

C H A P. LX.

Of Surety of the Peace.

INferior Offences more immediately against the Subject, not capital, either amount to an actual Disturbance of the Peace, or do not.

And first, I shall consider such Offences of this Kind, as amount to an actual Disturbance of the Peace: But before I descend to the several Kinds thereof, it may not be improper first to shew what Security may be had against the Breach of the Peace before it happens; and in order hereto, I shall examine how the Peace may be secured.

1. By Surety for keeping the Peace,
2. By Surety for the good Behaviour.

As to Surety for keeping the Peace, I shall consider the following Particulars:

1. In what Cases it ought to be taken *ex Officio*.
2. At whose Request it ought to be granted.
3. Against whom it ought to be granted.
4. For what Cause it is grantable.
5. In what manner it is grantable by the Courts of Chancery and King's Bench,
6. In what manner it is grantable by a Justice of Peace.
7. In what manner the Process for it ought to be executed.
8. How such Process may be superfeded.
9. What ought to be the Form of a Recognizance for this Purpose.
10. How such a Recognizance may be discharged.
11. How such a Recognizance ought to be certified and proceeded upon.
12. How it may be forfeited.

Dalt. cap. 67.
fol. 158, 159.
Lamb 77, 78.
9 Ed. 4. 3. a.
Bro. Peace
7, 8.
Crom. 135.
142.

Dalt. cap 67.
21 E. 4. 40.
Crom. 142. b.
Dalt. cap. 67.

Dalt. cap. 68.
Lamb. 78, 79
Crom. 133. b.
134.

Dalt. cap. 68.
Lamb. 80.

Señ. 1. As to the first Point, *viz.* In what Cases Surety of the Peace ought or be taken *ex Officio*, it seems, That any Justice of Peace may, according to his Discretion, bind all those to the Peace, who in his Presence shall make any Affray, or shall threaten to kill or beat any Person, or shall contend together with hot Words, or shall go about with unusual Weapons or Attendants, to the Terror of the People; and also all such Persons as shall be known by him to be common Barrators; and also all those who shall be brought before him by a Constable for a Breach of the Peace in the Presence of such Constable; and all such Persons who, having been before bound to keep the Peace, shall be convicted of having forfeited their Recognizance.

Señ. 2. As to the second Point, *viz.* At whose Request the Surety of the Peace ought to be granted; it seems agreed at this Day, That all Persons whatsoever, under the King's Protection, being of sane Memory, whether they be natural and good Subjects, or Aliens, or attainted of Treason, &c. have a Right to demand Surety of the Peace.

Señ. 3. But it has been questioned, whether Jews or Pagans, or Persons attainted of *Præmunire*, have a Right to it or not.

Señ. 4. However it is certain, That a Wife may demand it against her Husband threatening to beat her outrageously, and that a Husband also may have it against his Wife.

Dalt. cap. 68.
Lamb. 78.
Crom. 133. b.
3 Lev. 128.
F. N. B. 80. f.

Señ. 5. As to the third Point, *viz.* Against whom the Surety of the Peace ought to be granted, there seems to be no Doubt but that it ought upon a just Cause of Complaint to be granted by any Justice of Peace against any Person whatsoever, under the Degree of Nobility, being of sane Memory, whether he be a Magistrate or private Person, and whether he be of full Age or under Age, &c. But Infants and Females Covert ought to find Security by their Friends, and not to be bound themselves; and the safest Way of proceeding against a Peer is by Complaint to the Court of Chancery or King's Bench.

Dalt. cap. 68.
Lamb. 81. 82.
Cromp. 134.
135.

See the Books
above cited.

and Fitz.
Subpœna 20.

Señ. 6. As to the fourth Point, *viz.* For what Cause the Surety of the Peace is grantable; it seems clear, That where-ever a Person has just Cause to fear that another will burn his House, or do him a corporal Hurt, as by killing or beating him, or that he will procure others to do him such Mischief, he may demand the Surety of the Peace against such Person; and that every Justice of Peace is bound to grant it, upon the Party's giving him Satisfaction upon Oath, that he is actually under such Fear; and that he has just Cause to be so, by Reason of the other's having threatened to beat him, or lain in wait for that Purpose; and that he does not require it out of Malice, or for Vexation.

Dalt. cap. 67.
Lamb. 82.
Cromp. 135.

Señ. 7. It seems also the better Opinion, That he who is threatened to be imprisoned by another, has a Right to demand the Surety of the Peace; for every unlawful Imprisonment is an Assault and Wrong to the Person of a Man: And the Objection, That one wrongfully imprisoned may recover Damages in an Action, &c. and therefore needs not the Surety of the Peace, is as strong in the Case of Battery as Imprisonment, and yet there is no doubt, but that one threatened to be beaten may demand the Surety of the Peace.

Dalt. cap. 67.
Lamb. 82, 83.
Con. 1 Ed. 4.
4.
Bro. Peace 22.
Cromp. 135. a.

Señ. 8. As to the fifth Point, *viz.* In what manner such Surety is grantable by the Courts of Chancery and King's Bench, it is enacted by 21 Jac. 1. 8. *That all Process for the Peace or good Behaviour to be granted or awarded out of the same Courts, or either of them, against any Person or Persons whatsoever, at the Suit of, or by the Prosecution of any Person or Persons whatsoever, shall be void and of none Effect, unless such Process shall be so granted or awarded, upon Motion first made before the Judge or Judges of the same Courts respectively, (sitting in open Court, and upon Declaration in Writing upon their corporal Oaths, to be then exhibited unto them by the Parties which shall desire such Process) of the Causes for which such Process shall be granted or awarded, by or out of the said Courts respectively, and unless that such Motion and Declaration be mentioned to be made upon the back of a Writ, the said Writings there to be entered and remain of Record: And that if it shall afterwards appear unto the said Courts, or either of them respectively, that the Causes expressed in such Writings, or any of them be untrue, That then the Judge or Judges of the said Courts, or either of them respectively, shall and may award such Costs and Damages unto the Parties grieved, for their, or any of their wrongful Vexations in that Behalf, as they shall think fit: And that the Party or Parties so offending, shall and may be committed to Prison by such Judge or Judges, until he or they pay the said Costs and Damages.*

See 1 Lev. 53.
1 Syd. 67.

Señ. 9. As to the sixth Point, *viz.* In what manner such Surety is grantable by a Justice of Peace, it seemeth certain, That if the Person to be bound be in the Presence of the Justice, he may be immediately

14 H. 7. 8.
9. 10.
9 Ed. 4. 3. a.
Bro. Mainpr.
59.
COM- 2 Rol. Re. 46.

committed, unless he offer Sureties; and from hence it follows, *a fortiori*, That he may be commanded by Word of Mouth to find Sureties, and committed for his Disobedience; but it is said, That if he be absent, he cannot be committed without a Warrant from some Justice of Peace, in order to find Sureties, and that such Warrant ought to be under Seal, and to shew the Cause for which it is granted, and at whose Suit, and that it may be directed to any indifferent Person.

Seç. 10. As to the seventh Point, *viz.* In what Manner the Process for the Peace ought to be executed, it seems needless to give a particular Account of the Execution of the Writ of *Supplicavit*, because I do not find that it is much in Use at this Day. and therefore I shall refer the Reader for this purpose to *Fitzherbert's Natura Brevium*, fol. 80, &c. But as to the Execution of the Warrant of a Justice, the following Rules are to be observed.

Lamb. 89. *Seç. 11.* I. It can be executed only by the Persons to whom it is directed, as some of them, unless it be directed to the Sheriff, who may either by Parol, or by Precept in writing, authorize an Officer sworn and known, to serve it, but can not empower any other Person without a Precept in writing.

LongQuinro. 5 Ed. 4. 12. b. 13. c. Bro Fafle Impriſ. 18. Dalt. ca. 69. Lamb. 90. 91. Crom. 235. 5 Co. 59. b. 5 Co. 59. Dalt. ca. 69. Bro Fafle Impriſon. 11. 21 H. 7. 21 a. Lamb 94. 95. *Seç. 12.* II. If the Warrant be made in the common Form, directing the Officer to cause the Party complained of to come before some Justice of Peace, to find sufficient Surety, &c. and if he shall refuse so to do, to convey him immediately to Prison, without expecting any further Warrant, until he shall willingly do the same, &c. the Officer who serves it, before he makes any Arrest, ought first to require the Party to go with him, and find Sureties according to the Purport of the Warrant, but upon his Refusal to do either, he may carry him to the Gaol by Force of the same Warrant, without more.

Seç. 13. III. If the Warrant specially direct, that the Party shall be brought before the Justice who made it, the Officer ought not to carry him before any other: But if the Warrant be general, to bring him before any Justice of Peace, &c. the Officer has the Election to bring him before what Justice he pleases, and may carry him to Prison for refusing to find Surety before such Justice.

Dalt. c. 69. *Seç. 14.* As to the eighth Point, *viz.* How such Process may be superseded, it is said, That if one who fears that the Surety of the Peace will be demanded against him, find Sureties before any Justice of the Peace of the same County, either before or after a Warrant is issued against him, he may have a *Superſedeas* from such Justice, which shall discharge him from Arrest from any other Justice, at the Suit of the same Party, for whose Security he has given such Surety: Also it is said, That an Appearance upon a Recognizance for the Peace may be superseded, by finding Sureties in the Chancery or King's Bench, and purchasing a Writ testifying the same. But this Practice having often been abused by turbulent Persons, who deservedly fearing to be bound to the Peace or good Behaviour, by Justices of Peace, would procure themselves to be bound thereto in the said Courts, upon insufficient Sureties, or upon the colourable Prosecution of some Person who would be ready at all Times to release them at their Pleasure, whereupon Writs of *Superſedeas* had been often directed to Justices of Peace, commanding them to forbear to arrest the Parties for such Causes, by reason whereof such turbulent Persons used to misdeemean themselves among their Neighbours with Impunity, as it is recited by 21 Jac. 1. 8. it is thereupon enacted by the said Statute, That all Writs of *Superſedeas*, to be granted out of either of the said Courts,

shall

shall be void, unless such Process be granted upon Motion in open Court first made, &c. upon such sufficient Sureties, as shall appear unto the Judge or Judges of the same Court respectively, upon Oath, to be assessed at five Pounds Lands, or ten Pounds in Goods, in the Subsidy Book, at the least; which Oaths, and the Names of such Sureties, with the Places of their Abode, and where they stand so assessed in the Subsidy Books, shall be entered, and remain of Record in the same Courts: And unless it shall also first appear unto the said Judge or Judges, from whom such Superseas is desired, That the Process of the Peace, or good Behaviour, is prosecuted against him or them, desiring such Superseas, bona fide, by some Party grieved, in that Court, out of which such Superseas is desired to be so awarded and directed.

² Chancery Re-
part, 68.

Sett. 15. As to the ninth Point, viz. What ought to be the Form of such a Recognizance: If it be taken in Pursuance of a Writ of *Supplicavit*, it must be wholly governed by the Directions of such Writ; but if it be taken before a Justice of Peace, upon a Complaint below, it seems that it may be regulated by the Discretion of such Justice, both as to the Number and Sufficiency of the Sureties, and the Largeness of the Sum, and the Continuance of the Time, for which the Party shall be bound; and it hath been said, That a Recognizance to keep the Peace as to *A. B.* for a Year, or for Life, or without expressing any certain Time, (in which Case it shall be intended to be for Life) or without fixing any Time or Place for the Party's Appearance, or without binding him to keep the Peace against all the King's People in general, is good.

Lamb. 100.
101.
Dal. ca. 70.

Sett. 16. However, it seems to be the safest Way to bind the Party to appear at the next Sessions of the Peace, and in the mean Time to keep the Peace as to the King, and all his Liege People, especially as to the Party, according to the common Form of the Precedents.

Lamb. 108.
Dal. ca. 124.

Sett. 17. As to the tenth Point, viz. How such a Recognizance may be discharged, it seems agreed That it may be discharged by the Demise of the ^a King in whose Reign it was taken, or of the ^b principal Party who was bound thereby, if it were not forfeited before; also it hath been holden, That it may be discharged by the Release of the Party at whose Complaint it was taken, being certified together with it, but this may justly be questioned, because the Recognizance is not to the Subject but to the King, and consequently can not be discharged by the Subject, who is not a Party to it; however, such a Release will be a good Inducement to the Court, to which such a Recognizance shall be certified, to discharge it; and so also will the Non-Appearance of the Party at whose complaint it was taken, in order to pray the Continuance of it; and yet it is said, That the Sessions in that case may, in their Discretion, refuse to discharge it; however, it is certain that such a Recognizance can not be pardoned, or released by the King, before it is broken, because the Subject has a Kind of Interest in it; and it is said, That ^d the Sureties are not discharged by their Death, but that their Executors, &c. continue bound as their Testators, &c. were.

^a Bro. Peace
15.
¹ H. 7. 2.
^b 15 H. 7. 2. b.
13. A.
² Ed. 4. 70. b.
D. it. ch. 71.
³ Lev. 235.
^c Lamb. 110,
&c.
Crom. 139. b.
169. a.
Bro. Peace 17.

Crom. 144. b.
144. 7. 10. b.
11 H. 7. 12. a.
11 H. 4. 43. a.
B. 2 Ch. 26.
S. 64. Ch. 37.
S. 34.

Sett. 18. As to the eleventh Point, viz. How such a Recognizance ought to be certified, and proceeded upon: If it be taken by Force of a Writ of *Supplicavit*, it needs not be certified till the Justice receive a Writ of *Certiorari* to that purpose; but if it be taken upon a Complaint below, it must be certified, sent, or brought to the next Sessions of the Peace by Force of ³ H. 7. 1. that the Party so bound may be called; and by the same Statute, If the Party then make Default, the same Default shall be then recorded, and the same Recognizance with the Record of the Default, shall

^d Bro. Peace
17.
Lamb. 111.
112, &c.
Dal. ca. 70.

Will. 1. Geor. be certified into the Chancery, King's Bench or Exchequer: However, if the Party have any Excuse for his not appearing, it seems that the Sessions is not bound peremptorily to record his Default, but may equitably consider of the Reasonableness of such Excuse; and it is said, That the Sessions can not in any Case proceed against the Party for a Forfeiture of his Recognizance, either in respect of his not appearing, or breaking the Peace, but that the Recognizance in such Case ought to be removed into some of the King's Courts of Westminster-Hall, who shall proceed thereon by *Scire Facias* upon such Recognizance, and not by Indictment, &c.

3 Bull. 120. *Scit.* 19. It seemeth, that in a *Scire Facias* upon such a Recognizance, it is sufficient to lay the Fact alledged for a Breach thereof, as having been done *contra pacem*, without using the Words *V^o & Armis*.
 Whether such Scire Facias must show the Day on which the Sessions was holden, till which the Party was bound to keep the Peace. Cro. Ca. 138.

Bro. Peace 20. *Scit.* 20. As to the twelfth Point, viz. How such a Recognizance may be forfeited there is no Doubt but that it may be forfeited by any actual Violence to the Person of another, whether it be done by the Party himself, or by others thro' his Procurement, as Manslaughter, Rape, Robbery, unlawful Imprisonment, &c.

Lamb. 115. *Scit.* 21. Also it has been holden, That it may be forfeited by any Treason against the Person of the King, and also by any unlawful Assembly in *Terrorem Populi*, and even by Words directly tending to a Breach of the Peace, as by challenging one to fight, or, in his Presence, threatening to beat him, &c.

18 Ed. 4. 28 a. 22 Ed. 4. 35. b. Cro. Ca. 498, 499 see the Books cited in the Section following, and 3 R. A. 545. Pl. 2, 3, 4, 5, 6, 7, 8, 547. E. 3.

Scit. 22. However, it seems that it shall be forfeited by bare Words of Heat and Choler, as the calling a Man Knave, Teller of Lies, Rascal, or Drunkard; for tho' such Words may provoke a cholerick Man to break the Peace, yet they do not directly challenge him to it, nor does it appear that the Speaker designed to carry his Resentment any farther: And it hath been said, That even a Recognizance for the good Behaviour, shall not be forfeited for such Words, from whence it follows, *a fortiori*, That a Recognizance for the Peace shall not.

Scit. 23. Also there are some actual Assaults on the Person of another, which do not amount to a Forfeiture of such a Recognizance; as if an ^a Officer, having a Warrant against one who will not suffer himself to be arrested, beat or wound him in the Attempt to take him; or if a ^b Parent in a reasonable Manner chastise his Child, or a Master his Servant, ^c being actually in his Service at the Time; or a ^d Schoolmaster his Scholar, or a ^e Gaoler his Prisoner, or even a ^f Husband his Wife, as some say; or if ^g one confine a Friend who is mad, and bind, and beat him, &c. in such a Manner as is proper in such Circumstances; or if a Man ^h force a Sword from one who offers to kill another therewith; or if a Man gently lay his Hands on another, and thereby stay him from inciting a Dog against a third Person; or if ⁱ I beat one (without ^k wounding him, or throwing at him a dangerous Weapon) who wrongfully endeavours with Violence to dispossess me of my Land, or Goods; or the Goods of another delivered to me to be kept for him, and will not desist upon my laying my Hands gently on him, and disturbing him; or if a Man beat, ^l or, as some say, wound, or maim one who makes an

13 H. 4. 6. b. 9. a. Lutw. 1487. Cro. Jr. 236. Yel. 172. Cro. Ca. 138. 19 H. 6. 31. b. 10 E. 4. 6. b. 11 Ed. 4. 28. b. Kellw. 92. a. Yelv. 172. 2 R. A. 547. E. 1, 2. 548. Pl. 2, 3, 4, 5 6, 7 549. P. 9, 10, 11. Puls. 5, 6. Cro. 137. a. Dal. ca. 72. *Infra* Ch. 64. S. 1. ^k 2 R. A. 548. Pl. 4, 8. ^l 41 Aff. 21. 27 Ed. 3. 94. a. 25 Ed. 3. 42. a. 8 H. 4. 8. a. b. 9 Ed. 4. 48. b. 12 Ed. 4. 6. a. Bro. de Tort. Demesne 57. 1 Sid. 246. Kelyn. 128. 2 R. A. 547. E. Pl. 1, 2, 3, 4. 1 Keb. 884, 921. 2 Infl. 316.

Assault upon his Person, or that of his ^m Wife, Parent, Child, or Master; especially if it appear that he did all he could to avoid fighting before he gave the Wound; or if a Man ⁿ fight with or beat one who attempts to kill any Stranger; or if a Man even ^o threaten to kill one who puts him in Fear of Death in such a Place where he can not safely fly from him; or if one ^p imprison those whom he sees fighting, till the Heat is over.

Sett. 24. According to some Opinions, a ^q Master shall not forfeit such a Recognizance for beating another in defence of his Servant, but it is said, That a ^r Servant is liable to such Forfeiture for beating another in Defence of his Master's Son, tho' he were commanded by the Master so to do, because he is not a Servant to the Son; and for the like Reason it is said, That a ^s Tenant shall incur the like Forfeiture for beating another in Defence of his Landlord, &c.

Dal. ca. 72. Crom. 136. b. Con. 9 Ed. 4. 48. b. Salk. 407. 2. 19 Ed. 4. 48. b. Bro. Tresp. 189.

Sett. 25. But it seems agreed, That no one shall forfeit such a Recognizance by a bare Trespas on another's Lands, or Goods, unless it be accompanied with some Violence to the Person.

Sett. 26. And it seems to be the better Opinion, That a Man is in no Danger of such a Forfeiture from any Hurt done to another, by playing at Cudgels, or such like Sport, by Consent, because the Intent of the Parties seems no way unlawful, but rather commendable, and tending mutually to promote Activity and Courage; yet it is said, That he who wounds another in fighting with naked Swords, does in Strictness forfeit such a Recognizance, because no Consent can make so dangerous a Diversion lawful.

Sett. 27. But it seemeth, That a Man shall not forfeit such Recognizance, by a Hurt done to another merely thro' Negligence, or Mischance; as where one Soldier hurts another by discharging a Gun in Exercise, without sufficient Caution; for notwithstanding such Person must, in a Civil Action, give the other Satisfaction for the Damage occasioned by his Want of Care, yet he seems not to have offended against the Purport of such a Recognizance, unless he be guilty of some wilfull Breach of the Peace.

^m 35 H. 6. 58. b.
ⁿ 51. 2.
^o 19 H. 6. 31. a. b.
^p 66. 2.
^q 12 Ed. 4. 6. 2.
^r Crom. 136. b.
^s Dal. ca. 72.
^t 2 R. A. 546.
^u D. 1. 2. 3.
^v 12 H. 8. 2. b.
^w 32 H. 6. 18. b.
^x 10 Ed. 4. 6. b.
^y 2 R. A. 546.
^z 559 E.
^{aa} 22 E. 4. 45. b.
^{ab} 2 R. A. 546.
^{ac} D. 2.
^{ad} 19 H. 6. 31. b.
^{ae} 66. 2.

^f Dalt. ch. 72.
^g Lamb. 119.

^h Crom. 136. b.
ⁱ Dalt. ca. 72.
^j Cro. El. 86.
^k Moore 249.

^l Dalt. ca. 11.
^m B. o. Coron.
ⁿ 219
^o Fitz. B. 214.

^p Ho. 114.
^q 2 R. A. 548 G.

C H A P. LXI.

Of Surety for the Good Behaviour.

AND now we are come to Surety for the Good Behaviour, which being of great Affinity with Surety of the Peace, both as to the Manner in which it is to be taken, superseded, and discharged, &c. seems not to require a particular Consideration, save only as to the following Points,

1. For what Misbehaviours it is to be required.
2. For what it shall be forfeited.

Sett. 1. As to the first Point, it is to be observed, That by 34 Ed. 3. 1. Justices of Peace are impowered to restrain Offenders, Rioters, and all other Barrators, and to pursue, arrest, take, and chastise them, according to their Trespas, or Offence; and to cause them to be imprisoned, and duly punished according

to the Laws and Customs of the Realm, and according to that which to them shall seem best to do by their Discretions, and good Advise, and also to inform them and to enquire of all those that have been Pillors and Robbers in the Parts beyond the Sea, and be now come again, and go wandering, and will not labour as they were wont in Times past; and to take and arrest all those, that they may find by Indictment or by Suspicion, and to put them in Prison, and to take of all them that be not of good Fame, where they shall be found sufficient Surety and Mainprize of their Good Behaviour towards the King and his People, and the other duly to punish, to the Intent that the People be not by such Rioters troubled nor endamaged, nor the Peace blemished, nor Merchants, nor other passing by the Highways of the Realm disturbed, nor put in the Peril which may happen of such Offenders.

4 Inst. 181.
2 H. 7. 2. b. 3. a.

Lamb. 115,
116, 117.
Dalt. ca. 75.

213 H. 7. 10. b.
2 C. 0. n. 140. a.
1 Cro. El. 78.
1 Levin. 52,
53, 107.
11 Co. 98.
1 Ro. Re. 224.
Litch. 220.
Con. Cro. El.
689.

Palm. 130.
1 Rol. Rep.
227, 228.
3 Bulf. 139,
140.
11 Cro. Ca.
498, 499.
1 Cro. El. 86.
Moore 249.
Supra Ch. 60.
S. 22.
2 Rol. Re.
199, 227.
Palm 126.

Dalt. 75.
1 Rol. Re. 150.
2 Vent. 22,
23, 24.

Palm. 129.
130.

Sect. 2. In the Construction hereof there seem to have been some Opinions, that the Statute, speaking of those that be not of good Fame, means only such as are defamed, and justly suspected that they intend to break the Peace, and that it does not any Way extend to those who are guilty of other Misbehaviours not relating to the Peace; but this seems much too narrow a Construction, since the above mentioned Expression of Persons of evil Fame, in common Understanding, as properly includes Persons of scandalous Behaviour in other Respects, as those who by their quarrellsome Behaviour give just Suspicion of their Readiness to break the Peace; and accordingly it seems to have been always the better Opinion, That a Man may be bound to his Good Behaviour for many Causes of Scandal which give him a bad Fame, as being contrary to good Manners only; as for ^a haunting Bawdy-houses with Women of bad Fame; or for ^b keeping bad Women in his own House; or for speaking Words of Contempt of an inferior ^c Magistrate, as a Justice of Peace, or Mayor of a Town, &c. tho' he be not then in the actual Execution of his Office, or of an inferior Officer of Justice, as a Constable, and such like, being in the actual Execution of his Office.

Sect. 3. However, it seems the better Opinion, That no one ought to be bound ^d to the Good Behaviour for any rash, quarrellsome, or unmannerly Words, unless they either directly tend to a Breach of the Peace, or to scandalize the Government, by abusing those who are intrusted by it with the Administration of Justice, or to deter an Officer from doing his Duty; and therefore it seems, That he ^e who barely calls another Rogue, or Rascal, or Teller of Lies, or Drunkard, &c. ought not for such Cause to be bound to the Good Behaviour.

Sect. 4. However, I can not find any certain precise Rules for the Direction of the Magistrate in this Respect, and therefore am inclined to think, that he has a discretionary Power to take such Surety of all those whom he shall have just Cause to suspect to be dangerous, quarrellsome, or scandalous, as of those who sleep in the Day, and go abroad in the Night, and of such as keep suspicious Company, and of such as are generally suspected to be Robbers, &c. and of Eves Droppers, and common Drunkards, and all other Persons, whose Misbehaviour may reasonably be intended to bring them within the Meaning of the Statute, as Persons of evil Fame, who, being described by an Expression of so great Latitude, seem in a great Measure to be left to the Judgment of the Magistrate. But if he comit one for want of Sureties, he must shew the Cause, &c. with convenient Certainty.

Sect. 5. As to the second Point, viz. For what Misbehaviours such a Recognizance shall be forfeited, it is laid down as a general Rule in the Argument of Stamp and Hide's Case, That whatever will be a good Cause

Cause to bind a Man to his Good Behaviour, will forfeit a Recognizance for it, yet this is since denied in *Heyward's Case*; and indeed does by no Means seem to be maintainable, because the Statute in ordering Persons of evil Fame to be bound in this Manner, seems in many Cases chiefly to regard the Prevention of that Mischief which they may justly be suspected to be likely to do; and in that Respect requires them to secure the Publick from that Danger which may probably be apprehended from their future Behaviour, whether any actual Crime can be proved upon them, or not; and it would be extremely hard in such Cases to make Persons forfeit their Recognizance, who yet may justly be compellable to give one, as those who keep suspicious Company, or those who spend much Money idly, without having any visible Means of getting it honestly, or those who lie under a general Suspicion of being Rogues, &c.

Cro. Ca. 499.

13 H. 7. 10. b. Dalt. ca. 75.

Sett. 6. However, it seems that such a Recognizance shall not only be forfeited for such actual Breaches of the Peace, for which a Recognizance for the Peace may be forfeited, but also for some others, for which such a Recognizance can not be forfeited; as for going armed with great Numbers to the Terror of the People, or speaking Words tending to Sedition, &c. and also for all such actual Misbehaviours which are intended to be prevented by such a Recognizance, but not for barely giving Cause of Suspicion of what perhaps may never actually happen.

2 H. 7. 2. b.

Cro. Ca. 499.

C H A P. LXII.

Of Assaults and Batteries.

AND now I am come to consider the several Kinds of actual Disturbances of the Peace, and these are; either,

1. Such as may be committed by one or two Persons.
2. Such as require a greater Number.

Those which may be committed by one or two Persons, are,

1. Assaults and Batteries.
2. Affrays.
3. Forcible Entries and Detainers.

As to Assaults and Batteries, I shall consider the following Particulars:

1. What shall be said to be an Assault.
2. What shall be said to be a Battery.
3. In what Cases they may be justified.
4. In what Manner they are to be punished.

Sett. 1. As to the first Point, it seems that an Assault is an Attempt, or Offer, with Force and Violence, to do a corporal Hurt to another; as by striking at him with, or without, a Weapon; or presenting a Gun at him, at such a Distance to which the Gun will carry, or pointing a Pitch-fork at him, standing within the Reach of it; or by holding up

Pulton 4. 4.

6 Mod. 173.

174. 2 R. A. 545.

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one's Fist at him, or by any other such like Act done in an angry threatening Manner; and from hence it clearly follows, That one charged with an Assault and Battery, may be found guilty of the former, and yet acquitted of the later. But * every Battery includes an Assault, therefore on an Indictment of Assault and Battery, in which the Assault is ill laid, if the Defendant be found guilty of the Battery, it is sufficient. Notwithstanding the many ancient Opinions to the contrary, it seems agreed at this Day, that no Words whatsoever can amount to an Assault.

Sett. 2. As to the second Point, *viz.* What shall be said to be a Battery, it seems that any Injury whatsoever, be it never so small, being actually done to the Person of a Man, in an angry, or revengeful, or rude, or insolent Manner, as by Spitting in his Face, or any Way touching him in Anger, or violently jostling him out of the Way, are Batteries in the Eye of the Law: But it is said to be no Battery to lay one's Hand gently on another whom an Officer has a Warrant to arrest, and to tell the Officer that this is the Man he wants.

Sett. 3. As to the third Point, *viz.* In what Cases an Assault and Battery may be justified, this is so fully set forth already in the Chapter of *Surety of the Peace*, that there seems to be no need of any farther Consideration thereof in this Place; and therefore I shall only add, That where a Man in his own Defence beats another who first assaults him, &c. he may take an Advantage thereof upon an Indictment, as well as upon an Action; but with this Difference, that in the first Case he may give it in Evidence upon the Plea of Not guilty, and in the latter he must plead it specially.

Sett. 4. As to the fourth Point, *viz.* How unlawful Assaults and Batteries are punished, there is no doubt but that the Wrong-doer is subject, both to an Action at the Suit of the Party, wherein he shall render Damages, &c. and also to an Indictment at the Suit of the King, wherein he shall be fined according to the Heinousness of the Offence.

Wentr. 236.
1 Mod. 3.
1 Keb. 921.
40 Ed. 3. 40. a.
42 Ed. 3. 7. b.
45 Ed. 3.
24 b. 25 a.
22 Aff. 60.
2 R. A. 545.
Pl. 1, 2, 3, 4.
5, 6, 7, 8.
22 Aff. Pl. 11.
Pult. 3.
Lamb. 126.
2 Salk. 384.
6 Mod. 149.
172.
1 Mod. 3.
3 Lev. 404.
2 R. A. 546.
Pl. 1, 2.

6 Mod. 172.

C H A P. LXIII.

Of Affrays.

IN treating of Affrays, I shall consider,

1. What shall be said to be an Affray.
2. How far it may be suppressed by a private Person.
3. How far by a Constable.
4. How far by a Justice of Peace.
5. In what Manner the several Kinds of Affrays may be punished.

3 Inst. 158.
Dalt. ca. 8.

Lamb. 125.
126.

Sett. 1. As to the first Point, it is said, That the Word Affray is derived from the *French Word Effraier*, to terrify, and that in a legal Sense it is taken for a publick Offence, to the Terror of the People, from whence it seems clearly to follow, That there may be an Assault which will not amount to an Affray; as where it happens in a private Place, out of the hearing or seeing of any, except the Parties concerned; in which Case it cannot be said to be to the Terror of the People; and for this

this Cause such a private Assault seems not to be inquirable in a Court-Leet, as all Affrays certainly are, as being common Nufances.

Sett. 2. Also it is said, that no quarrellsome or threatening Words whatsoever shall amount to an Affray; and that no one can justify laying his Hands on those who shall barely quarrel with angry Words, without coming to blows; yet it seemeth, That the Constable may, at the Request of the Party threatened, carry the Person, who threatens to beat him, before a Justice of Peace, in Order to find Sureties.

Sett. 3. Also it is certain, That it is a very high Offence to challenge another, either by Word or Letter, to fight a Duel, or to be the Messenger of such a Challenge, or even barely to endeavour to provoke another to send a Challenge, or to fight; as by dispersing Letters to that Purpose, full of Reflections, and insinuating a Desire to fight, &c.

Sett. 4. But granting that no bare Words, in the Judgment of Law, carry in them so much Terror as to amount to an Affray; yet it seems certain, That in some Cases there may be an Affray where there is no actual Violence; as where a Man arms himself with dangerous and unusual Weapons, in such a Manner as will naturally cause a Terror to the People, which is said to have been always an Offence at Common Law, and is strictly prohibited by many Statutes: For by 2 Ed. 3. 3. it is enacted, *That no Man, great nor small, of what Condition soever he be, except the King's Servants, in his Presence, and his Ministers in executing of the King's Precepts, or of their Office, and such as be in their Company assisting them, and also upon a Cry made for Arms to keep the Peace, and the same in such Places where such Acts happen, be so hardy to come before the King's Justices, or other of the King's Ministers doing their Office, with Force and Arms, nor bring no Force in Affray of Peace, nor to go nor ride armed by Night nor by Day, in Fairs, Markets, nor in the Presence of the Justices or other Ministers, nor in no part elsewhere, upon pain to forfeit their Armour to the King, and their Bodies to Prison, at the King's Pleasure. And that the King's Justices in their Presence, Sheriffs, and other Ministers in their Bailiwicks, Lords of Franchises, and their Bailiffs in the same, and Mayors and Bailiffs of Cities and Boroughs, within the same Cities and Boroughs, and Borough holders, Constables and Wardens of the Peace within their Wards, shall have Power to execute this Act: And that the Justices assigned, at their coming down into the Country, shall have Power to enquire how such Officers and Lords have exercised their Offices in this Case, and to punish them whom they find, that have not done that which pertained to their Office; and this Statute is farther enforced by 7 Rich. 2. 13. and 20 Rich. 2. 1.*

And in the Exposition of it, the following Points have been holden:

Sett. 5. I. That any Justice of Peace, or other Person, who is int-powered to execute this Statute, may proceed thereon, either *ex Officio*, or by Force of a Writ out of Chancery formed upon the Statute, and that if he find any Person in Arms contrary to the Form of the Statute, he may seize the Arms, and commit the Offender to Prison; and that he ought also to make a Record of his whole Proceeding, and certify the same into the Chancery, where he proceeds by Force of the said Writ, or into the Exchequer, where he proceeds *ex Officio*.

Sett. 6. II. That where a Justice of Peace, &c. proceeds upon the said Writ, he may not only imprison those whom he shall find offending against the Statute in his own View, but also those who shall be found by an Inquest taken before him, to have offended in such Manner in his Absence; and I do not see why he may not do the same where he proceeds *ex Officio*; for seeing the said Writ hath no other Foundation but the

4 H. 6. 10. a.
8 Ed. 4. 5. b.

H. P. C. 135.
23 E. 4. 45. b.
Dal. ch. 8.
Lamb. Constable 14.

Poph. 158.
3 Inst. 148.
1 Sid. 186.
1 Keb. 694.
Hob. 120.
215.
3 Rol. Ab 78.

Lamb. 126.
3 Inst. 160.
76 D.
2 Rol. Ab 78.
Pl. 4.
H. P. C. 137.

E. N. B. 149
3 Inst. 161.
Dal. ch. 22.
Lamb. 168.
8c.
Dalif. 23.
2 Bull. 330.

Cro. El. 294.
Con. Lamb.
170.

the said Statute, and is the most authentick Explication thereof, it seemeth that the Rules therein prescribed, should be the best Direction for all Proceedings upon that Statute.

Cro. El. 294. *Señ. 7.* III. That the Under-Sheriff may execute the said Writ, being directed to the Sheriff, if it name him only by the Name of his Office, and not by his proper Name, and do not expressly command him to act in his proper Person.

24 Ed. 3. a. b. *Señ. 8.* That a Man cannot excuse the wearing such Armour in Publick, by alledging that such a one threatened him, and that he wears it for the Safety of his Person from his Assault; but it hath been resolved, *21 H. 7. 39. a.* That no one shall incur the Penalty of the said Statute for assembling his *3 Inst. 161, 162.* Neighbours and Friends in his own House, against those who threaten to do him any Violence therein, because a Man's House is as his Castle. *Con. 2 Rol. 78. d.*

2 H. 7. 39. a. *Señ. 9.* V. That no Wearing of Arms is within the Meaning of this Statute, unless it be accompanied with such Circumstances as are apt to terrify the People; from whence it seems clearly to follow, That Persons of Quality are in no Danger of offending against this Statute by wearing common Weapons or having their usual Number of Attendants with them, for their Ornament or Defence, in such Places, and upon such Occasions, in which it is the common Fashion to make use of them, without causing the least Suspicion of an Intention to commit any Act of Violence or Disturbance of the Peace. And from the same Ground it also follows, That Persons armed with privy Coats of Mail to the Intent to defend themselves against their Adversaries, are not within the Meaning of this Statute, because they do nothing *3 Inst. 162.* *in terrorem populi.*

3 Mod. 117, 118. *Señ. 10.* VI. That no Person is within the Intention of the said Statute, who arms himself to suppress dangerous Rioters, Rebels, or Enemies, and endeavours to suppress or resist such Disturbers of the Peace or Quiet of the Realm; for Persons who so arm themselves, seem to be exempted out of the general Words of the said Statute, by that Part of the Exception in the Beginning thereof, which seems to allow all Persons to arm themselves upon a Cry made for Arms to keep the Peace, in such Places where such Acts happen. *4 Buñ. 330.*

Poph. 121, 122. *Señ. 11.* As to the second Point, *viz.* How far an Affray may be suppressed by a private Person, it seems agreed, That any one who sees others fighting, may lawfully part them, and also stay them till the Heat be over, and then deliver them to the Constable, who may carry them before a Justice of Peace, in order to their finding Sureties for the Peace: Also it is said, That any private Person may stop those whom he shall see coming to join either Party; and from hence it seems clearly to follow, That if a Man receive a Hurt from either Party in thus endeavouring to preserve the Peace, he shall have his Remedy by an Action against him; also upon the same Ground it seems equally reasonable, That if he unavoidably happen to hurt either Party, in thus doing what the Law both allows and commends, he may well justify it, inasmuch as he is no way in Fault; and the Damage done to the other, was occasioned by a laudable Intention to do him a Kindness. *Lamb. 131.*

3 Inst. 158. *Señ. 12.* However it seems clear, That if either Party be dangerously wounded in such an Affray, and a Stander-by, endeavouring to arrest the other, be not able to take him without hurting, or even wounding him, yet he is no way liable to be punished for the same, inasmuch as he is bound under Pain of Fine and Imprisonment, to arrest such an Offender, and either detain him till it appear whether the Party will live or die, or carry him before a Justice of Peace, by whom he either is to be bailed or committed, &c. *H. P. C. 131.* *3 Inst. 158.* *Bro. Faux. Imprisonment 35, 44.* *10 H. 7. 20.* *2 Inst. 52.*

Sect. 13. As to the third Point, *viz.* How far an Affray may be suppressed by a Constable; it seems agreed, That a Constable is not only empower'd, as all private Persons are, to part an Affray which happens in his Presence, but is also bound at his Peril to use his best Endeavours to this Purpose, and not only to do his utmost himself, but also to demand the Assistance of others. which if they refuse to give him, they are punishable with Fine and Imprisonment.

3 Inst. 158.
H. P. C. 135
Lamb. 132,
133.
Dalt. cap. 8.
3 H. 7. 10. b.

Sect. 14. And it is said, That if a Constable see Persons either actually engaged in an Affray, as by Striking, or offering to strike, or drawing their Weapons, &c. or upon the very Point of entering upon an Affray, as where one shall threaten to kill, wound, or beat another, he may either carry the Offender before a Justice of Peace, to the End that such Justice may compel him to find Sureties for the Peace, &c. or he may imprison him of his own Authority for a reasonable Time, till the Heat shall be over, and also afterwards detain him till he find such Surety by Obligation: But it seems, That he has no Power to imprison such an Offender in any other Manner, or for any other Purpose; for he cannot justify the committing an Affrayer to Goal till he shall be punished for his Offence: And it is said, That he ought not to lay Hands on those, who barely contend with hot Words, without any Threats of personal Hurt, and that all which he can do in such a Case, is to command them under Pain of Imprisonment to avoid Fighting.

Lamb. 132,
133.
Dalt. ca. 1. 8.
H. P. C. 136.
Dalt. cap. 1. 8.
Bro. Surety,
23. 36.
Cro. El. 375.
9 Ed. 4. 26. a.
Moore 284.
Pl. 436.
3 H. 4. 9. a.
22 Ed. 4. 35. b.
10 Ed. 4. 18.
5 H. 7. 6. a.
Savil. 97. 98.

Sect. 15. But he is so far intrusted with a Power over all actual Affrays, that though he himself is a Sufferer by them, and therefore liable to be objected against, as likely to be partial in his own Cause, yet he may suppress them; and therefore, if an Assault be made upon him, he may not only defend himself, but also imprison the Offender, in the same Manner as if he were no way a Party.

5 H. 7. 6. a.
H. P. C. 136.
1 Rol. Re. 238.
2 Bulst. 329.

Sect. 16. And if an Affray be in a House, the Constable may break open the Doors to preserve the Peace; and if Affrayers fly to a House, and he follow with fresh Suit, he may break open the Doors to take them.

13 Ed. 4. 9. a.
7 Ed. 3. 12. b.
Dalt. cap. 8,
67.

Sect. 17. But it is said, That a Constable hath no Power to arrest a Man for an Affray done out of his own View, without a Warrant from a Justice of Peace, unless a Felony were done or likely to be done; for it is the proper Business of a Constable to preserve the Peace, not to punish the Breach of it; nor does it follow from his having Power to compel those to find Sureties who break the Peace in his Presence, that he has the same Power over those who break it in his Absence, inasmuch as in such Case it is most proper to be done by those who may examine the whole Circumstances of the Matter upon Oath, which a Constable cannot do; yet it is said, That he may carry those before a Justice of Peace, who were arrested by such as were present at an Affray, and delivered by them into his Hands.

Lamb. 133,
134.
H. P. C. 135.
Cro. El. 375.
Owen 105.
H. P. C. 136.
H. P. C. 92.

Sect. 18. As to the fourth Point, *viz.* In what Manner an Affray may be suppressed by a Justice of Peace; there is no doubt, but that he may and must do all such Things to that Purpose, which a private Man or Constable are either enabled, or required by the Law to do: But it is said, That he cannot without a Warrant authorize the Arrest of any Person for an Affray out of his View; yet it seems clear, that in such Case he may make his Warrant to bring the Offender before him, in order to compel him to find Sureties for the Peace.

Lamb. 131.
Dalt. cap. 8.

H. P. C. 136.
Dalt. cap. 8.
Bro. false Im-
prisonment
6. 12. 33.
14 H. 8. 7.
Moore 468.
Pl. 551.

See 38 Ed. 3.
6. b. 7. a.
22 Aff. 56.
5 Mod. 84.

H. P. C. 36.
Dalt. cap. 8.
Poph. 153.

Aleyn 79.

Sett. 19. Also it seems, That a Justice of Peace has a greater Power over one who hath dangerously wounded another in an Affray, than either a private Person or a Constable; for there does not seem to be any good Authority, that these have any Power at all to take Sureties of such an Offender: but it seems certain, That a Justice of Peace has a discretionary Power either to commit him or to bail him, till the Year and Day be past; but it is said, that he ought to be very cautious how he takes Bail, if the Wound be dangerous; for that if the Party die, and the Offender appear not, he is in Danger of being severely fined, if he shall appear upon the whole Circumstances of the Case to have been too favourable.

Sett. 20. As to the fifth Point, *viz.* In what Manner the several kinds of Affrays are to be punished, it sufficiently appears from the foregoing Part of this Chapter, how such Affrays as are accompanied with Force and Arms, are to be dealt with upon the Statute of *Northampton*; and therefore I shall only examine in this Place, what Penalties other Affrays are liable unto, as to which it is to be observed, That all Affrays in general are punishable by Fine and Imprisonment, the Measure of which is to be regulated by the Discretion of the Judges according to the Circumstances of the Case, which very much vary the Nature of this Crime, and in some Cases make it so inconsiderable as scarce to deserve to be taken Notice of; and in others make it an Offence of a very heinous Nature, as in the following Instances:

1. In Respect of the dangerous Tendency thereof.
2. In Respect of the Persons against whom it is committed.
3. In Respect of the Place wherein it happens.

Poph. 153.
3 Inst. 158.

1 Sid. 186.
1 Keb. 694.

Moore 563.
Pl. 763.

Sett. 21. And first, an Affray may receive an Aggravation from the dangerous Tendency thereof, as where Persons coolly and deliberately engage in a Duel, which cannot but be attended with the apparent Danger of Murder, and is not only an open Defiance of the Law, but carries with it a direct Contempt of the Justice of the Nation, as putting Men under a Necessity of righting themselves; upon which Considerations, Persons convicted of barely sending a Challenge, have been adjudged to pay a Fine of one hundred Pounds, and to be imprisoned for one Month without Bail, and also to make a publick Acknowledgment of their Offence, and to be bound to their good Behaviour.

Sett. 22. Secondly, An Affray may receive another Aggravation from the Persons against whom it is committed; as where the Officers of Justice are violently disturbed in the due Execution of their Office, as by the Rescous of a Person legally arrested, or the bare Attempt to make such a Rescous; for all the Ministers of the Law are under its more immediate Protection.

12 Co. 101.
1 Keb. 290,
491.
1 Mod. 186.

Sett. 23. Thirdly, An Affray may receive a farther Aggravation from the Place wherein it is committed, and upon this Respect all Affrays in the King's Court are so severely punished, as hath been shewn already in Chapter 21, and upon the same Account also, all Affrays in a Church or Church-yard, have been always esteemed very heinous Offences, as being great Indignities to the Divine Majesty, to whose Worship and Service such Places are immediately dedicated. And upon this Consideration, all irreverent Behaviour in these Places hath been esteemed so criminal by the Makers of our Laws, that they have not only severely punished such Disturbances in them which are punishable where-ever they happen, as all actual Affrays, &c. but also such, which if they happen elsewhere, are

are not punishable at all; as bare quarrellsome Words, and even such which would be commendable if done in another Place; as Arrests by Vertue of legal Process: But for the better Understanding hereof, I shall consider the several Statutes made for this Purpose.

Sect. 24. And first, It is enacted by 5 and 6 Ed 6. 4. *That if any Person whatsoever, shall by Words only quarrel, chide, or brawl, in any Church or Church-yard, that then it shall be lawful unto the Ordinary of the Place where the same Offence shall be done, and proved by two lawful Witnesses, to suspend every Person so offending; that is to say, if he be a Layman, ab ingressu Ecclesie, and if he be a Clerk from the Ministration of his Office, for so long Time as the same Ordinary shall by his Discretion think meet and convenient, according to the Fault.*

Sect. 25. And it is further enacted by the said Statute, *That if any Person shall smite or lay any violent Hands upon any other, either in any Church or Church-yard; that then, ipso Facto, every Person so offending shall be deemed excommunicate, and be excluded from the Fellowship and Company of Christ's Congregation.*

Sect. 26. And it is also farther enacted by the said Statute, *That if any Person shall maliciously strike any Person with any Weapon in any Church or Church-yard, or shall draw any Weapon in any Church or Church-yard, to the Intent to strike another with the same Weapon; that then every Person so offending, and thereof being convicted by Verdict of twelve Men, or by his own Confession, or by two lawful Witnesses, before the Justices of Assize, Justices of Oyer and Terminer, or Justices of Peace in their Sessions, by Force of this Act, shall be adjudged by the same Justices before whom such Person shall be convicted, to have one of his Ears cut off, &c. and besides that every such Person to be, and stand ipso Facto excommunicated, as aforesaid.*

And in the Exposition hereof it hath been holden:

Sect. 27. I. That notwithstanding the Words of the Statute be expressed, That he who smites another in the Church, &c. shall, *ipso Facto*, be deemed excommunicate; yet there ought either to be a precedent Conviction at Law, which must be transmitted to the Ordinary, or else the Excommunication must be declared in the Spiritual Court upon a proper Proof of the Offence there; for it is implied in every Penal Law, that no one shall incur the Penalty thereof, till he be found guilty upon a lawful Trial; also it must be intended in the Construction of this Statute, That the Excommunication ought to appear judicially, for otherwise there could be no Absolution.

Sect. 27. II. That he who strikes another in a Church, &c. can no way excuse himself, by shewing that the other assaulted him. Cro. Ja. 367.

Sect. 28. III. That Church-wardens, or perhaps private Persons, who whip Boys for playing in the Church, or pull off the Hats of those who obstinately refuse to take them off themselves, or gently lay their Hands on those who disturb the Performance of any Part of divine Service, and turn them out of the Church, are not within the Meaning of the Statute.

Sect. 29. Also it is enacted by 1 Ma. Sess. 2. cap. 3. *That if any Person or Persons, of their own Power and Authority, shall willingly and of Purpose by open and overt Word, Fact, Act, or Deed, maliciously or contemptuously molest, let, disturb, vex or trouble, or by any other unlawful Ways and Means, disquiet, or misuse, any Preacher who shall be licenced, allowed, or authorized to preach by the Queen's Highness, or by any Archbishop, or Bishop of this Realm, or by any other lawful Ordinary, or by any of the Universities of Oxford and Cambridge, or otherwise lawfully authorized or charged, by Reason of his or their*

Dyer 275.
Pl. 48.
Cro. Ja. 462.
1 Vent. 146.
Lit. 149.
Hett. 86.
Cro. El. 919.

1 Saund. 13.
14.
1 Sid. 301.
3 Keb. 124.
1 Mod. 168.

Cure, Benefice, or other Spiritual Promotion or Charge, in any of his, or their open Sermon, &c. or if any Person or Persons shall maliciously, willingly, or of purpose, molest, let, disturb, vex, disquiet, or otherwise trouble any Parson, Vicar, Parish Priest, or Curate, or any lawful Priest, preparing, saying, doing, singing, ministering or celebrating the Mass, or other such divine Service, Sacraments, or Sacramentals, as was most commonly frequented and used in the last Year of the Reign of the late Sovereign Lord King Henry the eighth, or that at any Time hereafter should be allowed, set forth, or authorized by the Queen's Majesty; or if any Person or Persons shall unlawfully, contemptuously, or maliciously, of their own Power or Authority, pull down, deface, spoil, or otherwise break any Altar or Altars, or any Crucifix, or Cross, in any Church, Chapel, or Church-yard; every such Offender and Offenders, his or their Aiders, Procurers or Abettors, may be apprehended by any Constable, or Church-warden of the Place where such Offence shall be committed, or by any other Officer or Person then being present at the Time of the said Offence; and being so apprehended, shall be brought before some Justice of Peace by whom they shall be committed forthwith, and within six Days the Matter shall be examined by the same, together with some other Justices; and on Proof by two Witnesses or Confession, the Offender shall be committed for three Months, and also till the next Quarter-Sessions, where, if they repent, they shall be discharged upon giving Sureties for their good Behaviour for a Year, and if they do not repent they shall be committed till they do.

2 Jon. 139.
Con. Aleyn
50.
2 Bull. 51.

Sett. 30. It hath been resolved, That the Disturbance of a Minister in saying the present Common Prayer is within this Statute; for the express mention of such Divine Service, as should afterwards be authorized by Queen Mary, doth implicitly include such also as should be authorized by her Successors; for since the King never dies, a Prerogative given generally to one, goes of Course to others.

Sett. 31. Also it is enacted by 1 Will. and Mar. 18. Par. 19. That if any Person shall willingly and of Purpose, maliciously or contemptuously come into any Cathedral or Parish Church, Chapel, or other Congregation permitted by the said Act, and disquiet or disturb the same, or misuse any Preacher or Teacher, such Persons, upon Proof before any Justice of Peace, by two or more sufficient Witnesses, shall find two Sureties to be bound by Recognizance in the penal Sum of fifty Pounds, and on Default of such Sureties shall be committed to Prison, there to remain till the next General or Quarter-Sessions, and upon Conviction of the said Offence at the said General or Quarter-Sessions, shall suffer the Pain and Penalty of twenty Pounds.

C H A P. LXIV.

Of Forcible Entries and Detainers.

Lamb. 135.
Dalc. cap. 76.
Crom. 70. a. b.

Kellw. 92.
Yelv. 172.
Cro. Ja. 236.
Supra Ch. 60.
S. 23.

Sett. 1. **I**T seems that at the Common Law a Man disseised of any Lands, or Tenements, (if he could not prevail by fair Means,) might lawfully regain the Possession thereof by Force, unless he were put to a Necessity of bringing his Action, by having neglected to re-enter in due Time: And it seems certain, That even at this Day, he who is wrongfully dispossessed of his Goods, may justify the re-taking of them by Force from the Wrong-doer, if he refuse to re-deliver them; for the Violence which happens through the Resistance of the wrongful Possessor, being

being originally owing to his own Fault, gives him no just Cause of Complaint, inasmuch as he might have prevented it by doing as he ought.

Sett. 2. But this Indulgence of the Common Law, in suffering Persons to regain the Lands, they were unlawfully deprived of, having been found by Experience to be very prejudicial to the publick Peace, by giving an Opportunity to powerful Men, under the Pretence of feigned Titles, forcibly to eject their weaker Neighbours, and also by Force to retain their wrongful Possessions, it was thought necessary by many severe Laws to restrain all Persons from the Use of such violent Methods of doing themselves Justice.

Sett. 3. However, even at this Day, in an Action of Forcible Entry grounded on those Laws, if the Defendant make himself a Title which is found for him, he shall be dismissed without any Inquiry concerning the Force; for howsoever he may be punishable at the King's Suit, for doing what is prohibited by Statute, as a Contemner of the Laws, and Disturber of the Peace, yet he shall not be liable to pay any Damages for it to the Plaintiff, whose Injustice gave him the Provocation in that Manner to right himself.

17 H. 7. 17 a. b.
21 H. 6. 39. b.
F. N. B. 449. d.
Bro. Force 5,
11, 29.

Sett. 4. Since therefore Offences of this Nature are made such, not by the Common Law, but by Statute; I shall for the better Understanding thereof, consider the several Statutes relating to this Subject.

Sett. 5. And first, I find it agreed, That by 2 Ed. 3. which is commonly called the Statute of *Northampton*; if there be any Use made of Arms to strike a Terror into the Persons upon whom a Forcible Entry is made, any Justice of Peace or other Officer, who is within the Purview of that Statute, may both seize the Arms for the King's Use, and also imprison the Offenders, but not restore the Party injured to his Possession; but the said Statute having been fully set forth in the foregoing Chapter, I shall proceed to those Statutes which more directly relate to this Matter.

3 Inst. 161.
Crom. 162. a.
Dalt. cap. 80.

Sett. 6. And first it is enacted by 5 Rich. 2. 7. in the following Words, *And also the King defendeth, That none from henceforth make any Entry into any Lands and Tenements, but in Case where Entry is given by the Law; and in such Case not with strong Hand, nor with Multitude of People, but only in peaceable and easy Manner. And if any Man from henceforth do to the contrary, and thereof be duly convicted, he shall be punished by Imprisonment of his Body, and thereof ransomed at the King's Will.*

Sett. 7. But this Statute being found by Experience not sufficiently to have provided against the Mischief intended to be redressed by it, inasmuch as it gave no speedy Remedy to the Party injured, against the Wrong-doer, but left him to the common Course of proceeding by way of Indictment or Action, and made no Provision at all against Forcible Detainers, it was thought necessary to supply these Defects by other additional Laws; and to this Purpose it was farther enacted by 15 Rich. 2. ch. 2. *That the said Statute and all others made against Forcible Entries, &c. shall be fully executed; and farther, That at all Times that such forcible Entries shall be made, and Complaint thereof cometh to the Justices of Peace, or to any of them, that the same Justices or Justice take sufficient Power of the County, and go to the Place where the Force is made; and if they find any that hold such Place forcibly, after such Entry made, they shall be taken and put in the next Gaol, there to abide convicted by the Record of the same Justices or Justice, until they have made Fine and Ransom to the King. And that all the People of the County, as well the Sheriff as others, shall be attendant upon the same Justices,*

to go and assist the same Justices to arrest such Offenders, upon Pain of Imprisonment, and to make Fine to the King: And in the same Manner it shall be done of them that make such Forcible Entries in Benefices or Offices of Holy Church.

8 Co. 121. a.
Dalt. cap. 22.

Lamb. 151.

Dalt. cap. 22.

^a B. R. Hill.

1708.

Salk 353.

Kellw. 41. 8.

Crom. 195. b.

196.

Dalt. cap. 22.

Moore 848.

Sal. 353.

Sett. 8. In the Exposition of this Statute it hath been holden, That one Justice of Peace may make a Record of such a forcible Holding, and that such Record is not traversable, because the Justice of Peace in making thereof, acts not as a Minister, but as a Judge: Also it hath ^a lately been solemnly resolved in Colonel *Leighton's* Case, That the same Justice may assess the Fine for this Offence, either before the Time of Conviction, or after; but it is said, That such Justice of Peace hath no Power to commit the Offender to Gaol, unless he do it immediately upon the Fact, or unless the Offender shall afterwards refuse to find Sureties for his good Behaviour. Also it was holden by the Court in *Leighton's* Case above-mentioned, That if a Person against whom a Complaint shall be made as having been guilty of a Forcible Entry, shall either traverse the Entry or the Force, or plead that he has been three Years in Possession, the Justice may summon a Jury for the Trial of such Traverse, for it is impossible to determine it upon View; and if the Justice have no Power to try it, it would be easy for any one to elude the Statute by the Tender of such a Traverse, and therefore by a necessary Construction, the Justice must needs have this Power as incidental to what is expressly given him.

Sett. 9. But this Statute being likewise very defective in many Respects, as in not giving any Remedy against those who were guilty of a Forcible Detainer after a peaceful Entry; nor even against those who were guilty of both a Forcible Entry and Forcible Detainer, if they were removed before the coming of a Justice of Peace; and in not giving the Justices of the Peace any Power to restore the Party injured by such Force to his Possession; and also in not fixing any Pain on the Sheriff for not obeying the Precepts of the Justices in the Execution of the said Statutes; it was farther enacted by 8 H. 6. 9. *That from henceforth where any doth make any Forcible Entry in Lands and Tenements, or other Possessions, or them hold forcibly, after Complaint thereof made within the same County where such Entry is made, to the Justices of the Peace, or to one of them, by the Party grieved, that the Justices or Justice so warned, within a convenient Time, shall cause, or one of them shall cause, the said Statute duly to be executed, and that at the Costs of the Party so grieved.*

Sett. 10. And it is further enacted by the said Statute, *That though such Persons making such Entries be present, or else departed before the coming of the said Justices or Justice, notwithstanding the same Justices or Justice in some good Town next to the Tenements so entered or in some other convenient Place, according to their Discretion, shall have, and either of them shall have, Authority and Power to enquire by the People of the same County, as well of them that make such Forcible Entries in Lands and Tenements, as of them which the same hold with Force. And if it be found before any of them, that any doth contrary to this Statute, then the said Justices or Justice shall cause to reseize the Lands and Tenements so entered or holden as afore, and shall put the Party so put out, in full Possession of the same Lands and Tenements, so entered or holden as before.*

Sett. 11. And it is further enacted by the said Statute, *That when the said Justices or Justice make such Inquiries as before, they shall make, or one of them shall make, their Warrants and Precepts to be directed to the Sheriff of the same County, commanding him of the King's Behalf, to cause to come before them, and every of them, sufficient and indifferent Persons, dwelling next about the Lands so entered as before, to enquire of such Entries, whereof every Man which shall*

shall be impanelled to enquire in this Behalf, shall have Land or Tenement of the yearly Value of forty Shillings by the Year at the least, above Reprizes, and that the Sheriff return Issues upon every of them at the Day of the first Precept returnable, twenty Shillings, and at the second Day forty Shillings, and at the third Time an hundred Shillings, and at every Day after the double. And if any Sheriff or Bailiff within a Franchise having Return of the King's Writ, be slack, and make not Execution duly of the said Precepts to him directed to make such Enquiries, that he shall forfeit to the King twenty Pounds for every Default, and moreover shall make Fine and Ransome to the King. And that as well the Justices or Justice aforesaid, as the Justices of Assizes shall have Power to hear and determine such Defaults of the said Sheriffs and Bailiffs, at the Suit of the King, or of the Party grieved, &c.

Se^ct. 12. And it is farther enacted by the said Statute, That Mayors, Justices or Justice of Peace, Sheriffs and Bailiffs of Cities, Towns and Boroughs having Franchise, have in the said Cities, Towns, and Boroughs, like Power to remove such Entries, and in other Articles aforesaid, rising within the same, as the Justices of Peace, and Sheriffs in Counties and Countries aforesaid have.

Se^ct. 13. But it is provided by the said Statute, That they who keep their Possessions with Force in any Lands and Tenements, whereof they or their Ancestors, or they whose Estate they have in such Lands and Tenements, have continued their Possessions in the same by three Years or more, be not endamaged by Force of this Statute.

Se^ct. 14. And the said Proviso was farther enforced and explained by 31 El. 11. by which it is declared and enacted, That no Restitution upon any Indictment of Forcible Entry, or holding with Force, be made to any Person, if the Person so indicted, hath had the Occupation, or been in quiet Possession, for the Space of three whole Years together, next before the Day of such Indictment so found, and his Estate therein not ended; which the Party indicted may alledge for stay of Restitution, and Restitution to stay till that be tried, if the other will deny or traverse the same: And if the same Allegation be tried against the same Person so indicted, he is to pay such Costs and Damages to the other Party, as shall be assessed by the Judges or Justices before whom the same shall be tried; the same Costs and Damages to be recovered and levied, as is usual for Costs and Damages contained in Judgments upon other Actions.

Se^ct. 15. In the Construction of these Statutes it was holden, That if a Lessee for Years or Copyholder were ousted, and the Lessor or Lord dis- seized, and such Ouster as well as Disseisin were found in an Indictment of Forcible Entry, the Court might in their Discretion award a Restitution of Possession to such Lessee or Copyholder, which was by necessary Consequence a Re-seisin of the Freehold also, whether the Lessor or Lord had desired or opposed it: But it was a great Question, Whether a Lessee for Years or a Copyholder, being ousted by the Lessor or Lord, could have a Restitution of their Possession within the Equity of 8 H. 6. the Words whereof as to this Purpose are, that the Justice shall re-seize the Lands, &c. by which it seems to be implied, That the Party must be ousted of such an Estate therein, whereof he may be said to be seized, which must be a Freehold at least.

Se^ct. 16. But to remove this Doubt, it is enacted by 21 Ja. 1. 15. That such Judges, Justices, or Justice of the Peace, as by reason of any Act or Acts of Parliament then in force, were authorized and enabled upon Enquiry, to give Restitution of Possession unto Tenants, of any Estate of Freehold, of their Lands or Tenements, which shall be entered upon with Force, or from them withheld by Force, shall by Reason of that Act have the like, and the same Authority and Ability from thenceforth (upon Indictment of such Forcible Entries, or forcible withholding before them duly found) to give like Restitution of Possession

Crom. 161. b.
166 b.

Yelv. 81.
Crom. 1 Leon.
327.

Lam. 159.
Crom. 71.
Dalt. cap. 77
Savil 63. Pl.
141.

session unto Tenants for Term of Years, Tenants by Copy of Court-Roll, Guardians by Night-Service, Tenants by Elegit, Statute-Merchant, and Staple of Lands or Tenements, by them so holden, which shall be entred upon by Force, or holden from them by Force.

Larch 182.

S^e Co. Litt. 61.

Vide Sal 587.

Crom. 71. a. 166. b. Dal. ch. 77.

Lamb. 155. Crom. 71. a Dal. ch. 77. 2 K^b. 495.

Sett. 17. But it hath been holden, That a Tenant by the Verge is not within this Statute, because he is not within the exprefs Words; *sed Quare*, for since such Person hath no other Evidence of his Title, but by the Copy of Court-Roll, he seems at least to be within the Meaning, if not within the Words, of the Statute; however it seems clear, That if a Lessor eject his Lessee for Years, and afterwards be forcibly put out of Possession again by such Lessee, he hath no Remedy for a Restitution by Force of any of the above mentioned Statutes, for he cannot have it by 8 H. 6. because he always continued seized of the Freehold, and clearly he is not within 21 Jac. 1. 15.

Sett. 18. However there seems to be no doubt, but that a Justice of Peace, &c. may, in either of the said Cases, remove the Force, and commit the Offender, &c.

Sett. 19. Having thus set forth the several Statutes relating to this Subject, together with the Mischiefs which occasioned them, and the several Defects of each of them, I shall, for the better Understanding of them all in general, proceed to examine the following Particulars:

1. What shall be esteemed an Entry within these Statutes.
2. What Entry is to be adjudged forcible.
3. What Detainer.
4. In respect of what Kind of Possessions one may be guilty of such forcible Entry or Detainer.
5. What Persons may be guilty thereof.
6. What ought to be the Form of a Record grounded upon these Statutes.
7. Of what Kind of Possessions a Restitution is to be awarded.
8. To whom such Restitution ought to be made.
9. By whom, and in what Manner, it is to be awarded and given.
10. In what Cases it may be barred by the Continuance of a Possession for three Years.
11. For what other Causes it may be stayed.
12. How it may be superseded before it is executed.
13. How it may be set aside after it is executed.

Crom. 70. b. Dal. ch. 77.

Crom. 69. Dal. ch. 77. Con. Cro. Ca. 486.

Crom. 69. a. Dal. ch. 77. H² ch. 29. S. 4.

Sett. 20. As the first Point, *viz.* What shall be esteemed an Entry within these Statutes, it seems certain, That if one who pretends a Title to Lands, barely go over them, either with, or without a great Number of Attendants, armed or unarmed, in his Way to the Church, or Market, or for such like Purpose, without doing any Act, which either expressly or impliedly amounts to a Claim of such Lands, he cannot be said to make an Entry thereinto within the Meaning of these Statutes.

Sett. 21. Yet in such Case, if he make an actual Claim with any Circumstances of Force or Terror, he seems to be guilty of a forcible Entry within 1 & 15 Ric. 2. whether his Adversary actually quit his Possession or not.

Sett. 22. Also all those who accompany a Man when he makes a forcible Entry, shall be adjudged to enter with him, within the Intent of these Laws, whether they actually came upon the Lands, or not.

Señ. 23. So also shall those who having an Estate in Land by a defeasible Title, continue with Force in the Possession thereof, after a Claim made by one who had a Right of Entry thereto.

*Crom. 69. h.
Dal. ch. 77.
Co. Lit. 256,
257.*

Señ. 24. But he who barely agrees to a forcible Entry made to his Use, without his Knowledge or Privity, shall not be adjudged to make an Entry within these Statutes, because he no way concurred in, or promoted the Force.

*Crom. 69. a.
Dal. ch. 77.
2 H. 7. 16. b.*

Sect. 25. As to the second Point, *viz.* What Entry is to be adjudged forcible, it seems clear, that it ought to be accompanied with some Circumstances of actual Violence or Terror; and therefore, That an Entry which hath no other Force than such as is implied by the Law, in every Trespass whatsoever, is not within these Statutes.

*Lamb. 142,
&c.
Dal. ch. 77.
Co. Lit. 257.
b.*

And therefore, for the better Understanding hereof, I shall consider;

1. In Respect of what Acts of Violence an Entry may be adjudged forcible.

2. In Respect of what Circumstances of Terror.

Señ. 26. As to the first of these Particulars, it seems to be agreed, That an Entry may be said to be forcible, not only in Respect of a Violence actually done to the Person of a Man, as by beating him if he refuse to relinquish his Possession, but also in Respect of any other Kind of Violence in the Manner of the Entry, as by breaking open the Doors of a House, whether any Person be in it at the same Time or not, especially if it be a Dwelling-house, and perhaps also by any Act of Outrage after the Entry, as by carrying away the Party's Goods, &c. which being found in an Assize of Novel Disseisin, will make the Defendant a Disseisor with Force, and subject him to Fine and Imprisonment: And according to some Opinions, an Entry may be said to be forcible from the bare drawing up of a Latch, or pulling back the Bolt of a Door; but surely such inconsiderable Circumstances as these, which commonly pass between Neighbour and Neighbour, without any Offence at all, can never bring a Man within the Meaning of these Statutes, which speak of Entries with strong Hand, or Multitude of People; and it hath been holden, That an Entry into a House through a Window, or by opening a Door with a Key, is not forcible: And it is said, That if one find a Man out of his House, and forcibly with-hold him from returning to it, and send Persons to take peaceable Possession thereof, in the Party's Absence, yet he is not guilty of a forcible Entry, inasmuch as he did no Violence to the House, but only to the Person of the other: But perhaps this Opinion may justly be questioned, because though the Force be not actually done upon the Land, nor in the very Act of the Entry, yet since it is used with an immediate Intent to make such Entry, and is the only Cause that it met with no Opposition, surely it cannot be said, that the Entry is without Force, which, whether it be upon, or off the Land, seems equally within the Statute.

*H. P. C. 116.
2 Rol. Re. 2.
Noy 136.
30 Aff. 50.
11 H. 4. 16. b.
17. a.
2 Inst. 235,
236.
Dal. ch. 77.
Crom. 70. a. b.
Moore 656.
Pl. 899.
Nov. 137.
Dal. ch. 77.
H. P. C. 138.
Lamb. 143.
2 Rol. Re. 2.
Lamb. 143.
Dal. ch. 77.*

Señ. 27. As to the second Particular, *viz.* In respect of what Circumstances of Terror an Entry may be adjudged forcible; it is to be observed, That where-ever a Man, either by his Behaviour or Speech, at the Time of his Entry, gives those who are in Possession of the Tenements which he claims, just Cause to fear, that he will do them some bodily Hurt, if they will not give way to him, his Entry is esteemed forcible, whether he cause such a Terror, by carrying with him such an unusual

*H. P. C. 128.
Lamb. 142,
&c.
Dal. ca. 77.*

10 H. 7. 12. a.
Crom. 69. Pl.
14. 24.

See the Books
above cited.

Bro. Dutels.
12, 16.
1 Inst. 253. b.
Dal. ca. 77.
Lamb. 143.

H. P. C. 138.

Lamb. 145.
Crom. 70.
H. P. C. 139.
Dal. ca. 77.
Cro. Ja. 199.

Crom. 70. b.
Lamb. 145.

Crom. 70. b.
Lamb. 145.

Crom. 73.
Dal. ca. 77.

a 1 Sid. 101.
1 Levin 90.
1 Keb. 438.
b Cro. Ja. 41.
c Cro. Ca. 201.
d 20 H. 6. 11. 3.
22 H. 6. 33. 3.
Bro. Force 7.
Cro. Ca. 201.
e Cro. Ca. 201.
f See Cro. ca.
486.
See Dal. ca. 77.
g Cro. Ja. 18.
h Crom. 69, 70.
Lamb. 144.
Dal. ca. 77.

1 Mod. 73.
2 Keb. 709.

Vide infra.
Sect. 40.

Number of Servants, or by arming himself in such a Manner, as plainly intimates a Design to back his Pretensions by Force, or by actually threatening to kill, maim, or beat those who shall continue in Possession, or by giving out such Speeches as plainly imply a Purpose, of using Force against those who shall make any Resistance, as if one say that he will keep his Possession in spite of all Men. &c.

Sect. 28. But it seemeth that no Entry shall be judged forcible from any threatening to spoil another's Goods, or to destroy his Cattle, or to do him any other such like Damage which is not personal.

Sect. 29. However it is clear, That it may be committed by a single Person, as well as by twenty.

Sect. 30. As to the third Point, viz. What Detainer is to be adjudged forcible, it seemeth certain, That the same Circumstances of Violence or Terror, which will make an Entry forcible, will make a Detainer forcible also; from whence it seems to follow, That whoever keeps in his House an unusual Number of People, or unusual Weapons, or threatens to do some bodily Hurt to the former Possessor, if he dare return, shall be adjudged guilty of a forcible Detainer, tho' no Attempt be made to re-enter; and it hath been said, That he also shall come under the like Construction, who places Men at a Distance from the House, in order to assault any one who shall attempt to make an Entry into it; and that he also is in like Manner guilty who shuts his Doors against a Justice of Peace coming to view the Force, and obstinately refuses to let him come in: But it is said, That a Man ought not to be adjudged guilty of this Offence, for barely refusing to go out of a House, and continuing therein in despite of another.

Sect. 31. As to the fourth Point, viz. In respect of what Kind of Possessions one may be guilty of a forcible Entry or Detainer within those Statutes, it seems clear, That one may come within the Danger thereof by a Force done to Ecclesiastical Possessions, as ^a Churches, ^b Vicaridge-Houses, &c. as much as if the same were done to any temporal Inheritance; also it hath been holden for a general Rule, That one may be indicted for a forcible Entry into any such incorporeal Hereditament, for which a ^c Writ of Entry will lie, either by the Common Law, as for ^d Rent, or by Statute, as for ^e Tithes, &c. but I do not find any good Authority, That such an Indictment will lie for a ^f Common or ^g Office; but it seems agreed, That an Indictment of forcible Detainer lies against any one, whether he be the Tertenant, or a Stranger, who shall forcibly disturb the lawful ^h Proprietor in the Enjoyment of any of the above-mentioned Possessions; as by violently resisting a Lord in his Distress for a Rent, or by menacing a Commoner with bodily Hurt, if he dare put in his Beasts into the Common, &c. yet it seems clear, That no one can come within the Danger of these Statutes by a Violence offered to another in respect of a Way, or such like Easement, which is no Possession. Also it seemeth, That a Man cannot be convicted upon View, by Force of 15 Ric. 2. 2. of a forcible Detainer of any such Tenement, wherein he cannot be said to have made a precedent forcible Entry, because that Statute gives the Justices a Jurisdiction of no other forcible Detainer, but what follows a forcible Entry.

Sect. 32. As to the fifth Point, viz. Who may be guilty of a forcible Entry or Detainer within these Statutes; it seems clear, That no one can come within the Intention thereof by any Force whatsoever done by him in entering into a Tenement, whereof he himself had the sole and lawful Possession, both at and before the Time of such Entry; as by breaking

breaking open the Doors of his own Dwelling-house, or of a Castle, which is his own Inheritance, but forcibly detained from him by one who claims the bare Custody of it; or by forcibly entering into the Land in the Possession of his own Lessee at Will. *Sed Quære.*

Sect. 33. But it seems clear, That a Jointenant, or Tenant in Common, may offend against the Purport of these Statutes, either by forcibly ejecting, or forcibly holding out his Companion, for tho' the Entry of such a Tenant be lawful *per my & per tout*, so that he cannot in any Case be punished in an Action of Trespass at the Common Law yet the Lawfulness of his Entry no Way excuses the Violence, or lessens the Injury done to his Companion, and consequently an Indictment of forcible Entry into a Moiety of a Manor, &c. is good.

Sect. 34. Also if a Man have been in Possession of Land for never so long a Time, by a defeasible Title, and another who hath a Right of Entry thereunto, make a Claim, and yet such wrongful Possessor still continue his Occupation with Force and Arms, he is punishable for a forcible Entry and Detainer against the Purport of these Statutes, because all the Estate whereof he was seized before such Claim, was wholly defeated by it, and his Continuance in Possession afterwards amounted in the Judgment of Law to a new Entry.

Sect. 35. It is said, That an Infant or Feme Covert may be guilty within the Intention of these Statutes, in respect of such actual Violence as shall be done by them in Person, but not in respect of what shall be done by others at their Command, because all such Commands of theirs are void: Also it is said, That a Feme Covert may be imprisoned for such Offence, but that an Infant ought not, because he shall not be subject to corporal Punishment, by Force of the general Words of any Statute, wherein he is not expressly named.

As to the sixth Point, *viz.* What ought to be the Form of a Record grounded upon these Statutes, it hath been resolved.

Sect. 36. First, That it is sufficient in the Caption of such an Indictment, to say, That it was taken before *A. B. & C. D. Justiciaris ad pacem Domini Regis conservandum assignatis*, without shewing that they had Authority to hear and determine Felonies and Trespasses, for the Statute enables all Justices of Peace, as such, to take such Indictments.

Sect. 37. Secondly, It hath also been resolved, That the Tenement in which the Force was committed, must be described with convenient Certainty, for otherwise the Defendant will neither know the special Charge to which he is to make his Defence, neither will the Justices or Sheriff know how to restore the injured Party to his Possession; and from hence it follows, That an Indictment of a forcible Entry into a Tenement, (which may signify any Thing whatsoever, ^b wherein a Man may have an Estate of Freehold,) or into a House ^c or Tenement, or into two Clofes of Meadow ^d or Pasture, or into a Rood ^e or half a Rood of Land, or into ^f certain Lands belonging to such a House, or into such a House, without shewing in what ^g Town it lies, or into a ^h Tenement with the Appurtenances called Trupenny in *D.* is not good. But it hath been resolved, That an Indictment for a forcible Entry *in* ⁱ *Domum Mansionalem sive Messuagium*, &c. is good, for these are Words equipollent: Also that such an Indictment for an Entry into a ^k Clofe, called Serjeant *Hern's* Clofe, &c. without adding the Number of Acres, is good, for here is as much Certainty as is required in an Ejectment;

Bro. forcib. Ent. 23. * 2 Leon. 186. ^b 2 Rol. Ab. 80. Pl. 7 ⁱ Cro. Ja. 633. Palm. 277. 458. ^a 2 Rol. Ab. 80. Pl. 8

and

and it hath been adjudged, That such Indictment may be void as to such Part thereof only which is uncertain, and good for so much as is certain, and therefore, that an Indictment for a forcible Entry into a House, and certain Acres of Land thereto belonging, may be quashed as to the Land, and stand good as to the House.

Sect. 38. Thirdly, it hath been also resolved, That an Indictment, on 5 or 15 *Rich. 2.* needs not shew who had the Freehold at the Time of the Force, because those Statutes seem equally to punish all Force of this Kind, without any Way regarding what Estate the Party had on whom it was made; yet it seems, That such an Indictment ought to shew that such Entry was made on the Possession of some Person, who had some Estate in the Tenements, either as a Freeholder or Lessee for Years, &c. for otherwise it doth not appear, that such Entry was made injurious to any one; but it is said, That an Indictment on 8 *H. 6.* must shew, that the Place wherein the Force was committed was the Freehold of the Party grieved at the Time of such Force; and therefore, That it is not sufficient to say that the Defendant with strong Hand, &c. entered into such a House, *existens liberum Tenementum J. S. &c.* without saying, *ad tunc existens liberum Tenementum, J. S.* for otherwise it may be intended, that it was his Freehold at the Time of the Indictment only, and not at the Time of the Force; and according to the general Opinion, an Indictment on that Statute cannot warrant an Award of Restitution, unless it find, that the Party was seized at the Time; yet it is said, That the Want of such an express finding may be supplied by such Words as necessarily imply, that the Party was seized at the Time of the Force; as where it is expressly laid that the Defendant disseised *J. S. &c.* which is impossible, unless he had been seized of the Freehold at the same Time; and it hath been said, That it is sufficient in such an Indictment to say that the Party was *Possessionatus pro termino Vitæ*, without using the Word *Seisitus*, &c. for the same Propriety of Expression is not required in Indictments as Pleadings; *sed Quare.* Also it is said, That if it do appear either in such an express or implicit Manner, that the Party injured had the Freehold of the Land at the Time of the Force, it is not necessary to shew farther what Estate in particular he had therein, or by what Title he claims the same; for it is not the Title, but the Possession, which is in Question. And upon the like Ground it hath been adjudged, That an Indictment on the said Statute for entering on my Farmer, and forcibly expelling him, and disseising me, is good, without shewing what Estate such Farmer had; for it is sufficient to shew that he had the Possession, and the Injury complained of is the forcible Disseisin done to me, which, being the main Point of the Indictment, if it be sufficiently set forth in Substance, the Indictment is good; yet in this very Case the Want of shewing that such Farmer was ousted, would have been an incurable Fault; because his Possession being my Possession, unless he were ousted, I could not be disseised. Also it hath been holden, That as an Indictment on 8 *H. 6.* must shew that the Party who is put out of Possession was seized of a Freehold, in order to bring him within the Purview of that Statute, so also an Indictment on 21 *Jac. 1. 15.* must shew, That the Party injured was possessed of such an Estate as will bring him within the Provision of that Act; and upon this Ground it hath been resolved. That such an Indictment, setting forth in general, that the Party was possessed, or that he was possessed for a certain Term, without adding, that it was for Years, is not good; for in the first Case it may be intended, That he was possessed only by Vertue of a Lease at Will; and in the second, That

That he was possessed of a Term for Life, in neither of which Cases he is within the Benefit of 21 Jac. 1. 15. Yet it hath been said, That the Possession of such an Estate, as is within that Statute, is sufficiently set forth in the reciting Part of an Indictment, as thus, *Quod cum J. S.* was possessed for a certain Term of Years, and being so possessed, was by strong Hand, &c. put out of Possession, &c. without any direct Allegation of such a Possession.

Sect. 39. Fourthly, it hath been resolved, That a Repugnancy in setting forth the Offence in an Indictment upon any of these Statutes, is an incurable Fault; and upon this Foundation it hath been adjudged, That an Indictment on 8 H. 6. setting forth, that the Defendants *Pacificè intraverunt*, &c. & *eum adtunc & ibidem vi & armis disseisiverunt*, or that J. S. was seized and possess'd, is void; and it hath also been adjudged, That an Indictment on 21 Jac. 1. setting forth, That the Party injured was possessed of a Term for Years, or of a Copyhold Estate, and that the Defendants with strong Hand, ousted, and disseised him, is void, because it is absurd and contradictory to set forth a Disseisin of such an Estate whereof it is impossible that any Man can be disseised; also it hath been holden, That an Indictment on 8 H. 6. setting forth a Disseisin of Land, *adtunc & adhuc existens liberum Tenementum J. S.* is void for its Repugnancy, inasmuch as it implies, That J. S. always continued in Possession; which, if it be true, makes it impossible that he could be disseised at all; but some have said that this seeming Repugnancy may be reconciled, by intending that the Disseisee might re-enter after the Time of the Disseisin, and before the finding of the indictment; however it seems clear, That if the Words *Adhuc extratenet* be added, such a Repugnancy cannot be helped by any Intendment; and that no Restitution can be awarded on such an Indictment, whether those Words *Adhuc extratenet* be in it or not, because the Party grieved appears by the Indictment it self to have had the Freehold at the Time of the finding thereof.

Sect. 40. Fifthly, It hath been resolved, That an Indictment of a forcible Detainer, without shewing that the Defendant made an Entry into the same Lands, is not good, because the Statute doth not prohibit one who hath always been in Possession, to maintain the same with Force: And it seems clear, That a Conviction of a forcible Detainer upon View by Force of 15 Rich. 2. 2. cannot be good, unless it shew that the Defendant was also guilty of a forcible Entry, for the Words of that Statute are, *That at all Times that such forcible Entries are made, and Complaint thereof cometh to the Justices, &c. that the same Justices, &c. shall go, &c. and if they find any that hold such Place forcibly, after such Entry made, &c.* by which it is plain, That the Justices have no Jurisdiction by Force of this Statute but where the Entry, as well as Detainer, was forcible: Yet in *Leighton's* Case it was resolved, That such a forcible Entry is sufficiently set forth in the Complaint recited in such a Conviction; and it is plain, That the Statute could not intend that the forcible Entry should be viewed, because it is to precede the Proceedings of the Justices; but perhaps it is the better Opinion, That an Indictment upon 8 H. 6. setting forth an Entry and forcible Detainer, without shewing whether the Entry were forcible or peaceable, is good; for there is no Medium between a forcible and peaceable Entry, and an Entry not alledged to have been forcible, shall be intended to have been peaceable, or, if not so, yet it seems to be no Way material, whether it shall be taken to have been forcible or peaceable, because in either Case it is equally within the Statute, the Words whereof as to this Purpose are, *Where any doth make forcible Entry in Lands and*

1 Mod. 75.

Allyn 50.
Show 272.
1 Vent. 108.
Poph. 205.
Raymond 67.
1 Keb. 423.
428, 435, 472.

2 Ro. Re. 311.
Show 272.
2 Bull. 121.
1 Sid. 102.

2 Rol. A. 80.
Pl. 10.

Palm. 195,
196, 197.
Cro. Ja. 19,
20, 32.
Cro. El. 915.

B. R. Hil.
1708.

2 Rol. Ab.
80 Pl. 11.

Yelv. 99.
Cro. Ja. 151.
1 Sid. 97, 99
414.
2 Keb. 505.
Vide infra,
Sect. 59.
B. 2. Ch. 25.
S. 2.

Salk. 260. 2.
Bro. Force.
13.
Lamb. 153.
Dal. ch. 81.

Cro. Ja. 41.

B. 2. ch. 23.
S. 88.

Dy. 68. Pl. 28.

^a Noy 125.
^b Cro. Ja. 32.
^c Cro. El. 186
Con. Noy
120.

Cro. El. 461.
Latch 224.
2 Bull. 258.
B. 2. ch. 25.
S. 92.
Con. 1. Keb.
572.
2 Keb. 133.
135.
1 Vent. 265.

7 Ed. 4. 18. a.
Dal. 25.

Tenements, or other Possessions, or them hold forcibly; by which it appears, That a forcible Detainer is a distinct Offence from that of a forcible Entry, and no Way depending on it; and my Lord Chief Justice *Holt* seemed to be of this Opinion in *Leighton's Case* above mentioned. However it seems to be certain, That if a Bill both for a forcible Entry and forcible Detainer be preferred to a Grand Jury, and found *Ignoramus* as to the Entry with Force, and *Billa vera* as to the Detainer, it will not warrant an Award of Restitution, but is void, because a Grand Jury cannot find a Bill true for Part, and false for Part, as a Petit Jury may.

Sect. 41. Sixthly, It hath been resolved, That no Indictment can warrant an Award of Restitution, unless it find that the Wrong-doer both ousted the Party grieved, and also continueth his Possession at the Time of the finding of the Indictment, for it is a Repugnancy to award Restitution of Possession to one who never was in Possession, and it is vain to award it to one who doth not appear to have lost it.

Sect. 42. Seventhly, It hath been resolved, That the Time and Place of the Disseisin are sufficiently set forth in an Indictment, alledging, That the Defendant *Tali die intravit, &c. & ipsum A. B. manu forti disseisivit*, without adding the Words *Adtunc & Ibidem*; for inasmuch as the Entry and Disseisin are both of them of the same Nature, and the one of them naturally tends to cause the other, it is implied, that they both happened at the same Time; and the forcible Entry being the principal Offence within the Purview of these Statutes, and the Disseisin being only added to shew that the Party grieved hath a Right to a Restitution, as to which the Day of the Disseisin is no Way material, it seemeth to be over nice to require a precise Exactness in setting it forth; neither can it be to any Purpose to alledge that the Disseisin was at the same Place with the Entry, since it appears from the Nature of the Thing, that it could not but be so; yet in an Indictment of Murther, it is perhaps a fatal Mistake, not expressly to shew the Day and Place of the Stroke, as well as of the Assault, because these Offences are of different Kinds, the one being only a Trespass, and the other a Felony, and may well be intended to have happened at different Times and Places, and the giving of the Stroke being the principal Offence, ought to be set forth with the most exact Certainty.

Sect. 43. Eighthly, It hath been resolved, That a Disseisin is sufficiently set forth, by alledging, That the Defendant entered, &c. into such a Tenement and disseised the Party, without adding, either the Words ^a *Illicite*, or ^b *Expulit*, or ^c *Inde*, for the Word *Disseisivit* implies as much.

Sect. 44. Ninthly, It hath been resolved, That an Indictment which pursues the Words of the Statute in alledging an Entry, &c. to have been made *Manu forti*, needs not expressly also to say, That it was made *Vi & Armis*, because that is implied; also it is said, That as the Want of those Words will not vitiate an Indictment which pursues the Statute, so neither will the using of them make good an Indictment which does not pursue it; yet it hath been resolved, That such an Indictment may be good without mentioning any Complaint, tho' the Statute seems to require it; for it is said, That those Words in the Statute are put in *causa abundanti*; and that if a Justice of Peace have by any Means whatsoever Notice of a forcible Entry or Detainer, he may and ought to proceed against the same according to the said Statute, as being a Disturbance of the publick Peace, the Preservation whereof was the chief End of these Statutes.

Sect.

Señ. 45. As to the seventh Point, *viz.* Of what Kind of Possessions a Restitution is to be awarded; it seems that it ought only to be awarded for the Possession of such Tenements as are visible and corporeal, for no one who hath a Right to such as are invisible and incorporeal, as Rents, Commons, &c. can be put out of Possession thereof, but only at his own Election, by a Fiction of Law, in order to enable him to recover Damages against the Person who hath wrongfully disturbed him in the Enjoyment of them; for such Things being mere Creatures of the Law, and depending entirely upon the Construction thereof, are always in the Possession of those whom the Law adjudges to have a Right to such Possession, and consequently all the Remedy that can be desired against a Force offered to a Man in respect of such like Possessions, is to have the actual Force removed, and the Offenders punished for the same, which may be done by Force of 15 *Rich. 2. &c.*

*Dal. ch. 81.
Lamb. 153.*

Co. Lit. 323

Señ. 46. As to the eighth Point, *viz.* To whom such Restitution ought to be made; it hath been holden, That it shall only be given to him who is found by the Indictment to have been put out of an actual Possession, and consequently that it shall not be awarded to one who was only seized in Law, as to an Heir upon whom a Stranger abateth upon the Death of the Ancestor, before any actual Entry made by such Heir; and from the same Ground it followeth, That it shall not be granted to an Heir upon an Indictment, finding a forcible Entry made upon his Ancestor.

*Dal. ch. 83.
Lamb. 153.*

*Lamb. 154.
Dal. ch. 83.
Vide Cro. Ja.
199*

Señ. 47. It hath been holden by some, That if a Disseisee re-enter peaceably upon the Disseisor, and continue for some Time peaceably upon the Tenements in Dispute, and afterwards detain them with Force, the Disseisor shall not be restored upon an Indictment finding the said Force, because his Possession was at first peaceably defeated, and at the Time of the Force, he had, in the Judgment of Law, no Possession at all; but I cannot be persuaded that this Opinion is agreeable to the Intention of the said Statutes, the principal End whereof seems to be to oblige all Persons to refer themselves to the Courts of Justice, for the Decision of their Claims to the Possession of Land, and to restrain them from disturbing the publick Peace, by such Endeavours to right themselves; but if such a Practice as this should be allowed, it would be easy to evade the Effect thereof by refraining from Violence at first, and then forcing the Party to leave the Possession of the Premises after a short Continuance thereon in Peace; neither do I see any Difference between such a Continuance for the Space of three Days, and a Continuance for three Hours or Minutes, inasmuch as the subsequent Force is in each Case equally within the Mischief intended to be provided against by the Statutes; and seeing the Statutes of 8 *H. 6.* and 31 *El. 11.* have expressly provided, That those who have been in Possession for three Years, shall not be put out of Possession by an Indictment of forcible Entry or Detainer; it seems plainly to be implied, That no one shall have the like Advantage, in respect of a Possession for a shorter Time.

*Crom. 162. b.
163 a. b.*

Señ. 48. It will be needless in this Place to shew of what Kind of Hereditaments, or of what Kind of Estate therein, the Party who is to be restored must be found to have been seized or possessed, because this may sufficiently appear by what hath been said in the foregoing Part of this Chapter.

Señ. 49. As to the ninth Point, *viz.* By whom and in what Manner such Restitution may be awarded and given, there is no doubt, but that the same Justice, before whom an Indictment of forcible Entry or De-

tainer

Dal. ca. 82.
Dy. 187. tainer shall be found, may grant an Award of Restitution to the Party; and it is said, That he may execute the same either in his own proper Person, or make his Precept to the Sheriff to do it.

1 Sid. 156.
1 Keb. 88.
1 Vent. 308.
Dy. 187. Pl. 6. *Sect. 50.* But it seems clear, That neither Justices of Peace, nor any other Court whatsoever, have Authority to grant a Restitution upon a Conviction of any Force taken by them upon View, unless the same be found by an Indictment, according to the Direction of 8 H. 6. or 21 Ja. Also it seems to be agreed, That no other Justices of Peace, except those before whom such an Indictment shall be found, have any Power, either at Sessions, or out of it to make any Award of Restitution; and that no other Court whatsoever can personally restore the Party without a Precept to the Sheriff.

Dal. ca. 82.
Lamb. 184.
Kellew. 159.
Dalif. 25.
9 Co. 118. b.
11 Co. 65. a.
7 Ed. 4. 18. a.
4 H. 7. 18. b.
Dalif. 25.
9 Co. 118. b.
11 Co. 65. a.
Dal. ch. 82.
Lamb. 157.
Dal. ch. 82. *Sect. 51.* Also it hath been resolved, That Justices of Oyer and Terminer have no Power, either to inquire of a forcible Entry or Detainer, or to award Restitution on any such Indictment; because, when a new Power is created by Statute, and certain Justices are assigned to execute it, it cannot regularly be executed by any other; and inasmuch as Justices of Oyer and Terminer have a Commission entirely distinct from that of Justices of Peace, they shall not, from the general Words of their Commission, *Ad inquirend' de omnibus transgr' & de omnibus aliis Articulis & Causis cont' formam quorumcunque Statutorum fact' sive perpetrat'*, be construed to have any such Powers as are specially limited to Justices of Peace; yet it hath been resolved, That the Justices of the King's Bench may award Restitution upon an Indictment of forcible Entry or Detainer removed before them, because the said Justices having a supream and sovereign Jurisdiction over all Matters of a criminal and publick Nature, have always been esteemed to have Power in all Causes of this Nature, being brought judicially before them, to give the Parties such Remedies in Relation thereto, as they shall appear to have a Right to demand, either by Common Law or by Statute.

Lamb. 157.
Dal. ch. 82. *Sect. 52.* The Sheriff, if need be, may raise the Power of the County to assist him in the Execution of a Precept of Restitution, and therefore, if he make a Return thereto, that he could not make a Restitution by reason of Resistance, he shall be amerced.

Saik. 260. Pl. 1. *Sect. 53.* As to the tenth Point, viz. How such Restitution may be barred by the Continuance of a Possession for three Years, it appears from the above mentioned Proviso of 8 H. 6. and also by 31 El. 11. That any one indicted upon these Statutes, may alledge such Possession to stay the Award of Restitution; in the Construction whereof it hath been holden, That such Possession must have continued without Interruption during three whole Years next before the Indictment; and therefore, That he who having been in Possession of Land for three Years, or more, is forcibly ousted, and then restored by Force of the Statute of 8 H. 6. cannot justify a forcible Detainer, till he have been in Possession again for three Years after such Restitution; and also for the same Reason it hath been said, That he who under a defeasible Title, hath been never so long in Possession of Land to which another hath a Right of Entry, cannot justify such a Detainer at any Time within three Years after a Claim made by him who hath such a Right, because all defeasible Estates in the Land are wholly defeated by such a Claim, and the subsequent Continuance in Possession amounted to a new Entry.

Dal. ca. 79.
22 H. 6. 18. b.
Crom. 71. *Sect. 53.* There have been some Opinions, That the three Years Possession must be of a lawful Estate, and consequently that a Disseisor's Continuance in quiet Possession for never so many Years, shall not justify

a forcible Detainer; but it seems necessary to make a Distinction between a Detainer against him who has a Right of Entry, and a Detainer against a Stranger, or one who by his Laches has lost his Right of Entry; for I do not see why three Years Continuance of a defeasible Possession should not justify a Detainer by Force against a Stranger, inasmuch as he cannot take Advantage of another's Right, and bare Possession is a good Title against all Persons, except him who hath the Right, and cannot be lawfully defeated by any other. Also if one who has the mere Right to Lands, have so long neglected to recover the Possession thereof, till in Judgment of Law he hath no more Right to such Possession, till he have recovered it by Action, than a mere Stranger, there doth not seem to be any Reason that he should have more Advantage against a forcible Detainer, than if he were a mere Stranger.

Sett. 54. Also it hath been holden, That a peaceable Continuance in Possession for three Years after a forcible Entry, under any Title whatsoever, will not justify a forcible Detainer, inasmuch as the Possession was at first gained by Force; but I cannot think this a reasonable Construction of the said Statutes, for the Force in the Detainer being after three Years quiet Possession, seems justifiable by the express Words of the Statute; and where the Force used in gaining a Possession is afterwards wholly laid aside, there seems to be no Colour to say, That it makes the subsequent Possession less quiet or peaceable than it would have been, if there had been no Force at all used at the first.

Sett. 55. It seems clear from the express Purview of the said Statute of 31 *El.* 11. that where-ever the Defendant pleadeth such a Possession in Bar of Restitution upon such an Indictment, either before the Justices of Peace, or in the King's Bench, no Restitution ought to be awarded till the Truth of the Plea be tried; and it hath been holden, That the Plea of such a Possession is good, without shewing under what Title, or of what Estate such Possession was, because it is not the Title, but the Possession only, which is material in this Case.

1 Keb. 538.
the King and
Burges.
Salk. 261. Pl. 1

Sett. 56. It seems that from the Wording of 31 *El.* 11. if one who has been in Possession for three Years, be ousted, and the same Day re-enter with Force, and also be indicted for such Re-entry on the very same Day, it may be questioned whether the Prosecutor ought to have Restitution, inasmuch as the Words of the Statute are, *That there shall be no Restitution, &c. if the Person indicted have been in quiet Possession for three Years next before the Day of the Indictment found*; and here the Defendant hath been in Possession three Years before the Day of the Indictment, tho' not three Years before the Indictment, inasmuch as he was ousted the same Day; but if it be considered, That the Circumstance of finding the Indictment on that Day no way affects the Merits of the Cause, or lessens the Offence any more than if it were found in any other Day; and that Restitution must have been awarded if it had been found on another Day; and that the Mischief complained of in the Pre-amble is, that Persons were by Colour of such Indictments often turned out of their Possessions which they had quietly enjoyed for three Years next before such Indictments found, which does not extend to the Defendant in the present Case, I rather incline to think that Restitution might be awarded to the Prosecutor in this Case, inasmuch as it clearly appears, That the Defendant's Possession hath not had three Years uninterrupted Continuance within the Intent of the Statute.

1 Sid. 149.
1 Keb. 538.
Raymond 84.
1 Vent. 265.

Sett. 57. As to the eleventh Point, *viz.* For what other Causes such Restitution may be stay'd, it seemeth to be settled at this Day, That if the Defendant tender a Traverse of the Force, which must be done in Writing, and not by a bare Denial of the Force by Parol, the Justice ought not to make any Restitution, till the Traverse be tried; in order whereunto he must award a *venire Facias*, whereon a Jury must be returned, on whose Verdict the Award of Restitution ought to depend.

Sett. 58. It hath been resolved, That if such a Jury find Part of the Indictment to be true, and Part of it to be false; yet if they find so much thereof to be true as will warrant a Restitution, the Justice ought to restore the Party; as where on an Indictment of Forcible Entry and Forcible Detainer, the Jury find that the Entry was peaceful, and the Detainer was only forcible

Sett. 59. As the Justice is bound to stay the Award of Restitution, upon the Defendant's tendering a Traverse of the Force, so it hath also been said, That he ought not to make such an Award in any Case in the Defendant's Absence, without calling him to answer for himself; for it is implied by natural Justice, in the Construction of all Laws, That no one ought to suffer any Prejudice thereby, without having first an Opportunity of defending himself.

Sett. 60. As to the twelfth Point, *viz.* How such a Restitution may be superseded before it is executed, there is no doubt but that the same Justices by whom a Restitution is awarded upon an Indictment of Forcible Entry or Detainer found before them, may also afterwards upon an Insufficiency of the Indictment appearing unto them, supersede the same before it is executed: And it hath also been said, That if such an Indictment be taken, and Restitution awarded by four or five Justices, that two or even one of the same Justices may supersede the Execution thereof, as well as more or all of them. But it seems to be agreed, That no other Justices, or other Court whatsoever, have such Power, except the King's Bench.

Sett. 61. However it is certain, that a *Certiorari* from the King's Bench is a *Superfedeas* to such Restitution; for every such *Certiorari* has these Words, *coram nobis terminari volumus & non alibi*, and consequently it wholly closes the Hands of the Justices of the Peace, and avoids any Restitution which is executed after the *Teste*, but does not bring the Justices of Peace, &c. into a Contempt, unless they proceed after the delivering thereof.

Sett. 62. As to the thirteenth Point, *viz.* How such Restitution may be set aside after it is executed; it is certain, That the Justices of the King's Bench, having a general superintendent Power over all the Proceedings whatsoever of Justices of Peace, may set aside any such Restitution, if it shall appear to them to have been either awarded or executed against Law; as where the Indictment whereon it was grounded, being removed before them, appears to be Insufficient, and thereupon is quashed; or the Defendant traverses the Force and gets a Verdict in the King's Bench, or where-ever it sufficiently appears that the Justices of Peace have been irregular in their Proceedings, as by refusing to try a Traverse of Force tendered by the Defendant, &c.

Sett. 63. Yet if an Indictment on these Statutes be removed into the King's Bench, and the Defendant, having been turned out of Possession by the Grant of Restitution to the Prosecutor by the Justices of Peace, traverse the Force in the King's Bench, and then the Offence be pardoned by a general Pardon, the Court cannot proceed on the Trial, notwithstanding

standing the Defendant would wave the Benefit of the Pardon, because it appears judicially, That the King can have no Benefit of a Fine from the Defendant, if the Verdict pass against him; and the Court will never falsify an Indictment, which is found by the Oaths of twelve Men by bare Affidavits; and consequently in this Case the Defendant can have no Remedy to set aside the Restitution by controverting the Truth of the Indictment.

Sett. 64. Neither can a Defendant in any Case whatsoever, *ex Rigore Juris*, demand a Restitution, either upon the quashing of the Indictment, or a Verdict found for him on a Traverse thereof, &c. for the Power of granting a Re-restitution is vested in the King's Bench, only by an equitable Construction of the general Words of the Statutes, and is not expressly given by those Statutes; and is never made use of by that Court, but when upon Consideration of the whole Circumstances of the Case, the Defendant shall appear to have some Right to the Tenements, the Possession whereof he lost by the Restitution granted to the Prosecutor.

Sett. 65. The Court of King's Bench hath been so favourable to one, who, upon his Traverse of an Indictment upon these Statutes being found for him, hath appeared to have been unjustly put out of his Possession, that they have awarded him a Re-restitution, notwithstanding it hath been shewn to the Court, that since the Restitution granted upon the Indictment, a Stranger hath recovered the Possession of the same Land in the Lord's Court.

C H A P. LXV.

Of Riots, Routs, and unlawful Assemblies.

IN treating of Riots, Routs, and unlawful Assemblies, I shall consider,

1. What shall be called a Riot, Rout, or unlawful Assembly.
2. How they may be suppressed and punished by the Common Law.
3. How by Statute.

Sett. 1. And first a Riot seems to be a tumultuous Disturbance of the Peace, by three Persons, ^a or more, assembling together of their own Authority, with an Intent mutually to assist one another, against any who shall oppose them, in the Execution of some Enterprize of a private Nature, and afterwards actually executing the same in a violent and turbulent Manner, to the Terror of the People, whether the Act intended were of it self lawful or unlawful.^b

For the better Understanding whereof, I shall consider the following Particulars:

1. How far such an Assembly may become riotous through the Want of legal Authority expressed or implied, or be excusable by Reason of such Authority.

2. How

B. 2. Ch. 37.
S. 64.

Raym. 85.
1 K. b. 343.
808.
2 Keb. 505.
H. P. C. 141.
Cro. El. 916.

Salk. 587.
Dyer 123.
Pl. 34.
2 Keb. 571.
Savil 68 Pl.
141.

Cro. El. 41.

^a vide 1 Vent.
251.
Salk. 594.
Da't. cap. 85,
86, 87.
Cromp. 61,
&c.
Pult. 25, &c.
3 Inst. 176.
H. P. C. 137.
3 Mod. 141.
^b But See Salk.
594. Pl. 4.

2. How far the Intention with which the Parties assemble together must be unlawful.
3. With what kind of Violence or Terror the intended Enterprize must be executed.
4. How far the Grievance intended to be redressed must be of a private Nature.
5. Whether the unlawful Execution of an Act in its own Nature lawful may not make an Assembly riotous.

Sett. 2. As to the first Point it seems, That where-ever more than three Persons use Force and Violence, in the Execution of any Design whatever wherein the Law does not allow the Use of such Force, all who are concerned therein are Rioters: But in some Cases wherein the Law authorizes Force, it is not only lawful, but also commendable to make use of it; as for a ^a Sheriff or ^b Constable, or perhaps even for a private ^c Person, to assemble a competent Number of People, in Order with Force to suppress Rebels, or Enemies, or Rioters, and afterwards with such Force actually to suppress them; or for a Justice of Peace, who has a just Cause to fear a violent Resistance to raise the *Possé*, in order to remove a Force in making an Entry into, or detaining of Lands. Also it seems to be the Duty of a ^d Sheriff, or other Minister of Justice, having the Execution of the King's Writs, and being resisted in endeavouring to execute the same, to raise such a Power as may effectually enable them to over-power any such Resistance; yet it is said not ^e to be lawful for them to raise a Force for the Execution of a civil Process, unless they find a Resistance; and it is certain, That they are highly punishable for using any needless Outrage, or Violence therein.

Sett. 3. As to the second Point, *viz.* How far the Intention with which such Persons assemble together must be unlawful; it seems agreed, That if a Number of Persons being met together at a Fair, or Market, or Church-ale, or any other lawful and innocent Occasion, happen on a sudden Quarrel to fall together by the Ears, they are not guilty of a Riot, but of a sudden Affray only, of which none are guilty but those who actually engage in it, because the Design of their Meeting was innocent and lawful, and the subsequent Breach of the Peace, happened unexpectedly without any previous Intention concerning it; yet it is said, That if Persons, innocently assembled together, do afterwards upon a Dispute happening to arise among them, form themselves into Parties, with Promises of mutual Assistance, and then make an Affray, they are guilty of a Riot, because upon their confederating together with an Intention to break the Peace, they may as properly be said to be assembled together for that Purpose from the Time of such Confederacy, as if their first coming together had been on such a Design: However it seems clear, That if in an Assembly of Persons met together on any lawful Occasion whatsoever, a sudden Proposal should be started of going together in a Body to pull down a House or Inclosure, or to do any other Act of Violence, to the Disturbance of the Publick Peace, and such Motion be agreed to, and executed accordingly, the Persons concerned cannot but be Rioters, because their associating themselves together for such a new Purpose, is no way extenuated by their having met at first upon another; also it seems to be certain, That if a Person seeing others actually engaged in a Riot, do join himself unto them and assist them therein, he is as much a Rioter, as if he had at first assembled with them for the same Purpose, inasmuch as he has no Pretence that he came innocently into the Company, but appears to have joined himself unto them, with an Intention

^a 2 And. 67.
^b Poph. 121.
^c 3 H 7 10. b.
^d Poph. 121.
^e Moore 656.

^a 2 Inst. 193.

^e 3 Inst. 161.
 2 Inst. 193.

Ho. 61, 164.

Lamb. 179.
 &c.
 Dalt. cap. 86.
 Crom 61, 62.
 6 Mod. 43.

Salk. 595.

to second them in the Execution of their unlawful Enterprize; and it would be endless, as well as superfluous, to examine whether every particular Person engaged in a Riot, were in Truth one of the first Assembly, or actually had a previous Knowledge of the Design thereof.

Sect. 4. As to the third Point, *viz.* With what kind of Violence or Terror, the intended Enterprize must be executed, it hath been holden, That it ought to be accompanied with some Offer of Violence, either to the Person of a Man, or to his Possessions, as by beating him, or forcing him to quit the Possession of his Lands or Goods, &c. And from hence it seems to follow, That Persons riding together on the Road with unusual Weapons, or otherwise assembling together in such a Manner as is apt to raise a Terror in the People, without any Offer of Violence to any one in Respect either of his Person or Possessions, are not properly guilty of a Riot, but only of an unlawful Assembly.

Sect. 5. However it seems to be clearly agreed, That in every Riot there must be some such Circumstances, either of actual Force or Violence, or at least of an apparent Tendency thereto, as are naturally apt to strike a Terror into the People; as the Shew^a of Armour, threatening Speeches or turbulent Gestures; for every such Offence must be laid to be done *in Terrorem Populi*: And from hence it clearly follows, That Assemblies at Wakes or other Festival Times, or Meetings for exercise of common Sports or Diversions, as Bull-bating, Wrestling, and such like, are not riotous. And from the same Ground also it seems to follow, That it is possible for more than three Persons to assemble together with an Intention to execute a wrongful Act, and also actually to perform their intended Enterprize, without being Rioters; as if a competent Number of People assemble together, in order to carry off a Piece of Timber to which one of the Company hath a pretended Right, and afterwards do carry it away without any threatening Words, or other Circumstances of Terror. And from the same Ground it seems also to follow, That Persons assembled together in a peaceful manner to do a Thing prohibited by Statute, as to celebrate Mafs, &c. and afterwards peacefully performing the Thing intended, cannot be said to be Rioters; for there seems to be no Reason why an Assembly should become riotous barely for doing a Thing contrary to Statute, any more than for doing a Thing contrary to Common Law.

Sect. 6. As to the fourth Point, *viz.* How far the Grievance intended to be redressed must be of a private Nature; it seems agreed, That the Injury or Grievance complained of, and intended to be revenged or remedied by such an Assembly, must relate to some private Quarrel only; as the Inclosing of Lands in which the Inhabitants of a Town claim a Right of Common, or gaining the Possession of Tenements, the Title whereof is in dispute, or such like Matters relating to the Interests or Disputes of particular Persons, and no way concerning the Publick; for where-ever the Intention of such an Assembly is to redress publick Grievances, as to pull down all Inclosures in general, or to reform Religion, or to remove evil Counsellors from the King, &c. if they attempt with Force to execute such their Intentions, they are in the Eye of the Law guilty of levying War against the King, and consequently of High Treason, as appears from Chap. 17. *Sect. 25.*

Sect. 7. As to the fifth Point, *viz.* Whether the Execution of an Act in its own Nature lawful, may make an Assembly riotous, it hath been generally holden, That it is no way material whether the Act, intended to be done by such an Assembly, be of it self lawful or unlawful; from whence

⁶ Mod. 41.

^a Dalt. cap. 85.
^b Lamb. 175.
^c 1 Inst. 176.

^a Lamb. 178.
^b Dalt. cap. 87.
^c 1 H. 7. 1. 2.
^d 6 Mod. 141.
^e 2 Keb. 558.
^f 1 on. 1 Rol.
^g R. p. 109.
^h Lamb. 179.
ⁱ Pulton 25.
^j 3 Keb. 578.

^a Lamb. 178.
^b Crom. 62. n.
^c Quere.

^d 6 Mod. 141.
^e 2 Keb. 558.
^f Con. 1 Mod.
^g 13.
^h 1 Vent. 369.
ⁱ 380.

^a Quere and
^b Vide Salk.
^c 594. 4.
^d Crom. 64. b.
^e 66. a.
^f Dalt. cap. 87.

whence it follows. That if more than three Persons assist a Man to make a Forcible Entry into Lands to which one of them has a good Right of Entry, or if the like Number in a violent and tumultuous Manner join together in removing a Nuisance, or other Thing which may lawfully be done in a peaceful Manner, they are as properly Rioters, as if the Act intended to be done by them were never so unlawful; for the Law will not suffer Persons to seek the Redress of their private Grievances, by such dangerous Disturbances of the Publick Peace: However the Justice of the Quarrel in which such an Assembly doth engage, is certainly a great Mitigation of the Offence.

Sect. 8. A Rout seems to be, according to the general Opinion, a Disturbance of the Peace by Persons assembling together with an Intention to do a Thing, which if it be executed will make them Rioters, and actually making a Motion towards the Execution thereof: But by some Books, the Motion of a Rout is confined to such Assemblies only, as are occasioned by some Grievance common to all the Company; as the Inclosure of Land in which they all claim a Right of Common, &c. However inasmuch as it generally agrees with a Riot as to all the rest of the above mentioned Particulars, requisite to constitute a Riot, which have been already fully explained, except only in this, That it may be a compleat Offence without the Execution of the intended Enterprize, it seems not to require any farther Explication.

Sect. 9. An unlawful Assembly, according to the common Opinion, is a Disturbance of the Peace by Persons barely assembling together, with an Intention to do a Thing, which if it were executed would make them Rioters, but neither actually executing it, nor making a Motion toward the Execution of it; but this seems to be much too narrow a Definition; for any Meeting whatsoever of great Numbers of People with such Circumstances of Terror, as cannot but endanger the Publick Peace, and raise Fears and Jealousies among the King's Subjects, seems properly to be called an unlawful Assembly; as where great Numbers, complaining of a common Grievance, meet together, armed in a warlike Manner, in order to consult together concerning the most proper Means for the Recovery of their Interests; for no one can foresee what may be the Event of such an Assembly.

Sect. 10. Also an Assembly of a Man's Friends for the Defence of his Person, against those who threaten to beat him if he go to such a Market, &c. is unlawful; for he who is in Fear of such Insults, must provide for his Safety, by demanding the Surety of the Peace against the Persons by whom he is threatened, and not make use of such violent Methods, which cannot but be attended with the Danger of raising Tumults and Disorders to the Disturbance of the Publick Peace: Yet an Assembly of a Man's Friends in his own House, for the Defence of the Possession thereof against those who threaten to make an unlawful Entry thereinto, or for the Defence of his Person against those who threaten to beat him herein, is indulged by Law; for a Man's House is look'd upon as his Castle.

Sect. 11. As to the second Point, viz. How far Offences of this Nature may be suppressed and punished by the Common Law; it seems clear, That every Sheriff and Under-Sheriff, and also every other Peace Officer, as Constables, &c. may and ought to do all that in them lies towards the suppressing of a Riot, and may command all other Persons whatsoever to assist them therein; also it is certain, That any private Person may lawfully endeavour to appease all such Disturbances, by staying those whom he shall see engaged therein from executing their Purpose, and also

Lamb. 175.
176
Cromp. 61.
Dalt. cap. 85.
Bro. Riots 4.5
Pulton 25.

Crom. 61. a.
Bro. Riots 4.
Pulton 25.
Dalt. cap. 95.

Hob 92.
Salk. 594. 595
1 Ven. 369.
380.

21 H. 7. 39.
Lamb. 179.
180
H. P. C. 137.
Cromp. 64. a.
Bro. Riots 1.
5 Co. 91. b.

Poph. 121.
3 H. 7. 13. 10. b.
Vide supra.

by stopping others whom he shall see coming to join them; for if private Persons may do thus much, as it is most certain that they may, towards the suppressing of a common Affray, surely *à fortiori* they may do it towards the suppressing of a Riot: Also it hath been holden, That private Persons may arm themselves in order to suppress a Riot; from whence it seems clearly to follow, that they may also make use of Arms in the suppressing of it, if there be a Necessity for their so doing. However it seems to be extremely hazardous for private Persons to proceed to these Extremities; and it seems no way safe for them to go so far in common Cases, least under the Pretence of keeping the Peace they cause a more enormous Breach of it, and therefore such violent Methods seem only proper against such Riots as favour of Rebellion, for the suppressing whereof no Remedies can be too sharp or severe. However it is enacted by R. George. 5. *That if more Persons than twelve being unlawfully, riotously and tumultuously assembled, twelve or more of them, shall continue together, and not disperse themselves within one Hour after Proclamation made in Pursuance of that Statute, that then every Peace-Officer of the Place where such Assembly shall be, and all Persons who shall be commanded to be assisting to such Officer, may and ought to apprehend all such Rioters, and carry them before some Justice of Peace; and that if any such Rioter shall happen to be killed, maim'd or hurt by Reason of their resisting, such Officer, &c. the Officer shall be discharged &c.* But the Statute being wholly in the Affirmative, cannot be thought to take away any Part of the Authority in the suppressing of a Riot, which was before that Time given either to Officers or private Persons by the Common Law or by Statute.

Po. sh. 121.
Keily. 76.

Sect. 12. Generally Offences of this Nature are punished at the Common Law, as Trespasses, by Fine and Imprisonment only; yet sometimes, where they have been very enormous, they have been punished with the Pillory; and anciently, if they were undertaken in Contempt of the King's express Prohibition of their Meeting, under Pain of Forfeiture of Lands, &c. they seem to have been punishable with such Forfeiture.

Crom. 61.
Dalt. cap. 48.
Cro. ca. 507.
2 Rol. Ab.
208.

Sect. 13. It hath been holden, That the Persons of whom a Corporation consists being guilty of a Riot, are punishable in their Natural, but not in their Politick Capacity; for the Corporation it self cannot be in Fault, because it is invisible, and exists only in Supposition of Law; yet there are some Precedents by which it appears, that Corporations have been amerced, and their Liberties seized into the King's Hands, for suffering a dangerous Riot to happen within their Jurisdiction without using their Endeavours to suppress it.

21 Ed. 4. 13 b.
14 a.
Dalt. cap 88.

Sect. 14. Women are punishable as Rioters, but Infants under the Age of Discretion are not.

Cro. Ca. 352.

As to the third Point, *viz.* How far Offences of this Nature may be suppressed and punished by Statute; I shall consider,

1. How far they may be suppressed and punished by one Justice of Peace.
2. How far by two or more.

Sect. 15. As to the first of these Points, it is enacted by 34 Ed. 3. 1. *That Justices of Peace shall have Power to restrain Offenders, Rioters, and all Barrators; and to pursue, arrest, take and chastise them according to their Trespasse and Offence, and to cause them to be imprisoned, and duly punished, &c.*

Sect.

14 H. 7. 9. b. *Sec. 16.* And this Statute has been liberally construed for the Advancement of Justice; for it has been resolved, That if a Justice of Peace find Persons riotously assembled, he alone without staying for his Companions hath not only Power to arrest the Offenders, and bind them to their good Behaviour, or imprison them if they do not offer good Bail, but that he may also authorize others to arrest them by a bare Parol Command without other Warrant, and that by Force thereof the Persons so commanded, may pursue and arrest the Offenders in his Absence as well as Presence. It is also said, That if a Justice of Peace be sick, and hear that Persons are riotously assembled, he may send his Servants to arrest them, and bring them before him; and that if he hear that Persons are riotously together in a certain Place, and go thither and find none there, he may leave his Servants behind him with a Command to arrest them, when they shall come. Also it is said, That after a Riot is over, any one Justice of Peace may send his Warrant to arrest any Person who was concerned in it, and also that he may send him to Gaol, till he shall find Sureties for his good Behaviour.

Sec. 17. But it seems to be agreed, That no one ^a Justice of Peace hath any Power by Force of this Statute, either to record a Riot upon his own View, or to take an Inquisition thereof after it is over: Also if one Justice of Peace proceeding upon this Statute, shall arrest an innocent Person as a Rioter, it seemeth that he is liable to an Action of Trespas, and that the Party arrested may justify the rescuing of himself, because no single Justice of Peace is by this Statute made a Judge of the said Offence. ^b But if a Riot shall be committed by Persons armed in an unusual Manner, contrary to the Statute of *Northampton*, and any one Justice of Peace acting *ex Officio*, in Pursuance of the said Statute, seize the Armour and imprison the Offender, and make a Record of the whole Matter, such a Record cannot be traversed, because it is made by one acting in a judicial Capacity, as appears more at large in the Chapter of Affrays; and for the same Reason, if a Justice of Peace proceeding on the Statute of *15 Rich. 2.* against Forcible Entries and Detainers, shall upon his own View record a Riot, which shall be committed in the making of any such Forcible Entry or Detainer, a Riot so recorded cannot be traversed, as hath been shewn in the foregoing Chapter. Also if a Justice of Peace acting as a Judge, by Vertue of any Statute whatsoever, empowering him so to do, make a Record upon his View of a Riot committed in his Presence, such Record shall not be traversed; for the Law gives such an uncontrollable Credit to all Matters of Record, made by any Judge of Record as such, that it will never admit of an Averment against the Truth thereof.

Sec. 18. It hath been questioned, Whether a Justice of Peace be authorized by Vertue of the above mentioned Statute of *34 Ed. 3. 1.* to raise the Power of the County to suppress a Riot; but it seemeth, That by being made a Conservator of the Peace, he hath by Implication of Law all such Powers in Relation thereto, as are incident to the Office of a Conservator of the Peace by the Common Law; and consequently, That he hath a Right of demanding the Assistance of others to enable him to preserve the Peace in the same manner, as every Sheriff and Constable are empowered to demand such Assistance by the Common Law: However there seems to be no Reason to doubt, but that every Justice of Peace is authorized by *17 Rich. 2. 8.* to raise the Power of the County to repress a Riot; for by the said Statute it is enacted, *That as soon as the Sheriffs, and other the King's Ministers,* (under which Words all Justices of Peace seem clearly to be included,) *shall hear of a Riot, Rout, or other Assembly against*

the Peace, they with the Power of the County where such Case shall happen, shall disturb such Malice with all their Power, and shall apprehend all such Offenders, and put them in Prison, until due Execution of the Law be made of them; and that the Lords and other liege People of the Realm shall attend with their whole Strength and Power, the Sheriffs and Ministers aforesaid.

Sett. 19. As to the second Point, viz. How far Offences of this Nature may be suppressed and punished by two or more Justices of Peace, it is enacted by 13 H. 4. 7. That if any Riot, Assembly, or Rout of People against the Law, be made in Parties of the Realm, that the Justices of Peace, three or two of them at the least, and the Sheriff or Under-Sheriff of the County where such Riot, Assembly or Rout shall be made hereafter, shall come with the Power of the County (if need be) to arrest them, and shall arrest them; and the same Justices and Sheriff, or Under-Sheriff, shall have Power to record that which they shall find so done in their Presence against the Law. And that by the Record of the same Justices and Sheriff, or Under-Sheriff, such Trespassers and Offenders shall be convicted in the Manner and Form as is contained in the Statute of Forcible Entries.

Sett. 20. In the Construction of this Statute, compared with the above mentioned Statute of 17 Rich. 2. 8. and also with the Statute of 2 H. 5. 8. it hath been holden, That all Persons whatsoever, and even Noblemen, and all others of what Condition or Degree soever they may be, except Women, Clergymen, Persons decrepit, and Infants under the Age of fifteen Years, are bound under Pain of Fine and Imprisonment upon reasonable Warning to attend the Justices and Sheriffs in the Execution of the said Statute, and not only to arrest the Rioters, but also to conduct them to Prison.

Pult. 29. a.
Lamb. 315.
Dalt. cap. 46.
Crompt. 63. a.
Lamb. 116.

Sett. 21. Also it hath been holden, That those who attend the Justices in order to suppress a Riot, may take with them such Weapons as shall be necessary to enable them effectually to do it, and that they may justify the Beating, Wounding, and even the Killing of such Rioters as shall resist, or refuse to surrender themselves.

Poph. 120,
121.
Crompt. 62.
Dalt. cap. 46.
Lamb. 316.

Sett. 22. It is said, That the Justices of Peace are not only impowered by the said Statute, to raise the Power of the County to assist them, in suppressing a Riot which shall happen within their own View or Hearing, but also, that they may safely do it upon a credible Information given them of a notorious Riot happening at a Distance, whether there were any such Riot in Truth or not; for it may be dangerous for them to stay till they can get certain Information of the Fact: But they seem to be punishable for alarming the Country in this Manner, without some such probable Ground of their Proceeding, as would induce a reasonable Man to think it necessary and convenient.

Lamb. 318,
319.
Dalt. cap. 46.
Pult. 29.

Sett. 23. It seems clear from the said Statute, That if the Justices, &c. in going towards the Place where they have heard that there is a Riot, shall meet Persons coming from thence riotously arrayed, they may arrest them for being assembled together in such an unlawful Manner, and also make a Record thereof, &c. for the Statute extends to all other unlawful Assemblies whatsoever as well as to Riots.

Pult. 29. a.
Lamb. 315,
316.
Crompt. 64. b.
Dalt. cap. 46.

Sett. 24. Also it seems clear, That after the Justices have had a View of a Riot, they may make a Record thereof whether the Offenders be in Custody at the same Time, or have escaped: And it is said, That the Justices may lawfully, upon a fresh Pursuit, arrest such of the Offenders as shall have escaped, but that they cannot at another Time award any Process on such a Record, and therefore that they ought to send it into the King's Bench, if any of the Offenders escape from a fresh

Dalt. cap. 46.
Lamb. 316.
Crompt. 63. a.

Lamb. 318.
Dalt. cap. 46.
Pult. 29. a. b.
8 Co. 121.

T r

Pursuit,

Vide infra
Sect. 29.
Vide supra,
Sect. 15 & 16.

Pursuit, and that Process shall issue against them from thence: However there seems to be no doubt, but that any of the same Justices who have recorded a Riot, or any other Justice of Peace, may at any Time by vertue of the above mentioned Statute of 34 Ed. 3. 1. arrest those who have been notoriously guilty of a Riot, in order to compel them to find Sureties for their Good Behaviour.

Raym. 386.
Crompt. 65. 2.
63. a.
Dalt. ca. 46.

Sect. 25. It seemeth to be certain, That the Record of a Riot expressly mentioned to have happened within the View of the Justices by whom it is recorded, is a Conviction of so great Authority, that it can no way be traversed, however little Ground in Truth there might be to affirm that any Riot at all was committed, or however innocent the Parties may be of the Fact recorded against them. And it is said, That if one be bound by Recognizance to keep the Peace, and on a *Scire Facias* thereon such a Record of a Riot be produced against him, he shall not only be concluded thereby from pleading the general Issue, but also from pleading any Matter of Justification whatsoever.

Puist. 29. a. b.
Lamb. 316,
317.

Sect. 26. However it seemeth clear, That if in such a Record of a Riot it be contained, that the Party was guilty therein of a Felony, or Maihem, or Rescous, the Party shall be concluded thereby as to the Riot only; and not as to any of the other Matters, because the Justices of Peace have by this Statute a judicial Authority over no other Offences except Riots, Routs, and unlawful Assemblies.

Lamb. 317.
Dalt. ca. 130.

Sect. 27. And inasmuch as such a Record is a final Conviction of the Parties as to all such Matters as are properly contained in it, it ought to be certain both as to the Time and Place of the Offence, and the Number of Persons concerned therein, and the several Kinds of Weapons made use of by them, and all other Circumstances of the Fact; for since the Parties are concluded from denying the Truth of such a Record, and have no other Remedy to defend themselves against it, but only by taking Advantage of the Insufficiency of what is contained in it, they may justly demand the Benefit of excepting to it, if it do not expressly shew, both that they are guilty within the Meaning of the Statute, and also how far they are guilty, and that the Justices have pursued the Power given them by the said Statute; and from the same Ground it seems also to follow, That such a Record may be excepted against, if it do not appear to have been made by the Sheriff or Under-Sheriff in Concurrence with the Justices.

Lamb. 316
Dalt. ca. 46.

Lamb. 319.
Raym. 386.
Gen. Dalt. ca.
46.

Sect. 28. It is said that the Offenders being under the Arrest of the said Justices, and also convicted by a Record of their Offence, ought immediately to be committed to Gaol by the same Justices, till they shall make Fine and Ransom to the King, which can be assessed by no other Justices of Peace, except those by whom the Record of the Offence was made; and by 2 H. 5. 8. such Fine ought to be larger than it was wont to be before that Statute, for the Support of the Charges of the said Justices, &c. whereof Payment ought to be made by the Sheriff, by Indenture thereof between him and them.

Lamb. 317.
Dalt. ca. 46.

Sect. 29. It is farther enacted by the said Statute of 13 H. 4. 7. that if it shall happen. *That such Trespassers and Offenders be departed before the coming of the said Justices and Sheriff, and Under-Sheriff, that the same Justices, three, or two of them shall diligently inquire within a Month after such Riot, Assembly, or Rout of People so made, and thereof shall hear and determine according to the Law of the Land.*

Sect.

Sett. 30. Also it is farther enacted by 19 H. 7. 13. That the Sheriff having a Precept directed to him to return a Jury, in pursuance of 13 H. 4. 7. shall return twenty four Persons dwelling within the Shire where such Riot, Rout, or unlawful Assembly shall be so committed and done, whereof every of them shall have Lands and Tenements within the same Shire, to the yearly Value of twenty Shillings of Charter-Land or Freehold, or twenty-six Shillings and eight Pence of Copyhold, or of both, over and above all Charges, for to enquire of the said Riot, Rout, or unlawful Assembly. And that he shall return upon every Person so by him impanelled, in Issues at the first Day twenty Shillings, and at the second Day forty Shillings, if they appear not, and be sworn to inquire of the Premises at the first Day. And that the Sheriff for every Default, &c. shall forfeit twenty Pounds, &c.

Sett. 31. It is not clearly settled, whether the Month, within which the Justices of Peace are confined to take their Inquiry by Force of these Statutes, must be reckoned according to the Computation of a Lunar, or of a Solar Month; however it seems to be agreed, That if the Justices give their Charge to the Jury, and it is said, that if they do but award a Precept for the returning of the Jury, within a Lunar Month, they may take the Verdict afterwards, for the Cause being regularly attached in them within the Time prescribed by the Statute, shall be prosecuted as all other Causes ought, with such convenient Dispatch as to the Judges thereof shall seem proper; and the Statute, by obliging the Justices to make so speedy an Inquiry, meant not to hurry them in the Execution of it.

Sett. 32. It is generally said, That any Justices of the County may take such an Inquiry, whether they dwell near the Place where the Riot happened, or at a Distance, or whether they went to view the Riot or not; for the Statute ought to be construed as largely as the Words will bear, in Favour of the Justices Power in the suppressing of such Riots; and therefore those Words in the Statute, that the same Justices, &c. shall inquire, ought to be thus expounded, That the same Justices who were before empowered to raise the *Posse*, &c. shall inquire; and it is clear, That any Justices in the County are within that part of the Statute which gives that Power; neither is it any way reasonable to construe the last Clause of the said Statute, whereby the Justices who dwell nighest, are bound to execute the Statute under Pain of one hundred Pounds, in such a Manner as to restrain the Jurisdiction of those who by the foregoing Part of the said Statute are authorized to execute it; for if such an Exposition should prevail, the Negligence of the Justices who happen to dwell nighest would make the Statute wholly ineffectual.

Sett. 33. It seems clear from the Wording of the above mentioned Clause, that the Sheriff ought not to join with the Justices in taking of such an Inquiry, as he ought to do in making a Record of a Riot upon View.

Sett. 34. Also it seems clear from those Words in the Statute of 13 H. 4. 7. That the same Justices shall hear and determine, &c. that they may award Process under their own *Teste*, against those who shall be indicted before them of any of the Offences above mentioned, according to the Form of the said Statute; and also that they may award the like Process for the Trial of a Traverse of such an Inquisition, and do all other Things in relation thereunto, which are of Course incident to all Courts of Record.

Sett. 35. But it hath been questioned, whether the Justices can safely dismiss the Offenders upon their paying such a Fine as shall be imposed upon

Sid. 186.
Keb. 695.
Vide supra.

Lamb. 328.
Dal. ca. 46.
Pult. 29.
6 Mod. 141.
Saik. 593.

Lamb. 327,
327.
Dal. ca. 46.
Pult. 29. b.
Crom. 62. b.
63 a. seems
contrary.

See Sect. 44.

Lamb. 327.
Raym. 386.
Vide Saik.
593.

Lamb. 323,
328.
Dal. cap 46,
& cap. 132.
Pult. 26 b.
Crom. 67.

Dalt. ca. 46.
Crom. 61. b.

upon them without some Judgment, for their Imprisonment as well as Fine, inasmuch as the Statute of 2 H. 5. 8. is express, That all Rioters attainted of great and heinous Riots, shall have one whole Year's Imprisonment at the least, without Bail, &c. and that Rioters attainted of Petit Riots, shall have Imprisonment, as best shall seem to the King or to his Council.

Crom. 67. a.
Pult. 24. b.
Dalt. ca. 46
See 1 Leon.
282.

Sett. 36. Formerly, if the Fine imposed upon Rioters by Justices of Peace had been too favourable, it was a common Practice for the Court of Star-Chamber afterwards to impose such other Fine as might, together with that which was assessed by the Justices of Peace, be proportionable to the Heinousness of the Offence; and this was said not to be a double Punishment for the same Offence, but only an Award of due Penalty at several Times.

Sett. 37. It is farther enacted by the said Statute of 13 H. 4. 7. *That if the Truth cannot be found in the Manner as is aforesaid, then within a Month then next following, the Justices, three, or two of them, and the Sheriff, or Under-Sheriff, shall certify before the King and his Council all the Deed and the Circumstances thereof: Which Certificate shall be of like Force as the Presentment of twelve Men; upon which Certificate the said Trespassers and Offenders shall be put to answer, and they which shall be found guilty, shall be punished according to the Discretion of the King and his Council. And if such Trespassers and Offenders do traverse the Matter so certified, the same Certificate and Traverse shall be sent into the King's Bench, there to be tried and determined, as the Law requireth; and if they appear not before the King and his Council, or in the King's Bench, upon such Process and Proclamation for their Appearance as are required by the said Statute, they shall be attainted of the Riot, &c.*

Sett. 38. And it is farther enacted by 19 H. 7. 13. *That if a Riot, &c. be not found by the Jury by reason of any Maintenance or Embracery of the Jurors, then the same Justices, &c. over and above such Certificate which they must and are bound to make by the said Statute of 13 H. 4. 7. shall in the same Certificate certify the Names and Misdemeanours of such Maintainers, &c. on Pain that every of the said Justices, &c. shall forfeit twenty Pounds, if they have no reasonable Excuse for not certifying the same; which Certificate so made, shall be of like Force as if the Matter were found by Verdict of twelve Men; and every Person duly proved to be such a Maintainer, &c. shall forfeit twenty Pounds, &c.*

Lamb. 323,
326.
Pult. 29. b.
Dalt. ca. 46.

Sett. 39. In the Construction of these Statutes it hath been holden, That the Certificate required by the above mentioned Statutes may be made, either by the Justices, &c. who went to see the Riot, or by those who took the Inquiry; but it seems to be most proper, That where-ever such an Inquisition is taken, such Certificate should be made by such Justices who made the Inquiry, because they having had the Examination of the Fact, must needs be best able to judge of the Circumstances thereof, and in that Respect are the most proper Persons to supply the Defects of the Inquiry: However the said Statute of 19 H. 7. 13. which is grafted on 13 H. 4. 7. seems clearly to imply, That some Justices are bound in a more especial Manner to make such Certificate than any others, by imposing the Penalty of twenty Pounds on those who neglect to make it as they are bound by 13 H. 4. 7. which Part of the Statute seems to be most reasonably applied to those Justices who took the Inquiry, or in Case that no Inquiry was taken, to those Justices who endeavoured to take one, but by the Fault of others were hindred from taking it; for there was no Need of such an additional Penalty on the neighbouring Justices, who were bound before to do their Duty in executing 13 H. 4. 7. under

under Pain of forfeiting one hundred Pounds, as will be shewn Section 44 &c.

Señ. 40. Also it is generally said, That such a Certificate must be made within a Month after the Inquiry; and this seems to be a very reasonable Construction where an Inquiry has actually been made; but it may happen that no Inquiry at all may be taken, either thro' the Default of the Sheriff in not returning a Jury, or the Obstinacy of the Jurors in refusing to appear, or the rebellious Humour of the People in not suffering the Justices to do their Duty; in all which Cases a Certificate seems to be required, both by the Intent and Letter of the Statute, the Words whereof as to this Purpose are, *If the Truth cannot be found in the Manner as is aforesaid, then within a Month then next following, the Justices, &c. shall certify, &c.* And therefore in these Cases it seems proper to make a Certificate of the Obstructions, which prevented the Taking of such an Inquiry, within a Month after they happen.

Pulcr. 29 b.
Lamb. 324.
Dalr. cap. 46.

Señ. 41. It seemeth clear from the plain Words of the Statute, That the Certificate ought to be made to the Privy Council board, which is clearly distinguished, both from the Chancery, and also from the King's Bench, which, in some Statutes relating to judicial Proceedings, are taken for the King's Council.

Lamb. 324.
Con. Crumpr.
63. b.
Dalr. ca. 46,
& 130.
Bro. P. rem. 1.

Señ. 42. It is said, That if there be a Variance between the Inquisition and Certificate, that shall be taken which is most for the King's Advantage; and therefore if the Inquisition be of a Riot by ten Persons, and the Certificate of a Riot by twenty, or by ten in Harness; or of a Battery join'd with the Riot, that the Certificate shall be preferred, because the Fine to the King shall be the greater; but if they differ only as to the Time, it is said that the Inquisition shall be preferred.

Pulcr. 29 b.
Cro. 63. b.
Lamb. 325.
Dalr. ca. 46.

Señ. 43. Also it seemeth certain, that such a Certificate, being in Nature of an Indictment at Common Law, ought to comprehend the Certainty of Time, Place, and Persons, and other material Circumstances, both of the Riots and Maintenance, &c. but perhaps it needs not express the Additions of the Offenders.

Lamb. 326.
Pulcr. 29 b.

Señ. 44. It is farther enacted by the said Statute of 13 H. 4. 7. *That the Justices of Peace dwelling nighest in every County where such Riot, Assembly, or Rout of People shall be made hereafter, together with the Sheriff or Under-Sheriff of the same County, and also the Justices of Assises, for the Time that they shall be there in their Session, in case that any such Riot, Assembly, or Rout be made in their Presence, shall do Execution of this Statute, every one upon Pain of one hundred Pounds, to be paid to the King as often as they shall be found in default of the Execution of the same Statute.*

Dalr. ca. 46,
& cap. 130.
Lamb. 327,
322

In the Construction of this Clause the following Opinions have been holden,

Señ. 45. I. That no Justice of Peace is in danger of incurring the Penalty thereof, unless he dwell in the County wherein a Riot happens.

Lamb. 326.
Crom. 63. b.
Dalr. ca. 46.

Señ. 46. II. That if any Justices of Peace, who do not dwell nearest to the Place, do actually execute the Statute, they excuse all the rest.

Dalr. ca. 46.
Lamb. 326.
Crom. 63. b.

Señ. 47. III. That if the Justices whose Dwelling was nearest at the Time of the Riot, or one of them, happen to die within the Month, those whose Dwelling is thereby become the nearest, are bound to execute the Statute in the same Manner as the others were.

Pulcr. 30. a.
Crom. 62. b.

Lamb. 327.
Dal. ca. 46.
Pult. 30. a.

Señt. 48. IV. That notwithstanding those Justices only, who dwell nearest, are liable to the Penalty of the Statute, yet if any others on Notice neglect to supply their Default, they are fineable at Discretion.

Crom. 63. b.
Lamb. 327.
Dal. ca. 46.
Pult. 30. a.

Señt. 49. V. That if the two Justices, or one of them, do their Duty in executing, or endeavouring to execute the Statute, they shall not incur any Penalty thro' a Default of the Sheriff, &c. either in refusing to appear, or to return a Jury, &c.

Crom. 61. b

Señt. 50. VI. That the said Justices, &c. shall not avoid the Penalty by executing the Statute in Part only, as by recording a Riot without committing the Parties.

Dal. ca. 46.

Señt. 51. VII. That no Justice, &c. is subject to the Penalty of the said Statute on account of a Petit Riot, but only of such as are notorious, and in nature of Insurrections and Rebellions.

Dy. 210. Pl. 25

Lamb. 328.
Pult. 28. b.
Crom. 62. b.
Dal. ca. 46.

Señt. 52. VIII. That if a Justice of Peace, &c. had no express Notice given him of the Riot, he shall be excused, unless it were so very flagrant, that by common Intendment, every one dwelling near it could not but have Notice thereof.

Crom. 62. b.
Lamb. 322.
Pult. 28.

Dal. ca. 46.
Crom. 61. a.

Señt. 53. IX. That the Acquiescence or Agreement of the Parties aggrieved is no Excuse to the Justices, because they ought, *ex Officio*, to make the Inquiry, and make Proclamation whether any will give Evidence for the King, &c. and may bind such of the Parties grieved as shall refuse to prosecute their Complaint to their Good Behaviour.

Señt. 54. Also it is farther enacted by 2 H. 5. 8. *That upon any Default of the said Justices, &c. touching the Execution of 13 H. 4. a Commission shall be awarded at the Instance of the Party grieved, to enquire as well of the Truth of the Case, as of the Default of the said Justices, &c. and that the said Commissioners shall presently return into Chancery the Inquests before them taken; and that the Jurors, who shall make Inquiry, shall be worth 10 l. per Annum, and shall be returned by the Coroners, if the Sheriff, supposed to be in Default, continue in his Office &c. See the Statute.*

Señt. 55. Also it is farther enacted by 2 H. 5. 9. and 8 H. 6. 14. *That the Lord Chancellor, upon Complaint made to him, that a dangerous Rioter is fled into Places unknown, and also upon a Suggestion under the Seals of two Justices of Peace and the Sheriff, that the common Fame and Voice runneth in the County of the Riot, may award a Capias against the Party returnable in Chancery upon a certain Day, &c. and afterwards a Writ of Proclamation returnable in the King's Bench, &c.*

Señt. 56. But all the Penalties of the above mentioned Statutes having been found by Experience not to be sufficient to restrain the Rage of the Populace from breaking out into dangerous Tumults, whenever they happen to be perswaded that they lie under any real or pretended Grievance, it was thought necessary to make a farther Provision against such insolent Disturbances of the Peace, by more severe Laws; and to this End it was enacted by 1 Geor. 5. *That if any Persons to the Number of twelve, or more, being unlawfully, riotously, and tumultuously assembled together, to the Disturbance of the publick Peace, and being required or commanded by any Justice of Peace, Sheriff of the County, or Under-Sheriff, or by the Mayor, Bailiff, or Bailiffs, or other Head Officer or Justice of the Peace of any City, or Town corporate, where such Assembly shall be, by Proclamation to be made in the King's Name, immediately to disperse themselves, and peaceably to depart to their Habitations, or to their lawful Business, under the Pains of the said Statute, shall afterwards unlawfully, riotously, and tumultuously continue together by the Space of one Hour after such Proclamation made, or after a wilful Let or Hindrance of a Justice*

Justice of Peace, &c. from making the said Proclamation, shall be adjudged Felons without Benefit of the Clergy.

Señ. 57. And it is farther enacted by the said Statute, That if any Person or Persons shall with Force and Arms wilfully and knowingly oppose, obstruct, or in any Manner wilfully and knowingly, let, hinder, or hurt any Person, &c. who shall begin to proclaim, or go to proclaim, according to the Proclamation appointed by the said Statute, whereby such Proclamation shall not be made, they shall be adjudged Felons without Benefit of Clergy.

Señ. 58. And it is farther enacted by the said Statute, That if any Persons unlawfully, riotously, and tumultuously assembled together, to the Disturbance of the publick Peace, shall unlawfully and with Force demolish or pull down, or begin to demolish or pull down, any Church or Chapel, or any Building for religious Worship, certified, and registered according to 1 Will. & Mar. 18. which is commonly called The Toleration Act, or any Dwelling-house, Barn, Stable, or other Out-house, they shall be adjudged Felons without the Benefit of the Clergy.

Señ. 59. And it is farther enacted by the said Statute, That when-ever any such Church, &c. shall be demolished, &c. by any such Rioters, &c. the Inhabitants of the Town or Hundred wherein the Riot happened, shall be bound to make good the Damage, &c.

C H A P. LXVI.

Of Offences by Officers in general.

Offences under the Degree of capital, more immediately against the Subject, not amounting to an actual Disturbance of the Peace, are either;

1. Such as are committed by Officers; or,
2. Such as are committed by common Persons without any Relation to an Office.

Offences by Officers seem reducible to the following Heads:

1. Neglect, or Breach of Duty.
2. Bribery.
3. Extortion.

Señ. 1. As to the first of these Offences, I take it to be agreed, That in the Grant of every Office whatsoever, there is this Condition implied by common Reason, that the Grantee ought to execute it diligently and faithfully: For since every Office is instituted, not for the sake of the Officer, but for the good of some other, nothing can be more just, than that he, who either neglects or refuses to answer the End for which his Office was ordained, should give way to others who are both able and willing to take Care of it. And therefore it is certain, That an Officer is liable to a Forfeiture of his Office, not only for doing a Thing directly contrary to the Design of it, but also for neglecting to attend his Duty

Co. Lit. 411,
234.

⁹ Co. 50.
Co. Lit. 233.

¹ 39 H. 6. 32.
²⁰ Ed. 4. 5 b.
²² Aff. 34
² H. 7. 11. b.
Pinw. Com.
379.
Long Quinto
Ed. 4. 27.
¹¹ Ed. 4. 1.

⁹ Co. 50. a.
^c Raym. 116.
^d Cro. Ja. 42. b.

Duty at all usual, proper, and convenient Times and Places, whereby any Damage shall accrue to those, by or for whom he was made an Officer. And some have gone so far as to hold, That an Office concerning the Administration of Justice, or the Common Wealth, shall be forfeited for a bare Non-User, whether any special Damage be occasioned thereby or not: But this Opinion doth not appear to be warranted by any Resolution in Point, and the ^a Authorities which are cited to maintain it, do not seem to come up to it: However it cannot but be very reasonable, That he who so far neglects a publick Office, as plainly to appear to take no manner of Care of it, should rather be immediately displaced, than the publick be in danger of suffering that Damage, which cannot but be expected some Time or other from his Negligence.

Sett. 2. But it would be endless to enumerate all the particular Instances, wherein an Officer may be discharged or fined; and it also seems needless to endeavour it, because they are generally so obvious to common Sense, as to need no Explication; for what can be more plain, than that a Gaoler deserves to be discharged and fined, for voluntarily ^b suffering his Prisoners to escape, or for ^c barbarously misusing them? What can be more evident, than that a ^d Sheriff is justly punishable for persuading a Jury to underprize Goods in the Execution of a *Fieri Facias*, &c. And therefore I shall leave the particular Cases of this Nature to every Man's own Judgment, which, from the Consideration of the general Rules above mentioned, and the various Circumstances of every Case, will easily discern how far each Offence of this Kind deserves to be punished.

C H A P. LXVII.

Of Bribery.

IN treating of Bribery, I shall consider,

1. What it is.
2. How it is punishable.

³ Inst. 145.

Sett. 1. And first, Bribery in a strict Sense is taken for a great Misprision of one in a judicial Place, taking any valuable Thing whatsoever, except Meat and Drink of small Value, of any one who has to do before him any way, for doing his Office, or by Colour of his Office, but of the King only.

³ Inst. 149.
Hob. 9.
Cro. Ja. 65.

Sett. 2. But Bribery in a large Sense is sometimes taken for the receiving or offering of any undue Reward, by or to any Person whatsoever, whose ordinary Profession or Business relates to the Administration of publick Justice, in order to incline him to do a Thing against the known Rules of Honesty and Integrity; for the Law abhors any the least Tendency to Corruption in those who are any Way concerned in its Administration, and will not endure their taking a Reward for the doing a Thing which deserves the severest of Punishments.

³ Inst. 148.

Sett. 3. Also Bribery sometimes signifies the taking or giving of a Reward for Offices of a publick Nature; and surely nothing can be more

palpably prejudicial to the Good of the Publick, than to have Places of the highest Concernment, on the due Execution whereof the Happiness of both King and People doth depend, disposed of not to those who are most able to execute them, but to those who are most able to pay for them; nor can any thing be a greater Discouragement to Industry and Virtue, than to see those Places of Trust and Honour, which ought to be the Rewards of those who by their Industry and Diligence have qualified themselves for them, conferred on such who have no other Recommendation but that of being the highest Bidders; neither can any thing be a greater Temptation to Officers to abuse their Power by Bribery and Extortion, and other Acts of Injustice, than the Consideration of the great Expence they were at in gaining their Places, and the Necessity of sometimes straining a Point to make their Bargain answer their Expectation; for which Reasons, among many others, it is expressly enacted by 12 Rich. 2. 2. *That the Chancellor, Treasurer, Keeper of the Privy Seal, Steward of the King's House, the King's Chamberlain, Clerk of the Rolls, the Justices of the one Bench and of the other, Barons of the Exchequer, and all other, that shall be called to ordain, name, or make Justices of Peace, Sheriffs, Escheators, Customs, Comptrollers, or any other Officer or Minister of the King, shall be firmly sworn that they shall not ordain, name, or make, any of the above mentioned Officers, for any Gift, or Brocade, Favour, or Affection, nor that none which sueth by himself, or by others, privily, or openly, to be in any Manner of Office, shall be put in the same Office, or in any other, but that they make all such Officers and Ministers of the best and most lawful Men, and sufficient to their Estimation and Knowledge.* Also it is farther enacted by 4 H. 4. 5. *That no Sheriff shall let his Bailiwick to Farm to any Man, for the Time that he occupieth such Office, &c.* Also it is enacted by 5 & 6 Ed. 6. 16. *That if any Person shall bargain or sell, or take any Reward, or promise of any Reward for any Office, or the Deputation of any Office, any way concerning the King's Revenue, or the Keeping of his Castles, or the Administration or Execution of Justice, (unless it be such an Office as had been usually granted before the making of the said Act by the Justices of the King's Bench, or common Pleas, or by the Justices of Assize) that then every such Person so bargaining or selling, or taking such Reward, or Promise, &c. shall not only forfeit his Right to such Office, or to the Nomination thereof, but also every Person who shall give any such Reward or Promise, &c. shall be adjudged a disabled Person in Law, to have or enjoy such Office, &c.*

Vide Noy
102.
Moore 781.

Vide Noy
102.
Moore 781.

In the Construction of this Statute of 5 & 6 Ed. 6. the following Points have been resolved;

SECT. 4. I. That the Offices of Chancellor, Register, and Commissary in Ecclesiastical Courts, are within the Meaning of the Statute, inasmuch as those Courts do not only determine Matters which are brought before them, merely *pro salute Animæ*, but also have the Decision of Disputes concerning the Lawfulness of Matrimony and Legitimation of Children, which touch the Inheritance of the Subjects, and also hold Plea of Legacies and Tithes, &c. in which respects they are Courts of Justice; but it hath been adjudged, that no Office in Fee is within the Statute.

Cro. Ja. 269.
3 Inst. 148.
Salk 458.
3 Lev. 289.
2 Vent. 187.
267.

SECT. 5. II. That one, who makes a Contract for an Office contrary to the Purport of the said Statute, is so far disabled to hold the same, that he cannot at any Time during his Life be restored to a Capacity of holding it by any Grant or Dispensation whatsoever.

2 Lev. 151.
Hob. 75.
Co. Lit. 234.
Cro. Ca. 361.
Cro. Ja. 386.

III. That a Bond by a Deputy of an Office to pay a certain Sum, at all Events is within the Statute; but not a Bond to pay a certain Sum out of the Profits of the Office.

Sal 466, 468.
6 Mod. 234.

IV. That the Statute extends not to the Offices in the Plantations.

Salk. 411.
SECT. QUERE 2 Mo.
45.

3 Inst. 145.

1 Leon. 295.
Cro. Ja. 65.
Rushw. Col-
lections,
part. 1. fol. 31.

3 Inst. 148.

Sett. 6. As to the second Point, *viz.* How Bribery is punishable; it is said, That at Common Law, Bribery in a Judge, in relation to a Cause depending before him, was look'd upon as an Offence of so heinous a Nature, that it was sometimes punished as High Treason before the

25 *Ed.* 3. And at this Day it is certainly a very high Offence, and punishable, not only with the Forfeiture of the Offender's Office of Justice, but also with Fine and Imprisonment, &c.

Sett. 7. Also all the other above mentioned Kinds of Bribery, taken in a large Sense, seem to be punishable with Fine and Imprisonment, &c. and in the Time of King *James* the First, the Earl of M. Lord High Treasurer of *England*, being impeached by the Commons for refusing to hear Petitions referred to him by the King, till he had received great Bribes, and for other such like Misdemeanours, was, by Sentence of the Lords, deprived of all his Offices, and disabled to have any for the Future, or to sit in the Parliament, and was fined fifty thousand Pounds, and imprisoned during the King's Pleasure.

C H A P. LXVIII.

Of Extortion.

IN treating of Extortion, I shall consider,

1. What shall be called Extortion,
2. How it shall be punished.

Co. Lit. 368.
10 Co. 102. a.2 Inst. 209.
Co. Lit. 368.42 Ed. 3, 4, b.
5. a.
2 Rol. Ab.
226. H. 1.4 Inst. 274.
Moore 523.
2 Inst. 209.21 H. 7. 17.
2 Inst. 210.
2 Inst. 176.
S.P.C. 49. A.

Sett. 1. As to the first Point it is said, that Extortion in a large Sense signifies any Oppression under Colour of Right; but that in a strict Sense it signifies the Taking of Money by any Officer, by Colour of his Office, either where none at all is due, or not so much is due, or where it is not yet due.

Sett. 2. It is said, That at the Common Law, which was affirmed by the Statute of *Westminster* 1. 26. it was Extortion for any Sheriff or other Minister of the King, whose Office did any way concern the Administration or Execution of Justice, or the common Good of the Subject, to take any Reward whatsoever for doing his Office, except what he received from the King: And surely this was a most excellent Institution, highly tending to promote the Honour of the King, and the Ease of the People, and hath been always thought to conduce so much to the public Good, that all Prescriptions whatsoever which have been contrary to it have been holden to be void; and upon this Ground it hath been resolved, That the Prescription, by vertue whereof the Clerk of the Market claimed certain Fees for the View and Examination of all Weights and Measures, &c. was merely void.

Sett. 3. But it hath been holden, That the Fee of twenty Pence, commonly called the Bar-Fee, which hath been taken, Time out of Mind, by the Sheriff, of every Prisoner who is acquitted, and also the Fee of one Penny, which was claimed by the Coroner of every Visne, when he came before the Justices in Eyre, are not within the meaning of the said Statute, because they are not demanded by the Sheriff or Coroner for doing any Thing relating to their Offices, but claimed as Perquisites of Right belonging to them, whether they do any thing or not.

not. But there seemeth to be no Necessity for this Distinction, for it cannot be intended to be the Meaning of the Statute to restrain the Courts of Justice, in whose Integrity the Law always reposes the highest Confidence, from allowing reasonable Fees for the Labour and Attendance of their Officers: For the chief Danger of Oppression is from Officers being left at their Liberty to set their own Rates on their Labour, and make their own Demands; but there cannot be so much Fear of these Abuses, while they are restrained to known and stated Fees, settled by the Discretion of the Courts, which will not suffer them to be exceeded, without the highest Resentment.

Sett. 4. Also it having been found by Experience, That generally it is vain to expect that any Officers who depend upon a known fixed Salary, without having any immediate Benefit from any particular Instances of their Duty, should be so ready in Undertaking, or diligent in executing them as they would be, if they were to have a present Advantage from them; it hath been thought expedient to permit them to take certain Fees in many Cases, but it is certain that they are guilty of Extortion, if they take any Thing more: Also it hath been resolved, That a Promise to pay them Money for the doing of a Thing, which the Law will not suffer them to take any thing for, is merely void, however freely and voluntarily it may appear to have been made; for if once it should be allowed, That such Promises could maintain an Action, the People would quickly be given to understand how kindly they would be taken, and happy would that Man be who could have his Business well done without them.

Sett. 5. As to the second Point, *viz.* How Extortion shall be punished, there is no doubt, but that at Common Law it is severely punishable, at the King's Suit, by Fine and Imprisonment; and also by a Removal from the Office, in the Execution whereof it was committed. Also Extortion in Sheriffs, Escheators, Bailiffs, Gaolers, the King's Clerk of the Market, and other inferiour Ministers and Officers of the King, whose Offices do any way concern the Administration or Execution of Justice, or the common Good of the Subject, or for the King's Service, have a farther additional Punishment by the above mentioned Statute of *Westminster* 1. 26. by which it is enacted, *That no Sheriff, nor other King's Officer, shall take any Reward to do his Office, but shall be paid of that which they take of the King, and that he who so doth, shall yield twice as much, and shall be punished at the King's Pleasure.*

C H A P. LXIX.

Of Perjury.

Offences under the Degree of capital, more immediately against the Subject, not amounting to an actual Disturbance of the Peace, which may be committed by private Persons, without any Relation to an Office; are either,

1. Such as are infamous, and grossly scandalous, proceeding from Principles of downright Dishonesty, Malice, or Faction.
2. Such as are of an inferiour Nature, and neither infamous, nor grossly scandalous.

Those

Those of the first Kind seem to be reducible to the following Heads,

1. Perjury, and Subornation of Perjury.
2. Forgery.
3. Cheats.
4. Conspiracy.
5. Keeping of a Bawdy-house.
6. Libels.

And first of Perjury, and Subornation of Perjury, of both which there are two Kinds :

1. By the Common Law.
2. By Statute.

Sett. 1. Perjury, by the Common Law, seemeth to be a wilful false Oath, by one who being lawfully required to depose the Truth in any Proceeding in a Course of Justice, swears absolutely, in a Matter of some Consequence to the Point in question, whether he be believed, or not?

For the better Understanding whereof, I shall consider the following Particulars :

1. How far this Offence must be wilful.
2. In what Kind of Proceedings it may be committed.
3. In what Cases an Oath may be said to be so far lawfully administered, that he who takes it may become guilty of Perjury.
4. In what Kind of Oaths Perjury may be committed.
5. Whether the Matter of the Oath must be false.
6. How far the Oath must be absolute.
7. How far the Things sworn ought to be material to the Point in Question.
8. How far the false Oath must be credited.

5 Mod. 350.

Sett. 2. As to the first Particular, *viz.* How far this Offence must be wilful, it seemeth that no one ought to be found guilty thereof without clear Proof, That the false Oath alledged against him was taken with some Degree of Deliberation; for if upon the whole Circumstances of the Case it shall appear probable, That it was owing rather to the Weakness than Perverseness of the Party, as where it was occasioned by Surprise, or Inadvertency, or a Mistake of the true State of the Question, it cannot but be hard to make it amount to voluntary and corrupt Perjury, which is of all Crimes whatsoever the most Infamous and Detestable.

Cro. El. 168,
169.
Noy 128.
2 Rol. Ab.
257.
Hob. 62.

Sett. 3. As to the second Particular, *viz.* In what Kind of Proceedings this Offence may be committed, it seems to be clearly agreed, That all such false Oaths as are taken before those who are any ways intrusted with the Administration of publick Justice, in relation to any Matter before them in Debate, are properly Perjuries; and it seems to have been holden by some, That all such false Oaths, as are taken before Persons authorized by the King to examine Witnesses in relation to any Matter whatsoever, wherein his Honour or Interest are concerned, are also punishable as Perjuries. And surely there can be no Offence of this Nature which will not justly deserve a publick Prosecution, inasmuch as if it should once prevail, it would make it impossible to have any Law whatsoever

soever duly executed, and expose the Lives, Liberties, and Properties, of the most Innocent, to the Mercy of the greatest Villains: And therefore it hath been holden, That not only such Persons are indictable for Perjury, who take a false Oath in a Court of Record, upon an Issue therein joined, but also all those who forswear themselves in a Matter judicially depending before any Court of ^a Equity, or Spiritual ^b Court, or any other ^c lawful Court, whether the Proceedings therein be of Record or not, ^d or whether they concern the Interest of the King or Subject: And it is said to be no way material, whether such false Oath be taken in the Face of a Court, or before Persons authorized by it to examine a Matter, the Knowledge whereof is necessary for the right Determination of a Cause; and ^e therefore, That a false Oath before a Sheriff, upon a Writ of Inquiry of Damages, is as much punishable as if it were taken before the Court on a Trial of the Cause. Also it seemeth, That any false Oath is punishable, as Perjury, which tends to mislead the Court in any of their Proceedings relating to a Matter judicially before them, tho' it no way affect the principal Judgment which is to be given in the Cause; as where a ^f Person who offers himself to be Bail for another, knowingly, and wilfully swears that his Substance is greater than it is. Also it hath been resolved, That not only such Oaths as are taken upon judicial Proceedings, but also all such as any way tend to abuse the Administration of Justice, are properly Perjuries; as where one ^g takes a false Oath before a Justice of Peace, in order to induce him to compel another to find Sureties for the Peace, &c. or where a Person forswears himself ^h before Commissioners appointed by the King to inquire of the Forfeitures of his Tenants Estates, &c. whereby he makes them liable to be seized by Exchequer-Process: Also it hath been said, That a false Oath is punishable as Perjury, in some Cases, wherein the King's Honour or Interest is concerned, tho' it do not concern the Administration of Justice; as where one swears a false Oath concerning the Possession of Lands, before Commissioners appointed by the King to inquire of such Persons whose Titles to the Lands in their Possession are defective, and want the Supply of the King's Parents: And this is certainly an Offence of a very heinous Nature, ⁱ tending not only to frustrate the King's gracious Purpose, but to abuse his Goodness by inducing him to grant his Patents to those who are out of Possession, and no way within the Intent of the Commission, which, instead of quieting the Possessions of the Subjects, cannot but end in the greatest Disturbance of them. However it seemeth certain, That no Oath whatsoever in a mere private Matter, howsoever wilful or malicious it may be, is punishable as Perjury in a criminal Prosecution; for private Injuries are left to be redressed by private Actions; and upon this Ground it hath been holden, That a false Oath taken by one upon the making of a Bargain, that the Thing sold is his own, is not punishable as Perjury. Also from what hath been said it appears, That the Notion of Perjury is confined to such publick Oaths only as affirm or deny some Matter of Fact, contrary to the Knowledge of the Party; and therefore, That it doth not extend to any promissory Oaths whatsoever; from whence it clearly follows, That no Officer, publick or private, who neglects to execute his Office in Pursuance of his Oath, or acts contrary to the Purport of it, is indictable for Perjury, in respect of such Oath; yet it is certain, That his Offence is highly aggravated by being contrary to his Oath, and therefore, that he is liable to the severer Fine on that Account.

Sec. 4. As to the third Particular, *viz.* In what Cases an Oath may be said to be so far lawfully administered, that he who takes it may be-

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come

^a Cro. El. 907.¹ Sid. 418.¹ Rol. A. 40.

Pl. 16, 17, 18.

20, 21.

⁵ Mod. 348.^b Cro. El. 185.

609.

² Rol. Re. 410.¹ Rol. A. 40.

Pl. 12.

¹ Leon. 131.

Con. Dy. 243.

Pl. 53.

^c 2 Rol. Ab.

257. Pl. 2.

¹ Rol. Ab. 41.

Pl. 19, 42, 30.

Winch. 3.

⁵ Mod. 348.

Hutton 34.

¹ Mod. 55.

Yelv. 27.

Cro. El. 297.

342, 348, 905.

⁴ 12 Co. 101.

Cro. Jz. 212.

Con. Cro. Jz.

120.

Vide Sec. 18.

⁶ 1 Rol. Ab.

39 Pl. 3, 42.

27.

¹ Cro. Ca. 146.² 2 Rol. Re.

410.

² Rol. Ab.

77. Pl. 5.

^b Noy 100.

Moore 627.

¹ Hob. 62.

Cont. 1 Vent

369, 370.

³ Rol. Ab.

257. Pl. 43.

² Rol. Ab.

257. Pl. 5.

³ Inst. 166.

come guilty of Perjury by swearing falsely; it seemeth clear, That no Oath whatsoever taken before ^a Persons acting merely in a private ^b Capacity, or ^c before those who take upon them to administer Oaths of a publick Nature, without legal Authority for their so doing, or ^d before those who are legally authorized to administer some kinds of Oaths, but not those which happen to be taken before them, or even ^e before those who take upon them to administer Justice by Vertue of an Authority seemingly colourable, but in Truth unwarranted and merely void, can never amount to Perjuries in the Eye of the Law, because they are of no manner of Force, but are altogether idle: And from the same Ground it seemeth also clearly to follow, That no false Oath in an Affidavit, made before Persons falsely pretending to be authorized by a Court of Justice to take Affidavits in relation to Matters depending before such Court, can properly be called Perjury, because no Affidavit is any way regarded, unless it be made before Persons legally intrusted with a Power to take it, as being both of sufficient Ability to ask all proper Questions of the Party who shall make such Affidavit, and also of such Integrity as not to suffer any Thing to be inserted therein, to the Truth whereof the Party hath not sworn. And though it may be said, That an Affidavit taken before Persons falsely pretending to be commissioned for such Purpose by the Courts of Justice, doth directly tend to impose upon such Courts, and may possibly happen through Surprise to be read, and may also in its own Nature be altogether as heinous, as if it had been made before Persons regularly impowered to take it; yet inasmuch as it is of it self of no manner of Validity, and is no otherwise regarded, than as it hath the Appearance of being sworn before Persons legally commissioned, without which it would have no manner of Credit, it seemeth that Offences of this Nature are most properly punished, by severely chastising those who usurp such an Authority of administering Oaths without any legal Warrant. However it hath been adjudged, That a false Oath, taken before Persons who having been commissioned to examine Witnesses, happen to proceed after the Demise of the King who gave them their Commission, and before Notice thereof, may be punished as Perjury; for it would be of the utmost ill Consequence to make such Proceedings void; and therefore though all such Commissions be in Strictness legally determined by the Demise of the King who gave them, without any Notice; yet for the Necessity of the Case, whatever is done under them before such Notice, must be suffered to stand good; for otherwise the most innocent and most deserving Subjects would be unavoidably exposed to numberless Prosecutions for doing their Duties, without any Colour of a Fault. And *Quere*, Whether a Perjury in a Court whose Proceedings are afterwards reversed by Error, may not still be punished as Perjury, notwithstanding such Reversal.

Sec. 5. As to the fourth Particular, *viz.* In what kind of Oaths Perjury may be committed, it seemeth clear, That a Man may be in Danger of being guilty thereof, not only in respect of a false Oath, taken by him as a Witness for another, but also in respect of a false Oath taken by him in his own Cause, either in an Answer to Questions put to him in a Court of ^a Law or ^b Equity, having Power to purge him upon Oath concerning his Knowledge of the Matters in Dispute, or in his ^c Affidavit concerning some collateral Matter, wherein the Parties own Oaths are allowed to be taken. But it seems, That a Juror who gives a Verdict contrary to manifest Evidence, is not properly guilty of Perjury within the above mentioned Description, because he is not sworn to depose the Truth, but only

^a Rol. Ab.

257.

³ Inst. 165

Yelv. 72.

^b Cro. El. 169.

³ Inst. 165.

^c Sid. 274

^d Rol. Ab.

257. Pl. 6.

Litch. 38,

132.

^d Yelv. 111.

³ Inst. 166

See 4 Inst. 97,

98

29 Co. 2 25

^a Rol. Re. 427

⁴ Inst. 278.

³ Inst. 165.

Cro. Ch. 97,

98, 99.

¹ Vent. 181.

¹ Syd. 148.

^a ¹ Rol. Ab.

40. Pl. 15,

83. Pl. 9.

Cro. El. 609.

^b ¹ Leon. 127.

Cro. El. 135,

905.

¹ Rol. Ab. 40.

Pl. 16, 17, 18.

69 Pl. 42.

¹ Sid. 244.

^c ¹ Rol. Re. 79.

Noy 128.

⁵ Mod. 348.

Moore 656.

Pl. 900.

² Keb. 451.

² Rol. Ab.

77. Pl. 4, 5.

only to give a true Judgment upon the Deposition of others, and in many Cases is not punishable at all *in foro humano*, as shall be set forth more at large in the Chapter of Conspiracy.

Sett. 6. As to the fifth Particular, *viz.* How far the Matter of the Oath which may amount to Perjury, must be false, it ^d is said not to be material whether the Fact which is sworn, be in it self true or false; for howsoever the Thing sworn may happen to prove agreeable to the Truth, yet if it were not known to be so by him who swears to it, his Offence is altogether as great as if it had been false inasmuch as he wilfully swears, That he knows a Thing to be true, which at the same Time he knows nothing of, and impudently endeavours to induce those before whom he swears to proceed upon the Credit of a Deposition, which any Stranger might make as well as he.

^d Palm. 294.
Hetley 97.
² Rol. Ab.
77 Pl. 5.
³ Inst. 166.
Con. 3 Mod.
122.

Sett. 7. As to the sixth Particular, *viz.* How far the Oath must be absolute, it is said, That no Oath shall amount to Perjury unless it be sworn absolutely and directly; and therefore, That he who swears a Thing according as he thinks, remembers or believes, cannot in respect of such an Oath be found guilty of Perjury.

³ Inst. 166.

Sett. 8. As to the seventh Particular, *viz.* How far the Thing sworn ought to be material to the Point in Question, it seemeth clear, That if the Oath for which a Man is indicted of Perjury, be wholly foreign from that Purpose, or altogether immaterial, and neither any way pertinent to the Matter in Question, not tending to aggravate or extenuate the Damages, nor likely to induce the Jury to give a readier Credit to the substantial Part of the Evidence, it cannot amount to Perjury, because it is merely idle and insignificant; as if upon a Trial, in which the Question is, whether such a one was *Compos* or not, a Witness introduces his Evidence by giving a History of a Journey which he took to see the Party, and happens to swear falsely in Relation to some of the Circumstances of the Journey. Also it hath been adjudged, That where a Witness being asked by a Judge, whether *A.* brought a certain Number of Sheep from one Town to another all together? answered, That he did so; where in Truth *A.* did not bring them all together, but Part at one Time and Part at another, yet such Witness was not guilty of Perjury, because the Substance of the Question was, Whether *A.* did bring them at all or not, and that manner of bringing them was only a Circumstance. And upon the same Ground it is said to have been adjudged, That where a Witness being asked, whether such a Sum of Money were paid for two Things in Controversy between the Parties? answered, That it was, where in Truth it was paid only for one of them by Agreement, such Witness ought not to be punished for Perjury; because as the Case was, it was no way material whether it were paid for one or both. Also it is said to have been resolved, That a Witness who swore that one drew his Dagger and beat and wounded *7. S.* where in Truth he beat him with a Staff, was not guilty of Perjury, because the beating only was material. But perhaps in all these Cases it ought to be intended, That the Question was put in such a Manner, that the Witness might reasonably apprehend that the sole Design of putting it, was to be informed of the substantial Part of it, which might induce him through Inadvertency to take no Notice of the circumstantial Part, and give a general Answer to the substantial; for otherwise, if it appear plainly, That the Scope of the Question was to sift him as to his Knowledge of the Substance, by examining him strictly concerning the Circumstances, and he give a particular and distinct Account of the Circumstances, which afterwards appears to be false; surely he cannot but be

Vide infra
Sett. 22.
¹ Rol. Ab. 41.
Aley 79.
Pl. 25, 78.
Pl. 3.
Cro. El. 500.
Salk. 514.
Noy 36.
² Rol. Re.
145.
Cro. Ca. 321.
Hob. 53.
⁵ Mod. 345.
348.

² Rol. Re. 41.

² Rol. Re. 42

Hetley 97.

2 Rol. Re. 368.
Palm. 382.

1 Sid. 274.

1 Keb. 935,
947.

Vide infra
Sect. 23.

Cro. Ja. 212.
12 Co. 101.
2 Leon 198.

guilty of Perjury, inasmuch as nothing can be more apt to incline a Jury to give Credit to the substantial Part of a Man's Evidence, than his appearing to have an exact and particular Knowledge of all the Circumstances relating to it. And upon these Grounds, I cannot but think the Opinion of those Judges very reasonable, who held, That a Witness was guilty of Perjury, who in an Action of Trespas for breaking the Plaintiff's Close, and spoiling it with Sheep, deposed that he saw thirty or forty Sheep in the said Close, and that he knew them to be the Defendant's, because they were marked with such a Mark, which he knew to be the Defendant's Mark, where in Truth the Defendant never used such a Mark; for the giving such a special Reason for his Remembrance could not but make his Testimony more credible than it would have been without it; and though it signified nothing to the Merits of the Cause, whether the Sheep had any Mark at all or not, yet inasmuch as the assigning such a Circumstance in a Thing immaterial had such a direct Tendency to corroborate the Evidence concerning what was most material, and consequently was equally prejudicial to the Party, and equally criminal in its own Nature, and equally tending to abuse the Administration of Justice, as if the Matter sworn had been the very Point in Issue, there doth not seem to be any Reason why it should not be equally punishable. But I cannot find this Matter any where thoroughly settled or debated, and therefore shall leave it to every Man's own Judgment, which from the Consideration of the Circumstances of each particular Case, may generally without any great Difficulty discern whether the Matter in which Perjury is assigned, were wholly impertinent, idle, and insignificant, or not, which seems to be the best Rule for determining whether it be punishable as Perjury or not. But it is said in *Siderfin*, speaking as I suppose of an Answer in Chancery, that a Man may be guilty of Perjury at the Common Law by swearing a Thing not material; but surely this ought not to be understood in so great a Latitude, as if it were meant that every Falsity in such an Answer must needs be Perjury, howsoever foreign, circumstantial and trivial the Point wherein it is assigned may be, which is directly contrary to what seems to be clearly taken for granted in other Books. And therefore perhaps where it is said, That a Man may be guilty of Perjury in a Thing not material, no more may be meant, but that he may be as well guilty thereof, by answering to a Matter not charged in the Bill, as by answering to the Matters therein contained, which may alone be said to be material, because the Defendant is not obliged in his Answer to take Notice of any thing else; or else perhaps the Meaning may be, That in a Prosecution for Perjury at Common Law, setting forth a false Oath in such an Answer, relating to the Thing said to be in Variance, the Falsity shall be intended *prima facie*, to have been some way material in the Cause, unless the contrary be proved by the other Side: Whereas in all Prosecutions upon the Statute, it is necessary expressly to shew in what manner the false Oath is material to the Cause in Question, because that Statute extending only to such Perjuries whereby some Person is grieved, cannot maintain a Prosecution which does not bring the Case within the Purview of it, by shewing that some one was grieved by the Injury complained of, which he could not be, unless the Thing sworn were some way material. However it seemeth to be clear, That a Man may as well be guilty of Perjury by a false Oath tending to extenuate or aggravate the Damages, as by an Oath which is direct to the Fact in Issue.

Se^t. 9. As to the eighth Particular, viz. how far the false Oath must be credited, it hath been holden not to be material upon an Indictment of Perjury at Common Law, whether the false Oath were at all credited or whether the Party in whose Prejudice it was intended, were in the Event any way aggrieved by it or not, inasmuch as this is not a Prosecution grounded on the Damage to the Party, but on the Abuse of publick Justice.

Se^t. 10. Subornation of Perjury by the Common Law, seems to be an Offence in procuring a Man to take a false Oath amounting to Perjury, who actually takes such Oath; but it seemeth clear, That if the Person incited to take such an Oath do not actually take it, the Person by whom he was so incited is not guilty of Subornation of Perjury; yet it is certain, That he is liable to be punished not only by Fine, but also by infamous corporal Punishment.

Se^t. 11. Thus far of Perjury and Subornation of Perjury by the Common Law, and now I shall proceed to examine in what Manner these Offences are restrained by Statute; as to which it is to be observed, that it is enacted by 5 El. 9. *That whoever shall unlawfully and corruptly procure any Witness or Witnesses by Letters, Rewards, Promises, or by any other sinister and unlawful Labour or Means whatsoever, to commit any wilful and corrupt Perjury, in any Matter or Cause whatsoever depending in Suit and Variance, by any Writ, Action, Bill, Complaint or Information, in any wise concerning any Lands, Tenements or Hereditaments, or Goods, Chattels, Debts or Damages, in any of the King's Courts of Chancery, White-hall, or elsewhere, within any of the King's Dominions of England or Wales, or the Marches of the same, where any Person or Persons shall have Authority by Vertue of the King's Commission, Patent or Writ, to hold Plea of Land, or to examine, hear, or determine, any Title of Lands, or any Matter or Witnesses concerning the Title, Right, or Interests of any Lands, or Tenements, or Hereditaments, or in any of the King's Courts of Record, or in any Lect, View or Frank-Pledge or Law-Day, Ancient Demesne-Court, Hundred Court, Court-Baron, or in the Court or Courts of the Stannary in the Counties of Devon or Cornwall, or shall unlawfully and corruptly procure or suborn any Witness or Witnesses, who shall be sworn to testify in perpetuam Rei Memoriam, shall for such Offence, being thereof lawfully convicted or attained, forfeit the Sum of Forty Pounds. And if any such Offender so being convicted or attained, shall not have any Goods or Chattels, Lands, or Tenements, to the Value of forty Pounds, that then every such Person shall suffer Imprisonment by the Space of one half Year without Bail or Mainprize, and stand upon the Pillory the Space of one whole Hour, in some Market-Town, next adjoining to the Place where the Offence was committed, in open Market there, or in the Market-Town it self where the Offence was committed.*

Se^t. 12. Also it is farther enacted by the said Statute, Par. 5. *That no Person being so convicted or attained, shall from thenceforth be received as a Witness in any Court of Record, in any of the King's Dominions of England, Wales, or the Marches of the same, till such Judgment against him shall be reversed by Attaint, or otherwise; and that upon every such Reversal, the Party aggrieved shall recover Damages against the Party who did procure the said Judgment so reversed to be first given, &c.*

Se^t. 13. And it is farther enacted Par. 6. *That if any Person or Persons shall either by the Subornation, unlawful Procurement, sinister Persuasion, or Means of any other, or by their own Act, Consent, or Agreement, wilfully, and corruptly commit any Manner of wilful Perjury, by his or their Deposition, in any of the Courts before mentioned, or being examined ad perpetuam Rei Memoriam, That then every such Offender being duly convicted or attained shall forfeit twenty*

Pounds, and have Imprisonment by the Space of six Months without Bail or Mainprize; and the Oath of such Offender shall not from thenceforth be received in any Court of Record in England or Wales, until such Judgment shall be reversed, &c. on which Reversal the Party grieved shall recover Damages in the Manner before mentioned. And it is farther enacted Par. 7. That if such Offender shall not have Goods or Chattels to the Value of twenty Pounds, That then such Person shall be set on the Pillory in some Market-Place within the Shire, City, or Borough, where the Offence shall be committed, by the Sheriff or his Ministers, if it shall fortune to be without any City or Town Corporate; and if it happen to be within any such City or Town Corporate, then by the head-Officer of such City, &c. where he shall have both Ears nailed, &c.

Se^ct. 14. And it was farther enacted Par. 8. 9. That one Moiety of the said Forfeitures shall be to the King, and the other Moiety to such Person as shall be grieved, hindered, or molested, by Reason of any of the Offences before mentioned, that will sue for the same, &c. and that as well the Judge and Judges of every such of the said Courts where any such Suit shall be, and whereupon any such Perjury shall be committed, as also the Justices of Assize and Gaol-Delivery, and Justices of Peace at their Quarter-Sessions, both within the Liberties and without, may enquire of, hear, and determine all Offences against the said Act.

Se^ct. 15. But it is provided Par. 11. That the said Act shall no way extend to any Spiritual or Ecclesiastical Court, but that every such Offender as shall offend in Form, as aforesaid, shall be punished by such usual and ordinary Laws as are used in the said Courts.

Se^ct. 16. Also it is provided Par. 13. That the said Statute shall not restrain the Authority of any Judge, having absolute Power to punish Perjury before the Making thereof, but that every such Judge may proceed in the Punishment of all Offences, punishable before the making of the said Statute, in such wise as they might have done, and used to do, to all Purposes, so that they set not upon the Offender less Punishment than is contained in the said Act. From whence it seemeth undoubtedly to follow, That the Court of King's Bench, &c. proceeding upon an Indictment, or Information of Perjury or Subornation of Perjury at Common Law, may not only set a discretionary Fine on the Offender, but also condemn him to the Pillory, without making any Inquiry concerning the Value of his Lands or Goods.

But for the better understanding of the other Parts of this Statute I shall consider the following Particulars :

1. How far the very Words of the Statute must be pursued in a Prosecution grounded thereon.
2. In what kind of Oaths one may incur the Danger thereof.
3. How far the false Oath must appear to have been prejudicial to some Person.

Se^ct. 17. As to the first of these Particulars it hath been holden, That in every Prosecution on this Statute the Words thereof must be exactly pursued, and therefore that an Indictment or Action on the said Statute, alledging that the Defendant deposed such a Matter ^a falso & deceptivè, or ^b falso & corruptè, or ^c falso & voluntarie, without expressly saying, that he did it voluntarie & corrupte, is not good; and that such a Defect cannot be ^d supplied by adding the Words *contra formam Statuti*, or concluding & sic voluntarium & corruptum commisit Perjurium: Also it hath been ^e holden, That it is necessary expressly to alledge that the Defendant was sworn, and therefore that it is not sufficient to say, that *tactò per se sacro Evangelio falso deposuit.*

^a 2 Leon. 211.
^b Leon. 230.
 Shower 190.
^c Het. 12.
 Cro. El. 147.
^d Savil 43.
^e 2 Leon. 214.
 3 Leon. 230.
 Het. 12.
 Savil 43.
 Cro. El. 147.
^f Cro. El. 105.

Señ. 18. However it hath been resolved, That it is not necessary to shew whether the Party, who is accused of Perjury, did take the false Oath through the Subornation of another, or without any such Subornation, notwithstanding the Words of the Statute are, *if any Person either by the Subornation, unlawful Procurement, sinister Perswasion, or Means of any other, or by their own Act, Consent or Agreement commit wilful Perjury, &c.* for inasmuch as there is no Medium between the two Branches of this Distinction, so that all Perjury whatsoever must needs come within one of them; and it is no way material under which of them it doth come, it is a reasonable Exposition to look on the said Words as put into the Statute *ex abundanti*, seeing they express no more than the Law must needs have implied without them; from whence it follows, That they operate no more than if they had not been expressed, and consequently shall not oblige the Prosecutor necessarily to pursue them, which would put him under the Difficulty not only of proving the Perjury, which alone is material, but also of shewing it to be within one of the Branches of the said Distinction, which is nothing to the Purpose.

*Vide suprà
Ch. 10. §. 8.*

Señ. 19. As to the second of the above mentioned Particulars, *viz.* In what kind of Oaths one may incur the Danger of this Statute, it hath been resolved, That no one can be guilty of Perjury within the Meaning thereof, in any Case wherein a Man may not possibly be guilty also of Subornation of Perjury within the same Statute; for it is very reasonable to give the whole Statute the same Construction; nor can it well be intended, that the Makers thereof, who expressly inflict a greater Penalty on Subornation of Perjury than on the Perjury it self, should mean to extend the Purview of the Law in relation to what they esteemed the lesser Crime, farther than in relation to that which they esteemed the greater; from whence it hath been argued and determined, That because that Part of the Statute, which concerns Subornation of Perjury, extends only to Subornation of Perjury in *Matters depending in Suit by Writ, Action, Bill, Plaint, or Information, in any wise concerning Lands, Tenements, or Hereditaments, or Goods, Chattels, Debts, or Damages, &c.* therefore the following Clause concerning Perjury it self, tho' it be penned in more general Words, shall come under the same Restriction. And from hence it clearly follows, That no Perjury upon an Indictment, or criminal Information, can bring a Man within the Danger of this Statute, because they are omitted in the above mentioned Clause. Also upon this Ground it seems easy to account for the Judgment in *Price's Case*, who being indicted for a Perjury supposed to be committed by him in an Information for the King, which as I suppose must be intended to have been a criminal one, was discharged upon an Exception taken to the Indictment; but if the Information whereon the said Perjury was supposed to have been committed, had been of a civil Nature, I do not see any Reason why it should not be as well within the Meaning, as it seems to be expressly within the Words of the Statute; for surely the Opinion, That the King cannot by Indictment, which is his own proper Suit, punish his own Witness, who swears for him, cannot be agreeable to Law, because however the Perjury of such a Witness may seem to tend to promote the King's Interest in relation to the Cause which happens to be in Dispute; yet certainly it is as heinous a Crime in its own Nature, and as much an Abuse to Justice, and of the same ill Consequence to the Publick, and consequently as worthy of the King's Resentment, as if it had been taken against him.

Co. 99. 1.

Cro. J. 120.

3 Inst. 164.

Señ. 20. Also it hath been resolved, That this Statute extends to no other Perjury except that of a Witness, not only because the Clause

concerning Subornation, to which the subsequent Clause concerning Perjury hath a Reference, relates to Perjury by Witnesses only, but also because the Clause concerning Perjury mentions only Perjury committed by Persons in their Examinations, *ad perpetuam Rei memoriam*, or else in their Depositions in some of the Courts above mentioned, which in common Speech are taken for such Oaths only as are taken by a Witness; and from hence it follows, That no one can come within the Statute by Reason of any false Oath in an ^a Answer to a Bill in Chancery, or in ^b swearing the Peace against another, or in a ^c Presentment made by him as Homager of a Court-Baron or by Reason of a false ^d Wager of Law, or for taking a false Oath before ^e Commissioners appointed by the King to make an Inquiry concerning his Title to certain Lands.

¹ Cro. El. 149.
² Leon. 201.
 Duff 84.
 Yelv. 120.
³ 2 Rol. Ab.
 77. Pl. 5.
⁴ 2 Leon. 201.
⁵ 1 Noy 7 108
 Finch 450.
⁶ Moore 627.

¹ 2 Rol. Ab.
 77. Pl. 4.
² 1 Rol. Re 79.
³ 3 K. b. 345.

Vide 2 Leon.
 40.

¹ 1 Rol. Ab. 30.
 Pl. 3, 42. Pl.
 27.

See the Authorities
 above
 cited.

Cro. Ji. 8.

Seiz. 21. Also it hath been said, That he who makes a false Affidavit against a Man in a Court of Justice, is not within this Statute; but perhaps the Books wherein this Opinion is holden, ought to be intended only of such Affidavits which no way relate to a Cause depending in Suit before such Court; for if they be of such a Nature, That either of the Parties in Variance be grieved, hindred, or molested in Respect of their Cause in such Court by Reason of the Perjury; as where a Trial is put off, or a Judgment or Execution set aside upon a false Affidavit, the Offence seems to be not only within the Meaning of the Statute, but also within the very Letter of it, unless the Words, Witnesses and Depositions, are confined to so strict a Signification, as to bear no kind of Application to any other Persons or Oaths, except those which are made use of upon the Trial of the Issue in Question, for which I cannot find any good Authority. However partly perhaps from this Notion, and partly because the Statute speaks expressly only of Depositions in the Courts above mentioned, it hath been questioned, Whether a false Oath before a Sheriff upon a Writ of Inquiry of Damages, be within the Statute or not? But if it be considered, That the Party to whose Prejudice such a false Oath is taken, is as much grieved by it as if it had been taken in the very Court, and the principal Judgment of the Cause depends upon such an Inquiry; and the Depositions made before the Sheriff, may as properly be said to be Depositions in the Court, by which the Sheriff is commissioned to take the Inquiry, as Depositions taken before Justices of *Nisi Prius*, upon a Trial of an Issue joined in a superior Court, which are undoubtedly within the Meaning of the Statute; and also inasmuch as those who give Evidence before a Sheriff upon such an Inquiry may in the common Use of the Word, be as properly called Witnesses, as those who give Evidence before the Court in which an Issue is joined, it seemeth to be the more plausible Opinion, that such a Perjury is within the Statute: But since it is disputable, whether it be so or no, and it is certain that it is Perjury at Common Law, and that in all Cases whatsoever where a Man takes a false Oath, which is not Perjury within the Statute, but is looked on as Perjury at Common Law, he is still punishable for it by Indictment or Information at the Common Law, it is certainly most advisable to prosecute such an Offender at the Common Law, and not upon the Statute.

Seiz. 22. As to the third Particular, *viz.* How far the false Oath must appear to have been prejudicial to some Person, it hath been collected from the above mentioned Clause, which giveth an Action to the Party grieved by the Offences mentioned in the Statute, That no false Oath is within the Meaning thereof, which does not give some Person a just Cause of Complaint; and upon this Ground it hath been said, That

he who swears a Thing which is true, but not known by him to be so, is not within the Statute, because howsoever heinous his Offence may be in its own Nature; yet, when it proves in the Event to be in Maintenance of the Truth, it cannot be said to give him a just Cause of Complaint, who would take Advantage against another from his Want of legal Evidence to make out the Justice of his Cause.

Sett. 22. Also from the same Ground it seemeth clearly to follow, That no false Oath can be within the Statute, unless the Party against whom it was sworn suffered some Kind of Disadvantage by it, for otherwise it cannot be said that any one was grieved, hindred, or molested by it; and therefore it is certain, That in every Prosecution upon the Statute, it is necessary to set forth the Record of the Cause wherein the Perjury complained of is supposed to have been committed; and also to prove at the Trial of the Cause, That there is actually such a Record, by producing the Record it self, or a true Copy thereof, which must agree with that which is set forth in the Pleadings, without any material Variance; for otherwise it cannot legally appear, That there ever was such a Suit depending, wherein the Party might be prejudiced in the Manner supposed: Also it seems to be agreed, That it is necessary not only to set forth the Point wherein the false Oath was assigned, but also to shew in what Manner it conduced to the Proof or Disproof of the Matter in Debate between the Parties; and it hath been adjudged, That an Indictment setting forth a Suit concerning the Manor of *Dale*, and assigning a false Oath concerning the Manor (*Manerium prædictum innuendo*) is not good, because it no otherwise appears, That the false Oath did concern the Manor of *Dale*, but by the *Innuendo*, which is not a sufficient Averment. Also upon the same Ground it seems to be safest in a Prosecution upon the Statute for a false Oath in Chancery, to set forth the Bill and Answer, That the Plaintiff may appear to have been aggrieved by it; and for the same Reason it seemeth also, That you ought in such a Prosecution of a Witness in Chancery, to set forth the Interrogatory in particular, and shew how it was material: Also it hath been resolved, That as in an Action on the Statute brought by one Person, it must appear, That the false Oath was prejudicial to the Plaintiff; so in an Action by more than one, it must appear to have been prejudicial to every one of the Plaintiffs: And it hath been said, That it is not sufficient to shew that the false Oath caused the Court to make an Award against the Plaintiff, unless it also appear that such an Award was prejudicial to him, and therefore where the Plaintiff at a Trial in Ejectment challenged a Juror, and proved his Challenge by a false Oath, by reason whereof the Inquest was not taken, and consequently the Possession of the Defendant, who had a defeasible Title, continued longer than it otherwise would have done; it hath been adjudged, That such a Defendant cannot have an Action on the Statute against such Witness, because in Truth he gained an Advantage by the Perjury. Also it hath been holden, That it is not sufficient to shew that the Perjury, for which an Action is brought upon the Statute, was actually prejudicial to the Plaintiff, unless it be also shewn to have been made in some Cause which may properly be said to have been depending in Suit between him and the Person for whom the Witness was examined; and therefore it hath been holden, That where *A.* brought a Bill in Chancery against *B.* and the Lord Keeper, by an Order made *C.* to be as a Party to the Bill against *B.* and afterwards a Commission went forth to examine Witnesses between *B.* and *C.* upon which *D.* being produced as a Witness on the Part of *C.* swore directly

1 Inst. 166
Vide supra
Sect. 6.
Con. Hetley
27.

Vide supra,
Sect. 8. &
3 Inst. 167.

Coke Ent.
164
6 Mod. 168.
2 Rol. Re. 7d.
1 Keb. 452.
931, 941.
Raym. 202.

2 Leon. 12.
2 Rol. Re.
427.
Cro. Ca. 351.
352, 353.
1 Keb. 452.

Cro. El. 418.

1 Keb. 931,
941.

1 Sid. 106.

2 Leon. 12.
3 Leon. 68.

2 Leon. 42.

- Yelv. 22. for him against *B.* whereupon a Decree was made against *B.* yet *B.* cannot have an Action on the Statute, because *C.* was not a Party to the Suit, but came in *à Latere*, by an Order; and it is said, That the Words of the Statute are, *where one is grieved by a Deposition in a Suit between Party and Party*, but perhaps the Authority of this Opinion may justly be questioned, not only because the Words of the Statute whereon it is grounded are mistaken, but also because the Offence seems in Truth to be both within the Meaning and Letter of the Law, since thereby a Person is grieved in respect of a Cause depending in Suit in a Court mentioned in the Statute:
- ² Leon. 198. However there seems to be no doubt, but that a Perjury which only tends to increase or lessen the Damages to be given to a Plaintiff, is as much within the Statute, as any Perjury which goes directly to the Point of the Issue: Also it seemeth to be settled, That Perjury in a Cause where-
¹ Keb. 9.
 Raymond 74
¹ Sid. 148.
² Keb. 718,
 854.
¹ Keb. 531. in an erroneous Judgment is given, is a good Foundation of a Prosecution upon the Statute, while such Judgment stands unreversed.

C H A P. LXX.

Of Forgery.

OF Forgery there are two Kinds:

1. By the Common Law.
2. By the Statute.

Señ. 1. Forgery by the Common Law seemeth to be an Offence in falsely and fraudulently making or altering any Matter of Record, or any other authentick Matter of a publick Nature; as a Parish Register, or any Deed or Will.

For the better Understanding whereof, I shall endeavour to shew:

1. In what Cases the Making or Altering of a Writing, shall be said to be so far false and fraudulent, as to amount to Forgery.
2. That a Man may be guilty of Forgery in respect of all the above mentioned Writings, and of no other.

Señ. 2. As to the first Particular, it is said to be possible for a Man knowingly to make a Deed in his own Name, and also to sign and seal it himself, which yet in Judgment of Law may be no better than a down-right Forgery; as if a Man make a Feoffment of certain Lands to *J. S.* and afterwards make a Deed of Feoffment of the same Lands to *J. D.* of a Date prior to that of the Feoffment to *J. S.* in which Case he is said to be guilty of Forgery, because he knowingly falsifies the Date, in order to defraud his own Feoffee, by making a second Conveyance which at the Time he had no Power to make: Also it is said, That his Crime would have been no less, if by his Conveyance he had passed only an equitable Interest for good Consideration, and had afterwards by such a subsequent antedated Conveyance endeavoured to avoid it. Also in many other Cases a Writing may be said to be forged where neither the Hand nor Seal of any one are forged; as where one being directed to draw up a Will for a sick Person, doth insert some Legacies therein of

³ Inst. 169.
 Pult. 46. b.
 27 H. 6. 3.

Moore 655.

Noy 101.
 Moore 759,
 760.
³ Inst. 170.
 Con. Dy.
 288 b.

his own Head; or where one finding another's Name at the Bottom of a Letter at a considerable Distance from the other Writing, causes the Letter to be cut off, and a general Release to be written above the Name, 3 Inst. 171. and then takes off the Seal, and fixes it under the Release; or where one inserts into an Indictment the Names of those against whom in Truth 3 Mod. 66. it was not found; or where one makes any fraudulent Alteration of the Form of a true Deed in a material Part of it; as by making a Lease of the Manor of *Dale* appear to be a Lease of the Manor of *Sal*, by changing the Letter *D.* into an *S.* or by making a Bond for five hundred Pounds, expressed in Figures, seem to have been made for five Thousand, by adding a new Cypher. But Sir *Edward Coke* seems to say, That a Deed so altered may more properly be called a false than a forged Writing, because it is not forged in the Name of another, nor his Seal nor Hand counterfeited. But I see no good Reason why such an Alteration of a Deed should not as properly be called Forgery, as the entire Making of a new Deed in another's Name; for in both Cases not only the Fraud and Villany are the very same, but also a Man's Hand and Seal are falsely made Use of to testify his Assent to an Instrument, which after such an Alteration is no more his Deed than a Stranger's. Also the Notion of Forgery doth not seem so much to consist in the counterfeiting a Man's Hand and Seal, which may often be done innocently, but in the endeavouring to give an Appearance of Truth to a mere Deceit and Falsity, and either to impose that upon the World as the solemn Act of another, which he is no way privy to, or at least to make a Man's own Act appear to have been done at a Time when it was not done, and by Force of such a Falsity to give it an Operation, which in Truth and Justice it ought not to have, as appears by the foregoing Cases in this Section, to most of which Sir *Edward Coke* himself seems to agree.

Sett. 3. But it seemeth to be clear, That he who writes a Deed in another's Name, and seals it in his Presence, and by his Command, is not guilty of Forgery, because the Law looks on this as the other's own Sealing. Pult. 46.
21 H. 6. 4. b.
Moore 619.
Noy 99.
Salk 175.

Sett. 4. Also it hath been adjudged, That he shall not be punished for Forgery who razeth out the Word *Libris*, out of a Bond made to himself, and putteth in *Marcis*, because here is no Appearance of a fraudulent Design to cheat another, and the Alteration is prejudicial to none but to him who makes it, whose Security for his Money is wholly avoided by it; yet it is said, That it would be Forgery, if by the Circumstances of the Case it should any way appear to have been done with an Eye of gaining an Advantage to the Party himself, or of prejudicing a third Person: Also it is holden, That such an Alteration, even without these Circumstances is a Misdemeanour, tho' it be no Forgery.

Sett. 5. It hath been resolved, That a Man shall not be adjudged guilty of Forgery for writing a Will for another without any Directions from him, who becomes *Non Compos* before it is brought to him; for it is not the bare Writing an Instrument in another's Name without his Privy, but the giving it a false Appearance of having been executed by him, which makes a Man guilty of Forgery. Moore 760.

Sett. 6. It is said, That regularly a Man cannot commit an Act of Forgery by a bare Nonfeasance, as by omitting a Legacy out of a Will, which he is directed to draw for another; yet it hath been holden by some, even in this very Case, That if the Omission of a Bequest to one cause a material Alteration in the Limitation of a Bequest to another, as where the Omission of a Devise of an Estate for Life to one Man causeth

a Devise of the same Lands to another to pass a present Estate, which otherwise would have passed a Remainder only, he who makes such an Omission is guilty of Forgery.

Sett. 7. It seemeth to be no way material, whether a forged Instrument be made in such a Manner, That if it were in Truth such as it is counterfeited for, it would be of Validity, or not; and upon this Ground it hath been adjudged, That the Forgery of a Protection in the Name of *A. B.* as being a Member of Parliament, who in Truth at the Time was not a Member, is as much a Crime as if he were.

And now I am to shew in the second Place, That a Man may be guilty of Forgery at Common Law, in Respect of any of the above mentioned Writings, and of no other.

Sett. 8. And first it is clear, That one may be guilty thereof by the Common Law, by counterfeiting a Matter of Record; for, since the Law gives the highest Credit to all Records, it cannot but be of the utmost ill Consequence to the Publick, to have them either forged or falsified.

Sett. 9. Secondly, Also there seemeth to be no doubt, but that one may be guilty of this Crime by the Common Law, by forging any other authentick Matter of a publick Nature, as a ^a Privy Seal, or a ^b Licence from the Barons of the Exchequer to compound a Debt, or a ^c Certificate of Holy Orders, or a ^d Protection from a Parliament Man.

Sett. 10. Thirdly, It is also unquestionable, That a Man may be in like Manner guilty of Forgery at Common Law, by forging a ^e Deed, and surely there cannot be any Reason to doubt, but that one may be equally guilty by forging a ^f Will, which cannot be thought to be of less Consequence than a Deed, but I do not find this Point any where directly holden.

Sett. 11. As to other Writings of an inferiour Nature, it seems to have been generally laid down as a ^g Rule, That the Counterfeiting of them is not properly Forgery; ^h and some have gone so far as to hold, That the Forging another's Hand, and thereby receiving Rent due to him from his Tenants, is not punishable at all; and therefore it cannot but be more safe to proceed against Offences of this Nature, as Cheats than as Forgeries; but surely it cannot be proved by any good Authority, That such base Crimes are wholly disregarded by the Common Law, as not deserving a publick Prosecution; for the Opinion in the Books above cited, That they are punishable by no Law, seems by no Means to be maintainable, since many of them are most certainly punishable by Force of 33 *H.* 8. 1. which is set forth at large in the following Chapter; neither can it be a convincing Argument, That they are not punishable at Common Law, ⁱ because they are of a private Nature; since Deeds concerning private Matters are also of a private Nature, as much as other Writings concerning such Matters; yet no one will say, That the Making a false Deed concerning a private Matter is not punishable at Common Law; but perhaps it may be reasonable to make this Distinction between the Counterfeiting of such Writings, the Forgery whereof hath been already shewn to be properly punishable as Forgery, and the Counterfeiting of other Writings of an inferiour Nature, that the former is in it self criminal, whether any third Person be actually injured thereby, or not, but that the latter is no Crime, unless some one receive a Prejudice from it.

Sett. 12. Thus far of Forgery by the Common Law, and now I am to consider Forgery by the Statute, which depends upon 5 *El.* 14. by which it is enacted, *That if any Person or Persons upon his or their own Head*

¹ *Rol. Ab.* 65.
² *Pl.* 1, 2, 76 *Pl.* 3
³ *Yelv.* 146.
⁴ *Cro. El.* 178.
⁵ *Mod.* 66.

¹ *Rol. Ab.* 68. *Pl.* 33.
² *Cro. Ca.* 326.
³ *Jon.* 125.
⁴ *Rol. Ab.* 65. *Pl.* 5.
⁵ *Bulf.* 137.
⁶ *1 Lev.* 138.
⁷ *1 Sid.* 142.
⁸ *Rol. Ab.* 66. *Pl.* 10.
⁹ *Raymond* 81.
¹⁰ *Owen* 47.
¹¹ *1 Sid.* 278.
¹² *Leon.* 170.
¹³ *Moore* 760.
¹⁴ *Noy* 101. *l.*
¹⁵ *Dy.* 302. *b.*
¹⁶ *1 Rol. Re.*

431.
¹⁷ *1 Sid.* 16, 155.
¹⁸ 451.
¹⁹ *1 Rol. Ab.* 66. *Pl.* 8, 9.
²⁰ *Winch.* 40. 90.
²¹ *3 Leon.* 231.
²² *1 Leon.* 101.
²³ *Cro. El.* 196.
²⁴ 853.
²⁵ *3 Bulf.* 264.
²⁶ *Cro. El.* 166.
²⁷ *Yelv.* 146.
²⁸ *3 Bulf.* 265.
²⁹ *1 Yelv.* 146.

and Imagination, or by false Conspiracy and Fraud with others, shall wittingly, subtilly, and falsly forge or make, or subtilly cause, or wittingly assent to be forged or made, any false Deed, Charter, or Writing sealed, Court-Roll, or the Will of any Person or Persons in Writing, to the Intent that the State of Freehold or Inheritance of any Person or Persons, of, in, or to any Lands, Tenements, or Hereditaments, Freehold or Copyhold, or the Right, Title, or Interest, of any Person or Persons, of, in, or to the same, or any of them, shall, or may be molested, troubled, defeated, recovered or charged; or shall pronounce, publish, or shew forth in Evidence, any such false and forged Deed, Charter, Writing, Court-Roll, or Will, as true, knowing the same to be false and forged, as is aforesaid, to the Intent above remembred, (except being an Attorney, Lawyer, or Counsellor, he shall for his Client, plead, shew forth, or give in Evidence such false and forged Deed, &c. to the forging whereof he was not Party nor Privy) and shall be thereof convicted, either upon Action or Actions of Forgery of false Deeds, to be founded upon the said Statute, at the Suit of the Party grieved, or otherwise, according to the Order and due Course of the Laws of this Realm, &c. shall pay unto the Party grieved his double Costs and Damages, to be found or assessed in that Court where such Conviction shall be, and also shall be set upon the Pillory in some open Market-Town, or other open Place, and there have both his Ears cut off, and also his Nostrils slit and cut, and seared with a hot Iron, &c. and shall forfeit to the King the whole Issues and Profits of his Lands and Tenements, and suffer perpetual Imprisonment, &c.

See Put 45,

46.

Par. 13.

Se^ct. 13. And it is farther enacted by the said Statute, Par. 3. That if any Person or Persons, upon his or their own Head or Imagination, or by false Conspiracy or Fraud had with any other, shall wittingly, subtilly, and falsly forge or make, or wittingly, subtilly and falsly cause or assent to be made and forged, any false Charter, Deed or Writing, to the Intent that any Person or Persons shall or may have or claim any Estate or Interest for Term of Years, of, in, or to any Manors, Lands, Tenements, or Hereditaments, not being Copyhold, or any Annuity in Fee-simple, Fee-tail, or for Term of Life, Lives or Years, or shall, as is aforesaid, forge, make, or cause, or assent to be made or forged, any Obligation, or Bill obligatory, or any Acquittance, Release, or other Discharge of any Debt, Accompt, Action, Suit, Demand, or other Thing personal; or shall pronounce, publish, or give in Evidence, (except as is before excepted) any such false or forged Charter, Deed, Writing, Obligation, Bill obligatory, Acquittance, Release, or Discharge, as true, knowing the same to be false and forged, and shall be thereof convicted by any of the Ways and Means aforesaid, he shall pay unto the Party grieved his double Costs and Damages, to be found and assessed in such Court where the said Conviction shall be had, and shall be also set upon the Pillory in some open Market-Town or other open Place, and there have one of his Ears cut off, and also shall suffer Imprisonment for one Year, &c.

Lutw. 190.

Se^ct. 14. And it is farther enacted by the said Statute, Par. 7 & 8. That if any Person or Persons being convicted or condemned of any of the Offences aforesaid by any the Ways or Means above limited, shall after any such his or their Conviction or Condemnation, afterwards commit or perpetrate any of the said Offences in Form aforesaid, that then every such second Offence shall be adjudged Felony without Benefit of the Clergy, saving to all Persons other than the said Offenders, and such as Claim to their Uses, all such Rights, &c. which they shall have to any the Hereditaments of any such Person, so as is aforesaid convicted or attainted, at any Time before, &c. saving also the Dower of such Offender's Wife, and the Right of his Heir.

Se^ct. 15. And it is farther enacted by the said Statute, Par. 10. That all Justices of Oyer and Terminer, and Justices of Assize, shall have Power to inquire of, hear and determine the Offences aforesaid.

B b b

Se^ct.

Señ. 16. But it is provided, Par. 9, 12 & 16. That this Act or any Thing therein contained, shall not extend to any Ordinary, or his Commissary, &c. for putting their Seal of Office to any Will to be exhibited unto them, not knowing the same to be false, or forged, or for writing of the said Will, or prohibiting of the same, nor to any Proctor, &c. of any Ecclesiastical Court, for the Writing, setting forth, or Pleading of any Proxy made according to the Ecclesiastical Law, &c. for the Appearance of any Person being cited to appear in such Court; nor to any Archdeacon, or Official, for putting their authentick Seal to the said Proxy or Proxies, nor to any Ecclesiastical Judge for admitting the same; nor to any Person who shall plead or shew forth any Deed or Writing exemplified under the great Seal of England, or under the Seal of any other authentick Court of this Realm; nor to any Person who shall cause any Seal of any Court to be set to any such Deed, Charter, or Writing enrolled, not knowing the same to be false or forged.

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

Señ. 17. I. That a false Customary of a Copyhold Manor, made in Parchment under the Seals of several Tenants of the Manor, and containing in it divers false Customs, apparently tending to the Disfranchisement of the Lord, and falsely pretending by its Title to be set forth by the Consent of all the Tenants, and Allowance of the Lord, is within the first Branch of Forgery mentioned in the Statute, as being a sealed Writing made to the Intent to molest the Inheritance of the Lord.

Señ. 18. II. That the Forgery of a Lease for Years, or of a Grant of a Rent-Charge for Years, in the Name of one who is seized of a Freehold or Inheritance, is also within the said first Branch of the Statute, because the said Branch is penned in general Words extending to any Molestation whatsoever of such Estate, without mentioning any Estate or Interest, in the Claim whereof such Molestation shall consist; and from this Ground it follows, That those Words in the second Branch of Forgery mentioned in the Statute, *to the Intent that any Person shall claim any Estate or Interest for Term of Years, &c.* are meant only of such Forgeries which relate to such an Estate or Interest *in esse* before.

Señ. 19. III. That the Forgery of a Will in Writing of one possessed of such an Estate, mentioning a Bequest thereof, is within the said second Branch of the Statute, as being a false Writing, made to the Intent that some Person may claim an Estate for Years; notwithstanding the said Branch makes no express Mention of a Will, as the first doth.

Señ. 20. IV. That the Forgery of a Lease of Lands in Ireland is not within either of the Branches of the Statute.

Señ. 21. V. That the Forgery of a Deed containing a Gift of mere personal Chattels, is also no way within the Statute, the Words whereof to this Purpose are, *If any Person shall forge any Obligation or Bill Obligatory, or any Acquittance, Release, or other Discharge of any Debt, Account, Action, Suit, Demand, or other Thing personal.*

Señ. 22. VI. That the Forgery of a Statute-Merchant, or of a Recognizance in the Nature of a Statute-Staple, by acknowledging them in the Name of another are within the Statute, as being Obligations, because they must have the Seal of the Party, by the express Words of the Statutes, which appoint in what Manner such Statute or Recognizance shall be taken: But that the Forgery of the Statute-Staple is no way within the Statute, because it needeth not the Seal of the Party, but only the Seal of the Staple provided for it.

Señ.

Señ. 23. VII. That he who is truly informed by another, that a Deed is forged, is in danger of the Statute if he afterwards publish the same to be true; notwithstanding the Words of the Statute be, *If any one shall publish, &c. such false and forged Deed, &c. knowing the same to be false or forged.* 3 Inst. 171.

Señ. 24. VIII. That the double Damages to be awarded to the Party grieved by a forged Release of an Obligation, &c. shall be governed by the Penalty, and not by the true Debt appearing in the Condition. 3 Inst. 172.

Señ. 25. IX. That one who hath been convicted of publishing a forged Deed, may become guilty of Felony by forging another Deed afterwards, as well as by publishing any such Deed, notwithstanding the second Offence be not of the very same Nature with the first; for the Words of the Statute are, *If any Person being convicted or condemned of any of the Offences aforesaid, &c. shall, after any such Conviction or Condemnation, afterwards commit any of the said Offences.* 3 Inst. 172.

Señ. 26. X. That notwithstanding it be necessary in every Prosecution upon the Statute strictly to pursue the very Words of it, (for which Cause it hath been resolved, That an Indictment, setting forth the Forgery of a Writing indented, without adding, that it was sealed, is insufficient;) yet there is no Necessity that the Translation of such Words be made in proper classical *Latin*, so that it be intelligible; and upon this Ground it hath been adjudged, That an Indictment, setting forth that the Defendant *super Caput suum proprium* did forge, &c. meaning thereby to express that he did it of his own Head, is sufficient. 3 Keb. 356, 367.
3 Inst. 169.
See 1 Keb. 849.
2 Keb. 129.
2 Levin. 221.
Other Cases of this Kind,
2 Keb. 129.
245 501 537.
1 Vent 23, 22.
Salk. 376. 18.
2 Levin. 111, 221.
3 Keb. 353.

Señ. 27. XI. That upon an Indictment of Trespas, Forgery and Publication of a Deed, a Verdict finding the Defendant guilty *de Transgressionem & Forgeriam prædictis prout superius in Indictamento supponitur*, is sufficient, because those Words *de Transgressionem prædictis* include the whole: Also perhaps such a Verdict may be sufficient for another Reason, because the Offence is equally within the Statute, and the Punishment the very same, whether the Party be guilty both of the Forgery and Publication, or of one of them only.

C H A P. LXXI.

Of Cheats.

OF Cheats punishable by publick Prosecution, there are two Kinds,

1. By the Common Law.
2. By the Statute.

Señ. 1. And first it seemeth, That those which are punishable at Common Law, may in general be described to be deceitful Practices, in defrauding or endeavouring to defraud another of his known Right by Means of some artful Device, contrary to the plain Rules of common Honesty; as by ^a Playing with false Dice; or by ^b causing an illiterate Person to execute a Deed to his Prejudice, by reading it over to him in Words a 2 Rol. Re. 107.
Cro. Ja. 497, 498.
2 Rol. Ab. 78
H. 1, 2.
1 Keb. 849.
Par. Case 6.
Mod. 42.
b 1 Sid. 312.

^a 1 Sid. 431.
^b Noy 103.
^c Noy 99.
 Moore 630.
 Cro. El. 531.
 1 Mod. 46.
 2 Jan. 64.
^d Noy 99.
^e See the
 Books above
 cited, but
^f Rol. A. 863.
 C. & 12. Co.
 123. are con-
 trary.
^g 6 Mod. 105.
 Salk. 379.
 5 Mod. 18.

See the Au-
 thorities ci-
 ted in Sect. 1.

Words different from those in which it was written; or by ^a perswading a Woman to execute Writings to another, as her Trustee upon an intended Marriage, which in Truth contained no such Thing, but only a Warrant of Attorney to confess a Judgment, &c. or by ^b suppressing a Will, or by ^c levying a Fine in another's Name, or ^d suing out an Execution upon a Judgment for him, or acknowledging an Action in his Name without his Privy, and against his Will; in which Cases, by some good ^e Opinions, the Record may be vacated.

Sect. 2. It ^f seemeth to be the better Opinion, That the deceitful receiving of Money from one Man to another's Use, upon a false Pretence of having a Message and Order to that Purpose, is not punishable by a criminal Prosecution, because it is accompanied with no manner of artful Contrivance, but wholly depends on a bare naked Lie; and it is said to be needless to provide severe Laws for such Mischiefs, against which common Prudence and Caution may be a sufficient Security.

Sect. 3. Some of the above mentioned Offences are punishable, not only with Fine and Imprisonment, but also with farther infamous Punishment, (as cheating with false Dice, especially if the Offender be a common Gamester) others are punishable with Fine and Imprisonment only, by the Discretion of the Judges, which is regulated by the Circumstances of each particular Case; and some of them are made Felonies by 21 Jac. 1. 26. as appeareth from Chapter 45.

Sect. 4. Offences of this Kind by Statute depend upon 33 H. 8. 1. by which it is enacted, *That if any Person or Persons shall falsely and deceitfully obtain or get into his or their Hands or Possession, any Money, Goods, Chattels, Jewels, or other Things of any other Person or Persons, by Colour and Means of any privy false Token, or counterfeit Letter made in another Man's Name, to a special Friend or Acquaintance, for the obtaining of Money, &c. from such Person, and shall be thereof convicted, by Witness taken before the Lord Chancellor, or before the Justices of Assize, or before the Justices of Peace of any County, City, Borough, Town, or Franchise in their general Sessions, or by Action in any of the King's Courts of Record, every such Offender shall suffer such Punishment, by Imprisonment, setting upon the Pillory, or otherwise by any corporal Pain, except Pains of Death, as shall be appointed by those before whom he shall be so convicted.*

Sect. 5. And it is farther enacted by the said Statute, *That as well the Justices of Assize for the Time being, as also two Justices of Peace in the same County, whereof the one to be of the Quorum, may call and convene by Process, or otherwise, to the said Assizes, or general Sessions, any Person being suspected of any of the Offences aforesaid, and to commit or bail him till the next Assizes or general Sessions, &c.*

3 Inst. 123.

Cro. Ca. 564.

Sect. 6. Sir Edward Coke is of Opinion, That the Offender cannot be fined in a Prosecution upon this Statute, because it is expressly ordained, That some corporal Punishment shall be inflicted, and no other is mentioned; however, there is a Precedent in Croke's Reports, by which it appears, That one convicted on such a Prosecution hath been adjudged not only to stand on the Pillory, but also to pay a Fine of five hundred Pounds, and to be bound with good Sureties to his good Behaviour.

C H A P LXXII.

Of Conspiracy.

FOR the better Understanding of the Nature of Conspiracy, I shall consider the following Particulars:

1. Who may be said to be guilty of it.
2. In what Manner such Offenders are to be punished.

Sett. 1. As to the first Point, there can be no better Rule than the Statute of 33, or rather 21 Ed. 1. the Intent whereof was to make a final Definition of Conspirators, to which Purpose it declareth, *That Conspirators be they that to confeder or bind themselves by Oath, Covenant, or other Alliance, that every of them shall aid and bear the other falsely and maliciously to indict, or cause to indict, or falsely to move and maintain Pleas, and also such as cause Children within Age to appeal Men of Felony, whereby they are imprisoned and sore grieved; and such as retain Men in the Country with Liveries or Fees for to maintain their malicious Enterprizes: And this extendeth as well to the Takers as to the Givers. And Stewards and Bailiffs of great Lords, who by their Seigniorie, Office, or Power, undertake to bear or maintain Quarrels, Pleas, or Debates that concern other Parties than such as touch the Estate of their Lords or themselves.* 2 Inst. 562.

Sett. 2. From this Definition of Conspirators it seems clearly to follow, That not only those who actually cause an innocent Man to be indicted, and also to be tried upon the Indictment, whereupon he is lawfully acquitted, are properly Conspirators, but that those also are guilty of this Offence, who barely conspire to indict a Man falsely and maliciously, whether they do any Act in Prosecution of such Conspiracy or not; for the Words of the Statute seem expressly to include all such Confederacies under the Notion of Conspiracy, where there be any Prosecution thereof or not; and if such a Confederacy be within the Letter of the Statute, there seems to be no Manner of Reason to say, That they are not also within the Meaning of it, since it is a high Contempt of the Law, barely to engage in such an Association to abuse it, to serve the Purposes of Oppression and Injustice; neither can it be a severe Construction which will bring a Crime so evidently contrary to the first Principles of common Honesty, within the Meaning of a Law, the Words whereof do plainly seem to extend to it. And therefore I cannot but question the Accuracy of that Description of Conspiracy which is given in the third Institute, whereby the lawful Acquittal of the Party grieved is required to make the Offenders guilty of this Crime. It is true indeed, That a bare Conspiracy to indict a Man will not maintain a Writ of Conspiracy at the Suit of the Party grieved, because it doth not do him any actual Damage; also it must be confessed, That it is often laid down as a general Rule, and taken for granted, That no such Conspiracy is a good Foundation for such a Writ, unless the Plaintiff be lawfully acquitted; and it is certain, That there is no formed Writ of Conspiracy in the Register for a malicious Indictment or Appeal; but what supposes such

C c c

Indict-

F.N.B. 114.d.
1 Danv. Abr.
211, 2.
213, 1, 2.
S.P.C. 173.A.
174, B. 10.
175, A.
Bro. Coro. 89
or 89.

Appeal 68.
1 Rol. Ab.
110. Pl. 2.
111 Pl. 5.
114 Pl. 3.
9 Co. 56. 57.
Regist. 134.
1 Jon. 93. 94.

Bro. Coro. 6.
or 8.
33 H. 6. 1.
Regist. 134. b.
See S. P. C.
174 D.
Vide 2 Inst.
407, 562.

* Regist. 134.
F. N. B. 116. B.
Finch. 306.
2 Inst. 562.
1 Keb. 254.
9 Co. 56. b.
1 Jon. 93. 94.
1 Leon. 107.
Cro. El. 70.
134.
Palm. 315.
Cro. Ja. 130.
357.
Larch. 79.
Cro. Ca. 15.
2 Rol. Re.
236. 237.
2 Bull. 270.
271.
1 Rol. Re. 109.
1 Rol. A. 112.
Pl. 11. 12. 13.
113 Pl. 14.
213 Pl. 3.
Ray 135. 180.
Con. 1 Bull.
185.
Yelv. 116.
Hutt. 49.
Cro. El. 563.
9 Co. 57. a.
1 Levin. 62.
126.
1 Sid. 174.
1 Keb. 350.

* 1 Levin. 62. 1 Mod. 185, 186. 1 Sid. 68. 1 Keb. 254. 1 27 Aff. 44 9 Co. 56. b. 2 Rol. Ab. 77. Pl. 2, 3.
See Moore 788 Salk 174. 1 Vent. 303, 304. 6 Mod. 185.

Indictment or Appeal to have been actually brought, and the Party to have been legally discharged; from whence it follows, That no one can have the Benefit of any such Writ in the Register, who upon a false Accusation, is put to the Trouble and Vexation of being apprehended, examined, or committed, &c. without being ever indicted or appealed. However it is certain, That an Acquittal by Verdict is not always necessary to maintain such a Writ, for it appears by the Register itself, That where one brought such a Writ in the usual Form, having it in the Words *quousque acquietatus fuisset*, &c. against one who had been nonsuited in a malicious Appeal of Felony brought against him, his Writ was abated, because such a Nonsuit would not make good the Words *quousque acquietatus fuisset*, and yet he afterwards brought a new Writ, where in he used the Words *quietus recessit*, instead of *acquietatus fuisset*, and recovered. And why may not a new Writ as well be formed in any other Case, which is as much within the Mischief of the Statute as this? Or what Colour can there be to say, That the malicious putting of a Man to the unreasonable Charge, Scandal, and Trouble, of a criminal Prosecution, which is so palpably groundless, as not to have Probability enough to induce a Grand Jury to find an Indictment, should not be as good a Foundation of Complaint, and a Grievance as much within the Meaning of the Statute, as the putting one to the Charge and Vexation of a groundless Action, either in a Temporal or Spiritual Court, for which it appears by the * Register, That a Writ of Conspiracy doth lie without making Use either of the Words *acquietatus recessit*, or *quietus fuisset*? Neither can it be said, That the Opinion I contend for is wholly unsupported by Authority, as appears from the *Poulter's Case* in *b Coke's ninth Report*. However, since it is certain, That an *c Action* on the Case in the Nature of such Writ doth lie for a false and malicious Prosecution, for any Crime, whether capital, or not capital, tho' it do not proceed to an actual Indictment, or Appeal, and that the same Damages may be recovered in such Action, as in a Writ of Conspiracy, it hath been thought needless to inquire, whether such Writ may be maintained for such a Prosecution, or not. But howsoever the Law may stand in Relation to Writs of Conspiracy, there seems to be no manner of Reason that the stated Form of such Writs should any way restrain a Proceeding by way of Indictment or Information against Persons which are apparently within both the Letter and Meaning of the Statute. Also it seems certain, That a Man may not only be condemned to the Pillory, but also to be branded for a false and malicious Accusation; but since it doth not appear to have been solemnly resolved, that such an Offender is indictable upon the Statute, it seems to be more safe and adviseable to ground an Indictment of this Kind upon the Common Law, than upon the Statute, since there can be no Doubt, but that all Confederacies whatsoever, wrongfully to prejudice a third Person, are highly criminal at Common Law, as where divers Persons confederate *d* together by indirect Means to impoverish a third Person, or *e* falsely and maliciously to charge a Man with being the reputed Father of a Bastard-Child, or to maintain one another in any Matter, whether it be true or false.

Secd. 3. Neither doth it seem to be any Justification of a Confederacy to carry on a false and malicious Prosecution, That the Indictment or Appeal, which was preferred, or intended to be preferred, in Pursuance of

of it, was ^a insufficient, or that the Court wherein the Prosecution was carried on, or designed to be carried on, had no Jurisdiction of the Cause, or that the Matter of the Indictment did import no Manner of ^b Scandal, so that the Party grieved was in Truth in no Danger of losing either his Life, Liberty, or Reputation; for notwithstanding the Injury intended to the Party against whom such a Confederacy is formed, may perhaps be inconsiderable; yet the Association to pervert the Law in order to procure it, seems to be a Crime of a very high Nature, and justly to deserve the Relentment of the Law.

¹ Rol. Rep. 109. ² Regis. 134. F. N. B. 116. f. 3 Aff. Pl. 13. 11 H. 7 15. b. 26. a. 1 Rol. Ab. 112. Pl. 10. a Mod. 52, 306. Con. 2 Keb. 881

^a Palm. 45.
³ Keb. 141.
Stile 157.
¹ Rol. Ab.
110 Pl. 2.
¹ Rol. Ab.
111. Pl. 7.
⁹ Co. 26. b.
Yelv. 46, 117.
Cro. El. 563.
² Bull. 270.
271.
Cro. Jac. 357.

Sett. 4. Neither ^c is it any Plea for one who is prosecuted for such an unlawful Confederacy, That nothing more was intended by him, but only to give his Testimony in a legal Course of Justice against the Party to whose Prejudice such Confederacy is supposed to have been formed; for notwithstanding it may be said, That it would be a great Discouragement to legal Proceedings to make Persons liable to a criminal Prosecution, for barely intending to give their Evidence, and it would be a prejudging of a Cause to try the Truth of the Testimony intended to be given in it before the Cause it self is determined; yet the Law will rather venture this Mischief, than suffer so flagrant a Villany to go unpunished. However if there be any Probability, That the principal Cause will ever be tried, it seems proper to apply to the Court to stay the Trial of the Confederacy till the Merits of the principal Cause be determined.

Sett. 5. Yet it ^d seemeth to be certain, That no one is liable to any Prosecution whatsoever, in respect of any Verdict given by him in a criminal Matter, either upon a Grand or Petit Jury; for since the Safety of the Innocent, and Punishment of the Guilty, doth so much depend upon the fair and upright Proceeding of Jurors, it is of the utmost Consequence, that they should be as little as possible under the Influence of any Passion whatsoever. And therefore, lest they should be biassed with the Fear of being harrassed by a vexatious Suit, for acting according to their Consciences, (the Danger of which might easily be insinuated, where powerful Men are warmly engaged in a Cause, and throughly prepossessed of the Justice of the Side which they espouse) the Law will not leave any Possibility for a Prosecution of this Kind. It is true indeed, the Jurors were formerly sometimes questioned in the Star-Chamber, for their Partiality in finding a manifest Offender not guilty, but this was always thought a very great Grievance; and surely as the Law is now settled by *Bushel's Case*, there is no Kind of Proceeding against Jurors in respect of their Verdicts in criminal Matters allowed of at this Day. As to the Objection, That an Attaint lies against a Jury for a false Verdict in a civil Cause, and that there is as much Reason to allow of it in a criminal one; it may be answered, That in an Attaint, a Man's Property only is brought into Question a second time, and not his Liberty or Life; and also it may be generally presumed, That a Jury is likely to be equally influenced with the Fear of an Attaint from either of the contending Parties, whereas if any such Examinations of their Proceedings were allowed in criminal Causes, they might be often in great Danger of one Side, by incurring the Relentment of a powerful Prosecutor, and provoking him to call their Conduct into Question for their supposed Partiality; but they could have little to fear from an injured Criminal, who would seldom be in Circumstances to make his Prosecution formidable.

Sett.

^c 9 Co. 55. b.
56, 57.
12 Co. 23, 90.
91, 92.
Cro. El. 70.
71, 134.
¹ Leon. 107.
¹ Rol. Ab.
113. Pl. 5, 114.
Pl. 4, 5, 115.
Pl. 7.
Winch. 28.
54.
Litch. 79, 80.
Con. 1 Rol.
Ab. 110. Pl. 1.
F. N. B. 115. e.
27 H. 8. 2 a. b.
^d 22 Aff. 77.
27 Aff. 12.
9 H. 6. 44. b.
Bridgm. 130.
131.
21 E. 3. 17. a.
47 E. 3. 17. a.
12 Co. 23, 24.
Regis. 134.
F. N. B. 115.
c d.
27 H. 8. 2.
S. P. C. 172,
173.

12 Co. 23, 24.
Vaugh. 135.

F. N. B. 105.
106.

12 Co. 24.
See Vaughan
138, 139.
12 Ed. 4. 18.
21 Ed. 4. 67. a.
S. P. C. 173.

Sect. 6. And as the Law has exempted Jurors from the Danger of incurring any Punishment in respect of their Verdicts in criminal Causes, it hath also freed the Judges of all Courts of Record from all Prosecutions whatsoever, except in the Parliament, for any Thing done by them openly in such Courts as Judges. For the Authority of a Government cannot be maintained, unless the greatest Credit be given to those who are so highly intrusted with the Administration of Publick Justice; and it would be impossible for them to keep up in the People that Veneration of their Persons, and Submission to their Judgments, without which it is impossible to execute the Laws with Vigour and Success, if they should be continually exposed to the Prosecutions of those whose Partiality to their own Causes would induce them to think themselves injured. Yet if a Judge will so far forget the Dignity and Honour of his Post, as to turn Solicitor in a Cause which he is to judge, and privately and extrajudicially tamper with Witnesses, or labour Jurors, he hath no Reason to complain, if he be dealt with according to the same Capacity, to which he so basely degrades himself.

12 Co. 24.

1 Rol. Ab.
111. Pl. 6. 112.
Pl. 8. 115.
Pl. 7.

Bro. Coro 89.
S. P. C. 173.
22 Aff. 77.

1 Leon. 107.
Cro. El. 134.

Kellw. 81. b.
83. b.
20 H. 7. 11.

20 H. 7. 11.
Kellw. 81. b.
Cro. El. 134.

1 Leon. 107.
8 H. 4. 6. b.
28 Aff. Pl. 12.
S. P. C. 173.
C. D. E. 174.
A. Cro. El.
701.

5 Mod. 222.
223.
1 Rol. A. 111.
Pl. 5. 112.
Pl. 9.

38 Ed. 3. 3.
a. b.
S. P. C. 174. a.

Sect. 7. It appears not only from the Words of the Statute, but also from the plain Reason of the Thing, That no Confederacy whatsoever to maintain a Suit can come within the Danger of the Statute, unless it be both false and malicious; for it would be a most dangerous Discouragement of all legal Prosecutions, if those who engage in them upon a probable Ground, should be in Danger of being found guilty of so heinous a Crime upon their not being able to bring their Suits to their intended Effect; and from hence it clearly follows, that if the Defendants to an Indictment or Appeal in Murder be found guilty of Homicide *se defendendo*, or by Misadventure, or get off by pleading the King's Pardon, their Prosecutors are in no Danger of being punished as Conspirators. And from the same Ground it also follows, That if the Defendants in a Writ of Conspiracy can shew a probable Cause of Suspicion, they shall be discharged; as where being accused of a Conspiracy for indicting a Person of Larceny, they can shew that a Larceny was committed at such a Time and Place, and that the Party charged by them for such Larceny was found by them at the same Time and Place, with suspicious Circumstances; or where Persons being charged with a Conspiracy for indicting another for feloniously carrying away a Woman, with great Violence and Numbers, are able to prove that they saw the Persons whom they so accused riding armed in a warlike Manner, and following after those who in Truth actually did the Felony, and that it was the common Report of the Country that they were all of the Company. But some have said, That there is a Necessity to plead such Matter specially, and that it cannot be given in Evidence on the General Issue.

Sect. 8. It plainly appears from the Words of the Statute, That one Person alone cannot be guilty of Conspiracy within the Purport of it; from whence it follows, That if all the Defendants who are prosecuted for such a Conspiracy be acquitted but one, the ^a Acquittal of the rest is the Acquittal of that one also; also upon the same Ground it hath been holden, That no such Prosecution is maintainable against a ^b Husband and Wife only, because they are esteemed but as one Person in Law, and are presumed to have but one Will. But it is certain, That an Action on the ^c Case in the Nature of a Conspiracy may be brought against one only: Also ^d it hath been resolved, That if such an Action be brought

^c 1 Rol. Ab. 111. Pl. 5. 112. Pl. 9. F. N. B. 116. Cro. Ja. 194. Cro. Ca. 239. 3 Mod. 220. ^d 1 Rol. Ab. 111. Pl. 5. 112. Pl. 9. Cro. El. 701. 6 Mod. 170. 1 Saund. 228. Raymond 180. 2 Keb. 497.

g ainſt ſeveral Perſons, and all but one be acquitted, yet Judgment may be given againſt that one only.

Seſt. 9. As to the ſecond Point, *viz.* In what manner Offenders of this Nature are to be puniſhed, it is clear, That thoſe who are convicted of Conſpiracy at the Suit of the ^c Party ſhall only have Judgment of Fine and Imprifonment, and to render to the Plaintiff his Damages. Alſo it is certain, That he who is convicted at the Suit of the ^f King, of a Conſpiracy to accuſe another of a Matter which may touch his Life, ſhall have Judgment that he ſhall loſe the Freedom and Franchiſe of the Law, (whereby he is diſabled to be put upon any Jury, or to be ſworn as a Witneſs, or even to appear in Perſon in any of the King's Courts;) and alſo that his Houſes, Lands, and Goods, ſhall be ſeized into the King's Hands, and his Houſes and Lands eſtreped and waſted, his Trees rooted up and arraſed, and his Body imprifoned. And this is commonly called a villainous Judgment, and is given by the Common Law, and not by any Statute, and is ſaid generally in ſome ² Books, to be the proper Judgment upon every Conviction of Conſpiracy, at the Suit of the King, without any Reſtriction to ſuch as endangered the Life of the Party; but I do not find this Point any where ſettled.

^c 24 Ed. 3.
³ 4. b.
³ Inſt. 143.
² Inſt. 383.
^{562.}
^{S P C. 175.}
^f 24 Ed. 3.
^{24 b.}
³ Inſt. 143.
² Inſt. 562.
^{S P C. 175.}
^{27 Aff Pl. 59.}

² See the Books
above cited.
^{27 Aff Pl. 59.}
^{S P C. 175.}

C H A P. LXXIII.

Of Libels.

IN treating of Libels, I ſhall conſider,

1. What ſhall be ſaid to be a Libel.
2. Who are liable to be puniſhed for it.
3. In what Manner they are to be puniſhed.

Seſt. 1. As to the firſt Point it ſeemeth, That a Libel in a ſtrict Senſe is taken for a malicious Defamation, expreſſed either in Printing or Writing, and tending either to blacken the Memory of one who is dead, or the Reputation of one who is alive, and to expoſe him to publick Hatred, Contempt or Ridicule.

³ Co. 121.
⁵ Mod. 165.
^{165.}

Seſt. 2. But it is ſaid, That in a larger Senſe the Notion of a Libel may be applied to any Defamation whatſoever, expreſſed either by Signs or Pictures, as by fixing up a Gallows againſt a Man's Door, or by painting him in a ſhameful and ignominious Manner.

⁵ Co. 121. b.

Seſt. 3. And ſince the chief Cauſe for which the Law ſo ſeverely puniſhes all Offences of this Nature, is the direct Tendency of them to a Breach of Publick Peace, by provoking the Parties injured, and their Friends and Families to Acts of Revenge, which it would be impoſſible to reſtrain by the ſevereſt Laws, were there no Redreſs from Publick Juſtice for Injuries of this kind, which of all others are moſt ſenſibly felt; and ſince the plain Meaning of ſuch Scandal as is expreſſed by Signs or Pictures, is as obvious to common Senſe, and as eaſily underſtood by every common Capacity, and altogether as provoking, as that which is expreſſed by Writing or Printing, why ſhould it not be equally criminal?

⁵ Co. 121.

Seſt. 4. And from the ſame Ground it ſeemeth alſo clearly to follow, That ſuch Scandal as is expreſſed in a ſcoffing and ironical Manner,

^{Hob. 215.}
^{Poph. 139.}

makes a Writing as properly a Libel, as that which is expressed in direct Terms; as where a Writing, in a taunting Manner reckoning up several Acts of publick Charity done by one, says, *You will not play the Jew, nor the Hypocrite*, and so goes on in a Strain of Ridicule to insinuate, that what he did was owing to his Vain-Glory; or where a Writing, pretending to recommend to one the Characters of several great Men for his Imitation, instead of taking Notice of what they are generally esteemed famous for, pitched on such Qualities only which their Enemies charge them with the Want of, as by proposing such a one to be imitated for his Courage, who is known to be a great Statesman, but no Soldier, and another to be imitated for his Learning, who is known to be a great General, but no Scholar, &c. which Kind of Writing is as well understood to mean only to upbraid the Parties with the Want of these Qualities, as if it had directly and expressly done so.

Brown's Case.

Sett. 5. And from the same Foundation it hath also been resolved, That a Defamatory Writing expressing only one or two Letters of a Name, in such a Manner, that from what goes before and follows after, it must needs be understood to signify such a particular Person, in the plain, obvious, and natural Construction of the whole, and would be perfect Nonsense if strained to any other Meaning, is as properly a Libel, as if it had expressed the whole Name at large; for it brings the utmost Contempt upon the Law, to suffer its Justice to be eluded by such trifling Evasions: And it is a ridiculous Absurdity to say, That a Writing which is understood by every the meanest Capacity, cannot possibly be understood by a Judge and Jury.

Hurt's Case.
Trin. 12.
Annæ.

5 Co. 125. b.
Hob. 213.
Moore 627.

Sett. 6. And from the same Ground it farther doth appear, That it is far from being a Justification of a Libel, that the Contents thereof are true, or that the Person upon whom it is made, had a bad Reputation, since the greater Appearance there is of Truth in any malicious Invektive, so much the more provoking it is.

5 Co. 125.

Sett. 7. Nor can there be any Doubt, but that a Writing which defames private Persons only, is as much a Libel as that which defames Persons intrusted with a Publick Capacity, inasmuch as it manifestly tends to create ill Blood, and to cause a Disturbance of the Publick Peace; However it is certain, That it is a very high Aggravation of a Libel that it tends to scandalize the Government, by reflecting on those who are intrusted with the Administration of Publick Affairs, which doth not only endanger the Publick Peace, as all other Libels do, by stirring up the Parties immediately concerned in it to Acts of Revenge, but also has a direct Tendency to breed in the People a Dislike of their Governors, and incline them to Faction and Sedition.

2 Rol. Re. 86.

2 Lev. 240.
1 Sid. 414. 415
1 Scaud. 131.
2 Keb. 832.
4 Co. 14. b.
Dyer 285.
Pl. 37.

Sett. 8. But it hath been resolved, That no false or scandalous Matter contained in a ^a Petition to a Committee of Parliament, or in ^b Articles of the Peace exhibited to Justices of Peace, or in any other ^c Proceeding in a regular Course of Justice, will make the Complaint amount to a Libel; for it would be a great Discouragement to Suitors to subject them to publick Prosecutions, in respect of their Applications to a Court of Justice. And the chief Intention of the Law in prohibiting Persons to revenge themselves by Libels, or any other private Manner, is to restrain them from endeavouring to make themselves their own Judges, and to oblige them to refer the Decision of their Grievances, to those whom the Law has appointed to determine them. Also ^d it seemeth to have been holden by some, That no Want of Jurisdiction in the Court, to which such a Complaint shall be exhibited, will make it a Libel, be-

4 Keb. 832
Con. 4. Co.
14. b.

cause

cause the Mistake of the proper Court is not imputable to the Party, but to his Counsel. Yet if it shall manifestly appear from the whole Circumstances of the Case, That a Prosecution is entirely false, malicious, and groundless, and commenced, not with a Design to go through with it, but only to expose the Defendant's Character under the Shew of a legal Proceeding; I cannot see any Reason why such a Mockery of Publick Justice should not rather aggravate the Offence, than make it cease to be one, and make such Scandal a good Ground of an Indictment at the Suit of the King; as it makes the Malice of their Proceeding a good Foundation of an Action on the Case at the Suit of the Party, whether the Court had a Jurisdiction of the Cause or not. But it is said, That no Presentment of a Grand Jury can be a Libel, not only because Persons who are supposed to be returned without their own seeking, and are sworn to act impartially, shall be presumed to have proper Evidence for what they do, but also because it would be of the utmost ill Consequence any way to discourage them from making their Inquiries with that Freedom and Readiness which the Publick Good requires. For which Considerations, it seems reasonable to exempt them from the Fear of any Kind of Prosecution in respect of their Inquiries, as hath been shewn more at large in the Chapter of Conspiracy.

See 1 Danv.
Ab. 208, 209,
210, 211, and
the foregoing
Chapter of
Conspiracy.

Moore 627.

Sett. 9. However it seems clear, That no Writing whatsoever is to be esteemed a Libel, unless it reflect upon some particular Person; and it seems, That a Writing full of obscene Ribaldry, without any Kind of Reflection upon any one, is not punishable at all by any Prosecution at Common Law, as I have heard it agreed in the Court of King's Bench; yet it seems, That the Author may be bound to his good Behaviour, as a scandalous Person of evil Fame.

See the Chap-
ter concerning
Surety for the
good Beha-
viour.

Sett. 10. As to the second Point, viz. Who are liable to be punished for a Libel, it is certain that not only he who composes, or procures another to compose it, but also that he who publishes, or procures another to publish it, are in Danger of being punished for it; and it is said, not to be material whether he who disperses a Libel knew any Thing of the Contents or Effect of it or not; for nothing could be more easy than to publish the most virulent Papers with the greatest Security, if the concealing the Purport of them from an illiterate Publisher would make him safe in dispersing them. Also it hath been said, That if he who hath either read a Libel himself, or hath heard it read by another, do afterwards maliciously read or repeat any Part of it, in the Presence of others, or lend or shew it to another, he is guilty of an unlawful Publication of it. Also it hath been holden, That the Copying of a Libel shall be a conclusive Evidence of the Publication of it, unless the Party can prove that he delivered it to a Magistrate to examine it, in which Case the Act subsequent is said to explain the Intention precedent. But it seems to be the better Opinion, That he who first writes a Libel dictated by another, is thereby guilty of making it, and consequently punishable for the bare Writing; for it was no Libel till it was reduced to Writing.

9 Co. 59. b.
Moore 627,
813.

Moore 627.
Con. 9 Co.
59. b.

Moore 627.
813.
9 Co. 59. b.

9 Co. 59. b.
Moore 813.

5 Mod. 167.
Vide Salk.
417 418, 419.

1 Keb. 931.
1 Levinz 139.

12 Co. 34.
Poph. 139.
Ray. 201.
1 Sid. 270.
1 Mod. 58.
Hob. 62, 215.
3 Inst. 174.
4 Inst. 180,
181.

5 Mod. 167.
9 Co. 59. b.
1 Keb. 931.

Sett. 11. Also it hath been resolved, That the sending of a Letter full of provoking Language to another, without publishing it, is highly punishable; and if the bare making of a Libel be an Offence, whether it be published or not, as it seemeth to be holden in some Books, surely the sending of it to the Party reflected upon, must be a much greater Crime, inasmuch as it so manifestly tends to a Disturbance of the Peace.

Sett. 12. Also it seems to be agreed, That he who delivers a Paper full of Reflections on any Person, in Nature of a Petition to a Committee

¹ Saund 133. of Parliament, to any other Persons except the Members of Parliament,
² Levinz 240. may be punished as the Publisher of a Libel, in respect of such a Disper-
¹ Sid. 414. sing thereof among those who have nothing to do with it.
 415.

^a 9 Co. 59. b. *Sett.* 13. But it hath been resolved, That he who barely reads a Li-
 Moore 813. bel in the Presence ^a of another, without knowing it before to be a Libel,
^b 9 Co. 59. b. or who hearing a Libel read by another, ^b laughs at it, or who ^c barely
 Moore 813. says, That such a Libel is made upon such a Person, whether he speak it
^c Moore 627. with or without Malice, or who is only proved to have had a Libel in
¹ Vent. 31. his Custody, shall not in respect of any such Act be adjudged the Pub-
² Keb. 502. lisher of it. But the having in one's Custody a written Copy of a Libel
³ Salk. 418. publicly known, is an Evidence of the Publication of it.

Sett. 14. Also it hath been holden, That he who repeats Part of a
 Moore 627. Libel in Merriment without Malice, and with no Purpose of Defamation,
 is no way punishable; but it seemeth, That the Reasonableness of this
 Opinion may justly be questioned; for Jest of this Kind are not to be
 endured, and the Injury to the Reputation of the Party grieved is no way
 lessened by the Merriment of him who makes so light of it.

Sett. 15. But it seemeth to be settled, That the bare Printing of a
¹ Keb. 832. Petition to a Committee of Parliament (which would be a Libel against
² Saund. 133. the Party complained of, if it were made for any other Purpose, than as
¹ Levinz 240. a Complaint in a Course of Justice) and delivering Copies thereof to the
¹ Sid. 414. Members of the Committee, shall not be look'd upon as the Publication
 415. of a Libel, inasmuch as it is justified by the Order and Course of Proce-
 edings in Parliament, whereof the King's Courts will take judicial Notice.

Sett. 16. As to the third Point, *viz.* In what manner Offenders of this
 Cro. Ca. 175, Kind are to be punished, there seemeth to be no Doubt, but that they
 &c. may be condemned to pay such Fine, and also to suffer such corporal Pu-
 nishment, as to the Court in Discretion shall seem proper, according to
 the Heinousness of the Crime, and the Circumstances of the Offender.

C H A P. LXXIV.

Of the Offence of keeping a Bawdy-House.

THE Offence of keeping a Bawdy-House being of so gross a Na-
 ture, and there being also so few Questions relating to it worth con-
 sidering, I shall pass it over with these following Observations:

¹ Kitchen 11. a. 1. That it comes under the Cognizance of the Temporal Law, as a
³ Inst. 205. Common Nuisance, not only in respect of its endangering the Publick
 Peace, by drawing together dissolute and debauched Persons, but also in
 respect of its apparent Tendency to corrupt the Manners of both Sexes,
 by such an open Profession of Lewdness.

2. That a Feme-Covert is punishable for this Offence as much as if she
 were sole, as more fully hath been shewn, Chap. 1. *Sett.* 12.

¹ Salk. 382. 3. That a Lodger who keeps only a single Room for the Use of Baw-
 dry, is indictable for keeping a Bawdy-House; but that the bare Solli-
 citation of Chastity is not indictable.

4. That Offenders of this Kind are punishable not only with Fine and
 Imprisonment, but also with such infamous Punishment as to the Court
 in Discretion shall seem proper.

C H A P. LXXV.

Of Common Nuisances.

Offences under the Degree of capital, more immediately against the Subject, not amounting to an actual Disturbance of the Peace, which may be committed by private Persons without any Relation to an Office, and which are of an inferiour Nature to the six Kinds of Offences last treated of, being neither infamous nor grossly scandalous, seem to be reducible to the following Heads:

1. Such as more immediately affect the Publick.
2. Such as more immediately affect the Interests of particular Persons.

Offences of this Kind, more immediately affecting the Publick, are four-fold;

1. Common Nuisances.
2. Monopolies.
3. Forestalling, Ingrossing, and Regrating.
4. Barratry.

And first of Common Nuisances; for the better understanding whereof I shall first consider them in general, and then descend to those relating to Highways and Publick Houses, which seem to be the most remarkable general Heads of this Offence.

As to Common Nuisances in general I shall consider,

1. What shall be said to be a Common Nuisance.
2. How it may be removed.
3. How it may be punished.

Señ. 1. As to the first Point it seems, That a Common Nuisance may be defined to be an Offence against the Publick, either by doing a Thing which tends to the Annoyance of all the King's Subjects, or by neglecting to do a Thing which the Common Good requires. 2 Rol. Ab. 83

Señ. 2. But Annoyances to the Interests of particular Persons are not punishable by a publick Prosecution as Common Nuisances, but are left to be redressed by the private Actions of the Parties aggrieved by them. 2 Rol. Ab. 83.

Señ. 3. And from hence it clearly follows, That no Indictment for a Nuisance can be good, which lays it to the Damage of private Persons only; as where it accuses a Man of ^a Surcharging such a Common; or of ^b inclosing such a Piece of Ground, wherein the Inhabitants of such a Town have a Right of Common, to the Nuisance of all the Inhabitants of such a Town; or of disturbing a ^c Water-course running to the Mill of J. S. *ad grave Damnum J. S. & Tenentium suorum*, without saying *omnium Ligeorum Domini Regis*; or of doing a Nuisance to a Thing no way appearing to be of a Publick Nature, *ad grave* ^d *Damnum*, or ^e *Detrimentum*, or ^f *commune No-*

^a 2 Rol. Ab. 83. Pl. 11. ^b 1 Mod. 107. ^c 1 Rol. Re. 406. ^d 3 K. b. 284. Cro. El. 414. Cro. Ja. 382.
^e 1 Saund. 135. Cro. El. 148. ^f 2 K. b. 461.

2 Leon. 183; *cumentum omnium Ligeorum Domini Regis prope Inhabitantium*; yet it hath been resolved; That an Indictment for not repairing a Bridge, by Reason whereof it was ruinous, *ita quod Ligei Domini Regis per eam transire non possunt*, and concluding, *ad Nocumentum eorumdem*, is good without using the Words *ad Nocumentum omnium Ligeorum, &c.* for by the King's liege People shall be understood, all his liege People.

27 Aff Pl. 19, 20. 2 Rol Ab. 83. Pl. 1, 2, 3. 2 Rol Ab. 84. Pl. 14. *Sett.* 4. Also it is said, That the Law hath so tender a Regard for the Interests of the King and of Religion, That an Indictment for doing a Thing which plainly appears immediately to tend to the Prejudice of either of them, is good, though it do not expressly complain of it as a common Grievance; and upon this Ground it hath been resolved, That an Indictment for converting the King's Money to one's own Use is good, without more. And upon the same Foundation also it hath been holden, That an Indictment for breaking and digging up the Wall of the Church of such a Town, *ad Nocumentum Burgi Ligeorum Domini Regis*, is good.

6 Mod. 11. 178, 213, 239. 311. Moore 847. 2 Keb. 410. 1 K-b. 161. 1 Rol Re 201. 1 Cro El. 148. 2 Keb. 461. Vi 3 2 Fol. Ab. 83. Pl. 11. *Sett.* 5. Also it hath been said, That an Indictment of a common Scold, by the Words *communis Rixatrix*, which seem to be precisely necessary in every Indictment of this Kind, is good, though it conclude *ad commune Nocumentum diversorum* instead of *omnium, &c.* perhaps for this Reason, because a common Scold cannot but be a common Nuisance. And upon the like Ground it seems that it may probably be argued, That an Indictment for laying Logs in the Stream of a navigable publick River, *ad Nocumentum J. S.* may be maintained, because it cannot but be a common Nuisance. And if the Law be so in this Case, why should not also an Indictment setting forth a Nuisance to a Way, and expressly and unexceptionably shewing it to be a Highway, be good, notwithstanding it conclude *in Nocumentum diversorum Ligeorum, &c.* without saying *omnium*; for why should such a Conclusion be more necessary in an Indictment for one Kind of Nuisance than for any other? And perhaps the Authorities which seem to contradict this Opinion, might go upon this Reason, That in the Body of the Indictment, it did not appear with sufficient Certainty, whether the Way, wherein the Nuisance was alledged, were a Highway, or only a private Way; and therefore that it shall be intended from the Conclusion of the Indictment, That it was a private Way.

1 Mod. 76. 2 Keb. 846. 3 Keb. 464. 5 Mod. 142. 1 Vent. 169. *Sett.* 6. There is no doubt but that common Bawdy-Houses are indictable as common Nuisances, as hath been more fully shewn in the foregoing Chapter; also it hath been said, That all common Stages for Rope-Dancers, and also all common Gaming-houses, are Nuisances in the Eye of the Law, not only because they are great Temptations to Idleness, but also because they are apt to draw together great Numbers of disorderly Persons, which cannot but be very inconvenient to the Neighbourhood.

1 Rol. Re. 109. 5 Mod. 142. See Rushworth's Coll. Part 2 Vol. 1. fol. 220, 247. *Sett.* 7. Also it hath been holden, That a common Play-house may be a Nuisance, if it draw together such Numbers of Coaches or People, &c. as prove generally inconvenient to the Places adjacent; and it seems to be a proper Distinction between Play-houses and the Nuisances mentioned in the foregoing Section, That Play-houses having been originally instituted with a laudable Design of recommending Virtue to the Imitation of the People, and exposing Vice and Folly, are not Nuisances in their own Nature, but may only become such by Accident, whereas the others cannot but be Nuisances.

2 Rol Ab. 138. f. 139. f. 1, 2, 3. *Sett.* 8. It hath been resolved, That neither an old nor a new Dove-cote, whether it were erected by the Lord of a Manor, or one of his Tenants,

Tenants, is a common Nuisance; for if a Dove-cote were a common Nuisance, it could never become lawful by any Licence or Prescription whatsoever, because every Nuisance is a *Malum in se*; but it is certain, that a Dove-house may be justified by a Prescription, and that it is so far countenanced by the Law, as to be ^b demandable in a *Præcipe* before any Land whatsoever which is not built upon, and that the Owner may justify the Taking another's ^c Hawk, which he shall find at his Dove-house, flying at his Pigeons; and from hence it seems clearly to follow, That tho' a Tenant, who builds a Dove-house without the Licence of the Lord of the Manor, may perhaps be liable to an Action on the Case at the Suit of such Lord, whose Prerogative is said to be incroached upon by the erecting such a House without his Licence, yet he cannot be punished for it by a publick Prosecution.

Sect. 9. But perhaps it may be argued, That if this Reasoning be good, it will follow from the same Ground, That a Gate erected in a Highway will be also no Nuisance; because, if it were, it could not be justified by any Prescription, as it is agreed that it may be; but to this it may be answered, That the erecting of such a Gate is therefore a Nuisance, because it interrupts the People in that free and open Passage which they before enjoyed, and were lawfully intituled to; but where such a Gate has continued Time out of Mind, it shall be intended, That it was set up at first by Consent, on a Composition with the Owner of the Land on the laying out the Road, in which Case the People had never any Right to a freer Passage than what they still enjoy.

Sect. 10. It hath been holden, That it is no common Nuisance to make Candles in a Town, because the Needfulness of them shall dispense with the Noisomness of the Smell; but the Reasonableness of this Opinion seems justly to be questionable, because whatever Necessary there may be that Candles be made, it cannot be pretended to be necessary to make them in a Town; and surely the Trade of a Brewer is as necessary as that of a Chandler; and yet it seems to be agreed, That a Brew-house, erected in such an inconvenient Place, wherein the Business cannot be carried on without greatly incommoding the Neighbourhood, may be indicted as a common Nuisance: And so in the like Case may a Glass-house or Swine yard.

Sect. 11. It seemeth certain, That it is a common Nuisance to divert Part of a publick navigable River, whereby the Current of it is weakened, and made unable to carry Vessels of the same Burthen, as it could before. Also it hath been holden to be a common Nuisance to divide a House in a Town for poor People to inhabit in, by reason whereof it will be more dangerous in the Time of Infection of the Plague.

Sect. 12. As to the second Point, *viz.* How a Nuisance may be removed; it seemeth to be certain, That any one may pull down or otherwise destroy a common Nuisance, as a new Gate, or even a new House erected in a Highway, &c. for if one whose Estate is, or may be, prejudic'd by a private Nuisance actually erected, as a House hanging over his Ground, or stopping his Lights, &c. may justify the entering into another's Ground, and pulling down and destroying such a Nuisance, whether it were erected before or since he came to the Estate, surely it cannot but follow, *a fortiori*, That any one may lawfully destroy a common Nuisance: And as the Law is now holden, it seems, that in a Plea, justifying the Removal of a Nuisance, you need not shew that you did as little Damage as might be.

265 E. 1.
2 Rol. Re. 4.
30.
Cro. Ja. 382,
492.
More 238.
1 Rol. Re.
136, 201.
Popham 143.
Con. 5. Co.
104. b.
5 E. N. B. 2. c.
15 E. 4 7 b.
Quar Moore
Pl 580 & 621.
Cro. El. 548.

1 Jones 221.
Cro. Ca. 184.
1 Bull. 203.
2 Rol. Ab.
137. C.

2 Rol. Ab.
139 Pl. 2.
Contr. 3 Mod.
138.

2 K. b. 400.
Vile 1 Danv.
A. 173, 174.
S. l. k. 458, 460

Noy 103.

2 Rol. Ab.
139 Pl. 27

2 Rol. Ab.
147. S.
Cro. Ca. 184.
1 Jon. 221.

2 Rol. A. 145.
U. W.
Salk. 459.
Yelv. 142.
5 Co. 101. b.
9 Co. 54. b.
1 Rol. Rep.
5 E. 4 35.
Bro. Nuisance
14.
1 Jon. 221.
Salk. 458.

37 Aff. 10.
2 Rol. Ab.
137. A.

Sect. 13. It hath been adjudged, That if a River be stopped, to the Nufance of the Country, and none appear bound by Prefcription to clear it: thofe who have the Pifcary, and the neighbouring Towns, who have a common Paffage and Eafement therein, may be compelled to do it.

6 Mod. 11.
178, 213.

2 Rol. Ab.
84. Pl. 15.

Sect. 14. As to the third Point, *viz.* In what Manner common Nufances may be punifhed; it is faid, That a common Scold is punifhable by being put into the Ducking-Stool, and there is no Doubt, but that whoever is convicted of another Nufance, may be fined and imprifoned; and it is faid, That one convicted of a Nufance done to the King's Highway may be commanded by the Judgment to remove the Nufance at his own Cofts; and it feemeth to be reasonable, That thofe who are convicted of any other common Nufance fhould alfo have the like Judgment.

C H A P. LXXVI.

Of Nufances relating to Highways.

AND now I am particularly to confider fuch Nufances as relate to Highways, and publick Houfes,

And firft for the better Underftanding of thofe which concern Highways, I fhall confider :

1. Such as relate to Highways in general.
2. Such as relate to Bridges in particular.

For the better Underftanding of Nufances relating to Highways in general, I fhall examine the following Particulars :

1. What fhall be faid to be a Highway.
2. At whole Charge and by whom it ought to be repaired.
3. In what Manner it is to be enlarged.
4. How the Surveyors thereof fhall be appointed.
5. How fuch Surveyors ought to execute their Office.
6. What fhall be faid to be a Nufance to the Highway.
7. How fuch Nufances are to be removed and punifhed.
8. In what Manner thofe who are charged with any Offence relating to the Highway, are to be proceeded againft.
9. How Perfons fo proceeded againft may defend themfelves.

As to the firft Point, *viz.* What fhall be faid to be a Highway, it is faid that there are three Kinds of Ways:

1. A Footway, which is called in *Latin, Iter.*
2. A Pack and Prime way, which is both a Horfe and Foot-way, and called in *Latin, Actus.*
3. A Cart-way, which contains the other two; and alfo a Cart-way, and is called in *Latin, Via* or *Aditus*, and this is either common

mon to all Men, and then it is called, *Via Regia*, or belongs to some City or Town, or private Person, and then it is called *Communis Strata*.

Sect. 1. It seemeth that any one of the said Ways, which is common to all the King's People, whether it lead directly to a Market-Town, or only from Town to Town, may properly be called a Highway, and that any such Cartway may be called the King's Highway, and that a Nuisance in any of the said Ways is punishable by Indictment in the Court-Leet; for Indictments for ^a stopping Horseways, and ^b Footways, have often been allowed, and where others have been quashed, no other Reason has been given for it, but that the Way was not called a common Way or Highway; and in ^c Books of the best Authority, a River common to all Men, is called a Highway; and it is laid ^d down as a general Rule, That Nuisances to any Way common to all Men, are inquirable in the Leet, and Horse Causes are taken Notice of by ^e Parliament; and therefore there seems to be no Reason why any Way leading from Village to Village, which does not terminate there, but is also a Thoroughfare to other Towns, may not properly be called a common or Highway, or why a Nuisance therein should not be indictable, whether it directly lead to a Market-Town or not; for since such a Way lies open to all the King's Subjects, a Nuisance therein ^f cannot but be a common Nuisance, and if it be not punishable by Indictment it would not be punishable at all, inasmuch as it ^g seems to be certain, That it is not punishable by Action, because if one Man might bring his Action in Respect of the Possibility of the Damage which he might receive from it, all other Men may do the like, which would introduce a Multiplicity of Actions; and therefore the Distinction which is taken in some ^h Books concerning this Matter, seems to be very reasonable, That every Way from Town to Town may be called a Highway, because it is common to all the King's Subjects, but that a Way to a Parish-Church, or to the common Fields of a Town, or to a private House, or perhaps to a Village, which terminates there, and is for the Benefit of the particular Inhabitants of such Parish, House, or Village only, may be called a private Way, but not a Highway, because it belongeth not to all the King's Subjects, but only to some particular Persons, each of which, as it seems, may have an Action on the Case for a Nuisance therein.

Sect. 2. It hath been holden, That if there be a Highway in an open Field, and the People have used, Time out of Mind, when the Ways are bad, to go by Outlets on the Land adjoining, such Outlets are Parcel of the Way, for the King's Subjects ought to have a good Passage, and the good Passage is the Way, and not only the beaten Track; from whence it follows, That if such Outlets be sown with Corn, and the beaten Track be foundrous, the King's Subjects may justify going upon the Corn.

Sect. 3. It seemeth to be agreed, That an ancient Highway cannot be changed without the King's Licence first obtained upon a Writ of *Ad quod damnum*, and an Inquisition thereon found, That such a Change will not be prejudicial to the Publick; and it is said, That if one change a Highway without such Authority, he may stop the new Way whenever he pleases; and it seemeth, That the King's Subjects have not such an Interest in such new Way as will make good a general Justification of their going in it as in a common Highway, but that in an Action of Trespass brought by the Owner of the Land against those who shall go over it, they ought to shew specially, by Way of Excuse, how the old Way was obstructed, and the new one set out; also it is said, That the

^a Palm. 389.

^b 6 Mod. 255.

^c Cro. El. 63.

^d 1 Vent. 208.

^e 2 Keb. 178.

^f 3 Keb. 26.

^g 6 Mod. 255.

^h 27 Aff. 23.

ⁱ Co. Lit. 56. a.

^j 5 Ed. 4. 2. b.

^k 3 & 4 W.

^l & M. 12.

^m Kitchin 35.

ⁿ Palm. 389.

^o 2 Rol. Re. 412.

^p Moore 180.

^q Pl. 321.

^r Cro. E. 664.

^s Co. Lit. 56. a.

^t 27 H. 8. 27. a.

^u 1 Vent. 189.

^v Kitch. 35. a.

^w 1 Vent. 208.

^x 3 Keb. 28.

^y Co. Lit. 56.

^z 1 Rol. A. 390.

^{aa} Pl. 1.

^{ab} Cro. Ca. 266.

^{ac} 267.

^{ad} Vaugh. 341.

^{ae} Cro. Ca. 267.

^{af} Yelv. 141.

^{ag} 142.

Inhabitants are not bound to keep Watch in such a new Way, or to make Amends for a Robbery therein committed, or to repair it.

Sect. 4. However it is certain, That a Highway may be changed by the Act of God; and therefore it hath been holden, That if a Water which has been an ancient Highway, by Degrees changes its Course, and go over different Ground from that whereon it used to run, yet the Highway continues in the new Chanel, in the same Manner as in the old.

As to the second Point, *viz.* At whose Charge, and by whom the Highway ought to be repaired, I shall consider:

1. What Provision is made by the Common Law concerning this Matter.
2. What by Statute.

Sect. 5. As to the first of these Particulars, it seems to be agreed, That of common Right, the general Charge of Repairing all Highways lies on the Occupiers of the Lands in the Parish wherein they are; but it is said, That the Tenants of the Lands adjoining are bound to scowr their Ditches, and there is no doubt but particular Persons may be burthened with the general Charge of Repairing a Highway, in two Cases:

1. In Respect of an Inclosure of the Land wherein it lies.
2. In Respect of a Prescription.

Sect. 6. And first a particular Person may be bound to repair a Highway in Respect of an Inclosure, as where the Owner of Lands not inclosed, next adjoining to the Highway, incloses his Lands on both Sides thereof, in which Case he is bound to make a perfect good Way, and shall not be excused for making it as good as it was at the Time of the Inclosure, if it were then any way defective, because, before the Inclosure, the People used, when the Way was bad, to go for their better Passage, over the Fields adjoining, out of the common Track, which Liberty is taken away by the Inclosure.

Sect. 7. Also it hath been holden, That if one inclose Land on one Side, which hath been anciently inclosed of the other Side, he ought to repair all the Way, but that if there be not such an ancient Inclosure of the other Side, he ought to repair but half that Way: And it is said, That where-ever one is bound to repair a Highway in respect of an Inclosure, and lays it open again as it was before, he shall be freed from the Charge of repairing it.

Sect. 8. Secondly, A particular Person may be bound to repair a Highway in respect of a Prescription; and it is said, That a Corporation aggregate may be compelled to do it by Force of a general Prescription, That it ought and hath used to do it, without shewing, that it used to do so in respect of the Tenure of certain Lands, or for any other Consideration, because such a Corporation in Judgment of Law never dies, and therefore, if it were ever bound to such a Duty, it must needs continue to be always so; neither is it any Plea, That such Corporation have always done it out of Charity, for what it hath always done, it shall be presumed to have been always bound to do; but it is said, That a Person cannot be charged with such a Duty by a general Prescription from what his Ancestors have done, because no one is bound to do what his Ancestors have done, unless it be for some special Reason, as

the having Land descended from such Ancestors, which are holden by such like Service, &c. yet it seems, That an Indictment charging a Tenant in Fee-simple with having used of Right to repair such a Way, *ratione Tenure Terræ sue*, is certain enough, without adding, That his Ancestors, or those whose Estate he hath, have always so done, for that is implied in saying, That he has always used to do it *ratione Tenure sue*. Also an Occupier, as such, tho' at Will only, is indictable for suffering a House standing upon the Highway to be ruinous, &c. and the Words *ratione Tenure*, &c. if added, are Surplus.

Kellew. 52. a.
Litch. 206.

Salk. 357. 2.

Sect. 9. However it seemeth certain, That whether a particular Person be bound to repair a Highway by Inclosure, or Prescription, &c. yet the Parish cannot take Advantage of it upon the Plea of Not guilty to an Indictment against them for not repairing it, but ought to set forth their Discharge in a special Plea.

1 Mod. 112.
3 Keb. 301.
1 Ven. 256.

And now I am to consider in the second Place, at whose Charge, and by whom the Highway ought to be repaired by Force of the Statute, for the better Understanding whereof, I shall examine :

1. Who are by Statute compellable to work in the Repairs thereof in their own Persons, or by others.
2. Who may be assessed to a Rate made for the defraying of the extraordinary Charges of such Repairs.
3. What other Provisions have been made to this Purpose.
4. In what manner the Profits of Lands settled in Trust for the Repairs of the Highways, shall be employed.

Sect. 10. As to the first Point, it is enacted by 2 & 3 Ph. & Mar. 6. and 22 Car. 2. 12. That the Parishioners of every Parish shall endeavour themselves to the amending of the Highways therein, and shall be chargeable thereunto as followeth; that is to say, Every Person for every Plough-land in Tillage or Pasture, That he or she shall occupy in the same Parish and every other Person keeping there a Draught or Plough, shall find and send at every Day and Place to be appointed for the amending of the Ways in the Parish, one Wain or Cart, furnished after the Custom of the Country, with Oxen, Horses, or other Cattle, and all other Necessaries meet to carry Things convenient for that Purpose, and also two able Men with the same, upon Pain of every Draught making Default, ten Shillings; and every Householder, and also every Cottager and Labourer of that Parish, able to labour, and being no hired Servant by the Year, shall by themselves, or one sufficient Labourer for every of them, upon every of the said Days, work and travel in the Amendment of the said Highways, upon Pain of every Person making Default, to lose for every Day, one Shilling and Six-pence: And if the said Carriages of the Parish, or any of them, shall not be thought needful by the Surveyors, to be occupied upon any of the said Days, that then every such Person that should have sent any such Carriage, shall send to the said Work, for every Carriage so spared, two able Men, there to labour for the Day, upon pain to lose for every Man not so sent to the said Work, Twelve-pence; and every Person and Carriage abovesaid, shall have and bring with them such Shovels, Spades, Picks, Mattocks, and other Tools and Instruments as they do make their own Ditches and Fences withal, and such as be necessary for their said Work: And all the said Persons and Carriages shall do and keep their Work, as they shall be appointed by the said Supervisors, or one of them, eight Hours of every of the said Days, unless they shall be otherwise licenced by the said Supervisors, or one of them.

22 Car. 2. 12.
Par. 9.

Sect.

Sect. 11. And it is farther enacted by 18 El. 10. Par. 2. That every Person or Persons (except such as dwell in the City of London) that shall be assessed to the Payment of any Subsidy to Her Majesty, to five Pounds in Goods, or forty Shillings in Lands, or above, during all such Time as he shall stand so assessed and not altered, and being none of the Parties chargeable for the Amendment of Highways by any former Law, but as a Cottager, shall find two able Men yearly to labour in the Highways, at the Times appointed.

Sect. 12. And it is farther enacted by the said Statute, Par. 3. That every other that shall occupy a Plough-land in Tillage or Pasture, lying in several Parishes, shall be chargeable to the making of the Ways within the Parish where he dwelleth, as far forth, and in such Manner and Form as any Person having a Plough-land in any one Parish, is or ought to be chargeable.

Dal. ca. 26.
3 Keb. 568.
2 Keb. 617.

Sect. 13. It was made a great Doubt in the Construction of these Statutes, what should be accounted a Plough-land within the Purview of them, for the settling whereof it was enacted by 7 & 8 W. 3. 29. That any Person that shall have in his or her Occupation, Wood-land, or other Land, to the Value of fifty Pounds per Annum, shall be adjudged and deemed to have a Plough-land, as to all, or any of the Purposes within any of the Statutes before that Time made, of or concerning the Highways, any Thing in them, or any Usage, or Custom to the contrary, in any wise notwithstanding.

Sect. 14. Also it is farther enacted by the above mentioned Statute of 22 Car. 2. 12. Par. 8. That in such Places where there is no Use of Carts and Teams for the Amendment of the Highways, but the Usage and Practice is to carry Stones, Gravel, Earth, or other Materials for such Amendment, upon the Backs of Horses, or by any other Kinds of Carriages; that in all such Places the Inhabitants using any such Horses, or other Carriages, shall send in such their Horses as are accustomed to that Kind of Labour, and such their other Carriages, with able Persons to work with the same, in like Manner, and under the like Directions, Forfeitures and Penalties, as by any former Statute for repairing of Highways, is appointed for Carts and Teams.

In the Exposition of the Statutes the following Opinions have been holden,

^a 3 Keb. 255,
476.
¹ Ven. 273.
Watf. ca. 40.
² Inst. 704.

Sect. 15. I. That ^a Persons in holy Orders are within the Purview of them, in respect of their spiritual Possessions, as much as any other Persons whatsoever, in respect of any other Possessions, for the Words are general, and there is no Kind of Intimation that any particular Persons shall be exempted more than others.

^b Raym. 186.
3 Keb. 567,
568.
Vide Dal.
ca. 26.
2 Keb. 617.

Sect. 16. II. ^b That he who keeps several Draughts in a Parish is bound to send a Team for each Draught, whether he occupy any Land in the Parish, or not; and in like Manner, That he who occupies several Plough-lands, ought to send a Team for each Plough-land, whether he keep any Draught, or not.

^c Palm. 389.
2 Rol Re. 412.

Sect. 17. III. That ^c notwithstanding the Words of the Statute extend only to the Occupiers of Land, yet if the Owner neither occupy them, nor let them, but suffer them to lie fresh, he shall be charged as much as if he had occupied them, for there is no Reason that the Publick shall suffer for his Negligence.

Dal. ca. 26.

Sect. 18. IV. That it is no Excuse for the Inhabitants of a Parish, being indicted at Common Law for not repairing the Highways, That they have done the full Work required of them by Statute, for since these Statutes are wholly in the Affirmative, and made in Aid of the Common Law, and to supply the Defects thereof, they shall not be construed to abrogate any Provision thereby made for these Purposes.

Sect. 19. Dalton is of Opinion, That he who keeps a Draught and but two Horses, ought to attend therewith at the Times appointed, and that if he carry with them such Loads as they are able to draw, he shall be excused. Dalt. ca. 26.

Sect. 20. As to the second Point, viz. Who may be assessed to a Rate made for the defraying of the extraordinary Charges of such Repairs, it is enacted by the above mentioned Statute of 22 Car. 2. 12. Par. 10, 11. and 3 & 4 W. & M. 12. That where the Justices of the Peace of any County, City, or other Place, or the major Part of them, at their General or Quarter-Sessions, shall be fully satisfied that the common Highways, Causeys, Bridges, Streets or Pavements, within any Parish, Township, or Hamlet, &c. within their respective Jurisdiction, cannot be sufficiently amended, repaired, and supported, by Means of the Laws then in Force, without the Help of the said Acts, in all such Cases one or more Assessment, or Assessments, upon all and every the Inhabitants, Owners, and Occupiers of Lands, Houses, Tenements, and Hereditaments, or any personal Estate, usually reateable to the Poor, within any such Parish, Township, or Hamlet, &c. shall be made, levied, collected, and allowed, by such Person and Persons, and in such Manner as the said Justices by their Order at such Sessions shall direct and appoint in that Behalf: And the Money thereby raised shall be employed and accounted for, according to the Order and Directions of the said Justices, for and towards the Amending, Repairing, Paving, Cleansing and Supporting such Highways, Causeys, and Bridges, from Time to Time, as Need shall require, and the said Assessments shall be levied by Distress and Sale of Goods on Non-Payment upon Demand, &c. Provided that no such Assessment or Assessments to be made in any one Year, shall exceed the Rate of Six-pence in the Pound of the yearly Value of any Lands, Houses, Tenements and Hereditaments, so assessed, nor the Rate of Six-pence for twenty Pounds in personal Estate.

Sect. 21. And it is farther enacted by the above mentioned Statute of 7 & 8 W. 3. 29. That if any Inship, Liberty, Precinct, or Vill, that uses to repair their own Highways, shall have levied the Rate of Six-pence in the Pound, and employed the same towards the Repair of the Highways, and yet the said Highways are not sufficiently repaired, in such Cases it shall be lawful for the Justices of the Peace at their special Sessions to be held every four Months, for the Consideration of the Highways, to order to the whole Parish to contribute to the Repairing thereof.

Sect. 22. It is recited by 3 & 4 W. & M. 12. That divers Parishes and Townships, having not any Gravel-Stones, Quarries, nor any other Materials fitting or convenient for the Amending or Repairing of the Highways within the said Parishes and Townships, the Surveyors of the Highways of such Parishes and Townships, had been forced to lay out their own Money for the Buying of such Materials as were necessary for that Purpose, and yet had no Remedy by any Law then in Force for a Re-imbursment of such Expences; and thereupon it is enacted, That upon Notice given by the Surveyor or Surveyors of the Highways to the Justices of the Peace at their special Sessions, and Oath made of what Sum or Sums of Money, he or they have or hath so laid out and expended, upon Amending and Repairing of the said Highways, the Justices of the Peace, or any two of them, at their special Sessions, may by Warrant under their Hands and Seals, cause an equal Rate to be made for the Re-imbursing the said Surveyor or Surveyors, the Moneys by him or them laid out as aforesaid, upon all the Inhabitants of such Parish or Township where such Moneys are expended, according to the Rules and Methods prescribed by 43 El. 2. which Rate being confirmed and allowed by the said Justices in their special Sessions, shall be collected and gathered by the said Surveyor or Surveyors of the Highways; and if any Person or Persons refuse to pay the Moneys so assessed on him or them, that then the same shall

The King against the Inhabitants of Newton in Cheshire.

be levied by the said Surveyors by Distress and Sale of the Goods and Chattels of the Persons so refusing, rendering to the Party the Overplus, reasonable Charges for making the said Distress first to be deducted. If the Justices refuse to make such a Rate, they are compellable by Mandamus from the King's Bench, on Affidavit of the Money having been laid out; and the Mandamus shall be directed to the Justices of the County, and served on those of the privy Sessions.

Sect. 22. As to the third Point, viz. What other Provisions have been made to this Purpose, it is enacted by the said Statute of 3 & 4 W. & M. 12. That no Fine, Issue, Penalty, or Forfeiture, for not repairing any Highway, shall be returned into the Court of Exchequer, or other Court, but shall be levied and paid into the Hands of the Surveyors of the Parish, or Place, to be applied towards the Repair and Amendment of such Highway; and that if any Fine, Penalty, or Forfeiture, imposed on any Parish or Place, for not repairing the Highways, shall hereafter be levied on any one, or more, of the Inhabitants of such Parish or Place, that then such Inhabitant or Inhabitants shall make his or their Complaint to the Justices of the Peace at their special Sessions, and the said Justices, or any two of them, are by the said Statute empowered and authorized by Warrant under their Hands and Seals, to cause a Rate to be made, according to the Form and Manner ^a aforesaid, for the Re-imbursing such Inhabitant or Inhabitants the Money so levied on him or them, as aforesaid, which Rate so made, and confirmed by two Justices, as aforesaid, shall be collected, and levied by the Surveyor or Surveyors of the Highways of such Parish or Place so presented or indicted, as aforesaid, and the said Surveyor or Surveyors shall within one Month next after the Making and Confirming the Rate aforesaid, pay unto the Inhabitant or Inhabitants, such Money so levied on him or them, as aforesaid.

^a See the precedent Section.

Sect. 24. Also the later Statutes which have imposed any Penalties on Surveyors of the Highways, or others, for any Offences relating to the Highways, have generally ordained that the whole, or Part thereof, shall be applied to the Repairs of the Highways of the Place wherein the Offence shall be committed, as will more fully appear in the subsequent Part of this Chapter.

Sect. 25. As to the fourth Point, viz. In what Manner the Profits of Lands settled in Trust for the Repairs of the Highways shall be employed, it is enacted by the above mentioned Statute of 22 Car. 2. 12. Par. 2. That where any Lands have been, or shall be given for the Maintainance of Causeys, Pavements, Highways and Bridges, all such Persons that are, or shall be, enfeoffed, or trusted with any such Lands, shall let them to farm at the most improved yearly Value without Fine; and that the Justices of the Peace in their open Sessions shall enquire by such Ways and Means as they think fitting, into the Value of all such Lands so given, or to be given, and order the Improvement and Employment of the Rents and Profits thereof, according to the Will and Direction of the Donor of such Lands, if they find that the Persons so intrusted, have been negligent or faulty in the Performance of their Trust, (except such Lands have been given to the Uses aforesaid, to any College or Hall in either of the Universities of this Kingdom, which have Visitors of their own) any Law, Statute, Usage, or Custom, to the contrary notwithstanding.

Sect. 26. As to the third general Head of this Chapter, viz. In what Manner the Highway is to be enlarged, it is enacted by 13 Ed. 1. commonly called the Statute of Winchester, Chap. 5. That Highways leading from one Market-Town to another shall be enlarged, so that there be neither Dyke, Tree, nor Bush, whereby a Man may lurk to do Hurt, within two hundred Foot of the one Side, and two hundred Foot of the other Side of the Way: So that the Statute shall not extend to Ashes, nor unto great Trees, &c. and if by Default of the Lord that will not avoid the Dyke, Underwood, or Bushes, in the Manner aforesaid,

aforsaid, any Robberies be done therein. the Lord shall be answerable for the Felony, and if Murder be done, the Lord shall make a Fine at the King's Pleasure: And if the Lord be not able to fell the Underwoods, the Country shall aid him therein. And the King willeth, that in his Demean Lands and Woods within his Forest, and without, the Ways shall be enlarged, as before is said. And if per-case a Park be taken from the Highway, it is requisite that the Lord shall set his Park the Space of two hundred Foot from the Highways, as before is said, or that he make such a Wall, Dyke, or Hedge, that Offenders may not pass nor return to do Evil.

Sect. 27. Also it is enacted by the above mentioned Statute of 3 & 4 W & M. 12. That the Surveyors of the Highways shall make every Cartway leading to any Market-Town, eight Foot wide at the least, and as near as may be, even and level.

Sect. 28. And it is farther enacted and declared by the same Statute, That no Horse-Causey, or Causey for Horses, travelling upon, or in any publick Highway, be less or under three Foot in Breadth.

Sect. 29. Also it is enacted by 8 & 9 W. 3. 15. That the Justices of the Peace of any County, City, Riding, Division, Liberty, or Place, or the major Part of them, being five at the least, at their Quarter-Sessions, shall have Power to enlarge or widen any Highways in their respective Countries, Ridings, Divisions, Liberties, or Places, so that the Ground to be taken into the said Highways do not exceed eight Yards in Breadth, and that the said Power do not extend to pull down any House, or to take away the Ground of any Garden, Orchard, Court, or Yard: And for the Satisfaction of the Persons who are Owners of, or may be interested in, the said Ground that shall be laid into the said Highways, the said Justices are by the said Statute impowered to impanel a Jury before them, and to administer an Oath to the said Jury, That they will assess such Damages to be given, and Recompence to be made to the Owners and others interested in the said Ground, for their respective Interests, as they shall think reasonable, not exceeding five and twenty Years Purchase for Lands so laid out, and likewise such Recompence as they shall think reasonable for the Making of a new Ditch and Fence to that Side of the Highway that shall be so enlarged, and also Satisfaction to any Person that may be otherwise injured by the enlarging of the said Highways: And upon Payment of the said Money so awarded, or leaving it in the Hands of the Clerk of the Peace of the respective County, for the Use of the Owner, or of others interested in the said Ground, the Interest of the said Persons shall be for ever divested out of them, and the Ground that shall be laid into any Highway by Vertue of the said Act, shall be esteemed a publick Highway to all Intents and Purposes whatsoever; and the said Justices shall have Power to order one or more Assessment or Assessments to be made, levied, or collected, upon all and every the Inhabitants, Owners, or Occupiers of Lands, Houses, Tenements or Hereditaments, in their respective Parishes or Places that ought to repair the same, to such Person or Persons, and in such Manner as the said Justices at such Sessions shall direct and appoint; and the Money thereby raised shall be employed and accounted for, according to the Order and Direction of the said Justices, for and towards the Purchasing of the Land to enlarge the said Highways, and for the Making the said Ditches and Fences: And the said Assessments shall, by Order of the said Justices, be levied by the Overseers of the Highways, by Distress and Sale of the Goods of Persons so assessed, not paying the same within ten Days after Demand, rendering the Overplus of the Value of the Goods so distrained to the Owner and Owners thereof (the necessary Charges being first deducted).

Sect. 30. But it is provided by the said Statute, That no such Assessment or Assessments made in any one Year, for enlarging of Highways, shall exceed the Rate of Six-pence in the Pound of the yearly Income of any Lands, Houses,
Tene-

Tenements, and Hereditaments, nor the Rate of Six pence in the Pound for personal Estates.

Sect. 31. Also it is farther enacted by the said Statute, That the Justices of Peace at their Quarter-Sessions, at the Request of any Person, for the putting in Execution the Powers contained in the said Act for the Enlarging of Highways, shall issue out their Precepts to the Owner or Owners of Ground, or others interested in the same, that are to be laid into the said Highways, to appear at the next Quarter-Sessions, or shew Cause why the said Highways should not be enlarged.

Sect. 32. And it is farther enacted, That if any Order or Decree shall be made by the said Justices for the laying out of Ground for the Enlarging of Highways, the Owners or Proprietors of the said Ground shall have free Liberty, within eight Months after such Order, to cut down any Wood or Timber growing upon the said Ground, or upon the Neglect thereof, that the same shall be sold by Order of the said Justices, and the Owners of such Wood or Timber shall receive the full of what shall be made thereof, the Charges being first deducted.

Sect. 33. And it is farther enacted, That any Person grieved by the Order or Decree of the said Justices may appeal to the Judges of Assize at the next Assize only to be held for the County where such Decree or Order shall be made, and any of the said Judges are by the said Statute impowered to examine, affirm, or reverse the said former Order and Decree, as in Judgment they shall think fit, and if affirmed to award Costs against such Appellants for their Vexation and Delay, and to cause the same to be levied by Distress and Sale of the Appellant's Goods, rendring the Overplus to the said Appellants.

Sect. 34. And it is farther enacted by the said Statute, That where any common Highway shall be inclosed after a Writ of Ad quod damnum issued, and Inquisition thereupon taken, any Person aggrieved by such Inclosure, may make his Appeal to the Quarter Sessions of the County to be held next after such Inquisition taken, which shall finally hear and determine such Appeal; and if no such Appeal be made, then the said Inquisition and Return entred and recorded by the Clerk of the Peace of such County at the Quarter-Sessions, shall be for ever afterwards binding to all Persons whatsoever.

Sect. 35. As to the fourth general Head of this Chapter, viz. In what Manner the Surveyors of the Highways shall be appointed, it is enacted by 3 & 4 Will. & Mar. 12 That upon the six and twentieth Day of December in every Year, unless that Day be Sunday, and then on the Seven and twentieth, the Constables, Headboroughs, Tithing-men, Church-wardens, Surveyor or Surveyors of the Highways, and Inhabitants in every Parish, shall assemble together, and the major Part of them as are so assembled, shall make a List of the Names of a competent Number of the Inhabitants in their Parish, who have an Estate in Lands, Tenements, or Hereditaments, in their own Right, or their Wives, of the Value of ten Pounds by the Year, or a personal Estate of the Value of one hundred Pounds, or are Occupiers or Tenants of Houses, Lands, Tenements, or Hereditaments, of the yearly Value of thirty Pounds, if any such there be; or if there be no such Persons in the Parish, then the said List to be of the most sufficient Inhabitants of such Parish, and shall return such List unto two or more of the Justices of the Peace in or near the Division of the County in which their Parish lies, at a special Sessions to be held for that Purpose within the said Division, on the third Day of January next following, unless it shall happen on a Sunday, and then to be the fourth of the same Month, or within fifteen Days after; for which Purpose the said Justices are required to hold a special Sessions at some Place within that Division where the Parish lies, and to give Notice of the Time and Place where they intend to hold the same, to the Constables, Headboroughs, Tithingmen, Church-wardens, and Surveyors of the Highways of every Parish

Parish within the said Division, at least ten Days before the Holding of the said Sessions; and the said Justices shall then and there, out of the said Lists, according to their Discretion, and the Largeness of the Parish, by Warrant under their Hands and Seals, nominate and appoint one, two, or more, as they shall think fit, and approve of, being of like Sufficiency as aforesaid, to be Surveyor or Surveyors of the Highways of every Parish within the Division, or for any Hamlet, Precinct, Liberty, Tithing or Town, of and in the same Division, for the Year ensuing; which Nomination and Appointment shall by the Constables, Headboroughs, Tithingmen, or Surveyors of the Highways for the Time being, or some of them, be notified to the Person or Persons so nominated, chosen, and appointed, by the said Justices within six Days after such Nomination, by serving him or them with the said Warrant or Warrants, or by leaving the same, or a true Copy thereof, at his or their Houses or usual Places of Abode; and from thenceforth the Person or Persons so nominated and appointed, shall be Surveyor or Surveyors of the Highways, for the Parish, Town, Village, Hamlet, Precinct, or Tithing, for which he shall have been so nominated, chosen, and appointed for the Year ensuing, and shall take upon him and them respectively, and duly execute the said Office according to the former Laws made concerning the Highways, and the said Act; and if the said Persons so nominated and served with the said Warrant shall refuse, or neglect so to do, he or they so refusing and neglecting, shall forfeit the Sum of five Pounds, to be levied on his or their Goods and Chattels, by Distress and Sale of the same, by Warrant under the Hand and Seal of two or more Justices of the Peace of the same Division, or in Default thereof any neighbouring Justices of the Peace for the said County, which Warrant the said Justices are required to make upon Information of any one credible Witness upon Oath; the one Moiety of which Forfeiture shall go to him that shall inform, and the other Moiety for and towards the Repair of the Highways of the same Parish, rendering the Overplus to the Party whose Goods shall be distrained, the Charges of the Distress and Sale being first deducted; and in Case of such Neglect or Refusal, the said Justices are empowered to nominate and appoint some other fit Person or Persons to perform the said Office, who upon like Notice of such Nomination and Appointment, shall take upon him or them, and duly execute the said Office, and if he or they neglect or refuse so to do, shall forfeit the like Sum of five Pounds, to be levied and disposed of as aforesaid; and if the Constables, Headboroughs, Tithingmen, Church-wardens, and Surveyor or Surveyors of the Highways of any Parish, Town, Liberty or Precinct, or some of them, shall not return the said List of Names in such Manner, as in this Act is directed, every of them so neglecting, shall forfeit the Sum of twenty Shillings, to be levied in the Manner, and employed to the Uses aforesaid.

Sett. 36. And it is farther enacted by the said Statute of 3 & 4 W. & M. 12. That if any Justice of the Peace shall neglect or refuse to do what is required of him by the said Act, he shall forfeit five Pounds, one Moiety whereof shall go to the Person that shall sue for the same, the other Moiety to be employed in the Repairs of the Highways of the Parish where the Person who shall sue for the same inhabits, to be recovered in any of the King's Courts of Record, by Action of Debt, &c.

Sett. 37. As to the fifth general Head of this Chapter, viz. In what Manner the Surveyors of the Highways ought to execute their Office, it is enacted by the said Statute of 3 & 4 W. & M. 12. That every Surveyor of the Highways, appointed as by the said Act is directed, shall within fourteen Days next after his first Acceptance of the said Office, and so from Time to Time every four Months, during his being Surveyor, take a View of all the Roads, common Highways, Water-Courses, Bridges, Causeys, and Pavements within the Parish, Town, Village, Hamlet, Precinct, or Tithing, for which he is appointed

Surveyor, that are to be repaired by the said Parish, &c. and shall make a Presentment upon Oath, in what State and Condition he finds the same, to some Justices of the Peace of the same Division, if then resident there, otherwise to some neighbouring Justice of the Peace for the said County, and in Default thereof shall incur the Penalty aforesaid, as if he or they had refused or neglected to accept and execute the said Office, unless he shall have some reasonable Excuse for omitting the same, to be allowed of by two Justices of the Peace of the same Division, &c. And what Defaults and Annoyances they shall find in any of the said Highways, &c. they shall from Time to Time the next Sunday immediately after Sermon, give publick Notice of the same in the Parish Church, and if the same shall not be removed, repaired, and amended within thirty Days after such Notice given, that then the said Surveyor or Surveyors shall within thirty Days remove, repair, and amend the same, and dispose of the same Annoyances, to and for the Repair of the said Highways; and the said Surveyor or Surveyors shall be re-imbursed what Charges and Expences they shall be at in so doing, by the Parties who should have done the same; and in Case the said Parties shall upon Demand refuse or neglect to pay the said Surveyors their said Charges, then the said Surveyors shall apply themselves to any Justice of the Peace within the Division of the County wherein such Highway is, and in Default thereof to any neighbouring Justice for the said County, and upon his or their making Oath before such Justice of the Notice to the Defaulter in manner aforesaid, the said Surveyors shall be repaid all such their Charges as shall be allowed to be reasonable by the said Justice, to be levied in Manner aforesaid.

Salk. 347.

Sect. 38. Also it is enacted by the above mentioned Statute of 22 Car. 2. 12. Par. 12. That the Surveyors shall appoint six Days for the providing Stones, Gravel, and other Materials, for the Amendment of, and for working in the Highways, having respect to the Season of the Year, and the Weather, and giving Notice publickly some convenient Time before the several Days; at which Days all Persons liable to the said Work, shall attend and work accordingly: And the said Surveyors, &c. shall make Return of the Defaulters, within one Month after every Default made, to some neighbouring Justice of the Peace of the same County; and the said Justice shall present the same at the Quarter-Sessions of the Peace held next after such Return made unto him; and the Offenders shall respectively incur the same Forfeiture, Pains, and Penalties, inflicted and appointed by the Laws then in Force for the Amending of the Highways. And it has been adjudged, That the Justices ought to fix the particular Days, and not generally to appoint six Days between such and such a Day.

Sect. 39. It is enacted by 5 El. 13. That it shall be lawful for the Surveyors of the Highways, for the better Reparation of the Ways within their several Limits (if it shall be so to them thought necessary) to take or carry away of the Rubbish or smallest broken Stones of any Quarry or Quarries lying and being within the Parish where they shall be Surveyors, without Licence, Controlment, or Impeachment of the Owner, so much as by their Discretions shall be deemed necessary for the Amendment of the said Ways: And that for the Fault of any Quarry not being within their said Parish or Limits, or in Default of Rubbish not to be found in any such Quarry, it shall be lawful for every such Surveyor, for the Use aforesaid, in the several Grounds of any Person or Persons being within the Parish and Limits where they shall be Surveyors, and nigh adjoining to the Way wherein such Reparations shall be thought necessary to be made, and wherein Gravel, Sand, or Cinders is likely to be found, to dig or cause to be digged for Gravel, Sand, or Cinders, and likewise to gather Stones lying upon any Lands or Grounds within the Parish, and meet to be used to such Purpose, and thereof to take and carry away so much as shall be by them thought necessary to be employed in the Amendment of the said Highways.

Sect. 40. But it is provided by the said Statute, Par. 6. That it shall not be lawful to any such Supervisor by vertue of the said Act to cause any Rubbish to be digged out of any Quarry or Quarries, but only shall extend to such Rubbish as shall be found there ready digged by the Owner or Owners of the said Quarry or Quarries, or otherwise by his or their Licence and Commandment; nor shall not extend or give Authority to any Supervisor to dig or cause to be digged any Gravel, Sand, or Cinders in the House, Garden, Orchard, or Meadow of any Person, nor that it shall be lawful to any such Supervisor to cause any more Pits to be digged for Gravel in any severall and inclosed Ground than one only; and that the same Pit or Hole so digged for Gravel, as is aforesaid, shall not by any Way be in Breadth or Length, above ten Yards over at the most: And that every such Supervisor as shall cause any such Pit to be made and digged for Gravel, Sand, or Cinders, as is aforesaid, shall within one Month next after such Digging or Pit made, cause the same to be filled and stopped up with Earth, at the Costs and Charges of the Parishioners, upon Pain to forfeit to the Owner or Owners of the Soil wherein any such Pit shall be made and digged, for every Default five Marks, to be recovered by Action of Debt, &c.

Sect. 41. And it is farther enacted by the same Statute, Par. 6. That every Supervisor shall within the Limits where he shall be Supervisor, have Authority to turn a Water-Course, or Spring of Water, being in any Highway, into any Ditch of the severall Ground of any Person whatsoever next adjoining to the said Ways, in such Manner as by the said Supervisors shall be thought meetest.

Sect. 42. Also it is enacted by the above mentioned Statute of 18 El. 10. Par. 7. That where any Soil hath been cast into the common Highway, or common faring Way, that there is a Bank between the said Way and the Ditch, it shall be lawful for the said Surveyors, &c. to make Sluices or other Devices by their Discretions, to convey the Water out of the said Way into the Ditch; any Law, Right, Interest, or Usage, to the contrary notwithstanding.

Sect. 43. And it is farther enacted by the said Statute of 3 & 4. W. & M. 12. That it shall be lawful for the said Surveyors, where the Ditches and Drains already made are not sufficient to carry off the Water that lies upon the Highways, to make new Ditches and Drains in and through the Lands next adjoining to the said Highways, and keep them scoured, cleansed, and open, and come upon any of the Lands with their Workmen for so doing.

Sect. 44. Also it is enacted by the above mentioned Statute of 5 El. 13. Par. 8. That every Surveyor for the Time being, shall within one Month next after Default or Offence made by any Person, contrary to the Provision and true Meaning of either of the said Statutes of 2 & 3 Ph. & Mar. 8. or 5 El. 13. present every such Default or Offence, to the next Justice of Peace for the Time being, under pain of forty Shillings.

Sect. 45. And it is enacted by the said Statute of 22 Car. 2. 12. Par. 1. That all Constables and Surveyors of the Highways, from Time to Time during their Continuance in their Offices, shall cause the severall Acts of Parliament then in Force, touching the Repairing the Highways, to be put in Execution, and the Penalties thereby imposed to be levied and disposed of, as by the said severall Acts is directed: And every Constable or Surveyor of the Highways refusing or neglecting to put the said Acts in Execution, or wilfully suffering any Waggon or Carts to pass thro' their respective Limits with more Cattle, or in other Manner than by Law is allowed, shall incur the like Penalty of forty Shillings, &c.

Sect. 46. And it is farther enacted by the said Statute of 3 & 4 W. & M. 12. That the Justices of the Peace of every County shall in their respective Divisions once in four Months, hold a special Sessions, and shall thereunto
summon

summon all the Surveyors of the Highways within that Division to come before them, and shall give them a Charge to do their Duty, and declare to them what they are obliged to do by virtue of that, or any former Act; after which the said Surveyors shall make a Presentment unto them upon Oath, of the State and Condition of the Highways within their respective Parishes, Towns, Hamlets, &c. and what Offences and Neglects any are guilty of, contrary to the Meaning of any Statute made concerning the Highways, or any Thing relating thereunto: And before any such Surveyor shall go out of, or be discharged from his Office, he shall at some such special Sessions, give an Accompt upon Oath of all Money that hath come to his Hands, which ought to be employed in amending of the Highways, and how he hath disposed of the same; and in case any Moneys shall remain in his Hands, he shall deliver the same to the Surveyors of the Highways, that shall serve for the same Parish, Town, or Hamlet, &c. for the Year ensuing, and in case of Failure, to forfeit the double Value of what shall be adjudged to be in his Hands, by the said Justices, &c.

Sec. 47. And it is enacted by 6 Annæ 29. That if any Surveyor shall neglect to put either that or any former Law for repairing Highways in Execution, he shall forfeit five Pounds, to be levied by Distress, &c. by Warrant of one Justice of the Peace.

As to the sixth general Head of this Chapter, *viz.* What shall be said to be a Nuisance to the Highway, I shall consider:

1. What shall be said to be such a Nuisance at Common Law.
2. What by Statute.

Kitch. 34, 35. Sec. 48. As to the first Point, there is no Doubt but that all Injuries whatsoever to any Highway, as by digging a Ditch, or making a Hedge overthwart it, or laying Logs of Timber in it, or by doing any other Act, which will render it less commodious to the King's People, are publick Nuisances at Common Law.

2 Rol. Ab. 137. B. 265. c. 2. Sec. 49. Also it seemeth to be clear, That it is no Excuse for one who layeth such Logs in the Highway, that he laid them only here and there, so that the People might have a Passage by Windings and Turnings through the Logs: Yet it is said to be no Nuisance for the Inhabitants of a Town to unlade Billets, &c. in the Street before their Houses, by reason of the Necessity of the Case, unless they suffer them to continue there an unreasonable Time, after they are unloaded.

2 Rol. Ab. 137. B. 2, 3. Sec. 50. There is no Doubt but that it is a Nuisance at Common Law to erect a new Gate in a Highway, as hath been more fully shewn in the precedent Chapter; also it seemeth clear, That it is a like Nuisance to suffer the Ditches adjoining to a Highway to be foul, by reason whereof it is impaired, or to suffer the Boughs of Trees growing near the Highway, to hang over the Road in such a Manner as thereby to incommode the Passage.

8 H. 7. 5. a. Kitch 34, 35. 8 H. 7. 5. b. Sec. 51. As to the second Point, viz. What shall be said to be a Nuisance to the Highway by Statute, not only all the above mentioned Nuisances, which are such at Common Law, are esteemed also Nuisances by Statute, but there is also one particular Nuisance which is made such by Statute, and doth not seem to be taken Notice of by Common Law, and that is the Drawing of a travelling Carriage with more than five Horses in Length, the Permitting whereof hath occasioned the Carrying of such excessive Loads in such Carriage, that the Weight thereof hath in many Places rendred the Roads unpassable.

As to the seventh general Head of this Chapter, *viz.* How such Nuisances are to be removed and punished, I shall consider the following Particulars:

1. In what Order Hedges and Ditches, adjoining to the Highway, ought to be kept.
2. How far all Trees and Bushes are to be removed from the Highway.
3. In what Manner all other Annoyances obstructing the Highway are to be removed.
4. How far all Persons are punishable for taking away Things made use of for the Benefit of the Highway.
5. How far they may be punished for drawing a Carriage with more than five Horses in Length.

Sec. 52. As to the first Particular, *viz.* In what Order Hedges and Ditches, adjoining to the Highway, ought to be kept; it is said, That he who hath Lands next adjoining to a Highway, is bound of common Right to scowr his Ditches; but it is said, That he who hath Lands next adjoining to such Lands, is not bound by the Common Law so to do, without some special Prescription for that Purpose; and perhaps it is the better Opinion, That he who hath Trees next adjoining to the Highway, and hanging over it to the Annoyance of the People, is bound by the Common Law to lop the same; and it seems clear, That any Person may justify the Lopping such Trees, so far as to avoid the Nuisance.

8 H. 7. 5. a. b.
Kirch. 34. 35
Dol. ca. 26.
H. P. C. 144

Sec. 53. However it is enacted by 5 El. 13. Par. 7. *That the Hays, Fences, Dikes, or Hedges, next adjoining on either Side, to any High or Common faring Way, shall from Time to Time be diked, scowred, repaired, and kept low, by the Owner or Owners of the Ground or Soil, which shall be inclosed with the said Hays, Fences, Dikes, or Hedges aforesaid, &c.*

8 H. 7. 5. a. b.

Sec. 54. And it is farther enacted by 18 El. 10. Par. 5. *That whoever shall not repair, ditch, or scowr, any Hays, Fences, Ditches, or Hedges adjoining to any Highway, or Common faring Way, according to the true Intent of the above mentioned Statute of 5 El. 13. shall forfeit for every such Offence ten Shillings, to be levied by the Surveyors, &c.*

Sec. 55. And it is farther enacted by 3 & 4 W. & M. 12. *If any Owner or Occupier of Lands next adjoining to any Highway, not twenty Foot broad, shall neglect to cleanse or scowr their Ditches, Gutters and Drains, adjoining to the said Highways, or cause the Earth taken out thereof to be carried away, and lay sufficient Trunks, Tunnels, or Bridges, where any Cartways are, into the said Grounds, for the Space of ten Days after Notice thereof given by a Surveyor, &c. every such Offender shall forfeit five Shillings, &c.*

Sec. 56. And it is farther enacted by the said Statute of 3 & 4 W. & M. 12. *That the Possessors of the Land next adjoining to any Highways, where they are not twenty Foot broad, shall from Time to Time, and at all Times, keep their Hedges plasht, cut, or pruned, so as no Tree, Bush, or Shard shall stand or grow in such Highway, nor Bough or Branch be suffered to hang over the same, or any Part thereof; but the said Hedges shall be kept cut and pared right up from the Roots, and not permitted in any sort to spread into or hang over the Highway, or any Part thereof, to the end that there may be a free and clear Passage for the Travellers, and all Sorts of Carriages loaden, without being any ways prejudiced or obstructed by any Hedges, Trees, Boughs, or Branches what-*

soever,

soever, and that the Sun may freely shine into the said Ways, to dry and amend the same.

Sect. 57. Also it is farther enacted by the above mentioned Statute of 18 El. 10. Par. 6. That every Occupier of Lands adjoining to the Grounds adjoining to any Highway, or Common faring Way, where any Ditching or Scouring should or ought to be, as aforesaid, shall from Time to Time, as Need shall require, ditch and scowr in his Grounds so adjoining, whereby the Water conveyed from the said Highway, &c. over the Ground next adjoining, may have Passage over such next Ground so adjoining, on pain of Forfeiture for every Time so offending for every Rod not so ditched and scowred, twelve Pence.

Sect. 58. As to the second Particular, viz. How far all Trees and Bushes are to be removed from the Highway, it appears from the above mentioned Statute of Winchester, Chapter 5. That no small Tree or Bush, whereby a Man may lark to do hurt, ought to be suffered to stand within two hundred Foot of either Side of a Highway leading from one Market-Town to another.

Sect. 59. And it is farther enacted by the said Statute of 5 El. 13. Par. 7. That all Trees and Bushes growing in the Highways, shall be cut down by the Owner or Owners of the Ground or Soil, &c. And it is also enacted by the said Statute of 18 El. 10. Par. 7. That whoever shall not cut down, or keep low, all Trees and Bushes, growing in or next adjoining to any the said Ways, according to the Intent of the above mentioned Statute of 5 El. 13. shall forfeit ten Shillings.

Sect. 60. Also it is enacted by the said Statute of 3 & 4 W. & M. 12. That no Tree, Bush, or Shrub shall be permitted to stand or grow in any Highway not full twenty Foot broad, but the same shall be cut down, grubbed up, and carried away by the Owner or Owners of the Land or Soil, where the same shall stand or grow, within ten Days after Notice to him or them given by the said Surveyors, or any of them, on pain to forfeit for every Neglect, five Shillings, &c.

Sect. 61. As to the third Particular, viz. In what Manner all other Annoyances obstructing the Highway are to be removed; it seems clear, That by the Common Law any one may abate a Nuisance to a Highway, and remove the Materials, but not convert them to his own Use, as hath more fully been shewn in the precedent Chapter; also it seemeth, That an Heir may be indicted for continuing an Incroachment, or other Nuisance to a Highway, begun by his Ancestor, because such a Continuance thereof amounts in the Judgment of Law to a new Nuisance.

1 Jon. 222.

Vide 4 Aff. 3.
17 Ed. 3 9. b.
2 Rol. Ab.
137. B. 4 142.
K. L.

Sect. 62. But the Common Law not having been thought sufficiently to have provided against Mischiefs of that Kind, it was enacted by the above mentioned Statute of 18 El. 10. Par. 7. That no Person, having any Ground adjoining to any Highway, or Common faring Way, leading to any Market-Town, shall cast or scowr any Ditch, and throw or lay the Soil thereof into the Highway, and suffer it to lie there by the Space of six Months, to the Annoyance of the said Highway, or Common faring Way, upon pain of Forfeiture for every Load of Soil so cast into the Highway, or Common faring Way, in Ditching or Scouring, twelve Pence: And that the Surveyors may make Sluices thro' Banks occasioned by the casting such Soil into any Highway, &c.

Sect. 63. And it is farther enacted by the above mentioned Statute of 3 & 4 W. & M. 12. That no Person shall lay in any Highway, not twenty Foot broad, any Stone, Timber, Straw, Dung, or other Matter, whereby the same shall be any ways obstructed or annoyed, on Pain to forfeit for every such Offence, five Shillings, &c. And it is farther enacted, That if any Timber, Stone, Hay, Straw, Stubble, or other Matter for the making of Dung, or on any other Pre-

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tence whatsoever, shall be laid in any Highway, as aforesaid, whereby the same shall be any Ways obstructed or annoyed, the Owners or Possessors of the Lands next adjoining to the same, shall clear the said Way by removing the said Timber, Stone, Hay, Straw, Dung, or other Matter, and have, take, and dispose of the same to his and their own Use; and if any such Owner or Occupier of Lands next adjoining to the said Highways, shall neglect to clear the said Ways of the said Nuisances, he shall forfeit five Shillings, &c.

SecT. 64. As to the fourth Particular, viz. How far all Persons are punishable for taking away Things made Use of for the Benefit of Highways, it is enacted by the above mentioned Statute of 7 & 8 W. 3. 29. That every Person who shall pull up, cut down, or remove, any Post, Block, great Stone, Bank of Earth, or other Security, which was set up, placed, and made, for securing any Horse, or Foot Causey, in a publick Highway, from Waggon, Wains, and Carts, shall upon Complaint to any Justice of the Peace or Division where such Offence shall be proved by the Oath of one credible Witness, &c. forfeit twenty Shillings, one Moiety thereof to the Surveyors, &c. and the other Moiety to him that shall discover the same.

SecT. 65. As to the fifth Particular, viz. How far Persons may be punished for drawing a Carriage with more than five Horses in Length, it is enacted by the above mentioned Statutes of 22 Car. 2. 12. Par. 6, 7. and 7 & 8 Will. 3. 29. and also by 6 Annæ 29. and 9 Annæ 18. and 1 Geor. 1. 12. That no travelling Waggon, Wain, Cart, or Carriage, wherein any Burthens, Goods and Wares shall be carried and drawn, (other than such Carts and Carriages as shall be employed in or about Husbandry and Manuring of Land, and in carrying of Hay, Straw, Corn^a unthrashed, Chalk, Timber for Shipping, ^a 1 Geo. 11. Materials for Building, Stones of all Sorts, or such Ammunition or Artillery as should be for the Service of his Majesty, his Heirs or Successors) shall at any one Time be drawn, or go in any common or publick Highway or Road, with above five Horses, Oxen, or Beasts in Length, (except^b only where such five ^b 6 Annæ 29. Horses shall not be sufficient to draw such Cart or Waggon up any steep Hill, ^c 9 Annæ 18. or out of any foul Place, in which Case it shall be lawful to join any Horses from another Cart or Waggon then travelling that Road, with the Consent of the Owner or Driver of such Cart or Waggon, to help such insufficient Horses up such steep Hill, or out of such foul Place) on Pain of^c forfeiting five Pounds, one Moiety ^c 6 Annæ 29. to the Surveyor of the Highways of the Place where such Offence shall be committed, for the Repairs of the said Highways, and the other Moiety to him who shall discover, and prosecute for the same, to be levied by Distress of all, or any of the Horses, Oxen, or Beasts of any Person offending against the said Statutes, which^d Distress may be made by any Person whatsoever, (without any War- ^d 9 Annæ 18. rant, as it seemeth from 9 Annæ 18.) And the Beasts so distrained are to be delivered forthwith to the Surveyor of the Highways, or other Parish Officer, of the Place where the Offence shall be committed; and if the said Penalty be not paid within three Days, the said Surveyor or other Parish Officer, may, by Warrant of one Justice of the Peace, sell the said Distress, and deliver the Money raised thereby to the said Justice, who is to distribute the Penalties in the Manner above directed, rendering the Overplus to the Owner, the Charges being first deducted; or if the Offender shall immediately pay the said Penalty to the Person who shall make such Distress, or to the Surveyor, or other Parish Officer, where the Offence shall be committed; then the Person so receiving the same, shall deliver it to the next Justice of the Peace, to be by him distributed, as aforesaid. Provided that if any Person shall refuse or neglect to carry any of the said Beasts by him so distrained, to the Surveyor, or other Parish Officer, as aforesaid, he shall forfeit twenty Pounds, to be levied of his Goods by Warrant of one Justice of the Peace, &c. And if any Surveyor, or other Parish Officer, shall refuse or neglect

See the Statute of 5 Geo. 12.

^a 1 Geo. 11.

^b 6 Annæ 29. ^c 9 Annæ 18.

^c 6 Annæ 29.

^d 9 Annæ 18.

neglect to deliver any Sum of Money, or Penalty by him received, to the said Justice, he shall forfeit twenty Pounds, to be levied, &c. as aforesaid.

Sect. 65. And it is farther enacted by the said Statute of 9 Annæ 18. That if any Person employed by any Carrier, or other Person subject to the Penalties mentioned in the said Act, shall drive, or assist in the Driving of any travelling Waggon, &c. with more than six Horses, &c. the Person so offending shall forfeit five Pounds, to be levied and disposed of in like Manner as the Forfeitures before mentioned are directed and appointed.

Sect. 67. As to the eighth general Head of this Chapter, viz. In what Manner those, who are charged with any Offence relating to the Highway, are to be proceeded against, it is enacted by the above mentioned Statute of 2 & 3 Ph. & Mar. 8. That the Steward of every Leet may enquire by the Oaths of the Suitors of all Offences which shall be committed within the Leet, against every Article of the said Statute, and to assess such Fines and Amerciaments for the same, as shall be thought meet by the said Steward: And in Default of such Inquiry or Presentment, the Quarter-Sessions of every Place may inquire of the same Offences which shall be committed within the Limits of their Commission, and to assess such Fines as they, or two of them, whereof one to be of the Quorum, shall think meet: And the Steward of every Leet shall make Estreats indented of all the Fines, Forfeitures, and Amerciaments, for the Defaults presented before him, and shall deliver the one Part thereof sealed and signed by him to the Bailiff, and High Constable of every Hundred, Rape, Lathe, or Wapentake, wherein the Default shall be presented, and the other Part to the Constable and Church-wardens of the Parish wherein the Defaults were made; the same to be yearly delivered within six Weeks after the Feast of Michaelmas: And the Clerk of the Peace shall make the like Estreats indented of the Fines, &c. for the Defaults presented before the Justices of the Peace, &c. The which Estreats shall be sufficient Warrant to the said Bailiff, or chief Constable, to levy the said Fines, &c. by Way of Distress: And if no sufficient Distress can be found by the said Bailiff or Chief Constable; or if the said Offender shall obstinately refuse to pay the said Fine, &c. and do not pay the same within twenty Days after a lawful Demand of the same by the said Officer, he shall forfeit the double Sum that he should before have paid.

Sect. 68. And it is farther enacted by the said Statute, That every of the said Bailiffs and Head Constables, shall at least once every Year, betwixt the first Day of March and the last Day of April, make a true Account and Payment of all such Sums of Money, (to the Constable and Church-wardens of every Parish wherein the Offences were committed, or to two of them) as he shall have collected upon any of the said Estreats, on Pain of, to forfeit for every Time he shall not so do, forty Shillings.

Sect. 69. And it is farther enacted by the said Statute, That all Fines, &c. which shall be due for any Offence against the Purview thereof, shall be to the Church-wardens of every Parish wherein the Offences shall be committed, to be bestowed of the Highways in the said Parishes: And the said Church-wardens shall have Authority to call the said Bailiff and Head Constable to account, before the Justices of Peace, or two of them, whereof one to be of the Quorum, by Bill, Information, or otherwise. The which Justices shall have Authority to take the said Account, and to commit the said Bailiff and Head Constable to Prison till he shall pay all such Arrearages as shall be adjudged by the said Justices; and every of the said Bailiffs and Head Constables upon their Accounts shall have allowed for every Pound he shall collect and pay, Eight-pence for his own Pains, and Twelve-pence for the Fees of the Clerk of the Peace, or Steward of the Leet, for the Estreats indented of every several Parish that they shall deliver as is aforesaid;

And the Successors of every Church-warden shall have the like Action of Account against their Predecessors, as is before appointed against the Bailiff.

SECT. 70. And it is enacted by the above mentioned Statute of 5 El. 13. Par. 8. That every Surveyor shall within one Month after any Default or Offence against the said Statute of 2 & 3 Ph. & Mar. 8. or the said Statute of 5 El. 13. present every such Offence to the next Justice of Peace, on Pain to forfeit for every such Offence in such Sort, not by him presented, forty Shillings: And that every such Justice of Peace to whom any such Offence shall be so presented, shall certify the same Presentment at the next general County Sessions, on pain to forfeit for not certifying of every such Presentment of every such Offence, five Pounds; and that the Justices of Peace of every County, where the said Offences shall be committed, may inquire thereof at their Quarter-Sessions, and assess such Fines for the same, as they or two of them, whereof one to be of the Quorum, shall think meet.

SECT. 71. And it is farther enacted by the said Statute, Par. 9. That every Justice of Peace may of his own proper Knowledge, in the open General-Sessions, make Presentment of any Highway not well and sufficiently repaired and amended, or of any other Default or Offence, contrary to either of the said Statutes of 2 & 3 Ph. & Mar. 8. or 5 El. 13. And that every Presentment made by any such Justice of Peace, upon his own Knowledge, as is aforesaid, shall be as good, and of the same Force, Strength, and Effect in the Law, as if the same had been presented, found, and adjudged, by the Oath of twelve Men: And that for every such Default so presented, as is aforesaid, the Justices of Peace of the said County shall immediately, at the said General-Sessions, have Authority to assess such Fines, as to them, or two of them, whereof the one to be of the Quorum, shall be thought meet: Saving to every Person that shall be touched by any such Presentment his lawful Traverse to the same Presentment, as he might have upon any Indictment of Trespass, or forcible Entry, by the Laws of this Realm, before the making of this Statute.

SECT. 72. It hath been holden in the Exposition of this Clause, That the Party against whom such a Presentment shall be made, cannot take any Traverse to the Want of Repair of such Highway; but it is agreed, That he may plead that some other Person ought to repair the same, and traverse his own Obligation to do it. Neither can I see upon what Reason the former Opinion is grounded, that he cannot traverse the Want of Repair of such Highway, for since the Statute expressly saves to every Person who shall be touched by any such Presentment, his lawful Traverse to the same, as he might have to an Indictment of Trespass or forcible Entry; and since it seems clear, That every Defendant to any such Indictment may traverse the whole Matter alledged against him, as hath been shewn more at large, Chap. 64. SECT. 57. why may he not as well have the same Benefit in the present Case? And tho' the Record of a Justice of Peace acting by Force of any Statute, as a Judge, be not traversable; yet it seems hard by such a general Rule, to make any Record not traversable, which by the express Words of the Statute, which authorizes the making of it, is allowed to be traversable: It is true indeed, That a Presentment in a Court Leet is not traversable, unless it touch the Party's Freehold; but I do not see why such a Presentment in Pursuance of this Statute should have the like Privilege since the Statute hath no Mention of such Presentments in Courts-Leet, but gives the like Traverse as is allowed by Law upon any Indictment of Trespass, &c.

SECT. 73. It is farther enacted by the said Statute of 5 El. 13. Par. 10. That all such Fines, &c. to be assessed by the said General Sessions, shall be estreat-

ed and levied in such Manner, and employed to such Uses and Intents, as in the said Statute of 2 & 3 Ph. & Mar. are appointed.

Señ. 74. And it is farther enacted by the above mentioned Statute of 18 El. 10. Par. 8. That all Justices of Assize, Justices of Oyer and Terminer, and Justices of the Peace in their Sessions, and Stewards of Leets in their Leets, shall hear and determine every Offence, Matter, and Cause, that shall grow, come, or rise, by Reason of the said Statute.

Señ. 75. Also it is enacted by the above mentioned Statute of 22 Car. 2. 12. Par. 9. That if any Person shall fail in his respective Days Labour in every Year towards the Repairing of the Highways, or neglect to send his respective Carriages, &c. required by Law; the Surveyors ought to make Complaint thereof to the next Justices of the Peace, who ought upon Proof by Oath of one credible Witness, to levy by Distress and Sale and Goods, &c. for every Day-Labourer failing, as is aforesaid, one Shilling and six Pence; and for every Man and Horse, that shall make Default three Shillings; and for every Cart with two Men, ten Shillings, for every respective Day wherein they shall make Default; which Penalties shall be employed towards the Repairs of the Highways, &c.

Señ. 76. And it is farther enacted by the same Statute, Par. 10. and 3 & 4 Will. & Mar. 12. That the Assessments to be made, in Pursuance of these Statutes, for the Repairs of the Highways, shall be levied by Distress and Sale of the Goods of every Person so assessed, not paying the same within ten Days after Demand, rendering the Overplus to the Owner, the necessary Charges being first deducted.

Sect. 77. It will be needless to shew in this Place in what Manner the several Penalties for other Offences against the above mentioned Statutes concerning the Highways, are to be recovered, because the same may appear from the foregoing Part of this Chapter, wherein the several Clauses of the said Statutes relating to the said Offences are set forth.

Señ. 78. It is enacted by the said Statute of 22 Car. 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 such Presentment or Indictment shall be removed by Certiorari, or otherwise, out of the said County, till such Indictment or Presentment be traversed, and Judgment thereupon given.

*Señ. 2. Ch. 27
S. 37. 46, 47.*

Señ. 79. And it is farther enacted by the said Statute of 3 & 4 W. & M. 12. That all Matters concerning Highways, Causeys, Pavements, and Bridges, mentioned in the said Act, shall be determined in the County where the same do lie, and not elsewhere; and that no Presentment, Indictment, or Order, made by vertue of the said Act, shall be removed by Certiorari out of the said County into any other Court.

*Queen and
Bramby.
Mic. 10 Ann.*

Señ. 80. Yet it hath been resolved, That if the Quarter-Sessions, under Pretence of the Jurisdiction given them by these Statutes, take upon them to do a Thing manifestly exceeding their Authority, as to make an Order on Surveyors of the Highways to make up their Accounts before a special Sessions, their Proceedings may be removed by Certiorari into the King's Bench, and there quashed; for the Quarter Sessions have no manner of Power given them to intermeddle originally with such Accounts, but only by Way of Appeal.

Sect. 81. It is enacted by the said Statute of 3 & 4 W. & M. 12. That no Person shall be punished for any Offence against the said Act, unless such Offender be prosecuted for the same within six Months after the Offence committed, and that no Person who shall be punished for any Offence by vertue of the said Act, shall be punished for the same Offence by vertue of any other Act, or Law whatsoever.

Sect. 82. As to the ninth general Head of this Chapter, *viz.* In what manner Persons proceeded against for any of the above mentioned Offences may defend themselves; it is enacted by the said Statute of 3 & 4 W. & M. 10. *That if any Person shall find himself aggrieved with an Assessment or Rate, or other Act by the said Justices of Peace, the general Quarter-Sessions of the Peace, may take such Order therein, as to them shall be thought convenient, and the same to conclude and bind all the said Parties.*

Sect. 83. Also it seems to be implied in the Construction of these as well as of all other Penal Statutes, That no one ought to be convicted of any Offence against them, without having Notice of the Accusation made against him, and an Opportunity of defending himself. And therefore I shall take it for granted, that generally no one ought to be punished for any of the above mentioned Offences, without being called upon to answer for himself, and having Liberty to traverse the Matters alledged against him; it is true indeed, that it is generally holden, That no Traverse can be taken against a Presentment by a Justice of Peace of his own Knowledge, as to the Want of Repair; yet this Opinion seems justly questionable for the Reasons alledged in the sixty-eighth Section of this Chapter.

Vide supra, Ch. 64. Sect. 57; 58, 59.

Sect. 84. However it is certain, That in all other Cases, whoever is indicted or presented in any Court, except a Court-Leet, for any Offence relating to the Highways, may traverse the whole Matter alledged against him in such Indictment or Presentment; but it seemeth to be agreed, That he, who is presented for such an Offence in a Court-Leet, can only traverse it so far as it concerns his Freehold, as by charging him with being bound to such Repairs in respect of the Tenure of his Lands, &c. for which Purpose it is certain, that he may remove it by *Certiorari* into the King's Bench, and there traverse it; also there is no Doubt, but that after Conviction, or upon a Demurrer, or Confession, any one may take Exceptions to any such Indictment or Presentment in any Court for the Want of legal Form; but the Court in Discretion will very rarely suffer a Man to take such Exceptions, before such Conviction or Confession, without a Certificate and Affidavit, that the Ways are in good Repair.

5 H. 7. 4. 4. Dy. 14. Pl. 64. Finch 386.

And. 234. 1 Keb. 256, 291, 829. 2 Keb. 715, 728.

Sect. 85. Therefore for the better Understanding in what Cases it may be safe to demur to, or confess an Indictment or Presentment of this Kind, I shall lay down the following Rules concerning them.

Sect. 86. I. That it is ^a safest in every such Indictment to shew both the Place from which, and also the Place to which the Way supposed to be out of Repair doth lead, yet Exceptions for Want of such Certainty, have sometimes been ^b disallowed; however it seems certain, That there is no Necessity to shew ^c that a Highway leads to a Market-Town, because every Highway leads from Town to Town.

22 Rol. Ab. 81. Pl. 18. Palm 420. 2 Keb. 715, 728. 3 Keb. 89, 644.

Sect. 87. II. That it is necessary ^d in every such Indictment expressly to shew in what Place the Nuisance complained of was done, for which ^e Cause an Indictment for stopping a Way at *D.* leading from *D.* to *C.*, is not good, for it is impossible that a Way leading from *D.* should be in *D.* and no other Place is alledged.

1 Brown 6. c Palm. 389. 2 Ro Re. 412. d 3 Keb 644. e 2 Rol. Ab. 81. Pl. 18.

Sect. 88. III. That every such Indictment ought also certainly to shew to what Part of the Highway the Nuisance did extend as by shewing how many Foot in Length, and how many Foot in Breadth it contained, or otherwise the Defendant will neither know of the Certainty of the Charge, against which he is to make his Defence, neither will the Court be able from the Record to judge of the Greatness of the Offence, in order to assess a Fine answerable thereunto; and upon this Ground it

Cro. Ja. 324

2 Rol. Ab. 80. Pl. 14. 81. hath Pl. 16.

hath been adjudged, That an Indictment for stopping a certain Part of the King's Way at K. is naught, for the Uncertainty thereof: Also it hath been resolved, That the Place wherein such a Nufance is alledged, is not sufficiently afcertained in such an Indictment, by fhewing that it contained fo many Foot in Length, and fo many in Breadth, by Eftimation.

2 Rol. Ab 81
Pl. 17.

Salk. 359.
6 Mod. 255.
256.
2 Gro. El. 63.
2 Ser. 2 R. A.
81 C.
1 Vent. 278.
Poph. 206.
2 Keb. 728.
1 Vent. 208.
3 Keb. 28.
2 Nov. 91.
3 Keb. 855.
But the Contra-
ry was adjudg-
ed Pasch. 5 Geo.
between the
King and Cor-
rack, according
to Vent. 331
Vide 2 Keb.
514.
Raym. 182.
3 Keb. 58.

Sett. 89. IV. That every fuch Indictment muft fhew, That the Way wherein a Nufance is alledged, is a Way common to all the King's People for which caufe it hath been resolved, That an Indictment for a Nufance to a ^a Horfe-way, without fhewing that it is a Common Way, is naught; and upon the fame Ground it feemeth alfo, That an Indictment for a Nufance to a common Foot way to the Church of D. for ^b all the Parifhioners of D. is not good; yet it ^c feems, That if thofe laft Words, *viz. For all Parifhioners of D.* had been omitted, fuch an Indictment might be maintained.

Sett. 90. V. That it is not fafe in an Indictment againft a common Perfon for not repairing a Highway, which he ought to have done in refpect of the Tenure of certain Lands, barely to fay that he was bound to repair it, *ratione Tenuræ Terræ*, without adding ^d *ſue*; alfo it is ſaid, That in an Indictment againft a ^e Biſhop, &c. for not repairing a Highway, in refpect of certain Lands, it ought to be fhewn in what Capacity he ought to repair it, becauſe otherwiſe it cannot be known in what Capacity the Proceſs is to be awarded againft him.

Sett. 91. VI. That in every fuch Indictment the Fact alledged againft the Defendant muſt be expreſſed in fuch proper Terms, that it may clearly appear to the Court to have been a Nufance; and for this caufe it hath been resolved, That a Preſentment for diverting a Highway is not good, becauſe a Highway cannot be diverted, but muſt always continue in the ſame Place where it was, howſoever it be obſtructed, and a new Way made in another Place.

1 And. 234.
Poph. 206.

Sett. 92. VII. That an Indictment againft a Man for ſtopping a Highway in his own Land is good, without laying the Offence done *Vi & Armis*. Alfo it is ſaid, That a Preſentment that a Highway in ſuch a Place is decayed by the Defaults of the Inhabitants of ſuch a Town is good without naming any Perſon in Certainty. But it hath been adjudged, That an Indictment againft particular Perſons muſt ſpecially charge them every one; for which Caufe it hath been resolved, That an Indictment againft ſeveral for not repairing their Streets, that they *& eorum interque*, did not repair them, is not good.

2 R. A. 70.

2 R. A. 81.
Pl. 6, 7.

1 Syd. 140.

Sett. 93. VIII. That the Defendants ought not to plead *quod non debent reparare*, without fhewing who ought.

Salk. 358.
6 Mod. 163.

Sett. 94. That the Defendants ſhall not be diſcharged by ſubmitting to a Fine, but a *Diſtringas* ſhall go in *infinutum* till they repair.

C H A P. LXXVII.

Of Nufances relating to Bridges.

AN D now I am in the ſecond Place to conſider Nufances relating to Bridges in particular; for the better Underſtanding whereof, I ſhall examine:

1. How publick Bridges are to be repaired by the Common Law.
2. How by the Statute.

As to the first Point, I shall consider,

1. In what Manner, and by whom such Bridges are to be repaired by Common Law.
2. In what Manner Persons bound to such Repairs are to be proceeded against.

Sect. 1. As to the first of these Particulars, it seemeth to be clear, That those who are bound to repair such Bridges, must make them of such Height and Strength, as shall be answerable to the Course of the Water, whether it continue in the old Chancel, or make a new one; and that they are not punishable as Trespassers, for entering on any adjoining Land, for such Purpose, or for laying thereon the Materials requisite for such Repairs. Also it seemeth to be clearly^a settled, That of common Right the Charge of repairing all common Bridges, lies upon the County wherein they are, unless Part thereof be within a Franchise; in which Case it is said, That so much as is within the Franchise shall be repaired by those of the Franchise.

Sect. 2. Also it seemeth to be^b certain, That such Charge may be cast upon a Corporation-aggregate, either in respect of a special Tenure of certain Lands, or in respect of a special Prescription, and that it may be cast upon any other Persons by reason of such a special Tenure, as hath been shewn more at large under the second general Head of the precedent Chapter. But it is^c said, That a Man shall not be bound to repair a new Bridge built by himself, for the common Good: But that the County shall be bound to repair it, if it become of publick Convenience.

Sect. 3. As to the second Particular, *viz.* In what Manner Persons bound to such Repairs, are to be proceeded against; it seemeth to be clear, That any particular Inhabitant or Inhabitants of a County, or Tenant or Tenants of Land charged to the Repairs of such a Bridge, may be made Defendants to an Indictment for not repairing it, and be liable to pay the whole Fine assessed by the Court for the Default of such Repairs, and shall be put to their Remedy at Law for a Contribution from those who are bound to bear a proportionable Share in the Charge, for the Necessity of the Case requires the greatest Expedition in Cases of this Nature.

Sect. 4. Also it hath been^c resolved, That it is not sufficient for the Defendants to an Indictment for not repairing a Bridge, to excuse themselves, by shewing either that they are not bound to repair the Whole, or any Part of the Bridge, without shewing what other Person is bound to repair the same; and it is said, That in such Case the whole Charge shall be laid upon such Defendants, by reason of their ill Plea.

Sect. 5. It is said, That where such Defendants plead, that *A. B.* ought to repair the Bridge mentioned in the Indictment, and take a Traverse to the Charge against themselves, the Attorney-General in this special Case may take a Traverse upon a Traverse, and insist that the Defendants are bound to the Repairs, and traverse the Charge alledged against *A. B.* and that an Issue ought to be taken on such second Traverse; and that the Attorney-General may afterwards surmise, that the Defendants are bound to repair it, and that the whole Matter shall be tried by an indifferent Jury, &c.

43 Aff. Pl. 47.
Dalr. ca. 14.

^a 2 Inst. 704.
H. P. C. 143.
Cro. Ca. 365.
6 Mod. 307.
Salk. 358, 359.

^b 2 Inst. 700,
701.
H. P. C. 143.
Dalr. ca. 14.

^c 2 Inst. 701.
6 Mod. 307.
Salk. 359.
See Cro. Ca.
365.

^d 1 Jon. 273.
Poph. 192.
6 Mod. 307.
Salk. 358.

^e 2 Levin. 112.
Poph. 192.
43 Aff. Pl. 37.

43 Aff. Pl. 37.
Bro. Presencement 23 and 29.
See 1 Syd. 149.

1 Levin. 114.

6 Mod. 307.

Sect. 6. It seems that no Inhabitant of a County ought to be a Juror for the Trial of an Issue, whether the County be bound to such Repairs or not, but it is said that he may be a good Witness.

Sect. 7. As to the second Point, viz. In what Manner such Bridges are to be repaired by the Statute, it is enacted by 22 H 8. 5. *That the Justices of Peace in every Shire of this Realm, Franchise, City, or Borough, or four of them at the least, whereof one to be of the Quorum, may inquire, hear, and determine, in their General Sessions, of all manner of Annoyances of Bridges broken in the Highways, to the Damage of the King's liege People, and to make such Process and Pains upon every Presentment afore them, for the Reformation of the same, against such as owen to be charged for the Making or Amending of such Bridges, as the King's Justices of his Bench use commonly to do; or as it shall seem by their Discretions to be necessary and convenient for the speedy Amendment of such Bridges.*

Sect. 8. And it is farther enacted, Par. 2 & 3. *That where it cannot be known and proved what Hundred, Riding, Wapentake, City, Borough, Town or Parish, nor what Person certain, or Body Politick, ought of Right to make such Bridges decayed, by reason whereof such decayed Bridges, for Lack of Knowledge of such as owen to make them, for the most Part lie long without any Amendment, to the great Annoyance of the King's Subjects, in every such Case, the said Bridges, if they be without City or Town-corporate, shall be made by the Inhabitants of the Shire or Riding, within which the said Bridge decayed shall happen to be: And if it be within any City or Town-corporate, then by the Inhabitants of every such City or Town-corporate wherein such Bridges shall be. And if Part of any such Bridges so decayed happen to be in one Shire, Riding, City, or Town corporate, and the other Part thereof in another Shire, Riding, City, or Town-corporate, or if Part be within the Limits of any City or Town corporate, and Part without, or Part within one Riding, and Part within another, that then in every such Case the Inhabitants of the Shires, Ridings, Cities, or Towns-corporate, shall be charged and chargeable to amend, make, and repair such Part and Portion of such Bridges so decayed, as shall lie and be within the Limits of the Shire, Riding, City, or Town-corporate, wherein they be inhabited at the Time of the same Decays.*

Vide 1 Keb.
422.

Sect. 9. And it is farther enacted, Par. 4. *That in every such Case where it cannot be known and proved what Persons, Lands, Tenements, and Bodies-politick owen to make and repair such Bridges, that for speedy Reformation and Amending of such Bridges, the Justices of Peace within the Shires or Ridings wherein such decayed Bridges been out of Cities and Towns-corporate; and if it be within Cities, or Towns-corporate, then the Justices of Peace within every such City or Town-corporate, or four of the said Justices at the least, whereof one to be of the Quorum, within the Limits of their several Commissions and Authorities, may call before them the Constables of every Town and Parish, being within the Shire, Riding, City, or Town-corporate, as well within Liberty as without, wherein such Bridges or any Parcel thereof shall happen to be, or else two of the most honest Inhabitants within every such Town or Parish in the said Shire, Riding, City or Town-corporate, by the Discretion of the said Justices of Peace, &c. And at and upon the Appearance of such Constables or Inhabitants, the said Justices of Peace, &c. with the Assent of the said Constables or Inhabitants, may tax, and set every Inhabitant in any such City, Town or Parish, within the Limits of their Commissions and Authorities, to such reasonable Aid and Sum of Money, as they shall think by their Discretions convenient and sufficient for the Repairing, Re edifying, and Amending of such Bridges, and after such Taxation made, the said Justices shall cause the Names and Sums of every particular Person*
so

so by them taxed, to be written in a Roll indented. And shall also have Power and Authority to make two Collectors of every Hundred, for Collection of all such Sums of Money by them set and taxed, which Collectors receiving the one Part of the said Roll indented, under the Seals of the said Justices, shall have Power and Authority to collect and receive all the particular Sums of Money therein contained, and to distrain every such Inhabitant as shall be taxed, and refuse Payment thereof, in his Lands, Goods and Chattels, and to sell such Distress, and of the Sale thereof retain and perceive all the Money taxed, and the Residue, (if the Distress be better) to deliver to the Owner thereof: And that the same Justices, or four of them, within the Limits of their Commissions and Authorities, may also name and appoint two Surveyors, which shall see every such decayed Bridge repaired, and amended from Time to Time, as often as need shall require, to whose Hands the said Collectors shall pay the said Sums of Money, taxed, and by them received: And that the Collectors and Surveyors, and every of them, and their Executors and Administrators, and the Executors and Administrators of them, and every of them, from Time to Time, shall make a true Declaration and Accompt to the Justices of Peace of the Shire, Riding, City, or Town-corporate, wherein they shall be appointed Collectors or Surveyors, or to four of the same Justices, whereof one to be of the Quorum, of the Receipts, Payments, and Expences of the said Sums of Money: And if they, or any of them refuse that to do, that then the same Justices of Peace, or four of them, from Time to Time by their Discretions, shall have Power and Authority to make Process against the said Collectors and Surveyors, and every of them, their Executors and Administrators, and the Executors and Administrators of every of them, by Attachments under their Seals, returnable at the General-Sessions of Peace: And if they appear, then to compel them to accompt, as is aforesaid; or else if they or any of them refuse that to do, then to commit such of them as shall refuse, to ward, there to remain without Bail or Mainprize, till the said Declaration and Accompt be truly made.

Sect. 10. And it is farther enacted, Par. 5. That where any Bridge or Bridges lien in one Shire or Riding, and such Persons Inhabitants, Bodies Politick, Lands or Tenements, which owen to be charged to the Making and Amending of such Bridges, lien and abiden in another Shire or Riding, or where such Bridges been within any City, or Town-corporate, and the Persons Inhabitants, Bodies Politick, Lands, or Tenements, that owen to make or repair any such Bridges, lien and been out of the said Cities, and Town-corporate, in every such Case the Justices of Peace of the Shire, City, or Town-corporate, within which such decayed Bridges, or any Part thereof, shall happen to be, shall have Power to inquire, hear, and determine all such Annoyances, being within the Limits of their Commissions and Authorities. And if the Annoyance be presented, then to make Process into every Shire within this Realm, against such as owen to make, or amend any such Bridges so presented before them to be decayed, to the Annoyance, and Let of the Passage of the King's Subjects, and to do further in every Behalf in every such Case, as they might do by Authority of the said Act, in Case that the Persons, &c. which owen to be charged to the Amending or Making of such Bridges, &c. were in the same Shire, &c. where such Annoyance shall happen to be. And that all Sheriffs, and Bailiffs of Liberties and Franchises, shall truly serve and execute such Process as shall come to their Hands from the said Justices of Peace, afore whom any Presentment shall be had for any such Annoyance, according to the Tenor and Effect of the said Process to them directed, &c. on Pain to make such Fine as shall be set on them by the Discretion of the said Justices.

Sect. 11. But it is provided, Par. 6. That nothing in the said Act contained shall be prejudicial to the Liberties of the five Ports, or Members of the same: And for Reformation of Annoyance of Bridges within the said Ports and Mem-

Members: It is farther enacted, Par. 7. That the Warden, Majors, and Bailiffs elected, and Jurates of the same Ports, and every of them, have Power and Authority to inquire, hear, and determine all manner of common Annoyances of Bridges within the same Ports and Members, and to make such Process, Pains, Taxations, and all other Things within the same Ports and Members, as the Justices of Peace may do in other Shires or Places out of the same Ports, by vertue of the said Act in every Behalf.

Señ. 12. And it is farther enacted, Par. 8. That the said Justices, &c. may allow such reasonable Costs and Charges to the said Surveyors and Collectors, as by their Discretion shall be thought convenient.

Señ. 12. And it is farther enacted, Par. 9. That such Part and Portion of the Highways in every Part of this Realm, as well within Franchise as without, as lie next adjoining to any Ends of any Bridges within this Realm, distant from any of the said Ends by the Space of three hundred Foot, be made, repaired, and amended as often as need shall require; and that the Justices of Peace, in every Shire of this Realm, Franchise, City, or Borough, or four of them at the least, whereof one to be of the Quorum, within the Limits of their Commissions and Authorities, may inquire, hear, and determine in their General-Sessions, all manner of Annoyances of and in such Highways, so being and lying next adjoining to any Ends of Bridges within this Realm, distant from any one of the Ends of such Bridges three hundred Foot, and to do in every Thing concerning the Making, Repairing, and Amending such Highways, &c. in as large and ample Manner as they might and may do, to and for the Making, Repairing, and Amending of Bridges, by vertue of the said Act.

In the Construction of this Statute the following Opinions have been holden;

2 Inst. 701.
Salk. 359.

Señ. 14. I. That no private Bridges are within the Purview thereof, but only such as are common in the Highways, where all the King's liege People have, or may have Passage.

2 Inst. 701,
702.

Señ. 15. II. That unless the Justices of Peace of a County, or Town, &c. be four in Number, and one of them of the Quorum, they have no manner of Jurisdiction by vertue of this Statute; but it is said, That the Justices of Peace of the County, in which such Town, being not a County of it self, and wanting such a Number of Justices, shall lie, may by vertue of the first Clause of the Statute, determine all Annoyances of Bridges within such Town, &c. if it be known what Persons in certain are bound to repair the same; But if it be not known, it seems that such Annoyances are left to the Remedy of the Common Law, because the Clause which in such Case authorizes the Justices of Peace to tax all the Inhabitants, seems expressly to confine the Power of taxing the Inhabitants of such Towns to their own Justices, &c.

2 Inst. 704.

2 Inst. 703.

Señ. 16. III. That all Housholders dwelling in any County, or Town, &c. whether they occupy any Lands or not; and also all Persons who have Lands in their own Possession or Manurance, whether they dwell in the same County, &c. or not; and also all Bodies Politick, either residing in, or having Lands in their own Hands in a County, &c. are liable to be taxed as Inhabitants, within the Meaning of the Statute.

2 Inst. 704.
Vide 1 Kcb.
96.

Señ. 17. IV. That the Taxation to be made in Pursuance of the Statute ought to be assessed distinctly on each Inhabitant, and not on a whole Hundred, Parish, or Town in general.

Señ. 18. V. That all Privileges or Exemptions and Discharges from Contribution to the Repairs of decayed Bridges, whether such Exemptions

tions were originally derived from Charter or Act of Parliament, or any other Foundation whatsoever, are taken away by the express Words of the Statute, *That the Justices, &c. shall tax and set every Inhabitant.*

Sect. 19. It hath been questioned whether a Borough which hath no Bridge within its own Limits, be not liable to contribute to the Repairs of a County-Bridge.

C H A P. LXXVIII.

Of Nuisances relating to publick Houses.

FOR the better Understanding of Nuisances relating to publick Houses, I shall consider:

1. In what Manner they are prevented and restrained by the Common Law.
2. In what Manner by the Statute.

Sect. 1. As to the first Point it seems to be agreed, That the Keeper of an Inn may by the Common Law be indicted and fined, as being guilty of a publick Nuisance, ^a if he usually harbour Thieves, or Persons of scandalous Reputation, or ^b suffer frequent Disorders in his House, or take exorbitant Prices, or set ^c up a new Inn in a Place, where there is no Manner of Need of one, to the Hindrance of other ancient and well governed Inns, or ^d keep it in a Place in respect of its Situation, wholly unfit for such a Purpose.

Sect. 2. And it seems also to be clear, That if one who keeps a common Inn, refuse either to receive a Traveller as a Guest into his House, or to find him Viſuals or ^e Lodging, upon his tendring him a reasonable ^f Price for the same, he is not only liable to render ^g Damages for the Injury in an Action on the Case at the Suit of the Party grieved, but may also be ^h indicted and fined, at the Suit of the King; also it is said, That he may be compelled by the Constable ⁱ of the Town to receive, and entertain such a Person as his Guest, and that it is no way ^k material whether he have any Sign before his Door or not, if he make it his common Business to entertain Passengers.

Sect. 3. It seems to have been always clearly ^l agreed, That he who has an Inn by Prescription, may lawfully enlarge it upon the same Land which has been used with it, either by erecting new Buildings thereon, or turning Stables into Chambers of Entertainment, and that he shall have the same Privilege in such new Parts of his House as in any of the old.

Sect. 4. Also it seems to be ^m settled at this Day, That any Person may lawfully set up a new Inn, unless it be inconvenient to the Publick in some of the Respects taken Notice of in the first Section, and that he has no Need of any Licence from the King for this Purpose, for the Keeping of an Inn is no Franchise, but a lawful Trade, open to every Subject. But if an Inn degenerate into an Ale-house, by suffering disorderly Tipling, it shall be deemed as such.

^a Inst. 704.^b 1 Keb. 68.^a Palm. 374.^a Ro. Re. 345.^b H. P. C. 146.

Cro. Ca. 549.

Dale. ca. 7.

^c H. P. C. 146.

Dalt. ca. 7.

Palm. 374.

² Ro. Re. 345.^e Palm. 374.^a Ro. Re. 345.^f 10 H. 7. 8. a.³⁹ H. 6. 18. b.³⁹ a.⁹ Co. 87. b.⁴ Dy. 158. Pl.

33.

Bro. Ac. sur

cas. 76. 92.

^b H. P. C. 146.

Dalt. ca. 7.

¹⁵ E. 4. 2. b.

Dalt. ca. 7.

^k Palm. 374.² Ro. Re. 345.

346.

¹² Rol. A. 84.

Pl. 8. 85. Pl. 9.

^m 2 Rol. A.

84. A.

Salk. 45.

² Rol. Re. 345.

Palm. 367.

374.

² Keb. 506.¹ Bull. 109.

Salk. 45.

Vide F N B.
172.
Regist. 184.

Sect. 5. As to the second Point, viz. In what manner Nuisances of this Kind are prevented and restrained by Statute, it is enacted by 12 Ed. 2. 6. That no Officer in City or in Borough, that by reason of his Office ought to keep Assizes of Wines and Victual, so long as he is attendant to that Office, shall not merchandize for Wines nor Victuals, neither in Gross nor by Retail; and if any be convict of such Offence, the Merchandize shall be forfeited to the King, and the third Part thereof delivered to the Party that sued for the same, &c.

Sect. 6. And it is farther enacted by 6 Rich. 2. 9. That no Victualler shall have, exercise, or occupy any judicial Office in any Town, but only where no other Person sufficient may be found to have the same Office. In which Case yet the same Judge, for the Time that he shall continue in the said Office, shall utterly omit and abstain himself and his from the Exercise of Victualling, upon pain of forfeiting his Victuals so sold.

Sect. 7. And it is farther enacted by 3 H. 8. 8. That as often as any Victualler chosen to bear any Office within any City, Borough, or Town corporate, which for the Time that he shall stand and be in such Office should have the Assessing and Correction for selling of Victuals, that then two discreet and honest Persons of the same City, Borough, or Town corporate, not being Victuallers, nor any of them being a Victualler, shall be chosen by the Commonalty of the same City, Borough, or Town corporate, in like Form as the said Officer shall be chosen: Which two Persons, with the said Officer, shall be sworn truly to set and set the Prices and Assizes of Victual there, for the Time that any such Victualler shall abide in the same Office: And that then it shall be lawful to all and every of the said Officers, after the same Victuals be set and sessed by the same Officer, and the said two Persons, or one of the same two Persons, the other being absent, to merchant and sell Wines, and all other Victual in Gross, and at Retail, during the Time that he shall be in any such Office, without any Thing therefore to forfeit: The said Statute, Act, and Ordinance of 12 E. 2. or any other Act or Acts, Ordinance, or Statute to the contrary made in any wise notwithstanding.

Vide Cro. Ja.
609, 610.
2 Rol. Re.
225, 226.

Sect. 8. Also it is enacted by 21 Jac. 1. 21. That all Hostlers or Innholders shall sell their Horse bread, and their Hay, Oats, Beans, Pease, Provender, and also all Kind of Victual, both for Man and Beast, for reasonable Gain, having Respect to the Prices for which they shall be sold in the Markets adjoining, without taking any Thing for Litter. And it is farther enacted by the said Statute. That every Hostler and Innkeeper dwelling in any Town or Village, being a Thorough fare, and no City, Town corporate, or Market-Town, wherein any common Baker, having been an Apprentice to the Trade for seven Years, is dwelling, may make within his House Horse bread sufficient, lawful, and of due Assize, according to the Price of Grain or Corn, any Thing in the said Statute contained to the contrary notwithstanding. And it is farther enacted, That if the Horse bread, which any of the said Hostlers or Innholders shall make, be not sufficient, lawful, and of due Assize, according to the Price of Grain and Corn, as abovesaid; or that if any of them shall offend in any Thing contrary to this Act, the Justices of Assize, Justices of Oyer and Terminer, Justices of Peace in every Shire, Liberty, or Franchise within this Realm, Sheriffs in their Turns, and Stewards in their Leets, may inquire hear, and determine, the said Offences of the said Hostlers and Innholders, who shall be fined for the first Offence, according to the Quantity of the Offence, and for the second Offence shall be imprisoned for one Month, and for the third shall stand upon the Pillory, &c.

Sect. 9. And it is enacted by 5 & 6 Ed. 6. 25. That the Justices of Peace within every Shire, City, Borough, Town corporate, Franchise, or Liberty within this Realm, or two of them at the least, whereof one to be of the Quorum, shall

shall have full Power and Authority within every Shire, City, &c. to remove, discharge, and put away common Selling of Ale and Beer in common Ale-houses and Tippling-houses.

Sect. 10. And it seems to have been the general Opinion in the Construction of this Clause, That an Alehouse-keeper suppressed in Pursuance of it, cannot be afterwards licenced again but in open Sessions. D.J. ca. 7.
H.P.C. 147.

Sect. 11. And it is farther enacted by the said Statute of 5 & 6 Ed. 6. 25 Par. 1 & 6. That none shall be admitted or suffered to keep any common Ale-house or Tippling-house, except in Fairs, but such as shall be allowed in the open Sessions, or by two Justices of Peace, whereof one to be of the Quorum: And that the said Justices shall take Bonds and Surety from Time to Time, by Recognizance, of such as shall be allowed to keep any common Ale-house or Tippling-house, as well for and against the using of unlawful Games, as also for the Maintenance of good Order within the same, as by their Discretion shall be thought necessary and convenient; for making of every which Recognizance the Parties bound shall pay but twelve Pence.

Sect. 12. And it is farther enacted, Par. 2. That the said Justices shall certify the same Recognizance at the next Quarter-Sessions of the same Shire, City, or Borough, &c. there to remain of Record before the Justices of Peace of the Shire, &c. upon Pain of forfeiting for every such Recognizance taken, and not certified, three Pounds six Shillings eight Pence.

Sect. 13. And it is farther enacted, Par. 3. That the Justices of Peace of every Shire, City, Borough, &c. may at their Quarter-Sessions by Presentment, Information, or otherwise by their Discretion, inquire of all such Persons as shall be allowed to keep any Ale-house or Tippling-house, and that be bound by Recognizance, as is abovesaid, if any of them have done any Act whereby they have forfeited the same Recognizance: And the said Justices shall upon every such Presentment or Information, award Process against every such Person so presented or complained upon before them, to shew why he should not forfeit his Recognizance, and may also hear and determine the same by all such Ways and Means, as by their Discretion shall be thought good.

Sect. 14. And it is farther enacted, Par. 4. That if any Person, other than such as shall be allowed by the said Justices, shall obstinately, and upon his own Authority, take upon him to keep a common Ale-house or Tippling-house, or shall contrary to the Commandment of the said Justices, or two of them, use commonly Selling of Ale and Beer, except in Fairs; that then the said Justices, or two of them, whereof one to be of the Quorum, shall for every such Offence commit every such Person so offending, to the common Gaol within the said Shire, City, Borough, &c. there to remain without Bail or Mainprize by the Space of three Days; and before his Deliverance the said Justices shall take his Recognizance with two Sureties, That he shall not keep any common Ale house, Tippling-house, or use commonly Selling of Ale or Beer, as by the Discretion of the said Justices shall seem convenient.

Sect. 15. And it is farther enacted, Par. 5. That the said Justices shall make Certificate of every such Recognizance and Offence, at the next Quarter-Sessions for the same Shire, City, Borough, &c. which Certificate shall be a sufficient Conviction of the same Offence; and the said Justices upon the said Certificate made, shall in open Sessions assess the Fine for every such Offence, at twenty Shillings.

Sect. 16. And it is farther enacted by 3 Car. 1. 3. That if any Person shall upon his own Authority, not being thereunto lawfully licenced, take upon him to keep a common Ale house or Tippling house, or use commonly selling of Ale, or Beer, Cyder, or Perry, except in Fairs, every such Person shall for every such Offence, forfeit twenty Shillings to the Use of the Poor of the Parish where such Offence

Offence shall be committed, the same Offence being viewed by any Mayor, Bailiff, or Justice of Peace, or other Head-Officer within the several Limits, or confessed by the Party so offending, or proved by the Oath of two Witnesses, to be taken before any Mayor, Bailiff, or other Head-Officer, or any Justice of Peace, being within the Limits of their Commission; the said Penalty to be levied by the Constables or Church wardens of the Parish, or Parishes, where the said Offence shall be committed, who shall be accountable therefore to the Use of the Poor of the said Parish, by Way of Distress, to be taken and detained by Warrant or Precept from the said Mayor, Bailiff, or Justice, &c. by whom the said Offence shall be viewed, &c. And for Default of Satisfaction within three Days next ensuing, the said Distress to be by the said Constables, or Church-wardens, apprized and sold, and the Overplus to be delivered to the Party offending; and if such Offender shall not have sufficient Goods and Chattels, whereby the said twenty Shillings may be levied by Way of Distress, as aforesaid, or shall not pay the said Sum of twenty Shillings within six Days after such Conviction, as aforesaid, the said Mayor, Bailiff, or Justice, &c. before whom the said Offender shall be so convicted, shall commit such Offender to some Constable, or other inferiour Officer of the City, Borough, or Parish, &c. where the Offence shall be committed, to be openly whipped, as the said Justice shall limit or appoint. And if such Constable, &c. shall neglect to execute the said Precept or Warrant, or to execute by himself, or some other, upon the Offender, the Punishment limited by the said Statute, the said Mayor, &c. may commit him to the common Gaol of the said County, City, or Town, &c. there to remain till the said Offender shall be by him or some other punished and whipped; or until the Person so neglecting shall have paid forty Shillings to the Use of the Poor of the Parish, for his said Contempt. And if any such unlicensed Alehouse-keeper shall offend in any the Premises the second time, and be thereof convicted in Manner and Form aforesaid, the said Mayor, Bailiff, or Justice, &c. shall commit him to the House of Correction, there to remain for one Month, and be dealt withall as an idle, lewd, and disorderly Person: And if such Person shall again offend, and be convicted, as aforesaid, he shall be committed to the said House of Correction, as aforesaid, there to remain till by the Order of the General-Sessions for the County, City, or Borough, &c. he shall be delivered from thence. Provided that such Offender as shall be punished by vertue of this Act, shall not be punished again for the same Offence by the above mentioned Statute of 5 & 6 Ed. 6. And that such Offender as shall be punished by vertue of the said Statute of 5 & 6 Ed. 6. shall not be punished again by vertue of this Act.

Sec. 17. Also it is enacted by 1 Jac. 1. 9. and 4 Jac. 1. 15. and 21 Jac. 1. 7. and 1 Car. 1. 4 That if any Inn-keeper, Victualler, or Alehouse-keeper, or any Keeper of a Tavern, or one who sells Wine in his House, and also keeps an Inn, or Victualling in his House, do permit or suffer any Person, whether such Person be an Inhabitant of the Place where such Inn, &c. shall be, or not, to continue Drinking or Tippling in any Inn or Victualling-house, &c. other than such as shall be invited by any Traveller, and shall accompany him only during his necessary Abode there; and other than Labouring and Handicraftsmen in Cities, and Towns-corporate, and Market-Towns, upon the usual working Days, for one Hour at Dinner-time, to take their Diet in an Ale-house; and other than Labourers and Workmen, who for the following of their Work by the Day, or by the Great, in any City, Town corporate, Market-Town, or Village, shall for the Time of their said continuing in Work there, sojourn, lodge, or victual in any Inn, Ale-house, or other Victualling-house; or other than for urgent and necessary Occasions, to be allowed by two Justices of Peace, That then every such Inn-keeper, &c. shall forfeit ten Shillings to the Use of the Poor of the Parish where such Offence shall be committed; the same Offence being viewed and seen by any Mayor,

Mayor, Bailiff, or Justice of Peace within their several Limits, or found by ^{4 Jac. 1. 5.} Verdict on a Trial upon an Indictment at Assizes, Sessions, or Court-Leet, or proved by the Oath of one Witness to be taken before any Mayor or Bailiff, &c. ^{21 Jac. 1. 7.} or any one Justice of the Peace, or by the voluntary Confession of any Offender, after which Confession the Oath of such Offender shall be taken, and be a sufficient Proof against any other Offending at the same Time.

Sect. 18. And it is farther enacted by the said Statute of 1 Jac. 1. 9. Par. 3. That the said Penalty of ten Shillings shall be levied by the Constables or Church-wardens of the Parishes where the Offence shall be committed, by way of Distress, and for Default of Satisfaction within six Days, the same to be presently appraised and sold, and the Surplusage to be delivered to the Party of whom the Distress was taken, and for Want of sufficient Distress the Party offending to be by the said Mayor, &c. committed to the common Gaol, there to remain till the said Penalty be paid. And if the said Constables or Church-wardens do neglect their Duty in levying the said Penalties, or in Default of Distress, do neglect to certify the same within twenty Days to the said Mayor, &c. every Person so offending shall forfeit forty Shillings, to the Use of the Poor of the Parish where such Offence shall be committed, to be levied by Distress of Goods, by Warrant from any one Justice of Peace, &c. to be taken and detained six Days; within which, if Payment be not made, the same Goods to be appraised and sold, &c.

Sect. 19. But it is provided by the said Statute of 1 Jac. 1. 9. That the Punishment of such as shall offend against the same, within either of the two Universities, or the Precincts or Liberties of the same, shall be done upon the Offenders, and Justice ministred in this Behalf, according to the Intent of the said Law, by the Governours, Magistrates, Justices of the Peace, or other principal Officers of either of the said Universities, to whom in other Cases the Administration of Justice, and Correction and Punishment of Offenders by the Laws of this Realm and their several Charters doth belong; and that no other within their Liberties, for any Matter concerning the said Law contrary to their several Charters, do intermeddle, and that all Penalties to be forfeited by vertue of the said Act, within either of the Universities or the Liberties or Precincts of the same, shall be levied by the Officers or Ministers of either of the said Universities, to be from Time to Time in that Behalf appointed by the Vice-Chancellors thereof for the Time being respectively, and that all Powers and Authorities given by the said Act, shall by the Governours, Magistrates, and principal Officers abovesaid, of either of the said Universities, be duly executed within either of the said Universities, &c.

Sect. 20. And it is farther enacted by 4 Jac. 1. 5. and 21 Jac. 1. 7. That whoever shall be drunk, and within ^a six Months after such Offence, shall ^{4 Jac. 1. 5.} be convict thereof, either on an Indictment at Assizes or Sessions, or Court-Leet, ^{Par. 11.} or before any ^b Justice of Peace in any County, or any Justice of Peace, or other ^{21 Jac. 1. 7.} Head-Officer in any City or Town-corporate, upon View or Confession, or by ^{4 Jac. 1. 5.} Oath of one Witness, shall forfeit five Shillings, to be paid within one Week after Conviction, to the Church-wardens of the Parish where the Offence shall be committed, &c. And if such Person shall refuse or neglect to pay the said Forfeitures, the same shall be levied of his Goods by Warrant or Precept from the said Court, or Judge before whom the same Conviction shall be: And if the Offender be not able to pay the said Sum of five Shillings, he shall be committed to the Stocks for every Offence, there to remain six Hours; and if he shall be convicted a second time of the like Offence, he shall be bound to the good Behaviour, with two Sureties in a Recognizance of ten Pounds. And if any Constable or other inferiour Officer of the Place where the Offence shall be committed, &c. do neglect the due Correction of the said Offender, or the due Levying of the said Penalties, he shall forfeit ten Shillings to the Use of the Poor, &c. to be levied by way of Distress, by Warrant from any Mayor, &c.

Sect. 21. And it is farther enacted by the said Statute of 4 Jac. 1. 5. and 21 Jac. 1. 7. and 1 Car. 1. 4. That if any Person shall remain or continue drinking or tippling in any Inn, Victualling-house, Ale house, or Tavern, &c. whether he be an^b Inhabitant of the Place at the Time of such drinking, or not; and the same be viewed by any Mayor, or other Head-Officer, or Justice of Peace, or confessed by the Offender, or proved by one Witness in the Manner prescribed for the above mentioned Offence of suffering Tippling in publick Houses, unless it be in such Cases as are excepted in the above mentioned Act, relating to the said Offence of suffering tippling, &c. Every Person so offending, and being convict^c within six Months, shall forfeit three Shilling and four Pence, to the Use of the Poor of the Parish where the Offence shall be committed, to be levied by way of Distress in such Manner as the above mentioned Forfeitures for Drunkenness are to be levied: And if any such Offender be not able to pay the said Forfeiture, any Mayor, Head Officer, Justice of Peace, or Court where any such Conviction shall be, may set him in the Stocks for four Hours.

^a 1 Ca. 1. 4.
^b 21 Jac. 1. 7.

Supra Sect.
27.

^c 4 Jac. 1. 5.
Par. 11.

Supra S. &.
20.

Sect. 22. And it is farther enacted by the said Statute of 4 Jac. 1. 5. Par. 7. That all Constables, Church wardens, Headboroughs, Tithingmen, Ale-conners and Sidemen shall in their several Oaths incident to their several Offices, be charged in like Sort to prevent the Offences contrary to the said Statute.

Sect. 23. But it is provided by the same Statute, Par. 8. That nothing therein contained shall in any wise abridge the Ecclesiastical Jurisdiction. And it is farther provided, Par. 9. That no Offender, who hath once been punished for his Offence against any Article of the said Act by any the Ways or Means before limited, shall be afterwards punished for the same Offence by any other Ways or Means.

Sect. 24. And it is farther provided, Par. 10. That nothing in the said Act contained shall be prejudicial to either of the Universities, but that the Chancellor, Master, and Scholars, &c. may as fully use and enjoy all their Jurisdictions, Rights, Privileges, and Charters, as before the said Statute they had or might have done, any Thing in the said Act to the contrary notwithstanding.

Sect. 25. And it is enacted by 7 Jac. 1. 10. That if any Person being an Alehouse-keeper, shall be lawfully convicted for any Offence committed against any of the Branches of either of the said Acts of 1 Jac. 1. 9 or 4 Jac. 1. 5. he shall for the Space of three Years next ensuing the said Conviction, be utterly disabled to keep any such Ale-house.

C H A P. LXXIX.

Of Monopolies.

FOR the better Understanding the Nature of the Offence of procuring or making Use of a Monopoly, I shall consider :

1. What shall be said to be a Monopoly.
2. In what Manner the procuring, or making Use thereof, are restrained by the Common Law.
3. In what Manner by the Statute.

Sect. 1. As to the first Point, it seemeth that a Monopoly is an Allowance by the King, to any Person or Persons, of the sole Buying, Selling, Making, Working, or Using of any Thing, whereby any Person is sought to be restrained from any Freedom which he had before, or hindered from his lawful Trade.

3 Inst. 181.
Noy 182.

As to the second Point it seemeth, That the procuring or making use of such Monopolies, is restrained by the Common Law two ways,

1. By declaring all Grants of this Kind to be void.
2. By making those who procure or make use of them, liable to be fined.

Sect. 2. And first it is said, That all Grants of this Kind relating to any known Trade, are made void by the Common Law, as being against the Freedom of Trade, and discouraging Labour and Industry, and restraining Persons from getting an honest Livelihood by a lawful Employment, and putting it in the Power of particular Persons to set what Prices they please on a Commodity; all which are manifest Inconveniences to the Publick.

Sect. 3. And upon this Ground it hath been resolved, That the King's Grant to any particular Corporation of the sole Importation of any Merchandize is void, whether such Merchandize be prohibited by Statute or not.

2 Rol. Ab.
214.
3 Inst. 182.
2 Inst. 61.

Sect. 4. And for the like Reasons also it hath been resolved, That the Grant of the sole ^b Ingrossing of Wills and Inventories in a spiritual Court, or of the sole ^c Making of Bills, Pleas and Writs in a Court of Law, to any particular Person, is void.

2 Rol. Ab.
214. Pl. 4.
c 1 Jones 231.
2 Rol. Ab.
214. Pl. 5.
3 Mod. 75.

Sect. 5. Also it hath been adjudged, That the King's Grant of the sole Making, Importing, and Selling of ^d Playing-Cards, is void, notwithstanding the Pretence, That the Playing with them is a Matter merely of Pleasure and Recreation, and often much abused, and therefore proper to be restrained; for since the Playing with them is in it self lawful and innocent, and the Making of them an honest and laborious Trade, there is no more Reason why any Subject should be hindered from getting his Livelihood by this than by any other Employment.

4 11 Co. 84,
85, &c.
Mo. 671. Pl.
219
Noy 173, &c.
2 Inst. 47.

Sect. 6. But it seemeth clear, That the King may for a reasonable Time make a good Grant to any one of the sole Use of any Art invented or first brought into the Realm by the Grantee, as shall be shewn more at large in the 14th, 15th, and 16th Sections of this Chapter. Also it seems to be the better Opinion, That the King may grant to particular Persons the sole Use of some particular Employments, (as of Printing the Holy Scriptures and Law Books, &c.) whereof an unrestrained Liberty might be of dangerous Consequence.

Noy 182, 183
1 Mod. 256.
3 Keb. 792.
3 Mod. 75.

Sect. 7. Secondly, Also it is holden, That the procuring or making use of an unlawful Monopoly is farther restrained by the Common Law, by subjecting those who are guilty thereof to a Fine and Imprisonment for the Offence, as being *Malum in se*, and contrary to the ancient and fundamental Laws of the Kingdom: And it is said, That there are Precedents of Prosecutions of this Kind in former Days, but I cannot find any modern Instance thereof.

3 Inst. 181.
2 Inst. 47, 61.

Sect. 8. As to the third Point, viz. In what Manner the procuring and making Use of a Monopoly are restrained by the Statute, it is declared and enacted by 21 Jac. 1. 3. That all Monopolies, and all Commissions, Grants, Licences, Charters and Letters Patents to any Person or Persons, Bodies-

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Politickor Corporate whatsoever, of or for the sole Buying, Selling, Making, Working or Using of any Thing within this Realm, or Wales, or of any other Monopolies, and all Proclamations, Inhibitions, Restraints, Warrants of Assistance and all other Matters whatsoever any Way tending to the Instituting, Strengthening, Furthering, or Countenancing of the same, or any of them, are altogether contrary to the Laws of this Realm, and so are and shall be utterly void, and of none Effect, and in no wise to be put in Ure or Execution.

Sect. 9. And it is farther enacted, Par. 3. That all Persons, Bodies Politick and Corporate whatsoever, shall be disabled, and incapable to have, use, exercise, or put in Ure, any Monopoly, or any such Commission Grant, or Licence, &c. or other Thing tending as aforesaid, or any Liberty, Power, or Faculty, grounded, or pretended to be grounded, upon them, or any of them.

Sect. 10. And it is farther declared and enacted, Par. 2. That all Monopolies, and all such Commissions, Grants and Licences, &c. and all other Things tending as aforesaid, and the Force and Validity of them, ought to be, and shall be examined, heard, tried, and determined, by and according to the Common Laws of this Realm, and not otherwise.

3 Inst. 182,
183.

Sect. 11. In the Construction of this Clause it hath been holden, That all Matters of this Kind ought to be tried in the Courts of Common Law only, and not at the Council-Table, or in the Court of Chancery, or any other Court of like Nature.

Sect. 12. And it is farther enacted, Par. 4. That if any Person shall be hindred, grieved, disturbed, or disquieted, or his Goods or Chattels any way seized, attached, distrained, taken, carried away or detained, by Occasion or Pretext of any Monopoly, or of any such Commission, Grant or Licence, &c. or other Matter or Thing tending as aforesaid, and will sue to be relieved in any of the Premises, he shall have his Remedy for the same at the Common Law, by Action grounded on the said Statute, to be heard and determined in the King's Bench, Common Pleas or Exchequer, against the Party by whom he shall be so hindred or grieved, &c. or by whom his Goods shall be so seized or attached, &c. wherein every such Person, which shall be so hindred or grieved, &c. or whose Goods shall be so seized or attached, &c. shall recover three Times so much as the Damages which he sustained by Means of such Hindrance, &c. and double Costs; and in such Suits, or for the staying or delaying thereof, no Essoin, Protection, Wager of Law, Aid Prayer, Privilege, Injunction, or Order of Restraint, shall be in any wise prayed, granted, admitted, or allowed, nor any more than one Imparlance: And if any Person shall after Notice that the Action depending is grounded upon the said Statute, cause or procure any Action at the Common Law grounded thereon to be stayed or delayed before Judgment, by Colour or Means of any Order, Warrant, Power or Authority, save only of the Court wherein such Action shall be depending, or after Judgment shall cause or procure the Execution to be stayed or delayed by Colour or Means of any Order, Warrant, Power or Authority, save only by Writ of Error or Attaint, that then the said Person or Persons so offending, shall incur a Præmunire.

3 Inst. 183.

Sect. 13. It is said, That the first Branch of this last Clause relating to the delaying of Causes of this Kind before Judgment, not only extendeth to the Privy-Council, Chancery, Exchequer Chamber, and the like, but also to those who shall procure any Warrant from the King for such Purpose; and it is said, That the latter Branch, relating to the delaying of Execution after Judgment, extendeth even to the Judges of the Court where the Cause is depending.

Sect. 14. But it is provided, Par. 6. That no Declaration in the Statute mentioned shall extend to any Letters Patents and Grants of Privilege for the Term of fourteen Years or under, of the sole working or making of any manner of

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new Manufactures within this Realm, (under which Words Manufactures newly brought into the Realm from beyond Sea are included, tho' they were new there) to the true and first Inventor and Inventors of such Manufactures, which others, at the Time of making such Letters Patents and Grants, shall not use, so as also they be not contrary to the Law, nor mischievous to the State, by raising Prices of Commodities at home, or hurt of Trade, or generally inconvenient: The said fourteen Years to be accounted from the Date of the first Letters Patents or Grant of such Privilege, but that the same shall be of such Force as they should be, if the said Act had never been made, and of none other. Salk. 447.

Sect. 15. It hath been resolved, That no new Invention concerning the working of any Manufacture, is within the Meaning of this Exception, unless it be substantially new, and not barely an additional Improvement of an old one. 3 Inst. 184.

Sect. 16. Also it hath been holden, That a new Invention to do as much Work in a Day by an Engine, as formerly used to employ many Hands, is not within the said Exception, because it is inconvenient in turning so many labouring Men to Idleness. 3 Inst. 184.

Sect. 17. Also it seems clear, That no old Manufacture in use before, can be prohibited in any Grant of the sole Use of any such new Invention. 3 Inst. 184.

Sect. 18. And it is farther provided, Par. 7. *That nothing in the said Act contained shall extend to any Grant or Privilege, Power, or Authority whatsoever before the said Act, made, granted, allowed, or confirmed by any Act of Parliament, so long as the same shall continue in Force.*

Sect. 19. And it is farther provided, Par. 9. *That nothing in the said Act contained shall be in any wise prejudicial to any City, Borough, or Town-corporate within this Realm, concerning any Grants, Charters, or Letters Patents to them made, or concerning any Custom used by or within them, or unto any Corporations, Companies, or Fellowships of any Art, Trade, Occupation, or Mystery, or to any Companies or Societies of Merchants within this Realm, erected for the Maintenance, Enlargement, or ordering of any Trade or Merchandize: But that the same Charters, Customs, Corporations, &c. and their Liberties and Immunities shall be of such Force and Effect as they were before the making of the said Act, and of none other; any Thing before in the said Act contained to the contrary in any wise notwithstanding.*

Sect. 20. And it is farther provided, Par. 10. *That nothing in the said Act contained shall extend to any Letters Patents, or Grants of Privilege concerning Printing; nor to any Commission, Grants, or Letters Patents concerning the digging, making, or compounding of Salt-Peter, or Gun-Powder; or the casting or making of Ordnance, or Shot for Ordnance: Nor to any Grant or Letters Patents of any Office erected before the making of the said Statute, and then in Being, and put in Execution, other than such Offices as had been decreed by Proclamation: But that all such Grants, &c. shall be of the like Force and Effect, and no other, as if the said Act had never been made.*

Sect. 21. But it is enacted by 16 Car. 1. 21. *That it shall be lawful for all Persons, as well Strangers as natural born Subjects, to import any Quantities of Gun-Powder whatsoever, paying such Customs and Duties for the same as by Parliament shall be limited: And that it shall be lawful for all his Majesty's Subjects of this his Realm of England, to make and sell any Quantities of Gun-Powder at his Pleasure, and also to bring into this Kingdom any Quantities of Salt-Peter, Brimstone, or any other Materials for the making of Gun Powder: And that if any Person shall put in Execution any Letters Patents, Proclamation, Edict, Act, Order, Warrant, Restraint, or other Inhibition whatsoever, whereby the Importation of Gun-Powder, Salt Peter, Brimstone, or other the Materials afore mentioned, shall be any ways prohibited or restrained, he shall incur a Præmunire.*

Sect. 22. And it is farther provided by the said Statute of 21 Jac. 1. 3. Par. 11. 12. *That nothing in the said Act contained shall extend to any Commission or Grant, concerning the digging, compounding, or making of Allum, or Allum-Mines, &c. nor concerning the Licencing of the Keeping of any Tavern, or selling of Wines, to be spent in the Mansion-House, or other Place, in the Tenure or Occupation of the Party selling the same, and a farther Provision is made in the latter Part of the Statute, for some particular Grants to particular Corporations and Persons as Newcastle upon Tyne, &c.*

3 Inst. 185.

Sect. 23. But it is said, That the said Clause relating to Allum was needless, because all such Mines belong of Course to the Persons in whose Grounds they are, and therefore no Privilege concerning them can be granted, but in the King's own Ground.

C H A P. LXXX.

Of Forestalling, Ingrossing and Regrating, and other Offences of like Nature.

FOR the better understanding the Nature of Forestalling, Ingrossing and Regrating, and other such like Offences, I shall consider,

1. How such Offences are treated by the Common Law.
2. How by Statute.

As to the first Point, I shall consider:

1. What is esteemed an Offence of this Kind by the Common Law.
2. How such Offence is punishable by the Common Law.

Sect. 1. As to the first of these Particulars it is said, That all Endeavours whatsoever to enhance the common Price of any Merchandize, and all Kinds of Practices which have an apparent Tendency thereto, whether by spreading false ^a Rumors, or by ^b buying Things in a Market before the accustomed Hour, or by buying and selling again the same Thing in the same ^c Market, or by any other such like Devices, are highly criminal at Common Law, and that all such Offences anciently came under the general Notion of Forestalling, which included all Kinds of Offences of this Nature.

^a 43 Aff. 38.
³ Inst. 195,
196.
Bro. Indict-
ment 40.
Presentment
32.
^b Crom. 80. b.
^c Crom. 80. b.

Sect. 2. And surely there can be no Attempt of this Kind, but must be look'd upon as a high Offence against the Publick, inasmuch as it so apparently tends to put a Check upon Trade, to the general Inconvenience of the People, by putting it out of their Power to supply themselves with a Commodity, without an unreasonable Expence, which often proves extremely oppressive to the poorer Sort, and cannot but give just Cause of Complaint to the richest.

³ Inst. 196.
H. P. C. 152.

Sect. 3. But it hath been resolved, That any Merchant, whether he be a Subject or a Foreigner, bringing Victuals, or any other Merchandize into the Realm, may sell the same in Gross, but that no Person can lawfully buy within the Realm any Merchandize in Gross, and sell the same in

in Grofs again, because by such Means the Price will be inhaufed, for the more Hands any Merchandize paffeth thro', the dearer it muft grow, because every one will make his Profit of it: And if fuch Practices were allowable, a rich Man might ingrofs into his Hands a whole Commodity, and then fell it at what Price he fhould think fit, which is of fuch dangerous Confequence, that the bare Ingroffing of a whole Commodity with an Intent to fell it at an unreaſonable Price, is an Offence indictable at the Common Law, whether any Part thereof be fold by the Ingroffer, or not. Cro. Ca. 231, 232.

Sect. 4. And ſo jealous is the Common Law of all Practices of this Kind, that it will not ſuffer Corn to be fold in the Sheaf, perhaps for this Reaſon, becauſe by ſuch Means the Market is in Effect foreſtalled. 3 Inſt. 197. H. P. C. 152.

Sect. 5. As to the ſecond Particular, *viz.* In what manner Offences of this Kind are puniſhable by the Common Law; it is ſaid, That by an ancient Statute the Offender was to be grievouſly amerced for the firſt Offence; for the ſecond, to be condemned to the Pillory; for the third, to be imprifoned and for the fourth, to be compelled to abjure the Vill: And there ſeems to be no doubt, but that at this Day all Offenders of this Kind are liable to a Fine and Imprifonment, anſwerable to the Heinousneſs of their Offence, upon an Indictment at Common Law. 3 Inſt. 195.

As to the ſecond Point, *viz.* In what manner theſe Offences are treated by Statute, I ſhall conſider,

1. What particular Proviſions have been made relating to this Matter.
2. What Caſes have been excepted out of thoſe Proviſions.
3. In what Manner the Offenders are to be proceeded againſt.

The particular Proviſions of this Nature are five-fold,

1. The obliging all Viſtuallers to ſell at a reaſonable Price.
2. The allowing all Foreigners free Liberty of importing and ſelling Viſtuals
3. The giving the great Officers of State a Power to tax the Price of Viſtuals.
4. The prohibiting Conſpiracies to raiſe the Price of Viſtuals.
5. The prohibiting all Foreſtalling, Ingroffing, and Regrating.

Sect. 6. The firſt of the ſaid Proviſions depends upon 23 Ed. 3. 6. by which it is enacted, *That Butchers, Fiſhmongers, Regrators, Hoſtelers, Brewers, Bakers, Poulterers, and other Sellers of all Manner of Viſtual, ſhall be bound to ſell the ſame for a reaſonable Price, having reſpect to the Price that ſuch Viſtual ſhall be ſold at in the Places adjoining; ſo that ſuch Sellers have moderate Gains, reaſonably to be required, according to the Diſtance of the Place from whence the ſaid Viſtuals be carried, on pain to forfeit double the Value, &c. And the chief Officers of Towns are required to ſee this Statute executed, on pain of paying the treble Value of the Thing ſold, &c.*

Sect. 7. The ſecond of the above mentioned Proviſions depends upon 6 R. 2. 10. and 11 Ric. 2. 7. and 1 H. 4. 17. by which it is enacted, *That all manner of Aliens, being of the Amity of the King, coming into any Town of the Realm with Fiſh, or other Viſtual, ſhall be under the King's eſpecial Protection, and may cut their Fiſhes and Viſtuals in Pieces, and in part, or in all, at Retail, or in Grofs, as to them beſt ſhall ſeem, to ſell and make their Profit, &c. And it is farther enacted by 14 H. 6. 6. That if any Man diſturb any Alien to ſell his Fiſh in Grofs, or at Retail, in Part or in Whole, contrary to the above*

above mentioned Ordinances, and thereof be duly attainted at the Suit of the King, or of the Party, he shall forfeit ten Pounds, &c.

Vide infra
S. 36.

Sect. 8. The Third of the above mentioned Provisions depends upon 25 H. 8. 2. by which it is enacted, That to remedy the frequent Rise of the Price of Cheese, Butter, Capons, Hens, Chickens, and other necessary Victuals for Man's Sustenance, by ingrossing and regrating the same; the Lord Chancellor and other high Officers of State, &c. may upon Complaint of any inhausing of the Prices of such Victuals without Ground or reasonable Cause, in any Part of the King's Dominions, set and tax reasonable Prices of such Victuals: And that after Proclamation made of such Prices, all Farmers, Owners, Broggers, and all other Victuallers whatsoever, having or keeping any such Victuals to the Intent to sell, shall sell the same to such of the King's Subjects as will buy them at such Prices as shall be taxed by such Proclamation, under the Pains to be limited in the said Proclamation.

Sect. 9. But it is provided, That the Officers of Cities, Boroughts, or Towns-corporate, and all other Persons having Authority to set Prices of such Victuals, may set such Prices in such Manner as if the said Act had not been made.

Sect. 10. The fourth of the above mentioned Provisions depends upon 2 & 3 E. 6. 15. by which it is enacted, That if any Butchers, Brewers, Bakers, Poulterers, Cooks, Coster-mongers or Fruiterers, shall conspire, covenant, promise, or make any Oaths, that they shall not sell their Victuals but at certain Prices; or if any Artificers, Workmen, or Labourers, do conspire, covenant, or promise together, or make any Oaths, that they shall not make or do their Works, but at a certain Price or Rate; or shall not enterprize, or take upon them to finish what another hath begun, or shall do but a certain Work in a Day, or shall not work but at certain Hours and Times, every such Person so conspiring, &c. shall forfeit for the first Offence ten Pounds, and if he pay not the same within six Days, shall suffer twenty Days Imprisonment; and for the second Offence shall forfeit twenty Pounds, &c. and for the Third, forty Pounds, &c. And if any such Conspiracy, Covenant, or Promise be made by any Society, Brotherhood, or Company, of any Craft, Mystery or Occupation of the Victuallers above mentioned, with the Presence or Consent of the more Part of them, that then immediately upon such Act of Conspiracy, &c. over and besides the particular Punishment before appointed, their Corporation shall be dissolved; and that the said Offences shall be determined at the Assizes, Sessions of the Peace, or Court-Lect. See 22 & 23 Car. 2. 15.

Vide infra
S. 36.

Sect. 11. The Fifth of the abovementioned Provisions depends chiefly upon 3 & 4 E. 6. 21. and 5 & 6 E. 6. 14. By the first of which Statutes it is enacted, That no Person, not being an Inn-holder, or Victualler, selling by Retail in his House, shall buy to sell again any Butter or Cheese, unless he sell the same again by Retail, in open Shop, Fair, or Market, not selling more than a Weight of Cheese, or a Barrel of Butter at one Time.

Sect. 12. And it is farther enacted by the said Statute of 5 & 6 E. 6. 14. which is the principal Statute relating to this Matter, That whosoever shall buy or cause to be bought, any Merchandize, Victual, or any other Thing whatsoever, coming by Land or by Water toward any Market or Fair to be sold in the same; or coming toward any City, Port, Haven, Creek or Road of this Realm, or Wales, from any Parts beyond the Sea, to be sold; or make any Bargain, Contract, or Promise for the having or buying of the same, or any Part thereof so coming as is aforesaid, before the same shall be in the Market, Fair, City, or Port, &c. ready to be sold; or shall make any Motion by Word, Letter, Message, or otherwise, to any Person or Persons, for the inhausing of the Price, or dearer selling of any Thing above mentioned; or else dissuade, move, or stir any one coming to the Market or Fair, to abstain or forbear to bring or convey any of the

the Things above rehearsed, to any Market, Fair, City, or Port, &c. to be sold, shall be deemed a Forestaller.

Sect. 13. It hath been resolved, That an Indictment upon this Clause, charging the Defendant with meeting *J. S.* at such a Place near a certain Town, and there buying of him certain Goods, which he was about to sell in the Market of such Town, is insufficient, because it is not expressly said, that the Goods so bought were coming to the Market to be sold. 1 Rol. Re. 421.

Sect. 14. And it is farther enacted by the said Statute of 5 & 6 Ed. 6. 14. Par. 2. *That whosoever shall by any Means regrate, obtain, or get into his Hands or Possession, in any Fair or Market, any Corn, Wine, Fish, Butter, Cheese, Candles, Tallow, Sheep, Lambs, Calves, Swine, Pigs, Geese, Capons, Hens, Chickens, Pidgeons, Conies, or other dead Victual whatsoever, that shall be brought to any Fair or Market to be sold, and do sell the same again in any Fair or Market holden in the same Place, or within four Miles thereof, shall be taken for a Regrator.*

Sect. 15. And it is farther enacted, Par. 3. *That whosoever shall engross or get into his Hands by buying, contracting or promise taking, other than by Demise, Grant or Lease of Land or Tithe, any Corn growing in the Fields, or any other Corn or Grain, Butter, Cheese, Fish, or other dead Victuals whatsoever, within the Realm of England, to the Intent to sell the same again, shall be reputed an unlawful Ingrosser.*

In the Construction of the last mentioned Clauses the following Opinions have been holden.

Sec. 16. I. That ^a Salt is a Victual within the Meaning of it, not only because it is of Necessity of it self for the Food and Health of Man, but also because it seasoneth and maketh wholesome Beef, Pork, and other Victuals, in which Respect it seemeth it self to come under the Notion of Victual, and seemeth to be so understood by the Makers of 13 El. 25. as appears from Par. 21 of that Statute. ^a 3 Inst. 195.
H. P. C. 152.
Cro. Ca. 231.

Sect. 17. II. That such ^b Victual only as is necessary for the Food of Man is within the Purview of it; and therefore that Apples, and Cherries, and such like Fruits, are not within the Intent of it; for the Words are, *Corn, or Grain, Butter, Cheese, Fish, or other dead Victuals*, which Words are said to import the same as if it had been said, *or other dead Victuals of like Quality*: Also it is said, That there is not any Thing prohibited within the Statute, but what hath a Proviso, how in some Kind it might be bought; and therefore, since there is not any such Proviso for Apples, that they never were intended to be restrained: And agreeably hereto it hath been holden, That neither ^c Hops nor ^d Malt are within the Meaning of the Statute. ^b 3 Inst. 195.
H. P. C. 152.
Cro. Ca. 231.
Owen 135.
Cro. Ja. 214.

^c Cro. Ca. 237.
^d 3 Inst. 196.
H. P. C. 152.
Con. Owen 135.
1 Rol. Re. 12.

Sect. 18. III. That the Buying of Corn, with an Intent to make ^e Starch of it, and then to sell it, is not within the said Clause, because it is not bought to be sold again in the same Nature in which it was bought, but to be first altered by a Trade or Science, and then sold again. And for the like Reason it seemeth to be the better ^f Opinion, That the Buying of Corn in order to make Meal of it, and then to sell it, is no way within the said Clause; and that the Buying of ^g Barley with an Intent to make it into Malt, and then to sell it, had no need of the Exception made for it in the said Statute. ^e Bridg. 5, 6.
Owen 135.
^f Moore 195.
Pl. 810.
Cro. Ca. 231.
Con. Owen 135.
^g Cro. Ca. 237.
3 Inst. 195.
See Chap. 33.
Sec. 15, 18.
Con. Owen 135.

Sect. 19. IV. That there is no Necessity in an Information or Indictment, grounded on the said Clause for ingrossing any Victual therein mentioned, to say, ^h That the Defendant did not come by it by a Demise of ^h 1 Joa. 157.

Land, &c. but that the Defendant, if he have any such Matter to alledge in his Defence, may give it in Evidence.

2 Leon. 39.

Sect. 20. V. That in every such Information, &c. the Words of the Statute must be precisely pursued, and therefore that it is not sufficient to say, That the Defendant bought so much Corn, &c. because the Words are, *shall ingross, or get into his Hands, by buying, &c.*

Sect. 21. And it is farther enacted by the said Statute of 5 & 6 E. 6. 14. Par. 4. 5, 6. *That whoever shall offend in any of the Things before recited, and be thereof duly convicted, shall for the first Offence, suffer Imprisonment for two Months, and forfeit the Value of the Goods so by him bought or had; and for the second Offence, shall suffer Imprisonment for one half Year, and forfeit the double Value of the Goods, &c. and for the third Offence, shall be set on the Pillory, and forfeit all his Goods, and be committed to Prison during the King's Pleasure.*

2 Bull. 317.

Cro. Ca. 381.

6 Mod. 32.

Sect. 22. And from hence it seems clearly to follow, as well as from the general Rules of Law, That no Information for any of the above mentioned Offences against the said Statute, can be good, without shewing in certain the Quantity of the Thing in Relation to which the Defendant is supposed to have incurred the Penalty, not only because otherwise the Judgment to be given on such an Information can never be pleaded in Bar of any other, because it cannot appear that both of them were brought for the same Thing, but also because it cannot appear to the Court what Forfeiture the Defendant ought to incur, unless the Extent of the Offence, which is to be the Measure of it, be specially set forth: And for these Reasons it hath been adjudged, That an Information for ingrossing Corn, the Quantity whereof is expressed by the Word *Cumulus* only, is not good; yet it is said, That an Indictment for ingrossing *magnum quantitatem frumenti*, is sufficient.

Sect. 23. And it is farther enacted by the said Statute of 5 & 6 E. 6. 14. Par. 8. *That if any Person having sufficient Corn and Grain, for the Provision of his own House, and sowing of his Grounds for one Year, do buy any Corn in any Fair or Market, for the Change of his Seed, and do not bring to the same Fair or Market the same Day, so much Corn as he shall fortune to buy for his Seed, and sell the same if he can, as the Price of Corn then goeth in the said Market or Fair, that then every such Person shall forfeit the double Value of the Corn so bought.*

Sect. 24. And it farther enacted, Par. 9. *That if any Person shall buy any manner of Oxen, Ronts, Steers, Kine, Heifers, Calves, Sheep, Lambs, Goats, or Kids living, and sell the same again alive, unless he keep and feed the same five Weeks, he shall lose the double Value of the Cattle so bought and sold, one Moiety whereof shall be to the King, and the other Moiety to him that will sue for the same.*

The principal Exceptions out of the above mentioned Statutes seems to be reducible to the following Heads:

1. Such as relate to Corn.
2. Such as relate to Butter and Cheese, and dead Cattle.
3. Such as relate to Beer, Cyder, and Mum.
4. Such as relate to Fish.
5. Such as relate to Wine, Oil, Sugar Salt, &c.
6. Such as relate to Fishmongers, Victuallers, Butchers, Poulterers, &c.
7. Such as relate to Badgers and Drovers.
8. Such as relate to Lessors, &c.
9. Such as relate to Shipping and Castles.
10. Such as relate to Towns-Corporate.

Sect. 25. As to the first of these Exceptions relating to Corn, it is enacted by the said Statute of 5 & 6 Ed. 6. 14. Par. 7. That the buying of any such Barley, Bigge, or Oats, as any Person (not forestalling) shall buy to convert into Malt or Oat-meal in his own House, and so shall be converted indeed, shall not be taken to be within the said Act.

Sect. 26. It seemeth to be the better Opinion, That if there had been no such Exception, yet the Buying of Corn for such Purpose should not be intended to have been within the Purview of the Statute, as hath been more fully shewn already Sect. 18. But upon the Supposition, that such an Exception was necessary, it hath been holden that the Buying of Corn and Turning it into Malt in another's House, because it was of so great a Quantity, that it could not be malted in the Buyer's own House, is not within the Benefit of it.

Owen 135.

Sect. 27. And it is farther enacted by 1 W. & M. Sess. 1. Ch. 12. That when Malt or Barley, Winchester Measure, shall be at twenty-four Shillings a Quarter or under; Rye at thirty-two Shillings a Quarter or under; and Wheat at forty-eight Shillings a Quarter or under, in any Port of England or Wales; every Person who shall put on Ship-board in English Shipping, the Master and two Thirds of his Mariners being their Majesties Subjects, any Sorts of the Corn aforesaid, from any such Ports where the Rates shall not then be higher than as aforesaid, with Intent to export the said Corn to Parts beyond the Seas, shall bring a Certificate in Writing under his Hand, containing the Quantity and Quality of the Corn so shipped, to the Persons appointed to collect the Customs within any such Port; and upon Proof of such Certificate by one or more credible Persons upon Oath, and upon Bond given by every such Exporter of two hundred Pounds for every hundred Tun of Corn so shipped, and so proportionably, that the said Corn (Dangers of Seas excepted) shall be exported beyond the Seas, and not landed again in England, Wales, Guernsey, Jersey, or Berwick on Tweed, shall receive from the said Persons appointed to receive the Customs, for every Quarter of Barley or Malt ground or unground, two Shillings and Six-pence; for every Quarter of Rye ground or unground, three Shillings and Six-pence; for every Quarter of Wheat ground or unground, five Shillings, without any Custom, Fee or Reward to be paid for the same. And upon Certificate returned under the common Seal of the chief Magistrate in any Place beyond Sea, or under the Hands and Seals of two known English Merchants upon the Place, that such Corn was there landed, or upon Proof by credible Persons that such Corn was taken by Enemies, or perished at Sea, the Examination and Proof thereof being left to the Receivers of the Customs, the Bond shall be delivered up to be cancelled; and the Monies so paid, shall be allowed as paid to their Majesties.

Vide 5 & 6 Ed. 6. 14. Par. 12, 13. 5 El. 5. Par. 26. 1 Ja. 1. 25. Par. 26. 21 Ja. 1. 28. 3 Ca. 1. 4. 12 Ca. 2. 4.

Sect. 28. As to the Second of the above mentioned Exceptions, relating to Butter and Cheese, and dead Cattle, it is enacted by 21 Ja. 1. 22. That neither of the above mentioned Statutes of 3 & 4 Ed. 6. 21. or 5 & 6 Ed. 6. 14. or any other Provision whatsoever before that Statute made, concerning the Sale of Butter and Cheese in open Shop, Fair or Market, or the Providing or Buying of any Butter or Cheese, shall in any wise extend to any Cheese-wonger, or Tallow-Chandler, free of the City of London, and having been brought up as an Apprentice seven Years, trading in Butter and Cheese, for such Butter and Cheese, and either of them, as he shall sell in London, Westminster, or Southwarck, for the victualling of any Ship of the King or Subject, or to any Butter and Cheese, which he shall sell by any Quantities at one Time, and to one Person, not exceeding four Wey of Cheese, or four Barrels of Butter, without Fraud, so as he sell the same in open Shop, Fair, or Market: Provided that if the Justices of Peace of any County at their Quarter-Sessions, shall declare that such Traders shall forbear to buy any Butter or Cheese, for any Time within such County;

Vide supra Sect. 11, 14, 15, &c.

County; that then during the Time of such Restraint, the said Traders in Butter and Cheese, that shall buy any such Butter or Cheese, and sell the same again by retail, contrary to any of the said Acts, shall not be freed from the Penalties thereof.

Sect. 29. And it is farther enacted by 3 & 4 W. & M. 8. That it shall be lawful for every Person, native or foreign, at any Time, to ship, lade, carry, and transport, or export, from any Place within England, Wales, or Berwick on Tweed, into any Part of the World in Amity with their Majesties, all Sorts of Beef, Pork, or Hogs flesh, Butter, Cheese, or Candles, free from any Custom or Imposition whatsoever

Sect. 30. As to the Third of the above mentioned Exceptions, relating to Beer, Cyder, and Mum, it is enacted by 1 Will. & Mar. Sess. 1. Ch. 22. That any Person may export any strong Ale, strong Beer, Cyder or Mum to be spent beyond the Seas, paying Custom for the same, at the Rate of one Shilling for every Tun, in such manner as is set forth more at large in the said Statute.

Sect. 31. As to the Fourth of the above mentioned Exceptions relating to Fish, it is enacted by the said Statute of 5 & 6 Ed. 6. 14. Par. 7. That the Buying of any dried or salted Fish, Herring, or Sprats (not forestalled) and sold for reasonable Prices, shall not be deemed any Offence contrary to the said Act.

Sect. 32. And it is farther enacted by the said Statute, Par. 15. That it shall be lawful for any Subject, dwelling within one Mile of the main Sea, to buy all manner of Fish fresh or salted, (not forestalling the same) and to sell the same again at reasonable Prices.

Sect. 33. And it is farther enacted by 5 El. 5. Par. 13. That so much of the said Statute of 5 & 6 Ed. 6. 14. and so much of all other Statutes against Regrators, Ingrossers, and Forestallers, as concerneth the Buying of Sea-fish unsalted, or Mud-Fish, to be taken and brought in any English Subjects Ships, Crayers, or other Vessel, into any Place of this Realm, shall be utterly repealed for so much of the said Fish, as any Buyer upon the Sea by way of Forestalling or Regrating, shall bring and discharge in any Port or Haven within this Realm.

Sect. 34. As to the Fifth of the above mentioned Exceptions relating to Wine, Oil, Sugar, Salt, &c. the same Exception is made in Relation to Wine, Oil, and Salt by the said Statute of 5 El. 5. Par. 13. as is set forth in the last Section concerning Fish unsalted, or Mud-fish.

Sect. 35. And it is farther enacted by 13 El. 25. Par. 21. That the said Statute of 5 & 6 E. 6. 14. is not meant to extend, nor shall extend to any Wines, Oils, Sugars, Spices, Currans, nor other foreign Victuals, brought into this Realm from beyond the Seas, Fish and Salt only excepted.

Sect. 36. As to the Sixth of the above mentioned Exceptions relating to Fishmongers, Victuallers, Butchers, and Poulterers, &c. it is enacted by the said Statute of 5 & 6 E. 6. 14. That the Buying of any Victual by any Fishmonger, Butcher, or Poulterer, as concern his own Faculty, Craft, or Mystery, otherwise than by Forestalling, which shall sell the same again upon reasonable Prices by Retail; or the Buying of any Wine or other dead Victual above mentioned, being meet for Man's Sustenance, by any Innholder, or other Victualler, to sell the same by Retail within his House, or to any of his Neighbours for their Sustenance, for reasonable Prices, shall not be deemed any Offence contrary to the said Act.

Sect. 37. Notwithstanding this Exception it hath been resolved, That any of the Persons therein mentioned may be indicted for ingrossing Victuals, with an Intent to sell them again, against the Form of the Statute; for it shall be intended that they ingrossed, and did not sell at reasonable Prices.

Cro. Ca. 314.
1 Rol. Rep.
11, 12.
1 Jon. 320.

Sect. 38. As to the Seventh of the above mentioned Exceptions relating to Badgers and Drovers, it is enacted by the said Statute of 5 & 6 E. 6. 14. Par. 7. *That the Buying of any Corn, Fish, Butter, or Cheese, by any such Badger, Lader, Kidder, or Carrier, that shall be allowed to that Office by three Justices of Peace, &c. which shall sell or deliver in open Fair or Market, or to any other Viſnaller, or to any other Person for the Provision of his House, all such Corn, Grain, Butter and Cheese, as any such Person shall buy, or cause to be bought, and that within one Month next after he shall so buy any such Corn, Grain, Butter or Cheese, so that the same shall be bought without Forestalling, shall not be deemed any Offence contrary to the said Statute.*

Sect. 39. And it is farther enacted by the same Statute, Par. 12. *That it shall be lawful to every Person who shall be allowed by three Justices of Peace, to buy (otherwise than by Forestalling) Corn, Grain, or Cattle, to be carried by Water from any Place within this Realm, or Wales, unto any other Place within the said Realm, or Dominions, if he shall without Fraud embark within forty Days next after he shall have bought the same, or taken Covenant, or Promise for the buying thereof, and with all possible Expedition transport the same to such Place as his Cocket shall declare, and there unlade the same, and bring a Certificate thereof from a Justice of Peace of the County, or Head-Officer of the Town, and Customer of the Port where it shall be unladen, &c. to be directed to the Customer and Comptroller of the Port where it shall be embarked.*

Sect. 40. And it is farther enacted by the same Statute, Par. 16, 17. *That it shall be lawful for any Person known for a common Drover, being licenced by three Justices of Peace, &c. to buy Cattle in such Shires where Drovers had been wont in Times past, accustomably to buy Cattle at their free Liberty and Pleasure, and to sell the same as is aforesaid, at reasonable Prices, in common Fairs or Markets, distant from the Place where he shall buy the same forty Miles, so that the same Cattle be not bought by way of Forestalling.*

Sect. 41. And it is farther enacted by 5 El. 12. and 13 El. 25. Par. 20. *That no Drover of Cattle, Badger, Lader, Kidder, Carrier, Buyer or Transporter of Corn or Grain, Butter and Cheese, shall be licenced to any such Office or Doing, in any County except Westmorland, Cumberland, Lancaster, Chester or York, but only in the General open Quarter Sessions of the Peace, to be holden in the Shire where such Person so to be allowed shall dwell, and shall have dwelled three Years next before the Telle of his Licence: And that no Person be admitted to any of the said Offices or Doings, but such only as be or have been married Men, and shall be at the Time of such Licence to be granted, Householders, and not Household-Servants, nor Retainers to any Person, and of the Age of thirty Years: And that such Licences shall be good only for one Year next after the Date, and shall bear Date of the Day and Place where the said Sessions shall be holden, and shall be signed and sealed with the proper Hands and Seals of three Justices present at the same Sessions, whereof one to be of the Quorum, on Pain that every Person that shall take any Licence contrary to this Ordinance, shall forfeit five Pounds, and that all Licences made otherwise than is before expressed, shall be void; and that the Justices in the said Sessions shall by their Discretion, take Bond and Surety from Time to Time, by Recognizance of such as shall be allowed a common Drover of Cattle, Badger, or Lader, &c. that they nor any of them shall by Colour of such Licence forestall, or engross, or otherwise do any Thing contrary to the Meaning of the said Statute of 5 & 6 E. 6. 14. And that every such Licence and Recognizance shall be made and written by the Clerk of the Peace of every County, where such Licence shall be granted, or by his Deputy, and by no other Person; and that every Person that shall have any such Licence, shall pay to the Clerk of the Peace, &c. Twelve-pence only; and for every such Recognizance, eight Pence; and for registering the same*

Licence and Recognizance, four Pence; and that the said Clerk, &c. for the said Fee, shall keep one Register-Book, and therein shall register and write all the Names, Surnames, and Dwelling-Places of such as shall be so licenced, with a brief Entry of the said Licence, and of the Day, Time, and Place where it shall be granted; and that the said Clerk of the Peace shall bring the said Book to every Sessions, that it may appear what Number of Licences have been granted. And that no Person shall by Authority of any such Licence, buy any Corn or Grain out of open Fair or Market to sell again, unless he shall be thereunto licenced by special and express Words contained in such Licence, on pain to forfeit five Pounds for every Time that he shall do to the contrary, and that one Moiety of the Forfeitures afore rehearsed, shall be to the Queen, and the other to him who will sue for the same, &c.

Sect. 42. As to the Eighth of the above mentioned Exceptions relating to Lessors, it is enacted by the said Statute of 5 & 6 E. 6. 14. Par. 7. That the Taking of any Cattle, Corn, Grain, Butter, Cheese, or any other Thing in the said Statute mentioned, reserved without Fraud or Covin, upon any Lease for Life or Years, shall not be deemed any Offence contrary to the said Statute.

Sect. 43. As to the Ninth of the above mentioned Exceptions relating to Shipping and Castles, it is farther enacted by the same Paragraph of the said Statute, That the same shall not extend to Provision made, without Fraud, by any Person, of any of the Things in the said Statute mentioned, for the victualling of any Ship, Castle, or Fort, within the King's Dominions, without Forestalling, which shall be employed only to that Use and Purpose, &c.

Sect. 44. As to the Tenth of the above mentioned Exceptions relating to Towns-Corporate, it is farther enacted by the same Paragraph, That the said Statute shall not extend to any common Provision to be made without Fraud by any Person, of any of the Things in the said Statute mentioned for any City, Borough, or Town-corporate.

Sect. 45. Also it is enacted by the said Statute of 5 El. 12. Par. 9. concerning the licencing of Badgers, &c. That nothing therein contained shall in any wise extend to the Prejudice of the Liberty of any City or Town-corporate, but that every of them may assign and licence Purveyors, for the Provision of the same, as they might have done before.

Sect. 46. As to the third Point, viz. in what Manner Offenders of this Kind are to be proceeded against, it is enacted by the said Statutes of 5 & 6 E. 6. 14. Par. 10, 11. and 5 El. 12. Par. 8. That the Justices of Peace of every County at their Quarter Sessions may enquire, hear, and determine, all the Offences contrary to either of the said Acts, by Inquisition, Presentment, Bill, or Information before them exhibited, and by Examination of two lawful Witnesses, or by any of the same Ways or Means, by their Discretion, and make Process thereupon, as though they were indicted before them by Inquisition, or by Verdict of twelve Men or more; and upon the Conviction of the Offender, by Information or Suit of any other than the King, make Extracts of the Moiety of the Forfeitures to be levied to the King's Use, &c. and award Execution of the other Moiety for the Complainant, &c. by Fieri facias, or Capias, as the King's Justices at Westminster use to do, &c. and if such Conviction shall be at the King's Suit, the Whole shall be levied to his Use only.

Sect. 47. Also it is provided by 31 El. 5. which ordains that Informations for Offences against Penal Statutes, must be laid in the proper County, That nothing in the said Statute contained, shall extend to any Information or Declaration, for any Offence comprised in any Statute made against Ingrossing, Regrating, or Forestalling, where the Penalty or Forfeiture shall appear to be to the Value of twenty Pounds, or above, but that every such Offence may be laid in any County at the Pleasure of the Informer.

See B. 2.
Ch. 26. S. 26.
co 39.

C H A P. LXXXI.

Of Barratry.

IN treating of Barratry, I shall consider :

1. Who shall be said to be a Barrator.
2. In what Manner such an Offender is to be proceeded against.
3. To what Punishment he is liable.

Sect. 1. As to the first Point it seems, That a Barrator is a common Mover, Exciter, or Maintainer of Suits or Quarrels, either in Courts, or in the Country. Co. Lit. 368.
8 Co. 36. b.

Sect. 2. And it is said not to be material, whether the Courts wherein such Suits are commenced, be of Record or not, or whether such Quarrels in the Country relate to a disputed Title of Possessions or not : But that all Kinds of Disturbances of the Peace, and the Spreading of false Rumors and Calumnies, whereby Discord and Disquiet may grow among Neighbours, are as proper Instances of Barratry, as the Taking or Keeping the Possession of Lands in Controversy. Co. Lit. 368.
8 Co. 36. b.

Sect. 3. But it hath been holden, That a Man shall not be adjudged a Barrator in Respect of any Number of false Actions brought by him in his own Right ; however if such Actions be merely groundless and vexatious without any Manner of Colour, and brought only with a Design to oppress the Defendants, I do not see why a Man may not as properly be called a Barrator for bringing such Actions himself, as for stirring up others to bring them. 1 Rol. Abr.
355. A.
3 Mod. 98.
8 Co. 36. b.

Sect. 4. But it seems, That an Attorney is in no Danger of being judged guilty of an Act of Barratry, in respect of his maintaining another in a groundless Action, to the commencing whereof he was no way privy. 3 Mod. 97, 98.

Sect. 5. Also it seems clear, That no one can be a Barrator in respect of one Act only ; for every Indictment for such Crime must charge the Defendant with being *Communis Barraſtor*. 8 Co. 36. b.

Sect. 6. It seems to have been holden, That a Feme-Covert cannot be indicted as a common Barrator, but this Opinion seems justly questionable ; for since a Feme-Covert is as capable of exciting Quarrels, in the frequent Repetition whereof the Notion of Barratry seems to consist, as if she were sole, why should she not as properly be indictable for it? 2 Rol. Re. 39.
See Chap. 1.
Sect. 13.

Sect. 7. As to the second Point, viz. In what Manner Offenders of this Kind are to be proceeded against, it is enacted by 34 E. 3. 1. That in every County shall be assigned for the Keeping of the Peace one Lord, and with him three or four of the most worthy of the County, &c. and that they shall have Power to restrain Offenders, Rioters, and all other Barrators, and to pursue, arrest, take, and chastise them, according to their Trespas or Offence ; and so cause them to be imprisoned and duly punished according to the Law and Customs of the Realm, and according to that which to them shall seem best to do by their Discretions and good Adviseement, &c.

Sect.

Con. B. 2. Ch.
8. S. 38. 39.
Yelv. 46.
2 Rol. Re. 151.

Sect. 8. It seemeth from these Words, That Justices of Peace (as such) have Cognizance of Barratry without any other Commission, *sed Quære*; for the contrary Opinion seems to have been holden in *Rolle's Reports*.

1 Mod. 288.
1 Sid. 282.
Cro. Ja. 526.

Sect. 9. However it seems clear, That no general Indictment of this Kind, charging the Defendant with being a common Oppressor, and Disturber of the Peace, and Stirrer up of Strife among Neighbours, is good, without adding the Words *communis Barrator*, which is a Term of Art appropriated by the Law to this Purpose.

2 Rol. Abr.
79 Pl. 3. 82.
Pl. 6.

Sect. 10. ^a Also it seemeth to be certain, That an Indictment of Barratry concluding *contra formam Statuti*, is good, tho' no Statute be made directly against it, but only for the Punishment of it, supposing it an Offence at Common Law.

Cro. Ja. 527.
Cro. Ca. 340.
2 Keb. 409.

410.
Cro. El. 148.
2 Keb. 410.
Cro. El. 195.
Con. Latch.

Sect. 11. ^b Also it hath been holden, That an Indictment of this Kind may be good, without alledging the Offence at any certain Place; because from the Nature of the Thing, consisting in the Repetition of several Acts, it must be intended to have happened in several Places; for which Cause it is said, That a Trial ought to be by a Jury from the Body of the County.

194.
Palm. 450.
1 Rol. Re. 295.
c Cro. Ja. 527.

Sect. 12. ^c But it hath been resolved, That such an Indictment is not good, without concluding *contra Pacem, &c.* for this is an essential Part of it.

2 5 Mod. 18.

Sect. 13. ^d Also it seemeth to be settled Practice, not to suffer the Prosecutor to go on in the Trial of an Indictment of this Kind, without giving the Defendant a Note of the particular Matters, which he intends to prove against him; for otherwise it will be impossible to prepare a Defence against so general, and uncertain a Charge, which may be proved by such a Multiplicity of different Instances.

Hutton 104.

Sect. 14. As to the third Point, *viz.* In what Manner Offenders of this Kind are to be punished; it is said, That if they be common Persons, they are to be fined and imprisoned, and bound to their good Behaviour; and if they be of any Profession relating to the Law, that they ought also to be farther punished, by being disabled to practise for the Future.

Vide 1 Dan.
Abr. 111. Pl.
6, 113. Pl.
15.

C H A P. LXXXII.

Of Usury.

Offences under the Degree of Capital more immediately against the Subject, not amounting to an actual Disturbance of the Peace, which may be committed by private Persons without any Relation to an Office, and which are neither infamous nor grossly scandalous, and more immediately affect the Interests of particular Persons, seem to be reducible to the following Heads:

1. Usury.
2. Maintenance.
3. The Offence of buying or selling pretended Titles.

In treating of Usury, I shall consider :

1. What it is.
2. How it is restrained by Common Law.
3. How by Statute.

Sect. 1. And first it seems, that Usury, in a strict Sense, is a Contract upon the Loan of Money to give the Lender a certain Profit for the Use of it, upon all Events, whether the Borrower make any Advantage of it, or the Lender suffer any Prejudice for the Want of it, or whether it be repaid on the Day appointed, or not. Wood's Inf.
171.
1 Inst. 151.
See Bro Usu-
ry 12.

Sect. 2. And in a larger Sense it seemeth, That all undue Advantages taken by a Lender against a Borrower come under the Notion of Usury, whether there were any Contract in relation thereto, or not; as where one in Possession of Land, made over to him for the Security of a certain Debt, retains his Possession after he hath receiv'd all that is due from the Profits of the Land. Gibb. 1070.

Sect. 3. But it hath been resolved, That an Agreement to pay double the Sum borrowed, or other Penalty on the Non-payment of the principal Debt at a certain Day, is not usurious, because it is in the Power of the Borrower wholly to discharge himself, by repaying the Principal according to the Bargain. 2 Ro. A. 801.
Pl. 2, 3.
802. Pl. 4.
26 E. 3, 71. 2.
2 Inst. 89.

Sect. 4. As to the second Point, viz. How Usury is restrained by the ^a Common Law; it is said, That anciently it was holden to be absolutely unlawful for a Christian to take any Kind of Usury, and that whosoever was guilty of it, was liable to be punished by the Censures of the Church in his Life-time; and that if after Death any one was found to have been an Usurer while living, all his Chattels were forfeited to the King, and his Lands escheated to the Lord of the Fee. 2 3 Inst. 151.
2 Ro. A. 800,
801.
2 Inst. 506,
507.
Palm. 293,
294.

Sect. 5. Also it seemeth to have been the Opinion of the Makers of some late Acts of Parliament, as 5 Ed. 6. 20. 13 El. 8. Par. 5. and 21 Jac. 1. 17. Par. 5. That all Kinds of Usury are contrary to good Conscience. b 2 Ro. A. 801.
26 Ed. 1. 71. 1.
1 Ro. Ab. 18.
Pl. 14, 15.
2 Ro. Re.
239, 240, 469.
Palm. 293.

Sect. 6. ^b And agreeably hereto it seemeth formerly to have been the general Opinion, That no Action could be maintained on any Promise to pay any Kind of Use for the Forbearance of Money, because that all such Contracts were thought to be unlawful, and consequently void. c 1 Ro. A. 25.
Pl. 35.
2 Ro. A. 782,
802. H. 1.
Pl. 4.
Winch. 114.
120.
Cro. Ja. 378,
379.
1 Vent. 198,
199.
3 Keb. 15.
Cro. Ca. 273.
1 Vent. 198.

Sect. 7. But it seems to be generally agreed at this Day, ^c That the Taking of reasonable Interest for the Use of Money is in it self lawful, and consequently that a Covenant or Promise to pay it, in Consideration of the Forbearance of a Debt, will maintain an Action: For why should not one who has an Estate in Money be as well allowed to make a fair Profit of it, as another who has an Estate in Land? And what reason can there be, that the Lender of Money should not as well make an Advantage of it as the Borrower? Neither do the Passages in the *Mosaical* Law, which are generally urged against the Lawfulness of all Usury, if fully considered, so much prove the Unlawfulness, as the Lawfulness of it; for if all Usury were against the moral Law, why should it not be as much so in respect of Foreigners, of whom the *Jews* were expressly allowed to take it, as in respect of those of the same Nation, of whom alone they were forbidden to receive it? From whence it seems clearly to follow, That the Prohibition of it to that People was merely political, and consequently doth not extend to any other Nation. Exod. 22.
ver. 25.
Levit. 25.
ver. 36, 37.
Deuter. 23,
ver. 19, 20.

Sect. 8. As to the Third Point, viz. How Usury is restrained by Statute, it is enacted by 12 Annæ 16. That no Person whatsoever, shall upon any Contract which shall be made from and after the nine and twentieth Day of September, 1714. take, directly or indirectly, for Loan of any Money, Wares, Merchandize, or other Commodities whatsoever, above the Value of five Pounds, for the Forbearance of one hundred Pounds for a Year, and so after that Rate for a greater or lesser Sum, or for a longer or shorter Time; and that all Bonds, Contracts, and Assurances whatsoever, made after the Time aforesaid, for Payment of any Principal, or Money to be lent, or covenanted to be performed upon or for any Usury, whereupon or whereby there shall be reserved or taken above the Rate of five Pounds in the Hundred, as aforesaid, shall be utterly void, (tho' the Reservation be of so much if requested, and the Request be never made) and that all and every Person or Persons whatsoever, which shall after the Time aforesaid, upon any Contract to be made after the said nine and twentieth Day of September, take, accept, and receive, by Way or Means of any corrupt Bargain, Loan, Exchange, Chevizance, Shift, or Interest of any Wares, Merchandize, or other Thing or Things whatsoever, or by any deceitful Way or Means, or by any Covin, Engine, or deceitful Conveyance, for the forbearing or giving Day of Payment for one whole Year, of and for their Money or other Thing, above the Sum of five Pounds for the forbearing of one hundred Pounds for a Year, and so after that Rate for a greater or lesser Sum, or for a longer or shorter Term, shall forfeit and lose for every such Offence the treble Value of the Money, Wares, Merchandize, and other Things so lent, bargained, exchanged, or shifted. And Note, That the treble Value is not forfeited, unless something be taken above the legal Rate; but the very Contract alone avoids the Security.

3 Keb. 259.
160.
1 Vent. 253.

2 Vide Cro.
Ja. 25.
Mo. 644 Pl.
819.
Noy 41.
Cro. Ca. 283.
Cro. Eliz 20.

Sect. 9. And it is farther enacted by the said Statute, That every Scrivener, Broker, Solicitor, and Driver of Bargains for Contracts, who shall, after the said nine and twentieth Day of September, take or receive, directly or indirectly, any Sum or Sums of Money, or other Reward or Thing, for Brokage, Soliciting, Driving or Procuring the Loan, or forbearing of any Sum or Sums of Money, over and above the Rate or Value of five Shillings for the Loan, or forbearing of one hundred Pounds, for a Year, and so rateably; or above twelve Pence, over and above the Stamp Duties, for making or renewing of the Bond or Bill for Loan, or forbearing thereof, or for any Counterbond or Bill concerning the same, shall forfeit for every such Offence twenty Pounds, with Costs of Suit, and suffer Imprisonment for half a Year, the one Moiety of all which Forfeitures shall be to the Queen, the other to him that will sue for the same, in the same County where the several Offences are committed, &c.

The Expositions which were made of the former Statutes of Usury being equally applicable to this which is penned almost in the very same Words, I shall take Notice of the Principal of them; as,

Dalif. 12.
Con. Raym.
197.

Sect. 10. I. That a Contract made before the Statute is no way within the Meaning of it, and therefore that it is still lawful to receive six per Cent. in respect of any such Contract.

2 And. 121.
Moore 752.
Pl. 1035.
Cro. Ja. 32, 33.
Yel 47.

Sect. 11. II That a Bond made, to secure a just Debt payable with lawful Interest, shall not be avoided by reason of a corrupt Agreement between the Obligors, to which the Obligees was no way Privy: As where A. being indebted to B. in 100 l. agrees to give him 30 l. for the Forbearance of that 100 l. for a Year, and gives him a Bond of 60 l. for Payment of the 30 l. and for the Payment of the 100 l. enters into a Bond of 200 l. together with B. for the Payment of a true Debt of 100 l. due from B. to C.

Sect. 12. III. That the Receipt of higher Interest than is allowed by the Statute, by vertue of an Agreement subsequent to the first Contract, does not avoid an Assurance fairly made, and agreeable to the Statute, but only subjects the Party to the Forfeiture of treble Value, for the Words are, *That all Assurances for the Payment of any Principal, &c. whereupon or whereby there shall be reserved or taken above the Rate of 5 l. in the Hundred, &c. shall be utterly void.*

1 Mod. 69.
3 Keb. 142.
2 Mod. 307.
1 Saund. 294.
Raym. 196.
2 Keb. 528,
690.
1 Bull. 17.

Sect. 13. IV. That in an Assurance for the Payment of fifty Shillings for the Use of 100 l. for six Months, the Computation shall be by Kalendar and not by Lunar Months, because by the latter the Interest would exceed the Rate allowed by the Statute.

Noy 37.
1 Leon. 96.

Sect. 14. V. That the Receipt of Interest before the Time when it is in Strictness due, being voluntarily paid by the Debtor for the greater Convenience of the Creditor, or for any other such like Consideration, without any Manner of corrupt Practice, or any previous Agreement of this Kind at the making of the first Contract, does not make the Party liable to the Forfeiture of the treble Value.

1 Bull. 17 20.
Yel. 30, 31.
Noy 171.
2 Keb. 690.
Con. 1 Leon.
96.

Sect. 15. VI. That the Grant of an Annuity for Lives not only exceeding the Rate allowed for Interest, but also exceeding the known Proportion for Contracts of this Kind, in Consideration of a certain Sum of Money, is not within the Meaning of the Statute, unless there were some underhand Bargain for the Security of the Repayment of the Principal or Consideration-Money.

Cro. Ja. 253.
Noy 151.
2 Levinz 7, 8.
Vid 2 Rol. A.
782. H. 1.

Sect. 16. VII. That no Contract is usurious, by which the Lender runs the Hazard of losing all his Money, both Principal and Interest: As where on the Loan of a certain Sum for a Year, for the Victualling of a Ship, it is agreed, That if the Ship return, the Lender shall have so many thousand Filthes at such a Rate, which exceeds the Interest allowed by the Statute, and if the Ship never return, or if it perish by unavoidable Casualties of Sea, Fire, or Enemies, that then he shall have nothing: Or where on the Loan of 30 l. a Bond is given for the Payment of 100 l. on the Marriage of a Daughter of one of the Parties; provided, That if either of them should die before, that then nothing should be paid: But it is clear, That if the Interest only be hazarded on such a Contract, and the whole Principal secured, the Whole is usurious. Also it hath been resolved, That an Agreement to pay more than the lawful Interest for the Loan of a certain Sum at such a Day, if A. B. shall be then alive, and if he shall be dead, then to pay such a Sum which is less than the Principal, is void by the Statute; for if such a Contingency would exempt the Case out of the Statute, by the same Reason twenty Lives might be added, and the Statute wholly evaded.

Cro. Ja. 208,
209, 508, 509.
1 Keb. 539,
711.
2 Ro. Re. 48.

1 Lev. 54.
1 Sid. 27.
3 Keb. 304.
Vide Cro. El.
741.

2 Ro. Re. 48.
Cro. Ja. 508.

5 Co. 70.
Moore 397.
Cro. Eliz. 642,
643, 741.
Lutw. 468,
469.

Sect. 17. VIII. That an Assurance made in Pursuance of a fair Agreement for such Interest as is allowed by the Statute, shall not be avoided by the Fault of the Scrivener, who draws it up in such a Manner as to bring it within the express Letter of the Statute: As where the Parties agree, That 5 l. shall be paid for the Loan of 100 l. for a Year, and the Scrivener in drawing the Bond for it, doth, without the Knowledge of the Parties, who are illiterate Persons, make the 5 l. payable at the End of hal a Year: Or where on the fair Loan of 100 l. agreed to be paid with common Interest, a Mortgage is made for the 100 l. with a proviso, That it shall be void on Payment of 105 l. at the End of one Year, without any Covenant for the Mortgagor to take the Profits till Default be made of Payment, so that in Strictness the Mortgagee is intitled both to the Interest and Profits.

Cro. Ja. 677,
678.
2 Ro. Re. 414.
415.
Hecley 11.
1 Jon. 396.
Cro. Ca. 501.
2 Vent. 83.

2 Mod. 307.
2 Rol. A. 793,
798, 5.

Sect.

Sect. 18. IX. That the Loan of Money for lawful Interest allowed by the Statute, shall not be construed to be within the Purview of it, in respect of any Expectations which the Lender may have of a voluntary Gratuity to be given him by the Borrower, if there be no Kind of Agreement relating to it.

Sect. 19. X. That the Reservation of a greater Sum than is allowed by the Statute for Interest, upon the Non-payment of the Principal at the End of the Year, is not usurious within the Statute, because it is in the Power of the Borrower to avoid the Payment of the Money so reserved, by paying the Principal at the Day appointed; yet it seemeth clear, That if it were originally agreed, that the principal Money should not be paid at the Time appointed, and that such Clause was inserted only with an Intent to evade the Statute, the whole Contract is void; for the Construction of Cases of this Nature must be governed by the Circumstances of the whole Matter, from which the Intention of the Parties will appear in the making of the Bargain, which, if it was in Truth usurious, is void, however it may be disguised by a specious Assurance.

Sect. 20. XI. That a ^a Fine levied, or Judgment suffered, in Pursuance of an usurious Contract, may be avoided by an Averment of the corrupt Agreement, as well as any common Specialty, or parol Contract. And in an *Assumpsit* if it appear, either upon the Evidence, or from the Plaintiff's own Express Shewing in his Declaration that the Contract was usurious, he cannot recover. But a Specialty cannot be avoided by Usury appearing on Evidence or on the Face of the Condition, but it must be pleaded.

Sect. 21. XII. That it is not ^b material whether the Payment both of the Principal and also of the usurious Interest be secured by the same ^c or by different Conveyances, but that all Writings whatsoever for the strengthening such a Contract, are void.

Sect. 22. XIII. That a Contract reserving to the Lender a greater Advantage than is allowed by the Statute, is equally within the Meaning of it, whether the whole be reserved by way of Interest, or in Part only under that Name, and in Part by way of Rent for a House, let at a Rate plainly exceeding the known Value.

Sect. 23. XIV. That a second Bond made after the Forfeiture of a former, and conditioned for the Receipt of Interest according to the Penalty of the forfeited Bond, is as much within the Statute as if it had been made before the Forfeiture; for if such a Practice should be allowed, nothing could be more easy than to elude the Statute; and though the whole Penalty be due in Strictness to the Obligee, yet the true principal Debt is in Conscience no greater after the Forfeiture of the Bond than it was before.

Sect. 24. XV. That in pleading an usurious Contract by way of Bar to an Action, you must set forth the whole Matter specially, because it lay within your own Privy; but that in an Information on the Statute for making such a Contract, it is sufficient to set forth the corrupt Bargain generally, because Matters of this Kind are supposed to be privily transacted, and such Information may be brought by a Stranger.

Sect. 25. XVI. ^d That in every such Information it is necessary expressly to set forth the Place where the corrupt Bargain was made.

Sect. 26. XVII. That if an usurious Contract in the County of *D.* be pleaded in Bar to an Action on a Bond said to be made in the County of *E.* the Trial shall be in the County of *D.* because the Ground of the Matter is the usurious Contract, and the Bond is confessed by the Plea.

Sect.

Sect. 27. XVIII. That he who hath agreed to pay Money upon an usurious Contract, shall not be admitted to give Evidence upon an Information against the Usurer, unless he have paid off the whole Debt; for by such Means a Man might avoid his own Act and Deed.

Co. Lit. 6. b.
2 Rol. A. 685.
2 Raymond
191. B. 2. Ch.
47 S. 24.

Sect. 28. XIX. That an Information for an usurious Contract on a Loan of Money, cannot be supported by Evidence of such a Contract on a Bargain concerning Wares sold.

1 Leon. 95, 96.

C H A P. LXXXIII.

Of Maintenance.

Señ. 1. **M**Aintenance is commonly taken in an ill Sense, and in general, seemeth to signify an unlawful Taking in Hand, or Upholding of Quarrels or Sides, to the Disturbance or Hinderance of common Right, and is said to be twofold:

Co. Lit. 368. b.
2 Inst. 208,
212.

Sect. 2. I. *Ruralis*, or in the Country; as where one assists another in his Pretensions to certain Lands, by taking or holding the Possession of them for him by Force or Subtilty, or where one stirs up Quarrels, and Suits in the Country, in relation to Matters wherein he is no way concerned: And this Kind of Maintenance is punishable at the King's Suit by Fine and Imprisonment, whether the Matter in Dispute any way depended in Plea or not, but is said not to be actionable.

Co. Lit. 368. b.
2 Inst. 212.
1 Ric. 1. ch. 4.
2 Rol. Abr.
115. F.

Señ. 3. II. *Civialis*, or in a Court of Justice, where one officiously intermeddles in a Suit depending in any such Court which no way belongs to him, by assisting either Party with Money or otherwise, in the Prosecution or Defence of any such Suit.

Falt. 25.
2 Inst. 212.
2 Rol. A. 115.
F.

Of this second Kind of Maintenance there seem to be three Species:

1. Where one maintains another without any Contract to have Part of the Thing in Suit, which generally goes under the common Name of Maintenance.
2. Where one maintains one Side, to have Part of the Thing in Suit, which is called Champerty.
3. Where one laboureth a Jury, which is called Embracery.

For the better understanding of the first of the above mentioned Species, I shall examine:

1. What shall be said to amount to an Act of Maintenance.
2. In what Respects some such Acts may be justified.
3. How far Offences of this Kind are restrained by the Common Law.
4. How far by Statute.

128 H. 6. 7. b.
12. a.
34 H. 6. 25,
26. a. b.
9 E. 4. 32. a.
11 H. 7. 40. b.
6 E. 4. 5. b.
19 E. 4. 3. b.
31 H. 6. 9.
Bro. Maintenance 7, 14,
17, 20, 24,
43, 44, 52.
2 Rol. A. 118
Pl. 5, 6.

Sect. 4. As to the first Point, it seemeth clear, That whoever assists another with Money to carry on his Cause, as by retaining one to be of Counsel for him, or otherwise bearing him out in the whole or part of the Expence of the Suit, may properly be said to be guilty of an Act of Maintenance, as it seems to be taken for granted in the ^a Books cited in the Margin.

Sect. 5. Also it is said, That not only he who lays out his Money to assist another in his Cause, but also that he who by his Friendship or In-

S I F

terest

† 18 H.6.7.b
12. b.
34 H.6.25 b.
9 E. 4. 32 a.
Bro. Mainte-
nance 6, 7, 20.
* 22 H.6 5 b.
Bro. Mainte-
nance 14.
Cro. E. 735.
b 28 H.6. 6 a.
11 H.6 41. b
Bro. Mainte-
nance 5, 51.
Fitz. Mainte-
nance 10.
2 Rol. Abr Pl.
118. Pl. 7, 8.
c Hetley 78,
79.
d 1 Rol. Ab.
593. Pl. 11.
e 19 E. 4 3 b.
12 E. 4 14. b.
Hetl. 79.
f 22 H.6. 5. b.
Bro. Mainte-
nance 14.
Fitz. Mainte-
nance 8.
* 22 H.6. 6. b.
11 H.6. 39. b.
19 E. 4. 3. b.
Bro. Mainte-
nance 51.
b 9 H.7. 18 b.
Bro. Cham-
perry 9.
f Bro. Main-
tenance 40.
18 E. 4. 1 Pl.
6. 2 Pl. 8.
17 E. 4 5. b.
Bro. Mainte-
nance 39.
k 12 E. 4. 14 b.
19 E. 4. 3 b.
22 H.6. 35. a.
Bro. Mainte-
nance 17.
3 Rol. Ab.
118. Pl. 2.
Fitz. Mainte-
nance 21.
3 H. 6. 54. a.
Fitz. Mainte-
nance 18
Bro. Mainte-
nance 1.
47 Ed. 3. 10. a.
Bro. Cham-
perry 2.

terest saves him that Expence which he might otherwise be put to, or but endeavours so to do, is also guilty of Maintenance; as where † one perswades, or but endeavours to perswade a Man to be of Counsel for another *gratis*.

Sect. 6. Also it is said, That all such Persons may properly be called Maintainers, who give or but endeavour to give any other Kind of Assistance to either of the Parties, in the Management of the Suit depending between them; as by ^a opening the Evidence to the Jury; or by ^b giving Evidence officiously without being called upon to do it; or by speaking in the Cause as ^c one of Counsel with the Party; or by ^d retaining an Attorney for him; or ^e perhaps for barely going along with him to enquire for a Person learned in the Law.

Sect. 7. Also it hath been said, That those shall come under the like Notion, who give any publick Countenance to another in Relation to any such Suit; as where one of great Power and Interest says ^f publicly, That he will spend twenty Pounds on one Side, or that he will give twenty Pounds to labour the Jury, whether in Truth he spend one Penny or not; or where such a Person comes to the Bar with one of the Parties, and stands by him while his Cause is tried, whether he say any Thing or not; for such Kinds of Practices do not only tend to discourage the other Party from going on in his Cause, but also to intimidate Juries from doing their Duty. But it seems, That a bare ^h Promise to maintain another, is not in it self Maintenance, unless it be either in respect of the publick Manner in which, or the Power of the Person by whom, it is made.

Sect. 8. Also it is said to be as much Maintenance for a ⁱ Juror, as for any other Person, to solicit a Judge to give Judgment according to the Verdict, because after a Juror has given his Verdict, he has nothing more to do: But it is said to be no ^k Maintenance for a Juror to exhort his Companions to join with him in giving such a Verdict as seems to him to be right.

Sect. 9. However it seems clear That a ^l Man is in no Danger of being judged guilty of an Act of Maintenance, for giving another friendly Advice, what Action is proper for him to bring for the Recovery of a certain Debt, or what Method is safest to take to free him from such an Arrest, or what Counsellor or Attorney is likely to do his Business most effectually; for it would be extremely hard to make such neighbourly Acts of Kindness, which seem rather commendable than blameworthy, to come under the Notion of Maintenance, which always seem to imply a contentious, and over-busy intermeddling in other Mens Matters, in which respect it is so highly Criminal. Yet it is said, that a Man of great Power not learned in the Law, may be guilty of Maintenance, by telling another who asks his Advice, that he has a good Title.

Sect. 10. Also it hath been said, That no one can be guilty of Maintenance, in respect of any Money given by him to another before any Suit is actually commenced; yet if it plainly appear, That it was given merely with a Design to assist him in the Prosecution or Defence of an intended Suit, which afterwards is actually brought; surely it cannot but be as great a Misdemeanour in the Nature of the Thing, and equally criminal at common Law, as if the Money were given after the Commencement of the Suit, though perhaps it may not in Strictness come under the Notion of Maintenance.

Sect. 11. However it is certain, That one may as properly be said to be guilty of Maintenance, within the Meaning of the Words *adhuc mantenetur*

nutenet, in an Action of Maintenance, for supporting another after Judgment, as for doing it hanging the Plea; because the Party grieved may be discouraged thereby from bringing a Writ of Error or Attaint.

As to the second Point, *viz* In what Respects some Acts of this Kind may be justified, I shall consider the following Particulars:

1. How far they are justifiable in Respect of an Interest in the Thing in Variance.
2. How far in Respect of Kindred or Affinity.
3. How far in Respect of other Relations.
4. How far in Respect of Charity.
5. How far in Respect of the Profession of the Law.

Sect. 12. As to the first of these Particulars, *viz*. How far some Acts of this Kind are justifiable in Respect of an Interest in the Thing in Variance, it seemeth to be clearly agreed, That if a ^a Tenant in Tail, or for Life, be impleaded, he in Remainder or Reversion may lawfully maintain the Defence of the Suit with his own Money: And upon the like Ground it seems to be clear, That if in an Action of Trespass, &c. brought by or against a ^b Lessee for Years, the Inheritance come into Question, the Lessor may lawfully maintain his Lessee, and give ^c Evidence to prove the Inheritance in himself; for tho' the Judgment which may be given against the Lessee cannot directly bind his Inheritance, yet the Verdict may be a Prejudice to his Title, being given on a Supposal of his not having a good one: Also it hath been ^d admitted as clear Law, That if one seized in Fee of certain Land, bring an Action of Trespass, *quare Clausum fregit*, and then alien the Land, and afterwards in the Trial of the Cause it be questioned whether the Inheritance at the Time of the supposed Trespass belonged to the Plaintiff or Defendant, the Alienee may lawfully produce Evidence to prove that the Inheritance was in the Plaintiff, because the Plaintiff's Title is now become his own.

Sect. 13. Also it hath been said, That not only those who have a certain Interest, but also that those who have a bare Contingency of such an Interest in the Lands in Question, which possibly may never come *in esse*, may in like manner lawfully maintain another in an Action concerning such Lands; from whence it follows, That if I grant to B that if my Lessee for Life shall die during my Life, that then he shall have the Land for ten Years, and after my Lessee be impleaded, B. may maintain him.

Sect. 14. And it hath been said, That not only those who have a Contingency of such an Interest, which it is in no Man's Power to bar them of, if the Contingent happen, may justify such Maintenance, but that those also shall have the same Privilege, who by the Act of God have the immediate Possibility of such an Interest, tho' it be in the Power of another to deprive them of it; and therefore that an Heir Apparent, or the Husband of such an Heir, may lawfully maintain the Ancestor in an Action concerning the Inheritance of the Land whereof he is seized in Fee.

Sect. 15. But it is said, That the Grantee of a Reversion, before the late Statute for Amendment of the Law which made all Attornment needless, could not maintain the Tenant of the Land without Attornment, because his Possibility was wholly created by the Act of the Party, and could not be executed but by the voluntary Attornment of the Tenant, which there was no Remedy to compel him to make by the Common Law; but perhaps the Authority of this Opinion may be questionable, especially if such Grant were made for good Consideration: For since those who have only an equitable Interest in Lands, may lawfully main-

^a 19 E. 4. 3 b.
⁹ H. 6. 64.
 Bro. Maintenance 3. 53.
² Rol. A. 117.
 O. 2.
⁶ E. 4. 2. b.
² Rol. Ab.
 117. O. 3.
 Bro. Maintenance 33.
³ 39 H. 6. 10 a.
 Bro. Maintenance 38.
⁴ 14 H. 6. 7. b.
 Bro. Maintenance 23.
² Rol. Ab.
 117. O. 4.

⁹ H. 6. 64. A.
 B.
² Rol. Ab.
 117. O. 5.

¹⁴ H. 7. 2. a.
¹⁹ Ed. 4. 3. b.
²¹ H. 6. 16 b.
² Inst. 564.
² Rol. A. 115.
 H. 1.

⁹ H. 6. 64. a.
² Rol. Ab.
 117. Pl. 7.

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tain others in Actions relating to those Lands, as shall more fully be shewn in the seventeenth Section; and since the Grantor in Equity shall stand intrusted for the Grantee after the Grant, and the Tenant may be enforced by a Court of Equity to attorn to him, I do not see any good Reason why such Grantee should be esteemed such a Stranger to the Land, that he may not lawfully defend an Action concerning it, in the Event whereof he is so nearly concerned.

¹¹ H. 6. 41. ^{Bro. Mainte-}
^{nance} 51.
² Rol. Ab.
^{118.} Pl. 8. **Sect. 16.** But it seems clear, That he who is bound to warrant Lands, may lawfully maintain the Tenant in the Defence of his Title, because he is bound by the Warranty to render other Lands to the Value of those which shall be evicted.

³⁴ H. 6. 30 b. ¹⁵ H. 7. 2. a. ² E. 4. 2. a. ^{Bro. Mainte-}
^{nance} 19. 30. ^{Noy} 100.
^{Moore} 620. ^{Pl.} 847. **Sect. 17.** Also it seems to be agreed, That he who hath an equitable Interest in Lands or Goods, or even in a Chose in Action, may lawfully maintain another in an Action relating thereto; and therefore it seemeth to be clear, That a Man may lawfully ^a maintain those who are infeoffed of Lands in Trust for him, in any Action concerning those Lands, and that if he sell them to another, the Vendee shall have the same Privilege; also it hath been ^b resolved, That where *A.* was bound as a Surety for *B.* and *B.* thereupon made a Deed of Gift of certain Sheep to *A.* in order to save him harmless from the said Bond, with an implied Trust that the Sheep should be returned to *B.* if *A.* should not be damnified, and afterwards an Action was brought against *A.* for the Taking of the Sheep, *B.* might justify the Maintaining of him in respect of the said Trust: Also it seemeth to be ^c certain, That the Assignee of a Bond, or other Chose in Action, being made over to him for good Consideration, in Satisfaction of a precedent Debt due *bonâ fide* to him, and not merely in Consideration of the intended Maintenance, may either maintain the Obligee in an Action brought by him for the Debt, or commence an original Action in his Name, for he hath an equitable Interest in the Debt.

³⁴ H. 6. 30 b. ¹⁵ H. 7. 2. a. ² E. 4. 2. a. ^{Bro. Mainte-}
^{nance} 19. 30. ^{Noy} 100.
^{Moore} 620. ^{Pl.} 847. **Sect. 18.** Also it seemeth to be ^d agreed, That where-ever any Persons claim a common Interest in the same Thing, as in a Way, Church-yard, or Common, &c. by the same Title, they may maintain one another in a Suit relating to the same.

³⁴ H. 6. 30 b. ¹⁵ H. 7. 2. a. ² E. 4. 2. a. ^{Bro. Mainte-}
^{nance} 19. 30. ^{Noy} 100.
^{Moore} 620. ^{Pl.} 847. **Sect. 19.** It is said, That he who is ^e Bail for another, may take Care to have his Appearance recorded, but that he ought not to intermeddle any farther.

³⁴ H. 6. 30 b. ¹⁵ H. 7. 2. a. ² E. 4. 2. a. ^{Bro. Mainte-}
^{nance} 19. 30. ^{Noy} 100.
^{Moore} 620. ^{Pl.} 847. **Sect. 20.** As to the second of the said Particulars, *viz.* How far some Acts of this Kind are justifiable in respect of Kindred or Affinity, it seems to be agreed, That whoever is any way of Kin or Affinity to either of the Parties, so long as the same ^f continues, or but related to him by being his ^g Godfather, may lawfully ^h stand by him at the Bar, and counsel and assist him, and also pray another to be of Counsel to him, but that he cannot justify the laying out of any of his own ⁱ Money in the Cause, unless he be either ^k Father, or Son, or Heir Apparent to the Party, or the Husband of such an Heiress.

³⁴ H. 6. 30 b. ¹⁵ H. 7. 2. a. ² E. 4. 2. a. ^{Bro. Mainte-}
^{nance} 19. 30. ^{Noy} 100.
^{Moore} 620. ^{Pl.} 847. **As to the third of the said Particulars, *viz.* How far some Acts of Maintenance are justifiable in respect of other Relations, I shall consider,**

1. How far a Lord may maintain his Tenant.
2. How far a Tenant may maintain his Lord.
3. How far a Master may maintain his Servant.
4. How far a Servant may maintain his Master.
5. How far one Neighbour may maintain another.

Sect. 20. As to the first Point it seems certain; That not only the ^a Lord, but also the *Cestui que Use* of a Seigniorie, may come with the Tenant to a Trial in an Assize against him, and stand by him and assist him, and also pray the Sheriff to return an indifferent Jury: Also it seemeth, That the ^b Lord of a Town in an Action brought against the Inhabitants, wherein a Right to a common Burying-place, claimed by them, is brought into Question, may maintain them in the Defence of their Right, by shewing authentick Evidence thereof to the Jury: And in some ^c Books it is said generally, That the Lord may maintain his Tenant, without saying, how far he may do it; and I do not find it any where expressly holden, That the Lord may justify Laying out his own Money in Defence of his Tenant's Title; but it seemeth the better Opinion, That he may as well justify it as any other of the above-mentioned Acts of Maintenance, for the Lord, by accepting a Man for his Tenant, seemeth to take him under his immediate ^d Protection; and inasmuch as the Lands were originally derived from the Lord, and he hath the continual Benefit of the Services due from them, the Law in many Cases of ^e Common Right, obliges him to warrant them unto his Tenant, and where it doth not oblige him, surely it will at least permit him to do it: But it ^f seems clear, That he cannot maintain him in respect of any Lands not holden of him.

Sect. 21. As to the second Point, *viz.* How far a Tenant may maintain his Lord, it is said, That he may justify ^g Coming with his Lord, and Standing with him at a Trial; but I cannot find any Thing more relating to this Matter in any of the Books.

Sect. 22. As to the third Point, *viz.* How far a Master may maintain his Servant, it is said, That the Master may go along with his ^h Servant, or with his ⁱ Chaplain, being retained to live in his House with him, in order to ^k retain Counsel, and that he may pray one to be of Counsel for him, and also that he may go with him to the ^l Trial and stand with him and aid him while the Cause is tried, but ought not to speak in the Court in favour of his Cause. Also it is said, That if my Servant be arrested in an Action of ^m Debt, I may assist him with Money in order to keep him out of Prison, that I may have the Benefit of his Service: But it is said, That the Master, in real Actions, cannot justify Laying out Money for his Servant, unless he hath some of his Wages in his Hands; which, if the Servant be willing, the Master may safely lay out in his Behalf.

Sect. 23. As to the fourth Point, *viz.* How far a Servant may maintain his Master, it seemeth clear, That a Person generally retained by another as his Servant to do all manner of Services, and not for a ⁿ particular Occasion only, may justify ^o Riding about to speed his Business, and Going to ^p Counsel in his Behalf, and Shewing his Evidences to the Counsel or to the Jury, and ^q Standing by him at a Trial between him and another; but it is certain, that he cannot lawfully lay out any of his own ^r Money to assist the Master in his Suit.

Sect. 24. As to the fifth Point, *viz.* How far one Neighbour may assist another, it seems clear, That a Man may lawfully go with his ^s Neighbour to inquire for a Person learned in Law, but that he ^t ought not to give him any Money towards carrying on his Suit.

Sect. 25. As to the fourth Instance wherein some Acts of this Kind are justifiable, *viz.* That relating to Charity, it seems to be ^u agreed, That any one may lawfully give Money to a poor Man to enable him to carry on his Suit. Also it hath been adjudged, That any one may safely go

^a 11 H. 6. 39. b.
^{40.} a.
² Rol. Ab.
^{117.} N.
^{Bro.} Maintenance 50.
^b 18 Ed. 4. 2. b.
^{Bro.} Maintenance 41.
² Rol. Ab.
^{116.} G.
^c 9 H. 6. 64. a.
^{Bro.} Maintenance 3.
^d Co. Lit. 65. a.
^e Co. Lit. 101.
^{384.}
¹¹ H. 6. 42. a.
² Rol. A. 117.
^{Fitz.} Maintenance 25.
¹¹ H. 6. 42. a.
² Rol. Ab.
^{116.} K.
^{Herley} 79.
¹⁹ H. 6. 30. b.
^k 28 H. 6. 7. b.
¹² b. 13. b.
³⁴ H. 6. 25. b.
^{26.} a. b.
^{Bro.} Maintenance 6. 14.
^{Fitz.} Maintenance 20.
^{Con.} Fitz.
^{Maintenance}
^{13.}
¹⁹ H. 6. 30. b.
¹¹ H. 6. 42. a.
² Rol. Ab.
^{116.} K.
^{Herley} 79.
²¹ H. 7. 40. b.
^{Moore} 814.
^{Bro.} Maintenance 24.
³¹ H. 6. 9. b.
¹⁹ Ed. 4. 3. b.
² Rol. Ab.
^{116.} K.
^{Herley} 79.
^{Bro.} Maintenance 44. 52.
³⁹ H. 6. 5. b.
^{6.} a.
^{Con.} Keil. 50.
^{b.}
^o 19 E. 4. 3. b.
¹⁹ H. 6. 31. b.
^q 11 H. 6. 42. a.
^r 3 H. 6. 53. b.
^{54.} a.
¹¹ H. 6. 10. b.
^{11.} a.
^s 19 E. 4. 3. b.
¹² Ed. 4. 14. b.
^t 19 E. 4. 3. b.
² Rol. A. 118.
²¹ H. 6. 16. b.
⁹ H. 6. 64. a.
¹² H. 6. 35. a.
^{Bro.} Maintenance 14.

^a 19 E. 4. 3. b. with a ^a Foreigner who cannot speak *English*, to a Counsellor, and inform him of his Case.
³⁴ H. 6. 25. b.
¹⁵ H. 7. 2. a.
 Bro. Maintenance 7.

As to the fifth Instance wherein some Acts of this Kind may be justified, *viz.* that relating to the Profession of the Law, I shall consider,

1. How far they are justifiable in a Counsellor.
2. How far in an Attorney.

^b 11 H. 6. 10. b. Sect. 26. As to the first Point, there is no Doubt but that a ^b Counsellor, having received his Fee, may lawfully set forth his Client's Cause to the best Advantage; but it is certain, That he can no more justify ^c giving him Money to maintain his Suit, or threatening a Juror, than any other Person.
¹¹ a.
² Rol. Ab.
¹¹⁶ M.
² Inst. 564.
^c Fitz. Maintenance 8.

²² H. 6. 6. Sect. 27. As to the second Point, there is no Doubt but that an Attorney may ^d lawfully prosecute or defend an Action in the Court wherein he is an allowed Attorney, in the Behalf of any one by whom he shall be specially retained, and that he may assist his Client, by laying out his own Money for him to be repaid again, and also may maintain an Action against him for the same by Virtue of such a Retainer, without any special Promise; and it is said also, That Attornies may justify such Maintenance in other Courts, wherein they are not ^e allowed Attornies, but that they cannot have an Action for the Money so laid out without a special Promise, and that they are more justified by a general ^f Retainer to prosecute for another all his Causes, than if they were not retained at all; and it is certain that they ought not to carry on a Cause for another at their own Expence, with a Promise never to expect a Repayment. And it ^g seems justly questionable, whether Solicitors who are no Attornies, can in any Case justify the Laying out their Money in another's Suit.
²³ H. 4. 16. b.
 Kellway 50. b.
 Hob. 117.
² Inst. 564.
² Rol. Abr.
¹¹⁶ M.
 Fitz. Maintenance 21.
^e 3 Mod. 98.
 Vid. 2 Danv.
 487, 12, 13, 14.
² C. R. 21.
 Winch. 52.
¹ Jon. 208.
 Cro. Ca. 159, 194.
 Con. Cro. El. 425, 459, 760.
 Moore 366.

Sect. 28. However it is certain, That no Counsellor or Attorney can justify the Using any deceitful Practice, in Maintenance of a Client's Cause, and that they are liable to be severely punished for all Misdemeanours of this Kind, not only by the ^h Common Law, but also by Statute; for it is enacted by *Westminster* 1. 28. *That if any Serjeant, Pleader or other, do any manner of Disceit or Collusion in the King's Court, or consent unto it, in Disceit of the Court, or to beguile the Court of the Party, and thereof be attainted, he shall be imprisoned for a Year and a Day, and from thenceforth shall not be heard to plead in that Court for any Man. And if he be no Pleader, he shall be imprisoned in like manner by the Space of a Year and a Day at the least. And if the Trespass require greater Punishment, it shall be at the King's Pleasure.*
¹¹⁴ Pl. 500.
² Rol. Ab.
¹¹⁴ Pl. 4. 115.
 Pl. 6.
² Rol. Ab.
¹¹⁴ Pl. 5.
² Rol. Ab.
¹¹⁵ Pl. 6.
 Winch. 53.
^b 2 Inst. 214.

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

¹¹ E. 4. 3. b. Sect. 29. I. That Counsellors, &c. who are not sworn, are as much within the Meaning of it as Serjeants, &c. who are sworn.
 Bro. Disceit. 28.

² Inst. 255, 216. Sect. 30. II. That all Fraud and Falshood, tending to impose upon or abuse the Justice of the King's Courts, are within the Purview of it, as in the following Instances:
 Dyer 249.
 Pl. 84.

² Inst. 215. Sect. 31. First, Where an Attorney sues out an *habere facias seissnam*, falsely reciting a Recovery in a real Action, where in Truth there was

was no Recovery at all, and by Colour thereof puts the supposed Tenant in the Action out of his Freehold.

Sect. 32. Secondly, Where one brings a *Præcipe* against a poor Man, knowing that he had nothing in the Land, on Purpose to get the Possession from the true Tenant. 2 Inst. 215

Sect. 33. Thirdly, Where one procures an Attorney to appear for a Man, and confess Judgment without any Warrant. 41 E. 3. 1. b.
2 Inst. 215.

Sect. 34. Fourthly, Where one pleads a false Plea, known to be utterly groundless, and invented merely with a Design to delay Justice, and abuse the Court; and therefore it is said, That if a Client desire his Attorney to plead such a Plea, the Attorney ought to enter upon the Roll, *non sum veraciter informatus, ideo nihil dicit.* Dy. 362. Pl.
13.
10 E. 4. 9. b.

Sect. 35. As to the third general Point of this Chapter, How far Offences of this Kind are restrained by the Common Law, it seemeth, That all Maintenance is strictly prohibited by the Common Law, as having a manifest Tendency to Oppression, by encouraging and assisting Persons to persist in Suits; which perhaps they would not venture to go on in upon their own Bottoms; and therefore it is said, That all Offenders of this Kind are not only liable to an ^a Action of Maintenance at the Suit of the Party grieved, wherein they shall render such Damages as shall be answerable to the Injury done to the Plaintiff, but also that they may be ^b indicted as Offenders against publick Justice, and adjudged thereupon to such Fine and Imprisonment, as shall be agreeable to the Circumstances of the Offence. Also it seemeth, That a Court of Record may commit a Man for an ^c Act of Maintenance done in the Face of the Court. 2 Inst. 208.
112.
11 H. 6. 11. 2.
2 Inst. 208.
2 Rol. Ab.
14. D.
8 H. 6. 8. a.
2 Rol. Ab.
114. D.
2 Inst. 208,
212.
c Hetley 19.

Sect. 36. As to the fourth general Point of this Chapter, How far Offences of this Kind are punished by the Statute, it is enacted by 1 E. 3. 14. which was farther enforced by 20 Ed. 3. 4. *That none of the King's Ministers, nor no Great Man of the Realm, by himself nor by other, by sending of Letters, nor otherwise, nor none other great nor small, shall take upon them to maintain Quarrels nor Parts in the Country, to the Let and Disturbance of the Common Law.*

Sect. 37. And it is farther enacted by 1 R. 2. 4. *That none of the King's Counsellors, Officers or Servants, nor any other Person within the Realm of England, of whatsoever Estate or Condition they be, shall take or sustain any Quarrel by Maintenance, in the Country or elsewhere, upon grievous Pain, that is to say, the said Counsellors and the King's Great Officers, upon a Pain which shall be ordained by the King himself, by the Advice of the Lords of his Realm, and other less Officers and Servants of the King's, as well in the Exchequer, and all his other Courts and Places, as of his own Meiny, upon Pain to lose their Offices and Services, and to be imprisoned, and then to be ransomed at the King's Will, every of them according to their Degree, Estate, and Desert: And all other Persons through the Realm, upon Pain of Imprisonment, and to be ransomed as aforesaid.*

In the Construction of these Statutes the following Points have been holden:

Sect. 38. I. That Maintenance of a Suit in a Court-Baron is as much within the Purview thereof as Maintenance in a Court of Record. Fitz. Maintenance 24.

Sect. 39. II. That *Nul tiel Record* is a good Plea to an Action of Maintenance brought on these Statutes; and therefore, That he who barely assists another in taking out an Original, which never is returned, is not liable to any such Action. 3 H. 6. 53. b.
54. a.
Bro. Maintenance 1.
Fitz. Maintenance 18.

Sett.

Fitz Maintenance 17, 16.

Reg. 182. b.

Sect. 40. III. That it is not material, whether the Plaintiff in an Action on the said Statutes were nonsuited, or recovered in the Action wherein the Maintenance is supposed.

Sect. 41. Also it is certain, That he who fears that another will maintain his Adversary, may by way of Prevention have an original Writ grounded on the said Statute prohibiting him so to do.

Sect. 42. Also all Persons are prohibited to give or receive any Liveries or Badges for Maintenance, under severe Penalties, by 1. R. 2. 7. 7 H. 4. 14. 13 H. 4. 3. 8 H. 6. 4. and 8 E. 4. 2.

Sect. 43. And it is farther enacted by 32 H. 8. 9. *That no Person whatsoever shall unlawfully maintain, or cause or procure any unlawful Maintenance, in any Action, Demand, Suit, or Complaint in any of the King's Courts of the Chancery, Whitehall, or elsewhere, where any Person shall have Authority by Virtue of the King's Commission, Patent or Writ, to hold Plea of Lands, or to examine, hear, or determine any Title of Lands, or any Matter of Witnesses, concerning the Title, Right, or Interest of any Lands, Tenements, or Hereditaments; and also that no Person whatsoever do unlawfully retain, for Maintenance of any Suit or Plea, any Person or Persons, or embrace any Freeholders or Jurors, or suborn any Witness by Letters, Rewards, Promises, or any other sinister Labour or Means, for to maintain any Matter or Cause, or to the Disturbance or Hinderance of Justice, or to the Procurement, by Occasion of any manner of Perjury by false Verdict or otherwise, in any manner of Courts aforesaid, upon Pain to forfeit for every such Offence ten Pounds, the one Moiety thereof unto the King, and the other Moiety to him that will sue for the same by Action of Debt, &c.*

Sect. 44. It seemeth that in an Information on this Statute it is not sufficient to say, That the Defendant maintained the Party without adding that he did it unlawfully.

Noy 68.

Cro. E. 594.

Sect. 45. Also it is said to have been adjudged, That Maintenance of a Suit in a Spiritual Court, is neither within this nor any of the other above mentioned Statutes concerning Maintenance.

Savil 41, 42.

Sect. 46. Also it hath been holden, That in an Information on this Statute, it is necessary to shew that a Plea was depending, and therefore that it is not sufficient to say that a Bill was exhibited.

C H A P. LXXXIV.

Of Champerty.

2 Inst. 208.
Co. Lit. 368. b.

Sect. 1. **A**ND now we are come to the second Species of Maintenance, called Champerty, which is the unlawful Maintenance of a Suit in Consideration of some Bargain to have Part of the Thing in Dispute, or some Profit out of it.

Sect. 2. Having shewn in the precedent Chapter what shall amount to an Act of Maintenance, and how far all Maintenance in general, and consequently Champerty, is punishable by the Common Law; I shall only take Notice in this Place, how far this Offence in particular is restrained by Statute, and to that End shall set down in Order the several Statutes relating to it, and shew in what Manner they have been expounded.

Sect. 3. And first, it is enacted by the Statute of *Westminster* 1. 25. That no Officers of the King by themselves nor by other, shall maintain Pleas, Suits, or Matters hanging in the King's Courts, for Lands, Tenements, or other Things, for to have Part or Profit thereof by Covenant made between them; and he that doth, shall be punished at the King's Pleasure.

In the Construction of this Statute the following Opinions have been holden :

Sect. 4. I. That by the King's Courts therein mentioned, are intended only his Courts of Record. 2 Inst. 108.

Sect. 5. II. That under the Word Covenant, which in a strict Sense signifieth only an Ageement by Deed, all Kinds of Promises and Contracts of this Kind are included, whether they be made by Writing or Parol. F. N. B. 172. L.
2 Inst. 109,
563.

Sect. 6. III. That Maintenance in personal Actions to have Part of the Debt or Damages, is as much within this Statute as Maintenance in real Actions for a Part of the Land. 47 Aff. Pl. 5.
47 Ed. 3. 9 b.

Sect. 7. IV. That Maintenance in Consideration of a Rent granted out of Land in Variance, is within this Statute, but that Rent granted out of other Lands is no way within the Purview of it. F. N. B. 172.
K. M.
2 Inst. 109,
47 Ed. 3. 9. b.

Sect. 8. V. That it hath been holden not to be material, whether he who brings a Writ of Champerty, did in Truth suffer any Damage by it, or whether the Plea wherein it is alledged be determined or not. 47 Aff. 5.
Con. 9 H. 7.
18 b.
Fitz. Cham-
perty 4.
Bro. Cham-
perty 2.

Sect. 9. VI. That the Maintenance of the Tenant or Defendant is as much within the Meaning of the Statute, as the Maintenance of a Demandant or Plaintiff. 21 E. 3. 52. a.
30 Ed. 3. 3. b.
4. a.

Sect. 10. VII. That such Grants only of Part of the Thing in Suit, which are made merely in Consideration of the Maintenance are within the Meaning of the Statute, and not such as are made in Consideration of a precedent honest Debt, which is agreed to be satisfied with the Thing in Demand when recovered. 2 Rol. Ab.
113. Pl. 3.
15 H. 7. 2 a.
Bro. Cham-
perty 6.

Sect. 11. And it is farther enacted by the Statute of *Westminster* 2. 49. That the Chancellor, Treasurer, Justices, nor any of the King's Counsel, no Clerk of the Chancery, nor of the Exchequer, nor any Justice or other Officer, nor any of the King's House, Clerk nor Lay, shall not receive any Church, nor Advowson of a Church, Land, nor Tenement in Fee, by Gift, or by Purchase, or to Farm, nor by Champerty, nor otherwise, so long as the Thing is in Plea before the King, or before any of his Officers, nor shall take no Reward thereof. And that he that doth contrary to this Act, either himself or by an other, or make any Bargain, shall be punished at the King's Pleasure, as well he that purchaseth as he that doth sell.

In the Construction of this Statute the following Opinions have been holden :

Sect. 12. I. That it extendeth only to the Officers therein named, and not to any other Persons. 2 Inst. 484,
485.

Sect. 13. II. That it so strictly restrains all such Officers from purchasing any Land hanging a Plea, that they cannot be excused by a Consideration of Kindred or Affinity, and that they are within the Meaning of the Statute by barely making such a Purchase, whether they maintain the Party in his Suit or not, whereas such a Purchase for good Consideration, made by any other Person, or any Ter-tenant, is no Offence, unless it appear that he did it to maintain the Party. 2 Inst. 485.
2 Inst. 484.
50 Aff. Pl. 3.
Bro. Cham-
perty 8.
Fitz. Cham-
perty 6.
22 E. 3.
10. b. 52. a.
2 Inst. 484.
F. N. B. 173.
Sect. D. E.

Sect. 13. And it is farther enacted by 28 E. 1. 11. in the following Words, *because the King hath heretofore ordained by Statute, That none of his Ministers shall take no Plea for Maintenance, by which Statute other Officers were not bounden before this Time. the King will that no Officer, nor any other, (for to have Part of the Thing in Plea) shall not take upon him the Business that is in Suit; nor none upon any such Covenant shall give up his Right to another; and if any do and be attainted thereof, the Taker shall forfeit unto the King so much of his Lands and Goods, as doth amount to the Value of the Part that he hath purchased for such Maintenance. And to obtain this, whosoever will, shall be received to sue for the King before the Justices before whom the Plea hangeth, and the Judgment shall be given by them. But it may not be understood hereby, that any Person shall be prohibited to have Counsel of Pleaders, or of learned Men in Law, for his Fee, or of his Parents and next Friends.*

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

^a 30 Aff.

Pl. 15.

8 Ed. 4. 13.

^a Inst. 563.

Fitz. Cham-

pertry 13.

F.N.B. 172.D

^b 47 Ed. 3. 9.b.

47 Aff. 5.

^a Inst. 563.

^c Moore 655.

Pl. 898.

Con. 2 Rol.

Ab. 113. Pl.

^a

^d 8 E. 4. 13.b.

Bro. Cham-

pertry 10.

F.N.B. 172.C.

^e F.N.B. 172.

E.

^a Inst. 564.

^c 2 Inst. 564.

F. N. B. 172.

11.

^a 13 H. 7. 17.A

Bro. Cham-

pertry 3.

^b 2 Inst. 564

Sect. 14. I. That a ^a Conveyance executed, hanging a Plea, in Pur-
suance of a Bargain made before, is not within the Meaning of it.

Sect. 15. II. That Champerty in any Action at ^b Common Law, whether it be real, personal, or mixt, is within this Statute: Also it seems the better Opinion, That the Purchase of Land while a Suit of ^c Equity concerning it is depending, is within the Purview of it.

Sect. 16. III. That a ^d Lease for Life, or Years, or a voluntary Gift of Land, hanging a Plea, is as much within the Statute as a Purchase for Money.

Sect. 17. IV. That a Surrender made by a ^e Lessee to his Lessor is not within the Meaning of the Statute; for since the Lessor may law-fully maintain his Lessee without such a Surrender, as hath been more fully shewn in the precedent Chapter, surely *à fortiori*, he may do it after the Surrender.

Sect. 18. V. That no ^f Conveyance, or Promise thereof, relating to Lands in Suit, made by a Father to his Son, or by any Ancestor to his Heir Apparent; is within the Statute, since it only gives them the greater Encouragement to do what by Nature they are bound to do.

Sect. 19. VI. That the ^g Giving of Part of the Land in Suit, after the End of it, to a Counsellor for his Wages, is not within the Meaning of it, if it evidently appear that there was no Kind of precedent Bargain relating to such Gift; but it seems ^h dangerous to meddle with any such Gift, since it cannot but carry with it a strong Presumption of Champerty.

C H A P. LXXXV.

Of Embracery.

FOR the better Understanding of the Nature of Embracery, I shall consider,

1. What Kind of Maintenance comes under the Notion of Embracery.
2. What Acts of this Nature are altogether unlawful.
3. In what Circumstances some Kinds of them may be lawful.
4. How far this Offence is restrained by the Common Law.
5. How far by Statute.

Sect. 1. As to the first Point it seems clear, That ^a any Attempt whatsoever, to corrupt, or influence, or instruct a Jury, or any way to incline them to be more favourable to the one Side than to the other, by Money, Promises, Letters, Threats, or Perswasions, except only by the Strength of the Evidence and the Arguments of the Counsel in open Court, at the Trial of the Cause, is a proper Act of Embracery, ^b whether the Jurors, on whom such Attempt is made give any Verdict or not, or whether the Verdict given be true or false.

Sect. 2. ^c And the Law so far abhors all Corruption of this Kind that it prohibits every Thing which has the least Tendency to it, what specious Pretence soever it may be covered with, and therefore it will not suffer a mere Stranger, so much as to labour a Juror to appear and act according to his Conscience.

Sect. 3. Also it is said, That generally the giving of Money to a Juror ^d after the Verdict, without any precedent Contract in Relation to it, is an Offence favouring of the Nature of Embracery; because if such Practices were allowable, it would be easy to evade the Law, by giving Jurors secret Intimations of such an intended Reward for their Service, which might be of as bad Consequence as the giving of Money beforehand. But it seems clear, That the giving of Jurors such a reasonable Recompence, as is usually allowed them for their Expences in travelling, &c. and which may fairly be expected by them from either Side that shall prevail, is no way criminal, because if no such Allowance were to be expected, it would be often difficult to prevail with Persons to serve on a Jury at their own Charge; and therefore by Experience it hath been found necessary to permit the Parties to give Jurors some Amends for their Charges.

Sect. 4. It hath been adjudged, That the bare ^e Giving of Money to another to be distributed among Jurors, is an Offence of the Nature of Embracery, whether any of it be afterwards actually so distributed or not; also it is ^f clear, That it is as Criminal in a Juror, as in any other Person, to endeavour to prevail with his Companions to give a Verdict for one Side, by any Practices whatsoever, except only by Arguments from the Evidence which was produced, and Exhortations from the general Obligations of Conscience to give a true Verdict. And there can be no Doubt

^a F.N.B. 171.
^b B. C.
Co. Lit. 369. a.
Moore 815.
Pl. 1104.

^b 21 H. 6. 20. a.
^c 22 H. 6. 5. b.
^d 37 H. 6. 31. d.
Bro. Decies
cautum 10,
11, 13.
Co. Lit. 369. a.
Mo. 815. Pl.
1104.

^e 13 H. 4. 16 b.
Moore 806.
Cro. El. 816.
Co. Lit. 159. b.
369. a.
^f 39 Aff. 19.
Bro. Decies
14

^a 21 H. 6. 5. b.
^b 28 H. 6. 7. b.
^c 12 b.
^d 31 H. 6. 8. b.
^e Bro. Main-
tenance 6. 14.
^f 17 Ed. 4. 5. b.
18 Ed. 4. 4. b.
Bro. Main-
tenance 32, 19.

^a 1 Saund.
301.

but that all fraudulent Contrivances whatsoever to secure a Verdict, are high Offences of this Nature; as where Persons by ^a indirect Means procure themselves or others, to be sworn on a *Tales* in order to serve one Side.

^b 13 H. 4. 16 b.
^c 17 a.
^d 11 H. 6. 11. a.
^e 2 Rot A. 116.
^f L. 6 M. 3.
^g 19 H. 6. 31 b.
^h 13 H. 4. 17. a.
ⁱ 2 Bulst. 25.
Noy 102.
Co. Li. 369. a.
Moore 815.
Pl. 1104.
^j Dyer 48.
Pl. 19.
Co. Li. 157. b.
369. a.
Moore 813.
Pl. 1101.
Hob. 294.
Noy 102.
^k Hob. 294.

Sect. 5. As to the second Point, viz What Acts of this Kind are altogether unlawful, it seems clear, That neither the Party himself, nor his Counsel, nor Attorney, nor any Person whatsoever, can justify any indirect Practices of influencing a Jury, either by giving ^b or promising them Money, or ^c menacing them, or ^d instructing them in the Cause before-hand, &c.

Sect. 6. As to the third Point, viz. In what Circumstances some Acts of this Nature may be lawful, it seemeth clear, That any Person who may justify any other Act of Maintenance, may safely labour a Juror to ^e appear and give a Verdict according to his Conscience, but that no other Person can justify intermeddling so far, and that no one whatsoever can justify the labouring a Juror ^f not to appear.

Sect. 7. As to the fourth Point, viz. How far Offences of this Kind are restrained by the Common Law, there can be no Doubt but that they subject the Offender either to an Indictment or Action, in the same Manner as all other Kinds of unlawful Maintenance do by the Common Law: Also it seemeth, That if an Act of Embracery were not known before the Trial of a Cause, so that the Party to whose Prejudice it was intended, had no Opportunity to prevent the ill Effects of it, by challenging the Juror who was practised upon, it will be a good Ground to move the Court to set aside the Verdict.

Sect. 8. As to the fifth Point, viz. How far Offences of this Kind are restrained by Statute, it is enacted, by 5 Ed. 3. 10. That if any Juror, in Assizes, Juries, or Inquests, take of the one Party or of the other, and be thereof duly attainted, that hereafter he shall not be put in any Assizes, Juries, or Inquests, and nevertheless he shall be commanded to Prison, and further ransomed at the King's Will. And the Justices before whom such Assizes, Juries and Inquests shall pass, shall have Power to enquire and determine according to this Statute.

Sect. 9. And it is farther enacted by 34 Ed. 3. 8. That in every Plea, whereof the Inquest or Assize doth pass, if any of the Parties will sue against any of the Jurors, that they have taken of his Adversary or of him, for to give their Verdict, he shall be heard, and shall have his Complaint by Bill presently before the Justices, before whom they did swear, and that the Juror be put to answer without any Delay; and if they plead to the Country, the Inquest shall be taken maintainant. And if any Man other than the Party will sue for the King against the Juror, it shall be heard and determined as afore is said And if the Juror be attainted at the Suit of other than the Party, and maketh Fine, the Party that sueth shall have half the Fine; and that the Parties to the Plea shall recover their Damages by the Assessment of the Inquest. And that the Juror so attainted have the Prison of one Year, which Imprisonment the King granteth, that it shall not be pardoned for any Fine; and if the Party will sue by Writ, before other Justices, he shall have the Suit in the Form aforesaid.

Sect. 10. And it is farther enacted by 38 E. 3. 12. That if any Jurors in Assizes sworn, and other Inquests to be taken between the King and Party, or Party and Party, do any Thing take by them, or other of the Party, Plaintiff, or Defendant, to give their Verdict, and thereof be attainted by Process contained in the said Statute of 34 E. 3. be it at the Suit of the Party that will sue for himself, or for the King, or any other Person, every of the said Jurors shall pay ten times as much as he hath taken. And that he that will sue,

shall

shall have the one half, and the King the other half. And that all the Embraceors to bring or procure such Inquest in the Country to take Gain or Profit shall be punished in the same Manner and Form as the Jurors. And if the Juror or Embraceor so attainted, have not whereof to make Gree in the manner aforesaid, he shall have the Imprisonment of one Year: And the Intent of the King of Great Men, and of the Commons is, That no Justice nor other Minister shall enquire of Office, upon any of the Points of this Article, but only at the Suit of the Party, or of other, as afore is said.

In the Construction of these Statutes the following Points have been holden:

Sect. 11. I That all Actions of *Decies tantum* being founded on an Offence supposed to have been committed in some former Action appearing upon Record, it will be a good Plea in Bar, either that there is no such Record at all, or that there is not any such Record by which it may appear that the Juror was sworn, and that it is a good Exception in Abatement of the Writ, that there is a Variance in the first Record from that in the Declaration in the present Action; yet it is said, That it is not necessary to shew the whole Record in certain, but only so much of it as conveys the Plaintiff to his Action.

Sect. 12. II. That it is not sufficient to shew that the Defendants took Money in order to embrace a Jury, without shewing also that they actually disposed of it accordingly.

Sect. 13. III. That the Plaintiff must shew in certain how much was received, for otherwise the Court will not know for what Sum to give Judgment.

Sect. 14. IV. That the giving of Money to a Juror after the Verdict is not within the Statute, unless there were some precedent Contract relating to it.

Sect. 15. V. That it is not material whether the Jurors gave any Verdict or not, or if they did give one, whether it were true or false.

Sect. 16. VI That all the Jurors and Embraceors may be joined in one Action, notwithstanding they severally received different Sums, because all was received in order to give the same Verdict, which could not but be the entire Act of all the Jurors. But it seems, That each Defendant ought to plead severally, that he did not take Money in the Manner as the Plaintiff hath declared.

Sect. 17. VII. That the Defendants ought not to plead generally, Not guilty, but that they ought specially to deny the Taking of the Money, &c.

Sect. 18. VIII. That the Plaintiff shall be paid the Moiety of the Money due to him on a Judgment in *Decies tantum* before the King, because the King's Moiety is not due as a Debt but as a Fine; and wherever the King is intitled to a Fine from the Suit of a Subject, the Plaintiff shall first be satisfied.

Sect. 19. IX That the Husband alone may bring a *Decies tantum* for an Embracery in a former Action brought by him and his Wife, because by a *Decies tantum* Money only is to be recovered wherein the Wife can claim no Share.

Sect. 20. X. That he who buys Land to maintain a Suit at a lower Price than it is known to be worth, is as much within the Statute, for so much as the Land is worth more than he gave, as if he had received it in Money.

^a 5 Ed. 4. 3. a.

Bro. Decies

tantum 1. 11

^b 37 H. 6. 31. a.

Bro. Decies

tantum 13.

^c 9 H. 6. 1.

Bro. Decies

tantum 1.

^d 34 H. 6. 4. b.

^e 37 H. 6. 31. 2.

E. N. B. 171. C.

^f Pl. Com. 85.

^g 39 Aff. 19.

Bro. Decies

tantum 14.

^h 21 H. 6. 31. a.

37 H. 6. 31. 2.

Bro. Decies

tantum 10,

13.

F. N. B. 171.

C. B.

Co. Lic. 169. 1.

Dy. 95. Pl. 39.

40 Ed. 3. 3. b.

36 H. 6. 28. b.

Bro. Decies

tantum 3, 4.

F. N. B. 171. a.

Finch. 255.

21 H. 6. 20.

ⁱ Bro. Decies

tantum.

18 Savil. 42.

^k 41 E. 3. 15. a.

44 E. 3. 36. b.

Bro. Decies

tantum 5, 7.

^l 7 H. 4. 2. b.

2. a.

43 E. 3. 16. 4.

Bro. Decies

tantum 9. 19.

^m 41 Ed. 3. 9. b.

Bro. Decies

tantum 4.

ⁿ Rol. Ab

579. A.

^a 5 E. 4. 2. b. Sect. 21. XI. That this being a popular Action may be barred by the ^a King's Release, being made before any Action brought, but that it cannot be barred by the Release of the Party grieved; and from the same Ground also it follows, That the Party grieved needs not in such Action declare of any Damages done to him by the Embracery; but if he do, it is said, That he ^b ought to lay them severally against each Defendant, or else that his Writ shall abate, unless he will release them: But perhaps there may be good Reason to question this Opinion, for why may not the Damages be as well recovered, as the Action jointly laid against all the Defendants?

^c 44 E. 3. 12. a. Sect. 22. XII. That no ^c Process of Outlawry lies in this Action, but only a *Capias* or Distress infinite, upon a *Nihil* returned, and that such Distress ought to be of the Lands which the Defendants had at the Time of the Writ of *Decies tantum* purchased, and not of those which they had at the Time of the Inquest; and that no *Capias* ^d into a foreign County lies against the Jurors, because it shall be presumed that they are in the County wherein they were returned on the Jury; but clearly this Reason can no way be extended to the Embracers: And perhaps it may be over favourable to carry it so far in Relation to the Jurors, especially since the Distress infinite can only affect the Lands which they had at the Time of the *Decies tantum*, before which they may possibly have sold those which they had at the Return of the *Venire*; and why should not the Sheriff's present Return that the Defendants have nothing in the County, over-balance the Presumption chiefly grounded on the former Return, with which the present is not inconsistent, being made at a subsequent Time.

Vide 6 E. 4.
11. a. b.
2 Rol. Ab.
277. B.

C H A P. LXXXVI.

Of the Offence of buying or selling a pretended Title.

FOR the better understanding the Offence of buying or selling a pretended Title, I shall consider:

1. How it is restrained by the Common Law.
2. How by Statute.

Moore 751.
Pl. 1031.
Hob. 115.
Pl. Com. 80. a.
88. a. Sect. 1. As to the first Point, it seemeth to be a High Offence at Common Law to buy or sell any doubtful Title to Lands known to be disputed, to the Intent that the Buyer may carry on the Suit, which the Seller doth not think it worth his While to do, and on that Consideration sells his Pretensions at an under-Rate; and it seemeth not to be material, whether the Title so sold be a good or bad one, or whether the Seller were in Possession or not, unless his Possession were lawful and uncontested; for all Practices of this Kind are by all Means to be discountenanced, as manifestly tending to Oppression, by giving Opportunities to Great Men to purchase the disputed Titles of others, to the

the great Grievance of the adverse Parties, who may often be unable or discouraged to defend their Titles against such powerful Persons, which perhaps they might safely enough maintain against their proper Adversary.

Sect. 2. As to the second Point, *viz.* How far Offences of this Kind are restrained by Statute, it is recited by 1 R. 2. 9. *That many Persons having true Title to Lands, and also in Personal Actions were wrongfully delayed of their Rights and Actions, by Means that the Defendants did commonly make Gifts and Feoffments of their Lands in Debate, and of their Goods, to Lords, and other Great Men, against whom the said Pursuants for Menace that was made to them, neither could nor durst make their Pursuits: And also that many Persons oftentimes used to disseize others, and anon after such Disseisin to make divers Feoffments, sometimes to Lords and other Great Men, to have Maintenance, and sometimes to Persons unknown, to the Intent to delay the said Disseisees, &c.* And it is thereupon enacted, *That from thenceforth no Gift, or Feoffment, of Lands, Tenements or Goods, be made by such Fraud or Maintenance; and that if any be in such wise made, they shall be holden for none and of no Value; and that the said Disseisees shall from thenceforth have their Recovery against the first Disseisor, as well of the Lands and Tenements, as of their double Damages, without having regard to such Alienations, so that the Disseisees commence their Suits within the Year next after the Disseisin done.*

In the Construcion of the Statute it hath been holden:

Sect. 3. That Feoffments of this Kind are only void in Respect of the Disseisees, but that they are effectual between the Feoffer and Feoffee, *&c.*

Bro. Feoffments de terres 1, 19.
Co Lit 369 a.

Sect. 4. And it is farther enacted by 32 H. 8. 9. *That no Person or Persons whatsoever shall bargain, buy, or sell, or by any Ways or Means, obtain, get, or have any pretended Rights or Titles, or take, promise, grant, or covenant to have any Right or Title, of any Person or Persons, in, or to any Manors, Lands, Tenements, or Hereditaments, but if such Person or Persons, which shall so bargain, sell, give, grant, covenant, or promise the same, their Ancestors, or they by whom he or they claim the same, have been in Possession of the same, or of the Reversion or Remainder thereof, or taken the Rents or Profits thereof, by the Space of one whole Year next before the said Bargain, Covenant, Grant, or Promise made, upon Pain that he that shall make any such Bargain, Sale, Promise, Covenant, or Grant, to forfeit the whole Value of the Lands, Tenements or Hereditaments so bargained, sold promised, covenanted or granted, contrary to the Form of this Act. And the Buyer or Taker thereof, knowing the same, to forfeit also the Value of the said Lands, Tenements, or Hereditaments so by him bought, or taken as is abovesaid. The one half of the said Forfeitures to be to the King, and the other half to the Party that will sue for the same in any of the King's Courts of Record, by Action of Debt, Bill, Complaint, or Information. In which Action, Bill, Complaint or Information, no Escoin, Protection, Wager of Law, nor Injunction shall be allowed.*

Sect. 5. But it is provided by the said Statute, *That it shall be lawful to any Person, being in lawful Possession, by taking of the yearly Farm, Rents, or Profits, of, or for any Manors, Lands, Tenements, or Hereditaments to buy, obtain, get, or have by any reasonable Way or Means, the pretended Right or Title of any other Person or Persons, hereafter to be made to, of, or in such Manors, Lands, Tenements, or Hereditaments, whereof he or they shall so be*

in

in lawful Possession, any Thing in the said Act contained to the contrary notwithstanding.

Sect. 6. And it is farther provided, That the said Statute shall not extend to charge any Person with any of the above mentioned Penalties, except such Person be sued for the Offence within one Year.

In the Construction of this Statute the following Opinions have been holden :

Sect. 7. I. That it is not material whether any Suit be depending
Pl. Com. 83 b. concerning the Lands contracted for, or not, whereas the Statutes set forth in the precedent Chapters extended only to Contracts concerning Lands which were actually in Suit.

Sect. 8. II. That in an Action on this Statute, the Plaintiff needs not
Lit. Rep. 369. recite it, because the Judges are bound *ex Officio* to take Notice of it,
B. 2 Ch. 25. being of a publick Nature; but that if he do recite it, he must at his
S. 103. Peril take Care to recite it certainly, because it is the Ground of his Ac-
Pl. Com. 84. tion; and the Court will not aid him by intending that there is another
Cro. Ca. 233. Statute to maintain his Action, different from that whereon he himself
Dy. 74. Pl. hath founded it.
19, 20.
Contr. 1 And.
76.

Sect. 9. III. That in such an Action against the Buyer of a pretended
1 Leon. 167. Title, it ought expressly to appear, That the Defendant did know that the Seller had not been in Possession the Year before; and *vice versa*, that in such an Action by the Buyer the contrary ought to appear, for otherwise it may be intended, that he was *Particeps Criminis*, and therefore ought not to have any Share of the Penalty.
Lit. Rep. 369.

Sect. 10. IV. That it is not sufficient to shew, That the Seller had not been in Possession, &c. a Year before, without expressly averring that he had a pretended Right or Title, because that is the Point of the Action.
Dy. 74. Pl.
19, 20. Pl.
Com. 80, 81,
87, 88.
Cro. Ca. 233.

Sect. 11. V. That it is not sufficient to set forth the Value of the Land at the Time of the Conveyance executed, without shewing the Value at the Time of the Bargain, because the Forfeiture is governed by the later.
Cro. Ca. 233.
4 Co. 26. a.
Co. Lit. 369. b.
Moore 655.
Pl. 898.

Sect. 12. VI. That a Contract for a customary Right to a Copyhold Estate, or for a Lease for Years, is as much within the Statute as a Contract for the Fee-Simple; for the Words of the Statute are, *any Right or Title*, and such Contracts are as much within the Mischief intended to be redressed by the Statute as any others can be: But it is said,
Pl. Com. 80, That a Lease for Years made with an Intent to try the Title in Ejectment, is not within the Meaning of the Statute, because it is in a Kind of Course of Law, unless it be made to a powerful Man to sway the Cause.
81, 87.
Dy. 74. Pl.
19, 20, 374.
Pl. 17.
4 Co. Lit.
369. a b.
Con. Moore
266, Pl. 414.
Dy. 374.
Pl. 17.
4 Co. Lit.
369 b.

Sect. 13. VII. That in an Action for the making such a Lease for Years, it is not necessary precisely to set forth the Commencement and End of it, because the Plaintiff is supposed to be a Stranger to it.
Pl. Com. 81,
85.
Dy. 74. Pl.
19, 20.

Sect. 14. VIII. That a Lease for Years by one out of Possession being made off the Land, is as much within the Statute as if it had been made upon the Land, though it be wholly void in Law; for it is a Lease in Reputation, and taken for such among the Vulgar, and tends as much to disquiet the Possession as if it had been effectual in Law.
1 Leon. 166.
1 And. 76, 77.

Sett. 15. IX. That no Conveyance made by one, who hath the uncontested Possession, and undisputed absolute Propriety of Lands, is any Way within the Meaning of the Statute, because it no Way favours of Maintenance, and can be prejudicial to no one; from whence it follows, That a Disseisor obtaining the Release of the Dissee, or a Mortgagor redeeming his Land, are in no Danger of the Statute in Respect of any Contract by them made, concerning such Land after such Release or Redemption.

Bro. Maintenance 38
Pl. Com. 88,
89.
Co. Lit. 369.a.

Sett. 16. X. That one, who gains the Possession of Lands, by Virtue of a Judgment at Law in Affirmance of an ancient Title, cannot come within the Meaning of this Statute in respect of any Lease made of such Lands; for it can never be imagined, That it was the Intent of the Statute, to oblige all Persons who should recover their Lands, to occupy them themselves, which would be generally inconvenient, and often wholly impracticable; and therefore it must be admitted from the Necessity of the Case, That such Persons may lawfully lease their Lands and Houses to proper Tenants, to be manured and occupied for the usual Rents: But if it shall appear, That the Title to such Lands is still contested notwithstanding such Recovery, and that such Lease was in Truth designed for the Maintenance of the Title, I can see no Reason why it should not be as much within the Statute as any Case whatsoever. However there seems to be no Doubt, but that if a Dissee enter upon a Disseisor, being in Possession of the Land under a pretended Title, and immediately sell it to a Stranger, he is as much within the Statute as if he had been out of Possession at the Time of such Sale; for notwithstanding his Entry was lawful, and he had both the absolute Property and Possession of the Land, yet inasmuch as the Disseisor claims a Title to it, which is yet in Dispute, such a Sale by the Dissee seems within the Intent of the Statute, which meant absolutely to restrain all Persons from transferring their disputed Titles to any Stranger whatsoever. But it is said, that such a Sale by a Father to his Son and Heir Apparent, is excepted out of the general Purview of the Statute, by common Reason, which by the Ties of Nature as well as of Interest, obliges such a Son to maintain his Father; yet it hath been holden, That such a Sale to a Brother of the half Blood is within the Statute.

Pl. Com. 88,
89.
Co. Lit. 369.a.
Moore 655.
Pl. 898.

1 Leon. 166,
167.
Co. Lit. 369.a.
seems contrary.

Savil 95, 96.
1 Leon. 167.
Mo. 656.

1 Leon. 167.
Savil 95, 96.

Sett. 17. XI. It is said that the above mentioned Proviso, That one, who is in lawful Possession by taking the yearly Rents or Profits of Lands, &c. may lawfully buy the pretended Right of any other Person by reasonable Means, is no more than the Law would have implied, if it had not been expressed; for such a Contract cannot possibly be to the Wrong of any one, and tends rather to quiet Suits than to promote them. And from the like Reason also it is said, That a Disseisor may lawfully get the Release of the Dissee, though his Possession was unlawful; and it seems clear, That such a Release cannot come within the Meaning of the Statute, if the Dissee had the true Right, and no other had any Pretence of Title to the Land; for in such Case it is clear, That the End of the Release is not for Maintenance, but for the Settlement of all Disputes: But if such a Dissee had had but a contested Title, and such Release were intended only to enable the Disseisor to defend himself with the dubious Title of his Dissee, surely it cannot but be as much within the Meaning of the Statute, as any Conveyance to one wholly out of Possession. However it seems clear, That those

Co. Lit. 369.b.

Instances in the said Proviso by which it is shewn how it shall appear, that the Persons who are permitted to contract for pretended Titles are in Possession, as by the receiving of Rent, &c. are only put for Examples, and that those, who are any Way whatsoever lawfully seized in Possession, Reversion, or Remainder, are within the Benefit of the Proviso; but it seems clear, That they can only justify the Taking such a Conveyance as will strengthen the Estate whereof they are seized, and that they cannot take a Covenant from a Stranger to convey the Land to them, when he shall have recovered it on a pretended Right, because such a Covenant seems clearly to favour as much of Maintenance, as if they had been Strangers to the Land.

F I N I S.