Eccleſiaſtical Judges; and this was anciently ſo far indulged them, that after they had been once delivered to the Ordinary, they could not afterwards be remanded to any temporal Court, before the Statute of 8 *Eliz.* 4. ſet forth more at large *Section* 122, *&c.* either for the ſame Crime wherewith they had been charged in ſuch Court, nor for any other [c] committed before the Time when the Benefit of the Clergy was allowed them, whether ſuch other Crimes were within the Benefit of the Clergy or not. And if they could acquit themſelves on their Trial before the Ordinary of the Crimes for which they had been arraigned in the Temporal Courts, which Acquittal was called a Purgation, [d] they anciently claimed a Right not only to be delivered out of Priſon, but alſo to be reſtored [e] to their Goods, *&c.* But to render ſuch Purgation the more difficult, and alſo to delay the Delivery of Great Offenders as much as poſſible, the Judges anciently often refuſed [f] to deliver them to the Ordinary till they had been arraigned of all the Crimes whereof they ſtood indicted. But after the Statute of 25 *E.* 3. the Judges could not refuſe the Delivery of Clerks Convict in Reſpect of any Crime whereof they had not been actually arraigned; and therefore they uſed to arraign them at once for all the Crimes whereof they ſtood indicted.

Sect. 118. And if ſuch Clerks could not purge themſelves upon ſuch a Trial, I do not [h] find that they were anciently liable to any greater Puniſhment than Degradation, and the [i] Loſs of their Goods, and the Profits of their Lands, unleſs they had been guilty of Apoſtacy, *&c.* But afterwards, [k] by a Provincial Conſtitution, if they were notoriouſly ſcandalous, they were to be kept in a perpetual Priſon, on ſlender Diet, *&c.*

Sect. 119. If the Ordinary had refuſed to admit a Clerk delivered to him to make his Purgation, he might be compelled [l] by a ſpecial Writ for that Purpoſe.

Sect. 120. But this Privilege was often very much abuſed; and therefore after the Statute of *Weſtminſter*, 1. *Ch.* 2. which requires that no Clerk ſhall be delivered without due Purgation, the Courts of Common Law would never deliver over a Clerk to the Ordinary, without a [m] previous Inquiry into, or Trial of his Crime, whereupon if the Clerk were found Guilty, he abſolutely forfeited his Goods, and the Judges would [n] often in their Diſcretion make a Special Delivery, *abſque purga-*

[a] Bract. Lib. 3. c. 9. S. P. C. 137. C.

[b] *See* the Statute of Weſt. 1. ch. 2. 2 Inſt 163, 164. S. P. C. 137. Lett. C. 138 Lett. A. If the Ordinary ſuffered a Clerk to go at large without making ſuch Purgation, he might be fined by the Temporal Courts. 15 H. 7. 9 pl. 8. 9 E. 4. 28. a

[c] And this Privilege was expreſly confirmed. 25 E. 3. ch. 5. and appears from the Recital of 8 E. 4 *Vide* Dyer, 214. pl. 48. 215. pl. 49. H. P. C. 213, 249. And. 114. S. P. C. 108. Lett. A. Finch of Law, 464. Poph. 107

[d] Finch of Law, 464, 465.

[e] H.P.C.241. 5 Co. 110. b. S. P. C. 185. In the Regiſter, 68. b. there are three Writs to this Purpoſe. S. P. C. 521 Lett. C. 185.

192. Lett. B. 193. Reg 68 b. *Vide* 1 Rich. 3. ch. 3. [f] Fitz. Coro. 394. 461. Bro. Clergy, 24, 30. S. P. C. 66. Lett. D. 108. Lett. A. H. P. C. 213. Bro. Coro. 11. [g] S P. C. 108. Lett. A. 142. Lett. B. Dy. 214, 215. [h] Bract. Lib. 3 c. 9. Sect. 2. S. P. C. 138. Lett. B. [i] H. P. C. 241. 5 Co. 110. b. Bracton and Staundforde in the Places cited to the precedent Letter ſeem to hold generally, That Degradation was the only Puniſhment; but I ſuppoſe that they mean the only Puniſhment to the Perſon. [k] S. P. C. 140, 141. *See* Cro Jac. 431. [l] Bract Lib. 3. cap. 9. Sect. 3. S. P. C 137. Lett. C. 138. Lett. A. 15 H. 7. 9. pl. 8. Cro Jac 431. Bro. Coro. 223. [m] *Vide ſupra*, Sect. [n] H. P. C. 240. 2 Inſt. 165. Hob. 289.

tione facienda; as where it appeared that a Priſoner was a common [a] Thief, *&c.* or where in an Appeal of Robbery a Reſtitution of the Goods ſtolen had been awarded [b] to the Appellant, which Judgment they would not ſuffer to be contradicted by a Purgation. And both in ſuch a Caſe, and alſo *a fortiori* where a Clerk is admitted to his Clergy after an Attainder, whether by an expreſs Judgment or by Outlawry, *&c.* or even after a Confeſſion [c], though he were not ſpecially delivered *abſque purgatione facienda*, the Ordinary ſeems by the ſtronger * Opinions to have been liable to an Eſcape, if he had admitted him to his Purgations becauſe it could not but contradict a Judgment, or the Party's own Confeſſion, which is the higheſt Conviction. Neither was any Purgation thought lawful without a previous Notice to the [d] King of the Time when it was intended to be made.

[a] S. P. C. 139 Lett. D. Hob. 289. Fitz. Coro. 247.
[b] Finch of Law, 464. S. P. C. 139 Lett. B. Fitz. Coro. 109, 247.
[c] But this is left a Quære, S P. C. 138. Lett. E. 239. Lett. A. but it ſeems agreed, That a Clerk might be admitted to his Purgation after a Conviction by Verdict. Fitz. Coro. 393. 5 Aſſ. pl. 5. Abrid. Fitz. 145. Cont. Fitz. Coro 417.
[d] S. P. C. 48, 138. Lett. C. 27 H. 6, 7. b. Abrid. Fitz. Coro. 16. 13 E. 4. 3. pl 6 Abrid. Bro. Coro 158. Fitz. Cor. 38. 3 H. 7. 12. pl. 5. Abrid. Fitz. Coro. 56, 136. 9 E. 4. 28. a. Abrid. Bro. Coro. 55. Bro. Coro. 4. Finch, 464, 465. Cont. Hob. 289. Fitz. Coro. 109, 128, 450, 247. 18 Aſſ. pl. 13. Abrid. Fitz. Coro. 176. Utlagary, 2. Theloal, B. 1. ch. 15. Sect. 26.
[e] Finch, 464. S. P. C. 138. Lett. B. Fitz. Coro. 152.
* H. P. C. 240.
[f] Kely. 25.

Sect. 121. As to the eighth general Point of this Chapter, *viz.* What ſhall be done to one who is allowed the Privilege of the Clergy at this Day, and how far it ſhall be for his Benefit: It is enacted by 4 *H.* 7. 13. *That if any Perſon, not in Orders, ſhall be convict of Murder, he ſhall be marked with an* M. *and if of any other Felony, with a* T. *on the Brawn of the Left Thumb, in open Court, before he ſhall be delivered to the Ordinary.* And it is ſaid by [e] *Hale*, That by 3 *H.* 7. 1. A Clerk convicted of Manſlaughter ſhall be committed, or bailed at Diſcretion till the Year be paſſed. But the contrary hath been [f] adjudged; for the ſaid Statute mentions only thoſe who are acquitted of Murder at the King's Suit, within the Year and Day, in which Caſe it directs that they ſhall be committed or bailed, till the Year and Day be paſſed, that they may be forthcoming, in order to anſwer to an Appeal, if brought within that Time. But it admits the Clergy once had to be a good Bar to an Appeal, even after an Attainder, and therefore cannot be thought to have intended to make Proviſion in any Caſe for the Parties being forthcoming to anſwer an Appeal after Clergy hath been allowed him, which makes it ineffectual. But it is certain that any Perſon who hath his Clergy may be committed for any Time within a Year by 18 *Eliz.* 7. *Par.* 3. ſet forth more at large, *Sect.* 125.

Sect. 122. It is recited by 8 *Eliz.* 4. *Par.* 3. *That divers Perſons had oft-times committed ſundry deteſtable Felonies, for the which Clergy is not allowable, and afterwards had fled to Places remote where they were not known, and committed ſome other Felony within the Benefit of the Clergy, and being arraigned for the ſame had had their Clergy allowed them, and thereupon been committed to the Cuſtody of the Ordinary, the former Offence being then not known, and ſo by that Means could not after be impeached for the ſame, to the great encouraging of Offenders, uſing ſuch Practices of Fore-knowledge and ſet Purpoſe, for their Diſcharge of the ſame.*

Sect. 123. *For Reformation whereof it is enacted, That every Perſon or Perſons, who ſhall hereafter upon his or their Arraignment for any Felony, be admitted to the Benefit of his Clergy, and delivered to the Ordinary for the ſame, and ſhall make his due Purgation for the ſame Offence or Offences, whereupon he was ſo admitted to his Clergy, and ſhall before the ſame Admiſſion to his Clergy, have committed any other ſuch Offence, whereupon Clergy is not allowable, and not being thereof indicted and acquitted, convicted, or attainted, or pardoned, ſhall and may be indicted or appealed for the ſame, and thereupon put to anſwer, and ordered and uſed in all Things according to the Laws and Statutes of this Realm, in ſuch like Manner and Form, as tho' no ſuch Admiſſion of Clergy had been; any Law, Cuſtom, or Uſage to the contrary notwithſtanding.*

Sect. 124. *And for the avoiding of ſundry Perjuries and other Abuſes, in and about the Purgation of Clerks Convict, delivered to the Ordinaries, it is enacted by* 18 Eliz. 7. *That every Perſon, who ſhall be admitted to his Clergy, ſhall not thereupon be delivered to the Ordinary, but after ſuch Clergy allowed, and burning in the Hand, according to the* [a] *Statute in that behalf provided, ſhall forthwith be enlarged and delivered out of Priſon by the Juſtices before whom ſuch Clergy ſhall be granted, that Cauſe notwithſtanding.*

[a] 4 H. 7. 13 for which ſee Sect. 121.

Sect. 125. But it is provided, Par. 3. *That the Juſtices before whom any ſuch Allowance of Clergy ſhall be had, ſhall and may for the further Correction of ſuch Perſons to whom Clergy ſhall be allowed, detain and keep them in Priſon for ſuch convenient* [b] *Time, as the ſame Juſtices in their Diſcretions ſhall think convenient, ſo as the ſame do not exceed one Year's Impriſonment.*

[b] 2 Bulſt. 137.

Sect. 126. And it is farther provided, Par. 5. *That all Perſons admitted to their Clergy, ſhall notwithſtanding ſuch Admiſſion, be put to anſwer to all other Felonies whereof they ſhall be indicted or appealed, and not being thereof before acquitted, convicted, attainted or pardoned, and ſhall in ſuch Manner and Form be arraigned, tried, adjudged, and ſuffer ſuch Execution for the ſame, as they ſhould have done, if, as Clerks Convicts, they had been delivered to the Ordinary, and there had made their Purgations; any thing in this Act contained to the contrary notwithſtanding.*

Upon theſe Statutes the following Points ſeem moſt remarkable,

Sect. 127. *Firſt*, Inaſmuch as it plainly appears, not only from the Preamble, but alſo from the expreſs Words of the above-recited Clauſe of 8 *Eliz.* 4. That it had nothing elſe in View but only to prevent the Inconvenience that Offenders ſhould be diſcharged of Crimes not within the Benefit of the Clergy, by being admitted to their Clergy for Crimes within the Benefit of it, as they were [c] before this Statute; and inaſmuch as the above-recited *Proviſo* of 18 *Eliz.* 7. tho' it be more largely worded than 8 *Eliz.* 4. hath a plain Relation to it, and therefore may reaſonably receive the ſame Conſtruction; it ſeems to have been agreed [d] ever ſince theſe Statutes, That a Conviction for a Felony within the Benefit of the Clergy, and an Allowance of Clergy thereon, is as much a Diſcharge of all precedent Felonies within the Benefit of the Clergy (tho' not of any others) as it was before theſe Statutes.

[c] *Vide ſupra*, Sect. 117.

[d] 1 H. P. C. 213, 249. 1 And. 114. Poph. 107.

Sect. 128. *Secondly*, Inaſmuch as the Statute of 18 *Eliz.* 7. is expreſs, *That every Perſon admitted to his Clergy, ſhall not be delivered to the Ordinary, but after ſuch Clergy allowed, and burning in the Hand, ſhall forthwith be enlarged and delivered out of Priſon*, &c. *with a* Proviſo *nevertheleſs, that for further Correction he may be kept in Priſon*, &c. *and alſo with a farther* Proviſo, *that he ſhall anſwer to all former Felonies, in the ſame Manner as if he had made his Purgation.* It ſeems to be the more prevailing Opinion, [e] That a Clerk Convict being admitted to his Clergy, may either be taken to have a Kind of a Statute-pardon, or elſe to be in the ſame Caſe as if he had made his Purgation at the Common Law. And both of theſe Conſtructions ſeem reaſonable. For as to the firſt it may be ſaid, That the Statute by ordaining that the Party ſhall be forthwith enlarged and delivered out of Priſon, under certain *Proviſoes*, ſeems plainly to imply that he ſhall be liable to no other Puniſhment, and conſequently in Effect pardons him. And as to the ſecond it may be ſaid, That the Statute ſeems only to intend to take away the Practice of making Purgation, which had been ſo much abuſed, but not the Benefit accruing to the Subject by

[e] *Vide* Kely. 37, 102.

it but rather to make it more univerſal, by giving the ſame Advantage to all by a direct and expreſs Law, attended with no Inconvenience, which before ſome only gained by an uſurped Practice, very frequently abuſed, and highly derogatory from the Honour of the Common Law. But [a] Sir *Edward Coke* is of Opinion, That it ſhall enure by way of Purgation in Reſpect of ſuch Perſons only who might be admitted to make their Purgation before the Statute, and in Reſpect of others by way of Pardon. And [b] *Hobart* argues, That becauſe many Offenders before the Statute might have their Clergy, who yet could not be diſcharged by making their Purgation; and the Statute intends that all in general who are admitted to their Clergy ſhall be diſcharged, *&c.* And alſo becauſe all Purgations diſcredited a Trial at Law, therefore is it not reaſonable to intend that the Statute meant that ſuch a Diſcharge ſhould enure by way of a Purgation, but only by way of a Statute-pardon. But to this it ſeems a reaſonable Anſwer, That it doth by no Means follow, that becauſe the Statute intended that ſuch Diſcharge ſhould extend to Perſons who could not have the Benefit of a Purgation, therefore it did not intend that it ſhould have the Effect of a Purgation; neither doth it ſeem to follow, That becauſe a Purgation diſcredited the Acts of a Jury, therefore ſuch a Diſcharge, if it have to ſome Purpoſes the ſame Effect as a Purgation, muſt diſcredit them likewiſe.

[a] 5 Co. 110. a. b.

[b] Hob 292 293.

Sect. 129. *Thirdly*, Taking the Statute to enure either by way of a Statute-pardon, or Purgation, it ſeems that it reſtores [c] the Party to his Credit, and conſequently enables [d] him to be a good Witneſs; which it hath been queſtioned whether a Pardon by the King can do, as ſhall be ſet forth more at large in the Chapter of *Pardon*. Alſo it ſeems agreed, That it gives him a Capacity to purchaſe [e] Goods, and to retain the [f] Profits of his Land, but gives him no Right to be reſtored to thoſe which he had at the Time of the Conviction, which being veſted in the King by the Forfeiture upon the Conviction, [g] ſhall not be deveſted either by a [h] Pardon or [i] Purgation. For it is certain that a Pardon never avoids [k] any precedent legal Act, as ſhall be more fully ſhewn in the Chapter of *Pardon*. Neither would the Common Law endure that Purgation, which was introduced by a Connivance, or rather tolerated than allowed, ſhould ſo far control its Proceedings.

[c] H. P. C. 241.
[d] Kely. 37. Raym. 369, 370, 380. *Vide* 1 Sid. 222. State Trials, Vol. 2. 523. Vol. 4. 379 to 386. 5 Mod. 15.
[e] H. P. C. 241. 5 Co. 110. Hob 293.
[f] 5 Co. 110. Fitz. Coro. 393. Forfeit. 34.
[g] 12 Co. 121. 5 Co. 110. b. H. P. C. 241. Co. Lit. 391. a. 3 H. 7. 12. pl. 10. Fitz. Coro. 53, 365, 356, 393. Fitz. Forfeit. 23, 34. Bro. Forf. 11. 8 H. 4. 2. b. Plow. Com. 262 b.

Sect. 130. *Fourthly*, Whether the Statute enure as a Pardon or Purgation, it [l] ſeems to take from the Spiritual Court the Power of depriving the Party for the Crime for which he has had his Clergy. For if it enure as a Pardon, ſurely it cannot be doubted but that it frees the Party from all ſubſequent Puniſhment, and conſequently from a Deprivation. And if it enure as a Purgation, which is admitted [m] to have been a good Bar to a Deprivation before the Statute, why ſhould it not have the ſame Effect as a Purgation had formerly, in this as well as in other Reſpects. Yet [n] *Watſon*, in his *Clergyman's Law*, holds an Opinion on the Authority of [o] *Croke's Second Report*, that a Clergyman may be deprived for Manſlaughter after he has had his Clergy, not obſerving, as I ſuppoſe, that what is

S. P. C. 285. 20 E. 4, 5. pl. 3. Bro. Coro. 166. But it is holden 40 E. 3. 42. pl. 23. Abridged, Fitz. Coro. 91. and Bro Forfeit. 5. That nothing is forfeited unleſs there be an Attainder, Alſo 'tis ſaid, that the Profits of Lands are not forfeited, 20 E. 4, 5. pl. 3. Bro. Coro. 166. [b] 1 Saund. 362. 1 Lev. 8. 120. [i] *Vide ſupra*, Sect. 110. Fitz. Coro. 356. Finch, 464. *Cont.* Fitz. Coro. 365. Bro. Forfeit. 113. F. N. B. 66. Lett. A. Bro. Clergy, 28. [k] 1 Saund. 362. 1 Lev. 8. 120. [l] Hob. 292, 293. 2 Roll. Ab. 305. pl. 3. [m] Cro. Jac 431. [n] Ch. 6 fol. 35, 36. in the Folio Edition. [o] Cro. Jac. 430. 431.

ſaid in this Book was only on the ſudden on a Motion for a Prohibition in the King's Bench; and that in the ſame Caſe a Prohibition was afterwards actually brought and declared on in the [a] Common Place, and Judgment thereupon ſolemnly given for the Plaintiff upon open Argument by all the Judges.

[a] Hobart 281. 2 Roll. Abr. 305. pl. 3. Alſo a Prohibition was granted in the like Caſe, 27 & 28 Eliz. Rotulo 2574. cited. Hob. 294. a.

Sect. 131. Fifthly, It ſeems agreed, that where a Perſon exempt from burning in the Hand, (either in Reſpect of his [b] Peerage or [c] Orders, or a [d] Special Pardon,) is admitted to the Benefit of his Clergy, he ſhall have the ſame Advantage of the Statute without being burnt in the Hand, as others ſhall have upon ſuch burning; for the Words of the Statute, that the Party *after ſuch Clergy allowed, and Burning in the Hand, ſhall be enlarged*, &c. ſhall have this Conſtruction, that he ſhall be enlarged, *&c.* upon burning where Burning ought to be.

[b] 1 Lev. 180.
[c] Hob. 294.
[d] 5 Co. 110. b.

Sect. 132. It is holden, That after a Man is admitted to his Clergy, it is [e] actionable to call him Felon, *&c.* becauſe his Offence being pardoned by the Statute, all the Infamy and other Conſequences of it are diſcharged.

[e] Hob 291. *Vide* Hob. 67, 81. 1 Danv. 163. pl 6. and the Chapter of Pardon.

Sect. 133. How far a Perſon convicted of a Crime within the Clergy, and praying or being ready to pray it, but not actually admitted to it, ſhall be within theſe Statutes, ſhall be conſidered. *Ch.* 37.

Sect. 134. It is enacted by 5 *Annæ* 6. *That where any Perſon ſhall be convict of Larceny, the Judges ſhall at their Diſcretion award him to the Workhouſe, or Houſe of Correction, there to be kept without Bail, not leſs than ſix Months, nor more than two Years from the Conviction; an Entry whereof is to be made of Record*, &c. *And if ſuch Offender eſcape, he ſhall be committed to ſome ſuch Houſe, there to remain not leſs than twelve Months, nor more than four Years*, &c.

Sect. 135. It is enacted by 4 *Geo.* 11. and 6. *Geo.* 23. *That where any Perſon or Perſons ſhall be convicted of Grand or Petit Larceny, or any felonious ſtealing or taking of Money, Goods, or Chattels, either from the Perſon, or the Houſe of any other, or in any other Manner, and who by the Law ſhall be intitled to the Benefit of Clergy, and liable only to the Penalties of burning in the Hand or whipping, (except Perſons convicted for receiving or buying ſtolen Goods, knowing them to be ſtolen) it ſhall and may be lawful for the Court before whom they were convicted, or any Court held at the ſame, or any * other Place with the like Authority, if they think fit, inſtead of ordering any ſuch Offenders to be burnt in the Hand, or whipt, to order and direct that ſuch Offenders ſhall be ſent, as ſoon as conveniently may be, to ſome of his Majeſty's Colonies, and Plantations in* America, *for the Space of ſeven Years: And that Court before whom they were convicted, or any ſubſequent Court, with like Authority as the former, ſhall have Power to convey, tranſfer, and make over ſuch Offenders, by Order of Court, to the Uſe of any Perſon or Perſons who ſhall contract for the Performance of ſuch Tranſportation, to him, or them, and his and their Aſſigns, for ſuch Term of ſeven Years. And where any Perſons ſhall be convicted of any Crimes for which they are excluded their Clergy, and the King ſhall extend his Mercy to them upon Condition of Tranſportation to any Part of* America, *and ſuch Intention of Mercy be ſignified by a Principal Secretary of State, it ſhall be lawful for any Court, having proper Authority to allow ſuch Offenders the Benefit of a Pardon, to order and direct the like Tranſportation, to any Perſon who will contract for the Performance thereof) of any ſuch Offenders, as alſo of any Perſon convict of receiving or buying ſtolen Goods, knowing them to be ſtolen, for the Term of fourteen Years, in Caſe ſuch Condition of Tranſportation be general, or elſe for ſuch other Term as ſhall be made Part of ſuch Condition; and ſuch Perſon ſo contracting, and his Aſſigns, ſhall have an Intereſt in the Service of the ſaid Offenders for ſuch Term of Years,*

* *Viz.* by 6. Geo ch. 23

And if any ſuch Offender return into Great Britain *or* Ireland *before the End of his Term, he ſhall be liable to be puniſhed as any Perſon attainted of Felony, without the Benefit of Clergy,* &c. *Provided, that the King may pardon and diſpenſe with any ſuch Tranſportation, and allow of the Return of ſuch Offender, paying his Owner at the Time, ſuch Sum as ſhall be adjudged reaſonable by any two Juſtices of the Peace where ſuch Owner dwells; and where any ſuch Offenders ſhall be tranſported, and ſhall have ſerved their Terms, ſuch Services ſhall have the Effect of a Pardon, as for the Crimes for which they were tranſported,* &c.

Sect. 136. And it is farther enacted, That *every ſuch Perſon to whom any ſuch Court ſhall order any ſuch Offenders to be transferred or conveyed ſhall before ſuch Offenders ſhall be delivered to them, contract with ſuch Perſon as ſhall be appointed by ſuch Court, and ſhall give ſufficient Security to the Satisfaction of ſuch Court, for the tranſporting ſuch Offenders to ſome Plantation in* America, *to be ordered by ſuch Court, and the Procuring an authentick Certificate from the Governor or Chief Cuſtom-Houſe Officer of the Place, of the Landing of ſuch Offenders,* &c. *and their not returning by the wilful Default of ſuch Contractor.*

Sect. 137. And it is farther enacted by 6 Geo. 23. *That the Court may nominate two or more Juſtices of the Peace for the Place where ſuch Offenders ſhall be convicted, who ſhall have Power to contract with any Perſon or Perſons for the Performance of the Tranſportation of ſuch Offenders; and to order ſuch and the like Security as the ſaid former Act directs to be taken by Order of Court, and to cauſe ſuch Felons to be delivered to ſuch Contractors; which ſaid Contracts and Security ſhall be certified by the ſaid Juſtices to the next Court held with the like Authority, to be filed,* &c.

Sect. 138. And it is farther enacted, *That all Charges in or about ſuch Contracts,* &c. *ſhall be born by each County,* &c. *for which the Court was held; and that the reſpective Treaſurers ſhall pay the ſame. And that all Securities for Tranſportation ſhall be by Bond in the Name of the Clerks of the Peace,* &c. *and the Money recovered ſhall be to the Uſe of the reſpective Counties,* &c.

Sect. 139. And it is farther enacted, *That the Perſons ſo contracting,* &c. *may carry ſuch Offenders towards the Sea Port,* &c. *and that if any Perſon ſhall reſcue ſuch Offenders, or aid them in making their Eſcape,* &c. *they ſhall be deemed guilty of Felony, without Clergy. And that if any Felon ordered for Tranſportation ſhall be afterwards at large within any Part of* Great Britain, *without ſome lawful Cauſe before the Expiration of his Term, and be lawfully convict thereof, he ſhall ſuffer Death without Clergy. And may be tried before Juſtices of Aſſiſe,* Oyer *and* Terminer, *or Gaol-Delivery, for the County where he ſhall be apprehended,* &c. *or from whence he was ordered to be tranſported,* &c. *and that the Clerk of Aſſiſe, and Clerk of the Peace, where ſuch Orders of Tranſportation ſhall be made, ſhall on Requeſt of the Proſecutor,* &c. *certify briefly a Tranſcript containing the Tenor of every Indictment, Conviction and Order of Tranſportation to the Juſtices of Aſſiſe,* &c. *which ſhall be a ſufficient Proof of ſuch Conviction and Order of Tranſportation.*

3

CHAP.

CHAP. XXXIV.

Of Pleas in Abatement.

AND now I come to *Pleas in Abatement*, which having already conſidered ſo far as they particularly relate to Appeals, Indictments, and Informations, in the ſeveral Chapters concerning them, and ſhewn in *Chap.* 23. from *Section* 101. to *Section* 126. what Pleas are good in Abatement of an Appeal; and in *Sections* 126, and 135 That an Appellee may plead as many of them as he pleaſes, unleſs they be repugnant to one another, and afterwards take the General Iſſue; and in *Chap.* 25. *Sect.* 12. That the ſame Matters may be pleaded to on Appeal on an Arraignment thereon at the Suit of the King, as on an Arraignment at the Suit of the Party, and in the ſame Chapter, *Sections* 70, 71, 72, 73. what Miſnoſmers, *&c.* may be pleaded in Abatement of an Indictment; and in *Chap.* 26. *Sections*, 63, 64, 65. What Pleas are good in Abatement of an Information; and having conſidered Demurrers in Abatement, *Chap.* 31. *Sect.* 5, 6, 7. I ſhall in this Place take Notice only of the following Particulars;

Sect. 1. Firſt, That it hath been holden [a] that it is no good Plea in Abatement of an Indictment, as it is of an Appeal [b], or Information, [c] that there is another Indictment againſt the Defendant for the ſame Offence. But in ſuch * a Caſe the Court in Diſcretion will quaſh the firſt Indictment if any Fault can be found in it.

Sect. 2. Secondly, That where an Indictment of a Capital Crime is abated for a Miſnoſmer of the Defendant's [d] Chriſtain Name, the Court will not diſmiſs him, but cauſe him to be indicted *de novo* [e] by his true Name, and arraign him again on ſuch new Indictment. For I take it to be ſettled [f] at this Day, That regularly a Defendant ſhall not be diſmiſſed for an Inſufficiency in an Indictment or Appeal for a capital Crime.

Sect. 3. Thirdly, That a Defendant appearing *Gratis*, and by Attorney to an Information, may [g] plead a Miſnoſmer in Abatement, as well as if he had appeared in proper Perſon; for if he be not the Perſon intended, the Attorney General may reject the Plea, and ſign Judgment on a *nihil dicit*; but if he accept the Plea, he thereby admits him that pleads it to be the Perſon concerned to make a Defence, and therefore ſhall not afterwards ſay that it doth not appear but that the Plea might be put in by a Stranger.

[a] 1 Jon. 199. Cro. Ca. 147.
[b] Ch 23. Sect. 124.
[c] Ch. 26 Sect. 63.
* Cro. Car. 147. 1 Jo. 199.
[d] *Vide* Ch. 25. Sect. 70, 71.
[e] H.P.C. 247. Cro. Ca. 371, 372.
[f] *Vide* Ch. 23. Sect. 4 131. Ch. 25. Sect 9. 10, 11. *Cont.* 11 H. 4. 41. pl 7. Fitz Miſnoſmer, 18. Coro. 88. Bro. Miſnoſ. 23.
[g] *See* the Books cited Ch. 23. Sect. 11. Lett. a. [h] Adjudged, Trin. 4 Geo. between the King and Weſtby

CHAP. XXXV.

Of the Plea of Autrefoits acquit.

PLeas in Chief are either,

1. In Bar, or
2. The General Iſſue.

As to the Pleas in Bar, having ſhewn already, *Chap.* 23. *Sect.* 128. what Pleas of this Kind to an Appeal are good, which ſhew that the Plaintiff had never any Right to bring it; and in *Sections*, 129, 130, 131. where a *Retraxit*, Nonſuit, Diſcontinuance, or Abatement, of one Appeal may be pleaded in Bar of another; and in *Section* 132. where the Bringing of an Appeal againſt one Perſon will be a Bar to a ſubſequent one againſt another Perſon not named in the Firſt; and in *Section* 133. where a Releaſe will bar an Appeal; and in *Section* 134. where an Appellant may be barred as to one Appellee, and continue his Suit againſt the Reſt; and in *Section* 135. what Pleas of this Kind are conſiſtent with the General Iſſue, and in *Ch.* 26. *Sect.* 64, 65. what is a good Plea in Bar to an Information, I ſhall in this Place only conſider,

1. The Plea of *Autrefoits acquit.*
2. The Plea of *Autrefoits attaint* or *convict.*
3. The Plea of a Pardon.

Sect. 1. And firſt of the Plea of *Autrefoits acquit*, which is grounded on this *Maxim*, [a] That a Man ſhall not be brought into Danger of his Life for one and the ſame Offence, more than once. From whence it is generally taken, by all the Books, [b] as an undoubted Conſequence, that where a Man is once found Not guilty on an Indictment or Appeal free [c] from Error, and [d] well commenced before any [e] Court which hath Juriſdiction of the Cauſe, he may by the Common Law in all [f] Caſes whatſoever plead ſuch Acquittal in Bar of any ſubſequent Indictment or Appeal for the ſame Crime. But for the more diſtinct Underſtanding hereof I ſhall particularly conſider,

1. How far he who pleads this Plea muſt be ready to produce the Record of his former Acquittal.
2. Where a Variance between the Record of the former Acquittal and the Indictment or Appeal to which it is pleaded, may be helped.
3. How far other Diſcharges of a former Proſecution have the ſame Effect as an Acquittal by Verdict.

[a] S. P. C. 105. Lett. A. 4 Co. 40 a. 4 C. 2. 47. a. 9 H. 7. 19. pl. 14. Fitz. Pard. 3. Bro. Appeal, 9, 12, 89. Coro. 11. Cromp. Juſt. 111. pl. 1.

[b] *See* the Authorities cited to all the other Parts of this Chapter, and 5 E. 3. 25. pl. 36.

[c] *Vide infra*, Sect. 8.

[d] *Vide infra*, Sect. 9.

[e] *Vide infra*, Sect. 10.

[f] 25 E. 3. 44. pl. 16. Abridged, Fitz. Coro. 136. 41 Aſſ. 9. Abridged, Fitz. Coro. 220. Bro. Coro. 120 or 121. 2 Leon. 161. *Vide infra*, Sect. 14, 15. 47 E. 3. 16. pl. 27. Abridged, Fitz. Coro. 104. Bro. Appeal, 14.

4. How far it is neceſſary that the Indictment or Appeal in the Record of Acquittal be free from Error, and well commenced.

4. Whether an Acquittal in any Court which has a Juriſdiction be ſufficient for this Purpoſe.

6. How far an Acquittal of a Perſon as Principal will bar a ſubſequent Proſecution againſt him as Acceſſary, *& e converſo*, how far an Acquittal of a Man as Acceſſary will bar a Proſecution againſt him as Principal.

7. How far the Law is altered in theſe Reſpects as to an Indictment of Death, by 3 *H.* 7. 1.

Sect. 2. As to the firſt Particular, *viz.* How far he who pleads this Plea muſt be ready to produce the Record of his former Acquittal, I take it to be [a] agreed, That ſuch Plea being a Plea in [b] Bar, and the Record not in the Cuſtody of, nor the Property of him that pleads it, there is no need to plead with a *profert ſub pede ſigilli*; but the Defendant ſhall have a [c] Day given him to bring it in. And there is in *Brook* a Note of a [d] Caſe in the Time of *Edw.* 3. wherein a Plea of *Autrefoits acquit* was diſallowed, becauſe the Defendant ſhewed forth the Record when he pleaded it; and the Book gives this Reaſon, That *the Record ought to come before the Court by Writ.*

Sect. 3. As to the ſecond Particular, *viz.* Where a [e] Variance between the Record of the former Acquittal, and the Indictment or Appeal to which it is pleaded may be helped? I take it to be clear, That if the Nature of the Crime be in [f] Subſtance the ſame a Variance may generally be helped by proper [g] Averments. And therefore if a Man be named in the firſt Record *Yeoman*, and in the ſecond *Gentleman*, yet it ſeems [h] clear, That he may make good the Variance, with an Averment that he only was meant under each Addition. Alſo if a Man be acquitted of an Indictment of Murder or Robbery *cujuſdam* [i] *ignoti*, and afterwards arraigned on an Indictment for the ſame Fact, deſcribing the Perſon killed or robbed by his proper Name; yet it hath been holden, [k] That he may plead the Acquittal in Bar, averring that both the Indictments are for the very ſame Felony. Alſo if the Perſon killed be deſcribed by his proper Name and Surname in the firſt Indictment, and by the ſame Chriſtian, but by a different Surname in the ſecond, yet it hath been [l] adjudged, That he may plead an Acquittal on the firſt in Bar of the ſecond Indictment, averring that the Perſon ſo differently named was one and the ſame Perſon. But it ſeems [m] adviſeable in ſuch Caſe to add a farther Averment, That the Perſon killed was known as well by the Name in the firſt, as by that in the ſecond Indictment; for if he were never known by the Name in the firſt Indictment, I much queſtion whether the Defendant could be found guilty upon it; and if he could not, it ſeems plain that his Life having never been in Danger by it, the Acquittal upon it [n] cannot be any Bar to a ſubſequent Indictment. But if there be no other Variance between the firſt and ſecond Indictment but only as to the [o] Times when the Crime is alledged to have been committed, or as to the [p] Places being both in the ſame County, there is no Doubt but

[a] S. P. C 105. Lett. A. H. P. C. 245. Fitz. Coro. Fitz. monſtrans de faits 33. *Vide* Raſt. Entr. 385. pl. 4 ſeems contrary.

[b] Co Litt. 128. *See* the Chapter of Pardon.

[c] Co Litt. 128 b. Fitz. Coro. 232.

[d] Bro. Coro. 218. But 26 Aſſ. pl. 15. Abridged, Fitz. Coro. 189.

[e] 11 H. 4 41. pl. 6. Abridged, Fitz. monſtrans de faits, 128. Bro. Coro. 29. 9 H. 7. 19. pl. 14. Abridged, Bro. Appeal, 89. ſeems contrary.

[f] *Vide* 2 Keb. 725. pl. 71. [g] 14 H. 7. 2. pl. 8. S. P. C. 168. Lett. B.

[h] S. P. C. 105. H. P. C. 246. [i] *Vide* Keil. 58. a. [k] *Vide ſupra*, ch. 25. ſect. 73. Keil. 25. b. Dy. 285. pl. 38. *Vide* Fitz. Coro. 159. [l] 26. Aſſ. pl. 15. Abridged, Bro. Coro. 98. Fitz. Coro. 189. Crompt. Juſt. 111 pl. 12. S. P. C. 105 Lett. C. *Vide* 11 H. 4. 41. pl. 6. Abridged, Fitz. monſtrans de faits, 128. Bro. Variance, 31. Coro. 29. 1 Rol. Rep 368. pl 22. [m] *Vide* H. P. C. 246. S. P. C. 105. Lett. C. Crompt. Juſt. 111. pl. 12. [n] *Vide ſupra*, ſect. 1. *& infra*, ſect. 8, 9, 10. [o] Dy. 285. pl. 38. H. P. C. 246. *Vide* 22 Aſſ. pl. 55. Abridged, Fitz. Coro. 179. S. P. C. 105. Lett. C. 11 H. 4. 41. pl. 6. Abridged, Bro. Coro 29. Variance, 31. Fitz monſtrans de faits, 128. 25 Ed. 3. 44. pl. 16. Abridged, Fitz Coro. 136. 3 Aſſ. pl 15. Abridged, Fitz. Coro. 166 Crompt. Juſt. 111. pl. 13. [p] H. P. C. 246. S. P. C. 105. Lett. C. 106. Lett. A.

that regularly it may be helped by an Averment, that the Felony in both is one and the ſame, becauſe neither the Time nor Place laid in an Indictment, *&c.* are material upon Evidence, ſo that the Defendant be proved guilty at any other [a] Time before the Indictment, or at any other Place [b] within the County. And it is holden by [c] *Staundforde*, That an Acquittal of Murder in one County may be pleaded in Bar of a ſubſequent Indictment in another County for the ſame Murder. But this ſeems queſtionable, becauſe all Indictments are local; and therefore if the firſt were laid in an improper County, the Defendant could not be found guilty upon it, and conſequently was in no Danger of his Life, and therefore [d] cannot plead an Acquittal upon it in Bar of a ſubſequent Indictment in the proper County: But if the firſt Indictment were in the proper County, the ſecond cannot but be in an improper one, and conſequently the Defendant not being liable to be found guilty upon it, cannot be ſaid to be reduced by it to the Inconvenience of being twice brought into Danger of his Life for one and the ſame Offence, the Avoiding of which Inconvenience [e] ſeems the chief Inducement for which the Law allows the Plea of *Autrefoits acquit*.

[a] H.P.C.264. Salk. 188.
[b] *See* the Chapter of Evidence; and H.P.C. 264.
[c] S.P.C.105. Lett. C. *See* Crompt. Juſt. 12. pl. 9.
[d] *Vide* Sect. 1, 8, 9, 10.
[e] *Supra*, Sect. 1, 8, 9, 10.

Sect. 4. But if a Man ſteal Goods in one County, and then carry them into another, in which Caſe it is certain [f] that he may be indicted and found guilty in either, it ſeems very reaſonable, that an Acquittal in the one County for ſuch Stealing may [g] be pleaded in Bar of a ſubſequent Proſecution for the ſame Stealing in another County, becauſe the Defendant may be altogether as well convicted in the one County, as in the other; and therefore if he could not bar the ſecond Proſecution by the Acquittal on the firſt, his Life would be twice in Danger from that which is in Truth but one and the ſame Offence, and only conſidered as a new one by a mere Fiction or Conſtruction of Law, which ſhall hardly [h] take Place againſt a Maxim made in Favour of Life. And as to the [i] Objection, That the Jurors of the one County can take no Manner of Conuſance of what is done in the other, and conſequently cannot try whether the Felony whereof the Party is indicted in the ſecond County be the very ſame with that of which he is acquitted in the firſt, it may be anſwered, That it appears from the old Books, that anciently the Judges often ſatisfied themſelves of the Truth of an Averment that the Offences in both Indictments were the ſame, by [k] Witneſſes, or by an [l] Inqueſt of Office, without putting it to a Trial by Jury, upon an Iſſue joined, on the Denial thereof by the Proſecutor, which ſeems [m] to have been of later Years the uſual Method. But granting, that it is to be tried by ſuch Jury, I do not ſee how it follows, That becauſe they cannot convict a Defendant upon Evidence of a Fact done out of their own County, therefore they cannot collaterally inquire whether an Offence laid in their own County be in Subſtance the ſame with that done in another, ſince it cannot be denied but that in Abundance of Caſes a Jury of one County may receive Evidence of Facts done in another. To which may be added, That in the *Year-Book* of 4 *H.* 7. 5. *pl.* 1. which is the [n] Chief Authority for the contrary Opinion, it is admitted that an Acquittal on an Appeal of Larceny in the one County, may be pleaded in Bar of a ſubſequent Appeal in the other; becauſe ſuch an Appeal intitles the Plaintiff to a Reſtitution of the Goods, whereof being once

[f] *Supra*, Ch. 23. Sect. 47. Ch. 25. Sect. 36. and B. 1. ch 33 ſect 9.
[g] 41 Aſſ pl. 9. Fitz. Coro. 220. But this is left doubtful, S.P.C. 105, Lett. C. 106. Lett. A. H.P.C. 246. Crompt. Juſt. 112. pl. 9. Bro. Coro. 139 or 140.
[h] 4 H. 7 5 pl 1. Fitz Coro. 62.
[i] *Vide ſupra*, ch. 18. ſect. 13. and ch. 19. ſect. 25. and ch. 29. ſect. 35.
[k] 4 H. 7. 5 pl 1. Fitz. Cor. 62.
[l] 26 Aſſ. pl. 15. Abridged, Fitz. Coro. 189. Bro. Coro 98. 41 Aſſ. pl. 9. Abridged Fitz. Coro. 220.
[m] 3 Aſſ. pl. 15. Abridged, Fitz. Coro. 166. *See* the ſixth Section.
[n] 9 H 7. 19. pl. 14 Abridged, Bro. Appeal, 89. [n] *Vide* Bro. Coro. 139 or 140. Fitz. Coro. 62. S.P.C. 106. H.P.C. 246.

barred he is barred for ever. But granting this to be a good Reaſon, which yet it ſeems difficult to make out, the very ſame may be ſaid at this Day as to an Indictment, which ſince * 21 *H.* 8. 11. intitles the Proſecutor to a Reſtitution alſo. Beſides, taking the Law as it ſtood formerly, why may not a Jury of one County try whether a Felony therein indicted, be the ſame whereon the Party was before acquitted in another County, in the Caſe of a ſecond Indictment, as well as of a ſecond Appeal?

* *Vide ſupra*, ch 23 ſect. 55, 56.

Sect. 5. It ſeems [a] that it is no Plea to an Appeal of Larceny, That the Defendant hath been found Not guilty in an Action of Treſpaſs brought againſt him by the ſame Plaintiff for the ſame Goods; for Larceny and Treſpaſs are entirely different: Alſo it ſeems a general [b] Rule, That a Bar in an Action of an inferior Nature, will not bar another of a ſuperior. Yet it ſeems, [c] That an Acquittal in an Indictment of Murder, will be a good Bar of an Indictment of Petit Treaſon, becauſe both Offences are in Subſtance the ſame. But it is clear, That an Acquittal of one Felony is [d] no Manner of Bar to a Proſecution for another in Subſtance different, whether committed before or at the ſame Time with that of which he is acquitted; and therefore if a Man commit a Burglary, and ſteal the Goods of *A* and *B*. and be indicted for the Burglary, and ſtealing the Goods of *A*. and acquitted; it hath been adjudged, [e] that he cannot plead ſuch Acquittal to an Indictment for ſtealing the Goods of *B*. But it ſeems agreed, That he may plead it to a ſecond Indictment for the Burglary.

[a] 2 Ric. 3 14 a. Bro. Appeal, 121
Vide infra, ch 36 ſect 7.
[b] Co. Litt. 146. a. 2 Ri 3. 14, 15.
[c] 3 Inſt. 213. H. P. C 246.
[d] S P.C. 105. Lett A. H. P. C 244. Bro. Coro 11.
[e] Kely 30, 52.

Sect. 6. As to the third Particular, *viz.* How far other Diſcharges of a legal Proſecution have the ſame Effect as an Acquittal by Verdict: Having ſhewn already in the [f] Chapter of *Appeals*, how far the Diſcharge of one Appeal will bar another, I ſhall only add in this Place, That notwithſtanding the [g] Allowance of a Pardon, or any other Bar of one Indictment, ſeems to be pleadable in Bar of another; and by the like Reaſon, whatever hath been allowed a good Bar of one Appeal may be pleaded in Bar of another: Yet it ſeems that no other Diſcharge of an Indictment will bar an Appeal and no other Diſcharge of an Appeal will bar an Indictment, but only an [h] Acquittal by Battel, or an Acquittal by Verdict on the General Iſſue, finding the Defendant's [i] Innocence; as where it finds him Not guilty on ſuch an Iſſue, on an Indictment or Appeal of any Felony whatſoever; or where it finds † him guilty of Homicide *ſe defendendo*, or *per infortunium*, on an Indictment of Murder. But it hath been adjudged, [k] That where a Demurrer by an Appellant to a Tender of Battel, or to a Plea, hath been adjudged againſt him, yet the Appellee may be afterwards arraigned at the Suit of the King.

[f] 1 Ch. 23. ſect. 129, 130, 131.
[g] 21 H. 4. 41. pl. 6. Abridged, Fitz mon. ſtrans de faits, 128 Bro. Coro 29. Appeal, 33. Variance, 31. *Vide* S. P. C. 206. Lett B.
[h] *See* the next Section.
[i] S.P.C. 169 a.
† 3 Inſt. 213. Crompt Juſt. 111. pl. 6. 4 Co. 46 b.
[k] Dy. 120. pl. 13. Crompt Juſt. 112. pl. 18.

Sect. 7. It is ſaid by Sir *Matthew Hale* in the [l] Chapter of *Autrefoits acquit*, That an Acquittal by Battel in an Appeal is no Bar of an Indictment. But I find no other Authority to this Point but a Note in *Fitzherbert* [m] of a Caſe to this Purpoſe in the Time of King *Edward* the Second. To which it may be anſwered, That this Matter is only ſpoken of incidently, and not adjudged. And that *Staundford* in the ſame Place [n] where he cites it, makes a *Quære*, whether it be Law or not. And it is expreſly holden by *Bracton*, [o] That an Appellee who vanquiſhes the Appellant in Battel, ſhall go quit not only from all other Appeals, *but alſo from the Suit of the King; becauſe by this he clears his Innocence againſt all, in the ſame Manner, as if he had put himſelf upon his Country and his Country had acquitted him.* Alſo it is admitted by Sir *Matthew Hale* in the

[l] H.P.C. 245
[m] Fitz Coro. 375.
[n] S.P.C. 106. Lett. D.
[o] *Lib.* 3 ch. 19. ſect. 8.

[a] Chapter

[a] Chapter of *Indictments*, That if an Approver be vanquiſhed in Battel joined on his Appeal, he ſhall be hanged, and the Appellee diſcharged, without being arraigned at the Suit of the King. Alſo it hath been [b] adjudged, That upon ſuch a Vanquiſhment the Appellee is intitled to his Damages againſt the Appellant, as being *legitimo modo acquietatus*, which ſeems [c] neceſſarily to imply that he is finally acquitted as well againſt the King as againſt the Party.

Sect. 8. As to the fourth Particular, *viz.* How far it is neceſſary that the Indictment or Appeal in the Record of Acquittal be free from Error, and well commenced: I take it to be ſettled [d] at this [e] Day, That where-ever the Indictment, or Appeal, whereon a Man is acquitted, is ſo far erroneous (either for want of Subſtance in ſetting out the Crime, or of Authority in the [f] Judge before whom it was taken,) that no good Judgment could have been given upon it againſt the Defendant, the Acquittal can be no Bar of a ſubſequent Indictment or Appeal, becauſe in Judgment of Law the Defendant was never in Danger of his Life from the firſt; for the Law will preſume *prima facie* that the Judges would not have given a Judgment, which would have been liable to have been reverſed. But if there be no Error in the Indictment or Appeal, but [g] only in the Proceſs, it ſeems agreed, That the Acquittal will be a good Bar of a ſubſequent Proſecution, notwithſtanding ſuch Error; the beſt Reaſon whereof ſeems to be this, That ſuch Error is [h] ſalved by the Appearance.

Sect. 9. It ſeems agreed, [i] That an Acquittal on an Appeal brought by one who had no Right to bring it, as by any other Woman [k] except the Wife of the deceaſed, or by any other Man [l] except the next Heir, is no more a Bar to an Appeal by another Appellant, or to an Indictment, than an Acquittal on an inſufficient Appeal or Indictment would have been.

Sect. 10. As to the fifth Particular, *viz.* Whether an Acquital in any Court which has a Juriſdiction, be ſufficient for this Purpoſe: Notwithſtanding the [m] Opinion in the Book of *Aſſizes*, That no Acquittal in any other Court can be any Bar to a Proſecution in the Court of King's Bench, becauſe that is the Higheſt Court, I take it to be ſettled [n] at this Day, That an Acquittal in any Court whatſoever, which has a Juriſdiction of the Cauſe, is as good a Bar of any ſubſequent Proſecution for the ſame Crime, as an Acquittal in the Higheſt Court. And therefore it hath been adjudged, [o] That an Acquittal of Murder at a Grand Seſſions in *Wales*, may be pleaded to an Indictment for the ſame Murder in *England*. For the [p] Rule is, That a Man's Life ſhall not be brought into Danger for the ſame Offence more than once.

[a] H.P.C. 200. *Vide ſupra*, ch. 25. ſect. 10. Lett. t. 21 H. 6. 34. pl. 1. S.P.C. 148. Lett B.

[b] Fitz. Coro. 98. S. P. C. 168. Lett. E.

[c] *Supra*, ch. 23. ſect. 140. S.P.C. 169. *Supra*, ch. 23. ſect. 140.

[d] 4 Co. 45. a. 47. a. H. P. C 244, 245. 3 Inſt. 214. Fitz Coro. 454.

[e] *Supra*, ch 23 ſect 140. Crompt. Juſt. 112. pl. 14, 15, 16, 19. 20 H 11. b. 12. a.

[f] 9 H. 5 2. pl 7. Abridged, Bro Appeal, 39. Coro. 35. Fitz Cor. 68

[g] But Staundforde ſeems to be of Opinion, That an Acquittal on an erroneous Appeal, is a good Bar to an Indictment till it be reverſed by Error. S. P. C. 106. Lett. B. cited in Crompt. Juſt. 112. pl. 15.

[h] But this ſeems repugnant to all other Books,

and to what is ſaid by Staundford himſelf, in the very ſame Page. Indeed in the ſecond Edition of Hale's Pleas of the Crown, there is a Note to the ſame Effect with what is ſaid in Staundforde; but this is manifeſtly miſprinted, and the Word *Acquit* put for *Attaint*. [i] Crompt. Juſt. 111. pl. 4, 5. *Supra*, ch. 9. ſect. 15, 16. 4 Co. 46. [k] Fitz. Coro. 444. 9 H. 5. 2. pl. 7. Abridged, Bro. Appeal, 39. Coro. 35. Fitz. Coro. 68. S P. C. 106. Lett. B. 169 Lett A. Crompt. Juſt. 111. pl. 15. [l] *Supra*, ch. 7. ſect. 107. [m] 20 H 7 11. b. 12. a. 21 H. 6. 28. b. 29. a. Abridged, Bro. Appeal, 41. Crompt. Juſt. 112. pl. 14. S. P. C. 106. Lett. B. H. P. C. 245. [n] *Supra*, ch. 23. ſect. 36, 37, 38. [o] *Supra*, ch. 23. ſect. 39, 40, 41, 42. [p] 9 Aſſ. pl. 15. [q] 4 Co. 45. b. Raſt. Ent. 385. pl. 4. 11 H. 41. pl. 6. Abridged, Fitz. monſtrans de faits, 128. 25 E. 3. 44. pl. 16. Abridged, Fitz. Coro. 136. 41 Aſſ. pl. 9. Abridged, Bro Coro. 120 or 121. Crompt. Juſt. 112. pl. 8. Fitz. Coro. 220. [r] 1 Lev. 118. 1 Sid. 179. *Supra*, ch. 25. ſect. 39, 40. *Supra*, ſect. 1, 8, 9.

Sect. 11. As to the ſixth Particular, *viz.* How far an Acquittal of a Perſon as Principal will bar a ſubſequent Proſecution againſt him as Acceſſary; *& è converſo*, how far an Acquittal of a Man as Acceſſary will bar a Proſecution againſt him as Principal: It ſeems to be [a] ſettled at this [b] Day, That an Acquittal of a Man as Principal is no Bar of a ſubſequent Proſecution againſt him as Acceſſary after the Fact, becauſe ſuch Acquittal clears him only of the Charge of having committed the Fact, which being a Crime entirely different from that of receiving him that hath committed it, there ſeems no more Reaſon that the Acquittal of it ſhould bar a Proſecution for the Receipt, than if there were Offences that bore no Manner of Relation to one another. But it is [c] holden in many Books of good Authority, (contrary to what is admitted [d] to have been the ancient Law,) that the Acquittal of a Man as Principal is a good Bar of a ſubſequent Proſecution againſt him as acceſſary before; for it is ſaid, That ſuch an Acceſſary is in ſome Meaſure [e] guilty of the Fact, and therefore that an Acquittal which clears a Man from being guilty of the Fact, doth by Conſequence clear him from being ſuch an Acceſſary. And this ſeems reaſonable upon the Suppoſition that a Man may be found guilty of an Indictment againſt him as Principal, upon Evidence which only proves him to have been an Acceſſary before. But if a Man cannot be found guilty of ſuch an Indictment upon ſuch Evidence, as it is ſtrongly [f] holden that he cannot, it may with great Reaſon be ſaid, that the Acquittal of him as Principal no way acquits him as Acceſſary before; for if ſo, he might ſave himſelf by a mere Slip in the Indictment, and bar all other Proſecutions by an Acquittal on a Trial, which in Truth never brought him into [g] Danger of his Life. And it is upon this Suppoſition, as I ſuppoſe, that it is holden in ſome [h] Books, contrary to thoſe abovecited, that one who has been acquitted as Principal may be tried again as Acceſſary before, as well as after.

Sect. 12. But it ſeems [i] agreed, that an Acquittal of a Man as Acceſſary before or after, is no Bar to a ſubſequent Proſecution againſt him as Principal.

Sect. 13. Alſo it hath been holden, that an Acquittal of a Man as Acceſſary to one Principal, will not ſave him from being arraigned afterwards as Acceſſary to another in the ſame Fact; but for this I ſhall refer to *Chap.* 22. *Sect.* 46.

Sect. 14. As to the ſeventh Particular, *viz.* How far the Law is altered in theſe Reſpects as to an Indictment by 3 *H.* 7. 1. It ſeems agreed, [k] That by the Common Law an Acquittal on an Indictment might be pleaded in Bar of an Appeal of Death, in the ſame Manner as an Acquittal of any other Felony might be pleaded in Bar of a ſubſequent Proſecution, and therefore in Favour of Appeals a general Practice was introduced, [l] not to try any Perſon on an Indictment of Death, till after

[a] Kely. 25, 26. H. P. C. 244. S. P. C. 105. Lett. A. Cromp. Juſt. 42. pl. 18. 112. pl. 7. 27 Aſſ. pl. 10. Abridged, Fitz. Coro. 200. Bro. Coro. 105. Lamb. B. 2. ch. 7.

[b] *Cont.* Fitz. Coro. 282.

[c] S. P. C. 44. Lett. C. 105. Lett. A. B. Kely. 25, 26. Lamb. B. 2. ch. 7. H. P. C. 224. 244. Crompt. Juſt. 42. pl. 18. 112. pl. 7. But the Principal Authority in the old Book is 2 E. 3. 20 pl. 14. Abridged, Fitz Coro. 150. which ſeems inconſiſtent with it ſelf; for the Words are for an Example, that a Man may in ſuch Caſe be twice put to anſwer, We award that you go quit. And Fitz Coro. 282. is contradicted by all other Books; for it ſays, That a Man acquitted as Principal, cannot be ſo much as arraigned as an Acceſſary after. And 27 Aſſ pl. 10 Abridged, Bro. Coro. 105. and Fitz. Coro. 200. extend only to the Caſe of an Acceſſary after. And 8 H. 5. 6. pl. 26. Abridged, Fitz. Coro. 463. expreſly goes upon the Suppoſition, that a Man may be found guilty as Principal, upon Evidence which only proves him Acceſſary.

[d] S. P. C. 105 Lett. B. Fitz. Coro. 424. [e] *Vide ſupra*, ch. 29 Sect. 13, 14. [f] H. P. C. 266. Keilw. 107. Daliſ. 14. [g] *Vide ſupra*, Sections, 1, 8, 9, 10. [h] Keilw. 107. Daliſ. 14. Lamb. B. 2. ch. 7. [i] Crompton's Juſtice, 43. pl. 30. Bro Coro. 186. [k] *Vide ſupra*, ch. 25. Sect. 15. 21 H. 6 28, 29. Abridged, Bro. Appeal, 41. 44 E. 3. 25. pl 36. Abridged, Bro. App. 12. H. P. C. 244, 245. 47 E. 3. 16. pl 27 Abridged, Fitz. Coro. 104. Bro. Appeal, 33, 35, 102. 2 Leon. 161. But this is made a Quære, 17 Aſſ pl. 1. [l] *Vide ſupra*, ch. 25. Sect. 15. Crompt. Juſtice, 111. pl. 2, 3. Kely. 95, 96, 97, 98. 2 Leon. 161. H. P. C. 244, 245. S. P. C. 107. Lett. A. Bro. Appeal, 9. 32 Aſſ pl. 8. Abridged, Bro. Appeal, 119. 45 E. 3. 25. pl. 36. Abridged, Bro. Appeal, 12. 11 H. 4. 94. pl. 56. Abridged, Bro. Appeal, 36. 41 Aſſ. pl. 14. Abridged Bro. Appeal, 75.

the Year and Day had been paſſed, by which Time it often happened that all was forgotten; and *for Reformation thereof it is enacted, That if any Man be ſlain or murdered, and therefore the Slayers, Murderers, Abettors, Maintainers and Comforters of the ſame, be indicted, that the ſame Slayers and Murderers, and all other Acceſſaries of the ſame, be arraigned and determined of the ſame Felony and Murder at any Time at the King's Suit, within the Year after the ſame Felony or Murder done, and not tarry the Year and Day for any Appeal to be taken for the ſame Felony or Murder. And if it happen any Perſon named as Principal or Acceſſary to be acquitted of any ſuch 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* [a] *either to remit him again to the Priſon, or elſe to let him to Bail after their Diſcretion till that Year and Day be paſſed. And if it fortune the ſame Felons or Murderers, and Acceſſaries ſo arraigned or any of them to be acquit, or the Principal of the ſaid Felony or any of them to be attainted, the Wife or next Heir to him ſo ſlain, as ſhall require, may have their Appeal of the ſame Death and Murder, within the Year and Day after the ſame Felony and Murder done againſt the ſaid Perſons ſo arraigned and acquit, and all other their Acceſſaries, or againſt the Acceſſaries of the ſaid Principal, or any of them, ſo attainted, or againſt the ſaid Principals ſo attainted, if they be on live, and the Benefit of the Clergy thereof before not had; and that the Appellant ſhall have ſuch and like Advantage, as if the ſaid Acquittal or Attainder had not been, the ſaid Acquittal or Attainder notwithſtanding.*

[a] *Vide ſupra*, ch. 33 § 121. F. N. B. 251. Lett. G. Crompt. Juſt. 111. pl. 2. 3.

Sect. 15. It ſeems [c] agreed, That this Statute ſhall not be conſtrued to extend to any other Appeal but of Death, nor to any other Acquittal but upon an Indictment; from whence it follows, That an Acquittal on an Indictment, or Appeal, for any other [d] Felony except Death, may ſtill be pleaded in Bar of an Appeal for the ſame Crime, and that an Acquittal on an Appeal of Death [e] may ſtill be pleaded in Bar of an Indictment, in the ſame Manner as by the Common Law.

[b] This ſeems miſprinted in Keble's Statutes, *Vide* S. P. C. 107. and Raſt. Statutes, Title. Murder 2.

[c] H. P. C. 244, 245. S. P. C. 107. Lett. A.

[d] H. P. C. 244, 245. S. P. C. 107 Lett. A.

[e] H. P. C. 244, 245. S. P. C. 107. Lett. A.

Sect. 16. How far a Perſon found guilty of Manſlaughter, or of Homicide *ſe defendendo*, on an Indictment of Murder, is liable to be tried again upon an Appeal by Force of this Statute, ſhall be conſidered in the next Chapter.

Crompton's Juſtice, 111. pl. 2, 3.

CHAP.

CHAP. XXXVI.

Of the Plea of Autrefoits attaint *or* convict.

Sect. 1. IT ſeems to be generally agreed, [a] That where-ever a Man is attainted of Felony, either by Judgment upon a Verdict, or by [b] Outlawry, or Abjuration, whether upon an Indictment or Appeal, he may plead ſuch Attainder to any ſubſequent Indictment or Appeal, for the ſame or any other Felony. And two Reaſons are given for ſuch Plea to a ſecond Proſecution for the ſame Felony; Firſt, [c] Becauſe the Life of the Defendant was in Danger by the firſt; and it is againſt a Maxim of Law to bring a Man into ſuch Danger more than once for one and the ſame Offence: 2dly, [d] Becauſe generally the proceeding in ſuch ſecond Proſecution cannot be to any Purpoſe, becauſe the Party is dead in Law by the firſt Attainder, and hath forfeited all that he can forfeit, and therefore it is ſaid, That it is equally abſurd to attaint him a [e] ſecond Time, as to attempt to kill one who is already dead. And this is the only [f] Reaſon I find any where given for the Plea of *Autrefoits attaint* of one Felony to a Proſecution for another. But where both of theſe Reaſons fail in the firſt Caſe, and the later of them in the ſecond; and alſo in ſome other Caſes, for ſpecial Reaſons, the Plea of *Autrefoits attaint* ſeems to be of little Effect, as in the following Inſtances.

Sect. 2. Firſt, Where the firſt Attainder is reverſed for Error, after which it can neither be pleaded to a Proſecution for the ſame or any other Felony; becauſe by ſuch Reverſal the Attainder is of no [g] more Force than if it had never been: And if an Acquittal on an erroneous Indictment or Appeal will not bar a ſubſequent Proſecution, ſurely *a fortiori* an Attainder reverſed will not do it. But it is agreed to be a good Bar while it ſtands unreverſed, becauſe it is not void but voidable only.

Sect. 3. Secondly, Where the Attainder was at the Suit of the King and [h] pardoned, and after the Party is proſecuted upon an Appeal; for it is an allowed Maxim, that the King cannot bar the Suit of the Subject, and if he cannot bar an Appeal by pardoning the Offender before it appear whether he be guilty or innocent, there cannot but be much leſs Reaſon that he ſhould bar it after the Guilt appears by a Judgment upon Record.

[a] 2 H. P. C. 247. S. P. C. 107. Lett. B. 12 Co. 100. 6 Co. 13. b. 3 Inſt. 213, 214. *Supra*, ch. 23. Sect. 38.

[b] Yet this is made a *Quære* 28 E. 3. 90. pl. 3. but no Notice is taken of the *Quære* in the Abridgment of the Caſe in Fitz. Coro. 136. *Vide* 18 H. 8. 2. pl. 12. 12 Co. 100.

[c] 9 H. 7. 19. pl. 14. Abridged, Bro. Appeal, 89. Coro. 11.

[d] S. P. C. 107 Lett. B. H. P. C. 247. 12 Co. 100. Cro. El. 516. Cromp. 113. pl. 1.

[e] Bro. App. 9. 44 E. 3. 44. pl. 57. Abridged, Fitz. Coro. 95. 6 H. 4. 6. pl. 29. Abridged, Fitz. Coro. 227. Bro. Appeal, 10.

[f] *See* the Chapter of Judgment.

[g] *See* the Books cited to the preceding Sect. 8 S. P. C. 106. Lett. B. 12 Co. 100. H. P. C. 247. 4 Co. 45. a.

[h] Bro. Coro. 11. 28 E. 3. 90. pl. 3. Abridged, Fitz. Coro. 139. S. P. C. 107. Lett. B. 3 Inſt. 213. Crompton's Juſtice, 113. pl. 3. 6 H. 4. 6. pl. 29. Abridged, Fitz. Coro. 227. Bro. Appeal, 10. *Cont.* 12 Co. 100.

Popham, 107. 7 H. 4. 31. pl. 16. Fitz. Eſcheat, 14. Bro. Coro. 11. Fitz. Coro. 81. 95. *Cont.* 4 E. 4. 11. pl. 18. Fitz. Coro. 27.

Sect. 4. Thirdly, Where a Perſon attainted of Felony, is afterwards indicted of High Treaſon, whether before or after his * Attainder; for the Judgment of Death in High Treaſon is not only different from that in Felony, but the Forfeiture is alſo more general, (extending to Land in Tail as well as to Land in Fee-ſimple, ſince [a] the Statutes of 26 *H.* 8. 13. and 33 *H.* 8. 20 But if the Felony were firſt committed, it ſeems [b] agreed, That the Title of Eſcheat to the Felons Lands in Fee-ſimple, veſted in the Lords of whom they are holden from the Time of the Felony, ſhall not be deveſted by the ſubſequent Attainder for the Treaſon, as it would be if the Treaſon had been firſt committed.

Sect. 5. Fourthly, Where an Appellee of Larceny hath a ſecond Appeal brought againſt him hanging the firſt, and afterwards is attainted in the firſt, in which Caſe, according to ſome [c] Opinions the Court may, in order to entitle the ſecond Appellant to a Reſtitution, enquire by an Inqueſt of Office, and according to other [d] by an Inqueſt taken at the Miſe of the Parties, whether ſuch Appellee be guilty of the Larceny or not. And the Law ſeems to be the ſame in Relation to an Indictment of [e] Larceny ſince the Statute of 21 *H.* 8. 11. which entitles the Proſecutor to a Reſtitution of his Goods, upon the Offender's being found guilty, *&c.* in the ſame Manner as upon an Appeal. Alſo it hath been [f] adjudged, that a Perſon attainted is as liable to anſwer a Perſonal Action as if he had not been attainted. For otherwiſe his Attainder would give him a Privilege and Protection, which the Law is far from intending in allowing the Plea of *Autrefoits attaint* to a ſecond Proſecution for a new Crime, which is chiefly grounded on this Reaſon, that the Law will not ſuffer an abſurd and vain Thing in attainting one who is attainted already.

Sect. 6. Fifthly, Where a Perſon attainted of one Felony, is afterwards proſecuted as a Principal in another, and others are alſo proſecuted together with him as his Acceſſaries, in which Caſe it is ſaid, [g] That for the Benefit of Publick Juſtice he is compellable to plead, *&c.* to the ſecond Proſecution in the ſame Manner as if he had not been attainted, becauſe otherwiſe the Acceſſaries to ſuch ſecond Felonies could not [h] be brought to their Trials for want of a Conviction of their Principal.

Sect. 7. It ſeems [i] clear, That a Judgment againſt a Man on an Indictment or Action of Treſpaſs, is no Bar to an indictment or Appeal of Larceny, for the ſame taking, becauſe Treſpaſs and Larceny are Offences of a different Nature, and the Judgment for the one entirely differs from that for the other. Alſo I take it to be in a great Meaſure [k] agreed, That the Judgment of *Pain fort & dure* in one Felony is no Bar to a Proſecution for another; becauſe ſuch Judgment neither corrupts the Blood, nor forfeits the Lands, as an Attainder doth. But it ſeems queſtionable, whether it may not bar a ſecond Proſecution for the ſame Felony, becauſe the Life of the Party was brought into Danger by the firſt.

Sect. 8. It is [l] ſaid, That *Autrefoits attaint* or *convict* was no Plea for one who had broken the Priſon of the Ordinary; but for this I ſhall refer to the Books cited, *Ch.* 33. *Sect.* 9, 10.

* 1 H. 6. 5. 22. Abridged, Bro. Treaſon, 11. Fitz. Coro. 2. 3 Inſt. 213. Poph. 107. H. P. C. 213, 214. And the Obſervation to the contrary in 2 Inſt. 590. and S. P. C. 107. Lett. B. Crompt. Juſt. 112. pl. 2 on the abovecited Year-Book of H. 6. 5. to the plain purport of it ſeems repugnant

[a] Co. Lit. 372, 391. *See* the Chapter of Forfeiture.

[b] 3 Inſt. 213. S. P. C. 137. Lett. B.

[c] *Vide ſupra*, ch. 23 Sect. 53. and ch. 28. Sect. 7. Fitz. Coro. 379.

7 H. 4. 31. pl. 16. Abridged, Fitz. Coro. Bro. Appeal, 21

Vide 44 E. 3. 44 pl. 57. Abridged, Bro. Appeal, 11. Fitz. Coro. 95.

[d] 4 E. 4. 11. pl. 18. S. P. C. 66. Lett. E. H. P. C. 212. 248. Bro. Appeal, 93. Fitz. Coro. 26.

Vide 6 Ed. 4. 4. Abridged, Bro. Coro 144.

[e] *Vide ſupra*, ch. 23. Sect. 55, 56. H. P. C. 212, 248. [f] 3 Inſt. 213, 215. Cro. El. 516. Cont. Cro. El. 213. 8 Poph. 107. [g] *Vide ſupra*, Ch. 29. from Sect. 36. to Sect. 45. [h] *Vide ſupra*, ch. 35. Sect. 5. 7 H. 4. 35. pl. 4. Fitz. Coro. 82. [k] 3 Inſt 213. Crompt. Juſt. 113. pl. 4. Dy. 308. pl. 73. [l] S. P. C. 31, 32.

Sect. 9. It is certain that an Attainder on an Indictment of Death is no Bar to an Appeal, by Reaſon of 3 *H.* 7. 1. ſet forth more at large in the precedent Chapter, which gives an Appeal againſt Perſons attainted of Death, the Benefit of Clergy thereof being not had, as it is certain that it cannot at this Day. But it ſeems * agreed, That in all other Caſes the Plea of *Autrefoits attaint* is ſtill of the ſame Force as it was by the Common Law.

* H.P.C. 247

Sect. 10. The Plea of *Autrefoits convict*, ſeems chiefly to depend on this Reaſon, [a] That the Party ought [b] not to be brought twice into Danger of his Life for the ſame Crime. Upon which Ground it ſeems [c] agreed, That a Conviction on an Appeal or Indictment of Burglary, or other Felony, may be pleaded to an Indictment or Appeal for the ſame Felony; And that a Conviction of Manſlaughter in an Appeal of Death may be pleaded in Bar of a ſubſequent Indictment or Appeal of the ſame Death; and that the Reaſon why ſuch a Conviction on an Indictment of Death cannot be pleaded to an Appeal as well as to an Indictment (unleſs the Perſon ſo convicted be admitted to his Clergy, or at leaſt have prayed it,) [d] depends entirely on 3 *H.* 7. 1. which expreſly giving an Appeal againſt a Perſon attainted on an Indictment of Death, who hath not had his Clergy, cannot but be thought to give it as well againſt a Perſon convicted, ſince every Attainder includes a Conviction and more; and it is wholly owing to the Default of the Court which ſhall not prejudice any one, that a Perſon convicted is not attainted [e]. But I do not find any Authority that a Conviction of one Felony may be pleaded in Bar of another; but on the contrary it is plain, That it was anciently the uſual [f] Practice, where a Clerk was indicted of ſeveral Felonies, and tried and convicted of one of them, and demanded by the Ordinary, not to deliver him upon ſuch Demand, but to detain him in Priſon till he had been arraigned of all the Felonies whereof he ſtood indicted. Alſo it ſeems [g] agreed, That even after the Statute of 25 *E.* 3. 5. *de clero*, a Clerk convict of one Felony, might immediately, while he ſtood at the Bar, be arraigned of any other.

[a] *Vide ſupra*, ſect. 1.
[b] *Vide* 4 Co. 39. b. 40. a. 47. a. 2 Leon. 83.
[c] 4 Co. 39. b. 40. a. 2 Leon. 83. Crompt. Juſt. 113. pl. 5. Kely. 94, 98. 4 Co. 46. 1 Salk 62, 63, Cro. Ca. 147.
[d] *Vide* 1 And. 68. 4 Co. 46. 3 Mod. 156, 157.
[e] *Infra* ſect. 17. *Vide* S.P.C. 108. Lett. A. H. P. C. 247, 248. Crompt. Juſt. 113.
[f] Fitz Coro. 394, 461. S. P. C. 108. Lett. A. *Supra* ch. 33. ſect. 117.
[g] *See* the Preamble of 25 E. 3. 5. 8 S.P.C. 108. Lett. A. Dy. 219. pl. 49.

Sect. 11. But it ſeems to be admitted [h] as a general Rule, That after a Clerk convict was once delivered to the Ordinary, he could not afterwards be impeached either for the ſame, or any other Felony committed before ſuch Delivery to the Ordinary, whether it were within the Benefit of the Clergy or not: And tho' this be ſo far remedied [i] by 8 *El.* 4. and 18 *El.* 7. That a Perſon admitted to his Clergy, for any Felony, ſhall not in Reſpect thereof bar a ſubſequent Proſecution for another Felony not within the Benefit of the Clergy; yet, as I take it, the Law generally ſtill continues as it was, as to the Felony whereof the Party who is admitted to his Clergy is convicted, and alſo as to other Felonies within the Benefit of the Clergy committed before ſuch Admittance, whereof it ſeems agreed, That regularly one admitted to his Clergy ſhall not be afterwards arraigned.

[h] Dy. 214, 215. H. P. C. 248, 249. *Supra*, ch. 33. ſect. 117 to 121. 18 H. 8. 2. pl. 12. 3 Inſt. 131. Kely. 93, 103. Crompt. Juſt. 113. pl. 8, 9, 10. Fitz. Coro. 232.
[i] *Vide ſupra*, ch. 33. from ſect. 121 to 130.

Sect. 12. It ſeems to have been long ſettled, That not only he who hath been admitted [k] to his Clergy on a Conviction of Manſlaughter, upon an Indictment of Murder, but alſo that he who being called to Judgment on ſuch a Conviction, hath [l] prayed his Clergy, but hath not been

[k] 4 Co. 40. Wetherel's Caſe, 45. b. 46. Crompt. Juſt. 102. pl. 10. *Vide* Cro. Ja. 282. Yelv. 204, 205
[l] Bulſt. 141. *See* the Caſes cited to the next Letter. 2 Leon 160, 161. 1 And. 68. 4 Co. 45. b. 46. a. Kely. 93, &c. 3 Inſt. 161. Co. Ent. 55. b. This is left doubtful, 2 Roll. Rep. 478.

been actually admitted to it, may bar any ſubſequent Appeal for the ſame Death, as he might by the Common Law. And as to the Objection from the ſeeming Abſurdity, that if the Law be ſo, he that hath his Clergy on a Conviction of Manſlaughter will be in a better Caſe than if he had been wholly acquitted, it may be anſwered, That this doth not depend on any Reaſoning from the Nature of the Thing, but from the Statute of 3 *H.* 7. 1. which expreſly takes away the Plea of *Autrefoits acquit* in this Caſe, but by ſuffering even Perſons attainted on an Indictment of Death, who have been admitted to their Clergy to plead ſuch Admiſſion in Bar of an Appeal, plainly ſeems to have intended to leave the Benefit of the Clergy, as it ſtood before.

Sect. 13. Alſo it hath been adjudged, [a] That it is not material whether the Appeal, in Bar whereof ſuch Conviction and Clergy are pleaded, were depending at the Time of ſuch Conviction or not; ſince the Judges [b] may, if they think fit in their Diſcretion, proceed on an Indictment of Death, notwithſtanding an Appeal thereof be depending; and therefore as on the one Side the Party is liable to be hanged, if found guilty of Murder on a Verdict againſt him on ſuch Indictment, pending an Appeal, it cannot but be equitable, that on the other Side he ſhould have the full Benefit of the Verdict, if found in his Favour.

Sect. 14. But there have been many [c] Opinions, That unleſs the Court call a Man to judgment on a Conviction of Manſlaughter on an Indictment of Murder, he cannot demand the Privilege of his Clergy, and conſequently cannot plead ſuch Conviction and Clergy thereon had or prayed, in Bar of an Appeal. And accordingly it was ſolemnly reſolved * by all the Judges, except one, in the later End of the Reign of King *James* the ſecond, That the Court might delay the Calling a Convict to Judgment, to hinder him from praying his Clergy, (eſpecially if an Appeal be depending,) in Order to make him liable to an Appeal. But the contrary ſeems [d] to be fully ſettled in the Caſe of *Armſtrong* and *Liſle*, wherein it was adjudged upon great Deliberation, That a Conviction of Manſlaughter on an Indictment of Murder, and the [e] Prayer of Clergy thereupon, may be pleaded in Bar of an Appeal of the ſame Death, whether ſuch Prayer were made upon the Party's being called to Judgment or not. For it ſeems to be [f] admitted, even by thoſe of the contrary Opinion, That the Delay of the Court in not admitting a Man to his Clergy who prays it when called to Judgment, ſhall no Way prejudice him, but that he may bar an Appeal by pleading the Conviction and Prayer of Clergy as much as if he had been actually admitted to it. And why ſhould it be more reaſonable that the Delay of the Court in not calling a Man to Judgment ſhould put it in the Power of the Court to make ſo high a Privilege in Favour of Life, wholly precarious and diſcretionary? To which may be added, That a Demand of Clergy by a Convict before he is called to Judgment, ſeems in Strictneſs to be as legal as a Demand after a Call to Judgment; ſince whenever a Perſon appears to have a Right to his Clergy, as he ſeems plainly to do, when his Crime is found to be ſuch as is within the Benefit of it, it ſeems a neceſſary Conſequence that he has a Right to pray it. And it ſeems [g] agreed, That by the ancient Common Law, Clergy might be demanded upon the Priſoner's firſt Arraignment. And tho' afterwards for ſpecial Reaſons, the Judges made it a Rule not to admit any one to it till after he had pleaded; yet I find it no where holden in the old Books,

[a] Salk 63. Kely. 91, 92, 94 104, 107, 108.

[b] But the contrary ſeems to be holden in 3 Inſt. 131. *Supra*. ch. 25. ſect 15. and the Notes to ch. 35. ſect. 14. Kely. 94, 95, 96, 97, 98.

[c] 1 Sid. 216. Kely. 106. *Vide* Dyer, 214. pl. 48. 215. pl. 49. 256 pl. 60.

[*] 3 Mod. 156, 157, 158. Kely. 106.

[d] Kely. 93, 103, 104, 105, 107. Salk. 62, 63.

[e] But note that in this Caſe the Party was actually admitted to his Clergy in the King's Bench.

[f] *Vide ſupra*, ſect. 12. 1 And 68. 4 Co. 45. 46. Kely. 105. Salk. 63.

[g] *Supra*, ch. 33. ſect. 110, 111.

Books, That a Man could not legally demand it till called to Judgment. Neither doth the [a] Opinion to the contrary, in the Report of the Caſe of *Armſtrong* and *Liſle*, grounded upon the Authority of [b] *Searl*'s Caſe, ſeem to be all made out by that Caſe.

[a] 1 Salk. 63. Kely. 105.
[b] Hob. 289.

Sect. 15. But it ſeems clearly ſettled, That whenever the Record on which a Man is convicted of Manſlaughter, and admitted to his Clergy, on an Indictment or Appeal of Murder, is erroneous, either in Reſpect of Inſufficiency [c] in the Indictment or Appeal, or for a [d] Miſ-trial, *&c.* ſo that his Life was not in Danger at the Trial, *&c.* he cannot plead ſuch Conviction and Clergy thereon had, in Bar of a ſecond Indictment or Appeal.

[c] 4 Co. 39. b. 40. a. 47. a. Crompt. Juſt. 111. pl. 4, 5.
[d] 6 Co. 14. b.

Sect. 16. It hath been adjudged, [e] That the Concluſion of a Plea of *Autrefoits convict* of Manſlaughter, and Clergy thereon, *&c.* may be either *petit judicium ſi prædict' A. B. iterum de eadem morte, de qua ſemel convictus eſt, reſpondere compelli debeat*; or thus, [f] *petit judicium ſi prædict' A. B. appellum ſuum prædict' verſus eum de morte prædict' habere ſeu manutenere debeat.*

[e] 3 Inſt. 131.
[f] Coke's Entr. 55. b. 3 Inſt. 131. [g] Crompt. Juſt. 111. pl. 6. [h] Coke's Ent. 55. 4 Co. 45. b. 46. 3 Leon. 160, 161. 3 Inſt. 131. [i] 1 And. 68. *Vide ſupra*, ſect. 10. [k] *Vide* 3 Inſt. 131. Kely. 104. [l] 1 And. 68. 4 Co. 46. *Supra, ſect. 10.*

Sect. 17. It is ſaid [g] to have been adjudged in *Holcroft*'s Caſe, That a Verdict finding a Man guilty of Homicide *ſe defendendo* on an Indictment of Murder may be pleaded to an Appeal of the ſame Death; but this was certainly not the very Point [h] in Queſtion in that Caſe; neither do I find it expreſly taken Notice of in any Report of it. However, ſince it ſeems clear, That ſuch a Conviction would be a good Bar of an Appeal at the Common [i] Law; and ſince it is not within the Letter of 3 *H.* 7. 1. which mentions only Perſons acquitted or attainted, it ſhall not eaſily be conſtrued to be within the Meaning of it, [k] being in this Reſpect a penal Statute, and derogatory from a Maxim of the Common Law in Favour of Life. And tho' it be in a great Meaſure [l] agreed, That the Statute in giving an Appeal againſt a Perſon attainted of Murder doth by neceſſary Conſequence give it as well againſt one convict of Murder, becauſe every Perſon attainted is convict and more; and if an Appeal ſhould not lie againſt a Perſon convicted until he were attainted, it would be wholly in the Power of the Court, by delaying to give Judgment on a Perſon convicted, to bar an Appeal. Yet ſince theſe Reaſons hold not in the Caſe of one convict of *Homicide ſe defendendo* only, it may well be argued, That a Conviction thereof may ſtill be a good Bar of an Appeal.

CHAP.

CHAP. XXXVII.

Of Pardon.

BEFORE I proceed to conſider in what Manner a Pardon is to be taken Advantage of, it may not be improper to premiſe ſome Things concerning the Nature of Pardon in general, as,

1. By whom it is grantable.
2. Where it is grantable of Right.
3. What is the Nature of a Pardon of Grace.

Sect. 1. As to the firſt Point, *viz.* By whom a Pardon is grantable: It ſeems that anciently the Right of pardoning Offences within certain Diſtricts was claimed by the Lords Marchers and others, who had *Jura regalia*, by ancient Grants [a] from the Crown, or by Preſcription; but it is enacted by 27 *H.* 8. 24. *Par.* 1. *That no Perſon or Perſons, of what Eſtate or Degree ſoever they be, ſhall have Power to pardon or remit any Treaſons or Felonies whatſoever, nor any Acceſſaries to the ſame, nor any Outlawries for ſuch Offences, whether committed in* England *or* Wales, *or the Marches of the ſame; but that the King ſhall have the whole and ſole Power and Authority thereof united and knit to the Imperial Crown of this Realm, as of good Right and Equity it appertaineth.*

[a] *See* the Statute of 27 H. 8. ch. 24. Co. Litt. 114. b. Crompt. Juſt. 116. pl. 19. S. P. C. 104. Lett. C. 3 Inſt. 233.

As to the ſecond Point, *viz.* Where a Pardon is grantable of Right, I ſhall endeavour to ſhew where it is to be ſo granted,

1. To Perſons found guilty of excuſable Homicide.
2. To an Approver who hath convicted an Appellee.
3. To Robbers, Clippers, Burglars, *&c.* who ſhall diſcover two or more guilty of Robbery, *&c.*

Sect. 2. And firſt, As to Perſons found guilty of excuſable Homicide, it is enacted by the Statute of *Gloceſter* 9. *That in Caſe it be found by the Country, that a Perſon tried for the Death of a Man, did it in his Defence or by Misfortune, then by the Report* [b] *of the Juſtices to the King, the King ſhall take him to his Grace, if it pleaſe him.* By which at firſt Sight it ſeems to be implied, That it is left to the Diſcretion of the King, whether he will grant a Pardon in ſuch Caſe or not. And agreeably hereto it is ſaid in four ſeveral Notes [c] in *Fitzherbert's Abridgment* of Caſes in the Time of *Edward* 3. That a Perſon found guilty of Homicide *ſe defendendo* is to be remitted to Priſon in Order to attend the King's Grace: And yet in two other Notes of [d] Caſes in the very ſame Year, it is ſaid,

[b] For the Form of a *Certiorari* in ſuch Caſe, and a Pardon thereon. *See* Regiſter 109.

[c] Fitz. Coro. 284. 286, 287, 354. Alſo Fitz. Coro. 305. and 44 Ed. 3. 44. pl. 55. Abr. Fitz. Coro. 94 and 2 H. 4. 18. pl. 5. Abr. Bro. Forfeiture, 9. are to the ſame Purpoſe.

[d] Fitz. Coro. 297, 361.

That in ſuch a Caſe, if the Priſoner cauſe the Record to come into the Chancery, the Chancellor will make him a Charter of Pardon, without ſpeaking to the King; and this ſeems to be [a] ſettled at this Day, and agreeable to the ancient [b] Common Law, which ſhall not without expreſs Words be reſtrained by a Statute which ſeems to be made in Affirmance of it. And therefore theſe Words in the Statute, *If it ſhall pleaſe the King*, ſhall be taken as ſpoken only out of Reverence to him, and not as intended to make the Right of the Subject to ſuch a Pardon precarious. And the Caſes above-cited, which ſeem to be contrary, may be reconciled with the others, by intending them to mean only the Grant of the King's Pardon to a Perſon repreſented to him as guilty of Homicide *ſe defendendo* only, without any Certificate of the Verdict upon Record; for none of thoſe Caſes make any Mention of ſuch Certificate, as the others do; and if there be no ſuch Certificate, it ſeems plain that the Grant of a Pardon is a meer Matter of Favour. However it ſeems to have been always [c] agreed, That the Forfeiture of Goods by ſuch Homicide may be ſaved by a Pardon, (which in this particular Caſe ſeems to purge the Offence *ab initio*). And it hath been [d] adjudged, That ſuch a Pardon is as neceſſary for one who is indicted only of Homicide *ſe defendendo* and confeſſes it, as for one who is found guilty of Homicide *ſe defendendo* on an Indictment of Murder. And if he were found guilty of having fled [e], *&c.* I queſtion whether the Pardon will ſave the Forfeiture of the Goods by Reaſon of the Flight; for that is grounded not on the Homicide, but on the Contempt of the Law in not ſtanding to it's Judgment.

[a] 3. P. C. 15 Lett. C. 16. Lett. D. 2 Inſt. 316, 317. 3 P. C. 250. Book. 1. ch. 29. Sect. 24. Bro Chart. de Pardon, 65. Keilw. 108. pl. 27.

[b] *Vide* Kely, 122, 123. Bract. Lib. 3. *cap.* 17.

[c] Book 1. ch. 29. from Sect. 19 to the end of the Chapter.

[d] *See* the Books cited to the other Parts of this Section, and 4 H. 7 2 pl. 3. Abridged, Fitz. Coro. 61. Bro. Coro. 138 or 139. Forfeit 51. 2 H. 4. 18. pl. 6 Abridged, Fitz. Coro. 69. Bro. Forfeit. 8.

[e] Keilw. 53. pl. 8. 4 H. 7. 2 pl. 3. Abridged, Fitz. Coro. *Vide* Fitz. Coro. 286, 287. and *infra*, in the Chapter of Falſifying Attainders.

Sect. 3. Secondly, In what Manner an Approver who convicts the Appellee is intitled to a Pardon, hath been already ſhewn, *Chap.* 24. *Sect.* 27.

Sect. 4. Thirdly, As to Robbers, Clippers and Coiners, and Burglars, *&c.* who ſhall diſcover two or more guilty of Robbery, *&c.* it is enacted by 4 *&* 5 *W. & M.* 8. *That if any Perſon or Perſons, being out of Priſon, ſhall after the 25th Day of March, 1691. commit any Robbery, and afterwards diſcover two or more, who then had, or afterwards ſhall commit any Robbery, ſo as two or more of the Perſons diſcovered ſhall be convicted of ſuch Robbery, any ſuch Diſcoverer ſhall himſelf have, and is hereby entitled to the gracious Pardon of their Majeſties, their Heirs and Succeſſors, for all Robberies which he or they ſhall have committed at any Time or Times before ſuch Diſcovery made, which Pardon ſhall be likewiſe a good Bar to any Appeal brought for any ſuch Robbery.*

Sect. 5. Alſo it is enacted by 6 *&* 7 *W.* 3. 17. *That if any Perſon or Perſons, being out of Priſon, ſhall after the firſt Day of May, 1695. be guilty of clipping, coining, counterfeiting, waſhing, filing, or otherwiſe diminiſhing the Coin of this Realm, and afterwards diſcover two or more who then had, or afterwards ſhall commit any of the ſaid Crimes, ſo as two or more of the Perſons diſcovered ſhall be convicted of the ſame, any ſuch Diſcoverer ſhall himſelf have, and is hereby intitled to the gracious Pardon of his Majeſty, his Heirs and Succeſſors, for all ſuch his Crimes, which he or they have committed at any Time or Times before ſuch Diſcovery made.*

Sect. 6. Alſo it is enacted by 10 *&* 11 *W.* 3. 23. (which excludes [f] all Perſons from their Clergy who ſhall by Night or Day, in any Shop, Warehouſe, Coach-houſe or Stable, privately and feloniouſly ſteal any Goods, Wares or Merchandizes, being of the Value of 5 *s.* or more, altho' ſuch Shop, *&c.* be not actually broken open, and altho' no Perſon be therein, or ſhall

[f] *Vide ſupra*, ch. 33. Sect. 64, 65.

aſſiſt, hire or command any Perſon to commit ſuch Offence,) *That if any Perſon or Perſons after the twentieth Day of* May, 1699. *ſhall commit any Burglary, Houſe-breaking, or Felony in ſtealing of any Horſe or Horſes, or any Money, Wares or Goods, from whom the Benefit of the Clergy is by the ſaid Act taken away, and being out of Priſon, ſhall diſcover two or more, who then had or after ſhall commit any ſuch Burglary, Horſe-ſtealing or Felony, as aforeſaid, and ſhall be convicted thereof, or cauſe to be diſcovered and apprehended two or more, who ſhall be convicted, as aforeſaid, every ſuch Diſcoverer ſhall have, and is hereby intitled to his Majeſty's moſt gracious Pardon for the Burglaries, Houſe-breakings, Horſe-ſtealings or Felonies as aforeſaid, which he or ſhe or they ſhall have committed at any Time or Times before ſuch Diſcovery made; which Pardon ſhall be likewiſe a good Bar to an Appeal for any ſuch Burglary,* &c.

* *Vide* Ch. 33. from Sect. 85. to Sect. 106.

Sect. 7. And it is farther enacted by 5 *Annæ* 31. *That every Perſon who ſhall be guilty of Burglary, or of the* * *felonious breaking and entering any Houſe in the Day-time, and after ſhall diſcover two who ſhall have committed ſuch Burglary or Felony, ſo as they be convict,* &c. *ſhall have* 40 l. &c *and be entitled to a Pardon of all Burglaries and Felonies, except Murder and Treaſon; which Pardon ſhall be a Bar to any Appeal,* &c.

As to the third Point, *viz.* What is the Nature of a Pardon of Grace, I ſhall conſider the following Particulars;

1. Where ſuch Pardon is good in Law.
2. What is the Effect of it.
3. Whether it may be waived.

As to the firſt Point, *viz.* Where ſuch a Pardon is good in Law, I ſhall conſider,

1. What is required to make a good Pardon of Felony in general.
2. What is particularly required in a Pardon of Treaſon, Murder, or Rape.
3. How far the Pardon of one Man may diſcharge another.
4. How far it is neceſſary that the Pardon of ſeveral Perſons for Felony, be ſeveral.
5. Whether the King's Grant of a Protection, or of a Place of Truſt to a Traitor or Felon, carry with it an implied Pardon of his Crime.
6. What is required to make a good Pardon of Offences not capital.
7. Whether any Offence can be pardoned before it is committed.
8. Whether there be any Offence which cannot be pardoned after it is committed.
9. How far a Pardon may be of Force againſt the private Intereſt of the Subject.
10. Whether it may be conditional.
11. Where a Pardon is void in Reſpect of a wrong Recital.

Sect. 8. As to the firſt Particular, *viz.* What is required to make a good Pardon of Felony in general: It ſeems to be laid down as a generule Rule in many Books, that where-ever it may be reaſonably intend-

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ed that the King, when he granted ſuch Pardon, was not fully [a] apprized both of the Heinouſneſs of the Crime, and alſo how far the Party ſtands convicted thereof upon Record, the Pardon is void, as being gained by Impoſition upon the King. And this is very agreeable to the Reaſon of the Law, which ſeems to have intruſted the King with this high Prerogative, upon a ſpecial Confidence that he will ſpare thoſe only whoſe Caſe, could it have been foreſeen, the Law it ſelf may be preſumed willing to have excepted out of its general Rules, which the Wit of Man cannot poſſibly make ſo perfect as to ſuit every particular Caſe. And upon this Ground it hath been holden, [b] that if one be indicted by theſe Words, that he had ſlain a Man for having ſued him in the King's Court, and the King make him a Charter of all Manner of Felonies; this Charter ſhall not be allowed, becauſe it ſhall be intended that the King was not acquainted with the Heinouſneſs of the Crime, but deceived in his Grant. Alſo where one outlawed in an Appeal of Felony prayed his Clergy, which was counterpleaded on the Account of Bigamy, *&c.* and afterwards purchaſed a Pardon, and ſued a *Scire facias* againſt the Appellant, *&c.* it is [c] ſaid, that the Pardon was not allowed, becauſe it made no Mention of the Bigamy. Alſo it ſeems agreed by all the [d] the Books That if a Man be attainted of any Felony, whether by Abjuration, or Outlawry, or otherwiſe, and afterwards get a Pardon which doth not expreſly mention the Attainder, the Pardon will not avail him; [e] becauſe it ſhall be intended that the King had not Conuſance of the Attainder, but was deceived in his Grant, which ſhall not grieve him when he has true Notice of the Matter. And upon the like Ground it hath been holden [f] that the Pardon of one who is convicted by Verdict of a Felony is not good, unleſs it recite the Indictment and Conviction. Alſo it hath been [g] queſtioned, whether the Pardon of one who is barely indicted of Felony be good, if it do not mention the Indictment. But this hath been [h] adjudged to be helped by the Words *ſive indictatus ſive non.*

[a] 8 H. 6. 20. a. Abridged, Bro. Charter of Pardon 19.

[b] 8 H. 6 21. Abridged, Bro. Patents, 15. 6 Co. 13. 3 Inſt. 238. But Note, that Brook in abridging this Caſe in the Title of Charter of Pardon, 19. omits the Words, becauſe he ſued him in the King's Court.

[c] Fitz. Charter, 16. S. P. C. 102. Lett. C. Crompt. Juſt. 115. pl. 4. from the Authority of the Year-Book of 11 H. 4. 11. pl. 24. and 48. pl. 23. where on the Debate of this Caſe it ſeems admitted that the Pardon was not good becauſe it made no Mention of the Bigamy, and yet it is ſaid that upon the Non-appearance of any one to maintain the Appeal, the Pardon was afterwards allowed. *Ergo Quere.*

Sect. 9. It hath been holden, That anciently [i] a Pardon of all Felonies, included all Treaſons, as well as Felonies whatſoever, and might be pleaded to an Indictment for them: And it ſeems to be taken for granted, in many [k] Books, that a Pardon of all Felonies in general, without deſcribing any one particular Felony, may even at this Day, if the Party be neither [l] attainted nor indicted, be pleaded in Bar of any Felony whatſoever, coming within the general Limitations of the Pardon, except Murder or Rape, and that the only [m] Reaſon why it cannot be alſo pleaded to Murder or Rape, is becauſe the Statute of 13 *R.* 2. ſet forth more at large under the next Point, requires an expreſs Mention of them. But I find this Point no [n] where ſolemnly debated; neither doth it ſeem eaſy to reconcile it with the general Rules concerning Pardons, agreed to be good in other Caſes; for if a Felony cannot be

[d] 8 H. 6. 21. Abridged, Bro. Patents, 15. 9 Ed. 4. 28. pl. 41.

Abridged, Fitz. Charter, 23. Bro. Charter, 23. 6 Ed. 4 4 1 Ed. 3. 13. pl. 8. 1 Aſſ. pl. 4. Abridged, Fitz. Coro 155 Same Point admitted, 36 H. 6. 25. a. b 26. a. Abridged, Bro Charter, 25. 6 Co. 13 b Fitz. Coro. 124. Crompt. Juſt. 115. pl. 1. 2. 3 Inſt. 238. H. P. C. 251. S. P. C. 102. Lett. C. 123. Lett. A. Dalt. ch. 94. Kely. 28. [c] Theſe are the very Words of 8 H. 6 21. Abridged, Bro. Patent, 15. [f] 1 Sid. 366 pl. 2. 430. pl. 18. 2 Keb. 363. pl. 11. 3 Keb. 694. pl. 24 [g] 2 Jon. 56. 3 Keb. 30. pl. 55. [h] 2 Jon. 56. 3 Keb. 30. pl. 55. 694. pl. 24. Crompt. Juſt. 115. pl. 11. [i] 10 Ed 4. 10. pl. 14. Co. Litt. 391. a. 3 Inſt. 236. *Vide* 22 Aſſ pl. 49. S. P. C. 2 Lett E. 102. Lett. F. Fitz. Charter, 13. Dy. 124. pl. 39. March, 214, *&c.* [k] Keilw. 91. b. Bro. Coro. 147 Co. Lit. 391. a. S. P. C. 2. Lett. E. 102. Lett. F. 3 Inſt. 236. 22 E. 4. 7 pl. 22. *See* the Books cited to the other Parts of this Section. [l] 8 H. 6. 21. Abridged, Bro. Patents, 15. Fitz. Coro. 24. 2 Keb. 574 pl. 92. 10 Ed. 4 10. pl. 14. 36 H. 6. 25. a. b. 26 a. H. P. C 251. 2 Jon. 56. 6 Ed. 4. 4. Bro. Chart. Pardon, 10. [m] Keilw. 91. b. 9 Ed. 4. 26. b. Crompton's Juſtice, 115. pl. 12. [n] *Vide* 2 Keb. 363. pl. 11. 415. pl. 45. 574. pl. 92.

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well [a] pardoned where it may be reaſonably intended that the King, when he granted the Pardon was not fully appriſed of the State of the Caſe, much leſs doth it ſeem reaſonable that it ſhould be pardoned where it may be well intended that he was not appriſed of it at all. And if a Felony whereof a Perſon be attainted cannot be well pardoned, even tho' it appear that the King was informed of all the Circumſtances of the Fact, unleſs it alſo appear that he was informed of the Attainder, much leſs doth it ſeem reaſonable that a Felony ſhould be well pardoned where it doth not appear that he knew any Thing of it: For by this Means, where the King in Truth intends only to pardon one Felony, which may be very proper for his Mercy, he may by Conſequence pardon the greateſt Number of the moſt heinous Crimes, the leaſt of which, had he been appriſed of it, he would not have pardoned. And for theſe Reaſons, as I ſuppoſe, general Pardons are commonly made by Act of Parliament; and have been of late Years [b] very rarely granted by the Crown, without particular Deſcription of the Offence intended to be pardoned. As to the [c] Precedents of ſuch general Pardons in *Raſtal's Entries*, it may be anſwered, That their Authority ſeems to be of leſs weight when compared with thoſe many Precedents of Pardons in the Regiſter, every [d] one of which particularly deſcribe the Offence which is pardoned, and even thoſe which relate to [e] Homicide by Lunaticks, or Infants, or in Self-Defence, *&c.* except only one which pardons Eſcapes, but expreſly excepts all voluntary ones. And therefore where the Books ſpeak of Pardons of all Felonies in general as good, perhaps it may be reaſonable for the moſt Part to intend that they either ſpeak of a Pardon by Parliament, or that they ſuppoſe [f] that the particular Crime is mentioned in the Pardon, tho' they do not expreſs it.

Sect. 10. It is enacted by 27 *E.* 3. 2. *That in every Charter of Pardon of Felony, which ſhall be granted at any Man's Suggeſtion, the ſaid Suggeſtion and the Name of him that makes it ſhall be compriſed; and if after the ſame Suggeſtion be found untrue, the Charter ſhall be diſallowed. And the Juſtices before whom ſuch Charters ſhall be alledged, ſhall enquire of the ſame* [g] *Suggeſtion, and if they find it untrue, ſhall diſallow the Charters ſo alledged.* And it is enacted by 5 *H.* 4. 2. That if an Approver become a Felon again after a Pardon, he who procured the Pardon ſhall forfeit 100 *l.*

Sect. 11. It is certain that a general Pardon of Felonies extends not to Piracy, as hath been more fully ſhewn, *Book* I. *Ch.* 37. *Sect.* 6.

Sect. 12. It ſeems a ſettled Rule, That no Pardon of Felony ſhall be carried farther than the expreſs Purport of it; and therefore where a Man was attainted on an Appeal of Robbery, and the King reciting the Attainder pardoned the Execution, it is ſaid, [h] That becauſe the Pardon did not expreſly mention the Felony, it was diſallowed. But it does not appear how it was pleaded, nor to what Purpoſe it was attempted to be made Uſe of, nor how far, or in what Reſpect it was diſallowed; and therefore tho [i] ſome Books ſeem to hold generally on the Authority of this Caſe, that ſuch a Pardon is no way good, yet I do not well ſee how any more can be proved from it than this, That it ſhall neither amount to a Pardon of the Felony it ſelf, nor of any other Conſequence of the Attainder beſides the Execution. But it ſeems difficult to give a Reaſon why it ſhould not well pardon the Execution, ſince the King doth not appear to have been any way deceived; and [k] it hath been clearly adjudged, that the King may, if he think fit, pardon the Execution, and no more.

[a] *See* the precedent Section.

[b] *Vide* 2 Keb 575. pl. 92.

[c] Raſt. Ent. 455 pl 1,2,3. 459. pl. 21.

[d] Regiſter of Original Writs from fol. 308 to 313.

[e] Regiſter of Original Writs, 309.

[f] *See* Dyer, 124. pl. 39. *Vide* 22 Aſſ. 47. Abridged, Fitz. Chart. 14.

[g] *Vide* Raym. 13. 1 Sid 41.

[h] 8 H 4. 21. Pl. 7. Abridged, Fitz. Chart. 26. Bro. App. 27 Charter de Pardon 13. Coro. 24. 6 Co. 13. b. S. P. C 102. Lect. C.

[i] Crompt. Juſt. 115 pl 3. H. P. C. 251.

[k] 6 H. 4. 6. pl. 29. Abridged, Fitz. Coro. 227. *See* the Chapter of Execution and Reprieve. State Trials, Vol. 1. f. 261.

Sect. 13. It ſeems [a] agreed, That where a general Act of Pardon excepts ſome particular Kinds of Felony, ſuch Exception extends as well to thoſe whereof any Perſons are attainted as to others; for if thoſe whoſe Guilt appears not on Record are excepted, much greater Reaſon is there that thoſe whoſe Guilt appears in ſo high a Manner ſhould be excepted; and therefore being within the Letter of the Exception, they cannot but be intended to be within the Meaning of it alſo. Neither doth it follow, That becauſe the Pardon of a Felony whereof a Perſon is attainted is not [b] good without mentioning the Attainder, therefore ſuch a general Exception of all Felonies ſhall not extend to thoſe whereon there hath been an Attainder; for the Caſe of ſuch a Pardon depends on this ſpecial Reaſon, That the King ought to be fully appriſed of the Proceedings againſt the Party before he pardons him, as hath been more fully ſhewn, *Sect.* 8.

[a] 6 Co. 13. b. H. P. C. 251. 3 Inſt. 238.

[b] *Vide ſupra*, ſect. 8, 9.

Sect. 14. As to the ſecond Particular, *viz.* What is particularly required in a Pardon of Treaſon, Murder or Rape: I do not [c] find that the Common Law required any Thing particular in the Form of Pardons of ſuch Crimes, which was not equally requiſite in the Pardon of any Felony whatever. But it being enacted by the Statute of 2 *Ed.* 3. 2. which is confirmed by ſeveral [d] ſubſequent Statutes, *That Charters of Pardon of Manſlaughters ſhall not be granted, but only where the King may do it by his Oath, that is to ſay, where a Man ſlayeth another in his own Defence, or by Misfortune.* And there being no Precedent in the Regiſter [e] of a Pardon of any other Homicide, but ſuch as is done either in Self-defence or by Miſadventure, or by Infants or Madmen; [f] ſome have gone ſo far as to hold that the King's Pardon of any other Homicide is not good, unleſs it be confirmed by Parliament, or at leaſt have a *non obſtante* of theſe Statutes. But this ſeems contrary not only to the general Tenour of the Books, which clearly [g] admit the King's Power to pardon any Homicide in general, but alſo to the expreſs Purport of 13 *R.* 1. which by ſhewing in what Form the King ſhall make a Pardon of Murder, plainly allows that he has a Power to make it. Beſides, the ſame Reaſons hold as ſtrongly againſt the King's Power to pardon Manſlaughter as Murder, which yet I never knew diſputed. However it ſeems reaſonable that thus much at leaſt be allowed to follow from the Arguments above-mentioned, that too great Caution cannot well be [h] taken in the Grant of Pardons of any Homicide, that there be ſome ſuch favourable Circumſtances in Extenuation of it, as may bring it ſome Way within the Equity of the Caſes in the Regiſter, and thoſe old Statutes.

[c] *Vide ſupra*, ſect. 9. Moor. 752. pl. 1033. 3 Mod. 37. 38. Fitz. Charter, 13. Coro. 25. Keilw 91.

[d] 4 Ed. 3. ch. 13. 10 Ed. 3. 2. 14. E. 3. 14.

[e] Regiſt. 309.

[f] 3 P. C. 101. Lett. A. 3 Inſt. 236. Style, 375, 377. March, 217.

[g] Bract 133. a. Show. Rep. 283, 284. 1 Keb. 67. 1 Lev. 8. 11 H. 4. 11. pl. 24. Abr. Fitz. Chart. 16. 4 Ed. 4 10. pl. 14. Abr. Fitz. Coro. 25.

[h] See Bracton, 133. a.

Sect. 15 It is recited by the Statute of 12 *Ric.* 2. 1. *That the Commons had grievouſly complained of the outragious Miſchiefs which had happened to the Realm, for that Treaſons, Murders and Rapes had been commonly done, and the more becauſe Charters of Pardon had been eaſily granted in ſuch Caſes, and that hereupon the Commons had requeſted the King that ſuch Charters might not be granted, to which the King had anſwered, That he would ſave his Liberty and Regality, as his Progenitors had done*; and thereupon it is enacted, *That no Charter of Pardon ſhall from thenceforth be allowed before any Juſtice for Murder, or for the*

9 H. 7. 5. pl. 11. Abr. Fitz. Scire fac. 58. 9 H. 4. 1. pl. 2. Abr. Fitz. Scire fac. 63. 13 H. 4. 6. pl. 14. Abr. Fitz. Coro. 266. Dy. 34. pl. 16.

in all which Books it is clearly admitted, That an Outlawry in an Appeal of Death may be pardoned by the King ſo far as the Publick Juſtice is concerned in it. *See* alſo, Show. Rep. 283, 284. 2 Jon. 56. Kely. 24, 25. 1 Sid. 366. pl. 2. Moor. 752. pl 1033. Raym. 13. 2 Keb. 363. pl. 11. 415. pl. 45. 574. pl. 92. 3 Keb. 38. pl. 55. 694. pl. 24. 3 Mod 37.

Death of a Man ſlain by Await, Aſſault or Malice prepenſed, Treaſon or Rape of a Woman, unleſs the ſame Murder, Death of a Man ſlain by Await, Aſſault or Malice prepenſed, Treaſon or Rape of a Woman, be ſpecified in the ſame Charter. And if the Charter of the Death of a Man be alledged before any Juſtices, in which Charter it is not ſpecified, That he of whoſe Death any ſuch is arraigned, was murdered, or ſlain by Await, Aſſault or Malice prepenſed, the ſame Juſtices ſhall enquire by a good Inqueſt, of the Viſne *where the dead was ſlain, if he were murdered or ſlain by Await, Aſſault or Malice prepenſed; and if they find that he was murdered, or ſlain by Await, Aſſault or Malice prepenſed, the Charter ſhall be diſallowed, and further it ſhall be done as the Law alloweth.*

Sect. 16. Alſo the ſaid Statute required, That the Name of him who ſued for ſuch a Charter ſhould be endorſed upon the Bill under a great Penalty, *&c.* But as to this, and all other Matters, except only what is contained in the precedent Section, it is repealed by 16 *Rich.* 2. 6.

Sect. 17. It ſo fully appears from the expreſs Words of 13 *Rich.* 2. That the King's Pardon of Murder, Rape or Treaſon cannot be good, without a Clauſe of *non obſtante*, unleſs the Crime be ſpecified in the Pardon, that I do not [a] know that it hath ever been diſputed. But it hath been often formerly [b] adjudged, That a Murder might be well pardoned under the general Deſcription of a felonious Killing, if the Charter had the Clauſe of *non obſtante* of this Statute. Which Conſtruction ſeems in a great Meaſure to evacuate ſo excellent a Law, by barely changing the Form of the Charter. But it ſeems difficult to give a good Reaſon why this Statute ſhould ſo eaſily be evaded, which was made for the Prevention of ſuch great Miſchiefs, and no Way tends to aboliſh the King's Prerogative, but only to put ſuch a Reſtraint upon the Abuſe of it, which every one muſt own to be reaſonable. But if ſuch Opinions were founded on the King's Power of diſpenſing with Statutes, they ſeem to have been of [c] little Force ſince the Statute of 1 *Will. & Mar. Seſſ.* 2. *ch.* 2. by which it is declared and enacted, *That from and after that Seſſion, no Diſpenſation by* non obſtante *of or to any Statute, or any Part thereof, ſhall be allowed,* &c.

Sect. 18. But it ſeems plain, That Pardons of Manſlaughter, or any other Felony, except Murder or Rape, remain as they were at Common Law, for which I ſhall refer to *Sections* 8, 9, 10, 11, 12, 13. from whence it follows, that the Pardon of the [d] felonious Killing of *J. S.* may be well pleaded to an Indictment of Manſlaughter for Killing him. But where ſuch a Pardon hath been pleaded to an Indictment of Manſlaughter by the Coroner's Inqueſt, the Court in Prudence hath refuſed [e] to allow it till the Fact hath been found Manſlaughter only, by a Jury directed by a higher Court.

Sect. 19. It hath been [f] adjudged, That where a general Act of Pardon expreſly pardons all Petit Treaſons, but excepts Murder it cannot be avoided by indicting one for Murder only, without the Word *Proditorie, &c.* who has been guilty of Petit Treaſon; for the leſs Offence being included, and conſequently drowned in the greater, cannot but be pardoned by a Pardon of it; and therefore the Exception of Murder in ſuch a Pardon muſt be conſtrued of ſuch Murder only as is ſpecially ſo called, and doth not amount to Petit Treaſon.

[a] *Vide* Bro. Charter of Pardon, 10. Crompt. Juſt. 115. pl. 12. Keilw. 91. b. Cro. Ja 495. March, 213, 214. *&c.* Yet in Raſt. Ent. 455. there are Precedents of Pardons of all Murders in general, without any *non obſtante*, and in Dyer 124. pl. 39. there is Mention of a Pardon of all Treaſons, *&c.* but I ſuppoſe that the particular Treaſon was alſo expreſly pardoned; for it appears that the Attainder for it was expreſly mentioned.

[b] 2 Keb. 363. pl. 11. 574. pl. 92. Show. Rep. 283, 284. 1 Sid. 366. pl. 2. 3 Mod. 37, 38. Kely. 24, 25. Moor, 752, pl. 1033. 12 Co. 18. 2 Jon. 56. Raſt. Ent. 455. pl. 3. the ſame Point is admitted and complained of, S. P. C. 132. Let. A. H. P. C. 250. *Vide* 3 Inſt. 236. 2 H. 7. 6. b. March, 214. Sty. Rep. Rickabee's Caſe. [c] Show. Rep. 283, 284. [d] 2 Keb. 363. pl. 11. 574. pl. 92. Kely. 24, 25. 2 Jon. 56. [e] 2 Keb. 415. pl. 45. [f] Dy. 50. pl. 4, 5. 235, pl. 19. 6 Co. 13. b. Crompt. 115. pl. 5, 6, 8,

Sect. 20. Alſo it hath been [a] adjudged, That a general Act of Pardon of all Felonies, &c. except Murder, ſhall extend to a *felo de ſe*; for notwithſtanding his Offence may in Strictneſs be called Murder, and conſequently may ſeem naturally enough to come within the Exception, yet ſince the general Words of an Act or Parliament are to be expounded according to the Common Uſe of them, and the Offence of *felo de ſe* and Murder are generally underſtood as diſtinct Offences, and as ſuch are diſtinctly treated by all Authors, who when they uſe the Word Murder, as ſignifying a certain Species of Offences, always mean by it the Murder of another; and farther, ſince there is greater Reaſon to except the Murder of another out of a Pardon, than that of a Man's ſelf, becauſe both the Law of God and Nature ſeem generally to require Blood for Blood, which can be applied only to the Murder of another, the Word Murder ſhall in ſuch an Exception be taken only to ſignify the Murder of another.

[a] 1 Lev. 8, 120. 1 Sid. 190. 1 Keb. 66, 548.

Sect. 21. Alſo it hath been [b] adjudged, That if a general Act of Pardon extend to all Felonies, Offences, Injuries, Miſdemeanours, and other Things done before ſuch a Day, it pardons a Homicide from a Wound given before the Day, whereof the Party died not till after the Day, becauſe the Stroke which is the Cauſe of the Death being pardoned, all the Effects of it are conſequently pardoned.

[b] Pl. Com. 401. Crompt Juſt. 116. pl 20. This is left a Quære, Dyer 99. pl. 65.

Sect. 22. As to the third Particular, *viz.* How far the Pardon of one Man may diſcharge another: It ſeems to be generally [c] agreed, That notwithſtanding all Felonies are [d] ſeveral, and conſequently a Pardon of one Man cannot be a direct Diſcharge of another, yet in ſome Caſes the Felony of one Man may be ſo far dependent upon that of another, that the Pardon of the one will by a neceſſary Conſequence enure to the Benefit of the other. As where the Principal pleaded his [e] Pardon, and was allowed it at the Common Law, [f] before his Attainder, or where he pleads and is allowed it at this Day before his [g] Conviction, in which Caſe it ſeems that the Acceſſary may by a neceſſary Conſequence take Benefit of it, becauſe he cannot be arraigned till after the Principal is convicted.

[c] *Vide ſupr.* ch. 29. ſect. 41. Lett. l. 34 H. 6. 9. pl. 19. 42 Aſſ. pl. 16. Bro. Charter of Pardon, 33. Coro. 122 or 123. Fitz Charter, 15.
[d] Cro. Eliz. 30, 31.
[e] 22 Ed. 4. 7. pl. 22. *See* the next Section, Dy. 14. pl. 21, 22. F.N.B. 115. Lett. c. 7 H. 4. 16. pl. 5.
[f] *Supra*, ch. 29. ſect. 41. Lett. l.
[g] *Supra*, ch. 29. ſect. 42.

Sect. 23. It is [h] agreed, That if a Man be bound to the King as Surety for another, for the Payment of a certain Fine or other Debt due to the Crown, the Pardon of the Principal is a Diſcharge of the Surety alſo. But it ſeems to have been [i] holden as a general Rule, That where a Man is bound as Surety for another for the Performance of a future Act, the Diſcharge of the Principal before the Time of the Performance will not diſcharge the Surety, becauſe nothing was due to the King at the Time of ſuch Diſcharge: But this ſeems extremely nice; neither do the Caſes [k] brought for the Proof of it ſeem any Way to come up to it. For as to the firſt of them, *viz.* That of the King's Releaſe of a Recogniſance for the Peace to the Principal, before it is forfeited, which ſhall not diſcharge the Sureties; it may be anſwered, that it will [l] not ſo much as diſcharge the Principal. And as to the other Caſe [m] cited for this Purpoſe, *viz.* That of the King's Pardoning *J. N.* the Building of ſuch a Houſe, for his Building whereof *J. S.* is bound to the King, which ſhall be no Diſcharge to *J. S.* it may be anſwered, that as this Caſe is put, *J. N.* doth not ſeem to be bound

[h] 1 H. 7. 10. pl. 12. Fitz Pardon, 4. Bro. Charter of Pardon, 36.
[i] *See* the Books next above-cited.
[k] *See* the Books next above-cited.
[l] *See* B. 1. ch. 60. ſect. 17.
[m] 1 H. 7. 10. *&c.*

at

at all, but only *J. S.* who therefore doth not ſeem to come under the Notion of a Surety, but of a Principal.

Sect. 24. As to the fourth Particular *viz.* How far it is neceſſary that the Pardon of ſeveral Perſons for Felony be ſeveral: It ſeems [a] agreed, That the Pardon of *A. B.* and *C.* of all Felonies by them done, without adding, or any of them, is void; becauſe it ſuppoſes them jointly guilty, and extends to no other but joint Felonies, whereas all Felony is ſeveral [b] in each Offender, and cannot be joint. And the *Year-Book* of [c] 22 *E.* 4. goes ſo far as to hold, That the Addition of the Words, *or any of them*, will not help a Pardon beginning with ſuch joint Words, But this is [d] ſaid to be miſreported, and contrary to the Roll, and ſeems to be agreed [e] not to be Law at this Day.

Sect. 25. As to the fifth Particular, *viz.* Whether the King's Grant of a Protection, or of a Place of Truſt to a Traitor or Felon, carry with it an implied Pardon of his Crime: It is generally [f] agreed, That a Protection granted to a Felon ſhall be ſo far from enuring as a Pardon, that it ſhall not ſo much as privilege him from anſwering immediately to an Indictment, in the ſame Manner as if he had no Protection at all. But there is a ſhort [g] Note of a Caſe in *Fitzherbert's Abridgment*, where one being indicted and found guilty of Felony, produced a Charter whereby it appeared that the King had hired him to go into *Gaſcoign*, to the Army, whereupon the Court allowed the Charter. And Sir *Edw. Coke* [h] ſuppoſes that the Offence was ſpecially recited in the Charter, and that ſuch Recital varies this Caſe from that of a Protection, which muſt be a formed Writ, and therefore can have no ſuch Recital. But however ſuch a Charter may enure as a [i] Suſpenſion of the Proceedings againſt a Felon for a Time, I do not ſee how it can be collected from this Caſe, that it ſhall enure as a Pardon of the Felony by Implication, which ſeems contrary to the Rule [k] of Law in other Caſes, which will not ſuffer a Pardon of Felony to be carried beyond the expreſs Purport of it. However it was ſolemnly adjudged [l] in Sir *Walter Raleigh's* Caſe, That the King's Grant of a military Command to a Perſon attainted of High Treaſon, wherein he called him his true and loyal Subject, and gave him judicial Power over the Lives of others, did not pardon the High Treaſon, becauſe every Pardon of High Treaſon requires an expreſs Mention of it, if not by the Common Law, yet at leaſt by the Statute of 13 [m] *R.* 2. Beſides if the Offence had been but Felony, yet after an Attainder it could not have been pardoned without an expreſs Mention both of the [n] Felony, and alſo of the [o] Attainder.

Sect. 26. As to the ſixth Particular, *viz.* What is required to make a good Pardon of Offences not Capital: It hath been adjudged, That a Pardon of all Miſpriſions, Treſpaſſes, Offences and Contempts, will pardon a Contempt in making a [p] falſe Return, *&c.* and a [q] Striking in *Weſtminſter-Hall*, and * Barretry, and even a [r] *Præmunire*: And it hath been laid down as a [ſ] general Rule, That it will pardon any Crime which is not Capital. But it is ſaid [t] to have been holden, That ſuch a Par-

[a] 22 Ed. 4. 7. pl. 22. Bro. Charter of Pardon, 51. Dyer 34. pl. 21, 22. S. P. C. 102. Lett. D.
[b] *See* the precedent Section.
[c] 22 E. 4. pl. 22.
[d] Bro. Charter of Pardon, 51. Dyer 34. pl. 21, 22. S. P. C. 102. Lett. D.
[e] Dyer 34. pl. 21, 22. H. P. C. 252.
[f] S. P. C. 104. Lett. D. Co. Lit. 130. b. 7 Ed. 4. 29. pl. 13. Abr. Fitz. Coro. 30. 3 Inſt. 239, 240. 2 Roll. Abr. 323. Lett. G. Fitz. Cor. 61. But Fitz. Coro. 122. ſeems contrary.
[g] Fitz. Coro. 239. cited 3 Inſt. 239, 240. S. P. C. 104. Lett. D. 2 Rol. Rep. 50.
[h] 3 Inſt. 240.
[i] *Vide* S. P. C. 104. Lett. D. 3 Inſt. 239, 240. 2 Roll. Rep. 50.
[k] *Vide ſupra*, ſect. 12. *&c.*
[l] Cro. Ja. 494. 2 Roll. Rep. 50. State Trials, Vol. 1. f. 187, 188, 877.
[m] *Supra*, ſect. 15.
[n] *Vide ſupra*, ſect. 8, 9.
[o] *Vide ſupra*, ſect. 8, 9.
[p] 36 H. 6. 24 pl. 21. 37 H. 6. 21, 22. Abr. Fitz. Charter, 22. Bro. Charter of Pardon. 25.
[q] 1 Lev. 106. 1 Sid. 211. 1 Keb. 852. pl. 56.
* 1 Mod. 102.
[r] Cro. Jac. 336. 2 Bulſt. 299.
[ſ] 1 Mod. 102. *Vide* Keilw. 159, 198. pl. 2. Fitz. Coro. 122.
[t] Watſon's Clergy-Man's Law, ch. 5. 1 Sid. 170, 222. the ſame Caſe is in Keble 780. but this Point is not taken Notice of. And the contrary ſeems to be admitted, Cro. Ei. 685. pl. 21. Moor, 916. pl. 1292. And is agreed, 2 Mod. 52.

don will not extend to Simony, becauſe it is *malum in ſe*; but this ſeems to be no good Reaſon? for Barretry, and the injurious Striking of another, and generally all Offences at Common Law, are alſo *mala in ſe*; and yet it ſeems clear, that unleſs they be Capital, they may be pardoned by ſuch a Pardon.

Sect. 27. It hath been queſtioned [a] whether a general Pardon of all Treſpaſſes extends to Champerty or Confedracy.

[a] 7 H. 4. 9. pl. 11.

Sect. 28. As to the ſeventh Particular, *viz.* Whether any Offence can be pardoned before it is committed: It ſeems agreed [b], That the King can by no previous Licence, Pardon, or Diſpenſation whatſoever, make an Offence diſpuniſhable which is * *malum in ſe*, *i. e.* unlawful in itſelf, as being either againſt the Law of Nature, or ſo far againſt the Publick Good, as to be indictable at Common Law. For a Grant of this Kind tending to encourage the Doing of Evil, which it is the Chief End of Government to prevent, is plainly againſt Reaſon, and the Common Good, and therefore void. Yet it ſeems to have been adjudged [c], That the King's Grant to the Biſhop, of *Salisbury*, and his Succeſſors, having the Cuſtody of a Priſon, that they ſhall be quit from all Eſcapes, *&c.* having been allowed in *Eyre*, ſhall be a good Diſcharge from any Fine for a negligent Eſcape out of ſuch Priſon. And yet it is admitted that ſuch a Grant is no Diſcharge of a voluntary Eſcape; but it is ſaid, that it ſhall diſcharge a negligent one, becauſe it is puniſhable only by a pecuniary Penalty; and it is a general Rule, That the King may diſcharge a [d] Poſſibility of an Intereſt before it happens; as where the Tenants of his Manor are to be amerced for a Default in Reſpect of their Tenures, which the King may pardon beforehand. But if it be a good Rule that the King cannot pardon an Offence which is *malum in ſe* before it happens, and the negligent keeping of a Priſon be ſuch an Offence, which I think cannot be denied; and farther if it be alſo a good Rule, That where the King's Grant is plainly againſt the Common Good, as a Grant of this Kind ſeems to be, as tending to make a Gaoler leſs diligent in his Duty, by taking off the legal Puniſhment of his Negligence, I do not well ſee how this Caſe can be maintained. For it ſeems by no Means to follow that becauſe the King can diſcharge his Right to an Amercement before it happens, for a Default of his Tenants in a Matter relating barely to the Revenue of the Crown, which it is admitted that in the like Caſe any other Lord may do as well; therefore he can diſcharge a pecuniary Penalty for an Offence of a publick Nature before it happens. Neither doth it ſeem that a negligent Eſcape is only puniſhable by a pecuniary Penalty; for in ſome [e] Books it is ſaid to be fineable, by which it is implied, that the Offender may be impriſoned. Beſides it ſeems [f] agreed, That many negligent Eſcapes will forfeit the Office of keeping a Gaol, and therefore it is plain that a pecuniary Penalty cannot be ſaid to be their only Puniſhment. However this is the only Caſe I [g] meet with which looks like an Exception out of the General Rule that the King cannot pardon an Offence that is *malum in ſe* before it happens.

[b] Finch of Law, 234, 235. 19 H. 6. 62. b. 37 H. 6. 4. b. 5. a. 11 H. 7. 11. 12. pl. 35. Bro. Charter, de Pardon, 76. Davis's Rep. 75. 5 Co. 35. b. 12 Co. 29, 30. * But Chief Juſtice Vaughan in Sorrel's Caſe, fol. 332, *&c.* ſeems to find fault with the Diſtinction between *malum in ſe* and *Prohibitum*, as not fully anſwering all the Caſes concerning Diſpenſations.

[c] 3 H. 7. 15. pl. 30. Abridged, Fitz Grant, 37. Bro. Patents, 51. Cited S. P. C. 102 Lett. E.

[d] Dy. 52. pl. 2. 19 H. 6. 62, 63, 64.

[e] Abridged, Bro. Patents, 16

[f] *Vide ſupra*, 19 Sect 31.

[g] *Supra*, Ch. 19. Sect. 29, 30.

Sect. 29. But where [h] a Thing, which is lawful in its own Nature, is made unlawful by the Prohibition of an Act of Parliament only, as the carrying [i] Bell-metal or [k] Beer, *&c.* out of the Realm, importing [l] certain Merchandiſes in Foreign Ships, *&c.* ſelling [m] Wines beyond a

[h] But Chief Juſtices Vaughan in Sorrel's Caſe, 335, 336. ſeems to argue to the contrary.

75, 76. Finch, 234, 235. [i] Dyer, 52. pl. 1, 2. [k] Dyer, 92. pl. 18. [l] Dyer, 54. pl. 17, 18. [h] Dav. Rep. [m] Dyer, 270.

certain Price, [a] exporting Wool to any other Place than *Calais*, selling [b] Wines without a Licence, multiplying [c] Gold or Silver, [d] Coining Money of a baſe Alloy, and [e] other Matters of the like Nature, it ſeems to have been formerly taken [f] for granted, that generally the King might diſpence with it as to a [g] particular Time, or Place, or Perſon, or even a * Corporation aggregate, *&c.* ſo far as the Publick was concerned in it. Yet where ſuch Diſpenſation could not but be attended with a great Inconvenience, as the Introducing a Monopoly, or Fruſtrating the End for which the Law was made, as the Licenſing [h] a particular Perſon to import Foreign Cards or Wines prohibited by Parliament, and [i] *a fortiori* if it tended to ſuſpend the whole Statute in general, it was commonly agreed to be void. Alſo where ever an Act of Parliament gives a particular Intereſt, or Right of Action, to the Party [k] grieved by the Breach of it, as the Statutes of [l] *Mortmain*, which give an Entry to the next immediate Lord for an Alienation to a Corporation, the [m] Statutes againſt Maintenance, Forcible Entries, carrying Diſtreſſes out of the Hundred, [n] ſuffering one in Execution to eſcape, *&c.* which give an Action to the Party grieved by the Offence prohibited; it ſeems to have been always agreed, That no Charter by the King can be of any Force to bar the Right of the Party grounded upon ſuch Statute, becauſe it is a ſettled Rule, that the King cannot prejudice the Intereſt of the Party. Alſo where a Statute is expreſs, that the King's Charter againſt the Purport of it, whether with or without a Clauſe of *non obſtante*, ſhall be void; it is ſaid by Sir [o] *Edward Coke*, that no Clauſe of *Non obſtante* can diſpence with it, unleſs to tend to reſtrain ſome Prerogative, ſolely and inſeparably incident to the Perſon of the King, as the Right of pardoning, or of commanding the Service of the Subject, for the publick Weal, which being, [p] as he ſeems to argue, founded on the Law of Nature, are ſo far inſeparable from the King, that by a Clauſe of *Non obſtante* he may diſpenſe with any Statute whatſoever, which tends to deprive him of them. And on this Ground the Reſolution of the Judges in the [q] *Year-Book* of *H.* 7. is ſaid to be maintainable, whereby it was adjudged, without any Difficulty, That where the Statute of 23 *H.* 6. *ch.* 8. expreſly enacts, That Patents to Sheriffs to continue longer than a Year ſhall be void, and the Party diſabled to bear the Office of Sheriff notwithſtanding any Clauſe of *Non obſtante*, yet the King by the Clauſe of *Non obſtante*, might make a good Patent of ſuch Office for Life. Which is in Effect to ſay that let there be never ſo good Reaſons for the making a new Law for the Reſtraint of the Prerogative in any Particular relating to the Service of the Subject, yet it is not in the Power of the Legiſlature to make ſuch a Law; and yet no one will deny that where-ever the Law of Nature leaves a Matter indifferent, there the Law of Man ought to prevail. Neither is there any Pretence to ſay that the King has a Right by the Law of Nature to appoint Sheriffs, ſince it is plain that before the [r] Statute of 9 *Ed.* 2. the Freeholders choſe them, unleſs they had a Fee in their Office. And what Reaſon can there be that the Statute-Law which gives the Crown the Power of making Sheriffs, may not alſo qualify that Power, as ſhall be thought convenient? But it is obſervable, that the Reſolution abovementioned, does not go upon any particular Reaſon which may di-

[a] 2 Rich. 2. 11, 12. pl 26. 11 H 7. 11, 12. pl. 35. 37 H. 6. 4. 2 H 7. 6. b. Bro. Charter, de Pardon, 24. 76. Parliament, 98. 13 H. 7. 8. b. Fitz. Charter, 21. Grant, 33.
[b] Vaughan, 330.
[c] Lev. 217. 1 Sid. 6, 7.
[d] 11 H 7. 11. pl. 26. Vaugh. 344.
[e] 2 Rich. 3. 12. a. 2 H. 7. 6. b. 12 H 3 a. by Martyn.
Dyer, 224. pl. 31 225. pl. 35. 303. pl. 49.
[f] *See* the Books above cited to the other Parts of this Section, and State Trials, Vol. 3. f. 799 to 810. f. 845.
[g] 11 Co. 83 a. 7 Co. 36. b. 1 Lev. 218. Co. Litt. 99. a. *Vide* 3 Lev. 389.
* Vaugh 352.
[h] Lev. 217.
[i] Vaugh. 344. 11 Co. 88.
[k] *See* the Books above-cited.
[l] State Trials, Vol. 3. fol. 793, 796, 808, 809.
[m] *Supra*, ch. 26. Sect. 64. 37 H. 6. 4. a. b. 2 Rich. 3. 12. a. Vaugh. 342, 343.
[n] *Infra*, Sect. 34
[o] 11 Co. 98, 99. *Vide* Keilw. 154. pl. 15. But now by 7 & 8 *W.* 3. 37. ſuch Licence may be granted by the King alone.
[p] 7 Co. Calvin's Caſe, 14. a.
[q] 2 H. 7. 6. b. Abridged, Fitz. Grant, 33. Bro. Patents, 102. *Vide* Finch of Law, 234, 235. 13 H. 7. 8. b. Plow. Com. 502. b.
[r] Inſt. 558, 559.

ſtinguiſh the Caſe of a Sheriff, from any other Caſe, but only on the King's Power by *Non obſtante* to diſpenſe with the Statutes concerning the Tranſporting Wool, the Pardoning of Murder, and the Expreſſing the Quantities of the Land granted by the King's Patents, and ſuch like, which becauſe they may be diſpenſed with by Clauſes of *Non obſtante*, it is taken for granted, that the Statute of 23 *H.* 6. might as well be diſpenſed with by them; as if it were a plain Conſequence that becauſe Statutes which ſay nothing concerning the Clauſe of *Non obſtante*, may be diſpenſed with by it; therefore a Statute which expreſly provides againſt it, may alſo as well be diſpenſed with by it.

Sect. 30. It is [a] ſaid, That the King may diſpenſe with the Statutes of *Mortmain*, without any Clauſe of *Non obſtante*; and this ſeems very reaſonable, becauſe thereby he only gives up that Right of Entry which thoſe Statutes give him for the Forfeiture, which every meſne Lord might alſo do as well ſo far as he had a Right by thoſe Statutes. Alſo it ſeems to be holden [b] by ſome Books, That the Clauſe of *Non obſtante* was only requiſite in Reſpect of ſuch Statutes which expreſly ſaid it ſhould be void. But the far greater Number of [c] Authorities ſeem to be to the contrary.

Sect. 31. But the diſpenſing Power was carried ſo very high in a late Reign, and found to be of ſuch dangerous Conſequence as to make the Execution of the moſt neceſſary Laws in Effect precarious, and merely dependent on the Pleaſure of the Prince. And it ſeeming highly incongruous that the King ſhould have a Kind of abſolute unlimited Power, in diſpenſing with Laws wherein the Church and State have the higheſt Intereſt, when at the ſame Time he has no Power at all to diſpenſe with any Law which veſts the leaſt Right or Intereſt in a Private Subject, it was found by Experience neceſſary to *declare and enact by* 1 Will. & Mar. Seſſ. 2 Ch. 2. *That no Diſpenſation by* Non obſtante *of or to any Statute, or any Part thereof, be allowed, but that the ſame ſhall be held void and of none Effect, except a Diſpenſation be allowed in ſuch Statute. But it is provided that no Charter, Grant, or Pardon, granted before* 23 October, 1699. *ſhall be any way impeached or invalidated by that Act, but that the ſame ſhall be and remain of the ſame Force and Effect in Law, and no other, as if the ſaid Act had never been made.*

Sect. 32. It hath been always [d] agreed, That the King never could diſpence with a Statute before it was made.

Sect. 33. As to the eighth Particular, Whether there be any Offence which cannot be pardoned after it is committed: I take it to be a ſettled Rule [e], That the King may Pardon any Offence whatever, whether againſt the Common or Statute Law, ſo far as the Publick is concerned in it, after it is over, and conſequently [f] may prevent any popular Action on a penal Statute by a Pardon of the Offence before any Suit commenced by an Informer. But while a Publick Nuſance continues unreformed, it ſeems * agreed, That the King cannot wholly pardon it, becauſe ſuch Pardon would take away the only Means of compelling a Redreſs of it. But it hath been [h] holden by ſome, That a Pardon of ſuch Offence will ſave the Party from any Fine for the Time precedent to the Pardon.

[a] Co. Lit. 99. Plowd. Com. 502 b. Dyer, 269 pl. 19. where the Grant is made *ex certâ Scientiâ. Cont.* by Dy. in Plow. Co. 502. *Vide* Raſt. Ent. 202. a. Fitz. Grant, 36. Entry congeable, 28. Plow. Com. 334. b.

[b] Finch, 234, 235. Plow. Com. 502.

[c] 2 H. 7. 6. b. Abridged, Bro. Patents, 109 Fitz. Charter, 37. 2 Rich. 3. 12. a. 43 Aſſ. pl. 19. *Vide* Dyer 52. pl. 1. 54. pl. 17. 29. pl. 17, 18, 270. pl. 22, 303. pl. 49. 352. pl. 25.

[d] Finch 235. 1 Sid. 6. Dy. 52. pl. 2.

[e] *See* the Books cited to the other Parts of this and the next Section.

[f] *Vide ſupra*, ch. 26. Sect. 64.

* *See* the following Section.

[h] 3 Inſt. 237. Vaugh. 333. 37 H. 6. 4 b. Plow Com. 487. *Vide* 12 Co. 30.

Fitz. Aſſiſe, 445 Keilw. 134. pl. 15. 12 Co 29, 30. State Trials, Vol. 1. fol. 578.

Sect. 34.

Sect. 34. As to the ninth Particular, *viz.* How far a Pardon may be of Force againſt the private Intereſt of the Subject: I take it to be a [a] ſettled Rule, That the King cannot by any Diſpenſation, Releaſe, Pardon or Grant whatſoever, bar any Right, whether of Entry, or Action, or any legal Intereſt, Benefit or Advantage whatſoever before veſted in the Subject; and upon this Ground it ſeems clear, That the King can no way bar any Action on a Statute by the Party [b] grieved; nor even a popular [c] Action by a Common Informer, if commenced before his Pardon or Releaſe; and that he cannot diſcharge a Recognizance [d] for the Peace, before it is forfeited.

Sect. 35. And upon the ſame Ground, it ſeems to be clearly agreed, That as the Releaſe of a Perſon robbed, or of the Wife or Heir of a Perſon killed, will not [e] bar an Indictment, or a Demand of Execution at the Suit of the King, ſo neither will a Pardon [f] by the King be any Bar to an Appeal, except only where it is carried on at the Suit of the King, after a Nonſuit of the Party, in which Caſe it may be barred by a [g] Pardon in the ſame Manner as an Indictment. But if one who appears to be attainted of Felony, whether by Outlawry, or otherwiſe, on an Appeal carried on at the Suit of the Party, get a Pardon from the King, he [h] muſt ſue a [i] *Scire facias* againſt the Appellant before the Pardon ſhall be allowed, unleſs the Appellant appear [k] *gratis*, and confeſs that he will ſue no farther, *&c.*

Sect. 36. If the Appellant appear on the *Scire facias*, it is [l] certain that he may pray Execution notwithſtanding the Pardon: But if the Sheriff have returned a [m] *Scire facias*, or two [n] *Nihils*, and the Appellant appear not [o] upon Demand, the Appellee ſhall be diſcharged. Yet if the Appeal be of Death, and the Sheriff return the Appellant dead, there are ſome [p] Authorities that a *Scire facias* ought to go againſt the next Heir to the deceaſed, but the greater Number of [q] Authorities ſeem to be to the contrary.

Sect. 37. There is ſaid [r] to be no Need of any *Scire facias* on ſuch a Pardon againſt the Lords mediate or immediate, becauſe the Pardon no way tends to reverſe the Attainder, and conſequently can do no Hurt to their Title of Eſcheat, *&c.* grounded on the Attainder, but rather affirms it.

[a] *Supra*, S. 29. 8 H. 6. 19. Abridged, Fitz. Grant, 4. 37 H. 6. 4. b. Abridged, Bro. Charter de Pardon, 24. 2 Rich. 3. 12. a. Pl. Com. 487. a. b. Fitz. Aſſiſe, 445. Cro. Ca. 199. 2 Roll. Abr. 178. Lett. S. 304. Lett. S. Cro. Ja. 159.

[b] *Supra*, ch. 26. ſect. 64. 2 Rich. 3. 12. a. *Vide* Keilw. 134. pl. 15. Fitz. Chart. 21.

[c] *Supra*, ch. 26. Sect. 64. 37 H. 6. 4. a. b. Abridged, Fitz. Grant, 21. Bro. Charter, de Pardon, 24. 2 Rich. 3. 12. a. 5 Ed. 4. 3. pl. 25.

[d] 37 H. 6. 4. b. Fitz. Charter, 21. Pardon, 4, 5. Bro. Charter, de Pard. 24. Recogniſ. 22. 11 H. 7. 12. pl. 35. 12 Co. 29, 30. Book. 1. ch. 60. Sect. 17.

[e] 8 H. 4. 22. pl. 17. Abridged, Fitz. Charter, 26. Bro. Charter de Pardon, 13. Appeal, 27, 33, 41, 128. 11 H. 4. 16. pl 36.

[f] *See* the Authorities cited to the other Parts of this Section, and Bro. Appeal, 150. 3 Inſt. 237.

[g] *Supra*, ch. 25. Sect. 13. Bro. Appeal, 33.

[h] Dy. 34. pl. 20. S. P. C. 104. Lett. B. H. P. C. 251. 11 H. 4. 11. pl. 24. 11 H. 4. 48. pl. 23. 9 H. 7. 5. pl. 1. 2 Rich. 3. 8. pl. 17. 9 H. 4. 1. pl. 2. 13 H. 4. 6. pl. 14. 38 H. 6. 13. pl. 26. and the Authorities cited to the other Parts of this Section.

[i] That the Appellee may have ſuch a *Scire facias* of Courſe on ſuch a Pardon, without producing a Releaſe or other Deed from the Appellant. 9 H. 7. 5. pl. 1. Abridged, Fitz. Scire facias, 56. Bro. Scire. Facias, 166. 2 Rich. 3. 8. pl. 17. S. P. C. 104. Lett. B. *Cont.* 11 H. 4. 16. pl. 36. Abridged, Bro. Scire fa' 73. That there was no Need of any *Scire facias* where an Appeal was abated by the King's Death, and the Year and Day were paſſed. 2 H. 7. 10. pl. 5. Bro. Charter of Pardon, 69.

[k] 11 H. 4. 16. pl. 36. Fitz. Coro. 87. Same Caſe Brg. Confeſſion, 12. and Jour in Court, 21. But 'tis made a Wonder that a *Scire facias* was not awarded.

[l] S. P. C. 104. Lett. B. H. P. C. 251. 11 H. 4. 1. pl. 2.

[m] S. P. C. 104. Lett. B. H. P. C. 251.

[n] Finch, 477. *Vide* Dy. 168. pl. 17. 172. pl. 10, 11.

[o] 2 Rich. 3. 8. pl. 17. 9 H. 4. 1. pl. 2. Abridged, Fitz. Scire facias, 63. Bro. Charter de Pardon, 14.

[p] 11 H. 4. 11. pl. 24. 11 H. 4. 48. pl. 23. 19 H. 4. 6. pl. 14. Abridged, Fitz. Coro. 266. *Vide* Fitz. Coro. 85. *Supra*, ch. 23. Sect. 38. & 41.

[q] 9 H. 7. 5. pl. 1. Abridged, Fitz Scire fac' 56. Bro. Scire Facias, 166. Appeal, 88, 144. 38 H. 6. 13. pl. 26. Bro. Appeal, 141. Charter de Pardon, 28. *Supra*, Ch. 23. Sect. 38, 41.

[r] Dyer, 34. pl. 20.

Sect. 38. If ſeveral Perſons be outlawed in an Appeal, and one of them be pardoned, and get his Pardon allowed on the Non-appearance of the Appellant on a *Scire facias*, *&c.* and afterwards another of them get his Pardon; it ſeems, That he ſhall take no [a] Advantage of the Appellant's Default on the firſt *Scire facias*, but muſt ſue out his *Scire facias*, *&c.* in the ſame Manner as if there had been no ſuch Default.

Sect. 39. It is holden by great * Authorities, That if a Perſon be convicted of Manſlaughter upon an Appeal of Death, the King may pardon the Burning in the Hand; for which this Reaſon is given by Sir *Edward Coke*. That it is no Part of the Judgment at the Suit of the Party, but a collateral and exemplary [b] Puniſhment inflicted by the Statute of 4 *H.* 7. 13. But this is made a *Quære* by [c] others, and the principal Caſe wherein it is ſaid to have been reſolved, is very differently [e] reported, and was never [f] adjudged; And the Ground laid down that the King may pardon it becauſe it is no Part of the Judgment at the Suit of the Party, by which it ſeems admitted, That if it were Part of the Judgment, the Law would be otherwiſe, ſeems rather to make againſt it than for it; for there are [g] Precedents of expreſs Judgments, *quod cautariſetur in manu ſuâ lævâ*. Alſo it is [h] admitted, That where a Defendant is to have a certain Impriſonment, *&c.* at the Suit of the Party upon a Statute, the King cannot diſpenſe with it, except in ſome ſpecial [i] Caſes, wherein it may be reaſonably intended that ſuch Impriſonment was given by the Statute, by Way of Satisfaction to the Publick Juſtice only, in which Caſe it ſeems agreed, [l] That the King may diſpenſe with it, as it is ſaid that he may, with finding of Sureties by one convict on the Statute againſt Treſpaſſes in Parks. But it ſeems doubtful, whether the Statute of 4 *H.* 7. 13. which appoints the Burning of the Hand can well admit of ſuch a Conſtruction; for the Words are, *Whereas upon Truſt of the Privilege of the Church, diverſe have been more bold to commit Murder*, &c. *becauſe they have been admitted to their Clergy as oft as they have offended; for avoiding of ſuch preſumptuous Boldneſs*, It is enacted, *That every Perſon not being in Orders, who hath once been admitted to his Clergy, be not again admitted thereto, and that every ſuch Perſon convict*, &c. *ſhall be marked*, &c. from whence it ſeems plain, That the Statute expreſly intends ſuch Marking as a Diſcouragement of the Offence; and it ſeems difficult to give a Reaſon why it ſhould be conſtrued to mean it only as a collateral and not as a direct Puniſhment. Neither doth it ſeem a plain Reaſon, That becauſe the Statute intended it as an exemplary Puniſhment, the King may diſpenſe with it; for ſurely the Execution of an Appellee attainted of Murder, and the perpetual Impriſonment of a Clerk delivered to the Ordinary upon a Conviction on an Appeal, who could not make his Purgation, were alſo exemplary Puniſhments; and yet it is generally [m] agreed, That the King never could diſpenſe with them. And therefore upon the Whole this ſeems to be a Point that deſerves to be farther conſidered.

Sect. 40. But granting that the King may pardon the Burning the Hand in an Appeal, it ſeems a very reaſonable [n] Conſequence that the Party ſhall immediately be delivered by Force of the Statute of 18 *Eliz.* which ſays, That after Burning he ſhall be delivered, which ought to have this Conſtruction, That he ſhall be delivered after burning, where he is to be burned.

[a] 1 H. 4. 1. pl. 2. Fitz. Scire facias, 63. But Bro. Charter de Pardon, 14. in the Abridgment of the ſame Caſe holds the contrary.
* H. P. C. 251. 3 Inſt. 237. Hob. 294. cited, State Trials, Vol. 4. f. 382.
[b] But my Ld. Hobart f. 274. ſays, That it is no Part of the Judgment, nor ſo much as in the Nature of the Puniſhment, but only a Mark to notify that the Party may have his Clergy but once.
[c] Raym. 369, 370. Dyer 202 pl. 68. 261. pl. 26. Cro. El. 464. theſi ſpl. 13.
[e] Biggin's Caſe, 5 Co. 50. Cro Eliz. 632. pl. 27. 682. pl. 14. Moor 571. pl. 782.
[f] Raym. 371. 5 Raſt. Ent. 1. b. pl. 2. 56. a. pl. 1. Yet it is omitted, 55. b. pl. 6.
[h] 5 Co. 50. b. Dy. 261. pl. 26. 323. pl. 28.
[i] 3 Inſt. 271, 237. 2 Inſt. 200, 439.
[l] Dy. 238. pl. 34, 35. 1 Inſt. 171. 2 Inſt. 200.
[m] *Vide ſupra*, ſect. 35. 5 Co. 50. b.

Dy. 261. pl. 26. Yet 'tis made a *Quære*, Dy. 200. pl. 68. whether the King could not pardon ſuch Impriſonment. [n] 5 Co. 50. b. *Vide* ch. 33. ſect. 131. Cro. Ca. 596, 597. Hob. 294.

Sect. 41. It ſeems to have been always agreed, [a] That the King's Pardon will diſcharge any Suit in the Spiritual Court *ex officio*: Alſo it ſeems to be [b] ſettled at this Day, That it will diſcharge any Suit in ſuch Court *ad inſtantiam partis pro reformatione morum*, or *ſalute animæ*, as for Defamation, or laying violent Hands on a Clerk, and ſuch like; for ſuch Suits, like thoſe in the Star-Chamber, are in Truth the Suits of the King, tho' proſecuted by the Party. Alſo it ſeems to be [c] agreed, That if the Time to which ſuch Pardon hath Relation, be prior to the Award of Coſts to the Party, it ſhall diſcharge them: And it ſeems to be the general [d] Tenour of the Books, That tho' it be ſubſequent to the Award of the Coſts, yet if it be prior to the Taxation of them, it ſhall diſcharge them; becauſe nothing appears in certain to be due for Coſts before they are taxed. [e] Alſo if a Perſon be impriſoned on a Writ of *Excommunicato capiendo* for his Contumacy in not paying Coſts, and afterwards the King pardon all Contempts, it ſeems, That he ſhall be diſcharged of ſuch Impriſonment without any *Scire facias* againſt the Party, becauſe it is grounded on the Contempt which is wholly pardoned; and the Party muſt begin anew to compel a Payment of the Coſts.

Sect. 42. But it ſeems agreed, [f] That a Pardon ſhall not diſcharge a Suit in the Spiritual Court, any more than in a Temporal, for a Matter of Intereſt or Property in the Plaintiff, as for Tithes, Legacies, Matrimonial Contracts and ſuch like. Alſo it is [g] agreed, That after Coſts are taxed in a Suit in ſuch Court at the Proſecution of the Party, whether for a Matter of private Intereſt, or *pro reformatione morum*, or *pro ſalute animæ*, as for Defamation, *&c.* they ſhall not be diſcharged by a ſubſequent Pardon.

Sect. 43. If the Offence be pardoned after Coſts are taxed, and then the Defendant appeal to a Superior Court, which gives new Coſts, whether upon the Affirmance or Reverſal of the firſt Sentence, they ſhall * not be avoided by Reaſon of the Pardon, becauſe they are not given in Reſpect of the Offence, but of the Award of the former Coſts, which being taxed before the Pardon, are not avoided by it, and therefore the Appeal was proper for determining whether they were well given or not. But if the Offence for which the Suit was in the Spiritual Court be pardoned, hanging an Appeal, and ſuch Pardon relate to a Time precedent to the Award of the Coſts, and after ſuch Pardon the Appellant deſert his Appeal, and the Spiritual Court award Coſts againſt him in Reſpect of ſuch Deſertion, it ſeems, [h] That he may have a Prohibition, becauſe the Pardon having diſcharged the Coſts of the firſt Suit as well as the Offence, made the Appeal to be to no Purpoſe. It is [i] ſaid, That Coſts taxed to the Party grieved for a Contempt in a Court of Equity are not diſcharged by a general Pardon of all Contempts, becauſe it is the Common Courſe of a Court of Equity to award ſuch Coſts at the Pleaſure of the Judge. But it hath been queſtioned whether Coſts taxed by the Prothonotary upon an Attachment to the Party grieved be not diſcharged by a general Pardon of all Contempts.

Sect. 44. It was inſiſted † by the Houſe of Commons in the Earl of *Danby*'s Caſe, and it is enacted by 12 & 13 *W.* 3. *ch.* 2. *That no Pardon under the Great Seal be pleaded to an Impeachment by the Commons in Parliament.*

Sect 45. As to the tenth Particular, *viz.* Whether a Pardon may be conditional: It ſeems agreed, [k] That the King may extend his Mercy on what Terms he pleaſes, and conſequently may annex to his Pardon any Condition that he thinks fit, whether precedent or ſubſequent, on the Performance whereof, the Validity of the Pardon will depend.

[a] 5 Co. 51. Cro. Eliz. 684. pl. 18 Cro. Ca. 113, 114.
[b] 5 Co. 51. Winch 125 Cro. Ja. 335. Hob. 81. Cont. Cro. El. 684. pl. 18. Cro. Ja. 335. Cro. Ca. 9. Vide Cro. Ca. 667, 668.
[c] 2 Roll. Abr. 304. pl. 1. 299. pl. 8. 5 Co. 51. Latch 190. Noy 85 91. Cro. Ca. 46, 47. Vide Cro. Ca. 9. wherein 'tis holden that an Award of Coſts tho' they have not been taxed, ſhall not be avoided by a Pardon, but the other Books ſeem contrary.
[d] 1 Jon. 227. 2 Rol. 178. Lett. S. Cont. adjudged, Cro. Jac. 159. And 'tis made a Quære Cro Ja. 212. whether an Excommunication can be diſcharged by the King's Pardon.
[e] 8 Co. 68, 69.
[f] 5 Co. 51.
[g] Latch 190. 5 Co. 51. Cr. Ca. 46, 47. and the Authorities cited to the precedent Sect.
* Cro. Ca. 46, 47. Winch 125.
[h] 2 Rol. Abr. 304. pl. 2. Noy 85. Latch. 155.
[i] 2 Vent. 194.
† State Trials, Vol. 2. f. 199, 723.
[k] Moor 466. pl. 662. Co Li. 274. b.

Sect. 46. As to the eleventh Particular, *viz.* Where a Pardon is void in Reſpect of a wrong Recital: It being a general Rule, [a] That wherever the King appears to have been deceived, his Grant is void, I take it to be agreed, That if it appear from the Recital of a Pardon, that the King was miſinformed either as to the [b] Nature of the Caſe, or the Proceedings thereupon, the Pardon is void; as where the [c] King pardons a Man for a Felony whereof he ſtands indicted, or indicted or attainted, and in Truth he never was indicted, *&c.*

Sect. 47. How a Pardon of Felony ſhall be avoided by Statute in Reſpect of a wrong Suggeſtion, hath been already ſhewn, *Sect.* 10.

Sect. 48. As to the ſecond general Point, *viz.* What is the Effect of a Pardon: I take it to be ſettled at this Day, That the Pardon of a Treaſon or Felony even after a Conviction or Attainder, does ſo far clear the Party from the Infamy and all other * Conſequences of his Crime, that he may not only have an Action [d] for a Scandal in calling him Traitor or Felon after the Time of the Pardon, but may alſo be a good Witneſs notwithſtanding the [e] Attainder or Conviction; becauſe the Pardon makes [f] him as it were a new Man, and gives him a new Capacity and Credit.

Sect. 49. And it hath been [g] admitted, That the King's Pardon of the Burning of the Hand on a Conviction of Manſlaughter hath the ſame Effect as to this Purpoſe, as the Burning would have had, which is [h] agreed to reſtore the Party to his Credit.

Sect. 50. But it hath been adjudged, [i] That a Pardon is of no Manner of Force, as to this Purpoſe, till it have paſſed the Great Seal.

Sect. 51. Alſo it is ſaid, [k] That the Pardon of a Felony will not make an Arreſt for it, by one who did not know of the Pardon, unlawful, becauſe ſuch Arreſts being for the Publick Good are to be favoured; and therefore ſhall not be actionable by Reaſon of ſuch a Pardon, as ſcandalous Words ſhall be, becauſe they deſerve no Favour.

Sect. 52. I do not [l] find it clearly ſettled, Whether the Pardon of a Conviction of Perjury make the Party a good Witneſs.

Sect. 53. If a Man be convicted, or deprived, or otherwiſe puniſhed for an Offence during a Seſſion of Parliament, and at the ſame Seſſion an Act paſſeth which pardons the Offence: It ſeems agreed, [m] That the Conviction or Deprivation, *&c.* are *ipſo facto* avoided, becauſe the Act taking Effect from the firſt Day of the Seſſion, it now appears that the Offence was pardoned at the Time of the Conviction, *&c.* Alſo it hath been adjudged, That where an Act of Parliament expreſly pardons ſuch and ſuch Crimes from a certain Day before the Seſſion, it thereby avoids all [n] Convictions and [o] Deprivations, and [p] Awards of Coſts and Amerciaments, [q] *&c.* for ſuch Crimes, whether ſuch Convictions, *&c.* were before or after the Seſſion, becauſe it appears to be the Intent of the Parliament that ſuch Crimes ſhall no Way be puniſhed, which cannot take Effect if ſuch Convictons, *&c.* continue in Force.

[a] Yelv. 43, 47, 48. Cor. Jac. 18, 34. [b] 2 Rol. Abr. 188 Lett. N. O. Dy. 352 pl. 26. Cro. Ja. 548. [c] Raym. 13. 1 Sid. 41. [d] 3 Inſt. 238. H. P. C. 251.

* *Vide* 1 Keb. 940. pl. 59. Fitz. Coro. 154, 281. 1 Aſſ. 3. Cro. Ca. 55. 1 Sid. 222. [e] 5 Co. 49. [f] Hob. 67, 81, 82. Moor 863 pl. 1187. 873. pl. 1213. 1 Rol. Abr. 87. pl. 6. Owen 150. 1 Brownl 162. Raym. 23. *Cont.* Cro. Ja. 622. pl. 14. [g] State Trials, Vol. 2. f. 269. Vol. 3. f. 552, 553, 585, 596, 610. Vol. 4. 119. 5 Mod. 15, 16. Raym. 369, 370. But the contrary is held Bulſt. 154. and State Trials, Vol. 2. 520 to 524. Raym. 379, 380. [i] State Trials, Vol. 4. 119. [k] State Trials, Vol. 4. 379. to 386. [h] *Supra*, ch. 33. ſect. 129. [l] By the Lords in the Earl of Warwick's Trial, State Trials, Vol. 4. 379 to 386. [k] Hob. 67, 82. [l] *Vide* State Trials, Vol. 2. 520 to 524. 1 Keb. 780. pl. 24. 5 Mod. 15, 16. Raym. 369, 370, 379, 380. Kely. 37, 38. [m] Sid. 52, 221, 222. 3 Lev. 426. [n] Cro. Eliz. 41. pl. 4. *Vide* Latch. 22. [o] 6 Co. 14. a. Cro. Ca. 67, 68, 114, 115. *Vide* Latch, 22, 141. 8 H. 5. 2, pl. 6. 35 H. 6. 1. 2. Fitz. Fines, 21. Pardon, 6. [p] Burton's Caſe. 6 Co. 13 b. 14. a. But this Caſe hath often been denied to be Law, 1 Keb. 780. pl. 24. 1 Sid. 164, 222. [q] Latch. 190. Noy. 91. Cro. Ca. 47. [r] 36 H. 6. 24, 25. 37 H. 6. 21. Fitz. Charter, 22. 5 Co. 49. Co. Litt. 126 b. Cro. Ja. 64. Moor 394. pl. 511. Cro. Eliz. 768, 778. Whether an Excommunication be pardoned by a general Pardon of all Contempts, *&c.* *Supra*, Sect. 41.

Sect. 54. But it ſeems to be a ſettled [a] Rule, That no Pardon by the King, without expreſs Words of Reſtitution, ſhall deveſt, either from the King or [o] Subject, an Intereſt either in Lands or Goods, veſted in them, by an Attainder or Conviction precedent. Yet it ſeems [c] agreed, That a Pardon prior to a Conviction, ſhall prevent any Forfeiture either of Lands or Goods.

Sect. 55. It hath been adjudged, [d] That a Clauſe of Releaſe of all Judgments and Executions in a general Pardon, extends as well to Debts due to the King by Aſſignment or Forfeiture, as to thoſe originally due to him, and that it doth not reſtore them to the Perſon who aſſigned or forfeited them, but extinguiſhes them in the Hands of the Debtor.

Sect. 56. It ſeems agreed, That notwithſtanding the King's Pardon to a Simoniſt coming into Church contrary to the Purport of 31 *El.* 6. or to an Officer coming into his Office by a corrupt Bargain, contrary to the Purport of 5 *&* 6 *Ed.* 6. 16. may ſave [e] ſuch Clerk or Officer from any Criminal Proſecution in Reſpect of the corrupt Bargain; yet ſhall it not [f] enable the Clerk to hold the Church, nor the [g] Officer to retain the Office, becauſe they are abſolutely diſabled by Statute.

Sect. 57. Alſo it ſeems [h] agreed, That the King's Pardon cannot ſalve the Corruption of Blood by Attainder of Treaſon or Felony.

Sect. 58. As to the third general Point, *viz.* Whether a Pardon may be waived: I take it to be [i] agreed, That a general Pardon by Parliament cannot be waived, becauſe no one by his Admittance can give a Court a Power to proceed againſt him, when it appears there is no Law to puniſh him.

Sect. 59. But it is [k] certain, That a Man may waive the Benefit of a Pardon under the Great Seal, as where one who has ſuch a Pardon doth not plead it, but takes the General Iſſue, after which he ſhall not reſort to the Pardon.

And now I am to ſhew in what Manner a Pardon is to be taken Advantage of, which I ſhall conſider,

1. In Relation to a general Pardon by Parliament.
2. In Relation to a particular Pardon under the Great Seal.

Sect. 60. And firſt, As to the Pleading of a general Pardon by Parliament: It ſeems [l] agreed, That if any Perſons are excepted out of it, the Court is not bound, and ſome [m] have holden that it hath no Power in Diſcretion to give any Perſon the Benefit of it, unleſs it be pleaded. Alſo it ſeems generally agreed, That if the Body of ſuch a Pardon either excepts divers particular Perſons by Name, or excepts all thoſe who come under a general Deſcription, as all thoſe who adhered to *J. S. &c.* no one can demand the Benefit of it, without expreſly ſhewing in the [n] firſt Caſe that he is not one of the Perſons excepted; and in the later [o] Caſe, that he is not included in ſuch Deſcription. And if he hap-

[a] 1 Lev. 8. 120. 2 Mod. 53. 1 Keb. 695, 757, 921, 817, 922. 3 Mod. 101, 241, 242. 1 Saund. 362, 363. 1 Sid. 167, 168, 264. Theloal *lib.* 1. ch. 85. ſect. 8. [b] Dy. 34. pl. 26. Finch of Law, 467. Theloal *lib.* 1. ch. 15. ſect. 3. [c] 5 Co. 81 o. b. Owen 87. State Trials, Vol. 4. 119. 2 Mod. 53. [d] 1 Lev. 120, 121. 1 Keb. 695, 757, 817, 921, 922. 1 Saund. 362, 363. 1 Sid. 167, 168. 264. [e] *Supra*, Sect. 26, 33. Owen, 87, 88. [f] Hetl. 104. Co Lit. 120. a. Watſon's Clergy-man's Law, ch. 5. [g] 3 Inſt. 154. 3 Bulſt. 90, 91. *See* B. 1. ch. 17. ſect. 5. 1 Keb. 781. pl. 24. [h] Co. Litt. 8. a. 391. 3 Inſt. 233, 240, 241. [i] *See* B. 1. ch. 64. ſect 63. S. P. C. 173. Lett. A 169. 103. Lett. A. Bro Notice 1. 26 H. 8. 7. pl. 34. 11 H. 4. 41. pl. 8. Bro. Coro. 30, 200. Indict. ment, 2. Fitz. Coro. 89. Crompt. Juſt. 115. pl. 13. [k] S. P. C. 173. Lett. A. 169. N. Bro. Coro. 200. Kely. 24, 25. [l] H. P. C. 252. 8 E. 4. 7. pl. 1. Cro. Ca. 32. Crompt. Juſt. 115. pl. 13, 14. Cro. El. 768. pl. 9. 778. pl. 11. 6 Co. 79. b. Moor 770. pl. 664. Raym. 23. 2 Inſt. 234. 2 Rol. Rep. 307. Cro. El. 4. pl. 2. Moor, 619. pl. 845. [m] 1 Leon. 300. Cro. El. 125. pl. 4. *Cont.* Lane 71. Moor 394. *Vide* 5 Co. 49. Cro. Ca. 32. Yel. 126. [n] 8 E. 4. 7. pl. 1. S. P. C. 103. Letter A. Fitz. Pardon, 3. Bro. Pleadings, 124. *Contra* 2 Leon. 26. [o] 8 E. 4. 7. pl. 1. S. P. C 103. Letter A. Fitz. Pardon, 3. Plowd. Com. 103. a. 484. b. Bro. Chart. 66. 4 H. 7. 8. pl. 9. Dy. 27. pl. 180. State Trials, Vol. 2. f. 5.

happen to be of the ſame Name with one of the Perſons excepted by Name, it is ſaid that it will not [a] be ſufficient for him to aver that he was none of the Perſons excepted, without adding that he is a different Perſon from ſuch other of the ſame Name. Which, how it can be tried, unleſs it appear by ſome Additions to the Name in the Statute, may deſerve to be conſidered. But if the Body of a Statute be general as to all Perſons whatſoever, and afterwards ſome are excepted in the Proviſoes, [b] perhaps it may be ſufficient to plead ſuch a Pardon, without any Averment That he who pleads it is none of the Perſons ſo excepted; it being a [c] general Rule, that where a Man is within the general Words of the Body of a Record or Deed, which is qualified by ſubſequent Proviſoes, it is ſufficient for him to bring his Caſe within ſuch general Words, and that the Exceptions in ſuch Proviſoes ought to be ſhewn of the other Side.

[a] 18 E. 4. 7. F. N. B. 238. S. P. C. 103. Lett. A. Fitz. Pardon, 3.

[b] *Vide* 1 Lev. 26. 4 H. 7. 8. pl. 9. Raym. 23.

[c] 1 Lev. 26, 88. Raym. 65. Cro. Ca. 515.

Sect. 61. But it ſeems agreed, [d] That the Court is ſo far bound to take Notice *ex Officio* of a general Pardon by Parliament, which extends to all Perſons in general without Exception, That it cannot proceed againſt any Perſon whatſoever as to any of the Offences pardoned, tho' he be ſo far from pleading it, or praying the Benefit of it, that he does all he can to [e] waive it.

[d] H. P. C. 252. Plow. Com. 83. b. 26 H. 8. 7. pl. 34. Bro. Notice 1 Dy. 28. pl. 188.

Sect. 62. Alſo where a general Act of Pardon excepts certain Kinds of Crimes, there is [f] no Need to aver that the Crime whereof a Perſon is indicted is not one of ſuch excepted Crimes; but the Court ought judicially to take Notice whether it be excepted or not.

[e] 5 Co. 49. 3 Inſt. 234. 11 H. 4. 41. pl. 8. Bro Coro. 36. Indictment, 2.

Sect. 63. Alſo where ſuch a Statute excepts only one Particular Perſon, it hath been [g] ſaid, that there is no Need of an Averment that a Perſon indicted is not ſuch Perſon; but that the Court is to take Notice whether he be or not.

[f] 2 Roll. Rep. 307.

[g] *Vide ſupra*, Sect. 58.

Secondly, As to the Taking Advantage of a particular Pardon under the [h] Great Seal, I ſhall obſerve only the following Particulars.

[h] Noy, 100. Black *verſus* Allen. Cro Ca. 449. Moor, 620. pl 847.

Sect. 64. Firſt, That it will be [i] Error to allow a Man the Benefit of ſuch a Pardon, unleſs it be pleaded.

[i] *Vide* 2 Leon, 26. Crompt. Juſt. 116. pl. 17. 8 Co. 68. 3 Inſt. 234.

Sect. 65. Secondly, That he who pleads ſuch a Pardon, ought to [k] produce it *ſub pede ſigilli*, tho' it be a Plea in Bar, becauſe it is preſumed to be in his Cuſtody, and the [l] Property of it belongs to him. Yet if a Man plead ſuch Pardon without producing it, it ſeems [m] that the Court may in Diſcretion indulge him a farther Day to put in a better Plea; and that at ſuch Day he may perfect his Plea by producing the Charter. Alſo it ſeems [n] agreed, that there is no Need in a Plea of *Autrefoits acquit*, *&c.* to produce the Record immediately, becauſe it is pleaded in Bar, and he that pleads it hath neither the Cuſtody nor Property of it.

[k] 5 Co. Eliz. 125. pl. 4. *Vide* 2 Leon. 26.

[n] That no ſuch Pardon is good unleſs under the Great Seal, and conſequently that Articles of Surrender cannot be pleaded as amounting to a Pardon, State Trials, Vol. 1. fol 578, *&c.* [l] Cro. Eliz. 153. pl. 33. [m] H. P. C. 252. S. P. C. 103. Lett. B. 11 H. 4. 41. pl. 6. [l] *See* the Books above cited, and Cro. Ja. 70, 317. Cro. Ca. 441, 442. 1 Jon 377. 1 Sid. 311. Cro. El. 217. pl. 2. 547. pl. 21. 716. pl. 42. [m] 11 H. 4. 41. pl. 6. S. P. C. 103. Lett. B. [n] *Vide ſupra*, Ch. 35. Sect. 2.

Sect. 66. Thirdly, That if there be a Variance [a] between the Record on which a Man is convicted or attainted, and his Charter of Pardon; yet if there be no Repugnancy to intend that the ſame Perſon or Thing are meant in both, it may be ſupplied by proper Averments: And therefore if one be indicted by the Name of *J. S.* [b] Yeoman, and pardoned by the Name of *J. S.* Gentleman, or indicted by the Name of *B.* the Tasker, and pardoned by the Name of *B.* the Son of *W.* he may make good the Variance by averring, that he is the ſame Perſon intended in ſuch Indictment and Pardon: Or if in an Indictment [c] of the Death of *J. S.* the Stroke be ſuppoſed to have been given on the firſt of *Auguſt*, and in the Pardon on the third, the Party may aver that the Death of one and the ſame *J. S.* are intended in both. And if ſuch a variant Pardon be pleaded without any ſuch Averment, it ſeems that the Court may in Diſcretion give the Party a farther Day either to [d] perfect his Plea, or to [e] purchaſe a better Pardon. And there are ſome [f] Inſtances in the old Books, where upon ſuch Variance the Court took an Inquiry of Office, whether the ſame Perſon were meant in both Records.

Sect. 67. Fourthly, That no ſuch Pardon can be pleaded together with, or after the General Iſſue, unleſs it be of a Date ſubſequent to the Time of the Pleading ſuch Iſſue, becauſe otherwiſe it is waived by it; as hath been more fully ſhewn, *Sect.* 58.

Sect. 68. Fifthly, [g] That the Party ſhall not be obliged to lay the Streſs of his Caſe on any particular Words or Clauſe in ſuch Pardon, but may take Advantage of the Whole.

Sect. 69. Sixthly, That after an * Amerciament in the King's Bench hath been eſtreated into the Exchequer, and the Party being taken upon Proceſs from thence hath inſiſted upon a Pardon, and been denied any Benefit from it, yet he may be brought by a *Habeas Corpus cum cauſa* to the King's Bench, becauſe the Record remains there, and the Tranſcript is only ſent into the Exchequer, and may plead the ſame Pardon in the King's Bench; and if it be adjudged ſufficient, may have a *Superſedeas* to the Barons, *&c.*

Sect. 70. Seventhly, That while the Statute of 10 *Ed.* 3. 2. ſtood in Force, (which required all Perſons pardoned for Felony to find Sureties for their Good Behaviour before the Sheriff and Coroners within three Months, *&c.*) no Pardon of [i] Felony could be allowed, without a Writ out of Chancery, commonly called a Writ of Allowance, teſtifying that the Party had found [k] Sureties, *&c.* according to that Statute, unleſs it were diſpenſed with by a Special Clauſe of *Non obſtante*, *&c.* But the Neceſſity hereof is taken away by 5 *&* 6 *W. &* *M.* 13. which hath repealed the ſaid Statute of 10 *Ed.* 3. *but hath provided, that the Juſtices before whom any Pardon for Felony ſhould be pleaded, may at their Diſcretion, remand, or commit the Perſon that pleads it to Priſon, till he or they ſhall enter into a Recognizance with two ſufficient Sureties for the Good Behaviour for any Time, not exceeding ſeven Years. Provided that if ſuch Perſon be an Infant or Feme covert, he or ſhe may find two ſufficient Sureties, who ſhall enter into a Recognizance for his or her Being of the Good Behaviour, as is aforeſaid.*

[a] H. P. C. 253. *Supra*, Ch. 35. Sect. 3, 4, 5. 3 Inſt. 240. S. P. C. 104. Lett. a. Crompt Juſt. 116. pl. 18.

[b] Keilw 58. a. Dy. 34. pl. 20. 1 Roll. Rep. 368. Fitz. Coro. 294. but 18. E. 3. 33. pl. 11. Abridged, Fitz. Brief, 364. ſeems contrary,

[c] 11 H. 4. 41. pl. 6. Abridged, Fitz monſtrans de faits, 128. Bro. Variance 31. Coro. 29. Charter de Pardon, 15. But Note, that none of theſe Books make mention of any Averment but ſeem to imply that the Pardon was allowed without it, notwithſtanding the Variance.

[d] 11 H. 4. 41. pl. 6. Fitz. monſt. de faits, 128.

* 3 Inſt. 240. 1 Sid. 41. 26 Aſſ. pl. 46. Raym. 13. Fitz. Office de Court, 34. Bro. Charter, de Pard. 32. Office de Court, 25.

[e] Fitz Coro. 294. 3 Aſſ. pl. 15. Abridged, Fitz. Coro. 166. Bro Cor 190 or 191.

Variance, 63. But Bro. in abridging this Caſe under the Title of Charter of Pardon, 29 makes this Remark, *quod mirum mihi.* [f] 37 H. 6. 4. a Fitz. Chart. 21. * 36 H. 6. 24, 25. Fitz. Chart. 22. Bro. Charter, 25. [i] S. P. C. 103 Lett. C. Crompt. Juſt. 115. pl. 15. 3 H. 7. pl. 5. Plow. Com. 502. b. 1 Keb. 9 pl. 11. 1 Sid. 41. Raym. 13. 3 Inſt. 234, 235. But there never was any Neceſſity for ſuch Writ upon a Pardon of Treaſon, Cro. Eliz. 814. pl. 2. Noy. 31. [k] That a Breach of the Recognizance avoided the Pardon. 3 H. 7. 7. pl. 5. S. P. C. 103. Lett. C. Crompt. Juſtice, 115. pl. 16.

Sect. 71. Eighthly, That the Judges may inſiſt on the uſual Fee of Gloves [a] to themſelves and Officers, before they allow a Pardon.

[a] Fitz. Coro. 294. 4 E. 4. 10. b. 2 Jon. 56. 1 Sid. 452. pl. 18. Kely. 25. Pulton de pace, 88. a.

CHAP. XXXVIII.

Of the General Iſſue.

Sect. 1. HAving ſhewn already, *Ch.* 23. *Sect.* 126 and 135. that the General Iſſue is pleadable in capital Caſes, together with any other Plea in Bar or Abatement, which is not repugnant to it; and that it may alſo be pleaded even after ſuch Plea found againſt a Defendant; and having alſo ſhewn, *Ch.* 37. *Sect* 59. That the Plea of the General Iſſue amounts to a Waiver of a Pardon; and *Ch.* 26. *Sect.* 66, *&c.* what is a good General Iſſue to an Information on a penal Statute; and in the ſame Chapter, *Sect.* 73, 74. In what Manner the Iſſue is to be joined on ſuch an Information, and where it is to be tried, I ſhall in this Place take Notice only of the following Particulars;

Sect. 2. Firſt, That in a criminal Information or Indictment in the [b] King's Bench, for a Miſdemeanour, and alſo in an Indictment before [q] Juſtices of the Peace, the Iſſue is well joined for the King by the Words *A. B. qui pro Rege ſequitur ſimiliter, &c.* without any Addition, ſhewing that *A. B.* is the proper Officer for this Purpoſe; for it ſhall be intended that he was ſufficiently known to be ſuch by the Court. But in all [d] Precedents I meet with of Informations of Intruſion, the Iſſue for the King is joined by the Attorney General, naming himſelf ſuch.

[b] 1 Sid. 230, 231. Coke's Entr. 363. a. [c] Cro. Ca. 315. [d] 1 Co. 17. a. 27. a. Coke's Entr. 372. a. 379. a. 381. a. 385. a. 387. b. 390. b. Raſt. Ent. 412. c.

Sect. 3. Secondly, That in Indictments of [e] capital Crimes, after the Defendant hath pleaded *quod ipſe nullo eſt inde culpabilis, & inde de bono & malo ponit ſe ſuper patriam*, (which is the general Form of pleading the General Iſſue in capital Caſes, both in [f] Indictments and [g] Appeals,) the Uſage ſeems to have been immediately to award Proceſs againſt the Jury, without any expreſs Joining of Iſſue on the Part of the King. But in the Precedents of Appeals of Felony, whether by an [h] Appellant or [i] Approver, generally the Iſſue is expreſly joined by the Appellant and Approver as well as the Appellee.

[e] Coke's Entr. 352. a. 353. b. 354. b. 355. b. 356. b. 358. a. 360. a. 361. a. Raſt. Ent. 385. pl. 5. 9. [f] *See* the Precedents above-cited. [g] Coke's Ent. 57. b. Raſt. Ent. 47. a. b. 48. a. 49 a. b. 50. a. b. 51. a. 52. a. 53. a. 54. a. 55. b.

Sect. 4. Thirdly, That it ſeems [k] the better Opinion, that if an Iſſue be joined in Proceſs on a Recognizance for the Peace, whether the Defendant killed *J. S.* and ſuch Iſſue be found for the King, yet ſhall it not eſtop the Defendant to plead Not guilty to an Indictment or Appeal for the Death of the ſame *J. S.*

[h] *See* the precedents cited to the precedent Letter. But in Raſt. Ent. 43. b. after the General Iſſue with an *&c.* the Proceſs is immediately awarded againſt the Jury. [i] Raſt. Ent. 42. b. [k] 7 H. 4. 35. b. Bro. Appeal, 19.

CHAP. XXXIX.

Where a Priſoner ſhall be allowed Counſel, and a Copy of the Indictment, &c.

A Perſon having pleaded Not guilty is to be tried either,

1. By his Country, or
2. By his Peers, or
3. By Battle.

But before I conſider what is proper to each of theſe in their Order, I ſhall endeavour to ſhew,

1. In what Caſes a Priſoner may have Counſel to aſſiſt him in his Defence.
2. Where he may have a Copy of the Indictment.

Sect. 1. As to the firſt of theſe Particulars, I take it to be a ſettled [a] Rule at Common Law, that no Counſel ſhall be allowed a Priſoner, whether he be a [b] Peer or Commoner, upon the General Iſſue, on an Indictment of Treaſon or Felony, unleſs ſome Point of Law ariſe, proper to be debated.

Sect. 2. This indeed many have complained of as very unreaſonable, yet if it be conſidered, that generally every one of Common Underſtanding may as properly ſpeak to a Matter of Fact, as if he were the beſt Lawyer; and that it requires no manner of Skill to make a plain and honeſt Defence, which in Caſes of this Kind is always the beſt, the Simplicity and Innocence, artleſs and ingenuous Behaviour of one whoſe Conſcience acquits him, having ſomething in it more moving and convincing than the higheſt Eloquence of Perſons ſpeaking in a Cauſe not their own. And if it be farther conſidered that it is the [c] Duty of the Court to be indifferent between the King and Priſoner, and to ſee that the Indictment be good in Law, and the Proceedings regular, and the Evidence legal, and ſuch as fully proves the Point in Iſſue, there ſeems no great Reaſon to fear but that, generally ſpeaking, the Innocent, for whoſe Safety alone the Law is concerned, have rather an Advantage than Prejudice in having the Court their only Counſel. Whereas on the other Side, the very Speech, Geſture and Countenance, and Manner of Defence of thoſe who are guilty, when they ſpeak for themſelves, may often help to diſcloſe the Truth, which probably would not ſo well be diſcovered from the artificial Defence of others ſpeaking for them.

[a] 3 Inſt. 29, 137. 7 H. 4. 35. b. Finch, 386. 2 Bulſt. 147. Bro. Coro. 54. Fitz. Coro. 31. Cro Ca. 147. S. P. C. 151. B. 9 E. 4. 2. pl. 4. 1 Lev. 86. Dr. & Stud. B. 2. ch. 48. State Trials, Vol. 1. f. 70. V. 2. f. 1002. *See* the Books cited to the other Parts of this Chapter.

[b] State Trials, Vol. 1. f. 70. 265, 614. Vol. 4. f. 355. 3 Inſt. 29. Ruſhw. Col. Part, 2. Vol. 1. f. 94.

[c] 2 Bulſt. 147. 3 Inſt. 29.

Sect. 3.

Sect. 3. But the Law allows a Defendant the ſame Benefit of Counſel in an [a] Appeal, whether Capital or not Capital, as in any other Action. Perhaps for this Reaſon among [b] others, becauſe Appeals are preſumed to be generally carried on with greater Heat and Spleen than Indictments, and yet are not ſo much to be favoured as being for the moſt Part rather grounded on a Deſire of private Revenge than of Publick Juſtice; and therefore the Defendant ſhall have at leaſt the ſame Advantage in them as in Common Actions.

Sect. 4. Alſo upon Indictments, the Court will never refuſe to aſſign a Priſoner Counſel to argue a doubtful Point of Law, happening to ariſe at or after his Trial; as where it ſhall appear queſtionable whether the Facts proved, if true, fully [c] amount to the Crime charged againſt him; or whether the Perſons offered to be Evidence againſt him be [d] legal Witneſſes in Reſpect of ſuch or ſuch Exceptions againſt them; or whether certain Perſons returned [e] of his Jury can be lawful Jurors, in Reſpect of certain Objections againſt them; or whether the † Indictment or ¶ Proceſs, *&c.* be ſtrictly legal: In all which Caſes the Priſoner muſt [f] propoſe the Point, and [g] if the Court think it will bear a Debate, they will aſſign him Counſel to argue it.

Sect. 5. Alſo where-ever a Priſoner hath a [h] Pardon or other [k] Special Matter to plead to an Indictment, or an [l] Error to aſſign in Order to reverſe an Outlawry, the Court will of Courſe aſſign him Counſel. And it is [m] ſaid, That for ſuch collateral Matters any one may be of Counſel for a Priſoner without any Aſſignment.

Sect. 6. But if a Queſtion ariſe on the Trial of a Peer concerning the Courſe of Parliamentary Proceedings, the Lords will not [n] ſuffer it to be argued by Counſel, but will debate it among themſelves.

Sect. 7. There is a Caſe in the *Year-Book* of [o] *H.* 7. Where a Serjeant at Law, as *amicus Curiæ*, offered his Opinion to the Court, concerning the Trial of an Indictment of Death, That it was not proper to proceed in it till the Year and Day were paſſed, nor doth he appear to have been any Way reprehended for it. [p] But it is not ſafe for any one to be either Counſel or Solicitor to one in Priſon for a Capital Crime, in Order to prepare him for his Trial, without an Aſſignment from the Court. But by Leave of the Court Priſoners have ſometimes been indulged the Aſſiſtance of Counſel, not only to [q] adviſe them in Priſon, but * alſo to ſtand by them at the Bar: But it is ſaid, [r] That in Strictneſs they ought not to be prompted by them as to Matters of Fact, [s] nor to have the Aſſiſtance of any Papers drawn up by Counſel to prepare them for their Trial.

Sect. 8. After a Priſoner hath had Counſel aſſigned him, the Court will not [t] diſcharge them without his Conſent, tho' they deſire it, but will ſometimes add others to them.

Sect. 9. It is [u] ſaid, That the Court cannot aſſign an Appellee any of the King's Counſel; but that if they will they may be either for or againſt him.

[a] 8. P. C 151. B
[b] Dr. & Stud. B. 2. ch. 48. Dy. 296. pl. 20 Keilw. 176 b Finch of Law 386. 1 Bulſt. 85. 9 E 4. 2. pl. 4. Bro Coro. 54. Fitz. Coro. 31.
[c] Dr. & Stud. B. 2. ch. 48. * 3 Inſt. 137.
[d] State Trials, Vol 1. f. 569. Ruſhworth's Stafford 671.
[e] State Trials, Vol. 2. 520. State Trials, Vol. 3. f 135.
† 3 Inſt. 29. 1 Lev. 68. Cro. Ca. 147.
¶ 3 Inſt. 29, 137. 6 Co. 14.
[f] 3 Inſt 137. State Trials, Vol. 2. f. 762.
[g] State Trials, Vol. 2. f 694, 701, 709, 763, 764. Vol. 3. 867.
[h] 3 Inſt. 29, 137. *Vide* 26 Aſſ. pl. 46. Fitz. Office de Court, 34.
[k] 1 H. 7. 23. a. Bro. Coro. 128, 129. Finch of Law, 386.
[l] 2 Jo. 180. Cro. Ca. 365. Yet in the Year-Book of 1 H. 7. 13. the Court refuſed it, becauſe the Party was of very bad Fame.
[m] 2 Jo. 180.
[n] State Trials, Vol. 2. 694, 699.
[o] 7 H 4. 36 a. S. P. C. 151. B. 3 Inſt. 29, 137.
[p] State Trials, Vol. 2. f. 272, 273, 712, 743, 763, 768.
[q] State Trials, Vol. 3. f. 133.
* State Trials, Vol. 2. f 614.
[r] State Trials, Vol 2. f. 614.
[s] State Trials, Vol. 1. f. 732. Vol. 2. f. 743, 762, 763, 770.
[t] State Trials, Vol 2. f. 711, 712.
[u] 1 Bulſt. 85.

Sect. 10. It having been found by Experience that Priſoners have been often under great Diſadvantages from the Want of Counſel, in Proſecutions of High Treaſon againſt the King's Perſon, which are generally managed for the Crown with greater Skill and Zeal than ordinary Proſecutions, it is enacted by 7 *W.* 3. 3. *That all and every Perſon and Perſons whatſoever, that ſhall be accuſed and indicted for High Treaſon, whereby any Corruption of Blood may or ſhall be made to any ſuch Offender or Offenders, or to any the Heir or Heirs of any ſuch Offender or Offenders, or for Miſpriſion of ſuch Treaſon, ſhall be received and admitted to make his and their full Defence by Counſel learned in the Law: And in Caſe any Perſon or Perſons ſo accuſed or indicted ſhall deſire Counſel, the Court, before whom ſuch Perſon or Perſons ſhall be tried, or ſome Judge of that Court is authoriſed and required, immediately upon his or their Requeſt, to aſſign to ſuch Perſon and Perſons, ſuch and ſo many Counſel, not exceeding two, as the Perſon or Perſons ſhall deſire, to whom ſuch Counſel ſhall have free Acceſs at all ſeaſonable Hours; any Law or Uſage to the contrary notwithſtanding.*

Sect. 11. But it is provided, *S.* 3. *That any Perſon being indicted of ſuch Treaſon may be outlawed*, &c. *and where by the Law, after ſuch Outlawry, he may come in and be tried, he ſhall upon ſuch Trial have the Benefit of the ſaid Act.*

Sect. 12. And it is farther provided, *S.* 12, 13. *That nothing in the ſaid Act ſhall extend, or be conſtrued to extend to any Impeachment or other Proceedings in Parliament whatſoever. And alſo that it ſhall not any Ways extend to any Indictment of High Treaſon, nor to any Proceedings thereupon, for counterfeiting his Majeſty's Coin, his Great or Privy Seal, his Sign Manual, or Privy Signet.*

Sect. 13. As to the ſecond Particular, *viz.* Where a Priſoner may have a Copy of the Indictment againſt him: It is ſaid, [a] That by the Common Law it is always denied in Caſes of Treaſon or Felony. Yet if a Priſoner take a legal Exception to an Indictment, it is ſaid, [b] That the Court will grant him a Copy of ſo much as concerns his Exception. Alſo if he have ſuch Matter to plead which cannot well be put into Form without Knowledge of the Charge againſt him as laid in the Indictment, as *Autrefoits acquit, &c.* it is [c] ſaid, That the Court will give him the Heads of the Indictment, to enable him to have his Plea ſo drawn as to ſuit the Charge againſt him.

[a] 1 Lev 68. Moor. 666. State Trials, Vol. 1. f. 644. Vol. 2. f. 711, 763. Vol. 3. f. 861, 862, 863, 864. Show. 131. 1 Sid. 85.
[b] Lev. 68. 1 Sid 85.
[c] State Trials, Vol. 2. f. 711.

Sect. 14. But it is enacted by 7 *W.* 3. *That every Perſon and Perſons indicted for High Treaſon, except for counterfeiting the Coin, or the Great or Privy Seal, or Sign Manual or Privy Signet, ſhall have a true Copy of the whole Indictment, but not the Names of the Witneſſes, five Days at the leaſt before Trial, to adviſe with Counſel thereupon, to plead and make their Defence, his or their Attorney, or Agent, requiring the ſame, and paying the Officer his reaſonable Fees for writing thereof not exceeding five Shillings for the Copy of every ſuch Indictment.*

Sect. 15. What Exceptions may be taken to ſuch Indictment, and when, hath been ſhewn, *Ch.* 25. *Sect.* 148, 149, 150, 151.

CHAP.

CHAP. XL.

From what County the Jury is to be returned, &c.

FOR the better Underſtanding what more particularly relates to a Trial by the Country in Capital Caſes, having ſhewn, *Ch.* 5. *Sect.* 18. That by Virtue of a ſpecial Commiſſion, Juſtices of *Oyer* and *Terminer* may ſit in one County, for the Trial of a Fact in another by the proper Jurors. And having alſo ſhewn, *Ch.* 23. *Sect.* 92. what is a proper Place from whence a *Viſne* may come, I ſhall in this Place only conſider,

1. From what County the Jury is to be returned.
2. By Virtue of what Proceſs.
3. Before what Court.
4. How they may be challenged.

As to the firſt of theſe Particulars, *viz.* From what County the Jury is to be returned: I ſhall endeavour to ſhew,

1. From what County they are to be returned for the Trial of the General Iſſue.
2. From what County for the Trial of a Foreign Plea.

Sect. 1. As to the firſt Point, *viz.* From what County a Jury is to be returned for the Trial of the General Iſſue: I take it to be [a] agreed, That [b] regularly by the Common Law they muſt be returned in all Caſes, for the Trial of the General Iſſue from the ſame County wherein the Fact was committed. And it is ſaid, That in an Appeal of Death, where the Wound was given in one County, and the Party died in another, the Jury [c] ought to be returned from each County before the Statute of 2 & 3 *Ed.* 6. 24. ſince which the whole may be tried either upon an [d] Indictment or Appeal, in the County wherein the Death happens.

Sect. 2. But it is enacted by 33 *H.* 8. 23. *That if any Perſon being examined by the King's Council, or three of them, upon any Manner of Treaſons, Miſpriſions of Treaſons, or Murders, do confeſs any ſuch Offences, or that the ſaid Council, or three of them, upon ſuch Examination, ſhall think any Perſon ſo examined, to be vehemently ſuſpected of any Treaſon, Miſpriſions of Treaſons or Murder, that then in every ſuch Caſe by the King's Commandment his Majeſty's Commiſſion of* Oyer *and* Terminer *under the Great Seal, ſhall be made by the Chancellor of* England *to ſuch Perſons and into ſuch Vills and Places as ſhall be nam'd and appointed by the King, for the ſpeedy Trial, Conviction or Delivery of ſuch Offenders; which Commiſſioners ſhall have Power to inquire, hear and determine all ſuch Treaſons, Miſpriſions of Treaſons and Murders, within the Places limited by their Commiſſion, by ſuch good and lawful Perſons as ſhall be returned before them by the Sheriff, or his Miniſter, or any other having Power to return Writs and Proceſs for that Purpoſe, in whatſoever other Shire or Place within the King's Dominions, or without*

[a] S.P.C. 154. Dy. 132. pl. 75. 286 pl. 5. Fitz. Coro. 194. 3 Inſt. 27. 26 Aſſ. pl. 32.
[b] *Vide ſupra*, ch. 5. ſect. 18. *Vide infra*, ſect. 5.
[c] Book 1. ch. 31. ſect. 13. *Supra*, ch. 23. ſect. 35. Fitz. Coro. 59. 62.
[d] *Vide ſupra*, ch. 25. ſect. 35.

without, ſuch Offences were done or committed, and that in ſuch Caſes, no Challenge for the Shire or Hundred ſhall be allowed.

Sect. 3. It hath been [a] adjudged, That this Statute as far as it relates to Treaſon done within the Realm, is repealed by 1 & 2 *P.* & *M.* 10. which enacts, That all Trials for Treaſon ſhall be according to the Common Law. But as to [b] Murder and [c] Miſpriſion of Treaſon, it ſtill ſeems co continue in Force. And as to High [d] Treaſon done without the Realm, it doth not ſeem material whether it be in Force or not, becauſe that is fully provided for by 35 *H.* 8. 2. as hath been more fully ſhewn *Ch.* 25. *Sect.* 47, 48, 49, 50, 51.

Sect. 4. It hath been [e] adjudged, That the Word *Murder* in this Statute ſhall have the ſame ſtrict Conſtruction as in the [f] Statutes which take away the Benefit of the Clergy from Murder, and conſequently ſhall not extend to one examined before the Council as Acceſſary only, and not as Principal, for Murder is one Offence, and the being Acceſſary to it is another.

Sect. 5. Having ſhewn already that he, who ſteals [g] Goods in one County and carries them into another, or does a Fact in one County which proves a * Nuſance to another, may be indicted or appealed in either, from whence it follows, That he may be alſo tried in either: Having alſo [h] ſhewn, That he who marries two Wives, the firſt in a Foreign Country, and the ſecond in *England*, may be indicted and tried in *England*; and that he who takes a Woman by Force out of one County, and carries her into another and there marries her, [i] may be indicted and tried in the ſecond County: And that Felonies in [k] *Wales* may by Force of 26 *H.* 8. 6. be indicted and tried in the next adjoining *Engliſh* County: And that Treaſons upon the Sea, [l] or in any Foreign [m] Country, and Felonies [n] and Piracies upon the Sea, may be indicted and tried in any County in *England*; and that an [o] Acceſſary in one County to Murder in another, may be appealed and tried in the County wherein the Stroke was given; and that an Acceſſary to Murder, or any other Felony in one County, may be indicted † and tried in the County wherein he was Acceſſary; I ſhall refer to the Places cited in the Margin for the farther Conſideration of theſe Matters.

Sect. 6. As to the ſecond Point, *viz.* From what County the Jury is to be returned for the Trial of a Foreign Plea, That is, the Plea of iſſuable Matter alledged in a different County from that wherein the Party is indicted or appealed; as where a Man indicted in the County of *A.* [p] pleads, That he was taken out of a Sanctuary in the County of *B.* Or where one appealed by a Woman for the Death of her Husband in one County, [q] pleads, That ſince the Death of her Husband ſhe hath married *J. S.* in another County; it is [r] agreed, That by the Common Law ſuch Pleas can only be tried by Juries returned from the Counties wherein they are alledged: And therefore if Iſſue be joined on ſuch Matters before a Court which has Juriſdiction out of the County wherein it ſits, there ſeems to be [s] no Remedy by the Common Law, but to remove the Proceedings by *Certiorari* into the King's Bench, which having a Juriſdiction throughout the whole Kingdom, will award proper Proceſs for the Trial.

[a] 1 And. 104, 105.
[b] 1 And 194, 195.
[c] *Vide ſupra*, ch. 25. ſect. 145. Bro. Coro. 220. 3 Inſt. 24.
[d] *Vide* Dyer 286. pl. 45.
[e] 1 And. 194, 195.
[f] *Supra*, ch. 33. ſect 26. B. 1. ch 31. ſect. 11.
[g] B. 1 ch. 33 ſect. 9 *Supra* ch. 23 ſect. 47. ch. 25. ſect 36.
* *Supra* ch. 25. ſect. 35.
[h] B. 1. ch. 43. ſect. 7. *Supra* ch. 25. ſect. 37.
[i] B. 1. ch. 42. ſect. 10. *Supra* ch. 25. ſect. 38.
[k] B. 1. ch. 31. ſect. 14. *Supra* ch. 25. ſect. 39, 40.
[l] *Supra* ch. 25. ſect. 41, 42, 43.
[m] *Supra* ch. 25. ſect. 46 to 52.
[n] B. 1. ch. 37. ſect. 12, 13, 14, 15. *Supra* ch. 25. ſect 41 to 46.
[o] *Supra* ch. 29. ſect. 49.
† *Supra* ch. 25. ſect. 52. and ch. 29. ſect. 50, 51. &c.
[p] Keilw. 175. pl. 10.
[q] Dy. 296. pl. 20.
[r] 3 Inſt. 27. S. P. C. 154. Keilw. 175. pl. 10. Dy. 296. pl. 20. H. P. C. 255.
[s] *Vide* 23 H. 8. 14. ſect. 5. [r] Keilw. 175. pl. 10. Dy. 296. pl. 20. *Vide* Dy. 286. pl. 5.

Sect. 7. But *for the more ſpeedy Trials of Murders and Felonies, it is enacted by* 23 H. 8. 14. Par. 5. *That all Manner of Foreign Pleas triable by the Country, upon any Indictment for any Petit Treaſon, Murder or Felony, ſhall be forthwith tried before the ſame Juſtices afore whom the Party ſhall be arraigned, and by the Jurors of the ſame County that ſhall try the Petit Treaſon, Murder or Felony, whereof he ſhall be ſo arraigned, without any further Reſpite or Delay, in whatſoever County or Counties, Place or Places of this Realm, the Matter of the ſame Pleas be ſuppoſed or alledged.*

Sect. 8. But this Statute extending neither to Indictments of High Treaſon, nor to Appeals, it [a] is ſaid, That a Foreign Iſſue therein muſt ſtill be tried by the Jury of the County wherein it is alledged.

[a] 3 Inſt. 17. S. P. C. 154. H. P. C. 258. *Vide* Dyer, 296. pl. 20.

CHAP. XLI.

Of Proceſs againſt Jurors.

FOR the better Underſtanding the Nature of Proceſs againſt Jurors in Criminal Caſes, I ſhall endeavour to ſhew,

1. Where a Panel may be returned without any Precept by a bare Award.
2. In what Manner the Proceſs is to be returnable.
3. Where a *Venire* may be joint or ſeveral.
4. What Proceſs may be awarded by *Proviſo*.
5. In what Caſes, and in what Manner a *Tales* is grantable.
6. Where it is neceſſary to return a Panel into Court, before an Inqueſt can be taken upon it, and where the Priſoner may have a Copy of it.

[b] Fitz. Inquiſt. 55. 3 Inſt. 168. 2 Inſt. 568. H. P. C. 158. 256. Crompt. Jur. 128. S. P. C. 155. Lect. E.

Sect. 1. As to the firſt Point, *viz.* Where a Panel may be returned without any Precept by a bare Award, it is [b] agreed, That Juſtices of [c] Gaol-Delivery, may have a Panel ſo returned by the Sheriff, without any Precept or Writ; and the [d] Reaſon given for it is, That before their Coming, they always make a general [e] Precept to the Sheriff in Parchment under their Seals, *to bring before them at the Day of their Seſſions twenty-four out of every Hundred*, &c. *to do thoſe Things which ſhall be enjoined them on the Part of the King*, &c. And therefore it is ſaid that they need not make any other Precept for the Return of a Jury, for the Trial of any Iſſue joined before them. But that their bare [f] Award that the Jury ſhall come is ſufficient, becauſe there are enow for that Purpoſe ſuppoſed to be preſent in Court, whom the Sheriff may return immediately whenever the Court ſhall require their Service. Alſo it is ſaid, [g] that a Jury may be ſo returned before Juſtices of Peace at their Seſſions, becauſe the [h] Precept

[c] Yet 'tis ſaid that the Law is otherwiſe, if they have a Special Commiſſion. Fitz. Inq. 55. 3 Inſt. 185. Crompt. Juriſ. 128.

[d] Fitz. Inq. 55. Crompt. Jur. 128. 3 Inſt. 168.

2 Inſt. 568. [e] *Vide* Raſt. Ent. 384. b. 385. a. pl. 1. Cro Ca. 448. [f] For the Form of ſuch an Award, *ſee* Raſt. Ent. 385. pl. 5. 6. State Trials, Vol. 4. fol. 182. [g] 2 Inſt. 568. Adjudged 1 Sid. 364 pl. 11. [h] *See* Lambard's Juſt. B. 4. Ch. 2. and Crompt. Juſtice, 232.

for the Summons of the Seſſions hath a Clauſe to the ſame Effect for the Summons of twenty-four out of every Hundred, *&c.* Yet I much queſtion whether this Matter do not rather depend on [a] Practice, and the conſtant Courſe of Precedents, than any Argument from the Reaſon of the Thing. For the [b] Precept to the Sheriff from Juſtices of *Oyer* and *Terminer*, in order for the holding of their Seſſions, hath in Effect the very ſame Clauſe for the Bringing of twenty four before them, out of each Hundred, at the Day of their Seſſions, *&c.* And yet it ſeems [c] agreed, that they cannot have a Jury returned for the Trial of an Iſſue joined before them, by Force of a bare Award, but ought to make a particular Precept to the Sheriff for that Purpoſe under their Seals.

Sect. 2. It ſeems [d] agreed, that by the Courſe of the King's Bench no Jury can be returned into it from a Foreign County, without proper Proceſs, under the [e] Seal of the Chief Juſtice, *&c.* But [f] *Quære* if it may not be returned for the Trial of an Indictment, *&c.* in the ſame County wherein it ſits, by a bare *præceptum eſt*, *&c.*

Sect. 3. As to the ſecond Point, *viz.* In what Manner the Proceſs againſt Jurors is to be returnable, it ſeems agreed, that it may be returnable immediately into the Court of King's Bench for the Trial of an Indictment in the ſame County wherein it ſits, whether for a Crime committed in ſuch County, or for a [g] Treaſon, *&c.* beyond the Sea. But that for the Trial of Indictments removed thither by *Certiorari* from other Counties, there [h] ought to be fifteen Days between the *Teſte* and Return of every Proceſs.

Sect. 4. Alſo it is [i] agreed, that Juſtices in *Eyre*, or of Gaol-Delivery, may order a Jury to be returned immediately for the Trial of a Priſoner arraigned before them. Alſo it is clearly [k] holden by Sir *Edward Coke*, and hath been often [l] adjudged, That Juſtices of *Oyer* and *Terminer*, for the Trial of any Iſſue joined before them, might award a *Venire* returnable the ſame Day on which the Party is arraigned. Alſo it is holden by Sir [m] *Edward Coke*, and hath been [n] adjudged, That Juſtices of the Peace may do the like; but there are very [o] ſtrong Authorities to the contrary, unleſs the Crime amount [p] to Felony, or the Party [q] conſent to be tried immediately.

Sect. 5. *Quære* how far the Law is altered as to theſe Points by 4 & 5 *W. & M.* 24. and 7 & 8 *W.* 3. 32. which by requiring that Jurors ſhall be ſummoned ſix Days before they are to appear, ſeem to make it neceſſary whenever a [r] *Venire* or particular Precept is required for the Return of a Jury, [s] that there be ſix Days between its *Teſte* and Return.

Sect. 6. It hath been [t] adjudged, That a *Venire* before Juſtices of *Oyer* and *Terminer* returnable at a Day certain is erroneous, unleſs the Seſſions appear to have been [u] adjourned to the ſame Day; becauſe otherwiſe it ſhall not be intended that their Commiſſion continued till ſuch Day, and if it did not, their Authority to try the Iſſue was determined. But it is admitted [x] that ſuch *Venire* may be made returnable at the next Aſſiſes, and then tried by Virtue of [y] 1 *E.* 6. 7.

[a] *Vide* 3 Inſt. 164. 1 Sid. 364. pl. 11.
[b] Raſt. Entr. 643. b pl. 1. 2.
[c] H. P. C. 162. 256. 3 Inſt. 164. 2 Inſt. 568.
[d] S. P. C. 154. Lett. B. *Vide* 27 H. 6. 10 pl. 4.
[e] *Supra*, Ch. 27 Sect. 16.
[f] *Supra* Ch. 27 Sect. 8.
[g] *Vide* Dyer, 118. pl. 78.
[h] *Vide* Ch. 25. Sect. 47 to 71.
[i] 2 Rol. A. 626. pl. 4, 5. *Supra*, Ch. 3. Sect. 12 and Ch. 27. Sect. 16. 2 Inſt. 568. State Trials, Vol. 4 fol. 214.
[k] Keilw. 159. b. H. P. C. 256. Crompt. Juſt. 152. 8. Cro. Ca. 315. 1 Sid. 335 pl. 20. Fitz. Inq. 55. *Vide* Kely. 7.
[l] 2 Inſt. 568. 3 Inſt. 164.
[m] Cro. Ca. 340, 583. 2 Roll Ab. 96 pl. 1. H. P. C. 161. Admitted. 2 Keb. 212. pl. 49, 292 pl. 75, 718. pl. 109.
[n] 2 Keb. 433. pl. 13. 1 Sid. 734. pl. 20.

[o] 1 Rol. Abr. 96 pl. 1. Cro. Ca. 340, 583. *Cont* Keilw. 159. b. Trial per pais, 26. 2 Rol. Ab. 625. pl. 2. H. P. C. 266. [p] 2 Inſt. 568. 3 Inſt. 164. [q] Cro. Ja. 404. pl. 2. And in this Book it is ſaid that Common Experience is ſo. [r] Fitz. Coro. 44. Keilw. 159. b. [s] Jon. 379. pl. 10. S. P. C. 156. a. 1 Keb. 433. pl 3. Trial per pais, 25. 26. 2 Keb. 212 pl 49. Crompt. Juſtice, 152. a. 1 Sid. 99. pl. 2 335. pl. 20. Cro Ca. 438, 448. 2 Roll. Abr 625 L. 1. 3. H. P. C. 256. [t] 1 Sid. 335. pl. 20. In Crompt. Juſtice, 150. b. 'tis ſaid that the Seſſions for the Peace may award Proceſs for the Trial of an Indictment of Felony, the next Day after it is traverſed. *Quære* if the Party's Being in Gaol make no Difference? Cro. Ca. 340. 2 Roll. Abr. 96. pl. 1. 1 Sid 335. pl. 20. [u] 1 Keb. 433. pl. 3. 1 Sid 99. pl. 2. 334. pl. 20. [x] *Vide ſupra*, Sect. 1. [y] State Trials, Vol. 4 fol. 99, 100. [z] 1 Sid. 348. pl. 15. 2 Keb. 284. pl. 53. 292. pl. 75. 718. pl. 109. 854. pl. 6. And in theſe Books ſuch Error is ſaid not to be helped by the next Aſſiſes happening to fall on the ſame Day. [a] *Vide ſupra*, Ch. 5 Sect. 6. 13. [x] 1 Sid. 348. pl. 15. 2 Keb. 284. pl. 53, 718. pl. 109, 854. pl. 6. Cro. Ca. 340. [y] *Vide* Ch. 5. Sect. 11

Sect. 7. It hath been [a] adjudged, That the Award of a *Venire* returnable at a certain Day before Juſtices of *Oyer*, *&c.* needs not expreſly mention before what Juſtices it ſhall be returnable; for it cannot but be intended that it ought to be before the ſame Court which awards it.

Sect. 8. As to the third Point, *viz.* Where a *Venire* may be joint or ſeveral: It ſeems agreed, that where ſeveral Perſons are arraigned upon the ſame [b] Indictment or [c] Appeal, and ſeverally plead not guilty, it is in the [d] Election of the Proſecutor, *&c.* either to take out [e] joint *Venires* againſt them all, or [f] ſeveral againſt each of them. But in an Appeal, if one plead not guilty, and the other plead a Releaſe made at *A.* it ſeems [g] that there muſt be ſeveral *Venires*.

Sect. 9. It ſeems generally [h] agreed, that where the ſame Jury is returned on ſuch a Joint Proceſs againſt ſeveral Defendants, if a Juror be challenged by any one Defendant, and the Challenge allowed, and the Juror thereupon [i] drawn, he is by neceſſary Conſequence drawn as to all the other Defendants alſo, becauſe there being but one Panel, the ſame Perſon cannot at the ſame Time be taken from it, and yet continue in it. But where one Jury is jointly returned for the Trial of ſeveral Defendants before Juſtices of Gaol-Delivery, it is [k] certain that they may afterwards ſever the Panel, if they find it expedient, for the Prevention of this Inconvenience. But I do not find [l] that this can be done in any other Caſe. And it ſeems agreed, That after an Appellant hath taken out a joint *Venire* againſt all the Appellees, he cannot [n] afterwards take out ſeveral ones, tho' the firſt be never returned; and the Reaſon ſeems to be becauſe it wou'd amount to a [o] Diſcontinuance.

Sect. 10. As to the fourth Point, *viz.* Where Proceſs may be taken out by the Defendant in Criminal Caſes by *Proviſo*. (*i. e.* with a [p] Clauſe that if two Writs come to the Sheriff he ſhall execute one of them only.) I take it to be agreed, [q] That it may be ſo awarded in any Appeal, whether Capital or not Capital, in the ſame Manner as in other Actions, after the Appellant hath made Default in [r] Relation to the very ſame Kind of Proceſs. And therefore if the Appellant, after Iſſue joined, either neglects to take out any [s] *Venire* the ſame Term, *&c.* or takes one out but doth not * get it returned, it ſeems that the Defendant may take one out by *Proviſo*, *&c.* And in like Manner if the Appellant make the like Default in ſuing out an *Habeas Corpora*, or other ſubſequent Proceſs, the Defendant may ſue out the like Proceſs by *Proviſo*. But where the Defendant hath ſued out any Proceſs by *Proviſo*, there are [t] Authorities that

[a] 29 Ed. 3. 30. b. 31. a. In Dy. 315. pl. 99. The ſame Caſe is taken Notice of, and it is there ſaid, that the *Venire* it ſelf needs not ſhew before what Juſtice it is returnable; but this ſeems not to be warranted by the Book at large. *Vide* 2 Keb. 855. pl. 6.

[b] H. P. C. 256.

[c] State Trials, Vol. 4. fol. 100. H. P. C. 2 6. S. P. C. 155. a.

[d] 1 Jo. 425. But Cro Eliz. 541. pl. 4. it is ſaid to be the Courſe to try the Defendants in Appeal by ſeveral *Venires*. S. P. C. 155. a. It is ſaid, that where there are three Defendants the Plaintiff may join 2 of them in one *Venire*, and take out another againſt the third.

[e] *See* the Books above cited.

425. and Fitz. Quare Impedit, 199. 21 H. 6. 22 pl. 46. [f] *See* the Books above cited. Alſo the ſame is adjudged, 1 Jon. 426 Where one Appellee was charged with doing the Fact *proditorie*, the others *felonice*. *See* Fitz Quare impedit, 199. Viſne, 11, 14. Keilw 106. b. [g] Dy. 120. pl. 10. 131. pl. 72. Cro. Eliz. 541. pl 4. [h] 30 E. 3. 1. pl. 1. Bro. Viſne, 27. *Vide* 11 H. 7. 5. pl. 9. Bro. D ſc. de Proceſs, 62. Fitz. Execut. 114. Niſi prius, 7, 8. [i] S. P. C. 155. a. H. P. C. 256. 9 Ed. 4. 27. pl. 40. Moor, 13. pl. 48. Co. Litt. 156. b. Dyer 246. pl. 70. Plowd. Com. 100. Bro. Challenge, 84. Parallel Caſe. Co. Litt. 130. b. 4 H. 4. 4. a. Dyer 246. pl. 70 [k] 50 Ed. 3. 1. pl. 1. Fitz Protection, 21, 126. 3 H 4. 5. pl. 24. Crompt. Juſt. 113. b. pl. 1. But this is made a *Quære* Dyer 152. pl. 8. And denied in the ſame Caſe in Dalis 25 pl. 11. [l] But if no Judgment be given that the Juror who is challenged by one ſhall be drawn, but only that he ſhall ſtand aſide for a Time, it is ſaid that he may try thoſe who do not actually challenge him. Dyer 120. pl. 8. *Cont.* Bendloes 58. pl 95. [n] Kely. 7. H P. C. 256. Plow. Com. 100. 9 Ed. 4. 27. pl 40. Crompt Juſt. 113. b. pl. 2. [o] Plow. Com. 100. [p] 8 Co 66. a S P. C 155. Lett. A. 27 H 6. 4. pl 28 Fitz. Proceſs. 94. S. P. C 155. Lett. A. Bro. *Venire facias* 32. 9 Ed. 4. 27. pl 40 Fitz. Challenge 56. *Vide* Fitz Inqueſt 59. Executors, 114. [q] *Supra*, Ch. 27. Sect 96. [r] 8 H. 6. 6 pl. 14. Fitz. Proceſs, 79 *Vide* 2 Rol. Ab. 666. B. 1. 2. Raſt. Ent. 645. pl. 7. [s] H. P. C. 257 S. P. C. 155. Lett. B Fitz Proceſs, 211. 15 H. 7. 9 pl. 10 Keil. 176 pl. 70. [t] *See* the Books cited to the other Parts of this Section. 33 H. 6. 14. a. [t] *Dyer* 215. pl. 51, 52. Cro. Ca. 484 *Vide* Dyer 284. pl 34, 319 pl. 13. 2 Rol. Ab. 666 B. 1. 2. 2 Jon. 34 Keilw. 156 pl. 11. * 8 H 6. 6. pl. 14. Fitz Proceſs 79 Bro Niſi prius, 13. [v] 15 H 7. 9. pl. 10. 14 H 7. 7. pl. 16. Fitz. Proceſs 211. Dyer 318. pl. 10. H. P. C. 257. Cro. Ca. 484. 2 Roll. Ab. 665. 1, 2, 3, 4. Bro. Octo Tales, 8. S. P. C. 71. Lett. A. 155. Lett. G. Dyer, 284. pl. 34. 193. pl. 28. *Cont.* Fitz. Proceſs 68. Dyer 215. pl. 51, 52, 217. pl. 51.

the

the Plaintiff is to ſue out the proper ſubſequent Proceſs upon it in the ſame Manner as if he had ſued out the firſt; and that it is irregular for a Defendant to take out any ſuch ſubſequent Proceſs till the Plaintiff has made a [a] Default in Reſpect of the ſame Kind of Proceſs, except only in ſuch Actions wherein the Defendant is an Actor as well as the Plaintiff, as in [b] Replevin, or [c] Error, or [d] *Quare impedit* againſt the Patron only, or [e] Prohibition, *&c.* in which Actions the Defendant may either take out Proceſs by *Proviſo*, without any Default in the Plaintiff, or [f] may, if he think fit, take it out in the ſame Manner as the Plaintiff, without any Clauſe of *Proviſo*. But it ſeems agreed, That neither in Actions wherein the King is ſole [g] Party, nor in [h] Indictments, there can be any Proceſs taken out by *Proviſo*, becauſe no Laches is imputable to the King. Alſo it hath been [i] queſtioned, whether there can be any ſuch Proceſs in Informations *qui tam*, becauſe the King is in ſome Sort a Party.

[a] Dyer, 215. pl. 51, 52. Bro. Niſi prius, 40. 6 Mod. 246
[b] Dy. 193 pl. 28. 21 H. 6. 22. pl. 2. 16 H. 7. 14. pl. 10 Fitz. Niſi prius, 9. Bro. Niſi prius, 40.
[c] 2 Lev. 5. 6. 2 Saund. 336.
[d] 6 Mod. 246. Fitz. Niſi prius, 6.
[e] Par. Caſe, 2 Roll. Abr. 666 Lett. R Fitz. Niſi prius. 3
[f] 2 Lev. 5, 6 16 H. 7 14. pl. 10. Bro. Niſi prius, 40. 21 H. 6. 22. pl. 2. Bro. octo Tales 17. 2 Saund. 336
[g] 2 Leon. 110.
[h] 6 Mod. 246 247. 1 Keb. 195. pl. 184 *Cont.* 1 Sid. 316.
[i] 2 Leon. 110. [k] S. P. C. 155. Lett. F. 10 Co. 104 b. H. P. C. 257 20 Ed. 3. 11. pl. 13.

As to the fifth Point, *viz.* In what Caſes, and in what Manner a *Tales* is grantable, I ſhall obſerve the following Particulars.

Sect. 11. 1. That if a full Jury appear not in an Appeal whether by Reaſon of the [k] Death of ſome of the Perſons returned, or for any other Cauſe, or if ſo many be [l] challenged and drawn that there do not remain enow to make a Jury; or if after the Jury is charged, one [m] or more of them die, the Appellant [n] may pray a *Tales*, in the ſame Manner as a Plaintiff in other Actions. And ſo alſo may the Appellee, if the Appellant neglect to pray one the ſame [o] Term, *&c.* But it ſeems that a Defendant cannot regularly pray it till there has been a Default in the Plaintiff.

Sect. 12. 2. That in Capital Caſes, a *Tales* may be granted for a larger Number than the firſt Proceſs, as for [p] ſixty, or forty, or any other even [q] Number that the Court thinks proper, in order to prevent the Delay, which may be occaſioned by the Defendant's peremptory Challenges. And in this Reſpect the Law in Reſpect of a *Tales* in Capital Caſes is different from what it is in any other Caſe; it being an allowed Rule, that in all [r] other Caſes the *Tales* muſt be for a leſs Number than the firſt Proceſs.

Sect. 13. 3. That every ſubſequent *Tales*, in Capital as well as in all [s] other Caſes, muſt be for a [t] leſs Number than the former, except the former were quaſhed, in which [u] Caſe the next may be for the ſame Number.

[l] State Trials, Vol. 1. f. 502. and the Books next above cited. [m] S. P. C. 155. Lett. F. 12 H. 4. 10. a. S. 10 Co. 104. b. *Quere* 2 Rol. Abr. 671. pl. 2. [n] H. P. C. 257. S. P. C. 155. Lett. C. 14 H. 7. 7. pl 16 [o] Cro. Ca. 484. 14 H. 7. 7. pl. 16. 10 Co. 104. b. *See* the Books cited to the precedent Section, under the Letter f. Yet 'tis ſaid in Dyer 359. pl. 2. That if a full Jury do not appear, and the Plaintiff pray a *Diſtringas* without praying any Tales, the Court ought to grant it at the Prayer of the Defendant. *Vide* 2 Roll. Abr. 671. N. [p] 14 H. 7 7. pl. 16. H. P. C. 257. S. P. C. 155. Lett. C. Finch. 415. Bro. octo Tales 6, 8, 19. Keilw. 176. pl 10. Dyer 213. pl. 43. 1 Bulſt. 121. 15 Ed 4 33. pl. 19. 16 Ed 4. 5. pl. 3. 10 Co. 104. b. 105. a. [q] 10 Co. 105. a. Finch of Law 414. But a *Tales de circumſtantibus* may be of any uncertain Number, 10 Co. 105. a. [r] 14 H. 7. 7. pl. 16. Finch of Law, 414. 10 Co. 104 b. 105. a. 2 Roll. Abr. 672. Lett Q 37 H. 6. 12. pl. 1. Bro. octo Tales 11, 16. Fitz. Inqueſt, 20, 40. 18 Ed. 4. 6. pl. 31. [s] Finch of Law 414. 2 Roll Abr. 672. Letters Q. S. Bro. octo Tales 15, 16. Bro. attaint 7. 10 Co. 105. 47 Aſſ. pl. 10. 14 H. 7. 2. pl. 6. [t] S. P. C. 155. Lett. C. H. P. C. 257. Keilw 176. pl. 10. 10 Co. 105. a. Fitz. Inqueſt 40. It is ſaid, that there may be 12 Tales, but this is contrary to all the other Books. [u] S. P. C. 155. Lett. C. H. P. C. 257. Fitz. Challenge 36. 20 H. 6. 38. pl. 2.

Sect. 14. 4. That the Quaſhing the Array of the principal Panel doth [a] not quaſh that of the *Tales*, but the Inqueſt ſhall be taken of thoſe returned on the *Tales* if there be enow, and if not, others ſhall be added to them by a new *Tales*. Yet it ſeems [b] agreed, That if all the Perſons returned on a *Habeas Corpora*, be challenged and drawn, there ſhall not be a *Tales* awarded, but a new *Venire facias*; for the Word *Tales* plainly refers to ſome others, to whom the Perſons returned are to be like. Alſo it ſeems agreed, [c] That if the firſt *Habeas Corpora* be quaſhed, the *Habeas Corpora* with a *Tales*, cannot but be quaſhed with it, and the Party muſt go on in the ſame Manner, as if the *Venire* had been only returned, and nothing done upon it; for where a Proceſs is quaſhed, all that follows it and depends upon it, ſeems of Courſe to fall with it.

Sect. 15. 5. That it ſeems the ſtronger Opinion, That a *Tales* is not grantable upon the Return of a *Venire*, but only [d] upon the Return of a *Habeas Corpora* or *Diſtringas*, becauſe it appears not before ſuch Return, but that a full Jury may appear.

Sect. 16. 6. That the [e] *Diſtringas* or [f] *Habeas Corpora*, with a Command to add ſo many more to thoſe ſummoned on the *Venire*, is the firſt Proceſs againſt the *Tales*; but it is [g] ſaid not to be grantable with a *Niſi Prius*, without having been firſt returned into the Court.

Sect. 17. 7. That [h] if a Juror be withdrawn after a Trial is commenced whereon a *Tales de Circumſtantibus* was awarded, and afterwards a new *Habeas Corpora* be taken out with a *Tales*, it ſhall appoint ſuch *Tales* to be added to the Jurors returned on the firſt *Venire*, and alſo to thoſe returned on the *Tales de Circumſtantibus*; becauſe the Court above will take judicial Notice of what is done at *Niſi Prius* being entred on Record.

Sect. 18. 8. That the [i] Statutes which authoriſe Juſtices of *Niſi Prius* to award a *Tales de Circumſtantibus*, extend [k] as well to all Capital Caſes, whether of Treaſon or Felony, as to others But it ſeems, That ſuch a *Tales* cannot be prayed for the King upon an Indictment, or Criminal Information, without a [l] Warrant from the Attorney General, or an expreſs [m] Aſſignment from the Court before which the Inqueſt is taken. But for the fuller Underſtanding of theſe Matters, not being ſo proper for this Treatiſe, I ſhall refer to the Statutes in the Margin.

Sect. 19. 9. That it hath been [n] queſtioned whether any *Tales* be grantable by Juſtices of *Oyer* and *Terminer*; and it hath been [o] holden, That it is not grantable by Juſtices of Gaol-Delivery: And therefore if a Trial before ſuch Juſtices be put off for Want of a ſufficient Number of Jurors, it ſeems the uſual Practiſe for the Court not to order a *Tales*, but a [p] larger Panel, whereon the former Jurors ſhall be returned in the ſame Order as before, and called to be ſworn as they ſtand, without any more Regard to thoſe who were ſworn before than to the others. Which is the Method likewiſe to be obſerved in the like Caſe, as to the Swearing of a Jury returned with a *Tales*.

[a] Fitz. Inqueſt, 32. S P.C. 155. Lett. G. Dy 245 pl. 64. 10 Co. 104. 1. 105. a.
[b] S. P. C. 155 Lett. E. Finch. 414.
[c] 34 H 6. 20. pl. 39. Fitz. Inqueſt, 20.
[d] Cro. Eliz. 502 503. 27 H. 6. 10. pl. 4. Bro. Niſi prius, 1. and Octo Tales, 1.
[e] 34 H 6. 21. pl. 39. 2 Roll. Abr. 671. O. pl. 2. *Cont.* Bro. Octo Tales, 10.
[f] 15 H. 7. 9. pl. 10.
[g] 1 Roll. Abr. 798. pl. 9.
[h] 27 H. 6. 10. pl 4. Bro. Niſi prius, 1. and Octo Tales, 1.
[i] 35 H. 8. 6. Par. 6, 7, 8. made perpetual by 2 & 3 Ed 6. 32. 4 & 5 Ph. & Ma. 7. 14. El. 9. Raym. 367. 1 Lev. 223. 1 Keb. 490. pl. 30.
[k] 27 H 6. 10. pl. 4. Bro. Niſi prius, 1. and Octo Tales, 1.
[l] 1 H. 5. 11. pl. 22. S.P.C 157 a. [b] Cro. Ja. 677.
[m] *See* the Statute of 14 El 9 [n] State Trials, Vol. 4. f. 179 to 182. [o] State Trials. Vol. 4. f. 179 to 182. Yet there is an Inſtance in Keilw 176 pl. 10. of the *Tales* awarded in an Appeal before ſuch Juſtices. And the like was done Plow. Com. 100. upon an Indictment of Murder. [p] State Trials, Vol. 4. f. 179 to 182. [q] 1 Lev. 23.

Sect. 20. As to the ſixth Point, *viz.* Where it is neceſſary to return a Panel into Court, before an Inqueſt can be taken upon it, and where the Priſoner may demand a Copy of it. It is recited by 42 *Ed.* 3. 11. *That divers Miſchiefs had happened, becauſe that the Panels of Inqueſts which had been taken before Juſtices by Writ of* Scire facias, *and other Writs, had not been returned before the Seſſions of the Juſtices at the* Niſi Prius, *and otherwiſe, ſo that the Parties could not have Knowledge of the Names of the Perſons which ſhould paſs in the Inqueſt, whereby divers of the People had been diſherited and oppreſſed, and thereupon it is ordaind that no Inqueſt* [c] *but Aſſiſes and Deliverances of Gaols, be taken by Writ of* Niſi Prius, *nor in any other Manner, at the Suit of the Great or Small, before the Names of all them that ſhall paſs in the Inqueſt, be returned in the Court.*

Sect. 21. It ſeems [f] agreed, That this Statute extends as well to Writs of *Niſi Prius* in Criminal Caſes as in Civil, and to [e] Jurors returned upon a *Tales* as well as to thoſe returned upon a Principal Panel.

Sect. 22. But it ſeems, [h] That in Trials before the Juſtices of Gaol-Delivery the Priſoner has no Right to a Copy of the Panel before the Time of his Trial, except only in Caſes within the Purview of 7 & 8 *W.* 3. 3. which enacts, *That every Perſon indicted and tried for High Treaſon, or Miſpriſion thereof (except it be for counterfeiting the Coin,* &c.*) ſhall have a Copy of the Panel of the Jurors, who are to try him, duly returned by the Sheriff, and delivered unto him two Days at leaſt before he ſhall be tried.*

Sect. 23. It hath been [i] adjudged to be ſufficient within the Intent of this Act to deliver to a Priſoner a Copy of a Panel arrayed by the Sheriff before it is returned into Court, if the very ſame Panel be afterwards returned.

[c] *Note*, That 6 H. 6. ch. 2. provides alſo for Aſſiſes, 3 Inſt. 175.

[f] S. P. C. 156, 157. H. P. C. 258. *Quære*, If the Statute extends to Juſtices of Oyer and Terminer, for it is ſaid to be the Practice for Trials before them for Treaſon to be on the *Venire* and not to award any Habeas Corpora. State Trials, Vol. 4. f. 102.

[h] State Trials, Vol. 2. f. 761. Vol. 3. f. 4, 866, 867. Vol. 4. f. 6. [i] State Trials, Vol. 4. f. 101 to 104.

CHAP.

CHAP. XLII.

Before what Court the Jury is to be returned.

Sect. 1. AND now I am to conſider before what Court the Proceſs againſt Jurors in Criminal Caſes is returnable: As to which there can be no [a] Doubt but that by the Common Law it is returnable only into the Court wherein the Proſecution was depending.

Sect. 2. But the Statute of [b] *Weſtm.* 2. *Ch.* 30. having ordained that all Pleas in either Bench, which require only an eaſy Examination, ſhall be determined in the Country before the Juſtices of Aſſiſe, by Virtue of the Writ preſcribed by that Statute, commonly called the Writ of *Niſi Prius*: It ſeems to have been univerſally agreed, [c] That an Iſſue join'd in the King's Bench upon an [d] Indictment or [e] Appeal, whether for Treaſon or [f] Felony, or a Crime of an inferior [g] Nature, committed in a different County from that wherein the Court ſits, may be tried in the proper County by Writ of *Niſi Prius* by Virtue of the ſaid Statute.

Sect. 3. Yet inaſmuch as the King is not expreſly named in this Statute, and it is a general Rule, That he ſhall not be bound by a Statute which doth not expreſly name him; it ſeems to have been generally holden, That where-ever the King is a Party it is irregular to grant a Trial by *Niſi Prius* without his [h] ſpecial Warrant, or the [i] Aſſent of his Attorney. But I do not find it denied, [k] but that regularly the Court may grant it an [l] Appeal in the ſame Manner as in any other Action.

Sect. 4. Having ſhewn already, *Ch.* 7. *Sect.* 17, 18. and *Ch.* 23. *Sect.* 141. the 2d. that Juſtices of *Niſi Prius* have Power by 14 *H.* 6. 1. to give Judgment in Felony and Treaſon, and how far they have Power to give Damages in an Appeal, and having alſo ſhewn *Ch.* 25. from *Sect.* 7 *to* 14. in what Caſes they may arraign an Appellee at the Suit of the King, after a Nonſuit of the Party, I ſhall refer to what is there ſaid concerning theſe Matters.

[a] *Vide* 4 Inſt. 159.

[b] 2 Inſt. 421, 423. 424. Cro. Ca. 349.

[c] 2 Inſt. 424. 4 Inſt. 160. *See* the Books cited to the other Parts of this Section.

[d] Bro. Coro. 231.

[e] 4 Co. 43. pl. 9. 4 Inſt. 160. Dy. 46. pl. 8. 261. pl. 26. 21 H. 7. 34. pl. 35. Raſt. Ent. 47. a. 55. a.

[f] Bro. Coro. 231. 4 Inſt. 160. Raym. 367.

[g] Cro. Ca. 348, 349. 6 Mod. 246, 247.

Vide ſupra, ch. 7. ſect. 18. ch. 23. ſect. 141, 201.

[h] Fitz Niſi prius, 16. 2 Leon. 110. 2 Inſt. 424. F. N. B. 241. Lett. A. Bro. Niſi prius, 16.

[i] 2 Inſt. 424. F. N. B. 241. Lett. A. Crompt. Juriſdict. 211. b. 6 Mod. 246, 247. S. P. C. 156. Lett. A. H. P. C. 258. In. Cro. Ca. 348, 349. In an Indictment of Barretry, which ſeemed to require great Examination, the Court refuſed to grant a Trial by *Niſi prius* at the Motion of the Attorney General, till the King by his Letters, had ſignified his Pleaſure, that it ſhould be ſo tried, *Vide* 6 Mod. 123.

[k] But not where the Jury is to be from two Counties, Dy. 46. pl. 6.

[l] *See* the Books cited to the precedent Section under Letter e.

CHAP.

CHAP. XLIII.

Of Challenges.

AND now I am to ſhew in what Manner the Jurors returned for the Trial of a Criminal may be challenged, which I ſhall conſider,

1. So far as it relates to all Perſons in general.
2. With Regard to Aliens only.

Sect. 1. As to the Learning of this Kind, ſo far as it relates to all Perſons in general, having premiſed, That no Challenge [a] can be taken, either to the Array or to the Polls, till a full Jury have appeared; and that no Juror can be [b] challenged either by the King or Priſoner, without [c] Conſent, after he hath been ſworn, whether on the ſame Day, or (according to the greater Number of [d] Authorities,) on a former, on the ſame Trial, unleſs it be for ſome Cauſe which happened [e] ſince he was ſworn, I ſhall endeavour to ſhew,

1. How Jurors may be challenged on the Part of the King.
2. How on the Part of the Priſoner.

Sect. 2. And firſt, As to ſuch Challenges on the Part of the King: It ſeems [f] agreed, That by the Common Law the King might challenge peremptorily as many as he thought fit, of any Jury returned to try any Cauſe in which he was a Party. But this is remedied by 33 *Ed.* 1. commonly called an Ordinance for Inqueſts, which is enacted as followeth, *Of Inqueſts to be taken before any of the Juſtices, and wherein our Lord the King, is Party, howſoever it be: It is agreed and ordained by the King and all his Counſel, that from henceforth, notwithſtanding it be alledged by them that ſue for the King, that the Jurors of thoſe Inqueſts, or ſome of them be not indifferent for the King, yet ſuch Inqueſts ſhall not remain untaken for that Cauſe; but if they that ſue for the King will challenge any of thoſe Jurors, they ſhall aſſign of their Challenge a Cauſe certain, and the Truth of the ſame Challenge ſhall be inquired of according to the Cuſtom of the Court.*

[a] Hob. 235. [b] Yelv. 23. Cro. Ca. 291. Co. Litt. 158. a. 22 Ed. 3. 8. pl. 20. 2 Roll. Abr. 658. pl. 5, 6, 7, 8, 9. 659. pl. 4, 5. 661. Lett. Q. 12 H. 4. 10. a. Fitz. Challenge, 64. 14 H. 7. 6. pl. 13. Bro. Challenge, 73. 9 H. 5. 7. pl. 21. Abridged, Fitz. Challenge, 72. Bro. Challenge, 50. 14 H. 7. 19. pl. 8. Abridged, Bro. Challenge, 75. State Trials, Vol. 3. f. 379.

Neither can a Challenge be taken to the Array after any of the Jurors are ſworn. Hob. 235. [c] Cro. Ca. 291. State Trials, Vol. 3. f. 379. [d] 22 Ed. 3. 8. pl. 20. 2 Rol. Abr. 658. pl. 5, 6, 7, 8. 659. pl. 4, 5. 661 Lett. Q. 12 H. 4. 10. a. 14 H. 7. 6. pl. 14. Bro. Challenge, 50, 73, 130. Fitz. Challenge, 143. 28 Aſſ. pl. 44. Yelv. 23. Yet adjudged, That a Juror after he is ſworn may be peremptorily challenged another Day, tho' not on the ſame wherein he is ſworn, 32 H. 6. 26. pl. 14. Abridged, Bro. Challenge, 193. 14 H. 7. 19. pl. 8. Abr. Bro. Challenge, 76. S. P. C. 158. 2 Rich. 3. 19. pl. 34. Abr. Bro. Challenge, 194. [e] 22 Ed. 3. 8. pl. 20. Yelv. 23. 2 Rol. Abr. 658. pl. 5, 6, 7, 8, 9. Bro. Challenge, 130. 28 Aſſ. pl. 44. Co. Litt. 158. a. 14 H. 7. 6. pl. 14. Bro. Challenge, 50, 73, 75. Fitz. Challenge, 64, 72, 143. [f] Co. Litt. 156 b. H. P. C. 259. S. P. C. 162. Lett. A. 1 Rol. Ab. 645. X. pl. 2, 3.

Sect. 3. It ſeems to be clearly ſettled [a] at this Day, that this Statute being general, extends as well to all Criminal as civil Cauſes: However if the King challenge a Juror before the Panel is peruſed, it is [b] agreed that he needs not ſhew any Cauſe of his Challenge till the whole Panel be gone thro', and it appear that there will not be a full Jury without the Perſon ſo challenged. And if the Defendant, in order to oblige the King to ſhew Cauſe, preſently challenge *touts paravaile* [c], yet it hath been adjudged that the Defendant ſhall be firſt put to ſhew all his Cauſes of Challenge, before the King need to ſhew any.

Sect. 4. As to the ſecond Point, *viz.* How Jurors may be challenged on the Part of the Priſoner: Having premiſed that a Peer can take no Challenge to any of his Peers; and that where ſeveral are tried on a joint [e] *Venire*, a Juror challenged and drawn as to one, cannot but be drawn as to all, I ſhall farther endeavour to ſhew,

1. How Jurors may be challenged peremptorily.
2. How they may be challenged for Cauſe.

As to the firſt Particular, *viz.* How Jurors may be challenged peremptorily, having premiſed that the Priſoner muſt take all ſuch Challenges himſelf, [f] even in ſuch Caſes wherein he may have Counſel, I ſhall endeavour to ſhew,

1. In what Caſes a peremptory Challenge is allowable.
2. How many Jurors may be ſo challenged.

Sect. 5. As to the firſt Particular, I take it to be agreed, that a peremptory Challenge was allowable by the Common Law, in all [g] capital Caſes both upon Indictments and [h] Appeals, and alſo in [i] Miſpriſion of High Treaſon; but it was enacted by 33 *H.* 8. 23. *Par.* 3. *That it ſhould not be allowed in any Caſes of High Treaſon, nor Miſpriſion of High Treaſon.* Nor do I know that any Statute hath revived it as to the later of theſe; for it is ſaid that the Statute of 1 *Ph. & M.* 10. which by reſtoring the old Courſe of the Common Law as to Trials of Treaſon, has revived [k] ſuch Challenge as to Treaſon, doth not [l] extend to Miſpriſion of High Treaſon.

Sect. 6. It hath been anciently [m] adjudged, and is holden both by [n] *Staundforde* and [o] *Coke*, That a Man ſhall have the ſame peremptory Challenges on an Iſſue joined upon collateral Matter alledged in Avoidance of an Outlawry for a capital Crime, as he may on the general Iſſue: But the contrary is holden by [p] *Hale*, and is ſaid to have been [q] adjudged in the Caſe of *Okey* and *Barkſtead*.

Sect. 7. As to the ſecond Particular, *viz.* How many Jurors may be challenged peremptorily: It ſeems to have been the ſettled [r] Rule of the Common Law, where ever ſuch Challenge was allowed, to ſuffer the

[a] Moor, 595. pl. 809. S. P. C. 162. Lett. A. H. P. C. 259. Co. Litt. 159. [b] and the Books cited to other Parts of this Section. Yet peremptory Challenges were taken for the Queen in Throckmorton's Trial. 1 Mar. State Trials Vol. 1. fol. 48. [b] 1 Ventr. 309 310. S. P. C. 162. Lett. A. State Trials, Vol. 2. 744. Vol 3. fol. 52. 869. H. P. C. 259. [c] State Trials Vol. 3. fol. 52. Raym. 473, 474. *See* State Trials, Vol 3. f. 4 Vol. 4. f. 117, 407. [d] Ruſhw. Collections, 2. V. 1 f. 94. Moor, 621, 622. Co. Litt. 156. b. State Trials, Vol. 1. fol. 164, 265. Trial per pais Ch. 9. [e] *Supra*, Ch. 41. Sect. 9. [f] State Trials, Vol. 4. f. 105. Vol 1. fol. 601. V. 2. fol. 743, 744. [g] Co. Litt. 156. b. Moor, 12. pl. 46. [h] Moor, 12.

pl. 46 Bendl. 42 pl. 77. 9 H. 5. 7 pl. 21. Abridged, Fitz. Challenge, 72. Bro. Challenge, 50 14 H. 7. 7. pl. 16. Bro. Challenge, 74. 75, 211. 3 H 7. 2. pl. 5. [i] 3 Inſt. 27. But in no other Caſe that is not Capital. State Trials, Vol. 2 fol 254 [k] 3 Inſt. 227 S. P. C. 157. Lett. B. 158. 1 And. 107, 108. Co. Litt. 156. b. State Trials, Vol 2. fol. 764. &c. But this is made a *Quære* Savil, 57. [l] *Supra*, Ch 25 Sect. 145. Yet 3 Inſt. 27 a it is ſaid that for Miſpriſion of Treaſon one may peremptorily challenge, 35. [m] Fitz Challenge, 153, 160. [n] S. P. C. 163. Lett. A. Yet the ſame Point is made a *Quære*, S. P. C. 158 [o] Co. Litt 157 b. [p] H. P. C. 269. [q] 1 Lev 61 But the other Books which report the ſame Caſe take no Notice of this Point. 1 Sid. 72. Kely. 13. [r] Co Litt. 156. b. Crompt. Juſt. 114. pl. 4. 9 H. 5. 7. pl. 21. 14 H. 7. 7 pl. 16. Bro. Challenge. 70, 74. 75, 217. 39 Ed. 4. 33. b. 3 H 7. 2 pl. 5 Abridged, Bro. Challenge, 211. 17 Aſſ pl. 6. 17 Ed. 3. 23. pl 8. Abridged, Bro. Challenge, 105. Trial per pais. Ch. 9. S. P. C. 157 b. 158. *See* the Books cited, Ch. 30. Sect. 2 Lamb. B. 4. Ch. 14, ſays that it was doubtful at Common Law how many might be challenged.

Priſoner to challenge as many as he thought fit under the Number of three full Juries, *i. e.* not amounting to more than thirty-five. But if a Criminal challenge more than that Number, [a] it ſeems the more prevailing Opinion that he is to be dealt with as one that ſtands Mute

Sect. 8. It is enacted by 22 *H.* 8. 14. *Par.* 7. made perpetual by 32 *H.* 8. 2. *That no Perſon arraigned for any Petit Treaſon, Murder or Felony, be admitted to any peremptory Challenge above the Number of twenty.* But it ſeems [b] agreed, That 1 *&* 2 *Ph. & Ma.* 10. which reſtores the Courſe of the Common Law as to Trials of Treaſon, has revived the old Challenge of 35 in Trials of Petit Treaſon.

Sect. 9. It ſeems to have been holden by Sir [c] *Edward Coke* that he who challenges more than twenty upon an Arraignment of Felony, ſince the abovementioned Statute of 22 *H.* 8. ſhall [d] neither forfeit his Goods, nor have Judgment of Death, nor of *pain fort & dure*, but ſhall only be over-ruled as to his Challenges ſo far as they exceed twenty, and put upon his Trial. But this ſeems to have been doubted by Sir *Matthew* [e] *Hale*, and the contrary is holden by [f] *Crompton*, and ſeems more agreeable to the moſt natural Conſtruction of 22 *H* 8. which ſeems to have intended no Alteration as to the Nature or Effect of peremptory Challenges, but only as to their Number. To which may be added, That nothing is more Common than for [g] ſubſequent Statutes which take from Felons the Benefit of the Clergy, [h] expreſly to exclude thoſe who challenge more than twenty, which would be needleſs if their Challenge were only to be over-ruled, and did not ſubject them to Judgment of [i] Death, *&c.*

Sect. 10. As to the ſecond Particular, *viz.* How Jurors may be challenged for Cauſe, having premiſed that it is a [k] general Rule, That where-ever [l] the King is a Party, as he is in every [m] Indictment, and in ſome Sort alſo in [n] Appeals of Felony, he who takes a Challenge for Cauſe muſt ſhew it preſently, and ſhall not have Time till the Panel is peruſed, as the King ſhall where he takes a Challenge, as hath been more fully ſhewn, *Sect.* 3. and having alſo farther premiſed that after a Priſoner hath challenged a Juror for Cauſe, and his Cauſe hath been diſallowed, or found againſt him, he may [o] challenge the ſame Juror peremptorily, before he is [p] ſworn, I ſhall endeavour to ſhew,

1. What ſhall be a good Challenge of a Juror, in Reſpect of his Honour or Inſufficiency.
2. What in Reſpect of his Unindifferency.

And firſt as to the Challenge of a Juror for his Honour or Inſufficiency; having premiſed that it is agreed to be a good Challenge of this Kind that a Juror is an [q] Alien, [r] Minor, or [s] Villain, I ſhall more fully endeavour to ſhew,

[a] *Supra*, Ch. 30. Sect. 2.

[b] Bro. Challenge, 217. H. P. C. 260. 3 Inſt. 227. *Vide ſupra*, Sect. 5. and Ch. 25. Sect. 134. 146

[c] S. P. C. 158 a. Co. Litt. 156. b.

[d] 3 Inſt. 227.

[e] *Vide* Ch. 30. Sect. 19. Staund. Prer. 46 a.

[f] H. P. C. 260.

[g] Crompton's Juſt. 114 pl. 4.

[h] *Supra*, Ch. 33. Sect. 32, 45, 48, 59. 61, 66, 69, *&c.*

[i] *Vide ſupra*, Ch. 33. Sect. 27. 36.

[k] Co. 31. a. 32 a. 35. b. S. P. C. 160. Lett. A.

[l] *Vide* Ch. 33. Sect. 20.

[m] Co. Litt. 158 a. Fitz. Challenge, 128. State Trials, Vol. 3. f. 235. S. P. C. 162. Lett. C. 2 Roll. Abr. 659 pl. 6, 7, 8. 34 Aſſ. pl. 22. 1 Sid. 244. *Cont.* 19 Aſſ. pl. 6. Abridged, Bro. Chal. 107. Except in Inqueſts, Fitz. Challenge, 105, 107. 2 Roll. Abr. 659. pl. 9. 650. N. 2.

[n] That Cauſe muſt be ſhewn preſently on Indictments, Co. Litt. 158. a. 1 Sid 244. 1 H. 5. pl. 1. Abridged, Fitz. Challenge, 70.

[o] That Cauſe muſt be ſhewn preſently in Appeals. Co Litt. 158. a. This is left a *Quære* S P. C. 162. Lett. D.

[p] Co. Litt. 158. a. 37 H. 6. 8. pl 17. Abridged, Fitz. Chal'enge, 48. Bro. Challenge, 86. *Cont.* 10 H. 4. 9. pl. 7. Abridged, Fitz. Challenge, 180.

[q] *Vide ſupra*, Sect. 1.

[r] Co. Litt. 156. b. Theloal B. 1. ch. 6. Sect. 14. 14 H. 4. 19. pl. 23. Bro. Challenge, 48 Fitz. Challenge, 91. 2 Roll. Abr. 656 pl. 2. Calvin's Caſe, 18. b.

[s] Co. Litt. 157. b. 172. b. Litt. Sect. 259. 1 2 Roll. Abr. 657. pl. 1. Co. Litt. 156. b. 9 Ed. 4. 16. pl. 16. 26 Aſſ. pl. 28. F. Challenge, 135. Bro. Challenge, 64, 118. But the contrary is holden in the Year-Book of 10 H. 7. 20. Abridged, Bro. Challenge, 220. and a Quære by the Reporter and Brook.

1. Where Peerage is a good Cauſe of Challenge.
2. Where the Want of Freehold.
3. Where Infamy.
4. Whether old Age, Sickneſs, or Non-Reſidence in the County be in any Caſe a good Cauſe of Challenge.

Sect. 11. As to the firſt Particular, *viz.* Where Peerage is a good Cauſe of Challenge, it is [a] agreed, That if a Peer be returned on a Jury and bring a Writ of Privilege, he ſhall be diſcharged. Alſo it ſeems to have been [b] holden, that even without ſuch a Writ he may either challenge himſelf, or be challenged by the Party. *Quære.*

Sect. 12. As to the ſecond Particular, *viz.* Where the Want of Freehold is a good Cauſe of Challenge: It ſeems to be admitted by the Statute of 21 E. 1. *de his qui ponendi ſunt in Aſſiſis*, and alſo by the Regiſter, That at the Common Law there was no [c] Neceſſity that Jurors ſhou'd have any Freehold as to Inqueſts before Juſtices in *Eyre*, or in Cities or Burghs, as hath been more fully ſhewn, *Chap.* 25. *Sect.* 20. Alſo it ſeems [d] agreed, That the Common Law doth not require that a Juror ſhould in any Caſe have a Freehold of any certain Value; and upon this Ground it hath been adjudged, That a Freehold worth but [e] 20 *s.* or [f] 5 *s.* or even a [g] Penny, is ſtill a ſufficient Qualification for a Juror in ſuch Caſes as are not within the Statutes which require a Freehold of a greater Value. Alſo it hath been [h] adjudged, that the Common Law did not require that a Juror ſhould in any Caſe have any Freehold. But this is not only contrary to what ſeems implied by all the Authorities above-cited, which in ſaying that the Common Law did not require a Freehold of any certain Value, plainly ſeem to ſuppoſe that it required ſome Freehold, but hath been alſo contradicted by many expreſs [i] Authorities; agreeably to which it ſeems to be [k] ſettled at this Day, that the Want of Freehold is a good Challenge of a Juror in all Caſes not otherwiſe provided for by [l] Statute, and conſequently in a Trial for High Treaſon in *London* as well as in any other County,

Sect. 13. But it ſeems agreed, that where-ever the Letter of the Common or Statute Law require that a Juror ſhould have a Freehold, the Meaning is fully ſatisfied, by his having the [m] Uſe of a Freehold; and that it is not material whether he have it in his own or his [n] Wife's Right, or whether it be [o] Abſolute or upon Condition, or an Eſtate of Inheritance, or only [p] for Term of one's own or another's Life, ſo that it be in the ſame [q] County, wherein the Suit is brought, and actually continue in the Juror [r] till the Time when he is ſworn.

[a] 48 Aſſ. pl. 6. 48 Ed. 3. 30. pl. 18. Bro. Challenge, 18, 37, 209. Dy. 314. pl. 98. 35 H. 6. 46. pl. 8. Moor, 767. Regiſt. 179. F. N. B. 165 E. 166.

[b] 22 E. 3. 18. pl. 75. Fitz. Challenge, 119. 2 Roll. Abr. 646. Y. 1. 2. but his Notes are not warranted by the Books at large. Co. Litt. 157. b. 9 Co. 49. 27 H. 8. 22. pl. 18. *Cont.* 35 H. 6. 46. pl. 3. Bro. Challenge, 8. Finch of Law 506. 6 Co. 53. a. Fitz. Challenge, 44. 1 Jon. 153. F. N. B. 166.

[c] *Vide* Raym. 485, 486. 1 Vent. 366. *Infra*, Sect 21.

[d] Keilw. 46. pl. 2. 54. pl. 19, 92. pl. 5. Cro. El. 413.

See the Citations to the next three Letters, and Litt. Sect. 464. and 2 Rol Abr. 647, 648. [e] 10 H. 6. 7. pl. 24. Abridged, Fitz Challenge, 29. Bro. Challenge, 189. 19 H. 6. 9. pl. 21. Abridged, Fitz. Challenge, 32. Bro. Challenge, 60. 2 H. 7. 13. pl. 17. Bro. Challenge, 152. 10 H. 6. 18. pl. 59. Bro. Challenge, 192. [f] 3 H. 4. 4 pl. 14. Abridged, Fitz. Challenge, 78. Bro. Chall. 32. [g] Keilw. 46. pl. 2. [h] 28 Aſſ. pl. 15. Abridged, Bro. Challenge, 106, 10 H. 7. 13. pl. 7. State Trials, Vol. 3. f. 135 to 140. *Vide* 16 H. 7. 14. pl. 10. 7 H. 6. 44. pl. 23. Abridged, Fitz. Challenge, 24 Bro. Challenge, 57. It ſeems to be holden that by the Common Law it is a Challenge only to the Favour. [i] Cro. Eliz. 413. pl. 4. Trial per pais, ch. 9. 3 H. 4. 4. pl. 14. Abridged, Fitz Challenge, 78. Bro. Challenge, 32. 4 H. 4. 1. pl. 2. *Vide* Keilw. 54. pl. 14. Co. Litt. 156. b. 157. a. 2 Roll. Abr. 647. pl. 9, 10. 7 H. 4. 1. pl. 4. Abridged. Bro. Challenge, 34. Fitz. Challenge, 58. 21 H. 7. 29 pl. 10. Abridged, Bro Challenge, 90. 10 H. 7. 11. pl. 30. It ſeems taken for granted that Iſſues in all Caſes are to be returned upon Jurors, by which it ſeems to be implied that they ought to have Land, *&c.* [k] State Trials, Vol. 3. 869 Vol. 4 fol. 874. [l] *Vide infra*, Sect. 19, *&c.* [m] Keilw. 46. pl. 2. 92. pl. 5. Dyer 9. pl. 26. Fitz. Challenge, 27. 13 H. 7. 7. b. 5 Ed. 4. 7. pl. 15. Bro. Challenge, 165 Co. Litt. 272. Plow Com. 58. a. 15 H. 7. 13. b. S. P. C. 160. Lett. b. Bro. Jurors, 14 [n] Fitz. Challenge, 27. 9 H. 7. 1. pl. 2. Bro. Challenge, 157. 12 H. 7. 4. pl. 2. Bro. Challenge, 160. Co. Litt. 156 b. [o] Co. Litt. 156. b. Keilw. 167, 168. 2 Roll. Abr. 648. pl. 20. *Cont.* 7 H. 4. 1. pl. 4. Fitz. Challenge, 158. But Bro. in abridging this Caſe in Title Challenge, 53. ſays *quod mirum*. [p] 9 H. 7. 1. pl. 2. 12 H. 7. 4. pl. 2. Bro. Challenge, 160 Co. Litt. 156. b. Bro Challenge, 157. *See* F. N. B. 14. Lett e. 166. Lett f. [q] 9 H. 7. 1. pl. 2. Bro. Challenge, 157. Co. Litt. 157. a. Raſt. Ent. 118. b. 19 H. 6. 9. pl. 21. [r] 12 H. 7. 4 pl. 2. Bro Challenge, 160. Co. Litt. 157. a. 7 H. 4. 1. pl. 4. Abridged, Fitz. Challenge, 158.

Sect. 14. It is enacted by the [a] Statutes of *Weſtminſter*, 2. 38. and 21 *Ed.* 1. *de his qui ponendi ſunt in Aſſiſis*, that none ſhall be put in Aſſiſes or Juries, except in Cities, Burghs or trading Towns, who have not Tenements to the yearly Value of 40*s. &c.* But it ſeems to have been * generally agreed that a Juror can neither be challenged by the Parties for being returned contrary to theſe Acts, nor alledge ſuch Matter himſelf for his Diſcharge, but muſt take his Remedy by Action againſt the Sheriff, or by Writ of Privilege for his Diſcharge.

Sect. 15. It is farther enacted by 2 *H.* 5. 3. *That no Perſon ſhall be admitted to paſs in any Inqueſt upon Trial of the Death of a Man, nor in any Inqueſt betwixt Party or Party in Plea Real, nor in Plea Perſonal, whereof the Debt or the Damage declared amount to forty Marks, if the ſame Perſon have not Lands or Tenements of the yearly Value of forty Shillings, above all Charges of the ſame; ſo that it be challenged by the Party, that any ſuch Perſon ſo impannelled in the ſame Caſes, hath not Lands or Tenements of the yearly Value of forty Shillings above the Charges as afore is ſaid.*

Sect. 16. It hath been [c] adjudged, that this Statute extends as well to a Collateral Iſſue, as to the General one, but not to an Indictment or Information for a Crime not [d] Capital, for the Words are, *Upon Trial of the Death of a Man, nor in any Inqueſt between Party and Party in Plea Real or Perſonal*, &c.

Sect. 17. It ſeems [e] agreed, That a *Ceſtuy que uſe* of any Freehold in the ſame County, of the yearly Value of 40*s.* is a good Juror within this Statute. And ſome have [f] holden, That the Law is the ſame as to a Feoffee of ſuch Land in Truſt for another, or a [g] Remainder Man of a State of Freehold expectant on a Leaſe for Years. But this ſeems not to be maintainable, becauſe the Statute in requiring that a Juror ſhall have Lands of the yearly Value of 40*s.* above all Charges, plainly ſeems to intend that he ought to have Lands of the clear [h] Income whereof at the Time he can expend ſo much. But a Man cannot expend any Thing out of Lands whereof he is enfeoffed to the Uſe of another, or wherein he has only a dry Remainder.

Sect. 18. It hath been [i] adjudged, that this Statute is repealed as to Treaſons by 1 [k] & 2 *Ph. & Ma.* 10. which enacts that all Trials for Treaſon ſhall be according to the Common Law.

Sect. 19. It is recited by 23 *H.* 8. 13. *That Trials in Murders and Felonies in Cities, Boroughs, and Towns corporate within this Realm having Authority to proceed in the Deliverance of ſuch Offenders, had been oftentimes deferred and delayed, by Reaſon of Challenge of ſuch Offenders, for lack of Sufficiency of Freehold, to the great hindrance of Juſtice.* And thereupon it is enacted, *That every Perſon and Perſons being the King's natural Subject born, which either by the Name of a Citizen, or of a Freeman, or any other Name, doth enjoy and uſe the Liberties and Privileges of any City, Borough or Town corporate where he dwelleth or maketh his Abode, being worth in movable Goods and Subſtance to the clear Value of forty Pounds, be admitted in Trial of Murders and Felonies in every Seſſions and Gaol-Delivery, to be kept and holden in and for the Liberty of ſuch Cities, Boroughs, and Towns Corporate, albeit they have no Freehold; any Act, Statute, Uſe, Cuſtom or Ordinance to the contrary hereof notwithſtanding.*

Sect. 20. *Provided that this Act no way extend to any Knight or Eſquire, dwelling, abiding, or reſorting in or to any ſuch City*, &c.

[a] *Vide ſupra*, Ch 25. Sect. 20, 21, 29.

* 2 Inſt. 448. 28 Aſſ pl. 15. Abridged, Bro. Challenge, 106. 3 H. 4 4 pl. 14. Abridged, Bro. Challenge, 32. Fitz. Challenge, 78. F. N B. 166. State Trials, Vol. 2. fol. 744. But 38 Aſſ. pl. 19. is contrary.

[c] Keilw. 92. pl. 5. 16 H. 7 14. pl. 10. 2 Rol. Abr. 647, 641.

[d] Cro. Eliz. 413. pl. 4. Raym. 485, 486.

[e] *Vide ſupra*, Sect. 13.

[f] Keilw 92. pl 5. and Bro. Challenge, 202. Jurors, 14. in an Abridgment of the Year-Book of 15 H. 7. 13. pl. 1. but I do not find this Point in the Book at large.

[g] Keilw. 168. pl. 2.

[h] *Vide* Keil. 92. a 18 Ed. 4 13, pl. 8. 19 H. 6. 9. pl. 21. Fitz. Challenge, 32. 36 H 6. 23. pl. 16. 2 Roll. Abr. 647. pl 11. 648. pl 28. 649 pl. 29.

[i] State Trials, Vol. 3 f. 135 to 140.

[k] *Vide*, ch. 25. Sect. 134, 144, 145, 146.

Sect. 21. Alſo ſpecial Proviſion is made by 11 *H.* 7 21. and 4 *H.* 8. 3. for Jurors in *London* in real and perſonal Actions above the Value of forty Marks, for which I ſhall refer to the Statutes at large.

Sect. 22. It is enacted by 4 & 5 *W.* & *M.* 24. *That all Jurors (other than Strangers upon Trials* per medietatem linguæ) *who are to be returned for Trials of Iſſues joined, in any of the Courts of King's Bench, Common Pleas or Exchequer, or before Juſtices of Aſſiſe or* Niſi Prius, Oyer *and* Terminer, *Gaol-Delivery, or General Quarter-Seſſions of the Peace in any County of this Realm of* England, *ſhall every of them have in their own Name, or in Truſt for them within the ſame County, ten Pounds by the Year at leaſt above Repriſes, of Freehold or Copyhold Lands or Tenements, or of Lands or Tenements of ancient* * *Demeſne, or in Rents, or in all or any of the ſaid Lands, Tenements or Rents, in Fee-ſimple, Fee-tail, or for the Life of themſelves or ſome other Perſon; and that in every County in* Wales *every ſuch Juror ſhall have in the ſame County ſix Pounds by the Year at leaſt, in Manner aforeſaid above Repriſes.*

* But by the Common Law a Freehold in Ancient Demeſne was not ſufficient. 9 H 7. 1. pl 2. Bro. Challenge, 157. Co. Litt. 156. b.

Sect. 23. But it is provided, *That it ſhall be lawful to return any Perſon on a* Tales *in* England, *who ſhall have five Pounds by the Year, or in* Wales, *who ſhall have three Pounds by the Year, in Manner aforeſaid.*

Sect. 24. Alſo there is a Saving to all [b] Cities, Boroughs and Towns Corporate, of their ancient Uſage of returning Jurors of ſuch Eſtate, and in ſuch Manner as before had been uſed and accuſtomed. But there is no expreſs Saving of any Trial contrary to the Purview of this Statute and made good by ſome other; and therefore it may be argued that the Trial of Felonies in Towns by Jurors worth 40 *l.* in Goods by Virtue of the abovecited Statute of 23 *H.* 8. is no longer lawful, it not being a Trial by Uſage, but by Statute. Yet ſeeing 4 & 5 *Gul.* & *Mar.* ſeems plainly to have a View to Trials in Counties only, and the Statute of 16 & 17 *Ca.* 2. 3. which is penned almoſt in the very ſame Words, was taken [c] no Way to alter the former Method of Trials in Towns, leſt it ſhould cauſe a Failure of Juſtice; and it being generally impracticable to get a ſufficient Number of ſuch Freeholders as the Statute requires in Towns, it ſeems a reaſonable Conſtruction of 4 & 5 *W.* & *M.* That the Trial by 23 *H.* 8. ſtill continues lawful as before. But it hath been [d] agreed, That for Trials in *London* for High Treaſon, every Juror ought to have ſuch Freehold or Copyhold as is required by 4 & 5 *W.* & *M.*

[b] *Vide ſupra*, ſect. 12. and there is the like Exception in 27 El 6. Par. 7. and 16 & 17 Ca. 2. 3. Par. 46

[c] 1 Vent. 366.

[d] State Trials, Vol 4. f. 186. and in Francis's Trial.

Sect 25. As to the third Particular, *viz.* Where Infamy is a good Cauſe of Challenge, it ſeems that it is a good Challenge of a Juror that he is [e] outlawed, or that he hath been [f] adjudged to any Corporal Puniſhment whereby he becomes infamous, or that he hath been convicted of Treaſon, or [g] Felony, or [h] Perjury, or [i] Conſpiracy or of [k] Forgery on 5 *Eliz.* 14. or attainted in an [l] Attaint for giving a falſe Verdict. And it hath been [m] holden, That ſuch Exceptions are not ſalved by a Par-

[e] Co. Litt. 158. a. 21 H. 6. 30. pl. 17. 11 H. 4. 41. pl. 8. Bro. Indict 2. 2 Rol. Abr. 657. pl. 3. Bro. Challenge, 64. Fitz. Proceſs, 208. Cro. Ca. 134. Trials per pais, ch. 9.

[f] Co. Litt. 6a. b. 156 a. Trials per pais, ch. 9.

[g] Co. Litt. 6. b. 158. a. 2 Bulſt. 154. State Trials, Vol. 2. f. 421. to 524. Trials per pais, ch. 9. Cont. 2 Lev. 263.

[h] Bract. *Lib.* 4. c. 19. ſect. 2. Fleta *Lib* 4. c. 8. ſect. 2. Trials per pais, ch. 9.

[i] *See* B. 1. ch. 72. ſect. 9 Co. Litt. 6. b. 158 a. It ſeems to be holden, That the Conviction for Conſpiracy ought to be at the King's Suit. But 33 H. 6. 55 pl. 45. Bro. Challenge, 15. Fitz. Challenge, 41. make no ſuch Diſtinction.

[k] Co. Litt. 6. b and the Reaſon ſeems to be becauſe the Statute is expreſs that the Offender ſhall be ſet on the Pillory, *&c* but it was adjudged, 33 H. 6. 55. pl. 45. Abridged, Fitz. Challenge, 41. Bro. Challenge, 15. 2 Rol. Abr 949 pl. 5. That a Conviction on 1 H. 5. 3. was not a good Challenge to a Juror, becauſe it was not a Conviction on an Action at the Common Law. *Vide* 44 Ed. 3. 39. pl. 39. Fitz. decies tantum, 11, 12.

[l] *See* the Authorities under the precedent Letter.

[m] State Trials, Vol. 2. f. 521 to 524. 2 Bulſt. 154. *Vide ſupra*, ch. 37. ſect. 48 to 53.

don. And it was anciently [a] holden that Excommunication was alſo a good Challenge. Yet it [b] ſeems that none of the abovecited Challenges are principal ones, but only to the Favour, unleſs the Record of the Outlawry, Judgment or Conviction be produced, if it be a Record of another Court, or the Term, &c. be ſhewn, if it be a Record of the ſame Court.

Sect. 26. As to the fourth Particular, *viz.* Whether old Age, or Sickneſs, or Non-reſidence in the County be in any Caſe a good Cauſe of Challenge of a Juror, I take it to be agreed, That notwithſtanding the [c] Statute of *Weſtm.* 2. 38. be expreſs that neither old Men above the Age of Seventy Years, nor Perſons perpetually ſick, nor thoſe who are infirm at the Time of their Summons, nor thoſe who do not reſide in the County, ſhall be put in Juries, or in the leſſer Aſſiſes; and therefore ſuch Perſons may ſue out a Writ of [d] Privilege for their Diſcharge, grounded on this Statute; yet if they be [e] actually returned and appear, they can neither be challenged by the Party, nor excuſe themſelves from not ſerving if there be not enow without them.

Sect. 27. As to the ſecond Point, *viz.* What ſhall be a good Challenge of a Juror in Reſpect of his Indifferency: It is expreſly enacted by 25 *Ed.* 3. *ch.* 3. which ſeems to have been made in [f] Affirmance of the Common Law, *That no Indictor ſhall be put in Inqueſts upon Deliverance of the Indictees of Felonies or* [g] *Treſpaſs, if he be challenged for that ſame Cauſe by him which is ſo indicted.* And this Exception againſt a Juror that he hath found an Indictment againſt the Party for the ſame Cauſe, hath been adjudged good, not only upon the Trial of [h] ſuch Indictment, but alſo upon the Trial of another Indictment or Action, [i] wherein the ſame Matter is either in Queſtion, or happens to be material, tho' not directly in Iſſue.

Sect. 28. It hath been allowed a good Cauſe of Challenge on the Part of the Priſoner, That the Juror [k] hath a Claim to the Forfeiture, which ſhall be cauſed by the Party's Attainder or Conviction; or that he hath declared his [l] Opinion before-hand that the Party is guilty, or will be hanged, or the like. Yet it hath been [m] adjudged, That if it ſhall appear that the Juror made ſuch Declaration from his Knowlege of the Cauſe, and not out of any Ill-will to the Party, it is no Cauſe of Challenge.

Sect. 29. But it hath been [n] adjudged to be no good Cauſe of Challenge, that the Juror hath found others guilty on the ſame Indictment; for the Indictment is in Judgment of Law ſeveral againſt each Defendant, for every one muſt be convicted by particular Evidence againſt himſelf.

Sect. 30. It hath been [o] ruled to be a good Challenge of a Juror, on the Part of the King, that he hath given his Dogs the Names of the King's Witneſſes.

[a] Co. Litt. 158.
[b] Co. Litt. 157. b. 33 H. 6. 55. pl. 45. 43 Aſſ. pl. 46. 8 H. 5. 11. a. 21 Ed. 4. 74. b. pl. 5. 2 Rol. Abr. 650 pl. 11. 649. pl. 13. 658. Lett. K. 33 H. 6. 1. pl. 1. Bro. Challenge, 15, 147.
[c] 2 Inſt. 446, 447, 448.
[d] F. N. B. 165. b. 166. D. Regiſter 179, 180.
[e] State Trials, Vol. 2. f. 744. 2 Inſt. 448.
[f] 12 Aſſ. pl. 36. 19 Aſſ. pl. 6. Bro. Challenge, 101, 107. S. P. C. 158. Lett. B.
[g] Yet in 7 Ed. 4. 4. pl. 11. Abridged, Bro. Challenge, 166. Fitz. Challenge, 53. It is holden to be no principal Challenge in Treſpaſs.
[h] State Trials, Vol. 2. f. 379. Vol. 4. f. 186.
In the Year-Book of 40 Aſſ. pl. 10. Abridged, Bro. Challenge, 142. An Indictor being returned on the Petit Jury and giving a Verdict, was fined becauſe he did not challenge himſelf. Yet 27 Aſſ. pl. 13. Abridged, Bro. Challenge, 120. and Fitz. Challenge, 137. 'tis not allowed to be a principal Challenge, even upon the Trial in the ſame Indictment.
[i] 8 H. 4. 2. pl. 4. Abridged, Bro. Challenge, 42. Fitz. Challenge, 79. Co. Lit. 157. b. 1 Syd. 244. 2 Rol. Abr. 649. pl. 9.
[k] State Trials, Vol. 1. f. 502.
[l] 21 H. 7. 29. pl. 10. Bro. Challenge, 90. State Trials, Vol. 4. f. 184, 185. and ruled, That the Priſoner ſhall not examine a Juror concerning ſuch Matter on a *voir dire*, becauſe it ſounds in Reproach. *Vide* 49 Ed. 3. 1. pl. 2. Abridged, Bro. Challenge, 25. Fitz. Challenge, 100.
[m] 7 H. 7. 25. pl. 8. Abridged, Bro. Challenge, 55. Fitz. Challenge, 22. 20 H. 6. 40. 2 Rol. Abr. 657. Lett. I. *Vide* 49 Ed. 3. 1. pl. 2. Abridged, Bro. Challenge, 25. Fitz. Challenge, 100.
[n] Kely. 9. State Trials, Vol. 4. f. 141, 175.
[o] State Trials, Vol. 2. f. 738.

Sect. 31. It ſeems to be [a] ſettled, That where the King is a Party he may take either a principal Challenge, or to the Favour.

Sect. 32. It is [b] ſaid, That the Subject cannot take a Challenge for the Favour againſt the King, becauſe every one is bound by his Allegiance to favour the King. But if [c] no more be meant by theſe Books, than that ſuch a Challenge is not good without ſhewing ſome actual Partiality in ſuch Sheriff or Juror, or ſome particular Cauſe in Reſpect whereof the King may influence them, it ſeems not clearly ſettled how the King in this Reſpect hath a greater [d] Privilege than the Subject, which yet it ſeems agreed [e] that he hath.

Sect. 33. It hath been [f] ſaid to be no principal Challenge where the King is a Party, that a Juror is of the King's Livery, or his immediate Tenant; but it is ſaid, That a Challenge for ſuch Cauſe ought to conclude to the [g] Favour. But theſe Matters ſeeming to be unſettled, I ſhall leave them to be farther conſidered by others.

For other Matters relating to Challenges, being not ſo proper for this Treatiſe, I ſhall refer to the [h] Books which more particularly treat of them.

Sect. 34. And now I am in the ſecond Place to conſider the Learning of Challenges, ſo far as it particularly relates to Aliens; as to whom it is enacted by 28 *Ed.* 3. 13. *Par.* 2. *That in all Manner of Inqueſts and Proofs, which be to be taken or made amongſt Aliens and Denizens, be they Merchants or* [i] *other, as well before the Mayor of the Staple as before any other Juſtices or Miniſters, altho' the King be Party, the one Half of the Inqueſt or Proof ſhall be Denizens, and the other Half of Aliens, if ſo many Aliens and Foreigners be in the Town or Place where ſuch Inqueſt or Proof is to be taken, that be not Parties, nor with the Parties in Contracts, Pleas or other Quarrels, whereof ſuch Inqueſts or Proofs ought to be taken: And if there be not ſo many Aliens, then ſhall be put in ſuch Inqueſts or Proofs, as many Aliens as ſhall be found in the ſame Towns or Places which be not thereto Parties, nor with the Parties, as aforeſaid, and the Remnant of Denizens, which be good Men, and not ſuſpicious to the one Party nor to the other.*

Sect. 35. It is declared by 9 *H.* 6. 29. that the above recited Statute of 2 *H.* 5. which requires that the Jurors in certain Caſes ſhall have Tenements to the yearly Value of 40 *s. ſhall be no wiſe prejudicial to this Statute of* 28 Ed. 3. *nor extend it ſelf but only to the Inqueſts to be taken between Denizen and Denizen.* Alſo it ſeems agreed, [k] That the ſubſequent Statutes which require that Jurors ſhall have Tenements to a greater Value no way repeal the ſaid Statute of 28 *E.* 3. Yet it ſeems, [l] That the *Engliſh* Half of the Jury ought to have Tenements to the ſame Value as in other Caſes. And it hath been [m] adjudged, That the Words *quorum quilibet habeat quatuor libratas terræ, &c.* ſhall be applied to the *Engliſh* only.

Sect. 36. It ſeems * agreed, That there is no need that any of thoſe who find an Indictment againſt an Alien ſhould be Aliens.

[a] Co. Lit. 156. a. 4 H. 7. 8. pl. 7. Fitz. Challenge, 63. 49 Ed. 3. 38. pl. 32. Bro. Challenge, 22. 2 Rol. Abr. 645. pl. 5.

[b] Fitz. Challenge, 63, 65. Co. Lit. 156 a. 2 Roll. Abr. 646. pl. 8. 4 H. 7. 8. pl. 3. Trials per pais, ch. 9. State Trials, Vol. 3. f. 235, 236. Vol. 4. f. 72, 661. Cro. Eliz. 663. pl. 12.

[c] *Vide* 2 Rol. Abr. 645 pl. 8. 640. pl. 6. 1 Vent. 309.

[d] For in the Year-Book of 20 H. 6. 40 a. Abridged, 2 Rol. Abr. 641. pl. 5, 6. It is holden in the Caſe of the Subject to be no Cauſe of Challenge, that the Sheriff hath Malice againſt the Party without ſhewing ſome particular Inſtance of Partiality.

[e] *See* the Books cited to the other Parts of this and the next Section.

[f] Fitz. Challenge, 17. S. P. C. 162. Lett. C. 2 Rol. Abr. 646. pl. 10. It is ſaid generally in ſome Books that it is a good Challenge of a Juror that he is the King's menial Servant, or a Valet of the Crown. Co. Lit. 156. a. Fitz Cor. 63. Trials per pais, ch. 9. 2 Rol. Abr. 646 pl. 11. But State Trials, Vol. 3. f. 235, 236. Vol. 4 f. 70. And in other Books the contrary is ruled. Bro. Challenge, 154. 4 H. 7. 3. pl. 5. Cro. Eliz. 663. pl. 12.

[g] *Vide ſupra*, Sect. 33.

[h] Co. Lit. 157, 158. Trials per pais, ch. 9. 2 Rol. Abr. 635 to 666.

[i] Fitz Inqueſt. 22. 3 Ed. 4. 11. pl. 3.

[k] Cro. El. 272. *Vide* H. P. C. 260, 261.

[l] Cro. El. 272. [m] Cro. El. 272, 841. pl. 18. [n] H. P. C. 260. S. P. C. 159.

Sect. 37. Alſo it hath been adjudged, [o] That the ſaid Statute of 28 *E.* 3. is repealed as to Trials for Treaſon, by [p] 1 & 2 *Ph. & Ma.* 10. which enacts that all Trials for Treaſon ſhall be according to the Courſe of the Common Law. Yet it ſeems that the [q] King may, if he thinks fit, make a ſpecial Grant to an Alien to be tried for Treaſon by a Jury whereof the one Half ſhall be Aliens.

Sect. 38. [a] Alſo it hath been adjudged that the ſaid Statute of 28 *Ed.* 3. doth not extend to an Appeal, or other Action by an Alien againſt an Alien, for the Words are *all Inqueſts*, &c. *between Aliens and Denizens.*

Sect. 39. It is [b] holden, That by Denizens in this Statute are meant not only thoſe who are born within the King's Legeance, but alſo thoſe who are made Denizens by the King's Letters Patents.

Sect. 40. It ſeems to be [c] ſettled, That no Alien whether he be Plaintiff or Defendant, can take any Advantage of the Statute, unleſs he [d] pray it in Time; and that if he have neglected to pray it before the Return of a Common *Venire*, he can neither except to ſuch *Venire*, nor pray a *Tales* or other Proceſs *de medietate linguæ.*

Sect. 41. It was [e] holden, even before the Union of the two Kingdoms under King *James* the firſt, That no *Scot* was an Alien within the Meaning of this Statute, not only becauſe the *Scotch* Language is the ſame with the *Engliſh*, but alſo [f] becauſe the *Scots* were never reckoned Aliens, but rather Subjects.

Sect. 42. *Note*, That [g] ſome of the Precedents for the Award of a *Venire* of a Jury of half Denizens and half Aliens, in Purſuance of 28 *E.* 3, mention, that the Aliens ſhall be of the ſame Country whereof the Party alledges himſelf; and others direct [h] generally that one Half of the Jury ſhall be Aliens, without ſpecifying any Country in particular. And this Form ſeems moſt agreeable to the Statute which ſpeaks of Aliens in general, and ſeems to be confirmed both by late * Practice, and the greater Number of † Authorities.

Sect. 43. If on a *Venire* of half Denizens and half Aliens, the Sheriff return 12 as Aliens, and among them ſome who in Truth are not ſuch, it ¶ ſeems that the Party ſhall not be concluded by ſuch Return, but may notwithſtanding challenge the Array for Want of a ſufficient Number of Aliens.

Sect. 44. It ſeems [i] agreed, That the Return of a *Venire* of half Denizens, and half Aliens, ought to ſpecify which of the Jurors are Denizens and which Aliens, and that a full Number of each muſt appear to be ſworn.

Sect. 45. If one or more be wanting to make up the full Number of ſix Denizens or Aliens, the Juſtices of *Niſi prius*, by a reaſonable [m] Conſtruction of the Statutes which give a *Tales de Circumſtantibus* may award ſuch a *Tales* for ſo many Denizens or Aliens as ſhall be wanting.

Sect. 46. It is expreſly enacted by 2 & 3 *P. & M.* and 4 & 5 *El.* 20. ſet forth more at large *B.* 1. *Ch* 54. that thoſe adjudged Felons, as *Egyptians* by Virtue of thoſe Statutes, ſhall be tried by the Inhabitants of the County or Place where they ſhall be taken, and not *per medietatem linguæ.*

[o] Daliſ. 22. Dy. 144. 145. pl. 61. Inſt. 27. H. P. C. 260.
[p] *Vide ſup.* a, ch. 25 ſect. 134, 144, 146.
[q] S. P. C. 158. Fitz. Trial, 71.
22 Ed. 3. 14. pl. 38.
[a] 21 H. 6. 4. pl. 10. Fitz. Trial, 32. Bro. Trial, 42. S. P. C. 260. Lett. C. H. P. C. 261.
But by 27 Ed. 3. 8. it is enacted, That in Pleas between Aliens concerning the Staple there ſhall be a Jury of none but Aliens. S. P. C. 159. Lett. C.
[b] Bro. Den. 4.
[c] Dy. 28. pl. 180. 145. pl. 60, 61. 304. pl. 51. 357. pl. 45.
3 Ed. 4. 11. pl. 3.
22 Ed. 3. 14. pl. 38.
2 Rol. Abr. 643. P. 1. Fitz. Inq. 22. Trial, 71. H. P. C. 261. Bro. Panel, 3. *Cont.* 21 H. 7. 32. pl. 23. Bro Deniz 4. S. P. C. 259.
'Tis holden Cro. Eliz. 869. pl. 3. by two Judges againſt one, that tho' the Defendant appear by the Declaration to be alien, yet the Common *Venire* is well awarded, unleſs a *Venire de medietate* be prayed.
[d] For the Form of ſuch a Prayer, Raſt. Ent. 7. a. pl. 2. 158. b. 159. a. 264. b. pl. 1, 2. 265. a. Dy. 144. pl. 60. S. P. C. 259 Pl. Com. 2. b.
[e] Dy. 304. pl. 51. H. P. C. 261.
[f] But *quære* of this Reaſon, for it ſeems contrary to what is admitted in the whole Argument of Calvin's Caſe, 7 Co. *See* State Trials, Vol 1. f. 572, 573. Vol. 4. f. 652. &c.
[g] Dy. 144. pl. 60. Raſt. Ent. 7. b. pl. 2. 159. a. 264. b. pl. 1, 2.
[h] Raſt. Ent. 265. a. 10 Co. 104. a.
* State Trials, Vol 3. f. 3.
† H. P. C. 261. S. P. C. 158. Lett. C. Bro. Denizen, 4. Bro. Panel, 3. *Cont.* Fitz. Trial, 30. By five Judges againſt one.
¶ 2 Rol. Abr. 643. pl. 2. *Vide* S. P. C. 158. Lett. C.
[i] Cro. El. 818. pl. 10. 84. 1. pl. 18. But this being only a Miſ-return is helped by Verdict in Caſes within the Statute of Jeofails.
[m] 10 Co. 104. a. Cro. Eliz. 305. pl. 3. 818. pl. 10. 841. pl. 18.

CHAP. XLIV.

Of a Trial by Peers.

AS to a Trial by Peers, having ſhewn already, *Ch.* 39. *Sect.* 1. That a Peer has no more Privilege than a Commoner as to having the Benefit of Counſel. And *Ch.* 43. *Sect.* 4. That a Peer cannot challenge any of his Peers, I ſhall now endeavour to ſhew,

1. The particular Form and Solemnity to be obſerved in ſuch a Trial.
2. Who are to be Triers.
3. Who are to be ſo tried.
4. As to what Crimes.
5. Upon what Suits and Pleas.
6. Whether a Peer can waive a Trial by his Peers.
7. In what Manner the Peers may require the Opinion of the Lord Steward or of the Judges.
8. Whether the Court may be adjourned.

And firſt of the particular Form and Solemnity to be obſerved in ſuch a Trial.

Sect. 1. When an Indictment is found againſt a Peer for a Crime for which he ought to be tried by his Peers, the King by his Commiſſion under the Great Seal reciting the Indictment, conſtitutes ſome [a] Peer High [b] Steward of the Kingdom *pro hac vice*, and by the ſame Commiſſion gives him Power to receive and proceed on ſuch Indictment, and requires the Peers to be attendant on him, and the Lieutenant of the Tower to bring the Priſoner before him.

Sect. 2. Alſo * a *Certiorari*, (which may either have the ſame Date with the Steward's Commiſſion, or a ſubſequent one) goes out of Chancery to certify the Indictment before the Steward *indilate*; and the Steward by his Precept under his Seal, directed to thoſe before whom the Indictment was found, appoints a certain Day and Place at which it ſhall be certified. And another Writ goes out of Chancery to the Lieutenant of the Tower, *&c.* to bring the Priſoner before the Steward at ſuch Day and Place as he ſhall appoint, and thereupon the Steward by his Precept under his Seal directed to the Lieutenant, *&c.* appoints the Day and Place.

Sect. 3. Alſo the Steward makes [c] another Precept under his Seal to the Serjeant at Arms, appointed to ſerve him during the Time of his Commiſſion, to ſummon the [d] Peers before him at ſuch a Place, Day, and Hour, *&c.*

[a] *Supra*, ch. 2.
[b] 1 H. 4. 1. 3 Inſt. 28. 13 H. 8. 11. pl. 1. S. P. C. 152. the Neceſſity of making a High Steward for the Trial of an Impeachment for High Treaſon was denied by the Houſe of Commons in the Earl of Danby's Caſe. State Trials, Vol. 2. fol. 198, 199.
* 3 Inſt. 28.
[c] This is to be intended when the Parliament is not ſitting, but is either diſſolved or prorogued. State Trials, Vol. 3. fol. 659 to 663. 3 Inſt. 28. S. P. C. 152. a. 13 H. 8. 11. pl. 1.
[d] 'Tis ſaid 13 H. 8. 11. pl. 1. S. P. C. 157. a. That the Steward ſhall make ſuch Precept to cauſe 20 or 18 Peers to come before him. but Sir Edward Coke, 3 Inſt. 28. ſays that the Precept doth not mention any certain Number; and now by 7 W. 3. all the Peers are to be ſummoned.

Sect. 4. At the Time appointed the Steward, attended with [a] ſix or [b] ſeven Serjeants at Arms carrying Maces before him, and by the King at Arms, and the Uſher of the Black Rod, enters the Place of Trial uncovered, and aſcends a Chair of State which always is [c] provided for that Purpoſe, and then the [d] Clerk of the Crown, or a [e] Maſter in Chancery delivers to him his Commiſſion, and he delivers it again to the Clerk [f] of the Crown, and then a Serjeant at Arms makes three [g] Oyes, and a Proclamation for Silence in the Name of the Steward, and then the Lord Steward and all the other Lords [h] ſtanding up uncovered, the Commiſſion is read, and then the [i] Uſher on his Knees delivers to the Steward a White Rod, who redelivers it to him or to a Serjeant at Arms, who holds it by him during the Trial: Then an [m] Oyes is made, and a Command given in the Name of the Steward to all Juſtices and Commiſſioners to certify all Indictments, *&c.* which being delivered into Court, the Clerk of the Crown reads the Return. Another Oyes is made that the Lieutenant of the Tower, *&c.* return his Writ and Precept, and bring the Priſoner to the Bar, and then the Priſoner is brought to the Bar, the [n] Gentleman-Gaoler of the Tower carrying the Ax before him, which being [o] done the Clerk reads the Return.

Sect. 5. All things being thus prepared, the High Steward * acquaints the Priſoner with the Nature of the Crime, and ſuch like Matters proper for ſuch an Occaſion, and then the Clerk of the Crown arraigns him, [q] but is not to inſiſt on his holding up his Hand.

Sect. 6. After the Priſoner hath pleaded and put himſelf upon God and his Peers, the King's Counſel go thro' with their Evidence; and after the Priſoner hath made his Defence, and the King's Counſel have been fully heard, the Priſoner is withdrawn from the Bar, and the Lords go together to conſider of their Evidence; and when a Majority of them are agreed, they return to the Place of Trial, and the Lord Steward demands of them one by one, beginning with the Puiſne, whether the Perſon arraigned be Guilty or Not Guilty, and they [r] all anſwer one by one, not upon their Oaths but on their [s] Honours and Ligeances. And the Lord Steward gives Judgment according to the Determination of the [t] Majority being more than twelve, but gives no Vote himſelf on a Trial by [u] Commiſſion, but only on a Trial by the Houſe of Peers, while the Parliament is ſitting.

Sect. 7. As to the ſecond Point, *viz.* Who are to be Triers: It is agreed, [x] That none but Lords, who have a Vote in Parliament can paſs on ſuch a Trial; and before 7 *W.* 3. 3. when the Trial was by Commiſſion, it ſeems to have been the Practice for the Lord Steward to cauſe as many Temporal Lords to be ſummoned as he thought fit; and for the Lords ſo ſummoned alone to paſs on the Trial. But this is remedied by that Statute ſet forth more at large in the next Section.

[a] 3 Inſt. 28. [b] Rushw. Col. Part, 2. Vol. 1. fol. 96. Vide 2 Jon. 54. [c] 3 Inſt. 28. S. P. C. 151. 1 H. 4. 1. 13 H. 8. 11. pl. 1. [d] 3 Inſt. 28. [e] Rushw. Col. Part, 2. Vol. 1. fol. 90. [f] 3 Inſt. 28. Rushw. Col. Part, 2. Vol. 1. fol. 96. [g] 1 H. 4. 1. 3 Inſt. 28. [h] State Trials, Vol. 3. f. 955. Vol. 4. fol. 350. [i] 3 Inſt. 28. Rushw. Col. Part, 2. Vol. 1. fol. 96. [m] 3 Inſt. 28. [n] State Trials, Vol. 3. f. 955. Vol. 4. fol. 355. [o] By 3 Inſt. 28. All this is to precede the Call of the Peers and their ſeating themſelves; viz. 1 H. 4. 1. and 13 H. 8. 11. b. and S. P. C. 152. a. and State Trials, Vol. 1. f. 266 Vol 3 f. 955. 956. and Vol. 4. f. 353 to 355. and 2 Jon. 55. are contrary. [x] 2 Inſt. 29. S. P. C. 152. a. 2 Jon. 55. and the other Books cited to the precedent Section. [q] Raym. 468. State Trials, Vol. 3. fol. 658, 957. Vol. 2. 702, 703. [r] 3 Inſt. 30. 2 Inſt. 49. Fitz. Coro. 34. 1 H. 4. 1. a. S. P. C 152. 13 H. 8. 12. 2 Jon. 55, 56. 10 Ed. 4. 61. pl. 17. [s] *See* the Books above-cited, and 1 Co. 30. b. 2. Inſt. 49. [t] 1 H. 4. 1. 13 H. 8. 12. S. P. C. 153. E. 3 Inſt. 30 Moor, 622. [u] State Trials, Vol. 2. fol. 702. Vol. 3. fol. 657, 679. [x] 2 Inſt. 48. Co. Litt. 156.

Sect. 8. It is agreed, That at a Trial before the Houſe of Peers, every Temporal Lord who has a Right to vote in that Houſe, has a Right to paſs on ſuch Trial, But it is ſaid in the *Year-Book* of 10 *Ed.* 4. 6. [a] *pl.* 17. That upon the Trial of a Peer in Parliament, the Biſhops ſhall make a Procurator, becauſe they cannot conſent to the Death of a Man; but this is [b] ſaid to be wholly grounded on a Canon not in Force at this Day, neither do I find any Precedent wherein they have been excluded againſt their Conſent, or have withdrawn themſelves without a Proteſtation of their Right, or making a Proxy; and the Judgment againſt the *Spencers*, was expreſly reverſed for this Reaſon among others, becauſe the Biſhops were not preſent; and in the Precedents chiefly inſiſted on of the other Side, it is not expreſly ſaid that they were not preſent, and it doth not clearly appear, but that they might be included under the Word Peers. However it hath been always [c] admitted that they have a Right to vote in a Bill of Attainder: Alſo in the Earl of *Danby*'s Caſe, they were adjudged [d] by the Houſe of Lords to have a Right to vote in Queſtions previous to the Trial of a Peer, tho' this was ſtrongly oppoſed by the Houſe of Commons. And their Right to vote at the Trial itſelf, if they think fit, ſeems fully implied in 7 *W.* 3. 3. which enacts, *That upon the Trial of any Peer or Peereſs for Treaſon or Miſpriſion, all the Peers who have a Right to ſit and vote in Parliament ſhall be ſummoned twenty Days at leaſt before every ſuch Trial, to appear at every ſuch Trial, and that every Peer ſo ſummoned and appearing, ſhall vote at the Trial, every ſuch Peer firſt taking the Oaths of Allegiance and Supremacy, and ſubſcribing and repeating the* * *Declaration againſt Popery.*

Sect. 9. As to the third Point, *viz.* What Perſons are to be thus tried: It is [e] agreed, that no Lord of any [g] other Country, or even of [h] *Scotland*, before the Union under Queen *Anne*, or of [h] *Ireland*, nor the Son and Heir [i] apparent of any Peer, nor any other Man whatſoever, who is not at the Time a Lord of Parliament, hath any Right to ſuch a Trial in this Kingdom. But that every Lord of Parliament hath a Right to ſuch a Trial [k] by Virtue of that Clauſe in *Magna Charta, ch.* 29. *Nec ſuper eum ibimus, nec ſuper eum mittemus, niſi per legale judicium parium ſuorum vel per legem terræ.*

Sect. 10. It is recited by 20 *H.* 6. 9. *to have been a Doubt in the Law of* England *how Ladies of great Eſtate in Reſpect of their Husbands, Peers of the Land, married or ſole, that is to ſay, Dutcheſſes, Counteſſes or Baroneſſes, ſhall be put to anſwer, and judged upon Indictments of Treaſons and Felonies, becauſe they are not mentioned in the ſaid Statute of* Magna Charta ch. 29. *and thereupon to put out ſuch Doubts, it is* [l] *declared, That ſuch Ladies ſo indicted of any Treaſon or Felony, whether they be married or ſole, ſhall thereof be brought to anſwer, and judged before ſuch Judges and Peers of the Realm, as Peers of the Realm ſhould be, if they were indicted or impeached of ſuch Treaſons or Felonies.*

Sect. 11. It ſeems [m] agreed, that a Queen, the King's Conſort, and alſo a Queen Dowager, whether ſhe continue ſole after the King's Death, or take a ſecond Husband, be he a Peer or Commoner; and alſo all Peereſſes by Birth, whether they be ſole or [n] married to Peers or Commoners; and alſo all Marchioneſſes and Viſcounteſſes, are intitled to a Trial by the Peers, tho' none of them be expreſly mentioned in this Act, or in *Magna Charta*. But it is [o] agreed, that a Peereſs by Marriage loſes her Dignity by marrying a Commoner.

[a] Abridged, Fitz. Coro. 34. Cited S. P. C. 153. Lett. B. [b] Brook in a Note of the ſame Caſe, Coro. 153. ſays that they ſhall make Proxies. Sir Edward Coke, 3 Inſt. 31. ſays that they muſt withdraw and make their Proxies. [c] *See* Biſhop Stillingfleet, of the Biſhops Juriſdiction in Criminal Caſes, Ch. 2, 3. and Hunt's Argument Ch. 9, 10, 11. [d] *See* Hunt's Argument for the Right of Biſhops, &c. Ch. 12. and Stillingfleet of the Biſhops Juriſdiction in Capital Caſes, Ch. 1. Sect. 3. and Ch. 2. [e] State Trials, Vol. 2. f. 179 to 202. [g] 1. Ch. 14. Sect. 1. [h] 2 Inſt. 48. 3 Inſt. 30. Co. Litt. 156. b. [i] *Vide* Fitz. Brief, 473. 20 Ed. 4. 6. pl. 6. Bro. noſme de Dignity, 49. [k] 9 Co. 117. *Vide* 39 Ed. 3 35. b. Bro. noſme de Dignity, 29. † *Vide ſupra*, Ch. 25. Sect. 50. [l] Bro. Treaſon, 2. [k] Such Trial is ſaid to be very ancient. 2 Inſt. 50. [l] 2 Inſt. 45, 50. [m] 2 Inſt. 50 Crompt Juriſd. 33. b. [n] *See* the Citations to the next Letter. [o] 2 Inſt. 50. Co. Litt. 16. b. 6 Co. 53. b. Dy. 79 pl. 51.

Sect. 12.

Sect. 12. It is ſaid by [a] *Staundforde* and [b] *Coke*, that thoſe who are Lords of Parliament, not in Reſpect of their Nobility, but of their Baronies which they hold of the Crown, as Biſhops now do, and ſome Abbots and Priors [c] did formerly, are not within the Intent of *Magna Charta*, to be tried by the Peers. And [d] *Selden* ſeems clear, that this is the only Privilege which Biſhops have not in Common with other Peers. And thoſe who ſeem [e] moſt for the contrary Opinion admit that the Law hath been generally ſo taken. Neither do they produce any Precedent where a Biſhop or Abbot has been tried by the Peers upon a Commiſſion; but on the contrary admit that there are [f] two Precedents of their being tried by the Countrey. And it is ſaid by [g] others, that there are divers Precedents of this Kind; yet *Selden*, with his utmoſt Diligence, ſeems able to produce but two, which clearly and fully come up to his Point, *viz.* thoſe of Archbiſhop *Cranmer* and Biſhop *Fiſher*. However it ſeems to be [h] agreed, that while the Parliament is ſitting a Biſhop ſhall be tried by the Peers.

Sect. 13. As to the fourth Point, *viz.* As to what Crimes a Peer is to be tried by his Peers: I take it to be [i] agreed, That he has a Right to be ſo tried upon an Indictment of Treaſon or Felony, [k] whether ſuch Treaſon or Felony be made ſuch by the Common Law, or by Statute; and alſo upon an Indictment for a Miſpriſion of Treaſon or Felony; but it [l] ſeems that regularly he is to be tried by the Country for all other Crimes, out of Parliament, as [m] *Præmunire*, [n] Riot, [o] Seducing a young Lady from her Parents in order to debauch her, *&c.*

Sect. 14. As to the fifth Point, *viz.* Upon what Suits and Pleas a Peer is to be tried by his Peers, it hath been [p] adjudged, That he ſhall not be ſo tried upon an Appeal of Felony, but only upon an Indictment; and the Reaſon given for it is, that thoſe Words in *Magna Charta*, *ch.* 29. *nec ſuper eum ibimus*, *&c.* are to be intended only of the Suit of the King, and not of the Suit of the Subject.

Sect. 15. Alſo it hath been [q] adjudged, and appears from conſtant [r] Experience, that neither the ſaid Clauſe of *Magna Charta*, nor any other Law privileges a Peer from being indicted by a Grand Jury of Commoners, either in the King's Bench, or before Commiſſioners of *Oyer*, or the Coroner, *&c.*

Sect. 16. Alſo it ſeems [s] to be clear, That if a Peer abſent himſelf, and cannot be found, he may be outlawed *per judicium coronatorum*, *&c.*

Sect. 17. Alſo it is ſaid that the Court of King's Bench may allow a [t] Pardon pleaded by a Peer to an Indictment in that Court: But that it cannot receive either his Plea of Not guilty, or Confeſſion, but only the Lord Steward on an Arraignment before the Lords.

Sect. 18. It ſeems clear, that if a Peer be * attainted of Treaſon or Felony, he may be brought before the King's bench and demanded, What he has to ſay why Execution ſhould not be awarded againſt him? And if he plead any Matter to ſuch Demand, his Plea ſhall be diſcuſſed and Execution awarded by the ſaid Court, upon its being adjudged againſt him.

[a] S. P. C. 152. A.
[b] 3 Inſt. 30. But in Fitz. Coro. 161. it ſeems admitted that a Biſhop ſhall be tried by the Peers in Caſes proper for ſuch Trial, and Brook *tit.* Trial, 142. cites a Note from Fitz. Challenge, 115. wherein he ſays it was holden, that Biſhops ſhall be tried by the Peers, but this is miſtaken, for there is no ſuch Opinion there holden.
[c] Co. Litt. 97. Fuller's Ch. Hiſtory B. 6. fol. 292.
[d] Selden of Baronage, p. 152. Titles of Honour, 1ſt Edit. p. 347.
[e] Hunt's Argument for the Biſhops Right in Capital Caſes, Ch. 18. Gibſon's Codex, 154. Stillingfleet of the Biſhops Juriſdiction in Capital Caſes, Ch. 4.
[f] Bro. Trial, 142. *See* Hunt's Argument Ch. 18. and Stillingfleet of the Biſhops Juriſdiction in Capital Caſes.
[g] S. P. C. 153. Lett. A. Seld. Baron. 142 to 155. *Vide* 3 Inſt. 30. [h] *See* Hunt's Argument, Ch. 18. Trials per pais Ch. 2. par. 8. State Trials, Vol. 1. f. 374. Stillingfleet of the Biſhops Juriſdiction in Capital Caſes. [i] 3 Inſt. 30. 2 Inſt. 49. S. P. C. 153. Lett. D. 1 Bulſt. 198. [k] S. P. C. 1-8. Lett. D. E. F. 1 Bulſt. 198. [l] *See* the Books above-cited. State Trials, Vol. 2. f. 3. Fitz. Coro. 161. [m] 1 Bulſt. 198, 199. 3 Inſt. 30. 12 Co. 93. [n] State Trials, Vol. 3. fol. 79 [o] State Trials, Vol. 3. fol. 52. 12 Co. 93. [p] 10 Ed. 4. 6. pl. 17. Fitz Coro. 34. Bro. Coro. 153. S. P. C. 152. Lett A. 2 Inſt. 49. 3 Inſt. 30. Raſt. Ent. 50. pl. 7. [q] 3 Inſt. 26, 28. 2 Inſt. 49. [r] 1 H. 4. 1. State Trials, Vol. 3. fol. 52, 79, 657, 951. Vol. 4. f. 351, *&c.* [s] 3 Inſt. 31. 2 Inſt. 49. [t] 2 Inſt. 49. * 1 H. 7. 22, 23. pl. 15. Bro. Coro. 129. Treaſon, 18. Fitz. Coro. 49.

Sect. 19. As to the ſixth Point, *viz.* Whether a Peer can waive a Trial by his Peers, it hath been [a] adjudged, That if a Peer on an Arraignment before the Lords refuſe to put himſelf upon his Peers, he ſhall be dealt with as one that ſtands Mute; for it is as much the Law of the Land that a Peer be tried by his Peers, as a Commoner by Commoners. Yet if one who has a Title to Peerage, be indicted and arraigned as a Commoner, and plead not guilty, and put himſelf upon his Country, it hath been [b] adjudged that he cannot afterwards ſuggeſt that he is a Peer, and pray a Trial by his Peers.

[a] Rushw. Collections, Part 2. Vol. 1. f. 94. 3 Inſt. 30. Kely. 57. Yet there is ſaid to be a Record in 4 Edw. 3 That T. Lord Berkley, put himſelf on his Country, and was tried by a Jury of Knights.
[b] Daliſ. 16.

Sect. 20. As to the ſeventh Point, *viz.* In what Manner the Peers may require the Opinion of the Lord Steward, or of the Judges: It was [c] reſolved by all the Judges in the Lord *Dacre*'s Caſe, who was tried by Commiſſion, that no Queſtion ought to be asked of the Lord Steward or of the Judges in the Abſence of the Priſoner. And it was [d] adjudged by the Lord Steward, in the Earl of *Warwick*'s Caſe, who was tried by the Houſe of Peers in Parliament, that no Queſtion ought to be asked of the Judges in the Abſence of the Priſoner. But in the Lord *Audley*'s Caſe, who was tried by Commiſſion; the Lords Triers, [e] after they were withdrawn, conſulted with the Lord Chief Juſtice four ſeveral Times, and alſo ſent to conſult with the Lord Steward. Yet, notwithſtanding this Precedent, the Judges [f] reſolved in the Lord *Morley*'s Caſe, who was likewiſe tried by Commiſſion, that if after the Lords were withdrawn they ſhould ſend for any of the Judges to deſire their Opinions on a Point in Law, and the Lord Steward ſhould permit them to go, they would tell the Lords, if they ſhould ask them any Queſtion, that they were not to give any private Opinion, without Conference with the reſt of the Judges, and that openly in Court. But they reſolved that if the Lord Steward ſhould ask them any Queſtion in open Court, tho' in the Abſence of the Priſoner, they would anſwer it, becauſe they are call'd to aſſiſt the Court, and the Demand of any Queſtion in ſuch Caſe is to be referred to the Diſcretion of the Lord Steward.

[c] 3 Inſt. 29, 30. 2 Inſt. 49. Kely. 57. State Trials, Vol. 3 f. 679.
[d] State Trials, Vol. 4. f. 381.
[e] Rushw. Collections. Part. 2. Vol. 1. f. 101. State Trials, Vol. 1. f. 271.
[f] Kely. 54.

Sect. 21. When a Peer is tried before the Houſe of Peers in Parliament, the Lord Steward [g] withdraws with the reſt of the Lords, and conſults with them.

[g] State Trials, Vol. 3. f. 679.

Sect. 22. As to the eighth Point, *viz.* Whether the Court may be adjourned: It is agreed, [h] That where a Peer is tried by the Houſe of Lords in full Parliament, the Houſe may be adjourned as often as there is Occaſion, and the Evidence taken by Parcels: Alſo it hath been [i] adjudged, That where the Trial is by Commiſſion, the Lord Steward, after a Verdict is given, may take Time to adviſe upon it, and that his Office continues 'till he has given Judgment. Alſo it was [k] ſaid to have been agreed by the Judges in the Lord *Dacre*'s Caſe, That on ſuch a Trial the Court might be adjourned, and that if the Lords Triers did not agree, it was holden by ſome they ought to be kept together all Night, and by others that they might to go to their ſeveral Houſes. But it is ſaid, [l] That there is no Precedent of the Lords Triers ever having ſeparated upon a Trial by Commiſſion, after the Evidence has been given for the King; and it is ſaid to have been [m] reſolved by all the Judges in the Caſe of the Duke of *Norfolk*, That the Peers in ſuch Caſe muſt continue together 'till they agree to give a Verdict, and the like was [n] adjudged by the Lord Steward in the Lord *Delamere*'s Caſe.

[h] State Trials, Vol. 2. f. 654. Vol 3. f. 677 to 680.
[i] Rushw. Collections, Part 2. Vol. 1. f. 95. State Trials, Vol. 1. f. 265. But Moor, 622. ſeems contrary.
[k] Kely. 57. But Moor, 622. in a Report of the very ſame Caſe it is ſaid that the contrary was holden.
[l] State Trials, Vol. 3. f. 678. But ſee Moor, 622.
[m] 3 Inſt. 30. in the Margin.
[n] State Trials, Vol. 3. f. 677 to 680.

CHAP. XLV.

Of Trial by Battel.

Sect. 1. A Trial by Battel, at the [a] Defendant's Choice, is allowable in Appeals [b] of Treaſon before the Conſtable and Marſhal, and in Appeals [c] of Felony, whether by Appellants or [d] Approvers.

Sect. 2. For the Manner of waging Battel in an Appeal of Treaſon, being according to the Civil Law, I ſhall refer to *Ruſhworth's Collections*, *Part.* 2. *Vol.* 1. *fol.* 112. *to* 128.

Sect. 3. When an Appellee of Felony wages Battel, he pleads [e] that he is Not guilty, and that he is ready to defend the ſame by his Body, and then [f] flings down his Glove, and if the Appellant will join Battel, he replies, That he is ready to make good his Appeal by his Body upon the Body of the Appellee, and takes up the Glove: And then the Appellee lays his [g] right Hand on the Book, and with his left Hand takes the Appellant by the Right, and [h] ſwears to this Effect, *Hear this thou who calleſt thy ſelf* John *by the Name of Baptiſm, that I, who call my ſelf* Thomas *by the Name of Baptiſm, did not felonioufly murder thy Father* W. *by Name, (on the Day of in the Year of at* B.) *as you ſurmiſe, nor am any way guilty of the ſaid Felony; ſo help me God,* (and then he ſhall kiſs the Book and ſay) *and this I will defend againſt thee by my Body as this Court ſhall award.* And then the Appellant lays his right Hand on the Book, and with his left Hand takes the Appellee by the Right, and ſwears to this Effect, *Hear this thou who calleſt thy ſelf* Thomas *by the Name of Baptiſm, that thou felonioufly (on the Day of in the Year of at* B.) *didſt murder my Father* W. *by Name, ſo help me God,* (and then he ſhall kiſs the Book and ſay) *and this I will prove againſt the by my Body, as this Court ſhall award.* And then the Court ſhall [i] appoint a Day and Place for the Battel, and in the mean while the Appellee ſhall be kept in the [k] Cuſtody of the Marſhal, and the Appellant ſhall find [l] Sureties to be ready to fight at the Time and Place, unleſs he be an Approver, in which Caſe [m] he ſhall alſo be kept by the Marſhal. And the [n] Night before the Day of Battel, both Parties ſhall be arraigned by the Marſhal, and ſhall be brought into the Field before the [o] Juſtices of the Court where the Appeal is depending, at the Riſing of the Sun, [p] bare headed, and bare legged from the Knee downwards, and bare in the Arms to the Elbows, and armed only with Baſtons an Ell long, and four cornered Targets, and before they engage they ſhall both take this [q] Oath, *Hear this ye Juſtices, that I,* A. B. *have neither eat nor drunk, nor done any Thing elſe, nor any other for me, by which the Law of God may be depreſſed, and the Law of the Devil exalted.* And then after [r] Proclamation for Silence under Pain of Impriſonment for a Year and a Day, &c.

[a] Finch of Law, 421. S. P. C. 176. Letter F. Fleta, *lib* 1. ch. 34. S. 27. Trials per pais, ch. 2. ſect. 19.

[b] *Vide ſupra*, ch 23. ſect 29 Crompt. Ju. 82. b. 88. a. Bro. Bac el, 15.

[c] Raſt. Ent. 50. pl. 10. Cro Eliz. 69. pl. 22. Dyer 220. pl. 10. S. P. C. 176. ch. 13, 14. and the Books cited to the other Parts of this Chapter.

[d] Raſt. Ent. 42. pl. 3. S. P. C. 178. b. 9 Co. 31. b

[e] Cro. Eliz. 69. pl. 22. Raſt Ent. 42. pl. 3. 50. pl. 10. Dyer, 120. pl. 10. 9 H 4 3. pl. 16.

[f] S. P. C. 178. Letter K. Fitz. Coro. 385. *Vide* 1 H 6. 6. b.

[g] Bro. Battel, 1, 6. 9 H. 4. 3. pl. 16. 17 Aſſ. pl. 1. 17 Ed. 3. 2. pl. 6. Britton, 41. S. P. C. 178. A.

[h] Fleta. B. 1. ch. 34. ſect. 28, 29. 9 H. 4. 3. pl. 16. 17 Aſſ. pl. 1. Bro. Battel, 1, 6. 17 Ed. 3. 2. pl. 6. Britton, 41. Bract. B. 3. ch. 21. ſect. 2. [i] Raſt. Ent. 42. b. pl. 2. S. P. C. 178. B. [k] Fleta, B. 1. ch. 33. ſect. 28. Raſt. Ent. 42. b. pl. 2. 9 H. 4 3. pl. 16. S. P. C. 178. Bro. Battel, 1. Fitz. Coro. 78, 111. [l] Fleta, B. 1. ch. 34. ſect. 28. 9 H 4. 3. pl. 16, 17 Aſſ pl. 1. S. P. C. 178. Lett. B. Fitz. Cor. 78, 111. Bro. Battel, 1, 6. 17 Ed. 3. 2. pl. 6. Bract. B. 3 ch. 21. ſect. 3. ſays that both Parties ſhall be kept in Cuſtody. [m] Raſt. Ent. 42 b. pl. 2. [n] 9 H. 4. 3. pl. 16. Bro. Battel, 1. [o] Fleta, B. 1. ch. 34. ſect. 30, 31. Dyer, 301. Bro. Battel. 15. S. P. C. 177, 178. Bract. B 3. ch. 21. ſect. 4, 5. Britt. 40. *Cont.* 37 H. 6. 20. [p] Britt. 41. By ſome the Appellant's Head ſhall be covered. 9 H. 4 3. pl. 16. Bro. Battel. 1. *Vide* 1 H. 6. 6. 7. Dy. 301. [q] Fleta, B. 1. ch. 34. ſect. 30. Bract. B. 3. ch. 21. ſect. 4. Britt. f. 40. [r] Fleta, B. 1. ch. 34. ſect. 31.

&c. they ſhall begin the Combat, wherein if the Appellee be ſo far vanquiſhed that he cannot or will not fight any longer, he may be adjudged to be * hanged immediately; but if he can maintain the Fight 'till the Stars appear, he ſhall have [b] Judgment to go quit of the Appeal. And if the Appellant become Recreant, that is, a Crying Coward or Craven, the Appellee ſhall not only recover his Damages, but may alſo as it † ſeems, plead his Acquittal in Bar of a ſubſequent Indictment or Appeal, and the Appellant [c] ſhall for his Perjury loſe his *liberam Legem*. Yet if there be other Appellees in the ſame Appeal, it hath been adjudged, [d] that it ſhall ſtill ſtand in Force againſt them. But for theſe Matters I ſhall refer to *Ch.* 24. *Sect.* 24.

* S P. C 178, b. *See* where this is done accordingly. 19 H. 6. 35. pl. 75. Fitz. Coro. 6. Bro. Coro. 46. Brack. B. 1. ch. 21. ſect. 6

Sect. 4. In Appeals each Party muſt fight in proper [e] Perſon, and not by Champions. And therefore if the Appellant be under an apparent Diſability of fighting, as being a [f] Woman, or in [g] Holy Orders, or under [h] Age, or of the Age of [i] ſixty, [k] or maimed, or [l] blind, he may counterplead the Wager of Battel, and compel the Appellee to put himſelf upon his Country. [m] Alſo if an Appellant become blind by the Act of God after he has waged Battel, the Court will diſcharge him of the Battel; and in ſuch Caſe it is [n] ſaid that the Appellee ſhall go free.

[b] Trials per pais, ch. 2. ſect. 19. 3 Inſt. 221. Fleta B. 1. ch 34 ſect 32. Brack. B. 3. ch, 21. ſect. 5.

† *Supra*, ch. 23. Sect. 140. and ch. 35. ſect. 6. Fitz. Cor. 98. Fleta, B. 1. ch. 34. ſect. 32.

Sect. 5. Alſo if a Peer of the Realm, and much more if the King bring an Appeal, the Defendant ſhall not be admitted to wage Battel, by Reaſon of the Dignity of their Perſons.

Sect 6. Alſo the Citizens of *London* have a ſpecial [p] Privilige by Charter, that in Appeals brought by any of them, there ſhall be no Wager of Battel.

[c] 3 Inſt. 221. Co. Lit. 6. b.

Sect. 7. Alſo any Plaintiff may counterplead a Wager of Battel, by alledging ſuch Matters againſt the Defendant as induce a violent Preſumption of Guilt; as in an Appeal of Robbery, by ſhewing [q] that the Defendant was taken with the Manner, *&c.* And in an Appeal of Death, that he was found lying upon the deceaſed with a bloody Knife in his Hand; and in any Appeal by ſhewing that the Defendant being under an Arreſt for the Crime charged againſt him, [r] brake the Priſon, or [s] eſcaped, unleſs ſuch Breaking or Eſcape be [u] pardoned. For the Law will [x] not oblige a Plaintiff to make good his Accuſation in ſo extraordinary a Manner, when in all Appearance he may prove it in the ordinary Way. It is alſo a good Counterplea of Battel that the Defendant hath been [k] indicted for the ſame Fact, unleſs the Indictment were inſufficient.

[d] Fitz. Coro. 98.

[e] Finch of Law 421, 422. 9 Co. 31. b. 3 Inſt. 221. Plow Com. 335. b. Trials per pais, ch. 2. ſect. 19.

Sect. 8. It is enacted by 6 *Ric.* 2. That the Defendant ſhall not be received to wage Battel in an Appeal of Rape.

[f] Keilw. 120. pl 66. Fleta, B. 1. ch 34 ſect 25. S. P. C. 180. Lett. A.

[p] Britton, 40. [b] Keilw. 120. pl. 66. Finch of Law, 423. Fitz. Droit, 3. S. P. C. 60. Lett. D. 180. Lett. A. 22 Ed. 4. 20. a. Fleta, B. 1. ch. 34. ſect 25. S. P. C. 60. Lett. D. 180. Lett. A. Fitz. Coro. 385. 22 Ed. 4. 20. a. Trials per pais, ch. 2. ſect 19. Fleta, B 1. ch. 34. ſect. 25. [k] Finch of Law, 423. Fitz. Coro. 230, 268. S. P. C. 180. Lett. A. 22 Ed. 4. 20. a. Trials per pais, ch. 2. ſect. 19 Fleta, B. 1. ch. 34. ſect. 25. [l] Fitz. Droit, 57. 3 Inſt. 158, 159. [m] Fitz. Droit, 57. 3 Inſt. 158, 159. [n] 3 Inſt. 158, 159. [o] Finch of Law, 423. S. P. C. 152. Lett. A. Plow Com 335. b. Fleta, B 1 ch. 34. ſect. 25 [q] S. P. C. 180. Lett. C. Fitz. Coro. 125, 187. [q] Finch of Law, 422, 423. S. P. C 179. Fitz. Coro. 100, 125, 144, 157, 230, 268, 375. 4 Aſſ pl. 1. 22 Ed. 4. 19 b. Bro Battel, 5, 7. Appeal, 114. 20 H. 7. 8. pl. 18. *Vide ſupra*, ch. 15. ſect. 41. [r] Finch of Law, 179. S P. C 179. Fitz. Coro. 411. [s] Finch of Law, 422. S. P C. 180. 1 Aſſ. pl. 3, 6. Hob. 82. Fitz. Coro. 154, 157, 164, 251, 281. [t] Finch of Law, 422. Hob. 82. S P. C. 80. Bro Battel, 3. 1 Aſſ. pl. 6. Fitz. Coro. 164, 251. [u] S. P. C. 180. Hob. 82. Fitz Coro. 154, 281. Bro. Battel, 3. 1 Aſſ. pl. 3. [x] Trials per pais, ch. 2. ſect. 19. [y] Finch of Law, 422. 22 Ed 4. 19 b. Bro. Battel, 7, 11. Appeal, 114. 20 Ed. 4. 6. pl. 5. Raſt. Ent. 50. pl. 10.

CHAP.

CHAP. XLVI.

Of Evidence.

Sect. 1. AS to the Nature of Evidence, ſo far as it more particularly concerns Criminal Caſes, having premiſed that it is a ſettled Rule, That in Caſes of Life no [a] Evidence is to be given againſt a Priſoner but in his Preſence; and that it hath been [b] adjudged, That no Bill of Exceptions is grantable on an Indictment of Treaſon or Felony, the Statute of *Weſtm.* 2. 3. *cum aliquis implacitatus, &c. proponat exceptionem, &c.* having been never thought to extend to any ſuch Caſe, it being plain that it could not but cauſe an infinite Delay of Juſtice, if it ſhould; I ſhall more fully conſider the following Points.

1. How many Witneſſes are required in Criminal Caſes.
2. What is to be allowed as Evidence.
3. Who may be Witneſſes.
4. In what Manner the Witneſſes for the Defendant are to give their Evidence.
5. Whether a Defendant have Right to Proceſs to bring in his Witneſſes.
6. What Evidence maintains an Indictment, *&c.*
7. What may be given in Evidence on the Part of the Defendant.

Sect. 2. As to the firſt Point, *viz.* How many Witneſſes are required in Criminal Caſes: Having already endeavoured to ſhew that the Common Law did [c] not require any certain Number of Witneſſes for the Trial of any Crime whatſoever, I ſhall only add in this Place, That it ſeems to have been the more * prevailing Opinion, That 1 [d] *E.* 6. 12. and 5 *&* 6 *E.* 6. 11. which required two Witneſſes in Treaſon, were not repealed by 1 *&* 2 *P. & M.* 10. which ordered that all Trials of Treaſon ſhould be according to the Courſe of the Common Law; and therefore that it was ſtill neceſſary in all Trials of High Treaſon, not concerning the Coin, to have either two Witneſſes to the [d] ſame Overt-Act, or one Witneſs to one, and another [e] Witneſs to another Overt-Act of the ſame Kind of Treaſon, or at leaſt one Witneſs to an Overt-Act, and [f] another to a material Circumſtance to prove it. In Relation to which Matters the Law ſeeming to be ſettled by 7 [f] *W.* 3. which is expreſs, *That no Perſon ſhall be indicted, tried or attainted for High Treaſon, but upon the Oaths of two lawful Witneſſes, either both of them to the ſame Overt-Act, or one of them to one, and the other of them to another Overt-Act of the ſame Treaſon*; it will be need-

[a] State Trials, Vol. 4. f. 277, 312.
[b] Sir Henry Vane's Caſe, State Trials, Vol. 1 f. 938. wherein it is ſaid that ſuch Bill never was nor ought to be allowed in any Capital Caſe, and as this Caſe is reported in 1 Sid 85. 1 Keb. 384. it ſeems to have been holden that it is not grantable on any Indictment; and as it is reported in 1 Lev. 68. and Kely. 15. That it is not grantable in any Criminal Caſe whatſoever. *Vide* 2 Inſt. 427.
[c] Ch. 25. ſect. 131.
* H. P. C. 262. and the Authorities cited to the other Parts of this Section. *Cont.* State Trials, Vol. 1. f. 180, 181, 636. Vol. 2. f. 408. and *ſupra*, ch. 25. ſect. 131.

¶ For theſe Statutes, and their Expoſition, *See* ch. 25. ſect 132 to 148. [d] Raym. 407, 408. State Trials, Vol. 2. f. 533. Vol. 3. fol. 688, 689. [e] State Trials, Vol. 1. f. 697, 723, 724. Vol. 2. f. 317, 695, 785, 829. 830. Vol. 3. f. 149, 156, 228. Vol. 4. f 86, 87, 88, 117. Raym. 407, 408. Kely. 9. [f] State Trials, Vol. 2. f 408. Vol. 3. f. 228, 229, 688, 689, 894 to 901. 928, 929 930. *Vide* State Trials, Vol. 1. f. 636. But State Trials, Vol. 1. f. 180, 181, 'tis holden that Circumſtantial Evidence alone is ſufficient. [f] *Vide* ch. 25. ſect. 136 to 148.

leſs at this Day to examine how far theſe Opinions were reconcileable with 1 *Ph. & Ma.*

As to the ſecond Point, *viz.* What is to be allowed as Evidence in Criminal Caſes, I ſhall conſider.

1. Where the Confeſſion of the Defendant or the Depoſitions of others out of Court may be allowed as Evidence.
2. How far Hearſay is Evidence.
3. Whether Similitude of Hands be any Evidence in Criminal Caſes.

Sect. 3. As to the firſt Particular, *viz.* Where the Confeſſion of the Defendant, or the Depoſitions of others, out of Court, may be allowed as Evidence: It ſeems that the Confeſſion of the Defendant himſelf, whether taken upon an [a] Examination before Juſtices of Peace, in Purſuance of 1 & 2 *Ph. & M.* 13. or of 2 & 3 *Ph. & Ma.* 10. upon [b] a Bailment or [c] Commitment for Felony, or taken by the Common Law upon an Examination before a Secretary of State, or other Magiſtrate, for [d] Treaſon, or [e] other Crimes, not within thoſe Statutes, or in [f] Diſcourſe with private Perſons, hath always been allowed to be given in Evidence againſt the Party confeſſing, but [g] not againſt others.

Sect. 4. Alſo it was [h] holden, That two Witneſſes of a Confeſſion of High Treaſon, upon an Examination before a Juſtice of Peace, were ſufficient to convict the Perſon ſo confeſſing, within the Meaning of 1 *E.* 6. 12. and 5 & 6 *E.* 6. 11. which required two Witneſſes in High Treaſon, *unleſs the Offender ſhould willingly without Violence confeſs the ſame*; But this is remedied by 7 *W.* 3 3. which requires two Witneſſes, *unleſs the Party ſhall willingly, without Violence, in open Court confeſs, &c.*

Sect. 5. It [i] ſeems an eſtabliſhed Rule, that where-ever a Man's Confeſſion is made Uſe of againſt him, it muſt all be taken together, and not by Parcels.

Sect. 6. It ſeems [k] ſettled, that the Examination of an Informer taken upon [l] Oath, and * ſubſcribed by him either before a [m] Coroner upon an Inquiſition of Death in Purſuance of 1 & 2 *Ph. & M.* 13. or before [n] Juſtices of Peace in Purſuance of 1 & 2 *Ph. & M.* 13. and 2 & 3 *P. & M.* 10. upon a [o] Bailment or [p] Commitment for any Felony, may be given in Evidence at the Trial of ſuch Inquiſition, or of an Indictment for the ſame Felony, if it be made out by Oath to the Satisfaction of the Court, that ſuch Informer is [q] dead, or unable to [r] Travel, or kept [s] away by the Means or Procurement of the Priſoner, and that the Examination offered in Evidence is the very ſame [t] that was ſworn before the Coroner or Juſtice, without any Alteration whatſoever.

[a] H. P. C. 102, 262, 263, 264. State Trials, Vol. 1. fol. 265. Vol. 3. fol. 8, 9.

[b] *Supra*, Ch. 15 Sect. 58, 59, 60, 61.

[c] *Supra*, ch. 15. Sect. 11, 12.

[d] State Trials, Vol. 1. f. 87, 181, 963. Francia's Trial.

Kely. 18.

[e] 5 Mod. 164, 165. State Trials, Vol. 2 fol. 426. Vol. 3. fol. 131, 132.

[f] Dyer, 215. pl. 50. H. P. C. 102, 193.

[g] Kely. 18, 19. State Trials, Vol. 3. fol. 8, 9. Vol. 4. f. 33. *See* the contrary practiſed State Trials, Vol. 1. in Sir Jerv. Ellis's Trial, and in Throgmorton's Trial, fol. 40 to 56. Duke of Norfolk's Trial, fol. 73 to 85. and 97, 98 Other Trials from fol. 118 to 122 Earl of Eſſex's Trial, 167, 168. Sir Walter Raleigh's Trial, fol. 177. 178, 181.

[h] Kely. 18. *Supra*, ch 25. Sect. 142.

[i] 5 Mod 165. *Cont.* State Trials, Vol. 1. fol. 53. Throgmorton's Trial.

[k] Kely, 55 H P. C. 262, 263 1 Lev. 180. Salk 281. pl. 8. 2 Keb. 19. *Vide* Cro El. 901. Dalt. ch. 111, 112, 113.

[l] State Trials, Vol. 1. fol. 265. H P. C 262, 263.

* H. P. C. 262, 263.

[m] *Supra*, ch. 9. Sect. 31. 2 Jon. 53.

[n] *See* the Books above-cited; but 2 Jon. 53. 'tis adjudged that Depoſitions before a Coroner may be read, but ſaid that thoſe taken before a Juſtice of Peace can in no Caſe be read.

[o] *Supra*, ch. 15. Sect 59, 60, 61.

[p] *Supra*, ch. 16. Sect. 11.

[q] Kely, 55 1 Lev. 180. 2 Keb. 19. pl. 39. H P C. 263.

[r] Kely. 55.

[s] Kely. 55. in Harriſon's Caſe, State Trials, Vol. 3. f. 941. ſuch an Examination was read in Evidence, upon Proof that the Witneſs had been enticed away, tho' it did not directly appear to have been done by the Procurement of the Priſoner.

[t] Kely. 55. 2 Keb. 19. pl. 39. H. P. C. 263.

Sect. 7. But it hath been [a] adjudged, that it is not ſufficient to authorize the Reading ſuch an Examination, to make Oath that the Proſecutors have uſed all their Endeavours to find the Witneſs, but cannot find him.

Sect. 8. Alſo it hath been [b] adjudged that Depoſitions taken before a Coroner upon an Inquiſition of Death *ſuper viſum corporis*, cannot be given in Evidence upon an Appeal for the ſame Death, becauſe it is a different Proſecution from that wherein they were taken.

Sect. 9. There are many [c] Inſtances in the Reigns of Queen *Elizabeth* and King *James* I. wherein the Depoſitions of abſent Witneſſes were allowed as Evidence in Treaſon and Felony, even where it did not appear but that the Witneſſes might have been produced *viva voce*. And it was adjudged in [d] the Earl of *Strafford*'s Trial, that where Witneſſes could not be produced *viva voce*, by Reaſon of Sickneſs, *&c.* their Depoſitions might be read for or againſt the Priſoner on a Trial of High Treaſon, but not where they might have been produced in Perſon. And it was admitted [e] in the Lord *Strafford*'s Trial, that the Depoſitions taken by a Witneſs before a Juſtice of the Peace might at the Priſoner's Deſire be read at the Trial, in order to take off the Credit of the Witneſs by ſhewing a Variance between ſuch Depoſitions, and the Evidence given in Court *viva voce*. And for the ſame Reaſon it ſeems [f] agreed, That where a Witneſs at one Trial varies from his own Evidence at another, in Relation to the ſame Matter, ſuch Variance may alſo be given in Evidence to invalidate his Teſtimony at the ſecond Trial.

Sect. 10. But it is § ſaid to have been adjudged in the ſeventh Year of *Will.* 3. by the Court of King's Bench upon Advice with the Juſtices of the Common Pleas, upon an Indictment for a Libel, that Depoſitions taken before a Juſtice of Peace relating to the Fact, could not be given in Evidence, tho the Deponent were dead; and that the Reaſon why ſuch Depoſitions may be given in Evidence in Felony depends upon the Statutes of *Ph. & Ma.* And that this cannot be extended farther than the particular Caſe of Felony. But in the Report of this Caſe in 5 [g] *Mod.* it is ſaid that the Reaſon why ſuch Depoſitions could not be read, was becauſe the Defendant was not preſent, when they were taken, and therefore had not the Benefit of a Croſs Examination.

Sect. 11. However it was [h] agreed in Sir *John Fenwick*'s Caſe, that the Information of a Witneſs taken upon Oath before a Juſtice of Peace, being joined with the Evidence of one other Witneſs only *viva voce*, could not in the ordinary Courſe of Juſtice, amount to ſufficient Evidence within the 7th of *W.* 3. which requires two Witneſſes in High Treaſon; and therefore it was thought neceſſary to proceed in that Caſe by Bill of Attainder in Parliament, whoſe Power can be reſtrained by no Rules but thoſe of natural Juſtice.

Sect. 12. And in the ſame Caſe it was [i] agreed, that the Evidence given by a Witneſs at one Trial, could not in the ordinary Courſe of Juſtice be made Uſe of, againſt a Defendant on the Death of ſuch Witneſs, at another Trial.

[a] K. ly. 55.

[b] 2 Rol. Rep. 460, 461. *Vide* 1 Sid. 325. 2 Keb. 384. pl. 54.

[c] State Trials, Vol. 1. Duke of Norfolk's Trial, f. 84. Abington's Trial, f. 118, 119. Udal's Trial, fol. 148, 149. Earl of Eſſex's Trial, fol. 166. Sir Walter Raleigh's Trial, fol. 181, 182. and the like was admitted in the Lord Audley's Caſe on an Indictment for a Rape on his own Lady. State Trials, Vol. 1. fol. 268, 269.

[d] Ruſhw. Strafford, fol. 231, 526 to 531.

[e] State Trials, Vol. 2. fol. 622 to 627, 644, 647, 651. *See* Vol. 1. f. 911.

[f] State Trials, Vol. 2. f. 343, 344, 528, 529. *See* Sect. 12. § Salk. 286. *Vide ſupra*, Sect. 3.

[g] 5 Mod. 165. *Vide* Ruſhw. Strafford, 524 to 531. and State Trials, Vol. 2. fol. 420. and Vol. 4. fol. 261. and *Vide ſupra*, Sect. 9.

[h] 2 Rol. Rep. 460, 461. [h] State Trials, Vol. 4. f. 237, *&c.*

[i] State Trials, Vol. 4. fol. 265 to 172. 1 Sid 325. 2 Keb. 384. pl. 54.

Sect. 13.

Sect. 13. Alſo it ſeems clear that Depoſitions taken in the Spiritual Court in a Cauſe of Divorce for a Forcible Marriage cannot * be given in Evidence upon an Indictment for ſuch Marriage on the [k] Statute of 3 *H.* 7. 2.

* H. P. C. 263.
[k] *Vide* B. 1. ch. 42.

Sect. 14. As to the ſecond Particular, *viz.* How far Hearſay is Evidence: It ſeems [a] agreed, That what a [b] Stranger has been heard to ſay is in Strictneſs no Manner of Evidence either for or againſt a Priſoner, not only becauſe it is not upon Oath, but alſo becauſe the other Side hath no Opportunity of a croſs Examination; and therefore it ſeems a ſettled Rule, that it ſhall never be made uſe of but only by way of Inducement [c] or Illuſtration of what is properly Evidence; yet it ſeems [d] that what the Priſoner hath been heard to ſay at another Time may be given in Evidence for him, as well as againſt [e] him, and alſo what a † Witneſs hath been heard to ſay at another Time, may be given in Evidence in order either to invalidate or confirm the Teſtimony which he gives in Court.

[a] State Trials, Vol. 2. f. 332, 414, 415, 761, 802, 803. Vol 3. fol. 145, 210, 252.
[b] Vol. 4 f. 33.
[c] *Vide ſupra*, Sect 3.
[d] State Trials. Vol. 2. f. 325, 328, 332, 333, 414, 415; Vol. 3 fol. 144, 145, 209, 210. Vol. 4. fol. 33.
[e] State Trials, Vol. 3. f. 254, 255.
† *Vide ſupra*, Sect. 3.

Sect. 15. As to the third Particular, *viz.* Whether Similitude of Hands be any Evidence in Criminal Caſes: It is obſervable that this with other Circumſtances in [f] *Algernoon Sidney*'s Caſe was ruled to be good Evidence of his having written a Paper charged againſt him as an Overt-act of High Treaſon: Yet in the Trial of the ſeven [g] Biſhops, the Court was divided in Opinion, whether Similitude of Hands were Evidence of the Defendants having ſigned the Paper charged againſt them as a Libel; and the Parliament having declared an Opinion in the Reverſal of *Algernoon Sydney*'s Attainder, that Compariſon of Hands is no Evidence of a Man's Hand-Writing in Criminal Caſes: It ſeems to have been generally holden [h] ſince that Time, that is not Evidence in any Criminal Caſe, whether capital or not capital.

† State Trials, Vol. 2. fol. 529, 802, 803. Vol. 3. fol. 218 to 222, 428, 429. Vol 4. fol. 51, 52, 53.
Vide Supra, Sect. 9. & 12.
[f] State Trials, Vol 3. f. 213, 216, 217, 226, 230.
[g] State Trials, Vol. 9. fol. 762 to 767.
[h] *Vide* State Trials, Vol. 3. fol. 892, 893. Vol. 4. fol 271, 272. and Francia's Trial.

As to the third Point, *viz.* who may be Witneſſes in criminal Caſes, I ſhall endeavour to ſhew,

1. Whether a Husband or Wife may be Witneſſes for or againſt one another.
2. Whether a Judge or Juror may be a Witneſs.
3. Where an Accomplice in the Crime charged againſt a Priſoner may be a Witneſs againſt him or for him.
4. Where a Perſon ſhall be diſabled to be a Witneſs in Reſpect of his having been attainted or convicted of a Crime
5. Where it is a good Exception againſt a Witneſs that his Intereſt is concerned.
6. What other Exceptions are good againſt a Witneſs.

Sect. 16. As to the firſt of theſe Particulars, *viz.* Whether a Husband or Wife may be Witneſſes for or againſt one another: It ſeems [i] agreed, That the Husband and Wife being as one and the ſame Perſon in Affection and Intereſt, can no more give Evidence for one another in any Caſe whatſoever than for themſelves; and that regularly the one ſhall not be admitted to give Evidence againſt the other, nor the Examination of the one to be made Uſe of againſt the other, by Reaſon of the implacable Diſſenſion which might be cauſed by it, and the great Danger of Perjury from taking the Oaths of Perſons under ſo great a Biaſs, and the extreme Hard-

[i] Co. Litt 6. b. 2 Rol. Abr. 686 pl. 4. H. P. C. 263. 1 Brownl. 47. Hutton, 116. Raym. 1. 2 Keb. 403. pl. 12. State Trials, Vol. 4. fol. 608.

Hardſhip of the Caſe: And therefore it hath been [a] adjudged, That the Husband cannot be a Witneſs againſt the Wife, nor the Wife againſt the Husband, to prove the firſt Marriage on an Indictment on the Statute of 1 [b] *Jac.* 1. 11. for a ſecond Marriage. Yet [c] ſome Exceptions have been allowed to this general Rule in Caſes of evident Neceſſity, as in the Lord [d] *Audley*'s Caſe who held his Wife's Hands and Legs while his Servant, by his Command, raviſhed her; or where a Man is indicted for a [e] Forcible Marriage againſt the [f] Purport of 3 *H.* 7. or where either a Husband or Wife have Cauſe to demand [g] Sureties of the Peace againſt the other, *&c.*

Sect. 17. As to the ſecond Particular, *viz.* Whether a Judge or Juror may be a Witneſs: It ſeems [h] agreed, that it is no Exception againſt a Perſon's giving Evidence either for or againſt a Priſoner, that he is one of the Judges or Jurors who are to try him. And in the Caſe of [i] *Hacker*, two of the Perſons in the Commiſſion for the Trial came off from the Bench, and were ſworn and gave Evidence, and did not go up to the Bench again during his Trial.

Sect. 18. As to the third Particular, *viz.* Where an Accomplice in the Crime charged againſt a Priſoner may be a Witneſs againſt him or for him: It has been long ſettled [k], That it is no Exception againſt a Witneſs that he hath confeſſed himſelf guilty of the ſame Crime, if he have not been [l] indicted for it; for if no Accomplices were to be admitted as Witneſſes, it would be generally impoſſible to find Evidence to convict the greateſt Offenders. Alſo it hath been often [m] ruled, That Accomplices who are indicted, are good Witneſſes for the King, until they be convicted. Alſo it hath been [n] adjudged, That ſuch of the Defendants in an Information againſt whom no Evidence is given, may be Witneſſes for the others. It hath been alſo [o] adjudged that where *A. B.* and *C.* are ſued in three ſeveral Actions on the Statute for a ſuppoſed Perjury in their Evidence concerning the ſame Thing, they may be good Witneſſes in ſuch Actions for one another.

Sect. 19. As to the fourth Particular, *viz.* Where a Perſon ſhall be diſabled to be a Witneſs in Reſpect of his having been attainted, or convicted of a Crime: It ſeems agreed, That a Conviction, and therefore a *fortiori* an Attainder, or Judgment of [p] Treaſon, [q] Felony, [r] Piracy, [s] *Præmunire* or † Perjury, or of Forgery [u] on 5 *Eliz.* and alſo a [x] Judgment in Attaint for giving a falſe Verdict, or in Conſpiracy at the Suit of [y] the King, and alſo [z] Judgment for any * Crime whatſoever to ſtand in the Pillory, or to be whipt or branded, being in a Court which had a ¶ Juriſdiction, are good Cauſes of Exception againſt a Witneſs, while they continue in Force.

[a] Raym. 1. and the ſame Point was admitted in Fielding's Trial. State Trials, Vol. 4. f. 754.

[b] *Vide* B. 1. Ch. 43.

[c] In Raym. 1. There is an Opinion that a Husband and Wife may be Witneſſes againſt one another in Treaſon, but the contrary is adjudged, 1 Brownl. 47. *See* 2 Keb. 403.

[d] State Trials, Vol. 1. f. 265, 269. Hutt. 116. Ruſhw. Collections, part 2. Vol. 1. fol. 94, 99.

But this Caſe is denied to be Law, Raym. 1.

[e] Cro. Ca. 488. State Trials, Vol. 4. fol. 588.

3 Keb. 193. pl. 43.

[f] *See* B. 1. ch. 42.

[g] *See* B. 1. ch. 60. Sect. 4. Hutt. 116.

[h] State Trials, Vol. 2. fol. 257, 632, 674. Kely, 12. 1 Sid. 133. pl. 6. 1 Kely. 12.

[i] State Trials, Vol. 1. f. 96, 696, 697, 723. Vol. 2. fol. 334, 501. Vol. 3. fol. 161, 217, *&c.* 595, 668, 669. Vol. 4. fol. 12, 33. *See* Hale's Opinion to the contrary *arguendo*. State Trials, Vol. 1. fol. 724. and Bracton. 118. b.

[k] State Trials, Vol. 1. fol. 96. Vol. 2. fol. 501.

[l] State Trials, Vol. 1. fol 966. Vol 4. f. 12. Kely. 17, 18. 3 Keb. 136. pl. 70. *Vide* Vol. 1. fol. 697.

[m] 1 Sid. 237. pl. 4. *Vide* Triuls per pais, 148. Style, 401. 12 Aſſ. 12. Savil. 34.

[n] 2 Rol. Abr. 685. pl. 3.

[o] 5 Mod. 16. Kely. 33.

[p] Raym. 369 Co. Litt. 6. b. 2 Bulſt 154.

[q] 2 Rol. Abr. 686. H. 2 3.

[r] Co. Litt. 6 b. † Raym. 32. *infra*, §. Sect 22, 23. *Supra*, Ch. 37. Sect. 52. Co. Lit. 6. b. H. P. C. 263.

[s] Co. Litt. 6. b. *Vide ſupra*, Ch 43. Sect. 25. 33 H. 6 55. pl. 45. But H. P. C. 263. 'tis ſaid in general that one attaint of Forgery cannot be a Witneſs

[u] Co. Litt. 6. b 2 Roll. 684. pl. 4

[x] 33 H. 6. 55. pl. 45. 24 E. 3. 34. pl. 34. *Vide ſupra*, Ch. 43. Sect. 25. B. 1. ch. 72 Sect. 9. Co. Litt. . b. But H. P. C 263. 'tis ſaid in general that one attaint of Conſpiracy cannot be a Witneſs.

[y] That it is not material whether ſuch Judgment were actually executed. 2. Salk. 689. 3 Inſt. 219. 3 Lev. 426. But Co. Litt. 6. b. Kely. 37, 38. H. P. C. 263 5 Mod. 75, 76. ſeem to make the Execution of the Judgment material.

[z] * 2 Salk. 689. 3 Lev. 426. This Point is made a *Quære*, 5 Mod. 15, 16, 75, 76 And it is ſaid that by the Civil and Canon Law no ſuch Judgment diſables a Witneſs, unleſs the Nature of the Crime be infamous. 3 Lev. 426, 427. ¶ 1 Sid. 51. pl. 16. Raym. 32.

Sect. 20. But it is ‖ agreed, That no ſuch Conviction or Judgment can be made Uſe of to this Purpoſe, unleſs the Record be actually produced in Court. Alſo it is a general Rule, That a ** Witneſs ſhall not be asked any Queſtion the Anſwering to which might oblige him to accuſe himſelf of a Crime; and that his Credit is to †† be impeached only by general Accounts of his Character and Reputation, and not by Proofs of particular Crimes, whereof he never was convicted.

Sect. 21. It ſeems [a] at this Day, That Outlawry in a perſonal Action is not a good Exception againſt a Witneſs, as it is againſt a Juror. And that a Perſon convicted of Felony, who is admitted to his Clergy and [b] burnt in the Hand, is thereby re-enabled to be a Witneſs.

Sect. 22. It ſeems [c] agreed, That the King's Pardon of Treaſon or Felony after a Conviction or Attainder, reſtores the Party to his Credit: Alſo it was holden by the late Chief Juſtice [d] *Holt*, That the King's Pardon will remove a Man's Diſability to be a Witneſs in all Caſes whatſoever, wherein it is only the Conſequence of the Conviction or Judgment againſt him, and not an expreſs Part of the Judgment, as it is in Conſpiracy [e] at the Suit of the King, and in Perjury on the Statute. But this Matter [f] ſeems not to be fully ſettled.

Sect. 23. It hath been [g] ruled, That a Conviction of Perjury doth not diſable a Man from making an Affidavit in Relation to the Irregularity of a Judgment.

Sect. 24. As to the fifth Particular, *viz.* Where it is a good Exception againſt a Witneſs that his Intereſt is concerned: It ſeems an unconteſted [h] Rule, in all Caſes whatſoever, That it is a good Exception againſt a Witneſs, that he is either to be a Gainer or Loſer by the Event of the Cauſe; whether ſuch Advantage be direct and immediate, or conſequential only. And this ſeems to be the Reaſon why he who is Bail for the Defendant, [i] cannot be an Evidence for him without Conſent. Alſo upon the ſame Ground it is [k] agreed, That he who borrows Money upon an uſurious Cantract, cannot be a Witneſs upon an Information for the Uſury (unleſs he [l] hath paid the Money) whether ſuch Information be brought by himſelf or any other; for if in ſuch Caſe a Man might be a Witneſs, he would in Effect ſwear for himſelf, by proving a Matter which may avoid his own Contract. And upon the like Reaſon it hath been [m] ruled, That he who by a Slight has been impoſed upon to ſet his Hand to a Note for more Money than he intended, is no good Witneſs on an Information for the Cheat; becauſe a Conviction may be a Means to avoid the Note, by being made Uſe of by the Party when ſued upon it, as a Motive to influence the Jury, which cannot well be prevented, tho' in Law it be no [n] Evidence. And for the like Reaſon I take it to be generally * agreed, That he whoſe Property may be prejudiced by a Forgery, is no Evidence to prove it on an Indictment or Information. And if it be a Forgery within 5 *Eliz.* a farther Reaſon may be offered why ſuch a Perſon cannot be an Evidence becauſe he may have an Action on the Statute; and upon this Reaſon alone it hath been [o] adjudged, That he againſt whom a Verdict is given, cannot be a Witneſs to prove Perjury in the Evidence. And yet it appears from daily Experience, That [p] a Perſon beaten, and generally any other Perſon to whoſe [q] Damage a criminal Information concludes, is a

‖ State Trials, Vol. 1. f. 268. Vol. 2. f. 307, 436, 445. Vol. 3. f. 435. Vol. 4. f. 132

** State Trials, Vol. 2. f. 268, 472. Vol. 3. f. 387, 1010. Vol. 4. f. 44. *Cont.* Ruſhw. Strafford, 605. & *ibid.* 558. one was not admitted to ſpeak to clear himſelf.

†† State Trials, Vol. 3. f. 256, 257, 680. Vol. 4. f. 129, 130. *Vide* Vol. 2. f. 151, 267, 297.

[a] Co. Lit 6. b. But 33 H. 6. 32. pl. 2. taken Notice of 2 Rol. Abr. 675. pl. 4. ſeems contrary.

[b] *Supra*, ch. 33. ſect. 129. ch. 37. ſect. 49

[c] *Supra* ch. 37. ſect. 48, 49, 50.

[d] 2 Salk. 514, 639. But ſee 2 Brow. 47.

[e] B. 1. ch. 72. ſect. 9.

[f] *Vide ſupra*, ch. 37. ſect. 52.

[g] 2 Salk. 461. pl. 3.

[h] Co. Lit. 6. 1 Sid. 237. pl. 5. 1 Keb. 836. pl. 17.

[i] State Trials, Vol. 3. f. 253.

[k] Co. Lit 6. b. 2 Rol. Abr. 685. pl. 2. 1 Raym. 191. *Vide* 2 Keb. 384. pl. 54.

[m] 1 Salk. 283. Yet between the King and Paris, 1 Sid. 431. 2 Keb. 572. pl. 84.

1 Vent. 49 the contrary was ruled in a ſtronger Caſe, by three Judges againſt the Opinion of Twiſden. [n] Salk. 283 pl. 12. 1 Sid. 325. * Salk. 283. pl 12. [o] 2 Rol. Ab. 685. pl. 4. and the ſame Point is taken for granted. 1 Sid. 237. pl. 5. 1 Keb. 836. pl. 17. *Vide* 1 Salk. 283. pl. 12. [p] 2 Rol Abr. 685. pl. 5. 2 Keb. 572. pl. 84. [q] 1 Sid. 237. pl. 5. 2 Keb. 384. pl 54. 572. pl 84. 1 Keb. 836. pl. 17. 1 Salk. 286. pl. 20. 1 Sid. 211. pl. 8.

good Evidence to prove ſuch Battery or other Miſdemeanour, notwithſtanding the Objection that he may have an Action. And therefore, upon the Whole, the Rules of Evidence concerning this Matter ſeem not to be clearly ſettled.

Sect. 25. It ſeems [a] agreed, That it is no good Exception againſt a Witneſs, That he has a Maintenance from the King; for every one may maintain his own Witneſſes. Alſo it hath been [b] adjudged to be no good Exception againſt a Witneſs, That he has received a Reward for having made a Diſcovery of the Crime to be proved againſt the Priſoner. Alſo it hath been [c] Ruled to be no good Exception, That a Witneſs hath the Promiſe of a Pardon or other Reward on Condition of giving his Evidence, unleſs ſuch Reward be promiſed by Way of Contract for giving ſuch and ſuch particular Evidence, or full Evidence, or any Way in the leaſt to biaſs him to go beyond the Truth; which not being eaſily avoided in Promiſes or Threats of this Kind, it is certain that too great Caution cannot be uſed in making them.

Sect. 26. As to the ſixth Particular, *viz.* What other Exceptions are good againſt a Witneſs: It ſeems [d] agreed to be a good Exception, That a Witneſs is an Infidel; That is, as I [e] take it, That he believes neither the Old nor New Teſtament to be the Word of God; on one of which our Laws require the Oath ſhould be adminiſtred.

Sect. 27. Alſo it is [f] certain, That want of Diſcretion is a good Exception againſt a Witneſs; on which Account alone it [g] ſeems, That an Infant may be excepted againſt; for in ſome Caſes an Infant of nine Years of Age has been allowed to give Evidence.

Sect. 28. But it ſeems agreed, That it is no good [h] Exception againſt a Witneſs that he is an Alien, or Villain, or Bondman, *&c.*

Sect. 29. As to the fourth Point, *viz.* In what Manner the Witneſſes for the Defendant are to give their Evidence: It hath always been [i] agreed, That the Evidence for the King muſt in all Caſes be upon Oath, and alſo that the Evidence for the Defendant in an [k] Appeal, whether capital or not capital, or in an Indictment or Information for a [l] Miſdemeanour, muſt alſo be upon Oath. And it is ſaid by Sir *Edw.* [m] *Coke*, *That we never read in any Statute, ancient Author, Book-Caſe or Record, that in Criminal Caſes the Party accuſed ſhould not have Witneſſes ſworn for him, and therefore that there is not ſo much as* ſcintilla juris *againſt it.* And it is ſaid by Sir [n] *Matthew Hale*, That there is no known Law againſt it. However there having been a conſtant immemorial [o] Practice not to ſuffer Witneſſes to be ſworn againſt the King upon Indictments of capital Crimes, * except in ſome Caſes ſpecially provided for by Statute; and the Judges being always tender of departing from the ſettled Practice of their Predeceſſors, and generally chooſing rather to preſume it originally founded on ſome Statute or other good Foundation, than to ſuffer the Reaſonableneſs of it to be nicely inquired into, which might be an Inlet to endleſs Uncertainties, it was thought neceſſary to enact by 1 *Annæ* 9. *Par.* 3. *That after the twelfth of* February 1702. *every Perſon who ſhall be produced or appear as a Witneſs on the Behalf of the Priſoner, before he or ſhe be admitted to depoſe, or give any Manner of Evidence, ſhall firſt take an Oath to depoſe the Truth, the whole Truth, and nothing but the Truth, in ſuch Manner as the Witneſſes for the Queen are by Law obliged to do; and if convicted of any wilful Perjury in ſuch Evidence, ſhall ſuffer all the Puniſhments, Penalties, Forfeitures and Diſabilities, which by any of the Laws and Statutes of this Realm, are or may be inflicted upon Perſons convicted of wilful Perjury.*

Sect. 30.

[a] State Trials, Vol. 2. f. 334, 335, 691, 693.
[b] State Trials, Vol. 1. f. 723, 724. Vol. 2. f. 334, 335. Vol. 4. f. 121. Kely. 28.
[c] Kely. 18. State Trials, Vol. 2. f. 334, 335, 693. Vol. 3. f. 221, 222. But Sir Matthew Hale of a different Opinion. Kely. 18. *Vide* State Trials, Vol. 4. f. 121.
[d] Co. Lit. 6. State Trials, Vol. 4 f. 131.
[e] *Vide* Trials per pais, 165. 2 Keb. 314. pl. 23.
[f] Co. Lit. 6.
[g] H.P.C. 263.
[h] Brownl. 47.
[i] State Trials, Vol. 1. f. 253.
[k] H.P.C. 264. 2 Bulſt. 147.
[l] State Trials, Vol. 2. f. 737. 1 Sid. 325. 1 Sid 211.
[m] 3 Inſt. 79.
[n] H.P.C. 264
[o] Cro. Ca. 292. 2 Bulſt. 147 State Trials, Vol 1. f. 55, 148. Vol. 2. f. 296, 737. H. P. C. 264.
* *Vide* 31 El. ch 4. 4 Jac. ch. 1.

Sect. 30. As to the fifth Point, *viz.* Whether a Defendant in criminal Cases have Right to Process to bring in his Witnesses: I take it that in Prosecutions for * Misdemeanours the Defendant may take out *Subpœnas* of Course, but that in Capital Cases he hath no [b] Right by the Common Law to any Process against his Witnesses without a [c] special Order of the Court. But it is enacted by 7 *W.* 3. 3. *Par.* 7. *That all Persons accused and indicted for any High Treason, whereby any Corruption of Blood may ensue, shall have the like Process of the Court where they shall be tried, to compel their Witnesses to appear for them at any such Trial or Trials, as is usually granted to compel Witnesses to appear against them.* And it seems that since the Statute of 1 *Annæ* 9. set forth more at large in the precedent Section, which ordains, That the Witnesses for the Prisoner shall be sworn, Process may be taken out against them of Course in any Case whatsoever.

* State Trials, Vol. 1. f. 969. Vol. 3. f. 238, 252, 420.
[b] *Vide* State Trials, Vol 1. f. 969. Vol. 3. f. 1002, 1003.
[c] But in Turner's Case, State Trials, Vol. 1. f. 995. 'Tis said that the Court can't grant the Prisoner any Precept to bring in his Witnesses, *&c.*

Sect. 31. As to the sixth Point, *viz.* What Evidence maintains an Indictment, *&c.* Having already shewn, *Ch.* 25. *Sect.* 117. and *Book* 1. *Ch.* 30. *Sect.* 9. That according to the later Opinions, where one is indicted upon a Statute, and the Evidence doth not bring the Case within the Statute, but yet proves the Offence in the Indictment as it is an Offence at the Common Law, the Defendant may be found guilty at the Common Law, and the Words *contra formam Statuti* rejected as Surplus; Having also shewn, *Ch.* 35. *Sect.* 11. That it is strongly holden that a Man cannot be found Guilty of an Indictment against him as Principal, upon Evidence which only proves him to have been Accessary before, but shall be discharged of the Indictment; I shall in this Place take Notice only of the following Particulars.

Sect. 32. *First*, That it is a settled Rule [d] in all Cases, whether capital or not capital, That the Day laid in the Indictment or [e] Appeal is not material upon Evidence, but that the Defendant may be convicted upon Proof of a Fact at any other Time, whether before or after the Day laid; so [f] that it were before the Time when the Indictment or Appeal were preferred. And agreeably hereto Sir [g] *Henry Vane* was found guilty of an Indictment of High Treason laid on the 30th of *May*, 11 *Car* 2. upon Evidence of a Fact done the 20th of *January*, 1 *Car.* 2.

[d] H. P. C. 264. 3 Inst. 230. 1 Salk. 288. Kely. 16. 2 Inst. 318, 319. State Trials, Vol. 4. f. 9.
[e] H.P.C. 187.
[f] 1 Salk. 288. State Trials, Vol. 4. f. 9. 3 Kely. 16.

Sect. 33. *Secondly*, That where the Time proved, varies from that laid in the Indictment or Appeal the Jury § may either find the Defendant guilty generally, in which Case the Forfeiture shall relate to the Time laid, till the Verdict be falsifyed by the Party interested, (as it may be in this [h] Respect, tho' not as to the Point of the Offence,) or they may [i] specially find him Guilty on the Day on which the Fact is proved, whether before or after the Day laid in the Indictment or Appeal, in which Case the Forfeiture shall relate to the Day so specially found. But where a Verdict expresly finds a Defendant guilty before the Time laid in the Indictment or Appeal, whether it may be falsifyed, as to the Time, by the Party interested, as it may be where it finds him guilty generally of the Offence in the Indictment or Appeal, upon Evidence of a Fact after the Time laid, may deserve to be considered.

[g] H.P.C. 264. 2 Inst. 318. 3 Inst. 230. [h] H.P.C. 264, 270. 3 Inst. 230. and *infra*, in Chapter 51. [i] Kely. 16. H. P. C. 264. 2 Inst. 318. 3 Inst. 230. [k] Salk. 385, 661.

Sect. 34. *Thirdly*, That where a certain [k] Place is made Part of the Description of the Fact which is charged against the Defendant, the least Variance as to such Place between the Evidence and Indictment is fatal; as where a Trespass in Taking away Goods, or any other Offence is alledged in such a Parish in the House of *J. S.* or in such a Parish in a Play-House in *Lincoln's Inn-Fields*, and upon Evidence it appear to have been done at the House of a different Person, or that there is no Play-House in *Lincoln's Inn Fields*. But it is a settled [l] Rule, That a Place laid

[l] H. P. C. 264, 265. Salk. 288. State Trials, Vol. 4. f. 9. Kely. 15, 33.

laid only for a Venue in an Indictment or Appeal is no Way material upon Evidence; but that a Proof of the ſame Crime at any other Place in the [a] ſame County, maintains the Indictment or Appeal as well as if it had been proved in the very ſame Place. Alſo it hath been [b] adjudged, That after a Crime hath been proved in the County in which it is laid, Evidence may be given of other Inſtances of the ſame Crime in another County, in Order to ſatisfy the Jury. Alſo it was [c] adjudged in Sir *Henry Vane*'s Caſe, That where one is indicted for High Treaſon in compaſſing the King's Death in the County of *M.* and the Levying of War in the ſame County is laid as an Overt-Act of ſuch Treaſon, and [c] proved in the ſame County by one Witneſs, the Levying of War in another County may alſo be proved by another Witneſs. But it ſeems to have been [d] agreed at the ſame Time, That where the Levying of War is the Treaſon for which the Party[e] is indicted, it muſt be fully proved in the County in which it is laid. Alſo it ſeems, That at this Day the Levying of War can in no Caſe be given in Evidence as an Overt-Act in any County in which it is not laid, unleſs it tend to prove ſome Overt-Act that is expreſly laid; for it is enacted by 7 *Wil.* 3. 3. *Par.* 8. *That no* [e] *Evidence ſhall be admitted or given of any Overt-Act that is not expreſly laid in the Indictment againſt any Perſon or Perſons whatſoever.* In the Conſtruction whereof it hath been [f] adjudged, That where one is indicted for High Treaſon in adhering to the King's Enemies, and certain Acts of Hoſtility done by him in a certain Ship called the *Clencarty*, are laid as the Overt-Acts of ſuch Adherence, no Evidence can be given of any other diſtinct Act of Adherence, having no Relation to, nor any Way tending to prove, what was done in the *Clencarty*, tho' it conduce to prove the ſame Species of Treaſon; and therefore that on ſuch an Indictment no Evidence can be given of the Priſoner's Having run away to the Enemy in a Cuſtom-Houſe Boat, *&c.* But it hath been [g] adjudged, That where one is indicted for High Treaſon in compaſſing the King's Death, and a Conſult and Agreement to aſſaſſinate the King is laid as one of the Overt-Acts of ſuch Treaſon, the Defendant's giving about among the Conſpirators a Liſt of the Perſons Names who were intended to be employed in the Aſſaſſination, may be given in Evidence againſt him upon ſuch Indictment, becauſe it naturally tends to prove his Agreement to the intended Aſſaſſination, which Agreement is one of the Overt-Acts laid in the Indictment. Alſo it hath been [h] adjudged, That where the Writing of ſeveral treaſonable Letters is laid as an Overt-Act of High Treaſon in Compaſſing the King's Death, and the Purport of ſuch Letters is only ſet forth in the Indictment without a particular Recital or Deſcription of any of them, the particular Letters making good ſuch Charge may be read at the Trial.

Sect. 35. *Fourthly*, That where ſeveral Overt-Acts are laid in an Indictment of High Treaſon, the Proof of any [i] of them maintains the Indictment as much as if every one of them were proved.

Sect. 36. *Fifthly*, That where one is indicted for writing a [k] Libel *ſecundum tenorem ſequentem*, or for forging a Deed ſo and ſo deſcribed, any the leaſt Variance between the Libel recited or Deed deſcribed, and thoſe given in Evidence, is fatal; but that where the Subſtance only of a Libel is ſet forth in *Latin*, it is ſufficient if the Libel be proved to have the ſame Senſe as is ſet forth. Yet it ſeems [l] agreed, That it is no Evidence in any criminal Caſe, that the Defendant ſaid ſo and ſo, or Words to the like Effect; becauſe the Court muſt know the very Words to judge of their Force and Effect.

[a] *See* the Books above-cited and *Supra*, ch. 25. ſect. 34 to 42. and Cro. El. 911.
[b] Kely. 33.
[c] Kely. 14, 15. State Trials, Vol. 1. f. 932. Vol 2. f. 317, 776, 785. *Vide* Vol. 1. f. 843. Vol 4. f. 78.
[e] For it is neceſſary that ſome Overt-Act be proved in the ſame County; for otherwiſe the compaſſing could no Way be ſaid to be proved in the County wherein it is laid. *See* the Books above cited.
[d] Kely 15.
[e] *Vide* State Trials, Vol. 1. f. 843.
[f] State Trials, Vol. 4 f. 331, 332, 333.
[g] State Trials, Vol 4. f. 124, 125, 132, 133. 134.
[h] Francia's Trial. *Vide* Vol. 1 f. 617, 950. Vol. 2. f. 98 99, 112. & 322, 323. Vol. 3. f. 857, 1009. Yet in ſome Indictments the very Words charged to have been treaſonable have been ſet forth. State Trials, Vol 2. f. 746. Vol 3. f. 204, 219.
[i] State Trials, Vol. 1. f. 843, 851. Vol. 2. f. 430. Vol. 4. f. 159.
[k] Salk. 660, 661. Hob. 272.
[l] Hob. 294.

Sect. 37. Sixthly, That a Variance between an Indictment or Appeal of Death, and the Evidence, as to the inſtrumental Cauſe mentioned in ſuch Indictment or Appeal, is no [a] way material, ſo that the Party be proved to have died by the ſame Kind of Death as is alledged in the Indictment or Appeal. And therefore it is [b] agreed, That if one be indicted or appealed for killing another with a Sword, and upon Evidence it appear that he killed him with a Staff, Hatchet, Bill or Hook, or any other Weapon with which a Wound may be given, he ought to be found guilty; for the Subſtance of the Matter is, whether he gave the Party a Wound of which he died, and it is not material with what Weapon he gave it, tho' for Form's ſake it be [c] neceſſary to ſet forth a particular Weapon. And on the ſame Ground it hath been alſo [c] adjudged, That an Indictment, or Appeal for poiſoning a Man with one Kind of Poiſon, may be maintained by Evidence of a different Kind of Poiſon; for the Subſtance of the Matter is whether the Defendant did poiſon the Deceaſed or not. [f] Yet it ſeems clear, That Evidence of poiſoning, burning, or famiſhing, or any other Kind of killing wherein no Weapon is uſed, will not maintain an Indictment or Appeal of Death by killing with a Weapon; and that Evidence of killing with a Weapon will not maintain an Indictment or Appeal of Poiſoning, *&c.* becauſe they are different Kinds of Deaths; and in like Manner that an Indictment of Treaſon could [g] never be maintained by Evidence of Treaſon of a different Species.

[a] 9 Co. 67. 2 Inſt. 319. 3 Inſt. 135. H. P. C. 265.

[b] *See* the Books above-cited, and *ſupra*, Ch. 23. Sect. 84.

[c] *Vide ſupra*, Ch. 23. S. 84.

[d] 3 Inſt. 135. H. P. C. 265.

[e] 3 Inſt. 319. H. P. C. 265. 2 Inſt. 319.

[f] State Trials Vol. 4. f. 9.

[g] H. P. C. 265. 3 Inſt. 165.

Sect. 38. Seventhly, That it ſeems a [h] general Rule, That wherever a Variance between an Indictment or Appeal, and the Evidence brought to ſupport them, is material or immaterial in Reſpect of the Principal; in the ſame Caſes alſo it will be material or immaterial in Reſpect of the Acceſſary.

Sect. 39. Eighthly, That it is [i] ſettled at this [k] Day, That if an Indictment or Appeal againſt *A. B.* and *C.* for the Death of *D.* charge *A.* as having given the mortal Blow, and *B.* and *C.* as having been preſent, procuring and abetting, and the Evidence prove that *B.* and *C.* gave the Blow, and that *A.* was only preſent procuring and abetting; yet it maintains the Indictment, becauſe in ſuch a Caſe in the [k] Judgment of Law, the Act of any of them is the Act of all.

[h] But there were anciently ſome Opinions to the contrary *Supra*, Ch 29. Sect. 9. Lett. x. S. P. C. 41. Lett. A. B.

[i] Plow. Com. 98, 100. a. 1 Salk. 334, 335. 3 Mod. 121.

[k] *See* the Books above cited, and B. 1. Ch. 32. Sect. 6 Ch. 31. Sect. 31. and 50. Ch. 34. Sect. 7. Ch. 38. Sect. 8, 9. Ch. 41. Sect. 6.

Sect. 40. Ninthly, That it hath been [l] reſolved, That if one be indicted as Acceſſary to two, and upon Evidence appear to have been Acceſſary to one of them only, yet he ſhall be found guilty. But it is [m] holden by Sir *Edward Coke*, That if an Appeal be brought againſt two as Principals, and againſt another as Acceſſary to them, and one of thoſe charged as Principals be found not guilty, the Acceſſary is diſcharged, for which he gives this Reaſon, That becauſe the Plaintiff made him Acceſſary to two, he cannot be found Acceſſary to one. But no Authority is cited for the Maintenance of this Opinion; neither doth it ſeem eaſy to reconcile it with the Reſolution above-mentioned, unleſs the Rules of Evidence on an Appeal differ from thoſe on an Indictment, which I do not [n] find that they do as to other Variances.

[l] 9 Co. 119. a. H. P. C. 232, 265. *Vide* Keilw. 107. and *ſupra*, Ch. 29. Sect. 46. 47.

[m] 2 Inſt. 183.

[n] *Vide ſupra*, Sect. 32, 34, 37. 38, 39.

[o] 9 Ch. 67. b. Cro Jac. 280. H. P. C. 266.

Sect. 41. Tenthly, That it hath been [o] agreed, That if a Perſon be generally indicted for the Murder of another *ex malitia præcogitata*, and no expreſs Malice appear upon the Evidence but only [p] Malice implied by Law, yet he ſhall be found guilty. Alſo it hath been [q] adjudged, That where an Indictment ſets forth all the ſpecial Matter in Reſpect whereof the Law implies Malice, a Variance between the Indictment and Evidence as to the Circumſtances doth no Hurt, ſo that the Subſtance of the Matter be found. As [a] where an Indictment for the Murder of a Serjeant of Mace in *London* upon an Arreſt, ſuppoſes that the Sheriff made a Precept to ſuch Serjeant for the Arreſt, and upon the Evidence it appears that there was not any ſuch Precept, but that the Serjeant made the Arreſt *ex Officio* at the Plaintiff's Requeſt upon the Entry of the Plaint, according to the Cuſtom of the City; for the Subſtance of the Matter is whether the Defendant killed an Officer in the lawful Execution of legal Proceſs.

[p] *See* B. 1. Ch. 31. Sect. 18, 19, and S. 40 to 43.

[q] 9 Co. 67.

[a] 9 Co. 62, 63, 67.

[b] Co Litt. 6. b. S. P. C. 179. Lett. A. *Vide ſupra*, Ch. 45. Sect. 10. and State Trials, Vol. 1. fol. 181, 636. Vol. 2. fol. 408. Vol. 3 f. 228, 229, 688, 689, 894 to 901, 928, 929, 930.

Sect. 42. Eleventhly, That violent [b] Preſumption from plain Circumſtances is in ſome Caſes taken for full Proof; as where a Man is ſtabbed in a Houſe, and another runs out with a bloody Knife in his Hand, and no one elſe is in the Houſe at the Time; alſo it is [c] ſaid, That a probable Preſumption is of ſome Weight, but that a light one is not to be regarded at all.

[c] Co. Litt. 6. b.

Sect. 43. Twelfthly, That it is enacted by 21 *Jac.* 27. *That if any Woman be delivered of any Iſſue of her Body, Male or Female, which being born alive ſhould by the Laws of this Realm be a Baſtard, and that ſhe endeavour privately, either by drowning, or ſecret burying thereof, or any other way, either by herſelf or the procuring of others, ſo to conceal the Death thereof, as that it may not come to light, whether it were born alive or not, but be concealed; in every ſuch Caſe, the ſaid Mother ſo offending ſhall ſuffer Death as in Caſe of Murder, except ſuch Mother can make Proof by one Witneſs at the leaſt, that the Child whoſe Death was by her ſo intended to be concealed was born dead.* In the Conſtruction whereof it hath been [d] adjudged, That in order to convict a Woman by Force of this Statute, there is no need that the Indictment be drawn ſpecially, or conclude *contra formam Statuti*; but that it is the better Way to ſet forth only that the Defendant *infantem maſculum vivum parturiit, qui quidem infans maſculus adtunc & ibidem vivus exiſtens natus per legem hujus regni Angliæ Spurius fuit, Anglice* a Baſtard, and then to go on in the ordinary Way to ſhew that ſhe murdered him, *&c. contra pacem, &c.* for the Statute doth not make a new Offence, but only make ſuch Concealment and undeniable Evidence of Murder. Alſo it hath been [e] agreed, That where a Woman appears to have endeavoured to conceal the Death of ſuch Child within the Statute, there is no Need of any Proof that the Child was born alive, or that there were any Signs of Hurt upon the Body, but it ſhall be undeniably taken that the Child was born alive and murdered by the Mother. But it hath been [f] adjudged, That where a Woman lay in a Chamber by herſelf, and went to Bed without Pain, and waked in the Night, and knocked for Help but could get none, and was delivered of a Child and put it in a Trunk, and did not diſcover it till the following Night, yet ſhe was not within the Statute, becauſe ſhe knocked for Help. Alſo it hath been [e] agreed, that if a Woman confeſs herſelf with Child before-hand, and afterwards be ſurpriſed and delivered, no Body being with her, ſhe is not within the Statute, becauſe there was no Intent of Concealment. And therefore in ſuch Caſes it muſt appear by Signs of Hurt upon the Body, or ſome other way, that the Child was born alive.

[d] Kely. 32.

[e] Kely. 32, 33.

[f] Kely. 32.

Kely. 33.

Sect. 44. As to the ſeventh Point, *viz.* What may be given in Evidence on the Part of the Defendant: It ſeems [f] agreed, that *ſon aſſault Demeſne* may be given in Evidence on the General Iſſue in an Indictment, but not in an Action of Battery. Alſo it ſeems to have been always [g] agreed, that the Defendant in an Information on a Penal Statute may give in Evidence any Exception in his Favour in the Body of the Act. And it hath alſo been [h] holden that he may give in Evidence any ſuch Exception in a *Proviſo* of the Act, (becauſe any ſuch Exception ſhews that he did not act againſt the Form of the Statute;) but that he cannot [d] give in Evidence any Clauſe of Exemption in a later Statute, but ought to plead it.

[a] B. 1. Ch. 62. Sect. 3.
[b] Savil, 32 pl. 75.
[f] Jon. 157.
[g] Rol. Abr. 683. pl. 11.
[h] 2 Roll. Ab. 683. pl. 10, 12. But this is left a *Quære* Savil, 32. pl. 75. Bro. General Iſſue, 3. *Vide ſupra*, Ch. 25. Sect. 115.
[d] 2 Roll. Abr. 683. pl. 11.

CHAP. XLVII.

Of Verdict.

FOR the general Learning of Verdicts I ſhall refer to other Books, and in this Place take Notice only of the following Particulars;

Sect. 1. 1ſt, That it ſeems to have been [e] anciently an uncontroverted Rule, and hath been allowed, even by thoſe [f] of the contrary Opinion, to have been the general Tradition of the Law, that a Jury ſworn and charged in a capital [g] Caſe, cannot be diſcharged (without the [h] Priſoner's Conſent) till they have given a Verdict. And notwithſtanding ſome [i] Authorities to the contrary in the Reign of King *Charles* II. this hath been holden for clear Law both in the Reign of King [l] *James* II. and [m] ſince the Revolution.

Sect. 2. 2dly, That it ſeems to have been * always agreed, that in all † capital Caſes the Jury muſt give their Verdict openly in Court, and cannot give a privy Verdict.

Sect. 3. 3dly, That it is ſettled, [n] that the Jury may give a ſpecial Verdict in any criminal Caſe, whether Capital or not Capital, as well as in a Civil.

Sect. 4. 4thly, That it hath been [o] adjudged, that where the Jury find a Man not guilty of an Indictment or Appeal of Murder, they are not bound to make any Inquiry, whether he be guilty of Manſlaughter, *&c.* But that if they will they may, according to the Nature of the Evidence, find him guilty of [p] Manſlaughter or [q] Homicide *ſe defendendo*, or *per infortunium*; for the Killing is the Subſtance, and the Malice but a Circum-

[e] Co. Lit. 227. b. 3 Inſt. 110. 1 And. 103, 104. H. P. C. 267.
[f] Raym. 84.
[g] And the ſame is holden by Coke as to Larceny, and any Caſe of Member. 3 Inſt. 110. Co. Litt. 227. b. but as to Caſes of an Inferior Nature, the contrary hath been adjudged, Raym. 84.
[h] 1 And. 103, 104.
[i] Kely. 47, 52. State Trials, Vol. 1. fol. 978 Vol. 2. fol. 155, 277, 389 Raym. 84.
[l] State Trials, Vol. 3 f. 678. *Vide ſupra*, Ch. 44. Sect 22.
[m] State Trials, Vol. 4. fol. 110, 178, 179.
* Co. Litt 227. b. 3 Inſt. 110. Raym 193.
† The ſame is holden by Sir Edward Coke, as to Larceny, and any Caſe of Member, 3 Inſt. 110. Co. Litt. 227. b And it is ſaid in Raym. 193 That no privy Verdict can be given in any Caſe where the Jury are to look upon the Priſoner when they give it.
[n] S. P. C. 165. Lett. A. H. P. C. 267. 9 Co. 12 b. 63. 1 Bulſt. 87. *Vide infra*, Sect. 6 But it is ſaid, Kely. 29. 30 That it is diſhonourable for the Court to ſuffer a ſpecial Verdict in a plain Caſe.
[o] Cro. Eliz. 276. pl. 5 296. pl. 2. 464 pl. 13.
[p] Dyer, 261. pl 26. 4 Co. 43. b. 9 Co 81. Dalſ. 14. H. P. C. 267. Latch, 126. Pl. Com. 101. Cro. Eliz. 276. pl 5. 296. pl. 2. 464 pl. 13. Moor, 407. pl. 546. Bro. Coro. 121 or 122. But 2 Roll. Re 461. this was queſtioned as to an Appeal of Death.
[q] Bro. Coro. 1. H. P. C. 267. Dalſ. 14. S. P. C, 165. Lett. A. *See* the Books cited to the following Section.

ſtance

stance, a [r] Variance as to which hurts not the Verdict. Yet the Books seem to make this Difference, that where the Jury find the Defendant guilty of Manſlaughter on an Indictment of Murder, they may give their Verdict [f] generally, without ſetting out any of the Circumſtance of the Fact: But that they ſhall not [a] be received to find him guilty generally of Homicide *ſe defendendo*, or *per infortunium*, but muſt ſet out the whole Circumſtances of the Fact, and in the [b] Concluſion ſhew of what Crime they find the Defendant guilty, wherein if they be miſtaken, it is [c] ſaid, that the Court may notwithſtanding give ſuch Judgment as ſhall appear to be proper from the Circumſtances of the Fact ſpecially ſet forth.

Sect. 5. 5thly, That it hath been [d] adjudged, That if the Jury on an In Indictment or Appeal of Murder find the Defendant guilty of Manſlaughter, without ſaying any thing expreſly as to the Murder, it is inſufficient and void, as being only a Verdict for Part. And *Quære* if the Law be not the ſame where the Jury upon ſuch an Indictment find that the Defendant killed the Deceaſed *ſe defendendo* or *per infortunium*, and do not expreſly find that he did not murder him, according to the Generality of the ancient [c] Authorities.

Sect. 6. 6thly, That it is agreed, that on an Indictment for ſtealing Goods of a certain Value above 12 *d.* the [f] Jury may find the Defendant guilty, but that the Goods are but of the Value of 10 *d. &c.* But it ſeems that if a Man be indicted for Felony generally, and upon the Evidence it [g] plainly appear that the Fact amounts to no more than a bare Treſpaſs, he cannot be found guilty of the Treſpaſs, but ought to be indicted anew. Yet if the ſpecial Circumſtances of the Caſe be ſet forth in an Indictment for an Offence laid as Felony, and the Defendant be found guilty generally, and afterwards the Court be of Opinion that the Fact doth not amount to Felony, but only to an enormous Treſpaſs, it ſeems [h] agreed, That Judgment may be given as for a Treſpaſs only. Alſo if the Jury find a ſpecial Verdict on a general Indictment for Felony; and the Crime be adjudged upon ſuch Verdict to be but a Treſpaſs, [i] Judgment may be given upon it as for a Treſpaſs only. Alſo if on an Indictment of Treſpaſs the Fact appear to have been felonious, it hath been [k] adjudged, That the Defendant may be found guilty of the Indictment as it is laid, becauſe the King may proceed againſt the Offender as he thinks fit, either as a Treſpaſſer or Felon. But the contrary is [l] ſaid to have been holden by the late Chief Juſtice *Holt*; and it hath been [m] adjudged, that if it appear in an Action of Treſpaſs that the Taking was felonious, no Verdict ought to be taken unleſs the Defendant have been before tried for the Felony, becauſe the Suffering ſuch Actions might be a Means to prevent Proſecutions for Felonies.

[r] 1 Bulſt. 87. 'Tis holden by two Judges againſt one, That where the Appeal mentioned three Wounds and the Verdict found but one, yet the Variance was immaterial. *Vide* Ch. 46. Sect. 37. For the Books cited under Letter p. 441. P. C. 267. S. P. C. 15. Lett. E. 165. Lett. A. 5 Inſt. 66. 26 H. 8. 5. a. Algn. 12.

[f] Fitz. Coro. 264, 286, 287, 305. *Vide* Benl. 47. 1 And. 41.

[g] 43 Aſſ. pl. 31. Fitz. Coro. 226. Crompt. Juſt. 114. pl. 1. S. P. C. 165. Lett. A. *Vide* Benl. 47. 1 And. 41.

[d] 1 And. 103, 104. and Note, That in all the Books cited under the precedent Section to Lett. p. where the Defendant is found guilty of Manſlaughter on an Indictment of Murder, he is expreſly acquitted of the Murder, but other Books, which ſpeak of this Matter, ſay in general that the Defendant may be found guilty of Manſlaughter on an Indictment of Murder, without ſaying any thing as to the Neceſſity of giving an expreſs Verdict upon the Murder, 9 Co. 67. b. Crompt. Juſt. 114. pl. 5. P. C. 267. *See* 4 Co. 40. a. 46. b. [c] Fitz. Coro. 284, 286, 287. *Sed Vide* 44 E. 3. 44. pl. 55. Fitz. Coro. 94. Benl. 37. 1 And. 41. [f] Fitz. Coro. 115, 177, 451. 18 Aſſ. pl. 14. H. P. C. 267. S. P. C. 165. Lett. B. Crompt. Juſt. 114. pl. 2. B. 1. Ch. 35. Sect. 4. [g] Kely. 29, 30. Cro. Ca. 332. 'Tis made a *Quære*, 2 H. 7. pl. 22. and 10. pl. 6. whether where an Indictment of Larceny is inſufficient as to the Felony, the Party may be found guilty of the Trespaſs, and ſo for a Treſpaſs. [h] Kely. 29, 30. Cro. Ca. 376, 377. [i] Jon. 351. [k] Cro. Ja. 497, 498. [l] 18 Ed. 4. 10. pl. 21. 2 Lev. 208. *Vide ſupra*, Ch. 35. Sect. 5. and Ch. 36 Sect. 6. That an Acquittal or Judgment againſt a Man in an Action or Indictment of Treſpaſs is no Bar on an Indictment or Appeal of Larceny, Kely. 30. [m] 6 Mod. 77. [n] Ki. Ab. 556. pl. 19. 557. pl. 20, 21, 22, 23, 24. Noy. 18. *Vide* 1 Jon. 147. Noy. 82. Latch, 145. 1 Mod. 263. Cont. Bract. cited S. P. C. 28. a. 83. b.

Sect. 7. 7*thly*, That it hath been holden, That a Verdict acquitting a Defendant of the Death of a Man found againſt him by the Coroner's Inqueſt, ought not to be received unleſs it ſhew what other Perſon did the Fact; but for this I ſhall refer to *Ch.* 9. *Sect.* 33.

Sect. 8. 8*thly*, That on an Indictment for a Riot againſt three or more, if a Verdict acquit all but two and find them guilty; or on an Indictment for a Conſpiracy, if the Verdict acquit all but one, and find him guilty, it is repugnant and [a] void as to the two found guilty in the firſt Caſe, and as to the one found guilty in the ſecond, unleſs the Indictment charge them with having made ſuch Riot or Conſpiracy, *ſimul cum aliis juratoribus ignotis*; for otherwiſe it appears that the Defendants are found guilty of an Offence whereof it is impoſſible that they ſhould be guilty; for there can be no Riot where there are no more Perſons than two, nor can there be a Conſpiracy where there is no Partner. Yet it ſeems [a] agreed, That if twenty Perſons are indicted for a Riot or Conſpiracy, and any three found guilty of the Riot, or any two of the Conſpiracy, the Verdict is good; And that [b] where ſeveral are indicted for Treaſon or Felony, or other Crime, which may be as well done by one only, as by more, a Verdict [c] may find one of the Defendants only guilty, and acquit all the reſt. And in like Manner it ſeems [d] agreed, That a Verdict on an Information on a penal Statute againſt ſeveral Perſons jointly charged with the Offence againſt the Statute, may acquit ſome and find others guilty; becauſe tho' the Words of the Information be joint, yet in Judgment of Law, each Defendant is ſeverally charged for his own Offence. And in like Manner [e] it ſeems, That the Defendant in ſuch Information may be found guilty for a leſs Time or Degree than is laid, unleſs the Offence conſiſt in the Doing ſome entire Thing, which muſt be preciſely proved in the ſame Manner as it is laid.

Sect. 9. 9*thly*, That the Court in judging upon a ſpecial Verdict is confined to the Facts expreſly found, and cannot ſupply the Want thereof, as to any material Part by any Argument or Implication from what is expreſly found; and therefore where an Indictment ſet forth that the Defendant diſcharged a Gun againſt *J. S.* and thereby gave him a mortal Wound, *&c.* and the Special Verdict found that he diſcharged a Gun and thereby killed *J. S.* but did not expreſly ſay, that he diſcharged it againſt *J. S.* it was [f] adjudged, That the Court could not take it from the other Circumſtances of the Fact, which were expreſly found, tho' they were as full to the Purpoſe as poſſibly they could well be, that the Defendant diſcharged the Gun againſt *J. S.*

Sect. 10. 10*thly*, That it hath been [g] adjudged, That where an Indictment found at the Aſſizes is removed into the King's Bench by *Certiorari*, and there the Defendant pleads Not guilty, *& de hoc ponit ſe ſuper patriam*, *&* T. F. *Miles Coronator & attornatus Dom' Regis, &c. ſimiliter*, and thereupon the Defendant is found guilty of the Offence *in Indictamento prædict' interius ei impoſit' prout prædict'* T. F. *interius verſus eum queritur*, the Verdict is good; for theſe Words *prout prædict'* T. F. *interius verſus eum queritur* ſhall be rejected as Surplus, [h] repugnant and void, and the Verdict is compleat without them.

[a] Poph. 202. 1 Salk. 385. State Trials, Vol. 2. f. 60, 61. Vol. 4. f. 160, 161. In the Year-Book of 11 H. 4. 2. pl. 3. Abridged Fitz. Verdict, 18. It is agreed, That ſuch Verdict is repugnant, and therefore the Court would not receive it, but ſent the Jury back again, whereupon they found both the Defendants guilty.

[b] State Trials Vol. 4. f. 160, 161.

[c] State Trials, Vol. 4. f. 160, 161.

[d] Yet it hath been holden, That on an Indictment of Burglary and other Felony againſt A. and B. the Jury cannot, upon the very ſame Evidence againſt both, find A. guilty of the Burglary, and B. of the Felony only, 1 Sid. 272. pl. 4.

[e] *Vide ſupra* Ch. 26. Sect. 75.

[f] *Vide ſupra*, ch. 26 ſect. 75. and State Trials, Vol. 4. f. 160, 161.

[g] Kely 112. & 2 Saund. 3 8.

[h] *See* B. 1 Ch. 30. Sect. What is a good Verdict on an Indictment of Forgery, B. 1. Ch. 70. Sect. 27.

Sect. 11. 11*thly*, That it hath been [a] adjudged, That if the Jury acquit a Priſoner of an Indictment of Felony againſt manifeſt Evidence, the Court may, before the Verdict is recorded, but [b] not after, order them to go out again and reconſider the Matter; but this is by many thought hard, and ſeems not of late Years to have been ſo frequently practiſed as formerly. Alſo there are [c] Inſtances where Defendants acquitted againſt plain Evidence, of Felonies and other enormous Crimes, have been bound to their Good Behaviour. However it is ſettled, That the Court cannot ſet aſide a Verdict which [d] acquits a Defendant of a Proſecution properly criminal, as it ſeems that they may a Verdict that [e] convicts him for having been given contrary to Evidence, and the Directions of the Judge, or any Verdict whatever for a [d] Miſtrial.

[a] 1 And. 104. Crompt. Juſt. 114. pl. 6. Aleyn 12. *Vide* State Trials Vol. 2. *f.* 60, 61.

[b] Crompt. Juſt. 114. pl. 6. Fitz. Coro. 108.

[c] Cro. Ca. 292. againſt the Opinion of Cro. and Berkely, and Cro Ja. 507.

Vide State Trials, Vol. 2. *fol.* 60, 61. where the Court upon the Acquittal of the Defendants of the Indictment againſt them for a Rior, committed them for their Contempt to the Court, during the Trial. [d] Agreed in the Caſe of the *King* and *Bennet*, *Hill.* 4 *Georg.* wherein it was holden by ſix of the Judges againſt ſix, That a new Trial was not grantable upon an Acquittal on an Information in the Nature of a *Quo Warranto*, becauſe it founds in the Criminalty. 1 Keb. 124. pl. 33. 2 Keb. 403. pl. 14. 404. pl 18. Whether it be grantable for a corrupt Practice in obtaining a Verdict. 1 Lev. 9. 10, 124. 1 Sid. 153, 154. 1 Keb. 546. pl. 47. 568. pl. 16. 590. pl. 54. 3 Keb. 179. pl. 2. 409 pl. 31. Shower 336. That it is not grantable where the Acquittal was occaſioned by a Slip in an Indictment of Perjury in varying from the Original Record. 2 Keb. 409. pl. 31. [e] Adjudged 2 Jon. 163. 3 Keb. 525. 1 Lev. 9. But it is doubted, 1 Keb. 124. pl. 33. 127. pl. 43. 5 Mod. 350. 1 Sid. 49. pl 12. and the contrary is ruled. 2 Keb. 396. pl. 81. 403. pl. 14. [f] *See* 6 Co. 14. b. 1 Keb. 546. *Supra*, Ch. 23. Sect. 92. and Ch. 36. Sect. 15.

CHAP. XLVIII.

Of Judgment.

Sect. 1. HAving ſhewn already what Judgment is good on an Information, or Action *qui tam*, and *Ch.* 33. *Sect.* 135. *&c.* where it may be ſaved by an Award of Tranſportation, and *Ch.* 25. *Sect.* 49. That Judgment in High Treaſon, not being for counterfeiting the Coin or Seal, *&c.* ſhall not be arreſted for Miſwriting or Miſpelling, or falſe or improper *Latin:* Having alſo premiſed, That by the Courſe of the Court of King's Bench, upon every Conviction in that Court, of a Crime [f] capital or not [g] capital, whether by * Verdict or Confeſſion, the Party is to have four Days to move in [h] Arreſt of Judgment, if there be ſo many Days remaining of the Term; and if not, [i] then the longeſt Time that can be had in the Term: Having alſo premiſed, That on a Conviction of Homicide *ſe defendendo*, or *per infortunium*, no [k] Judgment at all is to be given, but the Party let to Mainpriſe in Order to purchaſe his Pardon, I ſhall farther endeavour to ſhew the Nature,

[g] Algernoon Sidney's Caſe State Trials, Vol. 3. *fol.* 207, 231. Roſewell's Caſe, State Trials, Vol. 3. Knightley's Caſe, State Trials, Vol. 4. *fol.* 215.

[g] State Trials, Vol. 3. *fol.* 77. *State Trials, Vol. 4. *fol.* 210. [h] But in Saund. 301, 302. Chief Juſtice *Hale* refuſed to hear any Motion in Arreſt of Judgment of a ſcandalous Conſpiracy; but in my own Experience I never knew ſuch a Motion refuſed to be heard. [i] State Trials, Vol. 4 *fol.* 217. Yet in the Lord *Grey's* Caſe, State Trials, Vol. 3. *fol.* 77. the Court would not give Judgment on a Conviction for a Miſdemeanor, becauſe there were not four Days left of the Term. [k] H. P. C. 269. B. 1. Ch. 29. Sect. 24. *Supra*, Ch. 37. Sect. 2.

1. Of Judgments by expreſs Sentence to the Puniſhment proper for the Crime.
2. Of Judgments without any ſuch Sentence.

Of Judgments by ſuch expreſs Sentence in Criminal Caſes there are two Kinds.

1. Such as are fixt and ſtated, and always the ſame for the ſame Species of Crimes.
2. Such as are diſcretionary and variable according to the different Circumſtances of each Caſe.

Sect. 2. And firſt of fixed and ſtated Judgments; as to which it ſeems [a] agreed, That the Law makes no Diſtinction between a Peer and a Commoner, or between a common and ordinary Caſe, and one attended with extraordinary Circumſtances; for which Reaſon it was [b] adjudged in *Felton*'s Caſe, who was convicted by Confeſſion of the Murder of the Duke of *Buckhingham*, that the Court could not order his Hand to be [c] cut off, nor make it Part of the Sentence that his Body ſhould be hanged in Chains, but that the Body after Execution being at the King's Diſpoſal might be hanged in Chains, or otherwiſe ordered as the King ſhould think fit.

[a] State Trials, Vol. 2. *fol.* 704.
[b] 3 Inſt. 31. Hetl. 126. Litt. Rep. 237. Rushworth's Collections, Part 1 *fol.* 640, 641.
[c] Agreed 3 Inſt. 140. 12 Co. 71. That the Court cannot order the Hand to be cut off in any Caſe wherein it is not the ſtated Judgment. *See B.* 1. Ch 21. Sect. 1 to 7.

Of ſuch fixt and ſtated Judgments, the moſt remarkable are thoſe for Treaſon and Felony, *Præmunire* and Miſpriſions.

Sect. 3. The ſettled [d] Judgment at [e] this Day againſt a Man for High Treaſon, not relating to the Coin, ſeems to be, That he ſhall be [f] carried back to the Place from whence he came, and from thence be [g] drawn to the Place of Execution, and be there hanged by the [h] Neck, and cut [i] down alive, and that his [k] Entrails be taken out and [l] burnt before his Face, and his Head cut off, and his Body divided into four Quarters, and his Head and Quarters diſpoſed of at the King's Pleaſure. And I find little or no Variation in Subſtance from this Judgment, but only in ſome Circumſtances, for which I ſhall refer to the Notes in the Margin and the *State Trials*.

[d] 3 Inſt. 210, 211. H. P. C. 268. S. P. C. 182. Letter E. Plow. Com. 387. b.

Co. Entr. 361. b. [e] In the Time of *Will. Rufus* Judgment was given againſt two convicted of High Treaſon, that one ſhould have his Eyes put out, and the other *in crucem tollatur*. *Madox*'s Hiſtory of the Exchequer, *fol* 6. [f] S. P. C. 182. Let. E. But this Clauſe is wholly omitted in H. P. C. 268. and 3 Inſt. 210. and in Pl. Com. 387. b. it is thus expreſſed, *quod prad' R. D. ducevetur per præfat' conſtabular' uſque dictam turrim* London, *& deinde, &c.* And in Co. Ent. 361. b. it is thus, *Quod prad' T. B. ducatur per præfat' Mareſc. uſque priſonam M.r' Mareſc' Domini Regis, &c.* [g] S. P. C. 182. Letter E. It is expreſſed, That he ſhall be drawn upon an Hurdle. And Plow. Com. 387. b. it is, That he ſhall be drawn through the Middle of the City of *London*, to the Gallows at *Tyburn*. Alſo in Co. Entr. 361. b. and 3 Inſt. 210. a particular Place of Execution is mentioned. [h] S. P. C. 182. b. and 3 Inſt. 110. But Plowd. Com. 387. b. Co. Ent. 361. b. and H. P. C. 268. it is only ſaid, *Quod ſuſpendatur*, without adding *per Collum* [i] 3 Inſt. 110. S. P. C. 182. Letter E. Plow. Com. 387. b Co. Ent. 361. b. But this is omitted H. P. C. 268. [k] This Clauſe is thus expreſſed, 3 Inſt. 210, 211. Plow. 387. b. Co. Entr. 361. b. *Quod interiora ſua extra ventrem ſuum capiantur* without mentioning the Cutting off of the privy Members; and ſo is H. P. C. 268. and the later Precedents. But S. P. C. 182. Letter E. is expreſs that they ſhall be cut off. [l] S. P. C. 102. Letter E. But in Plowd. Com. 387 b. Co. Ent. 361. b. 3 Inſt. 211. it is thus expreſſed, *ipſoque vivente comburantur.*

Sect. 4. It hath been always agreed to be the proper Judgment againſt a Man for High Treaſon at Common Law, in counterfeiting the King's [a] Coin or [b] Seal, That he ſhall be drawn to the Place of Execution, and there hanged by the Neck 'till he be dead. But there have been [c] great Opinions, That the Judgment againſt a Man for Clipping, and other Offences againſt the Coin, made Treaſon by Statute, ſhall be to be drawn, hanged and quartered, as for other High Treaſons; becauſe it is a general [d] Rule, That where a Statute makes an Offence Treaſon or Felony, it gives it the like Incidents that belong to a Treaſon or Felony by the Common Law; yet inaſmuch as High Treaſon at Common Law in counterfeiting the Coin had Judgment only of drawing and hanging; and it is a reaſonable Conſtruction, That the Makers of the Statutes, which made other Offences concerning the Coin High Treaſon, intended to give ſuch Offences the like [e] Incidents with High Treaſons againſt the Coin at the Common Law, and not to make inferior Offences of this Kind ſubject to a heavier Puniſhment than the greater; it ſeems to be [f] ſettled at this Day, That the Judgment for ſuch Offences ſhall be the ſame as for counterfeiting the Coin, *&c.* at the Common Law, *i. e.* of drawing and hanging, without quartering.

Sect. 5. It hath been [g] long [h] agreed, That the Judgment againſt a Man for Petit Treaſon is the ſame with that for counterfeiting the Coin, *viz.* That he ſhall be [i] drawn to the Place of Execution and there hanged by the Neck 'till he be dead.

Sect. 6. The Judgment againſt a [k] Woman, in all Caſes of Treaſon, whether High or Petit Treaſon, is, That ſhe ſhall be drawn to the Place of Execution, and there burnt.

Sect. 7. The Judgment againſt a Man or [l] Woman for Felony of Death, hath always been the ſame [m] ſince the Reign of *H.* 1. *viz.* That he or ſhe be [n] hanged by the [o] Neck 'till [p] dead, which in the [q] Roll is ſhortly enter'd thus, *Suſ. per coll.*

Sect. 8. For the Judgment of *Pain fort & dure* upon an Offender's Standing Mute, I ſhall refer to *Ch.* 30. *Sect.* 16.

Sect. 9. Judgment in *Præmunire* at the Suit of the [r] King, againſt the Defendant, being in * Priſon, is, That he ſhall be out of the King's Protection, and that his Lands and Tenements, Goods and Chattels ſhall be forfeited to the King, and that his Body ſhall remain in Priſon at the King's Pleaſure; but if the Defendant be condemned upon his [s] Default in not appearing, whether at the Suit of the King or [t] Party, the ſame Judgment ſhall be given as to the Being out of

[a] S. P. C. 182. Lett. E. 3 Inſt. 17. H. P. C. 268 Cro Ca. 383. 19 H 6. 47. b pl. 103. Abridged Fitz Coro 8. Bro. Treas. 9.
[b] Fleta B. 1. ch. 22. ſect 1
[c] S.P.C. 182. Letter E. 3 Inſt 17. H. P. C 19
[d] *See* B 1. ch. 40. ſect. 4.
[e] *See* 2 Jon. 233. *Supra*, ch 25 ſect. 147.
[f] Dyer 230. pl. 55. 2 Lev. 98. 2 Jon. 233. 3 Keb. 278. pl. 27. Raym. 234
[g] But Bract. 104 b it is ſaid, That they are burnt, *qui ſalutis dominorum ſuorum inſidiaverint*
[h] 3 Inſt. 211. H. P. C. 268. S. P. C. 182. Letter F. 19 H. 6 47. pl. 102. Abridged Fitz. Coro 7. Bro. Treaſon 8. 33 Aſſ. pl. 7. Abridged Bro. Treaſon, 15. Fitz Coro. 210.

[i] *See* 21 E. 3. 17. pl. 21. Abridged Fitz. Coro. 447. Bro. Coro. 38. where an Approver becoming Nonſuit, had Judgment to be hanged only, and not drawn, tho' he ſtood indicted of Petit Treaſon. But the Caſe is obſcure both in the Reports and Abridgments. [k] Preface to the 6th Report. H. H. C. 268. 3 Inſt. 211. S. P. C. 182 Letter F. Fitz. Coro. 383. 23 Aſſ. pl. 2. Abridged Bro. Treaſon, 26, 12 Aſſ. 30. Abridged Bro. Coro. 73 or 74. Treaſon, 12. Fitz. Coro. 170. 1 Ric. 3. 4. pl. 5. Abridged, Fitz. Coro. 46. [l] 1 Ric. 3. 4. pl. 5. Abridged Fitz Coro. 46. [m] 3 Inſt. 53. [n] S. P. C. 182, Letter G. H. P. C. 268. 3 Inſt. 211. Fitz. Coro. 227. *See* the Citations to the next Letter. [o] The Words *per collum* are omitted. Co. Entr. 60. b. 352. b. pl. 2. 353. b. pl. 3. 355. b. pl. 7. 360. pl. 13. and Raſt Entr. 42. b. pl. 2. 53. b. pl. 6. 55. b. pl. 6. [p] 3 Inſt. 53. 211. H. P. C. 268. 6 E 4 4 But this is omitted, 6 H. 4. 6. b. S. P. C. 182. Letter G. and in Raſt. Ent 42. b. pl 2. 53. b pl. 6. 55 b. pl. 6. the Precedents in Coke's Entr. cited to Letter o. comes only under an *&c.* [q] S P. C 182. Letter G. [r] Co. Lit. 129 b. 'tis agreed, 30 E 3. 11. Abridged, Fitz. Judgment. 145 And in 8 H. 4. 6. b. 7. a. Abridged Fitz Forfeiture, 13. Bro. Forfeiture. 12. *Præmunire*, 6, and 20. That ſuch Judgment ſhall not be given at the Suit of the Party, on 27 Ed. 3. but in the two laſt Citations 'tis holden, That the ſame Judgment ſhall be given at the Suit of the Party on 16 Ric. 2. * 3 Inſt. 218. *Supra* B. 1. ch. 19. ſect. 14, 45. Co. Lit. 129. b. 130. a. [s] *Vide* B. 1 ch. 19. ſect. 14. Raſt. Entr. 466. b. 467. b. 3 Inſt. 125, 218. Dalt. ch. 90. [t] 8 H 4. 6. b. 7 a. Abridged Fitz. Forfeiture, 13. Bro. Forfeiture, 12. *Præmunire*, 6 20. 30 E 3. 11. b. Abridged Fitz Judgment, 145. 44 E 3. 7 pl. 6. Abridged, Fitz. Reſponder, 35. 39 E 3 37. Abridged, Fitz Return de Vicount, 61. Attorney. 36. 8 H. 6. 3. pl. 8. Abridged, Bro. *Præmunire*, 8, 20.

the King's Protection, and the Forfeiture; but inſtead of the Clauſe, that the Body ſhall remain in Priſon, there ſhall be an Award of a *Capiatur*.

Sect. 10. The Judgment againſt a Man for Miſpriſion of High Treaſon [a] is, That he ſhall be impriſoned during his Life, and forfeit all his Goods, and the Profits of his Lands during his Life.

Sect. 11. The Judgment againſt a Man for drawing a Sword on a Judge, or ſtriking any Perſon in the [b] Preſence of the King's Higher Courts, is, that he ſhall be impriſoned during Life, and forfeit his Goods, and the Profits of [c] his Lands during Life, and that his [d] Right Hand ſhall be cut of at a certain Place.

Sect. 12. For the Judgments for [e] ſtriking in the King's Palace, for [f] reſcuing a Priſoner from the Superior Courts, [g] for Perjury, or [h] Forgery on the Statute, and for the villainous [i] Judgment in Conſpiracy at the Suit of the King, I ſhall refer to the Citations in the Margin.

Sect. 13. The Entry of the Judgment for a Defendant upon an Acquittal by Verdict, or upon the Plea of a Pardon is, *ideo conſid' eſt quod præd'* A. B. *de* [k] *præmiſſis eat inde die*, or *eat ſine die*, omitting [l] *de præmiſſis*; or *de proditionibus prædictis eat inde* [m] *quietus*; or [n] thus, *Quod ſit inde quietus, &c. & quod ipſe eat inde ſine die*; and upon the Plea of a Releaſe to an Appeal, and in other Caſes of like Nature, it is, *ideo conſid' eſt quod* [o] *præd'* A. *quoad ſectam præd'* B. *in præmiſſis eat inde ſine die*. And [p] *Staundforde* ſays, that upon the Acquittal of one arraigned of Treaſon or Felony, the Judgment is no other, but that the Court diſcharges the Defendant paying his Fees.

Sect. 14. Secondly, As to Judgments by expreſs Sentence, which are diſcretionary and variable according to different Circumſtances, I ſhall obſerve in general, that for Crimes of an infamous Nature, ſuch as Petit [q] Larceny, [r] Perjury, or [s] Forgery at Common Law, groſs [t] Cheats, Conſpiracy not requiring a vallainous Judgment, keeping a Bawdy-houſe, bribing [u] Witneſſes to ſtifle their Evidence, and other Offences of the like Nature, againſt the firſt Principles of natural Juſtice, and common Honeſty, it ſeems to be in great Meaſure left to the Prudence of the Court to inflict ſuch corporal Puniſhment, and alſo ſuch Fine and Lien to the Good Behaviour for a * certain Time †, *&c.* as ſhall ſeem moſt proper and adequate to the Offence, from the Conſidertion of the Baſeneſs, Enormity, and dangerous Tendency of it, the Malice, Deliberation and Wilfulneſs, or the Inconſideration, Suddenneſs and Surprize with which it was committed, the Age, Quality and Degree of the Offender, and all other Circumſtances which may any way aggravate or extenuate the Guilt.

[a] H.P.C. 128, 269. 3 Inſt. 36, 218. Bro. Treaſon, 19, 25.
[b] *See* B. 1. Ch. 21. Sect. 3. to Sect. 6.
[c] So is H.P.C. 131. And in 41 Aſſ. pl. 25. Abridged, Bro. Fines, 11. Forfeiture, 41. Reſtitut. 32. *Scire facias*, 160. 2 Roll. Abr. 76. pl. 5. Judgment was given, that the Lands ſhou'd be ſeiſed into the King's Hands, and the King anſwered of the Profits; after which the King granted over the Lands as forfeited, and then pardoned the Offence; and the Heir was reſtored upon a *Scire facias*. By which it appears that the Inheritance of the Lands was not forfeited.

(*Vide ſupra*, ch. 37. Sect. 54.) But in 1 Keb 751. the Judgment is, that the Lands ſhall be forfeited during Life; and Daliſon, 23. a *Quære* is made by what Law the Lands ſhall be forfeited any farther than during Life: Yet 3 Inſt. 140, 218. and 39 Aſſ. pl. 1. Abridged, Bro. Contempts, 9. Fitz. Aſſiſe, 333. Dyer, 188. pl. 10. Fitz. Judgment, 174. Coro. 280. S. P. C. 38. Lett. B. Owen, 120. Cro. Eliz. 405. Daliſon, 23. ſay, in general, that the Land ſhall be forfeited without adding for Life; and 22 Ed. 3. 12. pl. 26. Abridged, Fitz. Forfeiture, 21. That the Offender ſhall be diſinherited. [d] In this Part of the Judgment the Books above cited generally agree. [e] B. 1. Ch. 21. Sect. 1, 2. [f] B. 1. Ch. 21. Sect. 5. [g] B. 1. Ch. 69. Sect. 11, 13. [h] B. 1. Ch. 70 Sect. 12. [i] B. 1. Ch. 72. Sect. 9. [k] Co. Entr. 356. b. Raſt. Ent. 47. b. pl. 3. 48. a pl. 4. [l] Co. Entr. 358. a. pl. 9, 10, 359, b. Raſt. Entr. 51. b. pl 12. 56. a. pl. 5. 57. pl. 7. [m] Co. Entr. 360. b. Raſt. Entr. 51. pl. 11. [n] Raſt. Ent. 49. b. pl. 6. 57. pl. 7. * Raſt. Entr. 43. pl. 8. 50. pl. 10. [p] S. P. C. 182, Lett. I. [q] 3 Inſt. 218. B. 1. Ch. 33. Sect. 36. [r] State Trials, Vol. 3. fol. 487, 488. Hob. 62. [s] Raym. 81. 1 Sid. 142, 278. 3 Leon. 170. [t] Cro. Ja. 498. 2 Rol. Abr. 78. H. 1. [u] Keb. 849. Noy. 99, 103. [q] State Trials, Vol. 2. fol. 272. Raym. 376. * 1 Sid. 214 pl. 14. † *See* Cro. Ca. 55. a Decree of the Star-Chamber againſt a Judge for Bribery, that he ſhould be incapable of any Office of Judicature.

Sect. 15. And at this Day by Force of 5 *Annæ* 6. and *Georg.* 11. and 6 *Georg.* 23. ſet forth more at large, *Ch.* 23. *Sect.* 134 *to* 139. the Judges upon a Conviction for Larceny, may in their Diſcretion award the Offender to the Houſe of Correction, and for that and other Felonies within the Benefit of the Clergy, inſtead of giving the uſual Sentence, *&c.* may direct that the Offender be tranſported.

[a] Daliſon, 20. [b] 2 Inſt. 47, 201. Co. Lit. 135.

Sect. 16. But it [a] ſeems that the Court cannot be authoriſed by any Letters Patents, but only by Act of Parliament, to inflict a Puniſhment unknown to our Laws, as of [b] Baniſhment, *&c.*

[c] Salk. 56, 400.

Sect. 17. [c] *Note*, That the Court may aſſeſs a Fine, but cannot award any corporal Puniſhment againſt a Defendant, unleſs he be actually preſent in the Court.

[d] 11 Co. 43, 44. 1 Roll. Rep. 74. *&c.* *Supra*, Ch. 9. Sect. 16. 1 Lev. 126.

Sect. 18. *Note alſo*, That where there are ſeveral Defendants, a joint Award of one Fine againſt them all is [d] erroneous, for it ought to be ſeveral againſt each Defendant; for otherwiſe one who hath paid his proportionable Part might be continued in Priſon till all the others have alſo paid theirs, which would be in Effect to puniſh him for the Offence of another.

[e] Dy. 232. pl. 6. [f] Co. Litt. 127. a.

Sect. 19. It hath been [e] adjudged, that where a Man is to make Fine and Ranſom, the Ranſom muſt be treble the Fine at leaſt; but Sir [f] *Edwarde Coke* ſtrongly argues, That Fine and Ranſom are in legal Underſtanding the ſame Thing under different Names, called a *Fine*, becauſe it makes an End of the Buſineſs, and a *Ranſom*, becauſe it redeems from Impriſonment; for if they were different Things, it would follow that where the Books ſay, That a Man ſhall make a Fine and Ranſom, they muſt be taken to intend that he ought to pay two different Sums, of which there is no Precedent.

[g] Co. Litt. 260. a. Adjudged, Raym. 376, 377. and there ſaid that Cro. Ca. 251. is to be thus underſtood.

Sect. 20. A Fine is under the Power of the Court, during the Term in which it is ſet, and [g] may be mitigated as ſhall be thought proper; but after the Term it admits of no Alteration.

2dly. Of Judgments without an expreſs Sentence to the Puniſhment proper to the Crime, there are two Kinds,

1. Outlawry.
2. Abjuration.

[h] Finch of Law, 356. Dy. 223. pl. 24. Bro. Coro. 166. 3 Inſt. 212. [i] If the Judgment appear not by the Return of the Exigent to have been given by the Coroner it is erroneous, except in *London*, where the Mayor by Cuſtom is Coroner, and the Judgment is given by the Recorder. Co. Litt. 288. Bro. Utlagary, 31. Dy. 317. pl. 6. 8 Co. 126. a. 21 H. 7. 33. Cro. Eliz. 648. pl. 3. [k] Reg. Jud. 2. a. [l] 3 Inſt. 212. [m] Co. Litt. 128. b. 288. b. 28 Aſſ. pl. 49. Abridged, Bro. Nonability, 25. 3 Inſt. 212. Thelcal, B. 1 Ch. 15. S. 20. [n] Co. Litt. 288. a. But the contrary ſeems to be holden, Dy. 223. pl. 23. 25. and it is made a *Quære*, 38 E. 3. 14. a. b. [o] *Vide* Raſt. Ent. 332. a. b. [p] Finch of Law, 467. 3 Inſt. 52. 212. State Trials, Vol. 3. fol. 324. Bro. Coro. 166.

Sect. 21. Judgment of Outlawry is [h] given by the [i] Coroner at the fifth County-Court upon the Party's not appearing to the Exigent, (which is a [k] Writ commanding the Sheriff to cauſe the Defendant to be demanded from County-Court to County-Court until he be outlawed, *&c.*) and ſuch Judgment is [l] entred thus, *Ideo, &c. per judicium coronatoris Domini Regis comitatus prædict' utlagatus eſt.*

Sect. 22. It ſeems [m] agreed, that when a Judgment of Outlawry for Treaſon or Felony appears of Record by the Sheriff's Return of the Exigent; and it hath been [n] holden, That if it appears not by ſuch Return, but only by the Coroners Return of a [o] *Certiorari* to them directed to certify whether the Party were outlawed or not, the Party is as much [p] at-

tainted, and ſhall forfeit and loſe as much as if Sentence had been given againſt him upon Verdict or Confeſſion.

Sect. 23. If ſuch [a] Outlawry appear to the Court to be erroneous, whereof any one as *amicus Curiæ* may inform them, the Party ſhall have Counſel aſſigned him to take Advantage of the Error; but if he will neither bring a Writ of Error, nor plead in convenient Time, and the Outlawry be voidable only and not void, the proper Execution ſhall be [b] awarded againſt him, but no Sentence pronounced, becauſe the Outlawry is a Judgment, and no Man ſhall have [c] two Judgments for one Offence.

Sect. 24. For the Nature of Abjuration, (which was alſo an [d] Attainder of it ſelf) being wholly obſolete at this Day, I ſhall refer to the Citations [e] in the Margin.

Sect. 25. It ſeems to be generally [f] agreed, that a Man can no other way be attainted of Treaſon or Felony at this Day but only by Judgment by expreſs Sentence, or by Outlawry or Abjuration; and therefore where an Appellee was ſlain in the Field upon a Wager of Battle, [g] Judgment was given, *Quod ſuſpendatur per collum* in order to intitle the Lord to his Eſcheat. But I know of no other Caſe wherein it is clear at this Day, that a Man may be attainted after his Death: It is ſaid indeed in a Note in *Fitzherbert*'s [h] *Abridgment* of a Caſe in the Time of *Edward* III. that in *Eyre* it hath been ſeen that a Man hath been attainted by Preſentment after his Death; alſo it was holden by * *Markham* in the Time of *Henry* IV. that if he who levies War againſt the King be ſlain in Battle, his Lands may be ſeiſed by the King. And it is ſaid in the [k] *Fourth Report*, That if one aiding the King's Enemies be ſlain in open Rebellion, and the Chief Juſtice of the King's Bench, who is the Sovereign Coroner of *England*, make a Record of it upon the View of the Body, and return it into the King's Bench, he ſhall forfeit his Lands. And this ſeems agreeable to 34 *E.* 3. 12. whereby the King expreſly reſerves his Prerogative as to Forfeiture of Wars, but grants that he will in no other Caſe ſeize Lands for Treaſon whereof the Party is not attainted in his Life. Yet the contrary Opinion ſeems to be holden in the *Firſt* and *Third* [m] *Inſtitutes*, and alſo by [n] *Hale*; and to this [o] *Staundforde* ſeems alſo to incline.

[a] 3 Inſt. 212, 213.
[b] State Trials, Vol. 3. f. 323, 324, 334, 335.
[c] Finch of Law. 389, 467. S. P. C. 34. Lett. C. 117. Lett. C. 122. Fitz. Coro. 313, 335.
[d] 11 H. 7. 4. pl. 10. Abridged, Bro. Coro. 226 or 227.
[e] 27 Aſſ. pl 54. Abridged, Bro. Coro. 110. 9 Ed. 4 28. b. pl. 41. Abridged, Bro. Coro 55. 12 Co. 100. Fitz. Eſcheat, 14.
[f] *Supra*, Ch. 23. Sect. 53. Ch. 36. Sect. 1. Yet Sentence was given upon one Outlawed of Felony, 3 H. 7. 7 pl. 5. Abridged, Bro. Coro. 134 or 135.
[g] Finch of Law, 389, 467. S. P. C. 34. Lett. C. 117. Lett. C. 122. Lett. C. Fitz. Coro. 313, 335. 3 Inſt. 216, 217.
[h] *Supra*, Ch. 9. Sect. 44. and Ch. 32. Sect. 6. 3 Inſt. 216, 217.
[i] Bro Coro. 166. and the other Books under-cited.
[k] Fitz. Judgment, 225. Co Litt. 390. a. 3 Inſt. 212. 2 Inſt. 283. Plowd. Com. 261. b. 262. a. Bro. Eſcheat, 24.
[l] Fitz. Petition, 2. Co. Lit. 390. a. *Vide* Fitz. Coro 290, 312, and the next Chapter, Sect. 16. where a Felon killed in the Purſuit forfeited his Chattels, and the Year, Day and Waſte, and the Meſne Profits of his Lands from the Time of the Felony. * 7 H. 4. 46. b but denied by Gaſcoign; and 'tis ſaid by Brown, in Plowd. Com. 263. a. that the ancient Law was ſo. *See* alſo Plowd. Com. 262. a. and Dalt. Ch. 89.
[m] 4 Co. 57. b. 3 Inſt. 27. Co. Litt. 13.
[n] H. P. C. 10. S. P. C. 188, 189.

CHAP.

CHAP. XLIX.

Of Forfeiture of Lands and Goods, Loſs of Dower, and Corruption of Blood.

AND now I am to ſhew the Conſequences of an Attainder or Conviction of Treaſon and Felony, which I ſhall conſider under the following Particulars.

1. What ſhall be forfeited by the Offender.
2. Where his Wife loſes her Dower.
3. How far his Blood is corrupted.

As to the firſt Point, I ſhall endeavour to ſhew,

1. What is forfeited by the Common Law,
2. What by Statute.
3. To what Time the Forfeiture ſhall relate,
4. What ſhall be done with the Goods of an Offender before they are actually forfeited.

As to the firſt Particular, *viz.* What is forfeited by the Offender, by the Common Law, I ſhall endeavour to ſhew,

1. Where his Lands are forfeited by the Common Law.
2. Where his Goods.

Sect. 1. And firſt as to the Forfeiture of Lands, it ſeems agreed, that by the Common Law all Lands of Inheritance whereof the Offender was [a] ſeiſed in his own Right, and alſo all Rights of [b] Entry to Lands in the Hands of a Wrong-doer, are forfeited to the [c] King by an Attainder of High Treaſon, and to the Lord of whom they are immediately holden, by an Attainder of Petit Treaſon or Felony: And that the Lands whereof a Perſon attainted of High Treaſon dies [d] ſeiſed of an Eſtate in Fee are actually veſted in the King without any Office, becauſe they cannot deſcend, the Blood being corrupted, and the Freehold ſhall not be in Abeyance.

Sect. 2. But it ſeems [e] agreed, that by the Common Law ſuch Lands were not veſted in the actual Poſſeſſion of the King during the Life of the Offender without an Office.

Sect. 3. Alſo it [f] ſeems clear, That the Lord cannot enter into the Lands holden of him upon an Eſcheat for Petit Treaſon or Felony, without a ſpecial Grant, till it appear by due Proceſs that the King hath had his Prerogative of the Year, Day and Waſte.

[a] 3 Inſt. 19. 3 Co. 2, 3.
[b] 3 Inſt. 19. 3 Co. 2, 3.
[c] *See* the Statute of 25 Ed. 3, 2.
[d] Co. Litt. 2. 4 Co. 52. a. 1 Leon. 21. and *infra*, S. 23.
[e] 3 Co. 10. Co. Litt. 2. S. P. C. 191. D. Bro. Coro. 208, 210. 1 Leon. 21. *Infra*, S. 23.
[f] S. P. C. 191. D. Fitz. Trav. 48. Aſſiſe, 166.

Sect. 4.

Sect. 4. It is [a] said, That the Inheritance of Things not lying in Tenure, as of Rents-Charge, Rents-Seck, Commons, *&c.* shall be forfeited to the King by an Attainder of High Treason, and that the Profits of them shall be also forfeited to the King by an Attainder of Felony during the Life of an Offender, and that the Inheritance shall be extinguished by his Death; for it cannot escheat, because there is no Tenure, nor descend because the Blood is corrupted.

Sect. 5. But it is [b] said, That no Right of Action whatsoever to Lands of an Estate of Inheritance are forfeited, either by the Common Law, or by the Statute; and it seems agreed, That no [c] Right of Entry into such Lands whereof there is a Tenant by Feoffment, or other Title, nor [d] Use, (except only Lands conveyed [e] fraudently with an Intent to avoid a Forfeiture,) nor [f] Condition, were liable to be forfeited before the Statute of 33 *H.* 8. and that [g] Land in Tail could not be forfeited after the Statute of *Westm.* 2. but only for the Life of the Tenant in Tail, 'till the Statute of 26 *H.* 8. 13.

Sect. 6. It [h] seems, That the Profits of such Lands whereof a Person attainted of Felony is seised of an Estate of Inheritance in the Right of his Wife, or of an Estate for Life only in his own Right, are forfeited to the King, and that nothing thereof is forfeited to the Lord.

Sect. 7. It seems [i] agreed, That by Force of a special Custom a Copyhold of Inheritance may be forfeited by an Attainder or Conviction of Treason or Felony: Also it hath been [k] holden, That by Custom it may be forfeited for Treason or Felony, even without a Conviction; also it [l] seems the stronger Opinion, That it shall be forfeited by an Attainder of Treason or Felony of Common Right, without any special Custom, but [m] not by a Conviction only.

Sect. 8. It seems [n] agreed, That by the Common Law upon an Attainder of Felony, the King had a Right utterly to waste the Lands holden of any but himself, whereof the Person attainted was seised of an Estate of Inheritance, either in his own or in his Wife's Right. [p] And it is said by some, That the King hath both this Right, and also a Right to hold such Lands for a Year and a Day; but it is holden by others, That the Right to hold over the Lands for a Year and a Day was given to the King in Lieu of the Waste; and this seems [q] implied in *Magna Charta, Ch.* 22. which saying, That the King shall not hold over the Lands of those convicted of Felony, but for one Year and a Day, and making no Mention of the Waste, seems plainly to intimate that at the Time of the Making of that Statute the King was thought to have no other Right but only to the Year and Day. Yet the Statute of *Prærogativa Regis* made in the 17th of *Ed.* 2. having declared the King's Right to the Year and Day, and also to the Waste; it seems to have been the more general [r] Opinion since that Time, that he hath a Right to both. Indeed if this Statute had been against the express Purview of *Magna Charta*, it would have been clearly repealed by those many subsequent Statutes which repeal all Statutes contrary to *Magna Charta*; but

[a] 3 Inst. 19, 21.
[b] 3 Co. 2, 3. 7 Co. 13. *Vide infra*, § 23, 24, 25.
[c] Fitz. Entry congeable 8. 3 Co. 2, 3. 3 Inst. 19.
[d] 3 Inst. 19.
[e] 2 Roll Abr. 34. pl. 1, 2.
[f] 3 Inst. 19.
[g] 3 Inst. 19. S. P. C. 187. Plow. Com. 554, 555. Dyer 289. pl. 55. Co. Litt. 130, 372, 391.
[h] 3 Inst. 19. Fitz. Assise, 166. Forfeiture, 23. 4 Ass. pl. 4.
[i] 2 Jon. 151. 1 Lev. 263. 1 Leon. 1.
[k] 1 Bulst. 13. 2 Brownl. 217, 218, 219, 220. *See* Godbolt, 267. 2 Vent. 38, 39. 2 Jon. 189. 2 Vent 38, 39. 5 Co. 117. b. 2 Keb. 451. pl. 23. Coke's Copyholder, Sect. 58.
[m] 1 Lev. 263. 2 Keb. 451. pl. 23.
[n] 4 Co. 124, b. S. P. C. 190, 191. Staundf. Prerog. 48, 49, 50.
[p] Fitz. Coro. 327. *Title* Fitz. Coro. 332.
[q] *Vide* 2 Inst. 36, 37. S. P. C. 190, 191. Staundf. Prerog. 48, 49, 50.
[r] *See* the Books abovecited. Yet it seems admitted 8 Ed. 3. Fitz. Traverse, 489. Prescription, 50. That the King was intitled to the Waste as to the Year and Day since this Statute. Bro. Coro. 206, 208, 209, 210. Fitz Coro. 290, 308, 310, 312, 327, 358. Register, 165. Fitz. Traverse, 19. S. P. C. 190, 191. Staundf. Prerog. 48. 49, 50. 49 Ed. 3. 11 pl. 3. 4 Co. 124. b. But 49 Ass. pl 21. the contrary seems to be holden. 2 Inst. 36, 37. Fitz Utlagary, 2. *See* also Fitz. Coro. 285, 390, 332, 344. And it seems agreed, That the King's Prerogative of the Waste is not grantable over, except only as to such Interests which by Virtue of it are actually vested in him. Fitz. Coro. 310. S. P. C. 191. Lett. E. Staundf. Prerog. 50.

being not contrary to the expreſs Words of it, but only to what is argumentatively drawn from it, it may be well argued that it is ſtill in Force.

As to the ſecond Point, *viz.* Where the Goods of the Offender ſhall be forfeited for Treaſon or Felony, I ſhall endeavour to ſhew,

Firſt, What Goods are liable to ſuch Forfeiture.
Secondly, In what Caſes.

Sect. 9. As to the firſt of theſe Particulars, it ſeems [a] agreed, That all Things whatſoever which are comprehended under the Notion of a perſonal Eſtate, whether they be in Action or Poſſeſſion, which the Party hath, or is intitled to in his own Right, and not as Executor or Adminiſtrator to another, are liable to ſuch Forfeiture.

Sect. 10. Alſo it [b] ſeems to be ſettled, That a Bond taken in another's Name, or a Leaſe made to another in Truſt for a Perſon who is afterwards convicted of Treaſon or Felony, are as much liable to be forfeited, as a Bond made to him in his own Name, or a Leaſe in Poſſeſſion

Sect. 11. Alſo it [c] ſeems to be in a great Meaſure ſettled, That the Truſt of a Term granted by a Man for the Uſe of himſelf, his Wife and Children, *&c.* is liable in like Manner to be forfeited, if fraudulently made with an Intent to avoid a ſubſequent Forfeiture; but that it ſhall be forfeited ſo far only as it is reſerved to the Benefit of the Party himſelf if made *bona fide*, whether before or after Marriage, for good Conſideration without Fraud, which is to be left to a Jury on the whole Circumſtances of the Caſe, and ſhall never be preſumed by the Court where it is not expreſly found.

Sect. 12. It hath been [d] adjudged, That a Power of Revocation of the Truſt of a Settlement reſerved to the Grantor is not liable to be forfeited, if it depend on ſomething Perſonal to be done by the Grantor himſelf, as the Making the Deed of Revocation under his own Hand and Seal.

2. Perſonal Things liable to Forfeiture ſhall be forfeited in the following Caſes.

Sect. 13. 1*ſt*, Upon a [e] Conviction of Treaſon or Felony.

Sect. 14. 2*ndly*, Upon a *fugam fecit* found before a Coroner, upon an Inquiſition of Death taken upon View of a dead Body; as to which it is [f] agreed, That where-ever a Perſon found Guilty by ſuch Inqueſt either as a Principal or as an Acceſſary [g] before the Fact, is found alſo to have fled for the ſame, he forfeits his Goods abſolutely, and the Iſſues of his Lands till he be acquitted or pardoned. Alſo it is [h] agreed, That where one indicted of any Capital Felony, either as Principal or Acceſſary before or after, before Juſtices of *Oyer*, *&c.* is acquitted at his Trial but found to have fled, he ſhall incur the like Forfeiture of his Goods, but not of the Iſſues of his Lands, becauſe by the Acquittal the Land is diſcharged, and conſequently the Iſſues. And it hath been [i] hol-

[a] Staundf. Prerog. 45, 46. S. P. C. 187. D. Cro. Ca. 566, 12 Co. 121. It is holden, Staundf. Prerog. 45. b. and S. P. C. 188. ch. 28. That a Felon ſhall forfeit the Goods of others ſtolen by him, but the Authorities cited to this Point, *viz.* 44 Ed. 3. 44. Fitz. Coro. 317, 318, 319, 323, 334, 379, 380. do not ſeem fully to come up to it except where ſuch Goods are waived, of ſuch a Nature as not to be diſtinguiſhable from others of the like Kind, as Corn out of a Bag, *&c.* *Vide* 2 Leon. 5, 6. 1 And. 19. Moor, 100. Dy. 309, 310. That a Term limited to Executors, and not veſted in the Party himſelf is not forfeitable.

[b] Cro. Ja. 312, 313. Hob. 214. and the Books cited to the following Section. [c] 2 Keb. 564, 608, 644, 763, 772. 1 Lev. 279. Lane, 54, 113. 1 Mod. 16, 38. Hardr. 466. 1 Ander. 294. Raym. 120. 2 Roll. Abr. 34 pl 1, 2. 1 Roll. Abr. 343. F. 5, 6, 7. March, 45, 88. 1 Sid. 260, 403. 1 Keb. 909. [d] 2 Keb. 564, 644, 763, 772. 1 Lev. 279. 1 Mod. 16, 38. *Vide infra*, ſect. 26. [e] 5 Co. 109. *Supra*, ch. 33. ſect 129. and the Books cited to the three foregoing Sections. [f] S. P. C. 183, 184, 198. c. 192. a. H. P. C. 271. Staundf. Prerog. 46. Keilw. 68. b. Dy. 239. pl. 36. 5 Co. 110. [g] *Sicus* if he be found Acceſſary after, for the Indictment is ſo far void. S. P. C. 184. A. B. *Supra*, ch. 9. ſect. 26. [h] S. P. C. 184 A. B. 191. G. H. P. C. 271. Keilw. 68. b. 5 Co. 110. Fitz. Forfeiture, 35. [i] H. P. C. 271. S. P. C. 184 B. Fitz. Coro. 206.

den,

den, That the Law is the ſame as to the Finding of a *fugam fecit* upon an Acquittal of an Indictment of Petit Larceny. But it is [a] certain, That the Party may in all Caſes, except that of the Coroner's Inqueſt, traverſe the Finding of a *fugam fecit*. Alſo it ſeems [b] agreed, That whenever the Indictment againſt a Man is inſufficient, the Finding a *fugam fecit* will not hurt him; and that in all Caſes the Particulars of the Goods found to be forfeited may be traverſed.

Sect. 15. 3*dly*, Upon a Default till the Award of an Exigent, as to which it is [c] agreed, That if one make ſuch a Default either upon an Appeal or Indictment of a capital Felony, he forfeits his Goods unleſs he was pardoned before the Exigent was awarded; and it hath been [d] holden, That the Law is the ſame as to ſuch a Default upon an Indictment of Petit Larceny: However it is clear, That where-ever Goods are ſo forfeited, they are not ſaved by an Acquittal at the Trial. But it ſeems [e] agreed, That they are ſaved by a Reverſal of the Award of the Exigent, for an Error either in Fact or in Law; as for the Impriſonment of the Defendant at the Time when the Exigent was awarded, or for a Defect in the Indictment, Appeal or Proceſs.

Sect. 16. 4*thl*, Upon a [f] Preſentment by the Oaths of twelve Men, That a Perſon arreſted for Treaſon or Felony, fled from, or reſiſted thoſe who had him in Cuſtody, and was killed by them in the Purſuit or Scuffle,

Sect. 17. 5*thly*, By being [g] waived or left by a Felon in his Flight, from thoſe who either actually do purſue him, or are apprehended by him ſo to do, whereby he forfeits the Goods ſo waived, whether they be his own [h] proper Goods, or the Goods of others ſtolen by him, which ſhall not be reſtored to the right Owners but upon a proper Proſecution, as hath been more fully ſhewn, *Chap.* 23. from *Sect.* 49 *to* 58.

Sect. 18. As to the ſecond Particular, *viz.* What is forfeited by Statute: It is enacted by 26 *H.* 8. 13. *That every Offender and Offenders being hereafter lawfully convicted of any Manner of High Treaſons by Preſentment, Confeſſion, Verdict or Proceſs of Outlawry, according to the due Courſe and Cuſtom of the Common Laws of this Realm, ſhall loſe and forfeit to the King, his Heirs and Succeſſors, all ſuch Lands, Tenements and Hereditaments, which any ſuch Offender or Offenders ſhall have of any Eſtate of Inheritance, in Uſe or Poſſeſſion, by any Right, Title or Means, within the Realm of* England, *or elſewhere within any the King's Dominions, at the Time of any ſuch Treaſon committed, or any Time after. Saving to every Perſon and Perſons, their Heirs and Succeſſors, other than the Offenders in any Treaſons, their Heirs and Succeſſors, and ſuch Perſon and Perſons as claim to any their Uſes, all ſuch Rights Titles, Intereſts, Poſſeſſions, Leaſes, Rents, Offices and other Profits, which they ſhall have at the Day of committing ſuch Treaſons, or at any Time before, in as large and ample Manner as if this Act had never been had nor made.* And the ſame is enacted in near the ſame Words by 5 & 6 *Ed.* 6. 11.

Sect. 19. And it is farther enacted by 33 *Hen.* 8. *That if any Perſon or Perſons ſhall be attainted of High Treaſon by the Courſe of the Common Laws, or Statutes of this Realm, in every ſuch Caſe every ſuch Attainder by the Common Law ſhall be of as good Strength, Value, Force and Effect, as if it had been done by Authority of Parliament; And that the King, his Heirs and Succeſſors, ſhall have as much Benefit and Advantage by ſuch Attainder, as well of Uſes, Rights, Entries, Conditions, as Poſſeſſions, Reverſions, Remainders and all other Things,*

[a] H. P. C. 271. 36 H. 6. 26. a. *Vide ſupra*, ch. 9. ſect. 51, 52. Fitz. Coro. 22.
[b] H. P. C. 271. S. P. C. 184. 47 Ed. 3. 26. pl. 72. Abridged, Fitz. Traverſe, 18. Bro. Coro. 17. Fitz. Coro. 181. Forfeiture, 28. S. P. C. 183. 185. D. Staundf. Prerog. 47. *Bro.* Coro. 8. Finch 352. 1 Rol. Abr. 793. 41 Aſſ. pl. 13. 22 Aſſ. pl. 11. Cro. El. 472. 5 Co. 110. b. 111.
[d] H. P. C. 271.
[e] 5 Co. 110. b. 111.
[f] 42 Ed. 3. 17, 18. H. P. C. 271. 1 Rol. Abr. 743. D. S. P. C. 184. D. Co. Litt. 259. Staund. Prerog. 47. Cro. Ja. 464.
[g] 5 Co. 109 b. Fitz. Coro 289, 290, 291, 317. S. P. C. 184. Lett. C. 189. 191. Lett. B. 192. A. 3 Inſt. 56, 227. Plowd. Com. 260. b. But Staundf. makes a *Quære* whether the Law in this Point be not altered by 34 E. 3. 12. taken Notice of above, ch. 48. ſect. 25. Staundf. Prerog. 46. a. S. P. C. 186. ch. 25. 5 Co. 109. Cro. Eliz. 611. pl. 18. 693. pl. 3.
[h] S. P. C. 186. ch. 25. and 29 E. 3. 29. b. Abridged, Fitz. Avowry, 253. ſeems expreſs to this Purpoſe. But 3 Inſt. 227. and 5 Co. 109. b. it is ſaid, That the Felon's proper Goods are not forfeited as Waifs, but as the Goods of a Fugitive.

as if it had been done and declared by Authority of Parliament, and ſhall be deemed and adjudged in actual and real Poſſeſſion of the Lands, Tenements, Hereditaments, Uſes, Goods, Chattels, and all other Things of the Offenders ſo attainted, which his Highneſs ought lawfully to have, and which they being ſo attainted ought or might lawfully loſe or forfeit, if the Attainder had been done by Authority of Parliament, without any Office, or Inquiſition to be found of the ſame, any Law, Statute, or Uſe of the Realm to the contrary thereof in any wiſe notwithſtanding.

Sect. 20. *Saving to all and every Perſon and Perſons, and Bodies Politick, and their Heirs, Aſſigns and Succeſſors, and every of them (other than ſuch Perſon and Perſons which hereafter ſhall be attainted of High Treaſon, and their Heirs and Aſſigns, and every of them, and all and every other Perſon and Perſons, claiming by them or any of them, or to their Uſes, or to the Uſes of any of them after the ſaid Treaſons committed,) all ſuch Right, Title, Uſe, Poſſeſſion, Entry, Reverſions, Remainders, Intereſts, Conditions, Fees, Offices, Rents, Annuities, Commons, Leaſes, and all other Commodities, Profits and Hereditaments, whatſoever they or any of them ſhould, might or ought to have had, if this Act had never been had or made.*

In the Conſtruction of theſe Statutes the following Points ſeem moſt conſiderable.

[a] S. P. C. 187. 3 Inſt. 19. Dyer 28.

Sect. 21. *1ſt*, It is [a] ſettled, That they are not repealed by 1 *Ma. Seſſ.* 1. *ch.* 1. which enacts, *That no Pains of Death, Penalty or Forfeiture in any wiſe enſue or be to any Offender or Offenders, for the Doing or Committing any Treaſon, Petit Treaſon or Miſpriſion of Treaſon other than ſuch as be in the Statute* 25 Ed. 3. *ordained and provided*; for the Words, *other than ſuch as be within the Statute of* 25 *Ed.* 3, *&c.* ſhall not be taken to refer to the Pains, Penalties and Forfeitures which are mentioned in the Beginning of the Sentence, but to Treaſons, Petit Treaſons and Miſpriſion of Treaſon, which are laſt mentioned.

[b] S. P. C. 187. Co. Lit. 372, 391. and the Books cited to the following Sections.

Sect. 22. *2ndly*, It is [b] agreed, That Eſtates in Tail are forfeited by Force of thoſe Words in 26 *H.* 8. *of any Eſtate of Inheritance*, which muſt be void, if they do not include Eſtates in Tail, for Eſtates in Fee-ſimple were forfeited before. Alſo it hath been [c] adjudged, That where Lands are given to a Man and his Wife, and the Heirs of their two Bodies, the Intail is forfeited by his Attainder, and the Heir as much diſabled as if the Gift had been made to the Heirs of his Body in general.

[c] Dy. 322. pl. 27. [d] 3 Co. 2, 3. 1 Leon. 270, 271. Moor 225. Hob. 340, 341. Cro. El. 389. cited and agreed, Cro. Ca. 428. 7 Co. 13. Moor 323. Lit. Rep. 100.

Sect. 23. *3dly*, It was [d] ſettled in the Marqueſs of *Wincheſter*'s Caſe, That the Right to a Writ of Error to reverſe an erroneous Common Recovery is not forfeited by theſe Statutes; alſo it is [e] agreed, That a meer Right of Action to Lands in the Hands of a Stranger, as of a Diſcontinuee, or of the Heir of a Diſſeiſor, is not forfeited: [f] But, That a Right of Entry into Lands to which a Perſon attainted of High Treaſon is intitled, is as much forfeited as Lands in Poſſeſſion; but yet that the King ſhall [g] not be adjudged in Poſſeſſion of ſuch Lands without an Office, and *Scire facias*, or Seizure on ſuch Office; for the Words, *That the King ſhall be deemed in Poſſeſſion without Office*, ſhall have this Conſtruction, That he ſhall be in Poſſeſſion without Office in the ſame Manner as he ſhould have been upon an Office found at Common Law: But at the Common Law, if a Diſſeiſee had been attainted of High Treaſon, and the Seiſin found by Office, the King ſhould not have been in Poſſeſſion, without a *Scire facias*, or a Seiſure at leaſt.

[e] 3 Co. 2, 3. Hob. 340, 341. 7 Co. 13. 4 Co. 58. a. [f] 3 Co. 2, 3. 10. [g] 3 Co. 11. a. 4 Co. 58. a. 1 Leon. 21. 9 Co. 95. a. *Supra*, Sect. 1, 2.

Sect. 24. 4thly, After two contradictory Judgments upon the ſame Point, it was at laſt [a] ſettled by a Majority of the Judges in *Stone* and *Newman*'s Caſe, That where a Tenant in Tail of the Gift of the Crown makes a Feoffment in Fee, the Reverſion being ſtill in the Crown, and afterwards is attainted of High Treaſon, the Right of the Intail is forfeited to the Crown: becauſe the Reverſion continuing always in the Crown, the Intail could not be diſcontinued, but the Heir might have entered after the Death of the Feoffor without bringing any Action; and tho' the Intail by ſuch a Feoffment be put in Abeyance as to any Benefit which the Feoffor himſelf may claim from it; yet ſince it is not turned to a Right of Action, and wou'd have continued ſtill in him for the Benefit of the Heir, if he had not been attainted, (as appears from the Form of a Writ of *Formedon*, which ſuppoſes that the Right deſcended to the Heir from the Feoffor, and conſequently that it was in him at his Death,) it ſhall likewiſe continue in him for the Benefit of the King.

[a] Cro. Ca. 427. *Vide* Plowd. Com. 552.

Sect. 25. 5thly, It was ſolemnly adjudged in the Exchequer-Chamber in [b] *Sheffield*'s Caſe, and a Judgment to the contrary in the Exchequer reverſed, That where one attainted of High Treaſon is ſeiſed of a defeaſible Eſtate in Tail, and hath at the ſame Time a Right to an ancient Intail which is diſcontinued, he forfeits both the Intail in Poſſeſſion, and the Right to the old Intail; for the firſt is within the expreſs Words of 26 *H.* 8. and the later within thoſe of 33. And it by no Means follows, that becauſe naked Rights of Action to Lands in the Hands of the Heir of a Diſſeiſor, or of a Diſcontinuee, are not within the Meaning of the Statute, as it is [c] ſettled that they are not; therefore alſo a Right to Lands in the Hands of the Perſon attainted himſelf is not within the Meaning of it; for the Forfeiture of ſuch naked Rights, might not only be of dangerous Conſequence in unſettling Poſſeſſions, but might alſo be highly prejudicial to Strangers whom the Statute by an expreſs Saving plainly intends to favour; but the Forfeiture of the Offender's Right to his own Lands can be of no Prejudice to any but himſelf and his Heirs, to whom the Statute is ſo far from intending any Favour, that it expreſly excludes them from all the Benefit of the ſaving Clauſe.

[b] Hob 334, &c. Palmer, 351. &c. 2 Rol. Rep. 305, &c.

[c] *Supra*, Sect. 23.

Sect. 26. 6thly, It ſeems [d] agreed, That a Power of revoking the Uſes of a Settlement may be forfeited by Force of 33 *H.* 8. if the Execution of it require nothing but what may be as well performed by any other Perſon, as by the Party himſelf, by whom it was reſerved, as the Tender of a Ring, *&c.* Alſo it was adjudged in [e] *Engleſield*'s Caſe, That the Mention of ſuch Conſiderations and Inducements for the reſerving of ſuch a Power of Revocation in the Preamble of it, as are inſeparable from the Perſon, do not alter the Caſe if nothing of this Kind be inſerted in the Proviſo it ſelf, by which it is reſerved. But it is agreed, That if the Proviſo by which ſuch a Power is reſerved require ſomething inſeparable annexed to the Perſon, it keeps it out of the Statute; and therefore in the [f] Duke of *Norfolk*'s Caſe, where there was this Proviſo, That if the Duke ſhould be minded to alter and revoke the Uſes, and ſignify his Mind in Writing under his Hand and Seal, that then, *&c.* it was clearly adjudged, That the Power of Revocation was not forfeitable, becauſe it depended on the Duke's Signifying his Mind in Writing under his proper Hand and Seal, which none but himſelf could do. Alſo it was adjudged in [g] *Main*'s Caſe, That the Law is the ſame where ſuch Proviſo doth not expreſly require the Party's Signifying a Change of Mind, but only that the Deed of Revocation be under his proper

[d] 7 Co. 12, 13. Poph 18. 1 And. 293. Moor. 303. 4 Leon. 135. Palmer, 433, &c. 1 Ro. Rep. 142.

[e] 7 Co. 12. and the other Books above-cited.

[f] Cited and agreed 2 Keb. 566, 763, 773. 1 Lev 279. Lane, 44. 1 Rol. Rep. 142.

[g] 7 Co. 13. Cited and agreed 1 Lev. 279. 2 Keb 566, 763, 773. 3 Inſt. 19.

[h] *Supra*, Sect. 12.

[a] Palmer, 429 Hand and Seal. [a] But if ſuch Proviſo require only the Tender of a Ring by the Feoffor, *ipſo adtunc declarante* that the Tender is to the Intent to avoid the Feoffment, it ſeems unſettled, whether it come within the ſame Conſtruction.

[b] Plow. Com. 381, 382 [c] Plow. Com. 379, &c. [d] Plow. Com. 379.

Sect. 27. 7thly, It [b] ſeems, That an Annuity granted to a Man *pro conſilio impendendo*, is not forfeitable by theſe Statutes; Alſo it ſeems [c] doubtful whether an Office granted to a Man for Life, and requiring Skill and Confidence, be forfeitable; but if it be [d] granted in Fee, it ſeems clear that it may be forfeited even by the Common Law; becauſe the Grantor in giving ſuch an Eſtate, which ſhall deſcend to all the Heirs of the Grantee however unqualified, ſeems plainly not to have been induced to make his Grant from any Conſideration of the peculiar Merit of the Perſons who are to execute the Office.

[e] 2 Lev. 169. 3 Keb. 459, 651, 712. 2 Mod. 130, 131. 2 Jon. 57. [f] Co. Litt. 130. and the Books above-cited.

Sect. 28. It hath been [e] adjudged, but not without great Difficulty, That an Act of Parliament that certain Perſons ſhall forfeit all their Lands, Poſſeſſions, Rights, Intereſts and Hereditaments, and other Things of what Nature ſoever, extends to Eſtates in Tail, by Force of the Words *all Intereſts of what Nature ſoever*. Yet it is [f] agreed, That the Statutes of *Præmunire*, which give a general Forfeiture of all the Lands and Tenements of the Offender extend not to Land in Tail.

[g] H. P. C. 8. 3 Inſt. 47, 90. Salk. 85. [h] Salk. 85.

Sect. 29. It is [g] holden, That a Saving againſt the Corruption of Blood in a Statute concerning Felony, doth by a neceſſary Conſequence ſave the Land to the Heir; becauſe the Eſcheat to the Lord for Felony is only *pro defectu tenentis*, occaſioned by the Corruption of Blood. Alſo it is holden, That a Saving of the Land to the Heir prevents the Corruption of Blood, and alſo the Loſs of Dower. But it hath been [h] adjudged, That a Saving againſt the Corruption of Blood in a Statute concerning Treaſon doth not ſave the Land to the Heir, becauſe in Treaſon the Land goes to the King by way of immediate Forfeiture, and not by Eſcheat.

[i] Fitz Forf. 3. 30. 30 H. 6. 5. a. S. P. C. 192. ch. 31. Fitz. Counterplea de voucher, 30 Co. Litt. 2. b. 8 Co. 170. 38 Ed. 3. 32. a. Plow. Com. 488. b. [k] Fitz. Forfeiture, 30. Staundf. Prerog. 48. S. P. C. 192. ch. 31. Bro. Relation. 31, Expoſition,

Sect. 30. As to the third Particular, *viz.* To what Time the Forfeiture ſhall relate: It ſeems [i] agreed, That the Forfeiture upon an Attainder either of Treaſon or Felony, ſhall have Relation to the Time of the Offence, for the avoiding of all ſubſequent Alienations of the Lands, but to the Time of the [k] Conviction, or *fugam fecit* found, *&c.* only as to Chattels; unleſs the Party were [l] killed in flying from or reſiſting thoſe who had arreſted him; in which Caſe it is ſaid, That the Forfeiture ſhall relate to the Time of the Offence.

[m] Cro. Car. 172, 173. 1 Jon. 217.

Sect. 31. But it ſeems [m] unſettled, Whether in *Præmunire* it ſhall relate to the Time of the Offence, or only to that of the Judgment.

[n] 8 Co. 170. Plowd. Com. 488. b. 38 Ed. 3. 32 a. But this is made a *Quære*, S. P. C. 191. Lect. D. and the contrary ſeems holden, Fitz. Coro. 290, 344. *See* alſo Fitz. Forfeiture, 16. Coro. 374. Finch. 326, 327.

Sect. 32. It ſeems the better [n] Opinion, That no Attainder whatſoever ſhall have any Relation as to the mean Profits of the Lands of the Perſon attainted, but only from the Time of the Attainder.

[o] Bract. B. 3. Ch. 8. Sect. 5. and Ch. 18. Sect. 1, 2. Flet. B 1. Ch. 26. Sect. 1, 2. 8 Co. 171. b. 7 H. 4. in the laſt Caſe. S. P. C. 193. a. State Trials, Vol. 1. fol. 994, 995. Vol. 4. fol. 65, 66, 454.

Sect. 33. As to the fourth Particular, *viz.* What ſhall be done with the Goods of an Offender both before and after they are actually forfeited: It ſeems to have been always [o] agreed, That one indicted or appealed of Treaſon or Felony may *bona fide* ſell any of his Chattels real or

[l] *Vide ſupra*, Sect. 16. S. P. C. 192. a. Fitz Coro. 290.

perſonal for the Suſtenance of himſelf and Family until they be actually forfeited.

Sect. 34. Alſo it ſeems [a] agreed, that the Goods of ſuch Perſon can in no Caſe be lawfully removed out of his Houſe until they be forfeited.

Sect. 35. Yet according to the general Tenour of the old [b] Books, the Goods of one [c] arreſted for Treaſon or Felony, may by the Purview of an ancient Statute, which * ſeems to continue ſtill in Force, be immediately inventoried and appraiſed, after which, and on Surety found that they ſhall be forth-coming, they ſhall be kept by the Bailiffs of the Party arreſted, and for want of ſuch Surety, by his Neighbours, till he be convicted, or found to have fled, *&c.* whereby they are actually forfeited.

Sect. 36. Alſo it was enacted by the Statute *de Officio Coronatoris*, (ſet forth more at large, *Ch* 9. *Sect.* 19, 20.) That where one is found guilty of Murder by a Coroner's Inqueſt upon View of a dead Body, the Coroner ſhall inquire what Goods he hath, and cauſe them to be valued and delivered to the Townſhip, *&c.* But ſo much of this Statute as enables the Coroner to ſeiſe the Goods, [cc] ſeems to be repealed by 1 *Rich.* 3. (ſet forth more at large *Sect.* 38.) unleſs the Party indicted be found alſo to have fled.

Sect. 37. Alſo it was enacted by 25 *Ed.* 3. 14. (ſet forth more at large *Ch.* 27. *Sect.* 116.) That in the ſecond *Capias* given by that Statute on the Return of a *Non inventus*, it ſhall be compriſed, that the Sheriff ſhall cauſe the Party's Chattels to be ſeiſed, and ſafely kept till the Day of the Writ or Precept returned, *&c.* and this is ſtill in [d] Force notwithſtanding the Statute of 1 R. 3. 3. for this prohibits only the Seiſing of the Goods of thoſe who are arreſted; and ſo far as it relates to this Purpoſe, is enacted as followeth.

Sect. 38. *And that no Sheriff, Under-Sheriff, nor Eſcheator, Bailiff of Franchiſe, nor any other Perſon, take or ſeiſe the Goods of any Perſon arreſted or impriſoned for Suſpicion of Felony, before that the ſame Perſon ſo arreſted and impriſoned be convicted or attainted of ſuch Felony according to the Law, or elſe the ſame Goods otherwiſe lawfully forfeited, upon Pain to forfeit the double Value of the Goods ſo taken, to him that is ſo hurt in that Behalf, by* [e] *Action of Debt*, &c.

Sect. 39. This Statute is ſaid to be in [f] Affirmance of the Common Law, and hath been [g] adjudged to extend as well to the Seizure of Money as of any other Chattel.

Sect. 40. It ſeems plain from this Statute, That Goods may be ſeiſed as [h] ſoon as they are forfeited; and it ſeems the whole Townſhip is anſwerable [i] for them to the King, and may ſeiſe them [k] where-ever they can be found.

[a] *See* the Citations to the foregoing and following Section.
[b] Fleta, B. 1. ch. 26 S. 2. Bract. B. 3. ch. 18. S. 2. Britton, f. 4. S. P. C. 52. Lett. C. 192. Lett. B. Staunf. Prerog. 47. b. 48 a. It is ſaid 26 Aſſ. pl. 32. Abridged, Bro. Coro. 102. That Juſtices of *Oyer*, *&c.* ſhall put the Chattels of Felons in Ireat preſently, *&c.* and deliver them to the Towns, *&c.* to anſwer to the King in *Eyre*. But this ſeems intended of the Chattels of one convict of Felony. And in 44 Aſſ. pl. 13. and 43 *E.* 3. 24 pl. 1. Abridged, Bro Coro. 9. Forfeiture, 7. Reſeiſer, 3. Office and Officer, 3. Fitz. Treſp. 7. Bar, 196. the 2d. it is ſaid, That no Miniſter of the King ought to take the Chattels of an Appellee of Felony away with him, but to ſeiſe them, and cauſe the Party to find Surety that they ſhall not be eloigned, *&c.* And if the Party cannot find Surety, he ought to deliver them to the Neighbours, *&c.* And in the laſt Caſe of 7 H. 4. Abridged, Fitz. Coro. 83. and Bro. Forfeit. 10. It is ſaid, that where one is indicted of Felony until he be attainted, his Goods ſhall not be removed out of his Houſe, but ſhall be kept by his Neighbours until, *&c.* and in the mean Time the Felon ought to live upon his Goods. *Vide* 41 Aſſ. pl. 3. Abridged, Fitz, Proceſs, 183. Bro. Forfeiture, 40. 13 H. 3. 13. pl. 6. in which Books it is ſaid, that Goods ſhall not be ſeiſed till they be forfeited. [c] the old Writ recited, Bract. B. 3. Ch. 18. Sect. 2. and Fleta, B. 1. ch. 26. Sect 2. is expreſs to this Purpoſe, Yet in 3 Inſt. 228. it is ſaid, that the Goods of any Delinquent cannot be inventoried, and the Town charged therewith before the Owner is indicted of Record; and a Note in H. P. C. 269. ſeems to be to the ſame Effect. * State Trials, Vol. 1. fol. 994, 995. Vol. 4. fol. 65, 66. S. P. C. 139. [cc] S. P. C 52. Lett. C. [d] S. P. C. 193. Staundf. Prerog. 48. [e] For Precedents of ſuch Actions, *See* 1 Lutw. 132. Cro. Eliz 749. [f] *Vide ſupra*, S. 33, 34, 35. S. P. C. 193. [g] Raym. 414. [h] Co. Litt. 391. [i] Fitz. Coro. 300, 347, 366. 13 H. 4. 13. pl 6. Abridged, Fitz. Forfeit. 32. 22 Aſſ. pl. 81. Abridged, Fitz. Coro. 181. Bro. Charge, 45. Forfeiture, 32, S. P. C. 193. B. 194. A. B. Staundf. Prerog. 47. b. 47 E. 3. 26. a. b. [k] 22 Aſſ. pl. 81. Abridged, Fitz. Coro. 181. Bro. Charge, 45. Forfeiture, 32. Staunf. Prerog. 47. b.

Sect. 41. And at the Common Law it was no [l] Plea for ſuch Townſhip, That the Goods were delivered to the Cuſtody of *J. S.* who imbezilled them, *&c.* But it is enacted by 31 *E.* 3. 3. *That if any Man or Town be charged in the Exchequer by Eſtreats of the Juſtices of the Chattels of Fugitives and Felons, and will alledge in diſcharge of him another which is chargeable, he ſhall be heard, and Right done to the other.*

Sect. 42. As to the ſecond Point, *viz.* Where the Wife loſes her Dower: It is agreed, that before the Statute of 1 *Ed.* 6. *ch.* 12. the Wife not only loſt her Dower at Common [a] Law, but alſo her Dower *ad oſtium eccleſiæ*, or *ex aſſenſu patris*, or by Special [c] Cuſtom (except that of [d] Gavelkind) by an Attainder of any Treaſon or [e] capital Felony, whether [f] committed before or after the Marriage, and whether the Land were in the Hands of a [g] Feoffee, or forfeited to the King, or eſcheated to the Lord of the Fee: And tho' the [h] Attainder were pardoned, *&c.*

Sect. 43. But it [i] ſeems that the Wife never forfeited Lands given jointly to her Husband and her, whether by way of Frank marriage or otherwiſe, but only [k] for the Year and Day and Waſte.

Sect. 44. Alſo it hath been [l] adjudged, That if a Husband having levied a Fine with Proclamations, is afterwards erroneouſly attainted of High Treaſon, and the five Years paſs after his Death, and then the Outlawry is reverſed, the Wife may purſue her Title of Dower within five Years after ſuch Reverſal; becauſe being barred of her Dower by the Attainder while it ſtood in Force, which Attainder ſhe could no way reverſe, ſhe had no Remedy to purſue her Title of Dower within the five Years, and therefore ſhall not be barred by her Non-claim.

Sect. 45. It is enacted by 1 *Ed.* 6. 12. *Par.* 17. *That albeit any Perſon ſhall be attainted of any Treaſon or Felony whatſoever, yet that notwithſtanding every Woman that ſhall fortune to be Wife of the Perſon ſo attainted, ſhall be endowable and enabled to demand, have, and enjoy her Dower in like Manner and Form as tho' her Husband had not been attainted*, &c.

Sect. 46. But this is repealed as to Treaſon by 5 *&* 6 *Ed.* 6. 11 *Par.* 9. by which it is enacted, *That the Wife whoſe Husband ſhall be attainted of any Treaſon whatſoever, ſhall in no wiſe be received to ask, challenge, demand, or have Dowry of any the Lands, Tenements, or Hereditaments of the Perſon ſo attainted during the ſaid Attainder in Force.* And this hath been conſtrued [m] to extend as well to an Attainder of Petit Treaſon, as of High Treaſon.

As to the third Point, *viz.* How far the Blood is corrupted by an Attainder of Treaſon or Felony, the following Particulars ſeem moſt remarkable.

Sect. 47. 1ſt, It is [n] agreed, That by [o] ſuch an Attainder, the Blood is ſo far ſtained or corrupted that the Party loſes all the Nobility or Gentility he might have had before, and becomes ignoble.

Sect. 48. 2dly, It is alſo [p] agreed, That he can neither inherit as Heir to any Anceſtor, nor have an Heir.

Sect. 49. 3dly, It is alſo farther [q] agreed, That where-ever it is neceſſary for any one who would make a Title to another, to derive the De-

[l] Fitz. Coro. 300, 347. S. P. C. 194. Lett. B.

[a] S. P. C. 194. D. Co. Litt 31. a. 37. a 41. a. 392. b. Litt. § 747. 3 Inſt. 47, 211.

[b] Co. Litt. 37. a. 41. a. S. P. C. 195. A. Bract. 311. pl. 13.

[c] Co. Litt. 41. a. Bract. 311. pl. 13. Winch, 27.

[d] Bract. 311. pl. 13.

[e] Co. Litt. 41. a.

[f] Co. Litt. 31. a.

[g] 3 Inſt. 216. Savil, 54, 55. Co. Litt. 41. a. Benl 55, 56. 57 Dy. 140. pl. 42. Moor, 639. pl. 879 *Cont.* by Vaſor. Litt. Sect. 55

[h] 1 Leon. 3.

[i] Co. Litt. 37 3 Inſt. 216. Bract 129. pl. 14. 130. pl. 23.

[k] Bract. 129. pl. 14. *Supra* Sect 8. *Cont.* Bract. 130 pl. 23.

[l] 3 Inſt. 216. Moor, 639. pl 879.

[m] S. P. C. 195. Dyer, 140. pl. 42. Co. Litt. 37. a. 392. b

[n] 3 Inſt 211.

S. P. C. 195. B. But an Attainder of Piracy, (B. 1. Ch. 37. Sect. 6, 8. Co. Litt. 391.) or Petit Larceny corrupts not the Blood. B. 1. Ch. 33. Sect. 36. 3 Inſt. 211. Co. Litt. 41. a. Noy, 170. [p] Co. Litt. 8. a. 391. b. 392. S. P. C. 195. b. B. o. Nonability, 21. Coro. 66. [q] Cro. Ca. 543. Litt. Rep. 28. 1 Vent. 413, 417. Noy. 159, 166, *&c.* 1 Lev. 60. 1 Sid. 200, 201.

ſcent

ſcent thro' him, the Attainder is a Bar to ſuch Title, [a] unleſs the Land were intailed. And therefore if there be Grandfather, Father and Son, and the Father be attainted, it is clear, That the Son [b] cannot claim as Heir to the Grandfather of the Lands in Fee-ſimple, becauſe he muſt of Neceſſity derive the Deſcent thro' the Father, which by Reaſon of the Attainder he cannot do. And for the ſame Reaſon, if there be two Brothers, and one of them having iſſue a Son, be attainted, and either the Son or Uncle purchaſe Land and die without Iſſue, the other [c] cannot be his Heir, becauſe the Blood of the Father thro' whom the Deſcent muſt be convey'd, is corrupted. But it ſeems a [d] general Rule, That the Attainder of a Perſon who needs not be mentioned in the Conveyance of the Deſcent, does no Hurt, let the Anceſtor be never ſo remote; and *a fortiori* therefore it ſeems clearly to follow, that where one may claim as immediate Heir to another, without deriving the Deſcent thro' any other, he ſhall not be barred by the Attainder of any other. And therefore it ſeems [e] agreed, That if the Son of one attainted purchaſe Land, and have a Son and die, ſuch Son ſhall inherit him, becauſe he derives his Deſcent immediately from him. And for the like Reaſon it hath been [f] ſettled, That if a Man hath two Sons, and then be attainted, and one of the Sons purchaſe Lands and die without Iſſue, the other ſhall be his Heir, becauſe he may make his Title without mentioning the Father.

But Sir *Edward Coke* [g] ſays, That the Reaſon of this Caſe is, *becauſe the Attainder of the Father corrupts only the lineal Blood, and not the collateral Blood between the Brethren which was veſted in them before the Attainder*; but he ſaith, *That ſome have holden that if a Man after he be attainted have Iſſue two Sons, the one cannot be Heir to the other, becauſe they could not be Heir to their Father, for that they never had any inheritable Blood in them.* But the Ground of this Opinion ſeems to be overthrown by the Reſolution in the Caſe of *Collingwood* and *Pace*, wherein it was adjudged [h] in the Exchequer-Chamber by ſeven Judges againſt three, that the Sons of an Alien might be Heirs to one another if born in *England* or naturalized; and yet it is certain that they could not be Heirs to their Father. Alſo it ſeems to [i] be the better Opinion, that where a Perſon attainted hath Iſſue by a Woman ſeiſed of Lands of Inheritance, ſuch Iſſue may inherit the Mother, tho' he never had any inheritable Blood from the Father.

Sect. 50. 4thly, It ſeems clear, That notwithſtanding a Perſon attainted be to many Purpoſes looked upon as dead in Law, yet he hath a Capacity to [k] purchaſe Land, which the King ſhall have upon Office found. Alſo if the Father of a Perſon attainted die ſeiſed of an Eſtate of Inheritance during his Life, no [l] younger Brother can be Heir, but the Land ſhall rather eſcheat; for the elder Brother, tho' attainted, is ſtill a Brother, and no other can be Heir to the Father while he is alive: But it ſeems [m] agreed at this Day, That if he die before the Father, the younger Brother ſhall be Heir.

[a] 3 Co. 10. b Lit. S. 746, 747. 8 Co. 166. a.
[b] 1 Vent. 416, 418. Dalis. 14 pl. 3. Co. Litt. 392.
[c] Cro. Ca. 543. Dy. 274. pl. 40.
[d] 1 Vent. 413, 416, 425. Cro. Ca. 543.
[e] 1 Vent. 413, 417, &c. Litt. Rep. 28. Noy. 159, 166, &c. 1 Lev. 60. 1 Sid. 200, 201. *Vide* Bract B. 3. Ch. 14. Sect. 17.
[f] 1 Vent. 416. Co. Lit. 8. a. 4 Leon. 5. Cro. Ja. 539. 1 Rol. Abr. 625. pl. 5. Cro. Ca. 543. 1 Vent. 425 Palm. 19. 1 Lev. 59. 2 Rol. Rep. 93.
[g] 2 Sid. 25, 27. This is left doubtful Moor 569 pl. 775. Noy. 158, &c. Cont. Litt. Rep. 28.
[h] Co. Litt 8 a. 1 Rol. Abr. 625. pl. 5.
[i] 1 Sid. 193. Hard. 224. 1 Vent. 413. 1 Lev. 59.
[k] 1 Sid. 201. 1 Vent. 422, 426.
[l] Noy. 159, 167, 168, 169. 2 Sid. 248.
[m] This alſo appears from 13 H. 7. 17. cited S. P. C. 196.

Abridged Bro. Tenant by Curteſy, 15. and wherein it is holden, That if the Husband of an Inheritrix have Iſſue, and be attainted of Felony and pardoned, he ſhall not be Tenant by Curteſy by Reaſon of the Iſſue born before the Pardon, but by Reaſon of Iſſue born after he ſhall; from whence it neceſſarily follows, that ſuch Iſſue muſt be inheritable to the Wife. Alſo it is admitted, Co. Lit. 84. b. That the Iſſue of an Inheritrix by an Alien or a Perſon attainted may be in Ward, which could not be unleſs he could inherit the Mother. *Vide* Cro Ja. 539. Lit. Rep. 28. 1 Lev. 59, 60. But the contrary was anciently holden. 3 Co. 41. Bract. B. 3 Ch. 13. Sect. 19, 20. [k] Co. Lit. 2. b. [l] Fleta B. 1. Ch. 28. Sect. 9. Co. Litt. 8. a. 13. a. Bro. Mordanceſter, 36. S. P. C. 195. B. Bract. B. 5. Ch. Sect. 7. Fitz. Petition, 20. Mordanceſter, 28. Diſcent, 7. 1 Vent. 413, 417. 1 Lev. 60. Deſcent, 17. 29 Aſſ. pl. 11. Noy. 166, 170. 1 Sid. 195. 26 Aſſ. pl. 2. [m] *See* the Books next above cited, and Bro. Diſcent, 64. Cont. Bract. B. 3 Ch. 14. Sect. 17.

2

Sect. 51. 5thly, It is clear, That the Corruption of Blood from an Attainder is ſo High that it cannot be abſolutely ſalved but by Act of Parliament; for it ſeems [a] agreed, That the King's Pardon cannot reſtore the Blood ſo as to make the Perſon attainted capable either of inheriting others, or of being inherited himſelf by any one born before the Pardon. [b] Yet if ſuch Perſon have a Son born after the Pardon, and purchaſe Lands and die, ſuch Son may be his Heir, unleſs he have an elder Brother alive born before the Pardon; for a Pardon doth as it were make a Man a new Creature, and give him a new Capacity, in Reſpect whereof his Iſſue born after the Pardon may be his Heir, as to Lands purchaſed after the Pardon in the ſame Manner as if he had never been attainted.

[a] Co. Litt. 8. a. 391. b. 392. a. S. P. C. 195. B. 3 Inſt. 233. Dalis. 4 pl. 3. Cont. 9 H. 5. 9. a. [b] *See* the Books next above cited.

CHAP. L.

Of avoiding Judgments in Criminal Caſes.

FOR the better Underſtanding the Learning concerning the avoiding of Judgments in criminal Caſes, I ſhall endeavour to ſhew,

1. How ſuch Judgments may be avoided.
2. The Effect of ſuch Avoidance.

And firſt, ſuch Judgments may be avoided either,

1. Whithout Writ of Error.
2. By Writ of Error.

They may be avoided without Writ of Error two Ways.

1. For Faults apparent in the Record.
2. For other Matters *dehors* the Record.

Sect. 1. And firſt I ſhall endeavour to ſhew where ſuch Judgments may be avoided by Plea without any Writ of Error for Faults apparent in the Record; as to which it is obſervable, That notwithſtanding it be the allowed Practice of the Court of Common Pleas to ſuffer a Defendant coming in by [c] *Capias Utlagatum* the ſame [d] Term in which an Exigent is returnable, to avoid the Outlawry without Writ of Error, by ſhewing that he purchaſed a [e] *Superſedeas* out of the [f] ſame Court, and

[c] Co. Litt. 259. b. 1 And. 36. pl. 92. *Vide infra*, Sect. 9. *Secus* if he comes in *gratis*. Dyer 192. pl. 25. Cont. 39 H. 6. 27. b. Abridged Fitz. Reſponder, 52. Bro. Utlagary, 35. *Vide* 14 H. 4. 27. a. b. Fitz. idempnitate nominis, 3. Bro. Utlagary, 28. 30 H. 6. 3. a [d] 8 H. 6, 37. pl. 8. Abridged Fitz Error, 19. 19 H. 6. 2. a. Abridged Fitz. Error, 26. But ſome have holden, That an Outlawry cannot be avoided for this or any other Cauſe in another Term. Co. Litt. 259. b. 37 H. 6. 17. a. b Abridged, Fitz. Utlagary, 28. Bro. Error, 97. 37 H. 6. 17. a. b. Abridged Fitz. Utlagary, 28. Bro. Error, 97. 8 H. 6, 37. a. b. Con. adjudged 1 And. 36. pl. 93. [e] 19 H. 6. 44. a b. Abridged Fitz. Utlagary, 20. Bro. Utlagary, 21. 33 H. 6. 1. b. Abridged Fitz. Utlagary, 27. Bro. 2. 30 H. 6. 3. a. Abridged Fitz. Protection, 11. Bro. Utlagary, 74. 12 H. 4. 18. a. Abridged Bro. Utlagary, 14. 7 H. 4. 1. a Abridged Bro. Utlagary, 5. 8 H. 6. 7. a b. Fitz. Error, 42. 11 H. 4. 34. 33 H. 6. 1. b. 45. a. Abridged Fitz. Utlagary, 27. 1 And. 36. pl. 93. But 1 Rol. Abr. 743. pl. 2. The contrary is ſaid to have been holden, 36 Eliz. [f] 30 H. 6. 3. a. Abridged Fitz. Protection 11. *Secus* if the Superſedeas were from the Chancery, 7 H. 4. 5. b. Abridged Fitz. *Superſedeas*, 10. Bro. Utlagary, 65. Superſedeas, 8 *Vide* 18 H. 6. 18. a. b. Abridged Fitz. Error, 24. 7 Ed. 4 9. b. Abridged Fitz. Exigent, 1. Bro. Superſedeas, 31. F. N. B. 236. A.

[a] delivered it to the Sheriff before the *quinto exactus, &c.* or by ſhewing any [b] other Matter apparent on Record which makes the Outlawry erroneous, as the Want of an [c] Original, or the [d] Omiſſion of Proceſs, or Want [f] of Form in a Writ of Proclamation, *&c.* or a [g] Return by a Perſon appearing not to be Sheriff, or a [h] Variance between the Original and Exigent or other Proceſs, or the Want of ſuch Addition as [i] required by 1 *H.* 5. Yet it is ſaid in many [k] Books, to be the conſtant Courſe of the Court of King's Bench, never to reverſe an Outlawry on the Crown-ſide either in the ſame or a different Term, for [l] theſe or other Errors of the like Nature (as the [m] Want of a *Capias* to the Sheriff of the County whereof the Party is named, or a [n] Fault in the Indictment) without a Writ of Error; yet ſince Sir *Edward* [o] *Coke* ſeems to be of another Opinion, and ſince alſo it is clearly holden, That one may plead even a Matter of Fact in the King's Bench in Avoidance of an Outlawry of Felony which cannot be pleaded in Avoidance of any other Outlawry, as ſhall be more fully ſhewn, *Sect.* 6. I ſhall leave this Point to be farther conſidered. However it is [p] agreed, That a Conviction of Felony whereon the Party hath had his Clergy may be diſcharged by Exception to the Indictment, becauſe no Writ of Error lies of ſuch a Conviction, not being a Judgment.

Sect. 2. As to the ſecond Particular, *viz.* Where a Judgment may be avoided without Writ of Error for Matters *dehors* the Record, it is holden, That he who purchaſes Land of a Perſon who afterwards is [r] outlawed of Felony, or condemned upon his own [s] Confeſſion, may falſify the Record not only as to the Time wherein the Felony is ſuppoſed to have been committed, but alſo as to the Point of the Offence. But it is [t] agreed, That where a Man is found guilty by Verdict, a Purchaſer cannot falſify as to the Point of the Offence, but that he may falſify for the Time where the Party is found Guilty generally of the Offence in the Appeal or Indictment; becauſe the Time is not material upon Evidence.

Sect. 3. Alſo it ſeems [u] agreed, That any Judgment whatſoever given by Perſons who had no good Commiſſion to proceed againſt the Perſon condemned, may be falſify'd by ſhewing the Special Matter without Writ of Error, becauſe it is void; as where a Commiſſion authoriſes to proceed on an Indictment taken before *A. B. C.* and twelve others, and by Colour thereof the Commiſſioners proceed on an Indictment taken before eight Perſons only.

Sect. 4. Alſo it ſeems [x] agreed, That if the Treaſon or Felony of which a Man is attainted, be afterwards pardoned by Parliament, the Attainder may be falſify'd by himſelf or his Heir without Plea.

[a] 14 H. 4. 27. a. b. Abridged, Bro. Utlagary. 15. Long quinto Ed. 4, 5. Abridged Bro. Error, 155. Dyer 222 pl. 23. 223 pl. 26. and it is ſaid not to be material whether it were delivered to the Sheriff or not. Co. Lit. 128. b. Bro. Utlag. 8 E. 4. 42. a. Cont. Fitz. Error, 77. *Vide* Fitz. Error, 42. [b] Co. Litt. 259. b. 33 H. 6. 1 b; 4 a. a. Abridged Fitz. Utlagary, 27. [r] 11 H. 7. 4. b. Abridged, Bro. Ut. 78. 16 E. 4. 9. b. Abridged Bro. Error, 172. Fitz. Utl. 41. *Vide* 19 Ed. 4. 8. b. But it is agreed, That an Outlawry without any Original is not void, but voidable only. Fitz. Color, 45. Utlagary, 18. V. 7 H. 7. 5. b. Abridged Fitz. Error, 52. Keil. 19. b.

Bro. Utlagary, 45. Long quinto, Ed 4. 116. b. [d] 33 H 6. 1. b. 45, a. Abridged Fitz. Utl. 27. [g] H. 6. 37. pl. 8. Abridged Fitz. Error, 19. Bro. Utlagary, 19. 19 H. 6. 2. a. Abridged Fitz. Error, 26. Long quinto, Ed. 4. 116. b. Bro. Utlagary, 45. [f] Dy. 206. pl. 10. 11 H. 4. 34. a. [g] Dy. 41. pl. 7. [h] Fitz. Utlagary, 41. 38 H. 6. 31. a. Abridged Fitz. Utlagary, 31, 21 Ed. 3. 56. b. Abridged Fitz. Diſcontinuance, 3. 16 El. 4. 9. b. Bro. Error, 172. Fitz. Diſcontinuance, 17. 20 H. 6. 18. Abridged Fitz. Diſcontinuance, 22. 2 Rich. 3. 13. b. Bro. Miſnoſmer, 80. Variance, 90. [i] 8 H. 6. 37. a. Abridged Fitz. Error, 19. [k] And. 36. pl. 92. [l] Rol. Abr. 743. pl. 6, 7. 2 Inſt. 670. Cont. Bro. Utlagary, 34. 39 H. 6. 1. b. [k] 1 Rol. Abr. 743. Lett. C. 37 H. 6. 17. b. Abridged Fitz. Utlagary, 28. 4 E. 4. 42. a. b. 43. Abridged Bro. Error, 158. Utlagary, 67. 19 H. 6. 2. a. Abridged Fitz. Error, 26. *Vide* Palmer, 43. *Contra*, 11 H. 7. 4 b. Abridged Bro. Utlagary, 71. [l] Not for the Want of an Addition, 19 H. 6. 2. a. Abridged Fitz. Error, 26. 11 H. 6. 15. b. 54. [m] *Supra*, Ch. 27. Sect. 127. 9 H. 6. 15. b. Bro. Utlagary, 20, 34. 39 H. 6. 1. b. [n] 1 Bulſt. 109. 1 Sid. 144. [o] Co. Litt. 259. b. *Vide* 11 H. 7. 4 b. Bro. Utlagary, 78. 33 H. 6. 1. b. Abridged Fitz. Utlagary, 27. 8 H. 6. 37. a. b. Abridged Bro. Utlagary, 19. [p] Cro. Eliz 489, 490. [r] H. P. C. 270. 3 Inſt. 230. Yet the contrary ſeems holden, 49 Ed. 3, 11. 49 Aſſ. pl. 2. Bro. Coro. 205 or 6. 207 or 8. Fitz. Traverſe, 19. [s] H. P. C. 270. 3 Inſt. 231. Bro. Traverſe de Office, 35. 7 Ed. 4 1. 2. Fitz. Eſtoppel, 91. [t] *See* the Books above cited. [u] H. P. C. 270. 3 Inſt. 231. Plow. Com. 392, *&c.* [x] 3 Inſt. 232. H. P. C. 271. 8 Co. 79. b. *Vide Supra*, Ch. 37. S. 53. Cro. El. 72. Cro Eliz. 4. 'Tis ſaid that a Writ of Error lies on ſuch a Pardon. But this is contrary to 3 Inſt. 232. and 6 Co. 14. a. For the avoiding of an Outlawry by the King's Pardon, *vide Supra*, Ch. 49. S. 85. Fitz. Chart. 27. Bro. Error, 56. 18 Ed. 3, 38. Bro. App. 7. 92. 9 H. 5. 14. b. 15. a.

Sect. 5.

Sect 5. But it hath been [y] adjudged, that the King's Letters Patents reverſing an Attainder are void, unleſs they be afterwards made good by Act of Parliament.

Sect. 6. It ſeems generally agreed, that by the Common Law, in [z] *favorem vitæ*, an Outlawry of Treaſon or Felony might be avoided by Plea that the Defendant was in * Priſon, or in the King's Service beyond the † Sea, *&c.* at the Time of the Outlawry ** pronounced againſt him. But I take it to be generally [a] agreed, that no Outlawry for any other Crime, (againſt a Party [b] rightly deſcribed) can be avoided by the Plea of any Matter [c] of Fact whatſoever.

Sect. 7. And it is enacted by 26 *H.* 8. 13. and 5 *&* 6 *Ed* 6. 11. *That all Proceſs of Outlawry to be had or made within this Realm, againſt any Offenders in Treaſon, being reſiant or inhabited out of the Limits of this Realm, or in any of the Parts beyond the Seas at the Time of the Outlawry pronounced againſt them, ſhall be as good and effectual in Law to all Intents and Purpoſes, as if ſuch Offenders had been reſident and dwelling within this Realm at the Time of ſuch Proceſs awarded, and Outlawry pronounced,* [d] *Provided, that the Party ſo to be outlawed, ſhall, within one Year next after the ſaid Outlawry pronounced,* [e] *yield himſelf to the Chief Juſtice of* England *for the Time being, and offer to traverſe the Indictment or Appeal whereon the ſaid Outlawry ſhall be pronounced as is aforeſaid, that then he ſhall be received to the ſame Traverſe, and being thereupon found not guilty by the Verdict of twelve Men, he ſhall be clearly acquitted and diſcharged of the ſaid Outlawry, &c.*

Sect. 8. And it hath been [f] reſolved, that theſe Statutes extend as well to Treaſons by ſubſequent Statutes as to thoſe within 25 *Ed.* 3.

Sect. 9. It ſeems generally agreed, That any Outlawry whatſoever may be avoided by a Defendant's Coming in upon the [g] *Capias Utlagatum*, and pleading a [h] Miſnoſmer either of the Name or Addition in the Writ, *&c.* as by ſhewing that whereas he is called by ſuch a Name of [i] Baptiſm, or [k] Surname, he hath been always known by a different one, and not by that in the Writ, *&c.* or whereas he is named of ſuch Eſtate, Degree, or Myſtery, that he hath ſome other [l] Addition, and not that in the Writ, *&c.* Alſo it is ſaid in many [m] Books, that he may plead, that there is no ſuch Town as that whereof he is named. And it ſeems clearly agreed, That he may plead that at the Time of the Writ purchaſed, and ever ſince, he hath made his Abode at ſome [n] other Town, and not at that in the Writ, *&c.*

[y] 29 Ed. 3. 25. a. 1 Rol. A. 489. Letter Y.

[z] Co. L. 69 b. V. 10. H. 4 7. a. Abridged Fitz. Reſpon. 101.

* Fitz. Utl. 2, 11, 18, 27. 33 H. 6. 1. b. 7 H. 6. 25. a. Br. Utl. 18, 40. 38 Aſſ. pl. 17. 27 Aſſ. pl. 47.

Vide Fitz. Coro. 123. 8 H. 4. 13. b. 3 Inſt. 32. *Cont.* 21 Ed. 4. 73. b. Bro. Utl. 57. 1 H. 7. 13. Bro. Utlaga. 68. Coro. 128.

That he who pleads this Plea muſt ſhew in whoſe Cuſtody he was, and in what County, and muſt alſo aver his Plea; and by Ed. 3. 13. an Averment is given againſt the Teſtimony of a Sheriff or others, having no Record teſtifying ſuch Impriſonment.

† Fitz. Utl. 11. 2 E. 4. 1. a. b. Abridged Fitz. Reſpond. 54. 9 H. 4. 3. a. Fitz. Scire Facias, 64. 11 H. 7. 5. a. Bro. Utl. 79. 4 Ed. 4. 10. b. Cont. Fitz. Coro. 123. *Vide* 10 H. 4. 7. a. Abridged Fitz. Reſ. 201. 8 Co. 107. 9 Co. 207. Co. 31. b. Co. Litt. 74. a.

** Fitz Utlagary, 2, 48. Forfeiture, 19. Reſpond, 54. 101. 7 H. 6. 25. a. Abridged Bro. Utlagary. 18. 16 Ed. 4. 6. a.

[a] Co. Litt 259. b. [b] *Vide infra.* Sect. 9. [c] Not by the Plea of Impriſonment. Fitz. Utl. 27, 47. 33 H. 6. 1. b. 45. a. Nor by the Plea of being beyond Sea. Fitz. Utl. 27. 33 H. 6. 1. 45. a. [d] 5 *&* 6 E. 6. 4. [e] *Vide* State Trials. V. 3. f. 335. 3 Mod. 47. 4 Mod. 366. Sir Tho. Armſtrong's Caſe. [f] 3 Inſt. 32, 216. But ſee Dyer, 287. pl. 48. *See* alſo 2 Jon. 180. Error aſſigned for the Reverſal of an Outlawry of High Treaſon, that the Defendant was beyond Sea at the Time. [g] 33 H. 6. 1. b. 38. 45. a. Fitz. Utlagary, 22, 23, 26, 27, 29, 32, 35, 37, 44. Nonſuit, 6. Eſtoppel, 47, 54, 67. Dyer, 192. pl. 25. Bro. Utlagary, 1, 22, 23, 24, 25, 26. Miſnoſmer, 52. 1 Ed. 4 2 b. 21 H. 6 50. b. 5 H. 7 16. a. 7 Ed. 4. 1. 27 H. 8. 11, 12. 22 H. 6. 23. a. 19 H. 6. 80. a. b. 5 H. 5. 7. b. 28 H. 6. 2. b. *Vide* Fitz. Variance, 74. 19 H. 6. 58. a. 22 Ed 4. 37, 38. [h] 33 H. 6. 1. b. 45. a. But in the Abridgment of this Caſe, Bro. Utlagary, 2. The contrary ſeems to be holden, Fitz. Utlagary, 27. [i] Fitz Utlagary, 44. Bro. Utlagary, 1. 27 H. 8, 11, 12. [k] 14 Ed. 4. 6. b. Bro. Utlagary, 53. 19 Ed. 4. 24, 25. Bro. Scire Facias, 132. Miſnoſmer, 1. 27 H. 8. 11, 12. 12 H. 6. 7. b. So if one be called in the Writ the Son of *J. S.* he may plead that he is the Son of *W. S.* 10 Ed. 4. 12. b. Bro. idempnitate nominis, 9. [l] Fitz. Nonſuit, 6 Eſtoppel, 47, 67. 1 Ed. 4. 2. b. 21 H. 6 50. b. 28 H. 6. 2, b. Fitz. Utlagry, 32, 35, 37. Bro. Utlagary, 15, 24, 78. Miſnoſ. 52. 5 H. 7, 16. a. 7 Ed. 4. 1. 5 H. 5. 7 b. Abridged Bro. Utl. 15. Fitz. Utl. 37 But 'tis there ſaid, that ſome were of Opinion, That the Party ſhou'd be put to his Writ of Error, becauſe he is the ſame Perſon. *See* 38 H. 6. 1. Bro. Utl. 32, 51. 10 Ed. 4. 16. a. Bro. Scire Facias, 132. 9 Ed. 4. 24, 25. [m] Fitz Utl 23, 26. 22 Ed. 4. 37. b. 22 H. 6. 23. a. 33 H. 6. 51. a. Bro. Utl. 26. the 2d. *Vide* Raſt. Entr 300. pl 24, 301. pl 25, 26. But the contrary is holden. 33 H. 6, 1. b. Becauſe ſuch Plea would avoid the Outlawry againſt all Perſons Bro. Utl. 29. There is an Opinion to the contrary, but it ſeems not warranted by the Year Book. [n] Fitz. Utl. 22. 23, 25, 29, 30, 33. Eſtoppel, 54. Error, 23. 38 H. 6. 1. a. b. 28 H. 6. 2. a. b. 33 H. 6. 38 22 H. 6. 7 a 16. a. 23. a. b. 19 H. 6. 80. a. b. Dyer, 192. pl. 25. 2 E. 4. 1. b. Bro. Utl. 22, 25, 32, 33, 58. 21 Ed. 4 79. Keil. 101. Such Matter is pleaded without any Traverſe of the Place in the Indictment. *Vide* 22 E. 4. 37, 38. 20 H. 6. 19. b. It is adjudged 28 H. 6 Abridged Fitz. Utl. 25. That it is no Plea for one named of the Pariſh of C. that there are 3 Vills in the ſame Pariſh, viz. *D. E. F.* and that he was commorant at *D.* and therefore ought to have been named of it.

and it is [p] ſaid, That by ſuch Plea the Outlary ſhall only be avoided as to the Perſon who pleads it,(who ſhall [q] not be intended to be the Perſon meant) and ſhall ſtand in Force againſt the Perſon of the Name and Addition in the Record. But it is ſaid, That a Perſon of the ſame Name and Addition as are mentioned in a Record of Outlawry, [r] cannot avoid it by averring that there are two Perſons of ſuch Name and Addition, and that the Perſon intended is the Elder, and he himſelf is the Younger, but ſhall be put to his Writ of *idempnitate nominis*, which is ſaid by ſome to be the [s] only Remedy in ſuch Caſe after an Outlawry returned. And it ſeems, That notwithſtanding in Civil Cauſes [t] before an Outlawry is returned one of the ſame Name may come into Court, and ſhew [u] that he is not the Perſon intended; whereupon if the Plaintiff confeſs it, the Diverſity of the Names ſhall be entered on the Roll, and a new Exigent ſhall iſſue with a fuller Deſcription of the Perſon intended: Yet this * cannot be done upon an Indictment, without a Writ of *idempnitate nominis*, becauſe it would make the Proceſs variant from the Indictment, which cannot be altered without the Conſent of the Jurors.

39 H. 6. 1 b. Bro. Utl. 34, 73. 10 H. 6. 4. b. 30 H. 6. 2. pl. 9. Fitz. Er. 23. 21 H. 7. 13. pl. 16 But it is ſaid, 21 H. 6. 21. b. Abridged, Fitz Scire facias, 55. Bro. Utl. 23. That a *Cap. ad ſatisfac.* the Judgment is affirmed or diſaffirmed by the Affirmance or Avoidance of the Outlawry. *Vide* 22 H. 6. 16. a.

And now I am to ſhew how Judgments in Criminal Caſes may be avoided by Writs of Error; as to which having ſhewn already, *Ch.* 29. *Sect* 40. That the Reverſal of the Attainder of the Principal *ipſo facto*, reverſes that of the Acceſſory, I ſhall in this Place only obſerve the following Particulars.

Bro. Utl. 25. 19 H. 6. 58. a. b. Fitz Utl. 21.

Sect. 10. 1*ſt*, That it ſeems to be in a great Meaſure [a] ſettled, That a Writ of Error to reverſe an Attainder of Treaſon or Felony may be brought as well by the Executor as by the Heir of the Party, but [b] no other Perſon whatſoever.

[q] And for this Cauſe this is a good Plea in Avoidance of the Plea of Outlawry in Diſability Fitz. Nonability, 14. 21 H. 7. 13. pl. 16. 7 E. 4. 1. Br. Nona. 50.

Sect. 11. 2*dly*, That a Perſon attainted of Treaſon or Felony, before he can have a Writ of Error to reverſe his Attainder, muſt [c] aſſign his Errors, and thereupon have Leave from the Court to proſecute his Writ of Error.

[r] 21 H. 7. 13. pl. 16. 14 H. 4. 27. a. b. Fitz Idempn. nominis, 2, 3. *Vide* Bro. Utl. 29, 55, 56. 21 Ed. 4. 15. a. 54. a.

Sect. 12. 3*dly*, That no Writ of Error for the Reverſal of an Attainder of Treaſon or Felony is to be [d] allowed without an expreſs Warrant from the King, or the Conſent of the Attorney General.

13 H. 6. 7. b. Fitz Utl. 1, 24, 43. Variance, 74.

Sect. 13. 4*thly*, That an Attainder of Felony of a Perſon who had any Lands, ſhall never be reverſed by Writ of Error [e] without a *Scire facias* againſt all the Ter-tenants, and Lords mediate and immediate; but it is [f] ſettled, That ſuch *Scire facias* is not neceſſary in the Caſe of High Treaſon. Alſo it is [g] ſaid, That it is not neceſſary in the Caſe of Felony when it ſuggeſted on the Roll that the Party had no Lands, and the Attorney General confeſſes it.

[s] Fitz Utl. 6, 16. Reſp. 21. Nona. 17. [t] 21 E. 4. 15. a. 13 H. 7. 12. a. Bro. Idempn. nominis, 3, 5, 7, 8. Fitz. Idempn. nomi 3, 6, 7.

Sect. 14. 5*thly*, That it hath been [h] ſettled, That the Statute of 33 *H.* 8. 29. which enacts, *That if any Perſon ſhall be attainted of High Treaſon by the Courſe of the Common Laws or Statutes of this Realm, that in every ſuch Caſe, every ſuch Attainder by the Common Law ſhall be of as good Strength, Value, Force and Effect, as if it had been done by Authority of Parliament*, is to be intended of lawful Attainders by due Courſe of the Common Law, and not of erroneous and void Attainders, which therefore may be avoided in the ſame Manner as before.

Cont. F. N. B. 268. Lett. B. [a] F. N. B. 268 Lett. A. Bro. Idemp. nominis, 3, 4, 11. 14 H. 4. 27. Fitz Idemp. nominis, 5. 21 Ed. 3. 36. b. *Cont.* Fitz. Idemp nominis, 4. Bro. Idemp. nominis, 6. Long quinto, Ed. 4. 51. [b] Fitz. Idemp. nominis, 3. F. N. B. 268. Lett. B. Bro. Idemp nominis, 2, 11. 9 H. 4. 3. [c] Cro. El. 225, 273, 558. 5 Co. 111. a. Owen, 147, 148. 1 Leon. 325, 326. Salk. 295. Shower, 13. [d] *Vide* Salk. 60, 61. [e] 1 H. 7. 13. b. Bro. Err. 135. [f] 1 Sid. 69. 1 Bulſt. 71. 3 Mod. 42. 1 Ro. Rep. 175. [g] Dy. 34. pl. 20. 1 Keb. 141. pl. 11. 1 Sid. 316. 22 E. 4. 37. b. 3 Keb. 29. 4 E. 4. 10. pl. 14. Fitz. Err. 52. 7 H. 7. 5 b. 4 Ed. 4 10. pl. 14. [h] The Queen and Strafford, *Mich.* 12 *Annæ*, upon Examination of all the Precedents. [i] 2 Salk. 495. *Vide* 3 Keb. 29. [k] 3 Inſt. 214, 215.

Sect. 15. *6thly*, That it is alſo clear, That the Statute of [a] 28 *Eliz.* 2. which enacts, *That no Record of Attainder that then was of High Treaſon, where the Party is or hath been executed, ſhall be reverſed, avoided or impeached by any Plea or Writ of Error*, extends not [b] to Attainders ſince that Time.

Sect. 16. *7thly*, [c] That it hath been holden, That a Writ of Error lies in the King's Bench of an Attainder before the Lord High Steward.

And now I am in the ſecond Place to ſhew the Effect of the Avoidance of a Judgment, as to which I ſhall take Notice only of the following Particulars.

Sect. 17. 1*ſt*, That it is [d] agreed, That after an Outlawry of Treaſon or Felony is reverſed, the Party ſhall be put to [e] plead to the Indictment, for that ſtill remains good.

Sect. 18. 2*ndly*, That it is [f] ſaid by Sir *Edward Coke*, If the Judgment be erroneous, both that, and the Execution thereupon, and all former Proceedings ſhall be [f] reverſed by Writ of Error; but if the Execution be erroneous that only ſhall be reverſed.

Sect. 19. 3*dly*, That it hath been [g] adjudged, That if the King grant over the Lands of a Perſon outlawed for Treaſon or Felony, and afterwards the Outlary be reverſed, the Party may enter on the Patentee, and needs neither to ſue a Petition to the King, nor a *Scire facias* againſt the Patentee.

[a] Which is called the 29th in the printed Statutes by a Miſtake.
3 Lev. 333.
[b] 3 Inſt. 213.
[c] 1 Sid. 208.
[d] Bro. Coro. 27, 142 or 144. 164, or 165.
7 H. 7. 5. pl. 7.
18 Ed. 4. 9. pl. 16.
3 Mod. 42.
Cro. Ja. 464.
Fitz. Error, 52.
Cro. Ca. 365.
[e] That the Law is the ſame in civil Cauſes.
Fitz. Err. 41.
37 H. 6. 17.

Bro. Utlagary, 28. 20 H. 6. 3. a. Abridged, Fitz. Protection, 11. Bro. Utlagary, 74. *Con.* 21 H. 6. 50. pl. 3. Abridged, Fitz. Nonſuit, 6. Bro. Utlagary, 24. *Vide* Bro. Utlagary, 35. [f] 3 Inſt. 2, 10. [g] 1 And 188.

CHAP. LI.

Of Execution and Reprieve.

AND now nothing remains but to ſhew in what Manner a Perſon condemned is to be executed or reprieved; as to which, having ſhewn already, *Ch.* 30. *Sect.* 8. That a Perſon attainted, ſtanding mute to a Demand why Execution ſhall not go againſt him, ſhall not be awarded to his Penance, but to the ordinary Execution proper for the Crime, I ſhall farther obſerve only the following Particulars,

Sect. 1. *Firſt*, That the Court of King's Bench hath not only Power to award Execution againſt Perſons attainted there, but alſo againſt Perſons attainted in [h] Parliament, or any other [i] Court, the Record of their Attainder, or a Tranſcript thereof, being firſt [k] removed into the Court of King's Bench, and themſelves brought thither by *Habeas Corpus*.

[h] 1 Sid. 72.
1 Lev. 61.
3 Keb 244.
Supra, ch. 44. ſect 18.
[i] Poph. 131. Cro. Ca. 176. Cro. Ja. 495.
[k] Cro Ca 176. Cro Ja. 495. 1 Sid 72. 1 Lev. 61. 3 Keb. 244.
[l] Cro. Ca. 176. Cro Ja. 495. 1 Sid. 72, 73.

Sect. 2. *2ndly*, That Execution ought [a] not to be awarded into a different County from that wherein the Party was tried and convicted, except only where a Record of Attainder is removed into the Court of Kings Bench, which [b] may award the Execution in the ſame County wherein it ſits.

Sect. 3. *3dly*, That where a Perſon attainted hath been at large after his Attainder, and afterwards is brought into Court and demanded why Execution ſhould not be awarded againſt him, [c] if he deny that he is the ſame Perſon, it ſhall be [d] immediately tried by a Jury returned for that Purpoſe.

Sect. 4. *4thly*, That the Court [f] may command Execution to be done without any Writ.

Sect. 5. *5thly*, That it is [g] holden by *Coke* and *Hale*, That no Execution can be warranted unleſs it be purſuant to the Judgment, and therefore that it cannot be altered by the King, as from hanging to beheading. Yet ſince there is a great Number of Precedents, where [o] Men condemned to be hanged for Felony, and Women condemned to be burnt [p] for Treaſon, have been beheaded by Force of a ſpecial Warrant from the King to that Purpoſe; and ſince [q] *Bracton* and [r] *Staundford* and the [s] *Year-Book* of 25 *H.* 6. ſpeaking of this Matter, are not ſo expreſs as *Coke* and *Hale*, but ſay only in general, That the Sheriff cannot lawfully behead a Man who is only condemned to be hanged, by which they may perhaps intend no more than that he cannot lawfully do it of his own Authority; I ſhall leave this Matter to be farther conſidered However it is agreed, That where Beheading is Part of the Judgment, as in Caſe of High Treaſon, the King may [t] pardon all the reſt, and conſequently in ſuch Caſe the Judgment will be well executed by Beheading only.

Sect 6. *6thly*, That it ſeems [u] agreed at this Day, That an Execution cannot be lawfully executed by any but the proper Officer.

Sect. 7. *7thly*, That it is [x] clear, That if a Man condemned to be hanged, come to Life after he be hanged, he ought to be hanged again; for the Judgment was not executed 'till he was dead.

Sect. 8. *8thly*, That it ſeems agreed, That every Court which has Power to award an Execution, has alſo of Common Right a diſcretionary Power of granting a Reprieve; as * where a Perſon pleads a Pardon defective in Point of Form, but ſufficiently ſhewing the King's Intention of Mercy; or where it is ** doubtful whether the Offence be not included in a general Statute-Pardon; or [y] whether as it is laid in the Indictment, it amounts to ſo high a Crime as that with which the Priſoner was charged. And it ſeems [z] agreed at this Day, that Judges continue to have this Power after their Commiſſion is determined.

[a] Cro. Ca. 176. 3 Mod. 124, 125. Cro. Ca. 176. Cro. Ja. 495. [b] Poph 131. Cro. Ca. 176. Cro. Ja. 495. [c] Compt Juſt. 183. b. [d] 1 Sid. 72. 1 Lev 61. Whether the Party may have peremptory Challenges on ſuch a Trial. *Supra*, ch. 43. ſect 6. [f] Finch of Law, 478. 3 Mod. 42. But ſometimes Execution is commanded by Writ, as in Sir Walter Raleigh's Caſe. Cro. Ja. 496. and in Lord Strafford's Caſe, State Trials, Vol. 2. f. 744, 745. being both in the Cuſtody of the Lieutenant of the Tower, and beheaded only. [g] 3 Inſt. 52. 211, 212, 217. 12 Co. 130. H. P. C. 272. and accordingly Lord Dacres, Lord Stourton, and Sanchar, a Scotch Lord were hanged for Murder. 3 Inſt. 211, 212. 9 Ca. 121. b. Lord Audley in 6 Car. 1. State Trials, Vol. 1. f. 271. [o] Lord Hungerford in 32 H. 8. 3 Inſt. 211. Duke of Somerſet in 5 Ed. 6. 3 Inſt. 211. [p] Queen Katharine Howard, Lady Jane Grey, Countes of Salisbury, Lady Alice Liſle. [q] Bracton, 104. b. *Vide* 3 Inſt. 217. [r] S. P. C. 13 a. [s] 35 H. 6. 38. [t] H. P. C. 273. 3 Inſt. 31, 52, 212. 12 Co. 130. *Supra*, ch. 37. ſect. 12. 3 Inſt. 31. it is ſaid, That ſuch a Pardon muſt be under the Great Seal; but it ſeems admitted, that it may be by Writ. State Trials, Vol 2. f. 704, 705. [u] *See* B. 1. ch. 28. ſect. 8, 9. [x] 6 Ed. 4. 4. Fitz Coro. 335. Finch of Law, 389, 467. *Vide ſupra*, ch. 48. ſect. 7. * 26 Aſſ. pl. 46. Abridged, Fitz. Office de Court, 34. ** Dy. 235. pl. 19. [y] Dy. 296. pl. 21. [z] Dy. 205. pl. 5. *Supra* ch. 6. ſect. 7.

Sect. 9.

Sect. 9. *9thly*, That it is clear, That if a Woman quick with Child be condemned either for [a] Treaſon or [b] Felony, ſhe may alledge her being with Child in Order to get the Execution reſpited, and thereupon the Sheriff [c] or Marſhal ſhall be commanded to take her into a private Room, and to impanel a Jury of [d] Matrons to try and examine whether ſhe be quick with Child or not; and if they find her quick with Child, the Execution ſhall be reſpited [h] 'till her Delivery. But it is agreed, That a Woman [i] cannot demand ſuch Reſpite of Execution by Reaſon of her being quick with Child more than once; and that ſhe can neither ſave herſelf by this Means from [k] pleading upon her Arraignment, nor from having [l] Judgment pronounced againſt her upon her Conviction. Alſo it is ſaid both by [m] *Staundford* and *Coke*, That a Woman can have no Advantage from being found with Child, unleſs ſhe be alſo found quick with Child.

[a] H. P. C. 272. 3 Inſt. 17.
[b] Quære if before Juſtices of Peace, Keilw. 51. a.
[c] S. P. C. 198. Letter C. 22 Aſſ. pl. 71. Abridged Fitz. Coro. 180. Bro Coro 88.
[d] 3 Inſt. 17. Finch of Law 478. S. P. C 198. Letter C.

[h] State Trials, Vol. 4. f. 612. S. P. C 198. Letter C. 3 Inſt. 17. State Trials, Vol. 4. f 612. Fitz Coro. 253, 410. 23 Aſſ. pl. 2. Abridged, Bro. Coro. 97. Fitz. Coro. 188. 25 Ed. 3. 42. b Abridged, Fitz. Coro. 130. 12 Aſſ. pl. 11. Abridged, Fitz. Coro. 168. Bro. Coro. 72. Bro. Pain, 11. [i] Finch of Law, 478. S. P. C. 198. Letter C. Fitz Coro. 168, 253. 3 Inſt. 17. H. P. C. 272. 23 Aſſ. pl. 2. Abridged, Bro. Coro. 97. Fitz. Coro. 188. 25 Ed. 3. 42. b. Abridged, Fitz Coro. 130. 12 Aſſ 11. Bro. Coro 7. 2. Pain, 11. [k] Finch of Law, 478. 3 Inſt. 17. 22 Aſſ. pl. 71. Abridged, Fitz. Coro. 180. Bro. Coro. 88. [l] State Trials, Vol. 4. f. 611. S. P. C. 198. Letter C. 3 Inſt. 17. [m] 3 Inſt. 17. S. P. C. 198. Letter C. and in 22 Aſſ. pl. 71. Abridged, Fitz Coro. 180. Bro. Coro. 88. it is expreſly ſaid, That the Inquiry was whether the Woman were enſeint with a live Child or not. *See* alſo H. P. C. 272. and Finch of Law. 478. Yet Fitz. Coro. 130, 168, 188, 240, 410. 22 Aſſ. pl. 2. 25 Ed. 3. 42. b. 12 Aſſ. pl. 11. Bro. Coro. 72. Bro. Pain, 11. 'tis ſaid only, That the Woman was found enſeint or pregnant.

FINIS.