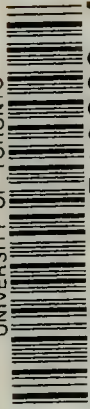


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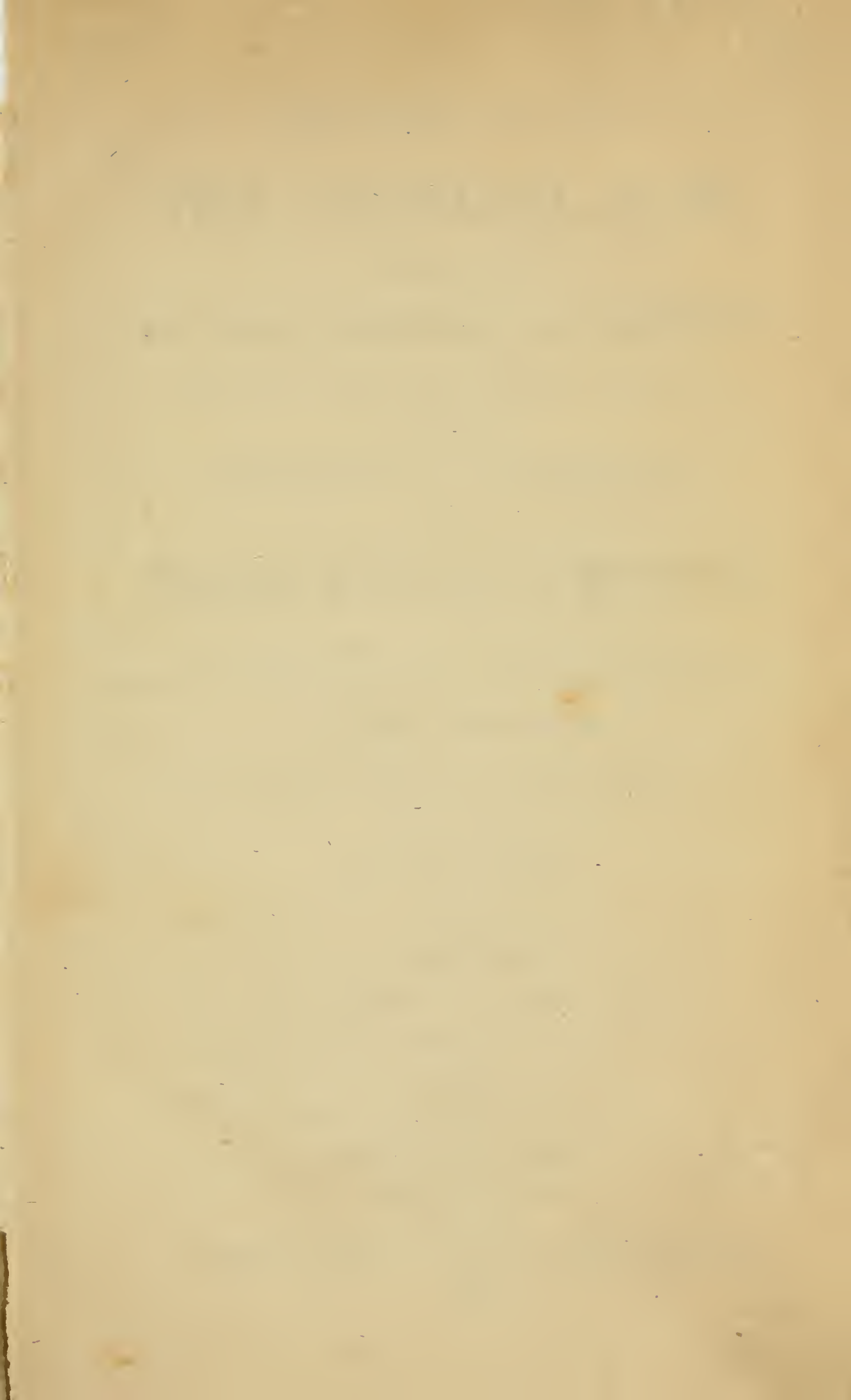
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Quarter Sessions - 1851

A
PRACTICAL TREATISE
ON
THE CRIMINAL LAW,
COMPRISING THE
PRACTICE, PLEADINGS, AND EVIDENCE,
WHICH OCCUR IN THE COURSE OF CRIMINAL PROSECUTIONS,
WHETHER BY
INDICTMENT OR INFORMATION:

WITH A
Copious Collection of Precedents
OF
INDICTMENTS, INFORMATIONS, PRESENTMENTS, AND EVERY
DESCRIPTION OF PRACTICAL FORMS, WITH COMPREHENSIVE NOTES UPON
EACH OFFENCE,
THE PROCESS, INDICTMENT, PLEA, DEFENCE, EVIDENCE, TRIAL,
VERDICT, JUDGMENT, AND PUNISHMENT.

IN FOUR VOLUMES.

VOL. I.

By JOSEPH CHITTY, Esq.
OF THE MIDDLE TEMPLE, BARRISTER AT LAW.

THE SECOND EDITION,
CORRECTED AND ENLARGED.

LONDON:
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1826.

1847 5/11/12

THE HISTORY OF THE

PROGRESS OF THE

ART OF

PRINTING

IN THE

WEST INDIES

FROM THE FIRST SETTLEMENT OF THE ISLANDS TO THE PRESENT TIME

BY

J. G. COLEMAN, ESQ.

OF THE BARR

AT LONDON

AND

OF THE

WEST INDIES

IN TWO VOLUMES

VOLUME I

1794

LONDON

PRINTED BY

J. G. COLEMAN

1794

ADVERTISEMENT

TO THE
PRESENT EDITION.

THE flattering reception of this Work by the Profession, has induced the Author to endeavour, in this Edition, to render it still more worthy of their attention. A great increase of matter has been introduced, and the numerous modern enactments affecting the Criminal Law have rendered it necessary, with much labour, entirely to re-mould some parts of the subject. The Author has availed himself of the valuable collections of cases recently published by Messrs. RUSSELL and RYAN, and by Messrs. RYAN and MOODY, which have afforded to the public most important and essential information on this branch of the Law. Several new Precedents have been added, and the whole has been carefully revised, corrected, and enlarged.

6, *Chancery Lane*,
1st March, 1826.

THE UNIVERSITY OF CHICAGO

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CHICAGO, ILLINOIS
JANUARY 1998

PREFACE

TO

THE FIRST EDITION.

IN the following work I have attempted to take a comprehensive and practical view of the Criminal Law. In the *first* volume are stated the principles, rules, and practice which affect criminal prosecutions in general, from their commencement to their conclusion. In the *second* and *third* volumes will be found the law relative to each particular offence, the process against the offender, the indictment, the defence, the evidence, the judgment, and punishment; with a very comprehensive collection of precedents of indictments and informations for each offence, with notes on the component parts of such precedents. The *fourth* volume contains the pleas to indictments and informations, and proceedings thereon; and the practical forms to be adopted by magistrates and others in the course of the prosecution, whether by indictment or information. But the better to enable the reader to form an opinion how far the subject may be worthy his attention, and to facilitate reference to different parts of the work, as well as to afford the student a concise view of the course of proceedings in criminal cases, it may be expedient to state more particularly the subject of the following pages.

As criminal prosecutions, though in the name of the king, are usually instituted by some particular individual, the *first* volume commences with a statement of the parties competent to prosecute, the obligations

and advantages inducing an individual to become the accuser, and the liability which he incurs.

In the *second* chapter, the law relative to arrests on criminal charges, is very fully considered, viz. who may be arrested—for what crimes—at what time—in what places—and by whom, as by private individuals, constables, watchmen, justices of the peace, sheriffs, coroners, and upon hue and cry. Next are considered the arrests under warrant; the information or evidence given before a magistrate; his summons or his warrant thereon; by whom a warrant may be issued; to whom directed; its form and requisites; the backing of the warrant, and the law and practice of a supersedeas to prevent an arrest under it. Then is considered how the warrant is to be executed; the legality of breaking open doors; the conduct of the officer after the arrest; the law relative to resistance of process, escapes, rescues, and retaking; the mode of detaining a party already in custody; the law relative to search warrants; and the indemnity to magistrates, officers, and parties concerned in the arrest.

In the *third* chapter is considered the examination of the accuser, the witnesses, and prisoner, before the magistrate; the recognizances; bail; commitment and incidental proceedings, viz. the time of examination; the statute and decisions which regulate it; the summoning of the witnesses, and enforcing their appearance before the magistrate; the swearing of the accuser and the witnesses, and the formal mode of taking their examinations, as well as that of the prisoner; the power of the magistrate to discharge the prisoner in cases where he considers there is no ground for the accusation; the recognizances to prosecute and give evidence; the duty to certify the examination and recognizances to the proper court; the law of bailing in criminal cases; what are sufficient bail; of the offence of taking insufficient bail, and of refusing bail; the

form and requisites of the recognizance of bail, and of certifying such recognizances, and the power of bail to take and render their principal. The law relative to the commitment of the prisoner is then considered; to what prison he is to be sent, the form and requisites of the commitment; how the expence of his conveyance to prison is to be defrayed; the duty of the gaoler to receive him, and to give him a copy of the mittimus. This chapter concludes with a full consideration of the writ of habeas corpus, as it applies to and affects criminal proceedings; when the writ is to be granted; the practical mode of obtaining it; the writ itself, its form, and requisites; the return which may be made to it; the proceedings upon it, and the bailing of the prisoner when brought up before the superior tribunal.

The supposed offender having been thus secured and committed for trial, the next considerations are, the court in which the proceeding is to be instituted; the time within which the prosecution must be commenced; and the mode of conducting it; and, therefore, in the *fourth* chapter are fully considered, the criminal jurisdiction of the courts of general and quarter sessions of the peace; oyer and terminer; general gaol delivery; assize and nisi prius courts under special commissions; the Admiralty Sessions, and the Court of King's Bench, with some other courts of more limited power; the *time* of prosecution, whether limited by the Habeas Corpus Act, or other particular enactments; the *modes* of prosecution, whether by indictment, presentment by a grand jury of their own knowledge, coroners' inquest, verdict of a jury in a civil action, information in the King's Bench, presentments of a judge or justice of the peace, or informations at sessions.

In the *fifth* chapter, the general principles, rules, and practice affecting the structure of an indictment, whether against principals or accessaries at common law, or upon statutes, are very minutely considered, viz. its ge-

neral requisites of certainty and language, and its form, parts, and particular requisites, as the venue and mode of stating and repeating it, the formal words of commencing the indictment, the name and addition of the defendant and of third persons, the statement of the time when the offence and other circumstances took place, the use of the *videlicet*, the description of the offence itself, the various technical terms which must be inserted, the usual words of concluding the indictment, the utility of several counts, the cases in which a part of a count may be found by the jury, and the joinder of several offences. The law relative to principals and accessaries in the first and second degree, and of accessaries before and after the fact, and the distinctions respecting the criminality and punishment of each of these offenders, together with the law respecting the joinder of several offenders in the same indictment, whether guilty in the same or different degrees, are then fully considered. Next are examined at some length the requisites of indictments founded upon statutes; and this chapter concludes with some general considerations on the consequences of unnecessary length, and of variance in the indictment, how far criminal proceedings are amendable, when the indictment will be quashed, and what are the consequences of its being found defective.

The *sixth* chapter relates to the grand jury, and the presentment and finding of the bill of indictment; viz. the number, qualification, and mode of summoning the jurors, and the proceedings to swear and charge them both at the assizes and sessions; the time they are to serve; the extent of their jurisdiction; the mode of preferring the bill of indictment before them; the evidence to be adduced; the mode of compelling the attendance of witnesses, and production of documents, and of the finding or rejecting the bill presented.

The caption of the indictment, or stile of the court at which it was found, is considered in the *seventh* chapter,

with the law relative to demurrers, founded on defects in the caption, and the jurisdiction and practice of the court as to amending a defect in this part of the proceedings.

In chapter *eight* the process against the defendant, after indictment found, and the proceedings thereon, are minutely examined: first the summary process, by *capias*, bench warrant, or by a judge's or justice's warrant; *supersedeas* to prevent arrest; the bailing of the defendant, and his commitment for trial; secondly, the process to outlawry, the consequences of that judgment, and the subsequent proceedings to enforce or reverse it.

The *ninth* chapter comprises the law and practice relative to the removal of indictments from inferior courts to the court of King's Bench by writ of *certiorari*.

In the *tenth* chapter are stated the application for a copy of the indictment, the assignment of counsel to the defendant, the cases in which the appearance and defence may be by attorney, and the defence in *formâ pauperis*. The law and practice of the defendant's arraignment in cases of treason and felony are then fully stated, together with the rules which govern the arraignment of principals and accessories, and arraignments upon several indictments, and also the incidents of arraignments, viz. denial of identity, pleading in abatement, standing mute, confession of guilt, and proceedings which severally follow them.

In the *eleventh* chapter, after stating the modes in the King's Bench of compelling the defendant to plead or demur, a comprehensive view is taken of criminal pleadings. First are shewn the various pleas in criminal cases, their general qualities, requisites, and number, the time and manner of pleading them, with the amending, withdrawing and pleading them afresh; and the mode in which pleas are entered; then the several particular pleas and proceedings thereon, are separately stated and discussed, viz. pleas to the jurisdiction,

demurrers to the indictment and their effects; pleas in abatement, and all proceedings to which they give rise;—pleas in bar, as autrefois acquit, convict, or attaint and pardon, and pleas to the matter or merits of the indictment, as the general issue, and special pleas when requisite. And then this chapter concludes with some observations on stopping the prosecution by *nolle prosequi*.

The *twelfth* chapter comprises the proceedings before the trial and relating to it; viz. the issue, record of nisi prius, the mode of obtaining a view, the time of trial, the notice of trial, the proceedings to put off the trial and the place of trial, together with trials at bar, remanets, compromises, and mode of withdrawing the record.

The jury and proceedings relating to them, form the next subject of inquiry; and therefore in the *thirteenth* chapter the following matters are fully considered; the county from which the jury must be summoned; the court into which the jurors are to be returned; the qualification of the jurors; their number; the process by which the jury is to be convened; when it may be joint or several, and with a clause of proviso; the mode in which the process is to be executed, and the attendance of the jurors compelled; the time when the process must be returnable, to whom directed, and by whom returned; the form of the return, and when a panel of the jury must be returned; when there may be a tales; the proceedings relative to special juries; a jury *de medietate linguæ*, and the indemnities and liabilities of jurors. Next is considered the calling of the defendant to the bar, and his treatment there, and the calling of the jury; and then the different proceedings relative to challenges, viz. those on behalf of the king and the defendants; challenges to the array, and to the polls; the time and mode of challenge, and how it is to be tried, and the mode of reforming the panel.

Lastly, are stated the manner of swearing the jury; their being placed in the jury-box; and the proclamation made immediately before the trial commences.

In the *fourteenth* chapter, great attention has been paid to the proceedings on the trial, and in particular to the evidence and verdict. In the first place is stated, the mode of reading the indictment in prosecutions for treason or felony, and the conduct of the junior and leading counsel for the prosecution. The evidence in criminal cases is considered and arranged, with reference to the parts of the indictment which are to be proved in evidence. Then are considered the degree and kind of proof, viz. what is sufficient evidence; of presumptive evidence, and evidence required by particular statutes; the requisite number of witnesses when it is sufficient to produce the best evidence the nature of the case allows; when hearsay evidence is admissible; when dying declarations may be received; when the defendant's confession is evidence, and when testimony as to character is admissible for the crown.—The modes of proof are next examined, which consist either of written documents or the verbal evidence of witnesses. Under the first class are considered public documents; private documents with the subpœna, and notice to produce them; proof of hand-writing, and the necessity for stamping the documents; with the depositions taken before a magistrate. Under the second class are discussed the parties who may be witnesses; the distinction between competency and credit; the grounds of incompetence, as infancy; defect of intellect; infidelity; religious scruples, and near relationship; interest in the event; infamy, and how the last objection is to be shewn to the court.

The grounds on which the evidence of accomplices is received are also stated, and the protection afforded to professional confidence. The time when the objection to the competency of a witness must be taken is also

shown. The mode of compelling the attendance of witnesses is also considered. Then is stated the practical method of swearing the witness and his giving evidence on the trial; his right to refuse to criminate himself; his cross-examination and bills of exception, and demurrers to evidence. The evidence on the part of the prosecution being closed, next are considered the address of the defendant and the evidence on his behalf; the reply on the part of the prosecution, the adjournment from day to day, the consequences of illness, &c. during the trial, the object of withdrawing a juror, committals for contempt of court, the summing up of the judge, and the conduct of the jurors in considering their verdict, and how they are asked to return it. The verdict and mode of delivering it are then considered—and the kinds of verdicts, whether general, partial, or special. The proceedings as to special cases and sending the jury to re-consider their verdict, and the proceedings on conviction or acquittal, conclude this chapter.

The *fifteenth* chapter states the proceedings between verdict and judgment, viz. the removing the verdict in some cases into the King's Bench, the Rule for Judgment, the proceedings as to obtaining a new trial, the motion for stay of judgment, and that in arrest of judgment, the process after verdict to bring in defendant to receive judgment, and the practice as to compromises with the prosecutor, between verdict and judgment. The law as to benefit of clergy is then very fully considered, both in its history and present practice; and this chapter concludes with the consideration of several matters of practice antecedent to the judgment in cases of prosecutions for misdemeanors, as the Rule to show cause why a fine should not be imposed on the defendant—the proceedings to compel an inferior court to give judgment—the affidavits in the King's Bench in mitigation or aggravation of the punishment, and the

course of proceedings thereon—and references to the master to determine what compensation should be made to the prosecutor, and the proceeding by attachment to enforce the master's decision.

The judgment and its incidents are the subjects of inquiry in the *sixteenth* chapter. The cases where the defendant must be in court—what court may pronounce the judgment—and the time and manner of giving judgment are stated; and then follow, in regular order, the law and practice as to express judgments or sentences, as well those which are fixed and stated as those which vary according to the discretion of the court, viz. in high treason—for coining—for petty treason—for murder—for felony in general—in premunire—for misprision of treason or felony; and some other express judgments for misdemeanors fixed by particular statutes. The discretionary punishments are then fully considered in the case of clergyable felonies; petty larceny; perjury; obtaining money by false pretences; libels; nuisances to highways and other offences. Judgments without express sentence are then considered; also what is to be the duration of the punishment when the defendant is convicted of several offences. Then follow the judgments for the defendant, with some points as to the record of the judgment, and the cases in which one sentence may be vacated, and another given.


In the *seventeenth* and *eighteenth* chapters are considered the consequences of judgment of death, viz. attainder, forfeiture, and corruption of blood; with the means of removing them, as well as the proceedings to reverse the judgment, with or without writ of error, or by act of parliament, &c.

Reprieves, pardons, and pleas of non-identity, are treated of in the *nineteenth* chapter. Reprieves by direction of the crown, or by the judge who has tried the prisoner, are first considered, and then are stated reprieves, on account of pregnancy or insanity. In con-

sidering pardons, the offences pardonable, and what are usually pardoned, are first examined ; and then is stated how a pardon is to be granted ; the manner of allowing it ; and its effect. And the chapter concludes with the law relative to the plea of non-identity, and proceedings when it is relied on.

In the *twentieth* chapter, punishments founded on the different sentences, are very fully considered in their nature, and the mode of their infliction. First, that of death : by what warrant the execution must be authorized ; by what court appointed ; the time and place of execution ; the officer by whom the sentence is to be executed ; and the manner in which it is to be conducted. Then follow the punishments of *transportation*, *whipping*, *pillory*, and *imprisonment* ; with the regulations as to the conduct of prisons and houses of correction, and the power of liability of gaolers. The punishment of fines and other collateral punishments, as that of striking an attorney off the rolls, deprivation of ecclesiastical benefices, or expulsion of a member of the House of Commons, are then stated. And this chapter concludes with a view of the effect of the sentence upon civil actions against the defendant, with the practice as to entries and registers of a prisoner's discharge, or satisfaction of a fine, &c.

In the *twenty-first* chapter are considered, certificates of conviction and allowance of clergy, &c. estreats, restitution of property stolen, rewards and immunities, exemption from offices under the certificate or Tyburn Ticket. The law relative to the costs of the prosecution and the costs of the defendant, the fees of officers, and the attorney's bill, is then stated ; and this chapter concludes with a short consideration of the remedies for malicious prosecutions.



Criminal informations in the King's Bench form the subject of inquiry in the twenty-second chapter, which concludes the first volume. The advantages and disadvantages of this course of proceeding, and the restrictions imposed in modern times, are fully stated. The subject is then divided into those informations, which are filed, *ex officio*, by the attorney-general, and those which, by leave of the court, are prosecuted in the name of the coroner or master of the Crown-office, either against private individuals, or against magistrates.

Informations *by the attorney-general* are considered, with reference to the party by whom to be filed; for what offence; how filed; and upon what evidence; the form of the information; of quashing it upon the application of the attorney-general; the amendment thereof; and the trial, judgment, and other proceedings.

Informations *against private individuals* are considered with reference to the cases in which the court will grant them; the time and notice of motion; the affidavits on which the motion is to be grounded; the motion for the rule to show cause; the service of the copy of the rule on the defendant, and the proceedings thereon. The affidavits and proceedings on the part of the defendant are then examined, as well as the enlargement of the time for showing cause, and the proceedings on showing cause, the recognizance to prosecute, and the information itself, its form and requisites; the trial; modes of mitigating or increasing the punishment, and the judgment ultimately passed by the King's Bench on a party convicted. The informations *against magistrates* are then considered in the points in which they differ from those against individuals; and, with a summary of these the volume concludes.

The *second* and *third* volumes contain a practical view of every description of crime; the process against

the offender; the requisites of the indictment; the defence and the evidence; the judgment and the punishment; and then are given the forms of indictments, informations, and presentments, for each offence; with notes on the particular parts of each precedent. The whole of the matter of these volumes is arranged in a systematic order, resembling that adopted by Mr. Justice Blackstone and Mr. East. The first chapter contains the usual commencements and conclusions of indictments, informations, coroner's inquests, and presentments of a judge or justice; and, as these forms are generally to be observed in the structure of all indictments, and other proceedings, they are referred to in the subsequent parts of the second and third volumes. Then are considered the proceedings for offences against God, religion, and public worship; morality and decency; the law of nations; the king, government, and public officers; offences relating to coin and bullion; against the revenue; against public justice; against public peace; against trade; against health; against public police; against the persons of individuals; against personal property; against real property; and relative to ships, and conspiracies. The contents of these volumes will appear more particularly, from the very copious Analysis at the commencement of the second volume, and the comprehensive Index of the law and precedents, at the end of the third.

The *fourth* volume contains the pleas, replications, demurrers, &c. which may arise in the course of a criminal prosecution, and the practical forms which are to be observed in the course of a prosecution, with notes to the precedents, referring to the different parts of the first volume, and with practical directions how the forms are to be used. The contents of this volume may be more fully collected from the Analytical Table at the

commencement of it, and the comprehensive Index at the end. The forms will be found, for the most part, arranged precisely as the matter in the first volume, so that the volumes tend to elucidate each other.

In preparing the whole of this work, great care and labour have been exercised. I have not been satisfied with merely collecting materials from abridgments, indexes, and treatises, but have searched for, and examined authorities in all the books of reports. Numerous decisions will be found referred to in the notes; and in order to afford the reader every access to information, the abridgments and treatises are also referred to. The second and third volumes contain all the approved precedents which can be found in print, with very numerous manuscript precedents, with many of which I have been favored by friends at the bar, and from the public offices, and others which I have long been collecting in the course of my own practice; and as the result of the prosecutions in most of these cases has been communicated to me, I am the more confident in their accuracy. The preliminary notes upon each offence will also be found to contain a distinct treatise upon each branch of the criminal law.

I have had considerable difficulty in collecting the forms contained in the fourth volume.—A great part of the practical proceedings before magistrates were obtained from the Public-office, Bow-street, and it is therefore hoped that this part of the work, which refers also to the copious directions in the second and third chapters of the first volume, will be found useful to magistrates. I have been favored with the commissions on which the criminal courts proceed, from the Crown-office, Rolls-buildings, from which they are issued. A great part of the other forms are from very valuable

collections of gentlemen of great experience in their respective official situations as clerk of assizes, and in other professional departments.

I am induced to hope that the work will be found accurate, by the circumstance of so experienced and able a criminal lawyer as Mr. Stafford, of the Police-office, Bow-street, having favored me with some valuable information on points of practice; and of Mr. Jones, of the Crown-office, having most obligingly gone over the greater part of the first volume, and by his practical knowledge, prevented many inaccuracies and omissions which might otherwise have occurred. I have also to acknowledge, that the completion of so laborious an undertaking has been greatly facilitated by the zealous assistance of my pupils; and it would be injustice not to acknowledge, in particular, the valuable assistance of my pupil and friend, Mr. Talfourd, whose ability as a pleader ensures him the most flattering success in his professional career, and who, by a rare union of great talent with peculiar assiduity, has enabled me much sooner, and more satisfactorily, to accomplish my undertaking than I otherwise could have done.

J, CHITTY,

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**** Subsequently to the publication of this Edition, several ACTS respecting CRIMINAL OFFENCES, and CRIMINAL PROCESS, have passed the Legislature. The subjects they embrace are numerous and important—it has consequently been thought necessary to print them at the end of Vol. IV. as ADDENDA to the Work, to which very particular attention should be given.*

The 7 & 8 G. 4. c. 29. materially affects the Chapter on LARCENY, Vol. III. page 917—but more in the Substitution of a single Statute for a multiplicity of enactments relating to Criminal Offences, than in any change of principle regulating Forms of Indictments, and other Forms of Judicial Process in Criminal Cases. It has been thought preferable therefore, to give the Acts verbatim—with Schedules of those which are repealed, and references to the Clauses of the new Laws, than to attempt, by cancelling part of this Work, to make it strictly conformable to the late regulations, which may probably require future revision. The same observations apply to the Act which consolidates the Laws relating to Malicious Injuries to Property, 7 & 8 G. 4. c. 30.

The Claim of Benefit of Clergy is abrogated as to the future, by the 6th Section of Cap. 28, but a reference to former Statutes on that subject is still needful, from the limitation of Capital Punishments dependant on those ancient enactments which allowed that Plea, being continued by Section 7 of the new Act.

A more recent and important Act is also given in the ADDENDA, the 9 G. 4. c. 31. which has repealed the various Laws relating to Murder and Personal Injuries, dispersed through a variety of Statutes, and reduced the whole into one Act, in which some important Alterations and Improvements will be observable.

Such FORMS OF INDICTMENTS given in this Work as have been drawn in strict conformity with the Words used in Statutes heretofore in operation, but now repealed, must be altered, where needful, to suit the expressions used in the Clauses for each Offence contemplated by C. 29 and C. 30 of 7 and 8, and C. 31 of 9 G. 4. the Larceny, Malicious Injuries, and Personal Offences Acts.

A General CHRONOLOGICAL TABLE is also given of the numerous Statutes repealed or altered by the above-mentioned Acts.

A
PRACTICAL TREATISE
ON THE
CRIMINAL LAW.

CHAPTER I.

OF THE PROSECUTOR.

WHEN a crime has been committed, it becomes necessary, in the first place, to consider who is to be the party by whom all the active steps are to be taken, in order to bring the suspected offender to justice. We purpose, therefore, here to inquire who is legally competent to institute criminal proceedings—what are the obligations and advantages inducing him to prosecute—and what liabilities he incurs.

Criminal prosecutions are carried on in the name of the king, and have, for their principal object, the security and happiness of the people in general, and not mere private redress (*a*). But as offences, for the most part, more particularly affect a particular individual, it is not usual for any other person to interfere. In general, however, every man is of common right entitled to prefer an accusation against a party whom he suspects to be guilty. And so far has this rule been carried, in its construction, for the benefit of public justice, that even an individual who has, for the purpose of detecting a suspicious person, afforded him an opportunity to commit the particular crime, is not thereby precluded from becoming a prosecutor, and instituting proceedings against him (*b*); unless the offence be destroyed by the consent of the party indicting; as in the instance of robbery, where it is essential that alarm should be excited, and when, if a plot be delibe-

1st, Who may prosecute.

[2]

(*a*) Hawk. b. 2. c. 25. s. 3.
Bac. Abr. Indictment, A. 3.

(*b*) 2 Taunt. 334. 2 B. & P.
508. 2 Leach, 912, 13, 14, 1019.

rately laid to detect the prisoner, no such offence has been in fact committed (*a*). This, however, can scarcely be termed an exception. And though the legislature, in the statute making it felony in a bankrupt to neglect to surrender to his commission, seems to have intended that there should be a concurrence of his creditors in the prosecution; yet it may be carried on by a person to whom he is not indebted (*b*), and several persons may associate for the purpose of prosecuting persons supposed to have been guilty of a crime, without being guilty of an illegal conspiracy (*c*). The Attorney-General, as we shall see more fully hereafter (*d*), may file an *ex officio* information for any misdemeanor affecting the public welfare. And though the original prosecutor die, the proceedings will not be defeated even in the case of a libel or assault, or other injury of a private nature; because they are professedly instituted not for the satisfaction of wrongs to individuals, but for the furtherance of public justice, and to punish the violation of the public peace (*e*). Those only are disqualified from becoming prosecutors, who either from religious scruples or infidelity, which render them incapable of taking an oath, or from infamy, which presumes them unworthy of credit, are incompetent to become witnesses. Of this description are Quakers, infidels who have no idea of God or a future state of retribution, and persons attainted of felony, treason, or false verdict, or convicted of any species of *crimen falsi*, which renders them infamous (*f*). All these parties, however, are perfectly at liberty to disclose the circumstances of the crime, and thereby enable others to bring an offender to justice, against whom they cannot themselves give evidence.

[3]

2d, The obligations to prosecute.

The persons thus legally entitled to prefer an accusation against a party suspected of a crime, are in general bound by the strongest obligations, both of reason and law, to exert the power with which they are invested. It must indeed be admitted, that revenge ought not to become the motive of their actions, or occasion any

(*a*) 2 Tannt. 334. 2 B. & P. 508. 2 Leach, 616.

(*b*) 1 Atk. 221. 1 Mont. B.L. 416.

(*c*) 1 Salk. 174. 3 M. & S. 71.

(*d*) Post, Chap. As to Informations, p. 841.

(*e*) 1 Wils. 222.

(*f*) 2 Burr. 1117. 2 Stra. 372. 946. Andr. 200. and see at large, post, Chap. on Evidence, p. 554. Peake's Ev. 140 to 159.

unnecessary harshness in their proceedings (*a*). But on the other hand, at least in cases of greater offences, which affect the public, they have no right to forgive the injury which society in general has sustained, or to deprive mankind of that security which can alone result from the prompt detection and punishment of those by whom it is broken (*b*). The object of criminal prosecutions is not vengeance for the past, but safety for the future; and to the furtherance of this design every man is bound to contribute.

This moral obligation is, in many cases, enforced by the laws themselves; and in many more is encouraged by their sanction. Thus, in cases of treason and felony, any person knowing the crime to have been committed, and concealing it, even though he has not actively assisted the offender, will be guilty of a misprision of the crime which he has been instrumental in concealing. For this he may be punished, in case of treason, by the forfeiture of his goods, the loss of all profits of his lands during life, and the imprisonment of his person for the same period; and where a felony has been thus covered, if a public officer, by fine and imprisonment for a year and a day, and, if a private individual, by fine and confinement for a less time, at the discretion of the judges. In all cases, therefore, when a capital offence has been committed, it is the absolute duty, and only safe conduct of the party who is aware of the circumstance, to reveal it as soon as possible to some judge of assize, or justice of the peace (*c*). And though in case of misdemeanors the neglect is not in general thus punishable, yet if the crime is of a public character it is illegal to receive, or stipulate to receive, a consideration for suppressing a prosecution for it, or compromising it, without the sanction of the court in which the proceedings were commenced (*d*).

[4]

(*a*) See Lord Mansfield's observations on the proceedings by appeal, 5 Burr. 2643. 2 Wooddes. 565, 6. 4 Bla. Com. 316. Paley, Mor. et Pol. Phil. vol. i. b. 3. part 2. ch. 8. Puffend. l. de J. B. et P. lib. 2. c. 20. s. 5. Grotius Law of Nations, b. 2. c. 4. s. 12. et b. 8. c. 3. s. 19. 23.

(*b*) Bece. c. 46. Paley, Mor. Phil. vol. ii. c. 9. 4 Bla. Com. 364.

(*c*) 1 Hale, 371 to 375. 3 Inst. 139, 140. 4 Bla. Com. 120, 121. Dalt. Just. ch. 161. Burn's Just. Felony, s. 2. and see 29 Geo. 2. c. 30. s. 5.

(*d*) 5 East, 298, 302. 11 East, 46.

And any contract or security made in consideration of dropping a criminal prosecution, suppressing evidence, soliciting a pardon, or compounding any public offence without leave of the court, is invalid (*a*).

[5]

In order further to compel persons who are acquainted with the circumstances attendant on crimes to perform the duty imposed on them by law, every magistrate has a power, at least on a charge of felony, to bind them over to prosecute and give evidence, and to commit them upon their refusal (*b*). Justices of the peace are themselves bound to present highways which are suffered to be in decay (*c*). And any constable of a parish may, on the application of two of the inhabitants, be compelled to indict a disorderly house within it (*d*). So the clerk of the peace in any county where a wreck has been plundered, is bound to proceed against the suspected individual (*e*). And any judge at the assize, during the session of the court, or within twenty-four hours after it is concluded, may direct a person examined as a witness on a trial before him to be indicted for perjury, either by the party immediately injured by his testimony, or by any other, to whom he may think the prosecution should most properly be entrusted (*f*). But a coroner has not any power to direct an overseer or other parish officer as such to prosecute; nor can a magistrate direct an overseer or constable to prosecute for an assault, so as to entitle him to deduct or recover the costs out of the poor-rate, under the 18 Geo. 3. c. 19. s. 4. (*g*).

3d, The inducements to prosecute.

There are also many instances in which the law has rendered it either necessary or advantageous to the party immediately injured to prosecute, as it affects his own private interests; wisely inter-

(*a*) 5 East, 298. 302. 11 East, 46. 16 East, 301. 1 Campb. 46. 55. 3 T. R. 17. 2 Esp. Rep. 643. 3 Esp. Rep. 253. 7 T. R. 475. 3 Pr. Wms. 279. 2 Wils. 349, but see 1 Stark. 88. 1 Bing. 105; but a party may refer to arbitration a prosecution for an assault. 1 J. B. Moore, 120.

(*b*) 3 M. & S. 1. Dalt. Just. c. 164. Toone, 140. Post, as to Magistrates' power to bind over to prosecute.

(*c*) 13 Geo. 3. c. 78. s. 23, 14.

(*d*) 25 Geo. 2. c. 36. s. 5. made perpetual by 28 Geo. 2. c. 19. Constructions of this act, 1 B. & A. 694. 58 Geo. 3. c. 70. s. 7.

(*e*) 26 Geo. 2. c. 19. s. 8.

(*f*) 23 Geo. 2. c. 11. s. 3.

(*g*) 2 B. & A. 522. 5 B. & A. 182. Cald. 510. *Sed vide* Imp. Off. Cor. 477. Umfrival's Off. Cor. 20. 313. 522.

weaving his own advantage with the public benefit. Thus in some cases a criminal proceeding is the only course he can pursue to obtain redress. In every case of felony and treason, his civil remedy is entirely suspended until he has performed his duty to society by an endeavour to bring the offender to justice, and he is indictable in case he agrees to a compromise (*a*). This civil right, however, is neither destroyed nor merged; for, after the party on whom suspicion was fixed has been convicted or acquitted without collusion, the prosecutor may support an action for the same cause, as that on which the criminal prosecution was founded (*b*). In misdemeanors, however, the party injured has, in general, the option of bringing an action, or preferring an indictment (*c*); and where the commissioners under a private inclosure act, have disobeyed an order of sessions directing them to set out a public road, they may either be indicted for their neglect, or the court of King's Bench will, on motion, proceed against them by a writ of *mandamus* (*d*).

[6]

But though in all cases of offences inferior to felony, the person immediately injured has the option either of proceeding criminally, or of bringing an action, there are cases, in which, on the mere ground of interest, the former course will most properly be adopted. Thus the rank or situation of either of the parties may render a criminal prosecution expedient. It is also frequently necessary, from a defect in the evidence, when the testimony of the party immediately injured may be necessary to substantiate the charge; for though incompetent in a civil proceeding to be a witness in his own cause, he may, except in case of forgery, appear to support an indictment, because the latter proceeding is at the suit of the crown, and carried on for the public, and not for his private benefit (*e*).

When a party applies to the Court of King's Bench, for a criminal information, it has been supposed that he must waive his

(*a*) 12 East, 409. R. T. H. 359. 1 Hale, 546. 2 T. R. 751. 756. 17 Ves. 329. 4 Bla. Com. 363. Bac. Abr. Trespass, E. 2. and Trover, D.
(*b*) Id. *ibid*.

(*c*) 6 East, 158.
(*d*) 2 M. & S. 80.
(*e*) 5 East, 582. Hawk. b. 2. c. 25. s. 3. 4 Bla. Com. 364. Bac. Abr. Indictment, A.

right of action, or the court will not grant a rule to shew cause, but this is not at present the practice, and after the granting an information has been refused, the party applying is at liberty to proceed by indictment, or at liberty to resort to his civil remedy (*a*). In an indictment, on the other hand, the proceedings will not be stayed in an action depending for the same cause, because the damages consequent on the one, and the punishment on the other, are entirely different in their nature and intention (*b*). Where, however, this kind of double proceeding is carried on for a trifling assault, or any other misdemeanor more immediately affecting the individual, with a spirit apparently vindictive, the Attorney-General will, on the application of the defendant, compel the prosecutor to elect which course he will pursue, or will direct a *nolle prosequi* (*c*). It is, therefore, in general advisable not to commence any civil action, at least until the criminal prosecution is concluded.

[7]

Besides these inducements to prosecute, there are various advantages, rewards, and immunities, which have been given by particular legislative provisions, and which will only be alluded to here, as we shall fully consider them when they arise after the conviction (*d*). Of these the restitution of stolen goods is one of the most ancient (*e*). By the common law, indeed, this was only to be obtained on an appeal, and consequently the proceeding by indictment was much less beneficial to the party injured (*f*). But, as at length it being considered that the latter course was, at least, as much deserving of encouragement as the former, the statute 21 H. 8. c. 11. provided, that after the conviction of an offender of robbery, on an indictment preferred by the party aggrieved, or by any other through his exertions, full restitution of his property should be made him by a writ to be granted by the justices (*g*). And so beneficially is this provision construed in favor of the prosecutor, that he may recover his goods though

(*a*) 2 Burr. 719. 2 T. R. 198. Dong. 446. Rep. Temp. Hardw. 241. Hawk. b. 2. c. 26. s. 8.

(*b*) 2 Burr. 719. 1 B. & P. 191. Cro. C. C. 22. Bac. Abr. Assault and Battery, C.

(*c*) Id. *ibid*.

(*d*) See post, Chapter, As to Rewards, &c.

(*e*) See post.

(*f*) 3 Inst. 242.

(*g*) 1 Hale, 538 to 547. Com. Dig. Justices, A. 4 Bla. Com. 362. Burn's Just. Restitutions. Williams's Just. Felony, VIII.

they have been sold in market overt to a *bonâ fide* purchaser; because the person who has performed an active service in bringing an offender to justice, is regarded as more worthy of protection, than he who has the mere negative merit of innocence (*a*).

Another mode of rewarding the prosecutor in case of mere personal injuries, is by suffering the defendant to compromise, or, as it is sometimes technically called, “*to speak with him*,” before any judgment is pronounced, and if he declares himself satisfied, to inflict but a trifling penalty:—This is done both to reimburse him for his expenses, and to give him some compensation for the damage he has sustained, without the trouble and circuity of a civil action (*b*). This practice has been censured, particularly when employed at the Quarter Sessions, and other courts of inferior jurisdiction, where, it is said, prosecutions for assaults are more frequently commenced for private lucre, than the ends of public justice (*c*). But, it may be urged, on the other hand, that country magistrates, from their local knowledge, and more accurate acquaintance with the character of the parties, are more fit to be intrusted with this power than the Judges of Assize, who generally know little more than the facts detailed in evidence (*d*). Against this practice it has also been contended, that where the testimony of the prosecutor is necessary to convict the defendant, the rules of evidence are subverted, as he is allowed to be a witness in the cause from the success of which he may derive a pecuniary benefit (*e*). But it should be remembered, that this case would be by no means singular; for there are a variety of instances in which the legislature offers a specific reward to a prosecutor, on the conviction of a defendant, and yet he is fully competent to give evidence (*f*). It must, however, be allowed, that this mode of remuneration ought to be used with great caution, and requires a considerable degree of prudence in its exercise.

[8]

(*a*) 1 Hale, 543. 4 Bla. Com. 363. Post, Chapter, As to Rewards.

(*b*) 4 Bla. Com. 364. Hullock, 557 to 559, and cases there collected.

(*c*) 4 Bla. Com. 364.

(*d*) Dick. Sess. 156.

(*e*) 4 Bla. Com. 364.

(*f*) See post, Chapter, As to Evidence.

[9]

When a defendant has been convicted in the King's Bench, that court, having the king's privy seal for the purpose, may give the prosecutor a third part of the fine which they think fit to impose (*a*). And it is said to be a common practice for them, in order to induce defendants to make satisfaction for the expenses of the prosecution and the personal injury, to intimate an intention, on that account, of mitigating the fine they would otherwise compel them to pay to his majesty (*b*). In conformity to this principle, it has been holden, that where a defendant has been convicted at the Quarter Sessions of ill-treating his parish apprentice, for which the officers had been bound over, by recognizance, to prosecute him, a security given by recommendation of the court to pay the fair expenses of prosecution, and on which account they mitigated the punishment they would otherwise have inflicted, is valid (*c*).

Besides these collateral advantages, rewards and immunities are given by a variety of statutes to those who are the means of convicting offenders. These we shall consider in that stage of the proceedings in which they naturally arise (*d*). And though, in some degree, to counterbalance these benefits, the costs of the prosecution must, in the first instance, be defrayed by the party at whose suggestion it is commenced, and the costs of prosecutions for misdemeanors must in general be borne by the prosecutor (*e*), yet the court are empowered wherever there appears reasonable ground for the investigation, either after a conviction or an acquittal, in case of felony, to award to the prosecutor his reasonable expenses, and, if he be poor, a compensation for his loss of time (*f*).

(*a*) 1 Keb. 487. Hawk. b. 2. c. 25. s. 3. Bac. Abr. Indictment, A.

(*b*) *Id.* *ibid.* Post, Chap. As to Costs.

(*c*) 11 East, 46; but see 9 East, 49.

(*d*) See post, Chap. As to Rewards, &c. As to rewards in general, see Becc. c. 36. Hawk. b. 2. c. 12. s. 21 to 38. Williams, J. Felony, IX. Burn, J. Felony, IV.

(*e*) 7 T. R. 377. 4 T. R. 591. 2 B. & A. 522. 5 B. & A. 180. Dick. Sess. 403, 4. 4 Bla. Com. 362. 412. Christian's edit.

(*f*) 25 G. 2. c. 36. & 18 G. 3. c. 19. See observations on these acts, 6 T. R. 237. Hullock, 601. Dick. Sess. 402; and for the law of costs in criminal cases in general, see post, chap. As to Proceedings after Judgment

The law always insures to the prosecutor all due protection in the discharge of his duty. And as it would be a great discouragement to public justices, if he were liable to an action, when he was mistaken in the object of his suspicions, it is settled that he cannot be sued for indicting a party, unless his proceedings were both actuated by malice and destitute of any probable foundation (*a*). Nor can any action be supported for a malicious prosecution of *felony* without producing a copy of the record of the indictment and acquittal, which are never granted, if the accusation was supported by any probable evidence (*b*). And further to shelter the party indicting, his own oath, in support of the charge, may, in some cases, be given in evidence in his favor (*c*). On the same principle it has also been decided, that no new trial ought to be granted after a verdict in his discharge, though there was strong evidence against him, and though the judge directed the jury in favor of the party accused (*d*).

4th, Protection and liability of prosecutor.

[10]

But when the law has been made the mere engine of oppression, the party injured has an effectual remedy, and prosecutors are sometimes liable to pay costs (*e*). An action on the case for a malicious prosecution has taken place of the old writ of conspiracy, and is now the usual mode of proceeding. This important subject, which though not actually a part of, bears so intimate a relation to, Criminal Law, will be fully considered after we have conducted the prosecution to its conclusion (*f*). There is, indeed, another course yet more penal, where several concur in preferring a malicious charge, by an indictment for a conspiracy; on which some very exemplary punishment is usually inflicted (*g*); for there cannot be a greater insult to public justice, than to abuse its forms, and, for the purposes of private malice, to render it an engine of oppression.

(*a*) 1 Campb. 199 to 204. 9 East, 361. 5 Taunt. 187. 1 Marsh. 12. Selw. N. P. Malicious Prosecution. Post.

(*b*) 3 Bla. Com. 126. 4 Burr. 1971. 14 East, 302.

(*c*) 6 Mod. 216. Bul. N. P. 14. Peake's Evid. 165.

(*d*) Cowp. 37. R. T. H. 279.

(*e*) 4 M. & S. 203. Post.

(*f*) See post, chap. Proceedings after Execution.

(*g*) 2 Burr. 993. 1 Bla. Rep. 368. Staund. P. C. b. 2. c. 23. 4 Wentw. 96. Jac. Dic. Indictment.

CHAPTER II.

OF THE ARREST.

WHEN a party has determined to prosecute, the next consideration is the mode in which he should proceed to bring the supposed offender to punishment.

When the party suspected is at large, he may in general, before an indictment has been found, be apprehended, either without warrant, by a private individual, or by a constable or other officer *ex officio*; or, under a warrant granted by a justice of the peace, or a judge, or the secretary of state; and if the supposed offender be in custody in a civil suit, he may be charged criminally under such warrant, though he cannot be taken, by its authority, out of the custody of the court, and sent to the county gaol (*a*). We will, therefore, consider the law relative to arrest on a criminal charge before indictment, under the following divisions: 1. Who are liable to apprehension. 2. For what crimes. 3. At what time. 4. In what places. 5. By whom, and under what authority, as with or without warrant, and the several incidents to the warrant and its execution. 6. Escapes, rescues, and retakings. 7. The proceedings of the officers after the arrest. 8. Rewards for apprehending, and indemnity to the parties. 9. The return to the warrant. 10. Search warrants; and, 11. The detention of a person on a criminal charge, who, on any ground either civil or criminal, is already in custody.

[12]

1st, Who may be arrested.

An arrest, in criminal cases, is the apprehending or detaining of the person, in order to be forthcoming to answer an alleged or suspected crime (*b*). To this arrest all persons are in general liable when accused of capital or violent injuries (*c*). The ex-

(*a*) 2 Stra. 828. 1 Wms. J. Arrest. 2 Barn. 114. 1 Barn. 129.

(*b*) Burn's J. Arrest. Lamb, 93. Dalt. J. ch. 170.

(*c*) 4 Bla. Com. 239.

exemptions which exist in civil cases here cease to operate. Thus a married woman, when she has committed an offence, for which she is subject to punishment, is liable to be apprehended (*a*): and though it has been enacted, that clergymen shall not be arrested in churches and church-yards, this is a privilege which extends only to civil process, and in cases of crimes affords no protection above other subjects (*b*). So peers (*c*) and members of parliament have no exemption from arrest in case of treason, felony, and actual breach of the peace (*d*); and, according to the resolution of both Houses of Parliament, members are not privileged even when accused of a seditious libel (*e*).

There seems to be considerable difficulty in precisely ascertaining in what cases a party suspected may be apprehended before a bill is found against him. It having been enacted by Magna Charta, that no one should be taken or imprisoned but by the lawful judgment of his peers, or by the law of the land (*f*); it was, for some time, insisted that no one could be deprived of his liberty for any offence, until after the finding of a bill against him by a grand jury, which afforded probable evidence that he was guilty (*g*). All the deviations from this rule have been considered as encroachments on the common law (*h*). An exception was very early allowed to prevail, when a thief was taken in the *mainour*, that is, apprehended with the stolen goods actually in his possession (*i*). And it is now fully established, that in every case of treason, felony, or actual breach of the peace, the party may be arrested on suspicion, before any indictment is preferred against him (*k*). And it should seem, that not only in these cases, but for every misdemeanor or offence indictable at the sessions, and which subjects the delinquent to corporal punish-

2d, In what cases an arrest may be made.

[13]

(*a*) 3 Burr. 1681. Hawk. b. 1. c. 1. 2 Leach, 954. 1102. Dalt. J. ch. 170.

(*b*) 1 R. 2. c. 15. 50 Edw. 3. c. 5. Cro. Jac. 321.

(*c*) Fortes. 359.

(*d*) 4 Inst. 24, 25. 2 Wils. 159, 160. Dalt. J. ch. 170.

(*e*) 11 Harg. St. Tr. 305.

(*f*) 9 Hen. 3. c. 29.

(*g*) 4 Inst. 176, 7, 8. Comb. 359.

(*h*) 1 Show. 54. Hawk. b. 2. c. 13. s. 11, 16, and 18. 3 Burr. 1755. Burn's Just. Warrant, III. Dick. Just. Peace, Justices of, 3.

(*i*) 1 Show. 24.

(*k*) 2 Hale, 72. 78. 103. Comb. 359. 3 Burr. 1755. Hawk. b. 2. c. 12, and c. 13. s. 11, and 18. 4 Bla. Com. 290. Burn's Just. Warrant, III.

[14]

ment, though it does not amount to a breach of the peace, he may, on a regular warrant of a justice of the peace, be arrested in this stage of the proceedings, on the ground that the law impliedly affords power to issue a warrant, when it gives jurisdiction over the offence; and it has been considered, that perjury and libels (*a*), and nuisances, when persisted in (*b*), subject the offender to such criminal process. And there are some misdemeanors for which particular acts of parliament expressly authorize a justice of the peace to issue his warrant, as, for keeping a disorderly house (*c*), or obtaining money under false pretences (*d*). In modern practice, however, it is not usual for a justice out of sessions to issue a warrant for a libel on a private individual, or for perjury; though where an illegal publication is manifestly dangerous in its tendency to the public interests, they will exercise that discretion with which long practice has invested them (*e*). This also they will always do on the commission of any misdemeanor which involves an attempt to perpetrate a felony. And when assembled in session, they may issue a warrant against a party suspected of perjury, even though he has not been indicted.

Formerly, it seems to have been thought, that no warrant could be granted on mere suspicion, except it arose originally in the breast of the magistrate (*f*). But it is now settled, that justices of the peace may issue criminal process on the information of others, as they are supposed competent to judge of the sufficiency of the evidence on which the charge is founded (*g*): and since the 39 Geo. 3. c. 37, a magistrate may issue a warrant to apprehend an offender for any crime committed on the high seas. An English magistrate may also cause to be arrested, and commit

(*a*) 4 J. B. Moore, 195. 1 B. & B. 548. Gow, 84. Fortes. 37. 358. 140. 11 St. Tr. 305. 316. 2 Wils. 159. 160. 2 Salk. 698. Comb. 358. 12 Co. 131. Dalt. Just. c. 170. 34 Edw. 3. c. 1. Hawk. b. 2. c. 13. s. 11, and s. 15, 16. Dick. Sess. 88. Toone, 397. See form of a warrant for a misdemeanor, Dalt. Just. ch. 174. Barl. Just. 41.

(*b*) Vent. 169. 1 Mod. 76. 5 Mod. 80. 142. 6 Mod. 180.

(*c*) 25 Geo. 2. c. 36. s. 6.

(*d*) 30 Geo. 2. c. 24.

(*e*) 4 J. B. Moore, 195. 1 B. & B. 548. Gow, 84.

(*f*) 4 Inst. 177.

(*g*) 2 Hale, 107 to 111. 1 Hale, 530. 1 Show. 54, n. c. Hawk. b. 2. c. 13. s. 15. 18. 4 Bla. Com. 290. Burn, J. Warrant, l. III. and Sessions.

an offender against the Irish law, or accused of having perpetrated a crime in a foreign country (*a*). This power of arresting before indictment, which has been thus gradually assumed and sanctioned, is founded on principles of justice, for, as the law permits an arrest on mesne process in a civil action for a mere debt, in order to afford security to the creditor for the defendant's forthcoming, in case judgment shall be given against him, there seems full as strong reason, when a party is accused of a crime, for the conviction of which he would be liable to receive corporal punishment, that he should be subject to apprehension in the first instance, because, in the latter case, he has a greater temptation to elude justice by absconding.

These observations apply, however, in their full extent, only to arrests made by virtue of a warrant of a magistrate; for it seems that no person can, in general, be taken into custody without warrant, for a mere misdemeanor, unattended with violence, as perjury or libel (*b*). And it has even been holden, that a watchman cannot, of his own authority, justify the arrest of a man talking loudly in the street, though it may be disorderly, neither has the constable any power to commit him to prison (*c*). But in every case of treason, felony, and actual breach of the peace, the supposed offender may be apprehended without warrant, if such a crime has been actually committed, and there is reasonable ground to suspect him to be guilty (*d*). In this case, the party making the arrest will not be liable to any action, though it should ultimately appear that he was mistaken, and that the person suspected was innocent (*e*). But if no such crime was committed by any one, an arrest without warrant by a private individual, would be illegal; though a peace officer would be justified, if he acted on the information of another (*f*). If, on the other hand, a warrant had previously been obtained,

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(*a*) 2 Stra. 848. and see 4 Taunt. 34.

(*b*) 2 Wils. 159. 169. 2 Salk. 698. Fortes. 140. Dick. Sess. 88.

(*c*) 1 Esp. Rep. 294. 2 Stra. 704.

(*d*) See 2 Hale, 72, &c. Hawk. b. 2. c. 12. & c. 13. s. 15. 4 Taunt. 43. as to the offences for

which an arrest may, in general, be made, and on what suspicion.

(*e*) Id. *ibid.* Doug. 359. Cald. 291. *acc.* Selw. N. P. 3d edit. 308. *Semb. cont.*

(*f*) Doug. 359. Cald. 291. 6 T. R. 315. 3 Campb. 420. Hawk. b. 2. c. 12. s. 16. Dick. Just. Arrest. 2 Inst. 52.

the party taken under it could sustain no action, without proving that the imprisonment was dictated by malice, and that there was no probable ground for the proceeding. And if the magistrate mistake the law and extent of his jurisdiction, the party applying to him is not liable unless he acted maliciously (*a*). Whenever, therefore, there is any reason to doubt whether a felony has actually been committed, it is the safer course for a private person to obtain the warrant of a justice: watchmen and constables, however, may, in the night-time, of their own accord, arrest persons who they may reasonably suspect of having stolen goods about them, and will be indemnified though it should ultimately prove that no theft was actually committed (*b*). And any person may, without warrant, apprehend and carry before a magistrate, a party about to expose an infant, and leave it to perish (*c*), or playing with false dice, or otherwise committing an indictable fraud affecting the public (*d*). And the 5 Geo. 4. c. 83, and other acts, contains regulations for arresting, imprisoning, and punishing idle and disorderly persons, and rogues and vagabonds; but as the object of this Treatise is only to treat of indictable offences, and the proceedings respecting them, the regulations of these acts will not be further noticed.

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3d, At what time. A person may be apprehended in the night as well as the day (*e*), and though the statute 29 Car. 2. c. 7. s. 6, prohibits arrests on Sundays, it excepts the cases of treasons, felonies, and breaches of the peace: in these cases, therefore, an arrest may be made on that day (*f*).

4th, In what places.

Since the privileges of sanctuary and abjuration were abolished (*g*), no place affords protection to offenders against the criminal law. And we have seen that even the clergy may, on a criminal charge, be arrested whilst in their churches (*h*), though it is illegal to arrest them in any civil case, whilst in the church to perform divine service, or going to or returning from the same on

(*a*) 3 Esp. Rep. 166. 1 Stark. 67. 1 D. & R. 97.

(*b*) 3 Taunt. 14. 32 Geo. 3. c. 53. s. 17. 51 Geo. 3. c. 119. s. 18. & 24.

(*c*) 1 Leon. 327. Com. Dig. Pleader, 3 M. 22.

(*d*) Sir W. Jones, 249. Com. Dig. Pleader, 3 M. 22.

(*e*) 9 Co. 66.

(*f*) Cald. 291. 293. 1 T. R. 265. Willes, 459.

(*g*) 21 Jac. 1. c. 28.

(*h*) Ante, 12. Cro. Jac. 321.

any day (*a*). And if a person having committed a felony in a foreign country, comes into England, he may be arrested here, and conveyed and given up to the magistrates of the country against the laws of which the offence was committed (*b*).

The offender may be apprehended in certain cases, either without warrant by a private person, or by peace officers, as watchmen, patroles, beadles, constables, bailiffs, justices of the peace, sheriffs, or coroners; or may be taken under a warrant granted by a magistrate legally authorized to award it.

5th, Who may arrest, and by what authority.

Private individuals are *enjoined* by law to arrest an offender when present at the time a felony is committed, or dangerous wound given, on pain of fine and imprisonment, if he escape through their negligence (*c*). And every private person is bound to assist an officer, demanding his help in the taking of a felon, or the suppressing an affray, and apprehending the affrayers, and, if he refuse to assist before the termination of the affray, he is punishable with fine and imprisonment (*d*). And there are other cases in which, though the law may not enjoin an arrest, yet it *permits* it. Thus upon probable suspicion, a private person may, if a felony has actually been committed by some one, arrest, or direct a peace officer to arrest, the party whom he supposes to be guilty (*e*); and if it can be proved that a felony had been committed by some person and there were a reasonable and probable ground for suspicion, he will not be liable to an action, though it shall afterwards be proved that the party imprisoned was innocent (*f*). But there is a distinction as to the authority to apprehend, when the felony was committed in the view of a private person, and when committed in his absence, and the arrest is

By private persons.

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(*a*) Bac. Abr. Trespass, D. 3.

(*b*) 4 Taunt. 34.

(*c*) As to arrests by private persons, see in general, Hawk. b. 2. c. 12. s. 1. c. 13. s. 7. & 8. 4 Bla. Com. 292. 1 Hale, 587. Com. Dig. Imprisonment, H. 4. Bac. Abr. Trespass, D. 3. Burn's Justice, Arrest, III. Williams's Just. Arrest, II. 1 East, P. C. 298, &c.

(*d*) Id. ibid. Bac. Abr. Tres-

pass, D. 3. A private individual may arrest a lunatic who seems disposed to do mischief. Bac. Abr. Trespass, D. 3.

(*e*) Ante, 15. Cald. 291. Doug. 359. 1 Hale, 588, 9. Hawk. b. 2. c. 12. Com. Dig. Imprisonment, H. 4. Bac. Abr. Trespass, D. 3.

(*f*) Id. ibid. 4 Taunt. 34. 5 Price, 525, *acc.* but see Selw. 3d edit. 830, note s. *Semb. cont.*

afterwards attempted in consequence of the suspicion of the guilt. In the first case, any one may justify breaking open doors upon following the felon, and if he kill him, provided he could not otherwise take him, the act is justifiable, and if he be killed in endeavouring to make such arrest, it is murder in the parties resisting (*a*). But a private person cannot justify breaking open doors to apprehend another upon probable suspicion of felony, and if he do, and either party be killed in the attempt, it is manslaughter, but no more (*b*); it is not murder, because there is no malicious design to kill: but it amounts to manslaughter, because it would be of most pernicious consequence if, under pretence of suspecting felony, a man unarmed by any legal power might break open a house or kill another; and also because such arrest upon suspicion is barely *permitted* by the law, and not *enjoined* as in the case of actual presence, when a felony is committed. So, regularly, no private person can, of his own authority, apprehend another for a bare breach of the peace after it is over; for, as an officer cannot justify such an arrest without a warrant from a magistrate, *à fortiori* it cannot be allowable in a private person (*c*). With respect to interference, and arrests in order to *prevent* the commission of a crime, any person may lawfully lay hold of a lunatic about to commit any mischief, which, if committed by a sane person, would constitute a criminal offence; or any other person whom he shall see on the point of committing a treason or felony, or doing any act which will manifestly endanger the life or person of another, and may detain him until it may be reasonably presumed that he has changed his purpose; but where he interferes to prevent others from fighting, he should first notify his intention to prevent the breach of the peace (*d*). Thus any one may justify breaking and entering a party's house and imprisoning him, to prevent him from murdering his wife, who cries out for assistance (*e*). And the riding in a body to quell a riot is lawful, and no information will be granted for small irregularities

(*a*) 2 Hale, 77.

(*b*) 2 Hale, 82, 3. Com. Dig. Imprison. H. 4. 4 Bla. Com. 293. 1 East, P. C. 299. 300.

(*c*) Hawk. b. 2. c. 12. s. 21. 1 East, P. C. 300. Bac. Abr. Trespass, D. 3.

(*d*) Hawk. b. 2. c. 12. s. 19.

1 Hale, 589. 2 Rol. Ab. 559, E. pl. 3. n. 8. Selw. 3d ed. 830. Com. Dig. Pleader, 3 M. 22. Bac. Abr. Trespass, D. 3. 1 East, P. C. 304.

(*e*) 2 B. & P. 260. Selw. 3d edit. 830. Bac. Abr. Trespass, D. 3.

in the pursuit of such a design (*a*). In one ancient case, the Court seems to have thought, that if the cause of suspicion should appear reasonable, the justification would be good, though no felony were committed by any one (*b*). But the current of authorities seems to establish, that a private person, in justifying the imprisonment, without warrant, of an innocent man, must state in his pleadings and prove in evidence, that a felony was committed *by some one*, as well as that, under all the circumstances, there was reasonable ground for suspecting the plaintiff, or he will be liable to pay damages (*c*). It is safer, therefore, to obtain a warrant when time will allow; because, where the arrest is under a warrant, no action of trespass, but only an action on the case lies, and the latter cannot be sustained unless the plaintiff can shew, that the charge was without probable cause, as well as malicious, and if the magistrate should erroneously issue his warrant, the party accusing will not be liable (*d*); but an arrest, when a warrant ought previously to have been issued, will not be rendered legal by a subsequent issuing of that authority (*e*). In the case, however, of a man apprehending a party on hue and cry, or detaining a person offering goods for sale or pawn, where there is reasonable suspicion of their having been stolen, there is an express enactment that he shall be indemnified, though it afterwards appear that no felony was committed (*f*). And it has been said, that a private person may legally, in the night-time, arrest a suspicious night-walker, though he subsequently prove his innocence of any criminality (*g*).

A private person, who has apprehended another for treason or felony, may deliver the prisoner into the hands of a constable, or he may carry him to any gaol in the county; but the safer course seems to be, to cause him, as soon as convenience will permit,

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(*a*) 1 Bla. Rep. 47. 2 B. & P. 264. n. a. 1 East P. C. 304.

(*b*) Samuel and Payne, Dougl. 359. note 7.

(*c*) 2 Inst. 52. Hawk. b. 2. c. 12. s. 8 to 19. 4 Taunt. 34. Com. Dig. Imprisonment, H. 4. Cald. 291. Dougl. 359. 6 T. R. 315. 3 Campb. 420. 4 Esp. Rep. 81. 1 Campb. 187. Ante, 16.

The case of Adams and Moore, Selw. N. P. 4th edit. 865, is not law to the extent reported.

(*d*) 3 Esp. Rep. 166. 3 T. R. 185. Boote v. Cooper, 1 T. R. 535. 3 Esp. Rep. 135.

(*e*) Bac. Abr. Trespass, D. 3.

(*f*) 30 Geo. 2. c. 24. s. 8.

(*g*) 1 East P. C. 303. 3 Taunt. 14. and post, 21 and 22.

to be brought before some justice of the peace, by whom the prisoner may be examined and bailed or committed to prison (*a*). Where a private person has apprehended another assisting in an affray, he may lawfully detain him till the heat is over, and then deliver him to the constable (*b*).

By constables.

The office of *constable* is either ministerial, in obeying warrants and precepts of justices, coroners, and sheriffs, and the charge of private individuals, or is original as a conservator of the peace at common law, or by virtue of particular acts of parliament (*c*). By the original and inherent power which he possesses, he may for treason, felony, breach of the peace, and some misdemeanors less than felony, committed in his view, apprehend the supposed offender, *virtute officii*, without any warrant (*d*). In general, when an affray takes place in his presence, he may either keep the parties in custody till it is over, or he may carry them immediately before a magistrate (*e*). He has, at least, an equal power to apprehend with any individual, and the chief difference between his power and duty and that of a private person seems to be, that the former has greater authority to demand the assistance of others, and is liable to a severer fine for any neglect of duty, and that he ought to bring the party suspected before a justice of the peace, in order to be examined (*f*). Another difference seems to be, that a private individual cannot, of his own accord, arrest a person, except upon his own suspicion, and not upon report, or the suspicion of another (*g*), whereas a constable, or other peace officer, may, if a felony has been committed by some one, lawfully apprehend a supposed offender upon the information of others, without any positive charge or his own knowledge of the

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(*a*) 1 Hale, 589. 2 Id. 77. 81. Hawk. b. 2. c. 13. s. 7. and b. 2. c. 16. s. 3.

(*b*) Hawk. b. 2. c. 13. s. 8.

(*c*) As to the office and authority of a constable in general, *virtute officii*, see 2 Hale, 88 to 97. Hawk. b. 2. c. 10. s. 37, &c. c. 13. s. 6, &c. 4 Bla. Com. 292. Burn's Just. Arrest, III. and Constable. Williams, Just. Constable. Bac. Abr. Constable. Com. Dig. Imprisonment, H. 4. Ld. Raym. 1296 to 1303. Com.

Dig. Pleader, 3 M. 22, 23. The 1 Geo. 4. c. 37. authorizes magistrates to appoint special constables to prevent tumult, riot, or felony; and see the metropolis act, 54 Geo. 3. c. 37.

(*d*) 1 Hale, 587. 1 East P. C. 303. Selw. N. P. 3d edit. 830, n. y. Churchill v. Matthews and others, Dick. J. Arrest, II.

(*e*) Selw. N. P. 3d edit. 830.

(*f*) Hawk. b. 2. c. 13. s. 7.

(*g*) Hawk. b. 2. c. 12. s. 15. Cald. 293. 1 East P. C. 300, 1.

circumstances on which the suspicion is founded (*a*). And a constable may justify an imprisonment, without warrant, on a reasonable charge of felony made to him, although he afterwards discharges the prisoner without taking him before a magistrate, and although it turn out that no felony was committed by any one (*b*). In general, however, a constable cannot, any more than a private person, of his own accord, and without an express charge or warrant, justify the arrest of a supposed offender, upon suspicion of his guilt, unless he can shew that a felony was committed by some person, as well as the reasonableness of the suspicion that the party imprisoned is guilty (*c*). There are, however, authorities in favor of an exception to this rule in the case of night-walkers, and persons reasonably suspected in the night, of felony (*d*). And, by a modern act of parliament, an express power is given to constables and other peace officers, when on duty, to apprehend every person who may reasonably be suspected of having, or carrying, or by any ways conveying, at any time, after sun-setting and before sun-rising, goods suspected to be stolen (*e*). And other statutes (*f*) authorize constables and other peace officers to apprehend evil-disposed and suspected persons and reputed thieves. Thus, by the 32 Geo. 3. c. 53. s. 17, constables, headboroughs, patrols, and watchmen, are empowered to apprehend reputed thieves frequenting the streets, highways, and avenues of public resort, and convey them before a proper magistrate. And, in order to give more effect to the public office at Bow-street, the 51 Geo. 3. c. 119. s. 24, and 54 Geo. 3. c. 37. s. 16, 17, 18, direct two magistrates of that office, (of whom the chief magistrate must be one,) to swear in men to act as constables for Middlesex, Surrey, Essex, Kent, and Westminster, and enable the persons so sworn to apprehend offenders against the peace, both by night and by day, with all the powers which other constables possess.

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(*a*) Cald. 291. 1 East P. C. 301. Selw. N. P. 3d edit. 830. 4 Esp. 80. 6 T. R. 315.

(*b*) Holt C. N. P. 478. Cald. 291.

(*c*) 4 Esp. Rep. 80. Holt C. N. P. 478. Hawk. b. 2. c. 12. s. 16. 2 Hale, 92, 89, n. f. Cald. 291.

(*d*) 3 Taunt. 14. 1 East P. C. 303. Hawk. b. 2. c. 12. s. 20. 2 Hale, 89. 5 Edw. 3. c. 14. 2 Inst. 52. Bac. Ab. tit. Constable, G.

(*e*) 22 Geo. 3. c. 53. s. 3. 54 Geo. 3. c. 57. s. 16, 17, 18.

(*f*) 32 Geo. 3. c. 53. s. 17. 51 Geo. 3. c. 119. s. 18 and 24.

Constables are bound, upon a direct charge of a felony, and reasonable grounds of suspicion laid before them, to apprehend the party accused (*a*), and if, upon a charge of burglary, or other felony, he be required to apprehend the offender, or to make hue and cry, and neglect so to do, he may be indicted (*b*). And a peace officer, upon a reasonable charge of felony, may justify an arrest without a warrant, although no felony has been committed (*c*), because, as observed by Lord Hale (*d*), the constable cannot judge whether the party be guilty or not, till he come to his trial, which cannot be till after his arrest; and, as observed by Lord Mansfield in *Samuel and Payne*, if a man charges another with a felony, and requires an officer to take him into custody, and carry him before a magistrate, it would be most mischievous that the officer should be bound first to try, and, at his peril, exercise his judgment on the truth of the charge; he that makes the charge should alone be answerable; the officer does his duty in conveying the accused before a magistrate, who is authorized to examine, and commit, or discharge (*e*). And, it should seem, that even upon a charge of a breach of the peace not committed in the view of the constable, if he arrest the party, and no breach of the peace was committed, the person who preferred the charge alone is liable (*f*), though it has been held, that a constable cannot arrest for an affray or breach of the peace, not committed in his view (*g*); and it seems that a constable is not justified in apprehending and imprisoning a person on suspicion of having received stolen goods, on the mere assertion of one of the principal felons (*h*). It seems preferable, in all cases not requiring immediate interference, for a constable to act under a warrant, because, if he does not, he will not be entitled to the benefit of the provision in the statute 24 Geo. 2. c. 44, which protects him, on granting a copy for every thing done in obedience to a warrant (*i*).

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(*a*) 2 Hale, 91, 92. 1 East P. C. 301. Holt C. N. P. 478.

(*b*) Cro. Eliz. 654. 2 Hale, 90, 91.

(*c*) Dougl. 360. 4 Esp. Rep. 80. Cald. 291. 3 Campb. 420. 2 Esp. Rep. 540. Selw. N. P. 3d edit. 830. 1 East P. C. 301.

(*d*) 2 Hale, 91, 2.

(*e*) Dougl. 360.

(*f*) 3 Camp. 420. 2 Hale, 90. 6 T. R. 315, but quære, see 1 East P. C. 305.

(*g*) Cro. Eliz. 375. 2 Esp. Rep. 540. Hawk. b. 2. c. 13. s. 8. Bac. Ab. Constable, C. 1 East P. C. 305.

(*h*) 2 Stark. 167.

(*i*) Sect. 8. 3 Esp. Rep. 226.

A constable may break open doors to take a felon, if he be in the house, and entry denied after demand, and notice given that he is a constable; and, if in such attempt, the constable or any in his assistance be killed, after competent notice of his office, it is murder; and if the felon resist and cannot be taken, whether it be after or before the arrest, the killing of the felon, who cannot otherwise be taken, is no felony; because the law enjoins a constable to take a felon, and if he omits his duty, he is indictable, and subject to fine and imprisonment (*a*). So, where a felony has been committed by some one, and there be reasonable ground to suspect that a person be the offender, a constable has a similar power of breaking open doors to apprehend him (*b*). Doors also may be broken by a constable where a felony is not yet committed, but likely to be so, in order to prevent it (*c*).

A constable having arrested the offender, may, in case of an affray, put him in the stocks, or otherwise confine him, till the heat of his passion or intemperance is over, or till he can bring him before a justice of the peace, and, in case of any offence for which the party suspected may be apprehended, a constable may convey him to the sheriff or gaoler of the county or franchise: but the safest and best course is said to be, in all cases, to carry the offender before a justice of the peace, as soon as circumstances will permit (*d*).

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In general, the common law authority of a constable is applicable to tithing-men, head-boroughs, and bors-holders, and several of the statutes before noticed afford these officers similar powers (*e*). Watchmen, patroles, and beadles, have authority at common law to arrest and detain in prison for examination, persons walking in the streets at night, whom there is reasonable ground to suspect of felony (*f*), though there is no proof of a felony having been committed (*g*). And the before-mentioned

By watchmen.

(*a*) 2 Hale, 90, 91, &c.

(*b*) Id. 92.

(*c*) Id. 94, 95. 2 B. & P. 260.

(*d*) 2 Hale, 95, 6. Selw. N. P. 3d ed. 830, n. y. Ante, 21.

(*e*) Id. 96.

(*f*) But at common law no peace officer is justified in taking

up a night-walker, unless he has committed some disorderly or suspicious act. Bac. Ab. Trespass, D. 3. 2 Ld. Raym. 1301.

(*g*) 2 Hale, 96, 98. Hawk. b. 2. c. 13. s. 1, &c. 3 Taunt. 14. 1 East P. C. 303. 2 Inst. 52. Burn, Just. Watch. Com. Dig. Imprisonment, II. 4.

statute give the same power to watchmen, as to constables, while on duty, to apprehend persons suspected of felony (*a*). A watchman, having apprehended a party, may discharge himself from liability for an escape, by delivering him to a constable, or he may himself take him before a magistrate (*b*).

By justices of
the peace.

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Justices of the peace have a double power in relation to the arrest of wrong-doers, the first branch of which authority may be personally exercised on the commission of a felony or breach of the peace in their presence, the second, by issuing a warrant on the evidence and complaint of another. And if a justice of the peace see a felony or breach of the peace committed, he may either himself arrest the parties offending, or verbally command any person to take them into custody. And it seems, that in order to prevent the riotous consequences of a tumultuous assembly, he may command his servants or others to arrest the affrayers, though, in general, if an offence be committed in his absence, he must grant his warrant in writing to apprehend the offender (*c*). It is laid down (*d*), that any justice or the sheriff may take of the county any number that he shall think meet, to pursue, arrest, and imprison traitors and felons, or such as break, or go about to break, or disturb, the king's peace, and that every man being required, ought to assist and aid them on pain of fine and imprisonment.

Where the magistrate is not present when a crime has been committed, he ought not, upon mere discretion, to send the party accused to prison, but upon due consideration of evidence adduced before him. It was well observed by Ch. J. Pratt (*e*), that in case a magistrate has notice, or a particular knowledge, that a person has been guilty of an offence, yet it is not a sufficient ground for him to commit the criminal, but in that case he is rather a witness than a magistrate, and ought to make oath of the fact before some other magistrate, who should thereupon act the

(*a*) 22 Geo. 3. c. 53. s. 3.
32 Geo. 3. c. 53. s. 17. 51 Geo. 3.
c. 119. s. 18.

(*b*) Dalt. Just. c. 104.

(*c*) 2 Hale, 86, 87. 2 Wils.
151, 158. Cro. Jac. 81. Hawk.
b. 2. c. 13. s. 13. Bac. Ab. Jus-

tices of Peace, E. 5, and Tres-
pass, D. 13. Dick. Just. tit. Ar-
rest, II.

(*d*) Dalt. Just. c. 171. Dick.
Just. 114.

(*e*) 2 Wils. 158. and see Comb.
359.

official part, by granting a warrant to apprehend the offender, it being more fit that the accuser should appear as a witness, than act as a magistrate.

Sheriffs are not only enabled but enjoined to arrest felons, and By sheriffs.
all persons are required to be assisting to them therein upon their summons, and they are respectively punishable, by fine and imprisonment, in case they neglect their duty (*a*). The sheriff may also arrest a person suspected of a capital offence, whose guilt is not certain (*b*). And if the sheriff be assaulted in the execution of his duty he may apprehend the offender, and keep him in prison for a reasonable time, to be carried before a justice of the peace, to be committed, or find bail to answer the offence (*c*). [26]

Though a coroner has no power of taking inquisition of felony, By coroners, &c.
except in case of death, yet he is a conservator of the peace in relation to all felonies, and may arrest, or cause another to arrest, any felon (*d*). The Secretary of State has also a power of issuing a warrant to apprehend any person suspected of state offences; which, though its origin is uncertain, is not now to be disputed (*e*).

There is another mode of arrest without warrant, to be considered, in which the necessity of the case arms all the inhabitants of a district with peculiar powers, and compels them to perform the duties which constables are usually required to execute. In examining the proceedings by hue and cry, we will consider, first, its nature and origin; secondly, by whom it may be levied; thirdly, how it may be levied; and lastly, what may be done in the pursuit which it occasions. Of arrests upon hue and cry.

HUE and CRY is the old Common Law mode of pursuing, Nature and origin of hue and cry.
"with horn and voice," persons suspected of felony, or having inflicted a wound from which death is likely to ensue (*f*). This

(*a*) 2 Hale, 87.

(*b*) Id. ib.

(*c*) 1 Saund. 77, 3. 1 Taunt. 146. Selw. N. P. 3d edit. 330.

(*d*) 2 Hale, 88.

(*e*) Fortescue, 140. 7 T. R. 742. 2 Wils. 151, &c. 11 St. Tr. 318.

(*f*) 3 Inst. 116. 2 Hale, 98. 4 Bla. Com. 293, 4.

[27]

practice seems to have arisen in the earliest times (*a*), and was distinctly recognized in the institution of *hundreds* by Alfred. It is laid down by Lord Coke (*b*), that where a felony has been committed, or dangerous wound given, the party grieved may resort to the constable, acquaint him with the circumstance, describe the offender, point out which way he is gone, and demand hue and cry to be made. Upon this, it becomes the duty of the officer to raise hue and cry within his district; and if the offender be not there taken, he must give immediate notice to the next constable, and he to the next, till the delinquent be secured. This power has been further confirmed by several statutes. The 3 Ed. 1. c. 9, compels all persons to arm and assist the constable on pain of severe penalties. By the 13 Ed. 1. st. 2. c. 1, *fresh suit* must be made immediately after the felon, from town to town, and from county to county, which is said to be the life of this practice (*c*). And the statute 27 El. c. 13. s. 10, enacts, that the hue and cry must be by horse as well as foot, or it will be invalid. In order to enforce this practice, which was found highly beneficial in the infancy of the police, the 13 Ed. 1. c. 3, makes the hundred liable to answer for the damage sustained by the robbery unless the felon is secured; and by a more recent enactment (*d*), the officer refusing to make hue and cry, is rendered liable to a forfeiture of £5.

By whom to be
levied.

[28]

At the present day, hue and cry may be raised either by the precept of a justice of the peace, by a peace officer, or by any private man who is aware that a felony has been committed (*e*). It may be raised by the warrant of a justice, from his general power to apprehend (*f*). Upon constables, head-boroughs, and other peace officers, it is especially incumbent, because, as we have seen, they are fineable if they neglect it, and their presence gives more weight and authority to the proceeding (*g*). However, it is clear that hue and cry may be made by private individuals, in the absence of the constable, and it has therefore been sometimes

(*a*) Bracton, lib. 3, c. 1.

(*b*) 3 Inst. 116.

(*c*) 3 Inst. 117.

(*d*) 8 Geo. 2. c. 16.

(*e*) 4 Bla. Com. 294. 2 Hale,

100. Hawk. b. 2, c. 12. s. 6.
Burn, J. Hue and Cry.

(*f*) See form of warrant,
Burn, J. tit. Hue and Cry, post,
vol. iv.

(*g*) 1 Hale, 100.

termed in the old books *Cry de pais* (a). Nor can any inconvenience result from this liberty: for, any one making hue and cry, or causing it to be made, without due cause, is liable to be punished as a wanton disturber of the peace (b).

The party who discovers that a felony has been committed, whether the party grieved, or a third person, should either apply for the warrant of a justice, or immediately give information to the constable of the vill. The former method is always prudent when circumstances will permit, but as we have seen, it is by no means necessary, and if the offender be likely to escape is improper from the delay it occasions (c). He should then make a full statement of all the facts within his knowledge relative to the offence and the offender; state his name, if known, and if otherwise, describe his person, horse, or other circumstances which may lead to detection (d). Should the crime, however, be committed in any manner, or at any time which prevents him from obtaining any of these clues to discovery, he may require the officers to search for all suspicious persons, vagrant in their districts, in order that they may be examined (e). He may then claim the assistance of all the inhabitants of the vill, and all neighbouring vills, who are to pursue by horse and foot, till the felon is secured, or they are liable to be punished for their neglect (f). And by this means, a constable who has obtained a warrant against a felon, may procure him to be apprehended in a different county from that in which it was granted; by following him with hue and cry, and so, without backing the warrant, cause him at once to be arrested (g).

How it shall be levied.

[29]

Hue and cry being thus levied, we are now to inquire what may be done on the pursuit. It is clear, that when once it is commenced, those who join will be protected, even though it should ultimately appear that no felony has been committed; and the reasons for this are evident, because the constable cannot examine on oath as to the truth of the statement, and the nature of the

What may be done on hue and cry.

(a) 2 Hale, 100. 2 Inst. 117. Hue and Cry. Barl. J. 318.
 (b) Hawk. b. 2. c. 12. s. 5. (c) 2 Hale, 101, 103. Burn, J.
 2 Hale, 100. 2 Inst. 173. Hue and Cry.
 (d) 2 Hale, 99. Burn, J. (f) 2 Hale, 101, 3 Inst. 116.
 Hue and Cry. Barl. J. 317. Dalt. J. c. 28.
 (g) 2 Hale, 100. Burn, J. (g) 2 Hale, 115.

proceeding requires the utmost promptitude, because officers are punishable if they neglect to observe it; and because he who without cause set it on foot, is punishable by fine and imprisonment, for the disturbance he has occasioned (*a*). And thus it is, that arrest upon hue and cry, differs from arrest upon mere suspicion; in the latter case, it is necessary to aver in justifying that a crime was committed, and that fact may be put in issue; whereas, in the latter case, no such allegation is necessary, nor is it ever stated in pleading (*b*). In short, this proceeding arms all persons with the same authority as a warrant gives to the party to whom it is directed; they are not answerable for the propriety of the cry itself, but only for the regularity of their own conduct when acting under it.

If, therefore, hue and cry be made against a suspected person, he may be arrested and taken to the common gaol, though he ultimately establish his innocence, and though in fact the crime is altogether fictitious (*c*). And so, where upon a description of the offender, whose name is unknown, the wrong person is apprehended by mistake, the party arresting is clearly justified (*d*). If [30] any of the pursuers be killed by the party flying, this will be murder; and if, on the other hand, the latter be killed, when he cannot otherwise be taken, the pursuers will be protected (*e*).

The pursuers under hue and cry, if the party suspected is actually in a house, have an unquestionable right to break open the outer door to secure him, on previous demand of admittance (*f*). They must, however, ascertain that fact, as if he be not found they will be trespassers (*g*). But they may search all suspected places which they can enter without forcing an outer door, whether they succeed or fail (*h*).

Although suspicious persons neither named, nor described, may

(*a*) 2 Hale, 102. 2 Inst. 173.
Hawk. b. 2. c. 12. Burn, J.
Hue and Cry.

(*b*) 2 Hale, 101.

(*c*) 2 Hale, 102. Burn, J.
Hue and Cry. Barl. J. 317.
Williams, J. Hue and Cry.

(*d*) 2 Hale, 103. Barl. J. 316.
Williams, J. Hue and Cry.
Burn, J. Hue and Cry.

(*e*) Jackson's case, cited 7 East
P. C. 292. 2 Hale, 100. Fost.
271, 2. Barl. J. 316.

(*f*) 2 Hale, 103. Burn, J.
Hue and Cry. Williams, J.
Hue and Cry, 3.

(*g*) Id. ibid. 3 B. & P. 223.
1 Marsh. 565.

(*h*) 2 Hale, 103. Barl. J. 316.

be taken, it will lie on the parties arresting to shew, that they had reasonable ground to suspect them, either from their being vagrants, not rendering a good account of themselves, or other similar circumstances, for otherwise this proceeding would be more dangerous than even general warrants (*a*). On any prosecution, however, the pursuers may, by statute, plead the general issue, and give the special matter in evidence (*b*).

It now only remains to observe, that if the felon be not secured, it is provided by a very ancient as well as by a modern statute, that an action may be supported against the hundred, at the suit of the party immediately injured, to recover the damages sustained by the robbery. And upon the construction of these acts, it has been holden, that the plaintiff is entitled to costs, as well as damages (*c*). These encouragements to the levying hue and cry, were found of great advantage in earlier times, when forcible robberies were common, and assumed a very formidable aspect, though now, from the increased excellence of the police, the practice is becoming obsolete.

[31]

Such are the modes by which arrests may be made without waiting for any legal authority, from a public magistrate, to sanction the proceedings. This summary course is necessary, when there is an imminent danger of an escape, or when, from other circumstances, the utmost promptitude is requisite. But we have seen that, whenever the case will admit, it is more prudent to obtain the authority of a magistrate, to give greater security to the parties by whom the arrest is to be effected (*d*). The mode, nature, and effect of this course of proceeding, now, therefore, demand our attention.

Arrests under warrant.

The party who knows or suspects that an indictable offence has been committed, usually goes before a justice of the peace, accompanied by any other witnesses whom he may be able to procure, and gives the magistrate his information and that of his companions, stating the grounds of suspicion on which his appli-

(*a*) 2 Hale, 104.

(*b*) 7 Jac. 1. c. 5. 13 Edw. 1. c. 3. 9 Geo. 1. c. 22. See the decisions and proceedings on this and other statutes, relating

to Hue and Cry, 2 Saund. Rep. 374. 380. Tidd, 122. 5th edit. Peake's Evidence.

(*c*) 1 T. R. 71.

(*d*) Ante, 15.

cation is grounded. They are sworn, if Christians, on the four Evangelists; if Jews, on the Old Testament, as follows: "You shall true answer make to such questions, as shall be demanded of you, So help you God." The magistrate then interrogates the accuser, and sometimes his witnesses, and takes down the substance of their replies in the following form, "The information of, &c. of, &c. who saith that, &c." stating the facts sworn to. This paper is then read to the parties, who have given evidence, and, if they adhere to the statement, they confirm it by their signature. Upon this, the justice usually issues his warrant or summons, according to the magnitude of the charge, or the apparent weight of the evidence by which it is supported.

[32]

Of the summons.

When the offence is between party and party, and not of an aggravated nature, and the supposed offender is not likely to abscond, a summons is recommended, as the preferable process to procure his attendance, and this seems necessary where there is no oath of the offence having been committed (*a*). But where there is an accusation on oath, of an offence of a higher nature, as treason or felony, it is proper to issue a warrant, in the first instance, if there appear any reasonable ground for the charge. But although there be a positive charge on oath, yet if the justice sees that no credit is to be given to it, he may decline issuing a warrant (*b*). For petty assaults, though justices are authorized to issue a warrant on complaint, on oath of the accuser, yet a summons is more advisable, as in many cases it is found that the accusation is frivolous, or without sufficient foundation (*c*). A summons should be signed by the magistrate who issues it (*d*), and may either be directed to the party himself, or to a constable requiring him to summon or give notice to the party, whose attendance is required. And it is usual in the summons, not only to fix a day, but a particular hour, for the appearance of the suspected individual; but the accused is bound to wait until the magistrate can attend to the complaint. In general, a summons may be granted without the oath of the complaining party; but, in some cases, by particular enactment, an oath is absolutely

(*a*) 2 T. R. 225. Comb. 359.
Dick. J. Warrant, II. 2 Barn.
34. 77. 101.

(*b*) Dick. J. 458, 9. Hawk.
b. 2, c. 13. s. 13.

(*c*) Dick. J. 458, 9.

(*d*) 2 East, 367. See form,
post, last vol.

requisite. If the complaint is on oath, it should be so stated (*a*), and a copy of the summons should be served upon, or left at the residence of the accused (*b*); but, in a criminal prosecution against the wife, there is no occasion to summon the husband (*c*). [33]

When the offender is not likely to abscond before warrant can be obtained, it is in general better to apprehend him by a *warrant*, than for a private person or officer to arrest him of their own accord, because if the justice should grant his warrant erroneously, no action lies against the party obtaining it, unless he acted maliciously (*d*). And if a magistrate exceed his jurisdiction, the officer who executes a warrant is protected from liability, and the magistrate himself cannot be sued until after a month's notice of action, during which he may tender amends (*e*), and no action can be supported against the party procuring the warrant, though the arrest was without cause, unless it can be proved that the warrant was obtained maliciously (*f*). Having already considered for what offences, and against whom a warrant may be granted (*g*), we will now proceed to inquire on what evidence it may be issued; by whom; to whom directed; the form and requisites of the warrant, and the consequences of its illegality; the places where the warrant may be executed; how it may be backed, and how executed. Of the warrant.

With respect to the *evidence* on which a warrant may be granted. A secretary of state may commit without oath (*h*); but a magistrate ought, unless he commits upon view of the offence, to examine upon oath the party requiring a warrant, as well to ascertain that a felony or other crime has actually been committed, as also to prove the cause and probability of suspecting the party against whom the warrant is prayed (*i*). And it is the duty of the magistrate well to consider all the circumstances sworn On what evidence. [34]

(*a*) Burn, J. Summons and Warrant, I. Bac. Abr. Just. of Peace, c. 5. 2 Barnard. 34. 77. 101. Toone, 41. 246. 400. 449. 2 T. R. 225. Sed quære, for this is not necessary in case of a warrant.

(*b*) Id. ibid.

(*c*) Burr. 1681.

(*d*) 3 Esp. 166, 7. Smith v. Elsee, 1 Dowl. & Ry. 97. Ante, 19.

(*e*) 24 Geo. 2. c. 44.

(*f*) 1 T. R. 535. 3 Esp. R. 135. 1 Dowl. & Ry. 97.

(*g*) Ante, 12 to 16.

(*h*) 1 Stra. 3. Com. Dig. Imprisonment, H. 7. 11 St. Tr. 316. 2 Wils. 286, 7.

(*i*) 1 Hale, 582. 2 Hale, 110, 111. 4 Bla. Com. 290. Hawk. b. 2. c. 13. s. 18. 2 T. R. 225. Comb. 359, Dick. J. Warrant, I.

to, and not to grant any warrant groundlessly or maliciously, without such a probable cause as might induce a discreet and impartial man to suspect the party to be guilty (*a*). And, if a magistrate should grant his warrant, without an oath of circumstances affording a reasonable suspicion of the guilt, and the party prove to be innocent, the magistrate will be liable to an action of trespass, at the suit of the individual aggrieved (*b*). For the same reason he ought not to grant a warrant on a quaker's affirmation, which is inadmissible in criminal proceedings, to criminate or excuse another, though it may be read to exculpate himself (*c*). It is the duty also of the magistrate to take all charges, of whatsoever nature, kind, or complexion, they may be, in writing (*d*). But the affidavit, or oath, though in writing, need not be stamped, there being an express exception in the stamp act, as to affidavits made before any justice of the peace (*e*).

By whom.

[35]

We have, thirdly, to consider the persons in whom the power of issuing criminal process is invested. A warrant may be granted in extraordinary cases by the privy council or secretaries of state (*f*); by the speaker of the House of Commons (*g*), or Lords (*h*); by justices of gaol delivery (*i*) or oyer and terminer (*k*), justices at sessions (*l*), or by a judge of the Court of King's Bench (*m*); but warrants are most usually issued by a single justice of the peace (*n*). And this he may do in any cases where he has a jurisdiction over the offence, and in all treasons, felonies, and breaches of the peace or offences, for which the party is

(*a*) Hawk. b. 2. c. 13. s. 18.
Dick. J. 453, 9.

(*b*) 2 T. R. 225. 2 Wils. 158.
Hawk. b. 2. c. 13. s. 18. Comb.
359.

(*c*) 2 Burr. 1117. 2 Atk. 70.
1 Dowl. & Ry. 121. Peake. Ev.
143. Phil. Ev. 13.

(*d*) 1 Leach, 241. Burn, J.
Warrant, II.

(*e*) 55 Geo. 3. c. 56. Sched.
Affidavit. Toone, 6.

(*f*) Fortes. 140. 4 Bla. Com.
289, 90. 1 Lord Raym. 65.
11 Harg. St. Tr. 318, 19. 2 Wils.
151. 283, 4. 288. 290. Ante, 26.

(*g*) 14 East, 1. 163.

(*h*) 8 T. R. 314.

(*i*) 1 Leach, 116.

(*k*) 1 Hale, 579. 2 Hale, 106.

(*l*) 1 Hale, 579.

(*m*) 1 Hale, 578. 2 Hale, 5, 6.
2 Barnard. 28. 48 Geo. 3. c. 58.
s. 1. Toone, 392. A judge may,
under 48 Geo. 3. c. 58. on an
affidavit that a party has been
guilty of an offence, and is to
be prosecuted, issue his warrant
to apprehend him. Gorman's
case, for libel on the Duke of
York.

(*n*) 4 Bla. Com. 290. 1 Hale,
579.

punishable with corporal punishment within the places over which his jurisdiction extends (*a*); and though justices of the peace have no jurisdiction over treason, yet, in order to secure a supposed offender, a justice may issue a warrant and commit him for such offence (*b*). At common law, if A. committed a felony in the county of B., and then went into the county of C., upon information given to a justice of the peace for the county of C., he might issue his warrant to apprehend him, and take his examination and commit him to gaol in the county of C., from whence he might be removed by habeas corpus to the county of B. for his trial (*c*); and a justice may grant a warrant to apprehend a person, who, being within his jurisdiction (*d*), has committed an offence on the high seas in Ireland or a foreign country (*e*): and if a person be a justice of the peace in two adjacent counties, though by several commissions he may, whilst he lives in one county, send his warrant to apprehend in the other (*f*); and the 28 Geo. 3. c. 49. provides, that the justice acting for two or more adjoining counties, may act in all things in any or either of the said counties, but he must be personally resident in one of them. And the statute 26 Hen. 8. c. 6. s. 6 & 8. affords power to justices of the peace to issue warrants from an English county into Wales.

The power of backing warrants, which will hereafter be considered, greatly extends the common law jurisdiction of justices of the peace. Peculiar powers are also given to the justices of the seven police officers for Middlesex and Surrey, by the statute 32 Geo. 3. c. 53. No justice can supersede the warrant of another, without a formal and legal examination; but an arrest under a warrant may be avoided, in case of a breach of the peace, by entering into a recognizance before another magistrate (*g*), which will operate as a supersedeas, as well of another justice's as of a judge's warrant, and prevent the inconvenience of an arrest

[36]

(*a*) 1 Hale, 579. 2 Hale, 107.
12 Co. 131. Dick. Sess. 88.
Dalt. J. c. 70. and 170. Hawk.
b. 2. c. 13. s. 15 & 16. 4 Bla.
Com. 290.

(*b*) Barl. J. 188, 9.

(*c*) 1 Hale, 580.

(*d*) Ante, 14.

(*e*) Ante, 14. 2 Stra. 848.
4 Taunt. 34.

(*f*) 1 Hale, 581.

(*g*) 2 T. R. 195. Cro. C. C.
16. Toone, 247. Burn, J. Surety
for the Peace, V. Hawk. b. 1.
c. 60. s. 14.

and imprisonment (*a*); but, as we have already seen, where a magistrate is himself a material witness against the offender, it is more proper that he should go before another justice, and depose to the facts, and cause him to issue a warrant (*b*).

At common law the chief justice of the King's Bench, or any other *judge* of that court, may issue a warrant in his own name for the apprehending and bringing before him any person, touching whom oath is made, for a felony committed, or of suspicion of felony upon him, into any county of England and Wales; for he is entrusted with the conservation of the peace through all England; and is of higher authority than a justice of oyer and terminer. But to avoid the trouble of bringing up the parties, the judges of the King's Bench usually direct their warrants to apprehend them, and bring them before some justice of the peace near adjoining, either to be examined, or bound over to the sessions, and further to be proceeded against according to law (*c*).

[37] A warrant from the chief justice, or other justice of the court of King's Bench, extending all over the kingdom, is tested or dated England; not Oxfordshire, Berks, or any particular county (*d*). The 26 Geo. 3. c. 17. s. 18, enables any judge of the King's Bench, in certain cases of offences relating to the public revenue, to issue warrants for apprehending the offender; and the 48 G. 3. c. 58, reciting that the provisions of the last-mentioned act have been found beneficial, and that it is expedient to extend the same to other cases, enacts, that "whenever any person shall be charged with any offence for which he may be prosecuted by indictment or information in his Majesty's Court of King's Bench," (not being treason or felony), and the same shall be made appear to any judge of the same court by affidavit, or by certificate of an indictment, or information being filed against such person in the said court for such offence, it shall be lawful for such judge to issue his warrant under his hand and seal, and thereby to cause such person to be apprehended and brought before him, or some other judge of the same court, or before some one of his Majesty's justices of the peace, in order to his being bound to the King's Majesty with two sufficient sureties in

(*a*) Cro. C. C. 16.

(*b*) Ante, 25. 2 Wils. 158.

(*c*) 1 Hale, 577, 8. 2 Hale, 105.

(*d*) 4 Bla. Com. 291.

such sum, as in the said warrant shall be expressed, with condition to appear in the said court, at the time mentioned in such warrant, and to answer to all and singular indictments or informations, for any such offence; and in case any such person shall neglect or refuse to become bound, as aforesaid, it shall be lawful for such judge or justice respectively to commit such person to the common gaol of the county, city, or place where the offence shall have been committed, or where he shall have been apprehended, there to remain until he shall become bound as aforesaid, or shall be discharged by order of the said court in term time, or of one of the judges of the said court in vacation; and the recognizance to be thereupon taken shall be returned and filed in the said court, and shall continue in force until such person shall have been acquitted of such offence; or, in case of conviction, shall have received judgment for the same, unless sooner ordered by the said court to be discharged.

[38]

The warrant may be directed to the sheriff, bailiff, constable, or to any indifferent person by name who is no officer; for the justice may authorize any person whom he pleases to be his officer, but it is most advisable to direct it to the constable of the precinct wherein it is to be executed; because no other constable and *à fortiori* no private person is compellable to execute it; whereas the constable of the proper precinct may be indicted, if he do not obey the warrant (*b*). It has recently been decided, that warrants may be directed to officers, either by their particular names, or by the description of their office, and that in the first case, the officer may execute the warrant any where within the jurisdiction of the magistrate who issued it; in the latter case, not beyond the precincts of his office; and where a warrant of a magistrate was directed "to the constable of W. and to all other his majesty's officers," it was held, that the constables of W. (their names not being inserted in the warrant,) could not execute it out of the district (*b*); and Mr. Justice Bayley observed, "that it is of

To whom warrant directed.

(a) 1 Hale, 581. 2 Hale, 110, 111. Hawk. b. 2. c. 13. s. 27. 1 Salk. 347. 1 Ld. Raym. 66. 2 Ld. Raym. 119. Com. Dig. Imprisonment, H. 7. 4 Bl. Com. 29. Dick. J. Warrant, III. Arrest, II. (b) 1 B. & C. 288. 2 D. & R. 444. As to this point, see Gilbert v. Coyney, Exch. East. T. 1825;

great consequence that magistrates should be careful to direct their warrants in such a manner that the parties to be affected by them may know that the persons bearing the warrants are authorized to execute them. The importance of giving such information will be easily admitted, when it is remembered, that according to the extent of the officer's authority, his death may be murder, manslaughter, or perhaps justifiable homicide. A magistrate has power to direct his warrant to a particular person by name, and then the latter has an authority co-extensive with that of him who confers it. But a warrant may also be directed to a person, not by his name as an individual, but by the description of his official character; and such a direction may be limited to the officers of a single parish, or may extend to all the officers of a county. In the latter case it is clear, that the instrument must be construed *reddendo singula singulis*, and the authority delegated to such officer is limited to the district for which he is appointed." This distinction is, however, now rendered immaterial by the 5 Geo. 4. c. 18. s. 6. which, reciting the law as above, and that by the existence of it means were afforded to criminals and others of escaping from justice, enacts, "that it shall and may be lawful to and for each and every constable, and to and for each and every headborough, tithingman, borsholder, or other peace officer for every parish, township, hamlet, or place, to execute any warrant or warrants of any justice or justices of the peace, or of any magistrate or magistrates, within any parish, township, hamlet, or place, situate, lying, or being within that jurisdiction for which such justice or justices, magistrate or magistrates, shall have acted, when granting such warrant or warrants, or when backing or indorsing any such warrant or warrants; in such and the like manner as if such warrant or warrants had been addressed to such constable, headborough, tithingman, borsholder, or other peace-officer, specially, by his name or names, and notwithstanding the parish, township, hamlet, or place in which such warrant or warrants shall be executed, shall not be the parish, township, hamlet, or place, for which he shall be constable, headborough, tithingman, or borsholder, or other peace-officer, provided that the same be within the jurisdiction of the justice or justices, magistrate or magistrates, so granting such warrant or warrants, or within the jurisdiction of the justice or justices, magistrate or magistrates, by whom any such warrant or warrants shall be backed or

indorsed.” If an act of parliament direct that a justice shall grant a warrant, and do not state to whom it shall be directed, it must be directed to the constable, and not to the sheriff, unless such power be given by the act(*a*).

It is generally laid down, that the warrant ought to be under the hand and seal of the justice who makes it(*b*): but it seems sufficient if it be in writing, and signed by him, unless a seal is expressly required by particular act of parliament(*c*). And it is observable, that the 24 Geo. 2. c. 44. s. 6, protects constables acting in obedience to a warrant, under the *hand* or seal of a justice. It is said that the warrant ought to set forth the year and day wherein it is made(*d*), but that the place, though it must be alleged in pleading, need not be expressed in the warrant, but that it is necessary to state the county in the margin at least, if it be not set forth in the body(*e*). The warrant of a judge extends over all England, and is tested England; but that of a justice of the peace is tested of the particular county or precinct over which his jurisdiction extends(*f*). But the warrant of a justice need not be returnable at a time(*g*) or place certain(*h*), and as it is not returnable at a certain time, it continues in force until fully executed and obeyed, provided the magistrate be living(*i*). It may be made either in the name of the king(*k*), or of the justice himself(*l*); but the latter is most usual; though process after indictment, issued from sessions of the peace, is said always to be in the king’s name(*m*). The warrant may be

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WARRANT. *

[39]

(*a*) 2 Ld. Raym. 1192. 2 Salk. 381. Sed vide 1 Hen. Bla. 15, notis.

(*b*) 1 Hale, 577. 2 Hale, 111. Com. Dig. Imprisonment, H. 7. Hawk. b. 2. c. 13. s. 21. 4 Bla. Com. 290. 2 Saund. 305. n. 13.

(*c*) Willes Rep. 411. Bul. N. P. 83. Burn, J. Warrant, IV. Dick. J. Warrant, III. Toone, 450.

(*d*) Hawk. b. 2. c. 13. s. 22. 2 Hale, 111. Burn, J. Warrant, IV. Dalt. J. c. 174.

(*e*) Hawk. b. 2. c. 13. s. 22. 2 Hale, 111. Burn, J. Warrant, IV. sec form, post, last vol.

(*f*) 4 Bla. Com. 291. Fortes. 143.

(*g*) Peake’s Rep. 234. 4 Bla. Com. 291.

(*h*) 4 Bla. Com. 291.

(*i*) Peake’s Rep. 234.

(*k*) 2 Ld. Raym. 1195.

(*l*) See form, Dalt. J. c. 174, p. 458.

(*m*) Hawk. b. 2. c. 13. s. 24. 2 Hale, 113. Burn, J. Warrant, IV.

* See forms of Warrants, post, last volume:

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WARRANT.

[40]

either general, to bring the party before any justice of the peace in the county, or special, to bring him before the justice only who granted it (*a*). If the warrant direct the offender to be brought before any justice, the election of the magistrate before whom he shall be taken, lies in the officer, and not in the prisoner (*b*). The name of the party to be apprehended should be accurately stated, and must not be left in blanks to be filled up afterwards (*c*), though it may be inserted after the warrant is sealed by the magistrate, before he delivers it over to the officer (*d*); but, if the name of the party to be arrested be unknown, the warrant may be issued against him, by the best description the nature of the case will allow, as "the body of a man whose name is unknown, but whose person is well known, and who is employed as the driver of cattle, and wears a badge, No. 573." (*e*). It is not usual to state any addition of place or degree in a warrant before indictment, but, after indictment found, both are usually stated, as in the indictment (*f*). If there be a mistake in the name of the supposed offender, or if the name of the officer be inserted without authority, and after the issuing of the warrant, or if the officer exceed the limits of his authority, and be killed, this will amount to no more than manslaughter in the person whose liberty is thus invaded (*g*). But if the warrant be filled up by the magistrate before he issues it, though after he signed it, the proceeding is regular, and killing the officer endeavouring to arrest the party is murder (*h*). Where a married woman has committed an offence without her husband, the warrant should be only against her (*i*). The warrant need not state the time when the party is to be brought before the magistrate for examination; it was indeed observed by Parker, Ch. J. (*k*) that this is never done in any warrant what-

(*a*) Hawk. b. 2. c. 13. s. 26.
2 Hale, 112. 1 Hale, 532. 4
Bla. Com. 291.

(*b*) 1 Hale, 582. 5 Co. 59, b.
Dick. J. Warrant, III. Fortes.
143, where it is said that the
officer has always a right to take
the party before any justice.

(*c*) 2 Hale, 114. Foster, 312.

(*d*) 2 Leach, 929. 8 T. R.
455. 1 East, P. C. 324, n.

(*e*) 1 Hale, 577. Burn, J.

Commitment, III. see form,
post, last vol.

(*f*) See form, post, last vol.

(*g*) Foster, 312. 6 T. R. 236.
2 Lord Raym. 1302. 1 East,
P. C. 310, 11. 1 Leach, 245.
5 East, 303.

(*h*) 3 T. R. 455. 2 Leach,
929. 1 East, P. C. 324, n.

(*i*) 3 Burr. 1681.

(*k*) Fortescue, 143. 8 T. R.
110.

ever, nor is it possible to do it without a manifest injury to the party; for suppose, for the purpose, a fortnight should be limited, the party then must be in custody all that time, and perhaps he might be discharged the very first day, and certainly would, if he did appear and was found innocent. The law has already fixed a time; for by law the officer is bound to carry him immediately before the magistrate. If he delay any time, it is contrary to the duty of his office.

FORM AND
REQUISITES OF
WARRANT.

It does not seem to be absolutely necessary to set out the charge or offence or evidence, in a warrant to apprehend, though it is necessary in the commitment; and it has been observed, that cases may occur in which it would be imprudent to let even the peace-officer know the crime of which the party to be arrested is accused (*a*). It is laid down, however, to be advisable, especially if the warrant be for the peace or good behaviour, to set forth the special cause upon which it is granted, in order that the party may be provided at once before the justice with sufficient sureties; but that if it be for treason or felony, or other offence of an enormous nature, it is not necessary to state it, and that it seems to be rather discretionary than necessary to set it forth in any case (*b*). It is, however, laid down by Lord Hale (*c*), that regularly a warrant ought to contain the cause specially, and should not be generally, to answer such matters as shall be objected against him, because it cannot appear whether it be within the jurisdiction of the justice, neither can it appear whether the party be bailable or otherwise. It is observed, however, that such a warrant, omitting the cause, is valid (*d*), and that a justice of the peace may make his warrant to apprehend a person suspected, by name, upon a complaint made to him, but that at common law a warrant cannot be issued to apprehend *all* persons suspected, not

Stating charge or
offence in war-
rant.

[41]

(*a*) 2 Wils. 158. 11 Harg. St. Trials, 304. Cro. Jac. 81. Lambert, 87. Com. Dig. Imprisonment, H. 7. Bac Ab. Trespass, D. 3. Hawk. b. 2. c. 13. s. 11. Dick. J. Warrant, III. Toone, 449. *Qu. Resolution*. 11 Harg. St. Tr. 323.
(*b*) Hawk. b. 2. c. 13. s. 25.

Bac. Ab. Trespass, D. 3. Dick. J. Warrant, III. Toone, 449. 11 Harg. St. Tr. 323.

(*c*) 2 Hale, 111. 1 Hale, 580. Fortes. 143. Dick. Just. Warrant, I.

(*d*) 2 Hale, 111. 1 Hale, 580. Dick. Just. Warrant, I.

FORM AND
REQUISITES OF
WARRANT.

[42]

naming them (*a*). And a general warrant to seize and apprehend all persons suspected, without naming or describing any person in particular, is illegal and void for its uncertainty; for it is the duty of the magistrate, and not to be left to the officer, to judge of the ground of suspicion (*b*). And for the same reason a warrant to apprehend all persons guilty of a crime therein specified, is not a legal warrant; for the point upon which its authority rests, is a fact to be decided on a subsequent trial, viz. whether the person apprehended be really guilty or not; it is, therefore, in fact, no warrant at all, and it will not justify the officer who acts under it (*c*). Upon the whole, therefore, it seems advisable in general concisely to describe the supposed offence. General warrants to take up loose, idle, and disorderly people (*d*), and search warrants (*e*), which will be hereafter considered, are the only exceptions to this rule. It seems, however, to suffice, to state the particular species of crime, without showing the particular facts of that crime, as in a warrant for felony, it is not necessary to set out in the warrant the particular goods stolen (*f*).

Indorsement of
bail.

[43]

The statute 45 Geo. 3. c. 92. s. 2, reciting that it may happen, by reason of a difference in the law of bailing in the different parts of the United Kingdom, that the judge or justice before whom any offender shall be brought, indorsed as therein mentioned, may not know whether the offence mentioned in such warrant be or be not bailable, enacts, that in case any person suing out such warrant, shall, by affidavit or otherwise, show to the satisfaction of the judge or justice granting such warrant, that it may be necessary to execute the same in a part of the United Kingdom, different to that in which it was issued, and it shall appear to the judge or justice granting such warrant, that the offence is not bailable, then he shall, upon the face of the warrant, write the words "not bailable," or the judge or justice before whom the party arrested is brought, may admit him to bail; but

(*a*) 2 Hale, 111.

(*b*) 1 Hale, 580. Hawk. b. 2. c. 13. s. 10 & 17. 4 Bla. Com. 291. 1 Bla. Rep. 555. 2 Wils. 151. 3 Burr. 1767. Burn, Just. Warrant, IV. Dick. Just. Warrant, I.

(*c*) Id. *ibid*.

(*d*) 3 Burr. 1766. Dick. Just. Warrant, I.

(*e*) Hawk. b. 2. c. 13. s. 17. n. 6. Dick. J. Warrant, 1051.

(*f*) Fortes. 143. 2 Wils. 158.

this regulation only extends to warrants upon indictment found, or information filed (*a*).

FORM AND
REQUISITES OF
WARRANT.

In practice, the warrants issued at the principal *police offices* in and near the metropolis (*b*), are addressed to all constables and other peace officers of the county or district, and after stating the county or city, and liberty of Westminster, in the margin, command the officers, in the king's name, upon sight of the warrant, to take and bring before the magistrate issuing the warrant, or some other justice of the county, &c. the body of the supposed offender, to answer all such matters and things, as, on his majesty's behalf, shall on oath be objected against him by A. B. "for having feloniously, &c." or "for assaulting, &c." or "on violent suspicion of feloniously, &c." and then stating very concisely, and nearly in the same form as in the subsequent commitment, the nature of the offence, and if it be founded on a statute, concluding "against the form of the statute in such case made and provided;" and then containing a formal injunction, "hereof fail not at your peril. Given under my hand and seal, this — day of —, A. D. 1825."

The forms of warrants used in *other counties* and places, and printed in the different treatises of the office of justices of the peace, differ, though not in any material circumstances, from those just mentioned. They are usually directed to the constable or constables of a particular parish or district, and state the county in the margin, and proceed by way of recital, "Forasmuch as," or "Whereas A. B. (naming the accuser, with his residence and degree) hath this day made information and complaint upon oath before me, E. F. esq. one of his majesty's justices of the peace, in and for the said county, that C. D. (naming the offender, and his addition and degree) did, &c." (then concisely stating the offence) "These are therefore, &c." commanding the officer to take the supposed offender, and bring him before the justice to answer the premises, &c. to be further dealt with according to law; and concluding the same as the other warrant.

[44]

(*a*) 45 Geo. 3. c. 92. s. 5.

(*b*) See forms, post, last vol.

FORM AND
REQUISITES OF
WARRANT.

There appears to be no substantial difference between these two forms of warrants; and either might be adopted. In the last volume, the usual forms are given, and the offence may be described as in the forms of commitments there inserted, or as in the volume of indictments.

To whom delivered,
and costs of
executing, &c.

The warrant being thus framed, is delivered to the constable, who, by custom, receives 4*d.* with it as a recompence for his trouble in carrying it into effect (*a*). In case of felony, tumult, and riot, high and special constables may, by the order of two justices, be allowed, out of the county rate, a larger sum as a compensation for their loss of time and expences (*b*). The 18 Geo. 3. c. 19. provides for the indemnification of constables out of the rates of the parish. As, however, this is left to the discretion of the vestry, where vexatious objections to accounts are not unusual, it were to be wished that some more efficacious and certain mode of remuneration were adopted (*c*).

Expences of a constable in proceeding on assault committed on him in the execution of his duty, cannot be paid by the overseer out of the poor-rate, and are not within this act (*d*); nor can expences of a constable in prosecuting for an offence committed in a place of religious worship, be charged on a township, the authority of such township to prosecute, not having been obtained (*e*).

Consequences of
defect, or of
being executed
by improper
officer.

We have seen that if the warrant be materially defective, or the officer exceed his authority in executing it, and if he be killed in the attempt, this is only manslaughter in the party whom he endeavoured to arrest (*f*); and any third person may lawfully interfere to prevent an arrest under it, doing no more than is necessary for that purpose (*g*).

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| (<i>a</i>) Dick. J. Arrest, III. | (<i>f</i>) Ante, 38. 40. 1 East, |
| (<i>b</i>) 41 Geo. 3. c. 78. s. 1 & 2. | P. C. 310. 1 Leach, 206. 6 T. R. |
| Dick. J. Constable, VI. | 122. 5 East, 308. 1 Barn. & |
| (<i>c</i>) Dick. J. Constable, VI. | Cres. 291. |
| n. (<i>a</i>). | (<i>g</i>) 5 East, 304. 308. 1 Leach, |
| (<i>d</i>) 2 Barn. & Ald. 522. | 206. 1 East, P. C. 310. 325. |
| (<i>e</i>) 5 Barn. & Ald. 182. | 295. Fost. 312. 1 Barn. & Cres. |
| | 291. |

We have already seen, that the warrant of a judge of the Court of King's Bench extends over the whole realm (*a*), but that of a justice of the peace cannot be executed out of his county, unless it be *backed*, that is, indorsed by a justice of the county, in which it is to be carried into execution (*b*). It is said, that formerly there ought in strictness to have been a fresh warrant in every fresh county, but the practice of backing warrants has long been observed, and was at last sanctioned by the statute 23 Geo. 2. c. 26. s. 2, and 24 Geo. 2. c. 55 (*c*). The last of these acts, repealing the former, provides that a justice of the peace of the county or place where the person may be, shall, upon proof being made upon oath, of the hand-writing of the justice granting the warrant, indorse his name (*d*); upon which the offender may be apprehended and taken before the justice so indorsing the warrant, *and* (*e*), if the offence be bailable, he is to bail the party, and deliver the recognizance, examination, or confession, and all proceedings to the constable, who is to deliver them to the clerk of assize, or clerk of the peace of the county in which the offence was committed. And if the offence be not bailable, or bail be not found, then the constable is to carry the offender before some justice of the county, in which the offence was committed. And the act provides, that the justice indorsing the warrant shall not be liable to any proceeding, but only the justice by whom it was originally granted. Subsequent acts have introduced regulations of a similar nature, to provide for the apprehension and trial of persons who have escaped from one part of the United Kingdom to the other. Thus it is provided by 13 Geo. 3. c. 31, and 45 Geo. 3. c. 92, relative to *Scotland*, that the sheriff or steward, deputy or substitute, or any justice, may indorse the warrant, and the party is to be bailed or removed into the proper place for trial, as in the case of an escape from one county into another. And the 44 Geo. 3. c. 92, contains similar regulations as to *Ireland*. The 45 Geo. 3. c. 92. s. 5, relating to England, Scotland, and Ireland respectively, prohibits

[46]

(*a*) Ante, 39.

(*b*) 2 Hale, 115. This seems still to be law, 5 Geo. 4. c. 18. s. 6.

(*c*) 4 Bla. Com. 291.

(*d*) See form, post, last vol. Burn, J. Warrant, V.

(*e*) The word *and* seems to be omitted by mistake in this act, as may be collected from the 44 Geo. 3. c. 92. s. 1.

OF BACKING
THE WARRANT.

any judge or justice from indorsing a warrant, unless the same shall appear to have been issued, if in England or Ireland, upon some indictment found, or information filed, or, if in Scotland, upon some libel or criminal letters raised and passed under the signet of the Court of Justiciary, against the party accused; or unless the warrant shall have issued in respect of some capital crime or felony set forth in the process. And the 6th section provides, that before warrants are acted upon, proof shall be given of the sealing and other formalities; but this last regulation is repealed by 54 Geo. 3. c. 186, and which enacts, "that all warrants issued in England, Scotland, or Ireland respectively, may and shall be indorsed and executed, and enforced and acted upon, in any part of the United Kingdom, in such and the like manner as is directed by the act of the 13 Geo. 3. in relation to warrants issued or granted in England and Scotland respectively, as fully and effectually, to all intents and purposes, as if all the provisions of the said act were in this act severally and separately repeated and re-enacted, and made part of this act, as to every part of the United Kingdom, and as to all justices of the peace, sheriff's officers, constables, or other officer or officers of the peace in Ireland, as well as in England and Scotland respectively."

Independently of these statutes, the secretary of state for Ireland may, by his warrant, remove a prisoner there, to be tried in England, for an offence committed in the latter (*a*). And as we have already seen, an English justice may commit a person here, who has committed an offence in Ireland, preparatory to sending him thither for trial (*b*).

Of a superse-
deas.

An apprehension under a warrant may, in many cases, be prevented by a party's going before a justice of the peace, and finding sufficient sureties for his appearance to answer any indictment, and obtaining the supersedeas of the magistrate. Thus it is said (*c*),

(*a*) 3 Esp. Rep. 178.
(*b*) Ante, 35. 2 Str. 848.
4 Taunt. 34.
(*c*) Cro. C. C. 16. Dalt. Just.
ch. 175 and 193, pages 475. 531.
Burn's Just. Surety for the

Peace, V. Hawk. b. 1. c. 60,
s. 14. See old forms of super-
seas, Dalt. Just. ch. 175, page
475, &c. and ch. 193, page 531,
and post, last volume.

OF A
SUPERSEDEAS.

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that where an assault has been committed, and the offender has not entered into a recognizance before a justice to answer the complaint, but has reason to believe that a bill of indictment will be preferred against him at the next sessions, he may search the office of the clerk of the peace, to see whether any indictment has been found, and if he should find that to be the case, may plead not guilty, and enter into a recognizance with sufficient sureties to appear and try at the ensuing sessions. Or he may apply to the clerk of the peace immediately after the termination of the sessions for a certificate of the finding of the bill; and, after obtaining it, may procure a *supersedeas* by producing the certificate before a judge or justice, finding sufficient sureties, and entering into proper recognizances to appear at the succeeding sessions. By this means he may avoid an arrest; for a judge's warrant cannot operate after the granting of a *supersedeas* by a justice of the peace, nor can a justice's warrant be executed after the *supersedeas* of a judge. This protection the defendant should keep in his possession, to produce it to any officer who may attempt to apprehend him. The *supersedeas* recites that the party has found sufficient sureties to answer the indictment, and commands all officers to forbear from arresting him (a). It is sufficient though it does not state names of sureties, or sum acknowledged, but the introduction of those particulars is recommended (b). The legality of this practice of granting a *supersedeas* has been questioned, and, at all events, it is confined to cases where the offence is clearly bailable (c).

The officer to whom the warrant is directed, should, as soon as he conveniently can, though he may do so at any time afterwards until the object of the warrant has been satisfied (d), proceed with secrecy to find out and actually *arrest* the party (e), not only in order to secure him, but also to subject him and all other persons to the consequences of escape or rescue, and, if he refuse or neglect to execute the warrant, he will be punishable for his

How warrant
executed.

(a) See form, Cro. C. C. 17. p. 531. Hawk. b. 1. c. 60. s. 14.
post, last volume. Burn's Just. Surety for the

(b) Dalt. Just. ch. 175, page 475. Peace, V.

(d) Peake's Rep. 234.

(e) 2 T. R. 195; but see Dalt. Just. ch. 175, page 475. ch. 193, Just. Arrest, III.

HOW WARRANT
EXECUTED.

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disobedience or neglect (*a*); but at some of the police offices, it is the practice to deliver the warrants for common assaults to one of the constables, who goes round to the parties accused, and states the time when they must go before a magistrate, in order that they may be provided with sureties. To constitute an arrest, the party against whom the process is awarded must either be actually touched by the officer, or confined in a room, or must submit himself either by words or actions to be in custody; and the merely giving charge or causing him voluntarily to appear before a magistrate, without the person's being taken in actual custody, will not amount to an arrest; for bare words will not in this respect be of any avail (*b*).

With respect to the *person* who may execute the warrant, it seems, that if it be directed to the *sheriff*, he may authorize others to execute it, but that if it be given to an inferior officer, he must personally put it in force, though any one may lawfully assist him (*c*). And if a warrant were generally directed to all constables, no one could act under it, out of his own precinct, and if he did, he would have been a trespasser (*d*), but if it were directed to a particular constable by name, he might execute it any where within the jurisdiction of the justice, by whom it was granted (*e*), because, as we have seen, a justice may direct his warrant to any person he may think fit, in which case, by the express nomination of the party, his authority becomes co-extensive with that of the magistrate (*f*). This distinction, however, has, as we have just seen, been rendered immaterial, and in either case the officer, or named person, may execute the process any where within the jurisdiction of the magistrate (*g*).

(*a*) Ante, 38. Cro. Eliz. 654. Hale, 581.

(*b*) 1 Salk. 79. Bul. N.P. 62. 1 Esp. Rep. 431. 3 Bla. Com. 283. 2 New Rep. 211. 1 East, P. C. 330. Rep. temp. Hardw. 301. Dalt. J. ch. 170. Dick. J. Arrest, III.

(*c*) Hawk. b. 2. c. 13. s. 29. 2 Hale, 115. Lamb. 39, but see Dick. J. Arrest, II. Bac. Abr. Constable, D.

(*d*) 1 Hen. Bla. 15, note a. Dick. J. Constable. 1 Bar. & Cres. 291. 2 Dowl. & Ry. 444.

(*e*) 2 Hale, 115. 1 East P. C. 314. 1 Hen. Bla. 15, in notes. Hawk. b. 2. c. 13. s. 30. 1 Bar. & Cres. 291. 2 Dowl. & Ry. 444.

(*f*) Ante, 38.

(*g*) Ante, 38. 5 Geo. 4. c. 16. s. 6.

The Westminster constables are appointed out of the different parishes, for the whole city and liberty (a). In London, by ancient custom, the constables, though appointed in particular wards, of which there are twenty-six, have power to serve warrants and execute their office throughout the city (b).

HOW WARRANT
EXECUTED.

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A warrant directed to several, may be executed by one (c), but it is said, that if it direct four *jointly, and not severally*, to arrest, then they must all be present (d). When the officer employs others to assist him, he must be so near as to be acting in the arrest, in order to render it legal (e). And he may not only demand the assistance of subjects in general, but may, if the warrant cannot otherwise be executed, engage the assistance of the military (f).

We have already seen that the warrant must be executed *within the jurisdiction* of the justice, who issued or backed it (g); and if the process be executed out of the jurisdiction of the court from whence it issues, the killing the officer attempting to enforce its execution, will be only manslaughter in the party resisting (h). But a warrant of a justice, to arrest for *felony*, may be executed in any franchise within the county, for it is the king's suit in which a *non omittas* is virtually included (i).

The arrest may be made in the *night* (k). And though by statute 29 Car. 2. c. 7, arrests in general are prohibited on a Sunday, cases of treason, felony, and breach of the peace are excepted (l). And in construction of this statute, it has been decided that a person may be apprehended on a Sunday, on an attachment for a rescue (m); and as no time is usually prescribed in the warrant, it continues in force until fully executed, though it were even seven years after its date, during the life-time of the

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| (a) 29 Geo. 2. c. 25. | (g) Ante, 34. 5. 45. 5 East, 233, and see 5 Geo. 4. c. 18. s. 6. |
| (b) Bac. Ab. Constable, D. | (h) 1 East P. C. 314. |
| (c) 1 East P. C. 320. Hut. 127. Yelv. 25. Palm. 52. Dalt. Just. ch. 169. Dick. Just. Arrest, II. | (i) 1 Hale, 116. |
| (d) 2 Taunt. 161. | (k) 9 Co. 65 b. 1 East P. C. 324. 3 Taunt. 14. |
| (e) Cowp. 66. Dick. Just. Arrest, II. | (l) 29 Car. 2. c. 7. s. 6. 1 East P. C. 324. |
| (f) 14 East, 190. | (m) Willes, 459. 1 T. R. 265. |

How WARRANT EXECUTED. magistrate, by whom it was originally granted; and a person may be twice apprehended under it, if the purposes of justice have not been effected (*a*).

The officer must carefully observe the directions of the warrant, or he will be liable to an action, and not entitled to any protection under the provisions of the statute 24 Geo. 2. c. 44. If, therefore, he take the wrong person he will be a trespasser (*b*). And where a warrant was directed to the officer "to take up a disorderly woman," and he took up a woman who did not answer to the description, the arrest was held to be illegal, and the constable liable to an arrest for the injury (*c*). So where a warrant was directed by a secretary of state to the king's messenger, to arrest the "author, printer, or publisher," of a libel, and he took a person who was neither author, printer, nor publisher, it was determined to be unjustifiable, because in neither case did the officers act in obedience to the warrants (*d*). And where the warrant directed the officer to seize certain *sugars* supposed to be stolen, and he seized *teas*, he was not protected by the warrant (*e*). And where the officers improperly broke open doors, which they were not authorized by the warrant to do, they were held liable to be sued in trespass without a previous demand and refusal of the copy of the warrant (*f*). And the general rule to be collected from all these cases, is, that where the justice cannot be liable, the officer is not within the protection of the statute (*g*).

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It is laid down that bailiffs, or constables if they be sworn, and commonly known to be officers, and act within their own precincts, need not show their warrant to the parties whom they come to apprehend, notwithstanding they demand the sight of it; but that these, and all other persons making an arrest ought to acquaint the party whom they are to apprehend with the substance of their warrants. It is also enjoined on all private persons to whom

(*a*) Peake's Rep. 234.

(*e*) 2 B. & P. 162. 2 M. & S.

(*b*) Com. Dig. Imprisonment, 261.

H. 7.

(*f*) 2 M. & S. 261.

(*c*) Hawk. b. 2. c. 13. s. 31.

(*g*) 3 Burr. 1742. 14 East,

(*d*) 3 Burr. 1742. Hawk. b. 2. 261.

c. 13. s. 31.

a warrant may be directed, and even officers if they be not sworn and commonly known, or if they act out of their own precinct, to shew their warrants if demanded (*a*). And in a late case (*b*), the doctrine, that even a known officer is not obliged to show his authority when demanded, was considered as dangerous, because it may affect the party criminally in case of resistance; and if homicide ensue, the legality of the warrant enters materially into the merits of the question. And Lord Kenyon observed, that he did not think a person is bound to take it for granted, that another who says he has a warrant against him, without producing it, speaks truth. It is, therefore, very important that in all cases where an arrest is made by virtue of a warrant, that the warrant should at least, if demanded, be produced, to leave a delinquent no excuse for resistance.

HOW WARRANT
EXECUTED.

We have now to inquire in what cases doors may be broken, in furtherance of the purposes of justice, a subject of equal delicacy and importance, as it often becomes material in cases of homicide; and as it affects the security and peace of domestic habitations. As there is a considerable degree of intricacy and confusion in the authorities which relate to this subject, we will investigate the law in the following order; 1stly, in what cases the house of the suspected party may be broken open; and 2dly, when that of a third person may be forced in order to advance the execution of justice. And in pursuing the first of these inquiries, we will consider when the house of the party suspected may be thus entered—1st, without warrant—2dly, under a warrant to apprehend—and 3dly, under a warrant to search for goods suspected to have been stolen.

Of breaking open
doors.

[52]

But first it may be proper to observe that, in general, a man's own house is regarded as his castle, which is only to be violated when absolute necessity compels the disregard of smaller rights, in order to secure public benefit; and, therefore, in all cases where the law is silent, and express principles do not apply, this extreme violence is illegal (*c*). There seems some doubt as to the dis-

(*a*) Hawk. b. 2. c. 13. s. 28.
2 Hale, 116. 1 Hale, 583.
1 East, P. C. 312, 314, 319.
Dick. J. Arrest, III.

(*b*) 8 T. R. 188.

(*c*) 3 Bla. Com. 288. 14 East,
79, 116, 17, 18. 154, 5. 5 Co.
91. Cowp. 1.

HOW WARRANT
EXECUTED.

inction which may exist between the power of constables and private individuals in this respect; for it is said, that the former being enjoined by law, on a reasonable charge, to apprehend the party suspected, may be justified in breaking open doors to apprehend him on mere suspicion of felony, and will be excused, though it appear that the suspicion was groundless; but a private individual acts at his own peril, and would, if the party were innocent, be liable to an action of trespass for breaking open doors without a warrant (*a*). But when *it is certain* that a treason or felony has been committed, or a dangerous wound given, and the offender being pursued, takes refuge in his own house, either a constable, or private individual, without distinction, may without any warrant break open his doors after proper demand of admittance (*b*). And when an affray is made in a house, in the view or hearing of a constable, he may break open the outer door in order to suppress it (*c*). So, in some extreme cases, it has been holden lawful even for a private individual to break and enter the house of another in order to prevent him from murdering another who cries out for assistance (*d*). Authors, however, differ on the point whether the same power be invested in the officer or private person when felony is only *suspected*, and has not been committed *within the view* of the party arresting. It is, indeed, certain that a constable may break open doors, upon the positive information of another who was actually a witness to the felony (*e*), and one material distinction between the power of officers and private individuals, is, that the latter can act only on their own knowledge, while the former may proceed on the information of others (*f*). We may, therefore, take it as settled, that a private person may break doors after a proper demand and notice, where he is certain a felony has been committed, and that a constable may do the same upon the information of the party in whom the knowledge or reasonable suspicion exists.

(*a*) 2 Hale, 82, 92. 2 B. & P. 260. Dick. J. Arrest, III.

(*b*) 1 Hale, 588, 589. Hawk. b. 2. c. 14. s. 7. 4 Bla. C. 292. 2 Hale, 82, 3, 88, 96. 14 East, 157, 8. Barl. J. Arrests.

(*c*) 2 Hale, 95. Hawk. b. i.

c. 63. Hawk. b. 2. c. 14. Dick. J. Arrest, III.

(*d*) 2 B. & P. 260.

(*e*) 1 Hale, 589. 2 Hale, 92. Dick. J. Arrest, III.

(*f*) Cald. 291. Dougl. 359.

But it is clear, that, in the case of criminal process for a *mis-demeanor*, it is necessary to demand admittance before the breaking open an outer door, even if it be not necessary in case of felony (*a*).

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As to how far doors may be broken open, upon *suspicion of felony*, Lord Coke (*b*) seems to imply that this may be done by the party originally suspecting, but by no other unless by the constable in his presence. And therefore he contends that no justice can issue a warrant before indictment, unless the suspicion arise from himself, an idea which constant usage has refuted. And Lord Hale positively lays it down, that doors may be broken open, without warrant, on *suspicion of felony* (*c*). This doctrine is as positively denied by Foster, though his general leaning is against the protection of offenders by the sanctity of private dwellings. According to him a bare suspicion will never authorize an arrest, even though a felony has actually been committed (*d*). And this opinion is the stronger as it proceeds from one who just before had declared, that "no regard ought to be paid to the "houses of malefactors, which were the dens of thieves and "murderers." This opinion is followed by Hawkins, and adopted by Mr. East: the latter author, however, qualifies it by observing that *at least* the party arresting must prove not only that his suspicion was reasonable, but that the person arrested was actually guilty (*e*).

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Upon the whole, therefore, it seems to be the better opinion that a private individual, in order to justify breaking open doors without warrant, must in general prove the actual guilt of the party arrested, and that it will not suffice to show that a felony has actually been committed by another person, or that reasonable ground of suspicion existed; but that an officer, acting *bonâ fide* on the positive charge of another, will be excused, and the party making the accusation will alone be liable (*f*). But the

(*a*) 2 Bar. & A. 592. 14 East, 163.

(*b*) 4 Inst. 117. 14 East, 155.

(*c*) 1 Hale, 583.

(*d*) Fost. 321.

(*e*) 1 East P. C. 322. Hawk. b. 2. c. 14. s. 7. Dalt. J. c. 78.

(*f*) Dougl. 358. Dick. Just. Arrest, III.

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breaking an outer door is, in general, so violent, obnoxious and dangerous a proceeding, that it should be adopted only in extreme cases, where an immediate arrest is requisite.

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We have now to inquire in what cases doors may be broken open, under the warrant of a justice of the peace. Lord Coke seems to have thought that no arrest could take place under a warrant *before indictment*, by any other than the accuser himself (*a*), but now it is clear that in all cases doors may be broken open, if the offender cannot otherwise be taken, under warrant, for treason, felony, suspicion of felony, or actual breach of the peace, or to search for stolen goods (*b*). In these cases too, a warrant is a complete justification to the person to whom it is directed, acting *bonâ fide* under it, even though the party accused should prove his innocence (*c*). And if in the attempt to execute a lawful warrant by breaking into the house of a felon, after previous demand of admittance, the officer be killed by the party attempting to resist, it will be murder in all concerned; and if, on the other hand, he unavoidably kill any of the parties opposing him, the homicide will be justifiable, because in furtherance of justice (*d*). And even where there is some error in the process which does not affect the justice of the case, the complexion of the offence of the party resisting will not be varied (*e*); though if it be altogether defective, as if there be a mistake in the name or addition of the party, or if the name of the officer be inserted without authority, after the issuing of the process, or it be executed without the jurisdiction, the crime will be reduced to manslaughter (*f*). It has been held, in several cases, that where the defect in the process is substantial, or the officer exceeds his authority, third persons may lawfully interfere, and if they kill the officers, it will amount only to manslaughter—because the view of an illegal arrest, is a sufficient provocation to the subjects of all England (*g*); but Mr. Justice Foster strongly

(*a*) 4 Inst. 177.

(*b*) Fost. 320. 1 Hale, 583.
Hawk. b. 2. c. 14. s. 7. 1 East
P. C. 322. 2 Hale, 117. Dalt.
Just. c. 169. 151. Dick. Just.
Arrest, III.

(*c*) 24 Geo. 2. c. 44. 4 Bla.
Com. 288. Hawk. b. 2. c. 13.
s. 11. Cro. Eliz. 130.

(*d*) 1 Hale, 494. Fost. 270.

(*e*) 1 East P. C. 310. Fost.
135.

(*f*) 1 Hale, 458. Cro. Car.
371. Fost. 312.

(*g*) Cro. Car. 371. 2 Lord
Raym. 1296. Kel. 5. 9. 5 East,
308.

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contests the principle thus laid down, in which he is followed by Mr. East, and they regard the earlier cases cited, as decided on their own peculiar circumstances (*a*). At all events, if the parties interfering, wantonly strike with destructive weapons, from which malice may be fairly presumed, it is murder (*b*).

We have thus seen, that on a warrant for treason, felony, or breach of the peace, the doors of the party accused may be broken open, if admittance cannot otherwise be obtained; but there seems no well-founded authority for extending this right to misdemeanors unaccompanied by violence.

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A contempt, however, of a court of justice, or of either House of Parliament, will authorize this proceeding under a warrant from the speaker (*c*). And it seems, that whenever the crime is of a public nature, this may be permitted (*d*), though it is clearly unjustifiable upon mere civil process (*e*). And if, in the attempt to execute civil process by such forcible entry, the officer, being a known bailiff, be killed, it will be manslaughter, and no more; manslaughter, because he was known to be an officer, and no more, because his attempt was illegal (*f*). And, if he be no officer, or out of his proper district, he may lawfully be killed to prevent his entry (*g*). It is however settled, that in case of an actual affray made in a house, within the view or hearing of a constable, or where those who have made an affray in his presence, fly to a house and are pursued by him, he may break open the doors to arrest the affrayers, or suppress the tumult (*h*). And it has been decided, that upon a violent cry of murder in a house, any person may break open the door to prevent the commission of a felony, and may restrain the party threatening, till he appear to have changed his purpose (*i*). And in all cases whatever, at least of misdemeanors, it is absolutely necessary that a demand of ad-

(*a*) Fost. 314, &c. 1 East P. C. 328.

(*b*) Fost. 135, and see Leach, 206. 1 East P. C. 329. S. C. 5 East, 308.

(*c*) 14 East, 157. 162.

(*d*) 14 East, 116.

(*e*) 5 Co. 91. Fost. 319.

(*f*) 1 Hale, 458. 1 East P. C. 321.

(*g*) 5 Co. 91. b.

(*h*) 2 Hale, 95. Hawk. b. 2. c. 14. s. 8.

(*i*) 2 Bos. & Pul. 260.

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mittance should be made, and be refused, before outer doors can be broken (*a*).

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Upon *search warrants* regularly granted, and specifically directed, it seems to be settled, that after the proper precautions, the house to be searched may be broken open, and whether the property is found there or not, the officer will be excused (*b*). A distinction seems to have been made, though never distinctly recognized, as far as respect *criminal* proceedings, that the officer would be justified, or not, according to the event of his search, but as all persons who act *bonâ fide* under a warrant, are now protected from any liabilities resulting from its having been improperly framed, this idea could not now be supported (*c*). It appears, however, that the party maliciously procuring a search-warrant is answerable to the person aggrieved in an action on the case (*d*). As warrants to search "all suspected places" are illegal (*e*), unless when they are issued under the provision of the particular statutes hereafter considered, it seems that a constable breaking open doors under the colour of their authority cannot be justified (*f*). The general doctrine, therefore, to be adduced from all the books relative to search-warrants, is, that if they are altogether illegal, the officer cannot be justified; but that if they are legal in form, though improperly granted, he may safely break open the doors to execute them, whether his search succeed, or the charge be malicious or mistaken.

The house of a third person, if the offender fly to it for refuge, is not privileged, but may be broken open after the usual demand; for it may even be so upon civil process (*g*). But then it is said, it is at the peril of the officer that the party, against whom he has obtained the warrant, be found there; for otherwise he will

(*a*) 2 Bar. & Ald. 592. 14 East, 163. Fost. 320. Hawk. b. 2. c. 14. s. 1. 3 Bos. & Pul. 229. Barl. Just. Arrests. Dick. Just. Arrest, III.

(*b*) 2 Hale, 151.

(*c*) *Quære*, see 3 Esp. Rep. 135. 1 T. R. 535. 3 B. & P. 223. 1 Marsh. Rep. 565.

(*d*) 2 Hale, 151. 1 T. R. 535.

3 Esp. Rep. 135. 3 B. & P. 225. 1 Dowl. & Ry. 97.

(*e*) 4 Bla. Com. 288. 10 St. Tr. 426. Hawk. b. 2. c. 135. s. 10.

(*f*) Hawk. b. 2. c. 13. s. 10. 3 Burr. 1767. Loft. 18. 11 St. Tr. 312.

(*g*) 5 Co. 91. 2 Hale, 117.

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be a trespasser (*a*). And this doctrine, as far as it respects civil process, has been recognized in modern decisions (*b*). It is necessary to observe, that all the privileges attendant on private dwellings, relate to arrests *before indictment*, and there is no question whatever that *after indictment found*, a criminal of any degree may be arrested in any place, and no house is a sanctuary to him (*c*). So also upon a *capias* from the King's Bench or Chancery, to compel a man to find sureties for his good behaviour, and even on a warrant of a justice for that purpose, doors may be forced, if necessary (*d*). So also upon a *capias utlagatum*, or *capias pro fine*, in any action whatever (*e*). So a constable, or other officer, having a warrant to levy the money adjudged by a justice to be levied, by virtue of an act of parliament, which authorizes him to convict in a penalty, to a part of which the king is entitled, may break open doors in order to effect his purpose, though he is compelled first to show his warrant if demanded (*f*). It is also to be observed, that after a party has been once actually arrested, and escapes from custody, any door may be broken open to retake him after proper demand of admittance (*g*). And when the officer, after obtaining admittance, is locked in, or otherwise prevented from retiring, he may lawfully break out by any means in his power, whether he be engaged in executing civil or criminal process; and the sheriff may break open the door of a house to rescue his bailiffs unlawfully detained within it (*h*). And when once the officer has entered the house, either upon civil or criminal process, he may, after ineffectually demanding entrance, break open any inner door that obstructs his progress, though the pro-

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(*a*) 2 Hale, 117. 5 Co. 63. a.

(*b*) 1 Marsh. Rep. 565. 3 B. & B. 223. Dick. J. Arrest, III.

(*c*) 12 Co. 131. 4 Inst. 131. Hawk. b. 2. c. 14. s. 3. Dick. Just. Arrest, III. Barl. Just. Arrests.

(*d*) Hawk. b. 2. c. 14. s. 3. Moor, 606, 668. Fost. 136. Dick. Just. Arrest, III. Barl. Just. Arrests.

(*e*) Hawk. b. 2. c. 14. s. 4. Yelv. 28. Barl. Just. Arrests, Dick. Just. Arrest, III.

(*f*) Sir T. Jones, 233, 234. Hawk. b. 2. c. 14. s. 5. Dick. Just. Arrest, III.

(*g*) Fost. 320. 6 Mod. 173, 4. Salk. 79. 1 Hale, 459. Hawk. b. 2. c. 14. s. 9. Barl. Just. Arrests. Dick. Just. Arrest, III.

(*h*) Cro. Jac. 555. Fortes. 319. 6 Mod. 173. Hawk. b. 2. c. 14. s. 11. 1 Hale, 459. Dick. Just. Arrest, III. Barl. Just. Arrests.

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cess be without a "non omittas" and if he be killed it will be murder (*a*). A hue and cry gives to all parties engaging in it the same protection as a warrant, and therefore any one may, upon this proceeding, break open a house, to which the felon has escaped, for all are then required to act as officers (*b*).

What may be
done after the
arrest.

When the officer has made his arrest, he is, as soon as possible, to bring the party to the gaol or to the justice, according to the import of the warrant; and if he be guilty of unnecessary delay, it is a breach of duty (*c*). But if the time be unseasonable, as in or near the night, whereby he cannot attend the justice, or if there be danger of a rescue, or the party be ill, and unable at present to be brought, he may, as the case shall require, secure him in the stocks, or in case the quality of the prisoner, or his indisposition so require, detain him in a house till the next day, or until it may be reasonable to bring him (*d*). It is said that where an arrest has been made without warrant, the constable may, in some cases, take the party's word for his appearance before a magistrate (*e*). And this is usually done where the charge is for an assault of a trifling nature, and the defendant is of good repute, and there is no probability of his absconding. But if a constable, having arrested a party under a warrant, suffer him to go at large, upon his promise to come again and find sureties, it has been doubted whether he can afterwards be arrested upon the same process, though it should seem, that as the public are interested in the offender's being brought to justice, there is no well-founded objection to such second arrest (*f*). And it is certain, that if the escape be made without the concurrence of the officer, the defendant may be retaken as often as he flies, upon fresh suit, although he were out of view, or had reached another county or district (*g*). It is also clear, that if, after a departure by the permission of the constable, the party return into his custody, he may lawfully detain him, in pursuance of his original

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(*a*) 1 Hale, 459. Fost. 319.
3 Bos. & Pul. 229.

(*b*) 2 Hale, 102. 5 Co. 92. b.

(*c*) Fortes. 143. 2 Hale, 119.

(*d*) 2 Hale, 119, 120, 95, 96.

(*e*) 1 Esp. Rep. 295. 2 New.
Rep. 211.

(*f*) Hawk. b. 2. c. 13. s. 9.
c. 19. s. 12. Bac. Ab. Con-
stable, D. Dick. J. Arrest, III.
and see Peake's Rep. 234.
Gow's Rep. C. P. 99.

(*g*) Dalt. J. c. 169. Dick. J.
Arrest, III.

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warrant (*a*). A gaoler will be protected in receiving a party into custody, although it appear that he was wrongfully taken under the warrant, because it is the duty of a gaoler to receive persons brought by a proper officer without inquiring into the legality of the arrest; and if the officer has taken the wrong party, he alone can be sued (*b*). If the warrant be to bring the party before the justice who issued it, then the officer is bound to bring him before the same justice, but if the warrant be to bring him before any justice, then the power of election is vested in the officer, and not in the prisoner, and the former may proceed to any magistrate who has jurisdiction within the county (*c*). And it is even said, that where a warrant directs a person to be brought before a particular magistrate, he may be taken before another, especially if nearer (*d*). When the prisoner is brought before the justice, he is still considered to be in the custody of the officer, until he has been either discharged, bailed, or committed to prison (*e*). The officer may keep his warrant for his own justification, and need only return to the justice what he has done in pursuance of its commands (*f*).

If the warrant be, in itself, defective (*g*), if it be not enforced by a proper officer (*h*), or, if it be executed out of the jurisdiction, without being backed by the proper magistrate (*i*), or the wrong person be taken under it (*k*), the party may legally resist the attempt to apprehend him, and even third persons may lawfully interfere to oppose it, doing no more than is necessary for that purpose (*l*). But if the process be legal and duly executed, resistance and interference are illegal, and subject the parties to an indictment or attachment (*m*). And if, when a man is

Of resistance of
process, escape,
rescue, and re-
taking.

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(*a*) Hawk. b. 2. c. 13. Dick. Just. Arrest, III.

(*b*) Sir T. Jones, 214. Cowp. 279. 1 T. R. 60. 62. 3 Campb. 420. Dougl. 359, 360. Accord. 3 Campb. 35, cont.

(*c*) 5 Co. 59. b. 1 Hale, 582. 2 Hale, 112. Ante, 39.

(*d*) Fortes. 143.

(*e*) 2 Hale, 120.

(*f*) 2 Ld. Raym. 1196. Dick. Just. Arrest, IV.

(*g*) Ante, 38. 40. 44.

(*h*) 1 East P. C. 312.

(*i*) 1 East P. C. 314. Ante, 45.

(*k*) Ibid. 313. 3 Campb. 35.

(*l*) 5 East, 304. 308. 1 Leach, 206. 1 East P. C. 310. 325. 295. Fost. 312.

(*m*) 4 Bla. Com. 129. Hawk, b. 2. c. 17, &c.

OF RESISTANCE
OF PROCESS,
ESCAPE,
RESCUE, AND
RETAKING.

apprehended and in the custody of officers of justice, a third person espouses his cause, and encourages the prisoner to resist, the officers may imprison the third person thus opposing the operation of justice (*a*). The recent act 1 & 2 Geo. 4. c. 88. subjects rescuers and aiders to transportation or imprisonment and hard labour, if the party rescued were guilty of felony; and persons obstructing or assaulting officers in the lawful apprehension of persons suspected of felony to imprisonment and hard labour for two years (*b*).

It is clearly agreed by all the books, that an officer making a fresh pursuit after a prisoner, who has been arrested, and has *escaped* through his negligence, may retake him at any time, whether he find him in the same, or a different county, without raising hue and cry, because, as the liberty obtained by the prisoner is wholly owing to his own wrong, there is no reason why he should be allowed to derive any advantage from it (*c*). But where the officer has voluntarily suffered a prisoner to escape, it is said by some, that he can no more justify the retaking him than if he had never had him in custody before, because, by his own consent, he has admitted that he has nothing more to do with him; it should seem, however, that the misconduct of the officer ought not to prevent a second arrest, in order that the offender may be brought to justice (*d*); and where a person has been convicted of a crime and committed in execution until he pay a fine, and is suffered by the officer to escape, the officer is bound to retake him (*e*). Where the party who has escaped takes shelter in a house, the officer, if denied entrance, may legally break open the outer door, in order to retake him (*f*). Where a felony has been committed, if the party suspected fly and endeavour to resist the attempt to apprehend, or escape after his capture, and he be killed in the resistance or pursuit, an absolute necessity, and that

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(*a*) Peake Rep. 89.

(*b*) See further, as to the statutes and law relating to rescue, post, vol. ii. 182, n. (*a*).

(*c*) 2 Hale, 115. Hawk. b. 2. c. 19. s. 12. e. 13. s. 9.

(*d*) Hawk. b. 2. c. 19. s. 12.

c. 13. s. 9. Peake Rep. 234. Gow's Rep. N. P. 99.

(*e*) Gow's C. N. P. 99.

(*f*) Hawk. b. 2. c. 14. s. 2. Fost. 321. 2 Hale, 117. Ante, 57.

alone, will justify the officer (*a*). But if the warrant be for a mere breach of the peace, the constable killing the party in the attempt to take him, will be guilty of felonious homicide (*b*). We have already, in considering the regulations as to backing the warrant, pointed out the course to be observed, where a party has escaped from one part of the United Kingdom to the other (*c*).

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A *rescue* signifies a forcible setting at liberty, against law, of a person duly arrested (*d*). It is necessary, that the rescuer should have knowledge that the person whom he sets at liberty has been apprehended for a criminal offence, if he be in the custody of a private person; but if he be under the care of an officer, then he is to take notice of it at his peril (*e*). The mere prevention of the arrest of a person who has committed a felony, is only a misdemeanor, but if a party be actually taken, and then rescued, then if the arrest were for felony, the rescuer is a felon, if for treason, a traitor, and if for a trespass, he is liable to a fine, as if he had committed the original offence (*f*). And if the principal be found not guilty, or guilty, of a crime not capital, the rescuer, though discharged of the felony, may be fined for the misdemeanor, in the obstruction and contempt of public justice (*g*). If the rescuer be convicted of felony, then the court may, at its discretion, sentence him to be transported for seven years, or to be imprisoned, or imprisoned and kept to hard labour for not less than one, and not exceeding three years (*h*). Assaulting or beating a constable, in order to obstruct, resist, or prevent the apprehension of a person for felony, is, besides punishable with fine and imprisonment, punishable with imprisonment and hard labour, for a time not less than six months, and not exceeding two years (*i*). A party rescuing, or attempting to rescue, a murderer, whilst going to be executed, or rescuing out of prison a person committed or convicted for murder, is a felon, and will be punished with death (*k*).

(*a*) 2 Hale, 117, 18. Hawk.
b. 1. c. 28. Dick. Just. Arrest,
III.

(*b*) Id. *ibid*.

(*c*) Ante, 45.

(*d*) Co. Lit. 160. Hawk. b. 2.
c. 21; and see further as to
rescue, post, vol. ii.

(*e*) 1 Hale, 606.

(*f*) 1 Hawk. b. 2. c. 21. 1
Hale, 606.

(*g*) 1 Hale, 593, 9.

(*h*) 1 & 2 Geo. 4. c. 88. s. 1.

(*i*) 1 & 2 Geo. 4. c. 88. s. 2.

(*k*) 25 Geo. 2. c. 37. s. 9.

OF RESISTANCE
OF PROCESS,
ESCAPE,
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RETAKEING.

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Where the offender has escaped, or is rescued, the justice may grant a fresh warrant to all officers within his district, reciting the former proceeding, and the escape or rescue, and directing the apprehension of the offender (*a*), or the prosecutor may obtain an escape warrant from the *chief justice* (*b*).

Of detaining a
party already in
custody.

When the party accused is already in custody in the King's Bench, or other prison, in a civil action, he may be there charged criminally by merely leaving with the gaoler, the warrant of a justice of the peace or other magistrate, but such justice cannot take a prisoner out of the custody of the court, and send him to the county gaol (*c*); for the prisoner, in such case, can only be removed under the authority of an *habeas corpus*, issuing out of the court of King's Bench; and, in a late case, an *habeas corpus* was awarded to remove the body of the defendant out of the custody of the warden of the Fleet, to be examined in Somersetshire, upon a charge of forgery alleged to have been committed by him in that county, upon the production of a warrant, issued by the mayor of Bath, for his apprehension, and without any bill of indictment having been previously found against him (*d*); and in another case, the court of King's Bench granted an *habeas corpus* to the warden of the Fleet, to take the body of a debtor confined there before a magistrate, to be examined from time to time respecting a charge of felony or misdemeanor (*e*). A person having a day-rule from the King's Bench prison, may be taken on a warrant when out of actual custody of the marshal, and removed into his proper county, preparatory to his trial.

When the party in custody on a civil action, is thus to be proceeded against criminally, the practice is for the magistrate before whom the complaint is laid, to take the information of the accuser and witnesses, and to issue his warrant, which is lodged with the keeper of the place of confinement where the defendant is kept in prison. This officer, on the termination of the civil imprisonment, sends for a constable, who takes the party before a justice of the peace, by whom the accuser, witnesses, and pri-

(*a*) Fost. 135.
(*b*) 2 Barnard, 78.
(*c*) 2 Strange, 828.

(*d*) Williams, J. Arrest, VI.
2 Barnard, 114.
(*e*) 5 B. & A. 730.

soner, are examined, and the latter is discharged, bailed, or committed as on an original accusation. When the party is already in gaol on a criminal charge, and fully committed for trial, it is not usual to bring him from his first custody before a magistrate on a subsequent charge but the examination of witnesses is taken as in ordinary cases, and a warrant of detainer is sent to the gaoler in whose custody he remains. By this means it will appear on the calendar, that he is charged with two offences, and if acquitted on that for which he was first committed, his discharge will be prevented, and if the offence was committed in another county, he may be sent thither by habeas corpus to take his trial at the assizes.

OF DETAINING
A PARTY
ALREADY IN
CUSTODY.

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A prisoner in custody on a criminal account, cannot be charged in a civil action with a declaration or in execution (*a*) without leave of the court (*b*) or a judge; though, if he accept a declaration and suffer judgment to go against him without complaining, he waives all objection, and will be bound by it (*c*); and one who is attainted of felony, or even treason, may be charged with a civil action by leave of the court or of a judge, so as it be not to defeat the effect of the king's pardon, by disabling him from going abroad (*d*). But a habeas corpus will not in general be granted to bring up a prisoner in custody, in execution, on a criminal account, in order to have him charged with a declaration, and re-committed to his former custody so charged (*e*). But a prisoner in custody to take his trial may, on behalf of his bail, be removed by *habeas corpus*, from the Cold Bath prison, and rendered in discharge of his bail, and committed to Newgate (*f*). The court of Chancery will make an order that a prisoner in custody on a criminal charge shall be brought up for want of an answer, and turned over to the Fleet, and then carried back to Newgate with his cause (*g*). Where the party,

(*a*) Prac. Reg. 325. Tidd's Prac. 8th edit. 347.

(*b*) T. Raym. 58. 1 Sid. 90. S. C. 1 Lev. 124. 1 Sid. 154. S. C. 1 Lev. 146. 1 Salk. 354. R. T. 2 Geo. 1. (*a*).

(*c*) Cas. Pr. C. P. 31; and see 1 T. R. 591. 1 Chit. Rep. 386.

(*d*) 2 Salk. 500. 2 Ld. Raym.

848. Tidd, 8th edit. 347, and cases there cited.

(*e*) 2 New Rep. 245. 3 J. B. Moore, 259. 1 B. & B. 23. S. C. 9 East, 154.

(*f*) Gunn v. Cromer, Trin. Term, K. B. 13th June, 1825. See 5 D. & R. S. C.

(*g*) 1 Ves. & B. 78. 2 Dick. 711. 8 Ves. 314.

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in custody on a criminal account, is brought up to be charged in a civil action, the court will in general remand him to his former custody (*a*).

Of search war-
rants.

As the discovery of stolen goods frequently leads to the detection of the offender, it may be proper here to consider Search Warrants. Formerly, according to Lord Coke (*b*), such warrants were contrary to law, and Lord Camden (*c*) said, that they had crept into the law by imperceptible practice; but Lord Hale clearly establishes their legality, on the ground that without them, felons would frequently escape detection (*d*), and by statute 22 Geo. 3. c. 58. s. 2. (*e*), it is made lawful for any one justice of the peace, upon complaint made before him, upon oath, that there is reason to suspect that stolen goods are knowingly concealed in any dwelling-house, or other place, by warrant under his hand and seal, to cause every such place to be searched in the *day-time*; and the person knowingly concealing the stolen goods, or in whose custody the same shall be found, being privy thereto, shall be deemed guilty of a misdemeanor, and shall be brought before any justice of the peace for the district, and made amenable to answer the same by like warrant of any such justice. There are other Acts of Parliament of a similar nature relative to coining (*f*), having in possession naval and military stores (*g*), and goods stolen from on board ships in the Thames (*h*), and to the taking of idle and disorderly persons (*i*), in order to recruit the land forces and marines, and under the vagrant act, 5 Geo. 4. c. 83. s. 8. a justice may order the trunks, bundles, &c. of vagrants to be inspected; and by s. 13. he may grant his warrant to search lodging houses, &c. suspected to conceal vagrants. But a search warrant for libels and other papers of a suspected party is illegal (*k*); for, as observed by Lord Camden (*l*), the difference between seizing stolen goods and

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(*a*) 2 Stra. 1217.

(*b*) 4 Inst. 176.

(*c*) 11 State Tr. 321. Hawk.
b. 2. c. 13. s. 17. n. 6.

(*d*) 2 Hale, 113. 2 Wils. 149.
291. 11 Harg. State Tr. 321.
1 D. & R. 97. Burn, J. and
Williams, J. Search Warrant.
Dick. J. Warrant, I.

(*e*) See also, 30 Geo. 2. c. 4.
s. 9.

(*f*) 11 Geo. 3. c. 40.

(*g*) 39 & 40 Geo. 3. c. 89.

(*h*) 2 Geo. 3. c. 28. s. 7.

(*i*) 19 Geo. 3. c. 10. But
this act has expired, 1 Leach,
211.

(*k*) 2 Wils. 275. 11 St. Tr.
313, 321.

(*l*) 11 St. Tr. 321.

private papers of the party accused is apparent. In the one, I am permitted to seize my own goods which are placed in the hands of a public officer, till the felon's conviction shall entitle me to restitution. In the other, the party's own property would be seized before, and without conviction, and he have no power to reclaim the goods, even after his innocence is cleared by acquittal.

OF SEARCH
WARRANTS.

The search warrant is not to be granted without *oath* (*a*) made before the justice, that the party complaining has probable cause to suspect his property has been stolen, or is concealed in such a place, and shewing his reasons for such suspicion (*b*). The oath need not positively and directly aver that the property has been stolen (*c*). The *warrant* should direct the search to be made in the day-time (*d*), though it is said, that where there is more than probable suspicion, the process may be executed in the night (*e*). It ought to be directed to a constable, or other public officer, and not to a private person, though it is fit that the party complaining should be present, and assisting, because he will be able to identify the property he has lost (*f*). It should also command, that the goods found, together with the party in whose custody they are taken, be brought before some justice of the peace, to the end that, upon further examination of the fact, the goods and the prisoner may be disposed of as the law directs (*g*).

But though there are precedents of general warrants to search all suspected places for stolen goods (*h*), these are not at common law legal, because it would be extremely dangerous to leave it to the discretion of a common officer to arrest what persons, or search what houses he thinks fit (*i*). And in the great case of *Money v. Leach* (*k*), it was declared by Lord Mansfield, that a warrant to search for, and secure the person and papers of the

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(*a*) See form of oath for Search-warrant, post, vol. iv.

(*b*) 2 Hale, 113. 150. 2 Wils. 283. 291, 2. 11 St. Tr. 321. Post, vol. iv. 1 D. & R. 97.

(*c*) 1 D. & R. 97.

(*d*) 2 Hale, 113. 150. 22 G. 3. c. 58. s. 1.

(*e*) Shaw, J. Barl. J. Burn, J. Williams, J. Search-warrant.

(*f*) 2 Hale, 150. 11 St. Tr. 321.

(*g*) 2 Hale, 150, 151.

(*h*) Dalt. J. 353, 4. 2 Hale, 114.

(*i*) 2 Hale, 114. 150. Hawk. b. 2. c. 13. s. 10. and s. 17.

(*k*) 3 Burr. 1766. 1 Bla. Rep. 555. See also 2 Wils. 291. Loft. 1. 3.

OF SEARCH
WARRANTS.

author, printer and publisher of a libel, is not only illegal in itself, but is so improper on the face of it, that it will afford no justification to an officer acting under its sanction. And by two resolutions of the House of Commons such general warrants were declared to be invalid. At present, therefore, a search warrant must specify the place to be searched, as well as the particular person to be taken, unless it be founded on some particular statute.

With respect to the mode of executing this warrant, if the door be shut, and, upon demand, not opened, it may be broken open, and so may boxes, after the keys have been demanded, and though the goods be not found, the officer will be excused(*a*); though if the party obtaining the warrant acted maliciously, he is liable to a special action on the case, but not to an action of trespass(*b*). But the officer must strictly observe the directions of the warrant, and if he be directed to seize only stolen sugar, and seize tea, he will be a trespasser(*c*). So a warrant under the vagrant act to search all suspected houses, for idle and disorderly persons, is strictly confined to persons of that description, and the officer will not be justified if he attempt to execute it in any other places than those intended by the statute(*d*).

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If on the return of the warrant before the justice it appear that the goods were not stolen, they are to be restored to the possessor; if it appear they were stolen, they are not to be delivered to the proprietor, but deposited in the hand of the sheriff or constable, in order that the party robbed may proceed by indicting and convicting the offender, to have restitution. The party who had the custody of the goods is to be discharged if they were not stolen: and if they were, not by him, but by another person, who sold or delivered them to him, and it appear that he was ignorant of the mode in which they were procured, he may be discharged, but bound over to give evidence as a witness against him that sold them: if it appears, that he knew them to be stolen, then he should be bound to answer the felony, for there is a probable

(*a*) 2 Hale, 157. Dougl. 359.
2 Wils. 284. 3 B. & P. 228.

(*b*) 2 Hale, 151. Hawk. b. 2.
c. 13. s. 17. n. 6. 3 Esp. Rep. 135.

(*c*) 2 B. & P. 158. 2 M. &
S. 261. 2 Wils. 291, 2.

(*d*) 1 Leach, 208.

cause of suspicion, at least, that he was accessory after the fact (*a*).

OF SEARCH
WARRANTS.

It is the duty of the officer to whom the warrant is addressed or delivered to execute it within his district, without fee or reward, and if he neglect or refuse, he will be punishable by indictment. The statute 41 Geo. 3. c. 78. however, provides, that when special constables shall be appointed in England to execute warrants, in cases of felony, two justices may order proper allowances to be made for their expenses and loss of time, which order shall be submitted to Quarter Sessions, and two justices are enabled by the same statute to order allowances to be made to high constables in England, for extraordinary expenses incurred in the execution of their duties, in cases of riot or felony.

We have already considered the rights and liabilities of the prosecutor, and, incidentally, the protection the law affords to persons concerned in the arrest. It may be here proper to consider more particularly the protection afforded by law to the magistrate and persons executing his warrant. With respect to a person acting as justice of the peace, no action can be brought against him for any thing done in the execution of his office, until after one calendar month's notice in writing of the intended process, and he may tender amends, and plead the same in bar of the action, or he may pay such amends into court, and the action must be brought within six calendar months after the cause of it is alleged to have arisen (*b*): the months being reckoned inclusive of the day of the act (*c*). In the case of a continued imprisonment, the magistrate is liable to answer in an action for such part of the imprisonment suffered under his warrant as was within six calendar months before the action commenced against him (*d*). It has been deemed sufficient to entitle a justice to the benefit of this act, that he conceived himself to be acting as a justice, though what he did was not in the regular execution of his office (*e*); but no notice is ne-

Of the indemnity to the magistrate, officers, and parties concerned in the arrest.

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(*a*) 2 Hale, 151, 2.

(*b*) 24 Geo. 2. c. 44. See this act fully commented upon, 11 St. Tr. 319, 320. 2 Wils. 288, 9. Dick. J. Peace, Justice of, 4.

(*c*) 4 J. B. Moore, 465.

(*d*) 12 East, 67.

(*e*) 9 East, 365. 3 Campb. 242. 3 M. & S. 580. 2 Price, 126.

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INDEMNITY
TO THE
MAGISTRATE,&c.

cessary to support an action against a person for the penalty given by the statute 18 Geo. 2. c. 20, for acting as a justice without a proper qualification (*a*). The notice must express the nature of the writ or process intended to be sued out, as well as of the cause of action (*b*). The venue also must be laid in the county in which the cause of action occurred (*c*). The defendant may also plead the general issue, and give the special matter in evidence; and if the plaintiff do not recover, the defendant shall have double costs (*d*). But a secretary of state and others acting under his warrant, are not within the protection of the statute in favor of justices (*e*).

With respect to the protection of inferior officers, it is enacted, that if any action be brought against any constable, head-borough, &c. or their deputies, or any other in their aid and assistance, or by their command, for any thing touching or concerning their office, the venue shall be laid in the county in which the supposed wrong was committed, and the defendant may plead the general issue, and give the special matter in evidence. And if he obtain a verdict, or the plaintiff be nonsuited, or suffer a discontinuance, the defendant shall have double costs (*f*). And though these inferior officers are not entitled to notice of action, nor can tender amends, or pay the same into court, as in the case of a justice of the peace, it is provided (*g*), that no action shall be brought against any constable, head-borough, or other officer, or person acting by his order, or in his aid, for any thing done *in obedience* to any warrant under the hand or seal of any justice, until demand in writing has been made or left at the usual place of his abode by the party intending to bring the action, or his attorney, of the perusal and copy of such warrant, and the same has been refused for six days after the making of such demand, and that, in case after such

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(*a*) Holt, C. N. P. 458.

(*b*) 7 T. R. 621, and see cases on this subject, Tidd, 8th edit. 27.

(*c*) 21 Jac. 1. c. 12. s. 5. 42 Geo. 3. c. 85. s. 6.

(*d*) 21 Jac. 1. c. 12. s. 5. See the decisions on these statutes in Tidd, 8th edit. 19. 27. Selw.

Ni. Pri. Imprisonment, II.

(*e*) 2 Wils. 288 to 292. 11 Harg. St. Tr. 316, 319, 320.

(*f*) 21 Jac. 1. c. 12.

(*g*) 24 Geo. 2. c. 44. s. 6. See constructions on this statute, Tidd, 8th ed. 19, 31, &c. Selw. Ni. Pri. Imprisonment, II.

demand has been complied with, an action should be brought against such officer, without making the justice a defendant, then, on producing the warrant at the trial, the jury shall give a verdict for the defendant, notwithstanding any defect of jurisdiction in the justice; and if the action be brought jointly against the justice, constable, &c. then, on proof of the warrant, the jury shall find for the constable, notwithstanding the defect in the process. And it is provided (*a*), that no action shall be brought against a constable, &c. or person acting in his aid, unless commenced within six calendar months after the act committed.

At common law, a lawful warrant from a justice who had jurisdiction of the cause, justified the officer who executed it, although it was irregularly awarded; but the officer was not excused, when the justice who issued the warrant had not jurisdiction of the cause (*b*). The statute 24 Geo. 2. c. 44. s. 6, was, therefore, passed to protect officers who are not competent to ascertain with certainty the jurisdiction of the magistrate, and who are liable to be indicted if they neglect to obey the warrant (*c*). Therefore, if an officer seize goods in *obedience* to the search-warrant of a magistrate, whether that warrant be legal or not, he cannot be sued until a previous demand has been made of a copy of it (*d*). And a constable executing the warrant, if sued in trespass without the justice, is within the protection of the statute, and entitled to a verdict on proof of the warrant, having first complied with the plaintiff's demand of a perusal and copy of that instrument at any time before the action brought, though not within six days after such demand, as the act directs (*e*). In the construction of the words "any thing done in obedience to any warrant," it has been held, they are equivalent to the words "acting by his order, and in his aid," and that where the justice cannot be liable, the officer is not within the protection of the statute. And it is necessary, in order to bring the officer within

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(*a*) 24 Geo. 2. c. 44. s. 8.

(*b*) Com. Dig. Imprisonment, H. 8 & 9. Hawk. b. 2. c. 13. s. 10. Dick. J. Arrest, V.

(*c*) 3 Burr. 1742. 3 Esp. Rep. 226.

(*d*) 2 Bos. & Pul. 158. 3 Esp. Rep. 96. 5 East, 237. 1 East, P. C. 299, note (*a*).

(*e*) 5 East, 445; and see 3 B. & A. 333.

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it, that he should act most strictly in obedience to the warrant (*a*). And, therefore, where a warrant was to take up a disorderly woman, and the officer took up a person who was not so, and where the warrant was to take up the author, printer, or publisher, but the officer took up a person who was neither author, printer, nor publisher (*b*); and where it was to seize stolen sugars, and the officer took teas (*c*), the officers respectively were not within the protection of the statute. So, if the officer execute it out of the jurisdiction of the justice, or the constable's own precinct, without being expressly directed so to do by the warrant, he is liable to be sued as a trespasser (*d*). And where the constables, in order to levy a poor's rate, under a warrant of distress, granted by two magistrates, broke and entered the house, and destroyed the windows, it was held, that they might be sued in trespass, without a previous demand of the perusal and copy of the authority, on which their proceedings were founded (*e*). But if the constable acts *bonâ fide*, and with an honest opinion that he is discharging his duty, and that he is acting at the very time in obedience to the warrant, he is entitled to the protection of the statute; and where a constable, acting under a warrant commanding him to take the goods of A. takes the goods of B. he was held entitled to the protection of the act (*f*). A constable imprisoning a person on suspicion of felony, without any reasonable grounds of his own authority, without any warrant or charge from any other person, is within the 21 Jac. 1. c. 12, which requires the venue to be laid in the proper county (*g*).

[71] With respect to the person who may be considered as acting by command of the constable, and in his aid, it has been held, that if a person procures a warrant against another, and points out the latter to the constable, he is entitled to the protection of the statute, and may plead the general issue, and give the special matter in evidence (*h*). A gaoler receiving and detaining a prisoner under

(*a*) 3 Burr. 1763. 2 M. & S. 260. 11 St. Tr. 320. 3 B. & A. 333.

(*b*) 3 Burr. 1763.

(*c*) 2 Bos. & P. 158. 2 M. & S. 261; but see 5 J. B. Moore, 323.

(*d*) 1 H. B. 15. 5 East, 233.

(*e*) 2 M. & S. 259.

(*f*) 3 B. & A. 330. 5 J. B. Moore, 322.

(*g*) 2 Stark. 445; and see 3 Esp. 226.

(*h*) 3 Campb. 257; and see 2 Stark. 445.

a warrant of magistrates, is entitled to the protection of the statute, in having the magistrates made defendants with him in an action of trespass (a).

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MAGISTRATE, &c.

Though the statute 24 Geo. 2. enacts, that no action shall be brought against any constable, &c. yet it has been held, that the act extends only to actions of trespass or tort (b). And, therefore, where an action for money had and received was brought against an officer, who had levied money on a conviction by a justice, the conviction having been quashed, it was holden that the demand of a copy of the warrant was not necessary (c). If a constable acts without warrant, the statute does not apply, and the action against him may be brought after the expiration of six months (d). In cases to which the statute applies, if the plaintiff's attorney make out two papers, precisely similar, purporting to be demands of a copy of the warrant, pursuant to the statute, and sign both for his client, and then deliver one to the defendant, the other will be sufficient evidence at the trial (e).

(a) Gow C. N. P. 97.

(c) Id. ibid. Bnl. N. P. 24.

(b) Bul. N. P. 24. 5 East, 122. 1 White, W. 24. Tidd, 33. Selw. N. P. 3d edit. 822. n. w.

(d) 3 Esp. Rep. 226. Selw. N. P. Imprisonment, II. N. 15.

(e) 2 Bos. & Pul. 39. Tidd, 34.

CHAPTER III.

OF THE EXAMINATION—RECOGNIZANCES—BAIL— COMMITMENT—HABEAS CORPUS—AND INCI- DENTAL PROCEEDINGS.

HAVING in the preceding chapter considered the arrest of the accused party before indictment found, we have now to consider the time when the offence is to be investigated by the magistrate—the examinations before him—the discharge of the prisoner, in case his innocence is manifest—the recognizances to prosecute and give evidence—the certifying of the examination and recognizance—the bailing, or commitment of the prisoner, and the relief from imprisonment by habeas corpus.

Time of exami-
nation.

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We have seen that it is the duty of the officer to bring the party accused within a reasonable time after the arrest, before the proper magistrate, in order that he may be examined, and, after due investigation, discharged, bailed, or committed (*a*). It then becomes the duty of the magistrate to take and complete the examination of all concerned, and to discharge or commit the individual suspected, as soon as the nature of the case will permit (*b*), but he is allowed a reasonable time for this purpose, before he makes his final decision. A commitment for further examination, must not be made use of as a commitment for trial, and the examination must take place in a reasonable time, otherwise an action will lie against the magistrate (*c*).

It seems to have been formerly supposed, that the law intends three days to be sufficient, and that a magistrate cannot justify the

(*a*) Ante, 59. 2 Hale, 120.

(*b*) Fortes. 142, 3. and other cases in the following notes.

(*c*) 3 Dow's Rep. 184. and id.

Index, Commitment.

detainer of a party sixteen or twenty days under examination (a). But there appears to be no precise limitation of the time, which must depend on the circumstances of each particular case; and in the practice of the best regulated police offices, there are many instances of prisoners being detained much more than twenty days, between their first being brought before a justice, and their commitment for trial, and being brought up for examination several different days during the interval (b).

If, when the party is first brought before a magistrate, he finds that it is necessary to inquire further into the case before he discharges or commits him, he may from time to time verbally remand him into custody, and a written warrant, or authority, is unnecessary (c), but it is usual, when the party is detained for examination, or re-examination till another day, to make out a *written warrant* for that purpose (d), which need not state the crime of which the party is accused, for it may not always be proper to let the peace officer know the crime on account of which he is detained (e). And even after the magistrate has determined on committing the party, he may verbally authorize the constable to detain him, until he can make out his mittimus (f).

But it is said to be the usual practice, at the present day, to commit from three days, to three days, by a written mittimus, though where the prisoner is remanded only for a single day, it may be done by parol (g). It has been said that the magistrate ought not to detain him in prison, in his own house, but should send him to the common gaol of the county, for otherwise, when the justices come to deliver the gaol, he is not in the gaol, and may not be delivered, and so shall lie longer than is reasonable (h). But according to other authorities, because it may be unseasonable to take the information and examinations presently, or possibly it

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(a) Cro. Eliz. 829. 1 Hale, 585, 6. 2 Hale, 120, 1. Hawk. b. 2. c. 16. s. 12. Dick. J. Examination, III.

(b) Dick. J. Examination, III. 3 Dow's Rep. 160. 183. 186.

(c) Moore, 408. 1 Hale, 585. 2 Hale, 120. Bac. Ab. Tres-

pass, D. 3. Dick. J. Examination, III.

(d) See forms post, last vol.

(e) Bac. Ab. Trespass, D. 3.

(f) 7 East, 533. 3 Smith, 513. 2 Hale, 122.

(g) Dick. J. Examination, III.

(h) Cro. Eliz. 830.

TIME OF
EXAMINATION.

may take longer time, the prisoner may be continued in the custody of the officer, or may be detained in the justice's house, or committed to some near safe place of custody till the final examinations can be completed (*a*). It seems more reasonable that the time for the full investigation of the case and final decision of the magistrate should depend on the circumstances of each case, than that he should be restricted to any particular time, as a general rule; for either the prisoner or the accuser may be unable to bring forward his evidence immediately, and the compelling the magistrate to discharge or commit within any limited time might be prejudicial to the purposes of justice.

Proceedings on
examination.

An attorney, or even counsel for the party accused, has no right to be present at the time of the examination of the latter (*b*). The court will grant a habeas corpus to the warden of the Fleet, to take the body of a debtor confined there before a magistrate, to be examined from time to time respecting a charge of felony or misdemeanor (*c*).

Examination to
be put into writ-
ing, &c.

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The examination of the accuser, of his witnesses, and of the prisoner, are principally regulated by the statutes, 1 & 2 P. & M. c. 13. s. 4. and the 2 & 3 P. & M. c. 10 (*d*). By the former of these it is enacted, "that the justices, or one of them, being of the quorum, when any prisoner is brought before them, for manslaughter, or felony, before any *bailment* or *mainprize*, shall take the examination of the prisoner and information of them that bring him, of the fact and circumstances thereof, and the same or as much thereof as shall be material to prove the felony, shall put *in writing* before they make the same bailment, which examination, together with the said bailment, the justices shall certify at the next general gaol delivery to be holden within the limits of their commission." This act, it will be observed, relates only to proceedings, previous to the admission

(*a*) 2 Hale, 120. 1 Hale, 585. Moore, 408. See the form of commitment for further examination, Burn, J. Commitment. Toone, 103. Dick. J. Commitment, VII. Post, last vol.

(*b*) 1 Barn. & Cres. 37. 2

Dow. & Ryl. 36. 3 B. & A. 432. 1 Chitty's Rep. 218.

(*c*) 5 B. & A. 730.

(*d*) See the object and operation of these statutes, commented upon in Lamb's case, 2 Leach, 552.

of a party suspected to bail; but the 2 & 3 P. & M. c. 10, after reciting this defect, and that the powers granted by the former statutes were as necessary, or rather more, before committing, than bailing, the defendant, enacts, "That from thenceforth the
 " justice or justices before whom any person shall be brought for
 " manslaughter or felony, or for suspicion thereof, before he
 " or they shall commit, or send such prisoner toward, shall take
 " the examination of such prisoner, and information of those that
 " bring him, of the fact, and circumstance thereof, and the same
 " or as much thereof, as shall be material to prove the felony,
 " shall put in writing within two days after the said examination,
 " and the same shall certify, in such manner and form, and at
 " such time as they should and ought to do, if such prisoner, so
 " committed, or sent to ward, had been bailed, or let to main-
 " prize, upon such pain, as in the said former act is limited and
 " appointed for not-taking, or not certifying, such examinations,
 " as in the said former act is expressed."

EXAMINATION
 TO BE PUT INTO
 WRITING, &c.

By the statute 24 Geo. 2. c. 55. s. 1 (a), where a warrant is backed, and the prisoner is taken in a county in England, different from that in which the offence is supposed to be committed, he is to be taken before a justice of the county or place where he was apprehended, and if the offence was bailable, and bail to the satisfaction of such justice be given, he must take the recognizance and deliver the same, together with the *examination or confession* of the prisoner, and all other proceedings relating thereto, to the officer who apprehended him, who is to deliver the same to the clerk of assize, or clerk of the peace, of the county, or place, where the defendant is by the recognizance to appear, and such recognizance, examination, or confession, are declared to be valid. There is a similar provision, where a party is apprehended in one county of Ireland, for a supposed offence, committed in another (b). It should seem however, that, independently of these modern statutes, the magistrate of the county where the party is

Proceeding as to
 examination, &c.
 where warrant of
 arrest is backed,
 &c.

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(a) See Dalt. J. c. 111. 2 Hale, 235. The word "and" appears to be omitted in the first section of this act. See a

similar provision in 44 Geo. 3. c. 92. s. 1.

(b) 44 Geo. 3. c. 92.

PROCEEDING
AS TO
EXAMINATION,
&c.

Summoning wit-
nesses.

apprehended, has power to take the examinations, though they might not have been so available in evidence (*a*).

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The magistrate having by these statutes authority to examine the *party bringing the offender*, which expression is construed to include as well the accuser, as all witnesses in support of the charge, as incident to this authority, has a power to bring before him all persons who appear upon the oath of the informer, or who may occur to the magistrate himself, to be material witnesses for the prosecution, and for this purpose may issue his warrant to a constable, requiring him to cause the witness to appear before the magistrate, and give evidence (*b*). And it should seem that, if the witness refuse to attend, he may be brought by the officer before the magistrate, who also has power to bind him over to give evidence, or to commit him in case of his refusal (*c*). And it should seem that, upon the reasonable request of the defendant, the magistrate has a similar power to bring before him any witness who may be able to give material evidence in his behalf (*d*). And on the application and notice of two inhabitants of a parish, a constable may be compelled to appear before a magistrate to enter into a recognizance, to prosecute a party for keeping a disorderly house within the district (*e*).

Mode of exami-
nation of acenser
and witnesses.

It is to be observed, that the first of these statutes (*f*) on which the law of examination is at present founded, directs the proceedings before the party suspected can be admitted to bail, and the

(*a*) 2 Hale, 285. Dalton, J. c. 111.

(*b*) Dalt. J. c. 164. 3 M. & S. 1. Burn, J. Examination. Williams, J. Examination. See form, post, last vol.

(*c*) 2 Hale, 282. 3 M. & S. 1. Hawk. b. 2. c. 8. s. 58. Bac. Ab. Evidence, D. Dalt. J. c. 164. Dick. J. Examination, II.

(*d*) 3 Inst. 79. 1 Anne, st. 2. c. 9. 4 Bla. Com. 359. According to 3 M. & S. 1. a justice of the peace may commit a feme covert who is a material witness upon a charge of felony brought

before him, and who refuses to appear at the sessions to give evidence, or to find sureties for her appearance. But Shuttleworth (page 8 & 9,) says, it is a matter of great doubt to the most experienced magistrates, whether they have the power of issuing warrants to compel the appearance of witnesses, if the summons be disobeyed.

(*e*) 25 Geo. 2. c. 36. s. 5. See further proceedings directed by 58 Geo. 3. c. 70. s. 7. See form of notice post, last vol.

(*f*) 1 & 2 P. & M. c. 13.

last (*a*) extends the same provisions to cases where he is committed (*b*). It is necessary for a justice, when acting under their authority, to attend with the most scrupulous exactness to their directions; for if the statements of the parties are informally taken, they will not be admissible in evidence, or, at least, will receive no additional sanction from the acts just mentioned, and which they would otherwise confer (*c*). The accuser and his witnesses must be ready to confront the prisoner, in whose presence the evidence must be given. Before the statements of the prosecutor and his witnesses are reduced into writing, it is advisable for the magistrate to hear their narrative in the common way of relating events: by which means he will be put in full possession of all the circumstances of the case, and often enabled to discover, by the manner of the parties, whether they are speaking truth, or combining in the assertion of falsehood (*d*). The informant and his witnesses are then to be sworn, if Christians, on the Evangelists, if Jews, on the Old Testament, and if of any other faith, according to the ceremonies which it prescribes (*e*). The usual form of oath on this occasion is, "You shall true answer make to such questions as shall be demanded of you: so help you God." An oath in some form or other is absolutely necessary, or the examinations of the informant and his witnesses cannot, under any circumstances, be received in evidence (*f*); and consequently the affirmation of a quaker will not suffice (*g*). And if a magistrate were to commit without an oath made before him, he would be liable to an action, if the prisoner were acquitted (*h*). Even a peer cannot be admitted to give evidence upon his honor (*i*). When they are thus sworn, the justice inquires the names and additions of the parties whose depositions he is about to receive, and if the prosecutor acts in any official capacity, his office, as well as those of

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(*a*) 2 & 3 P. & M. c. 10.

(*b*) 2 Leach, 562. See observation on these statutes in general, 2 Leach, 555.

(*c*) 1 Leach, 501, 2. 2 Leach, 561.

(*d*) Dick. J. Examination. As to the duties of the magistrate as to taking the examination in general, see Gisb. Duties of Man, vol. i. 402.

(*e*) See post, as to evidence, ch. xvi.

(*f*) Dalton, J. c. 164. s. 3. 1 Hale, 586. Dick. J. Examination.

(*g*) See post, ch. xiv. on Evidence, and 7 & 8 W. 3. c. 34.

(*h*) 1 Hale, 586. Dalt. J. c. 164. 1 Leach, 202. 309. 2 T. R. 225. 231. Comb. 359.

(*i*) Dick. J. Examination, III.

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the prisoner. His next duty is to reduce the examination of each of the deponents into writing, in a plain and intelligible manner, and as nearly as possible in the language in which the first narration was delivered (*a*). According to the directions of the statutes, all the facts and circumstances are to be inserted which are necessary to prove the felony, and the *corpus delicti* should appear on the face of the depositions; for, if this be properly done, though the commitment should be informal, the prisoner will not be discharged on the ground of the defect in the mittimus (*b*). Though the words "them that bring the prisoner" includes not only the prosecutor, but those whom he can bring forward to sustain his charge (*c*): none ought to be examined but those who are competent to give evidence (*d*). It is absolutely necessary, that the testimony of the accuser and his witnesses should be taken in writing, or it will be of no effect (*e*). All this must be done in the presence of the party accused, in order that he may have the advantage of cross-examining the witnesses, and contradicting their testimony, or the examinations cannot be received in evidence as if taken in pursuance of the statutes (*f*); though if the party were under apprehension of approaching dissolution, it may be read as a declaration made in extremis (*g*). Though the statutes merely require the examinations to contain "so much thereof as may prove the felony," it is very desirable that the whole statement in all its circumstances and bearings should be thus secured, and not merely so much as will serve to shew that it comes within the jurisdiction and justifies the commitment of the magistrate. This is very important, in order that the witnesses may be tied down to their first narration, and not left open to the influence of those impressions either of pity or of revenge, which may affect them during the interval (*h*). And though the words of the statute seem only to include of necessity the testimony adduced in support of the charge, the justice

(*a*) Leach. 202. 309. Dick. J. 503, note a. 561. 5 Mod. 163, Examination, I. 164.

(*b*) 3 East, 157.

(*c*) 1 Hale, 586. Dalt. J. ch. 164.

(*d*) See post, ch. xiv. as to Evidence.

(*e*) 1 Leach, 202. 309.

(*f*) 1 Leach, 202. 309. 500.

(*g*) 1 Leach, 500. 503, note a. 561. 5 Mod. 163, 164; and see post, ch. xiv. as to Evidence, where this subject is fully discussed.

(*h*) Dick. J. Examination, I. Gisb. Duties of Man, vol. i. 402.

ought to take and certify, as well the information, proof, and evidence which tend in favor of the prisoner, as those which are brought forward against him (*a*). And though formerly his witnesses could not be examined upon oath (*b*), they are now placed on a footing with those whom the prosecutor adduces (*c*). The witnesses, especially if they appear unwilling, should be examined separately; and no one who has already passed his examination should be permitted, if it be possible to avoid it, to inform any other who has yet to undergo that process, to what particulars his discoveries have extended. By this means, a conspiracy to overwhelm a prisoner will probably be detected, and undue motives to favor him from interest or pity will be prevented from obstructing the progress of justice (*d*).

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The formal mode of taking down the examinations is as follows. How to take down the examination.
“The examination of A. B. of, &c. taken on oath, &c.” But if the original information and evidence taken before the warrant was issued, contain a complete case, it is the practice, after re-swearing the accuser and witnesses, to read over their former depositions in their presence and that of the prisoner, and then to state to the latter, that he is at liberty to ask the prosecutor and witnesses any questions respecting the charge against him; and, if he declines so doing, the examinations are not again gone over, but a fresh jurat is made to them; and this even before a fresh magistrate. The papers are then to be signed by the parties deposing, and also by the justice before whom they are taken; but these formalities are not absolutely requisite (*e*). The depositions at the police office, Bow Street, are generally taken in a book, and, when completed, a fair copy is made while the parties wait, and then all of them, as well as the magistrate, again authenticate them by their signature.

Before the statutes of Philip & Mary, depositions thus taken before justices of the peace, in the county where a felony was committed, were not admissible in evidence even when death or How far examinations of accuser or witnesses are evidence.

(*a*) Dalt. J. c. 165.

(*d*) Dick. J. Examination, II.

(*b*) Dalt. J. c. 165.

(*e*) 1 Leach, 458. 2 Leach,

(*c*) 1 Ann. st. 2. c. 9. 4 Bla. 854.
Com. 360.

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some absolute necessity prevented the witness from attending (*a*). And, even now, they cannot be received on the trial, without first proving on oath to the satisfaction of the court, that the deponent is dead (*b*), or not able to travel (*c*), or that he is kept away by the means and contrivance of the prisoner (*d*). It must also be shown that the documents produced in evidence were the same, without alteration, as those which were sworn before the magistrate (*e*). It is also to be observed, that these statutes relate only to manslaughter and felonies; and, therefore, the depositions cannot, in any case, be given in evidence on an indictment for a misdemeanor, as in an information for publishing a libel, or in an appeal, which, though the object of it is capital, is, in form, a civil proceeding (*f*). And a conviction for treason, or petit treason, cannot be grounded on their production (*g*); but they may be received on an indictment for the latter offence, as a ground for a conviction of murder (*h*), which, as we shall see hereafter, may be obtained on a prosecution for the more aggravated offence (*i*).

As informations, when regularly taken, are evidence against a prisoner, if the informant dies before trial; so, on the other hand, where the informant himself gives evidence, the informations may be used on the part of the prisoner to contradict his testimony. One of the objects of the legislature in passing the statutes, was to enable the judge and jury, before whom the prisoner is tried, to see whether the witnesses at the trial are consistent with the account given by them before the committing magistrate (*k*). Thus it was admitted in Lord Stafford's case (*l*), that the depositions of a witness taken before a justice of peace, might be read, at the

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| (<i>a</i>) 3 T. R. 710. 722. 5 Mod. 164. 1 Salk. 281. Comb. 359. | 2 Hale, 52. |
| (<i>b</i>) 1 Leach, 12. 2 Leach, 854. Kel. 55. 1 Lev. 180. 1 Salk. 281. 1 Hale, 305. 586. 2 Hale, 52. 120. 284. Dalt. J. c. 111. Bul. N. P. 242. | (<i>f</i>) 5 Mod. 163. 1 Salk. 281. Comb. 358. 1 Ld. Raym. 729. 3 T. R. 710. 722. |
| (<i>c</i>) Kel. 55. 1 Hale, 305. 586. 2 Hale, 52. 284. | (<i>g</i>) Fost. 337. Hawk. b. 2. c. 46. s. 16. As to treason, see 2 Hale, 285. Phil. Ev. 163. |
| (<i>d</i>) Kel. 55. Fost. 337. Hawk. b. 2. c. 46. s. 15. | (<i>h</i>) 1 Leach, 457. Fost. 106. |
| (<i>e</i>) Kel. 55. 1 Hale, 305. | (<i>i</i>) Id. <i>ibid.</i> post. |
| | (<i>k</i>) 2 Leach, 558. |
| | (<i>l</i>) 3 Harg. State Trials, 131. |
| | Hawk. b. 2. c. 46. s. 22. |

desire of the prisoner, in order to take off the credit of the witness, by showing a variance between the depositions and the evidence given in court, *vivâ voce*.

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The before-mentioned statutes of Philip and Mary direct that the justices shall put the examinations in writing within two days after the same are taken, and shall certify the same at the next general gaol delivery within the limits of their commission. It often happened, before the statute 24 Geo. 2. c. 55. that a party accused was taken and examined by a magistrate, in a county where the offence was not committed. In such a case the examinations and informations were transmitted into the county where the prisoner was indicted, and might there be read in evidence against him, though the magistrate had not original cognizance of the offence (*a*), and this proceeding is now established by the last-mentioned provision (*b*).

Though the examination of the witness duly taken in writing, in the presence of the prisoner, may be received in evidence on his trial, yet it cannot be offered before the Grand Jury on preferring the bill, though there be strong grounds of suspicion, that the witness has been since tampered with on behalf of the prisoner (*c*).

Before we dismiss the subject of the examination of witnesses, it may be proper to consider the conduct of the magistrate in obtaining the evidence of accomplices (*d*). An accomplice, who has been admitted by the magistrate to give evidence of his knowledge of the transactions, is not thereby necessarily exempted from prosecution; and it depends upon his making a full disclosure of the joint guilt of himself and his companions, whether the King's Bench will admit him to bail that he may apply for a pardon (*e*). The engagement of a magistrate to an accomplice, that if he

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of accomplice.

(*a*) Dalt. J. c. 111. 2 Hale, 20 to 24. And see post, ch. xiv. on Evidence.

(*b*) 24 Geo. 2. c. 55. s. 1. and 44 Geo. 3. c. 92.

(*c*) Leach, 514.

(*d*) As to this evidence in general, see Phillips on Evidence,

(*e*) 1 Leach, 115. Cowp. 331. S. C. 1 Leach, 155. 4 Bla. Com. 331. Ed. by Christian, note 6. Dick, Sess. 428, 9.

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will give his evidence, he will experience favor, is merely in the nature of a recommendation to mercy, for no authority is given to a justice of the peace to pardon an offender, and to tell him that he shall be a witness against others. He is not therefore assured of his pardon, but gives his evidence *in vinculis*, in custody : and it depends on his behaviour, whether he shall or shall not be admitted to mercy. A justice has no authority to select whom he pleases to pardon or prosecute, and a prosecutor himself has even less power, or rather pretence, to select than a justice of the peace. It is merely an equitable claim to the mercy of the crown, from the magistrate's express or implied promise of an indemnity upon certain conditions of a most candid disclosure (a). The practice of the London Police Offices is in conformity to these principles ; for it is not their custom to release an accomplice, who proposes to give evidence as a witness against his associates, but to commit him for the felony ; in which case, upon his fully disclosing the facts upon the trial, he will probably receive his pardon. In order, however, to avoid collusion, in the testimony between the parties suspected, the accomplice is usually committed to the house of correction, and the others to the county prison.

Examination of
prisoner.

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With respect to the examination of the prisoner himself, it has been observed, that the statutes of Philip and Mary were the first warrant given for the examination of a felon by the English law (b). For, at the common law, the maxim, *Nemo tenebatur prodere se ipsum*, prevailed in its full strictness, and the guilt of an offender was not to be wrung out of himself, but rather to be discovered by other means and other men ; and though the statutes just noticed authorize an examination, they are not compulsory on the prisoner to accuse himself (c). At common law, his voluntary confession was always available in evidence against him (d), and this even in the case of treason, if made before a magistrate or person having competent authority to take it, and proved by two witnesses (e). But there is no mode of extorting such con-

(a) Id. ibid. Dick. Sess. 428, 9.

(b) 4 Bla. Com. 296. Bac. Abr. Evidence, L. Kel. 19. 2 Leach, 558.

(c) Dick J. Examination, III.

(d) Bac. Ab. Evidence, L.

2 Leach, 559.
(e) Fost. 240, 244. 4 Bla. Com. 357.

fession or other statement from the prisoner. And, indeed, the examination has been considered rather as a privilege in favor of the party accused, afforded by law for the benefit of an innocent man, who, perhaps, may on examination clear himself from suspicion, and then he will immediately regain his freedom, than as any additional peril; and it is said, that in case of felony, the justice of peace is bound to take his examination (*a*). If the magistrate examine the prisoner rather as a witness than a charged offender, the evidence given by him, although no threat or inducement was held out to him, cannot be read against him (*b*). If the examination, previous to committal, purports to have been taken on oath, evidence upon the trial of the prisoner for felony, is not admissible to shew that in fact the examination was not on oath (*c*). On the examination of the defendant, there are three modes of conduct which he may adopt; to disclose his defence, to remain silent, or to confess himself guilty. If he has, in his own opinion, so decisive an answer to the charge, as amounts to a physical certainty that he has been falsely accused, he prefers adopting the first course, and advancing it in this stage of the prosecution, to being confined in prison until the assizes, or even calling on his friends to bail him, if the offence alleged is one in which that security could be taken. But if his defence amounts to more than a moral certainty, and it is dubious whether it would make such an impression as to secure his immediate discharge, it may be prudent to reserve it to the time of trial, and decline answering any questions, which, we have seen, the magistrate has no power to enforce (*d*). If his guilt be manifest, and there is small chance of acquittal, he sometimes prefers making a frank confession, which is the only circumstance it will now be material to consider.

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In practice, when the party is brought before the magistrate, he is generally cautioned that he is not bound to accuse himself, and that any admission may be produced against him at his trial (*e*). At all events, no improper influence, either by threat, promise, or misrepresentation, ought to be employed; for however slight the

(*a*) Fortes. 142.(*b*) Holt C. N. P. 597.(*c*) 1 Stark. 242.(*d*) Dick. J. Examination, III.(*e*) Id. *ibid*.

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inducement may have been, a confession so obtained cannot be received in evidence, on account of the uncertainty and doubt whether it was not made rather from a motive of fear or interest than from a sense of guilt (*a*). A confession so obtained is not rejected from a regard to public faith, but, because, when forced from the mind by the flattery of hope, or by the torture of fear, it comes in so questionable a shape, that no credit should be given to it by a jury (*b*). The justice should also be upon his guard against confessions uttered by collusion. A remarkable instance of this kind deserves to be mentioned, as singularly illustrative of this caution. Two brothers committed a robbery in a dark night to a large amount, and fled. A younger brother, who was at home, and innocent, in order to favor their escape, contrived to draw suspicion on himself, and when examined, dropped hints amounting to a constructive admission of his guilt, which he refused to subscribe. On this he was committed to prison, and the pursuit of his brothers was discontinued. On the trial he proved an alibi on the clearest evidence, and obtained an easy acquittal. In the mean time, the actual felons had safely arrived in America with their plunder (*c*). If, however, by means of a confession so unduly obtained, other facts are brought to light, they may be proved, though the confession itself is inadmissible (*d*). The magistrate is to put all proper questions to the prisoner, taking down his statement in writing as he proceeds, and, after closing his examination, should read over the whole, and ask him if it be true, and if it contain any admission, should then require him to sign it, and should sign it himself (*e*). And an examination thus taken may be given in evidence against the prisoner on his trial (*f*), though not against any other persons whom he may have incidentally accused (*g*).

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(*a*) 1 Leach, 263. 291. 386. 2 Leach, 264. and id. 265, n. a.
 2 Hale, 234. 4 Bla. Com. 357. 2 East, P. C. 658. Phil. Ev.
 Phil. Ev. 50, 1, 2. Hawk. b. 2. 51. Dick. Sess. 212.
 c. 46. s. 36. (*c*) Dalt. J. c. 164.
 (*b*) 2 Leach, 263, 4. Dick. (*f*) 1 Hale, 586.
 Sess. 211, 12. (*g*) Hawk. b. 2. c. 46. s. 31 to
 34.
 (*c*) Dick. J. Examination, III.
 (*d*) Hawk. b. 2. c. 46. s. 38.

The examination of the prisoner ought not to be upon oath (*a*); and when thus taken, it has been rejected (*b*). On first view it might appear unreasonable to refuse in evidence a confession, made under this sanction, requiring stricter adherence to truth, and which would otherwise have been evidently admissible (*c*); but it must be remembered, that every admission of the prisoner must, in order to render it available, be purely voluntary; and that the dread of perjury, with the apprehension of additional penalties in case he deviates from the truth, may create an influence over his mind, which the law is particularly scrupulous in avoiding. The prisoner ought, therefore, never to be required to swear: and he ought not to be questioned or examined by the magistrate like a common witness (*d*). The statutes are imperative on the magistrate, to take the examination in writing (*e*). What the party accused says in other places, may undoubtedly be received upon *vivâ voce* testimony; but as the law requires that his examination shall be reduced into writing, and returned to the court; the particulars of such examination cannot be given in evidence *vivâ voce*, unless it be clearly proved that in fact such examination never was reduced into writing; for it would be permitting the negligence of the magistrate to operate to the prejudice of the prisoner; as a witness, by selecting only part of what had been said, might, by using different words, give a different colour to the original statements (*f*). It should seem, however, that if it be proved that the examination was not taken in writing, parol evidence of the prisoner's declaration is admissible; for otherwise this absurd consequence would follow, that whatever a prisoner says, when not before a magistrate, would be admissible, though depending on memory; but the moment a prisoner was introduced into the presence of a justice, nothing that he might disclose would be admissible, though taken under circumstances of the greatest caution and solemnity (*g*). Therefore, minutes taken by a solicitor for the prosecution, on the examination of a prisoner,

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(*a*) 1 Hale, 585. 2 Hale, 52. Ante, 84.
 120. 284. Bac. Ab. Evidence, L. (c) 2 Leach, 555. 4 Esp. Rep.
 Burn, J. Examination. Dick. J. 172.
 Examination, III. (d) Holt. C. N. P. 597.
 (b) Bul. N. P. 242. Hawk. (e) 1 Leach, 310.
 b. 2. c. 46. s. 37. Dick. J. Ex- (f) 2 Leach, 310, note a.
 amination, III. 1 Stark. R. 242. (g) Id. ibid. 2 Leach, 639. 552.

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at the direction of such magistrate, may be read in evidence on the trial, as a memorandum to refresh the witness's memory, though not signed either by the prisoner or the magistrate (*a*). And the signature of the prisoner, though it is advisable to obtain it, is not essentially requisite (*b*). It is competent, however, for the prisoner to retract before the magistrate his admission of guilt, so as to prevent his examination from being read in evidence against him, under the statute 2 & 3 P. & M. c. 10 (*c*); but still the previous admission may be given in evidence, independently of the statute, as a confession of the offence (*d*). If after the examination of a prisoner before a magistrate upon a charge of felony has been taken down by the magistrate's clerk, and it is read over to him, and he is told that he may sign it or not as he chooses, he declines to sign it, the examination cannot be read in evidence (*e*) unless he says it is true (*f*).

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If there be more than one person accused, it is of evident importance that all of them should be examined apart; in order that an opportunity may be afforded of detecting any variations in their story. In order also to prevent any communication between them previous to the trial, it will be prudent to give special directions to the keepers to confine them in different parts of the prison (*g*). If the party accused decline making any defence, the magistrate may proceed to commit him. During the whole of the proceedings, it will be prudent for the justice to have his clerk, or other intelligent person present, in order that no difficulty may arise in proving the identity of the deposition, in case of a refusal to subscribe it by a witness (*h*).

Obstructing, &c.
justice in exami-
nation, how pun-
ished.

If, pending the examination, the prisoner or any other person insults the magistrate, he may be committed for the obstruction of justice, as this is an indictable offence; and without this power, no court could exist (*i*). Such commitment, however, cannot be to detain the party, until he retract or make personal

(*a*) 2 Leach, 637. Id. 552. (*f*) 2 Stark. 483. Lamb's case, 16 How. St. Tr. 214. Dick. J. Examination, III. Leach, C. L. 625.

(*b*) 2 Leach, 552. Id. 637.

(*g*) Dick. J. Examination, III.

(*h*) Id. *ibid*.

(*c*) 2 Leach, 553, note a.

(*i*) 1 Stra. 421. 14 East, 85.

(*d*) 2 Leach, 552.

6 T. R. 530; but see Peake's Rep. 62, 63, n. See form of mittimus, post, last vol.

(*e*) 2 Stark. 483.

submission for the offence (*a*), but must be for a time certain (*b*), and there must be a written warrant (*c*).

The examinations thus taken, should be attached to the information in the order in which they were taken, and remain in the hands of the magistrate until they can be transmitted, in the regular course, to the proper officer (*d*). During this interval, it is his duty to keep them securely, and not to suffer them to be perused by any one not properly authorized to inspect them (*e*). The party accused himself has not, in cases of treason or felony, a right to demand a copy of the depositions (*f*), though in the former, he must be put in possession of a list containing the names of the witnesses (*g*). He may, however, compel their production on the trial by serving the magistrate with a subpoena to produce them. But even after an acquittal for felony, it is not usual for the magistrate to allow the defendant a copy of the proceedings before him in order to enable him to support an action for a malicious prosecution. But the Court of K.B. will, by rule, compel a magistrate to produce examinations on a trial (*h*); and where the plaintiff in an action on a deed, has had the same taken from him under a warrant against him for felony, the court will, on an

Examinations how to be used and kept, and the right of parties to copy, &c.

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(*a*) 14 East, 142.

(*b*) 5 B. & A. 894. 1 Dowl. & Ry. 559.

(*c*) Marsh. 377. 7 Taunt. 63.

(*d*) Dick. J. Examination, III.

(*e*) Id. *ibid*.

(*f*) But see Barnes' Rep. 468, 9. Action for malicious prosecution and imprisonment of plaintiff ordered by the court, that the original information be produced by the justice before whom it was taken, and that the constable should produce the original warrant, in order that they might be given in evidence on the trial. 1 Strange, 126, rule granted that a justice produced *faciat* (not *quod producat*) an examination at a trial; because an examination is not evidence of itself without proving the hand of the party, as also of warrants and affidavits, and

the original must be produced; and in 1 Chitty Rep. 627, it was held, that a mandamus will not lie to compel a magistrate to produce depositions taken before him on a charge of felony, for the purpose of founding an indictment of perjury against the deponents; the magistrate must be subpoenaed to produce the depositions which may be read in evidence before the grand jury. 2 Chitty Rep. 229. rule absolute to magistrates and constables to produce deed of a person in their custody for felony, on his paying the expenses. 1 Strange, 126, *supra*, 83.

(*g*) 4 T. R. 691. Phil. Evid. 204.

(*h*) 1 Stra. 126. In case they have been destroyed, when parcel evidence admissible, 2 B. & C. 494, Post, 333.

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HOW TO BE USED
AND KEPT, AND
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PARTIES TO
COPY, &c.

affidavit of demand upon the magistrate and constable direct them to give plaintiff a copy to declare on, and to produce the deed on the trial, plaintiff undertaking to pay the expences (*a*). But when the prosecutor or his solicitor are respectable, it is usual for the magistrate to allow them copies of the depositions, in order to prepare the briefs and arrange the evidence.

Of discharging
the prisoner.

If, upon the examination of the whole matter, it manifestly appears that either no such crime was committed by any person, or that the suspicion entertained of the prisoner was wholly groundless, it is lawful for the magistrate totally to discharge him, without even requiring bail (*b*). A magistrate is clearly bound, in the exercise of a sound discretion, not to commit any one unless a *prima facie* case is made out against him by witnesses entitled to a reasonable degree of credit, and neither an attorney or a counsel has a right to attend on the examination before the magistrate, either on behalf of the prosecution or for the prisoner (*c*). But if there be an express charge of felony, on oath, against the prisoner, though his guilt appear doubtful, the justice cannot wholly discharge him, but must bail or commit him; and it is said, that if a person be killed by another, though it be *per infortunium* or even *se defendendo*, which is not properly felony, yet the justice ought not to discharge him, for he must undergo his trial; and therefore must be sent to prison, or admitted to bail (*d*). And, in modern practice, though exculpatory evidence is received at the instance of the prisoner, and certified with the other depositions, unless it appear in the clearest manner, that the charge is malicious as well as groundless, it is not usual for the magistrate to discharge him, even when he believes him to be altogether innocent.

Of the recogni-
zances to prose-
cute.

When the magistrate has concluded the examinations, and there appears to be probable ground to suppose that the prisoner is guilty, he should take the recognizance of the prosecutor to appear and prefer a bill of indictment, and give evidence at the next

(*a*) 2 Chit. Rep. 229.

(*b*) 4 Bla. Com. 290. Hawk. b. 2. c. 15. s. 1. 2 Hale, 121. 1 Hale, 583.

(*c*) Per Bayley, J. 1 Barn. & Cres. 50, 1.

(*d*) 2 Hale, 121. Hawk. b. 1. c. 29. Id. b. 2. c. 15. Dalt. J. c. 164. s. 1. Sed vide Dick. J. Commitment, II. note (*a*), and Examination, III. and Homicide, III.

sessions of the peace or gaol delivery, as the case may require; and in case of his refusal, may commit him to gaol (*a*). And where goods above the value of £20 have been obtained by false pretences, the recognizances should be in double the value of the goods (*b*). A recognizance is an obligation of record, entered into before a magistrate duly authorized for that purpose, with condition to appear at the sessions or assizes (*c*). The party need not sign this recognizance, but the record thereof is afterwards made out on parchment, and subscribed by the justice before whom it is taken (*d*). But it is a matter of record as soon as taken and acknowledged, although not made up by the justice, and only entered in his book (*e*). Where the offence is supposed to have been committed within the county of a city or town corporate, the prosecutor has the option of prosecuting within that jurisdiction, or at the sessions of oyer and terminer for the county at large; but if he prefers the latter, then he must enter into a recognizance in £40 to pay the extra costs thereby occasioned, if the court should think proper (*f*).

In case of prosecutions for grand and petty larceny or other felony, the expences of the prosecutor, and, if poor, a remuneration for his loss of time, are provided for by the 25 Geo. 2. c. 36. s. 11. 18 Geo. 3. c. 19. s. 7. 38 Geo. 3. c. 70. s. 4. (*g*), the provisions of which acts will hereafter be more fully considered (*h*).

When it appears from the examinations, that a person brought before the magistrate as a witness, may probably be able to give material evidence against the prisoner, he has, in the cases of manslaughter and felony, by the express provisions of the statutes 1 & 2 Ph. & M. c. 13. s. 5, and 2 & 3 Ph. & M. c. 10. s. 2, authority to bind such witness by recognizance or obligation

Of the recogni-
zance to give
evidence.

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(*a*) 1 Hale, 586. 2 Hale, 52.
121. 3 M. & S. 1. See form of
recognizance, Burn, J. Exami-
nation and Recognizance. Wil-
liams, J. Recognizance, post.
If more than one are to be
bound, the recognizances should
not be taken separately. Gibs.
Duties of Man, vol. i. 416.

(*b*) 30 Geo. 2. c. 24. s. 2.

(*c*) Dick. Just. Recognizance.

Toone, 368.

(*d*) Dalt. Just. c. 176. Dick.
Sess. 87. Dick. J. Recogni-
zance.

(*e*) Dalt. J. c. 163. Barn, J.
Recognizance.

(*f*) 38 Geo. 3. c. 52. s. 12.
4 East, 203. See forms of re-
cognizance, post.

(*g*) Cro. C. C. 12.

(*h*) Post.

OF THE
RECOGNIZANCE
TO GIVE
EVIDENCE.

to appear at the next general gaol delivery, to give evidence against the party indicted; and infants and married women, who cannot legally bind themselves, must procure others to be bound for them (*a*). And if the witness refuse to give such recognizance, the magistrate has power to commit him, this being virtually included in his commission, and by necessary consequence upon the above-mentioned statutes (*b*). This doctrine was confirmed in a late case, where a married woman refused to enter into a recognizance for her appearance at sessions, to give evidence against a felon, and the magistrate committed her, and the Court of King's Bench held that the commitment was legal (*c*). But a justice of the peace is not authorized by law to commit a witness, willing to enter into a recognizance for his appearance, to give evidence against an offender, merely because such witness is unable to find a surety to join him in such recognizance, nor ought the justice to require such surety: the party's own recognizance (at the peril of commitment) is all that ought to be required (*d*). The expence and loss incurred by the witnesses, if poor, in afterwards attending to give evidence, is to be repaid them, according to the regulations contained in the statutes 27 Geo. 2. c. 3. s. 3. 18 Geo. 3. c. 19. s. 8. and 58 Geo. 3. c. 70. (*e*), which will be fully considered hereafter.

Of certifying the
examination, &c.

The statutes of Philip and Mary before-mentioned, enact that the justices who bail or commit for manslaughter or felony, shall certify the examination and recognizances at the next general gaol delivery to be holden within the limits of their commission. But notwithstanding the latter words "at the next gaol delivery," yet for petty larcenies and small felonies, the party accused may be tried at the quarter sessions, and the examinations and recognizances may be certified there (*f*). And the examination and recognizances taken by justices in one county upon a backed

(*a*) See form of recognizance, Burn, J. Examination. Id. Recognizance. Williams, J. Recognizance. Post, last vol.

(*b*) 3 M. & S. 1. 1 Hale, 586. 2 Hale, 121. 232. Hawk. b. 2. c. 8. s. 58. Bac. Abr. Evidence, D. Dick. J. Recognizance. Dalt. J. c. 164. 168. Dick. Sess. 89. 91. See Coroners, similar jurisdiction and

forms of warrants, &c. Imp. Off. Coroners, 110, 111.

(*c*) 3 M. & S. 1.

(*d*) Per Graham, B. Bodmin Sum. Assizes, 1817. 1 Burn, J. 24th edit. 1013.

(*e*) Cro. C. C. 18. Post, Chap. XIV. on Evidence.

(*f*) Dalt. J. c. 164. Burn, J. Examination.

warrant, may be by them certified into another county, and there read and given in evidence against the prisoner (*a*). Formerly the justice used personally to attend with the informations, in order to certify them, but now they are handed over by the clerk of the justices to the clerk of the peace or assizes.

OF CERTIFYING
THE EXAMINA-
TION, &c.

If by the non-appearance of the prosecutor or witness at the trial, his recognizance be broken, it becomes forfeited, and absolute, and being estreated (that is, taken out from among the other records) and sent up to the Exchequer (*b*), the party becomes an absolute debtor to the crown for the sum or penalty mentioned in the recognizance (*c*). As, however, the non-performance of the condition of the recognizance is frequently owing to mere inattention and ignorance, the 4 Geo. 3. c. 10, empowers the barons of the Exchequer to discharge any person, on petition, whom they shall think a fit subject for favor (*d*). The statute 38 Geo. 3. c. 52, provides for the forfeiture and estreating of recognizances, where the prosecutor does not proceed in pursuance of his notice, to try in the county at large, for an offence committed in any city or town corporate.

Of estreating the
recognizances,
&c.

The magistrate having heard the examinations, and ascertained that the party accused is not entitled to be completely discharged, is next to determine whether he shall bail or commit him.

Of bailing.

Bail is a delivery or bailment of a person to his sureties, upon their giving, together with himself, sufficient security for his appearance, he being supposed to continue in their friendly custody, instead of going to prison (*e*). As more immediately connected

(*a*) Dalt. J. c. 164. 2 Hale, 285. 24 G. 2. c. 55. 44 G. 3. c. 92.

(*b*) It seems questionable now whether the court of Quarter Sessions can in any case, since the passing of the 3 G. 4. c. 46. (amended by 4 G. 4. c. 37.), send the estreats of forfeited recognizances, taken before them, or justices of the peace, into the Exchequer, see 13 Price, 299.

(*c*) Burn, J. Fines and Recognizance. Cro. C. C. 23. Bac. Abr. Bail in Criminal Cases, L.

(*d*) See post, as to estreating recognizances of bail; and Cro. C. C. 23 to 27. Instances, 3 Price, 261. 6 Ib. 102. 13 Ib. 299; but the great source of the general authority of the Exchequer to discharge estreated recognizances is a writ of privy seal, see form of it, 13 Price, 303.

(*e*) As to bail in general in criminal cases, see 4 Bla. Com. ch. 22. Hawk. b. 2. c. 15. 2 Hale, c. 15. Burn, J. Bail. Bac. Ab. Bail in Criminal Cases. Com. Dig. Bail, F. 1, &c.

OF BAILING. with our present inquiries, we will first consider the power of *justices of the peace*, and the incidents of their authority: and then the jurisdiction of other magistrates to bail the supposed offender.

In what cases
and who may
bail,

With respect to the cases in which bail is allowable, it is observable that at common law no justice, or indeed any court, could bail a person in execution on a judgment or conviction for any offence; for then such imprisonment without bail, is part of the sentence and punishment, and this is the existing law (*a*). Nor will a court between conviction and judgment, bail the offender without the consent of the prosecutor (*b*). But when a party was arrested, before conviction, by the ancient common law, all felonies wereailable, till murder was excepted by statute (*c*); so that persons might be admitted to bail before conviction in almost every case (*d*). But the statute of Westminster, 3 Edw. 1. c. 15, takes away the power of justices of the peace to bail in treason, and in several instances of aggravated felony. This statute enacts that such “prisoners as before were *outlawed*, and they which have *abjured* the realm, *provors*, and such as be taken with the mainour, and those which have broken the king’s prison, thieves openly defamed and known, and such as be appealed by provors, so long as the provors be living, if they be not of good name; and such as be taken for house-burning feloniously done, or for false money, or for counterfeiting the king’s seal, or persons excommunicate, taken at the request of the bishop, or for manifest offences, or for treason touching the king himself, shall be in no wise replevisable by the common writ, nor without writ.”

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“But such as be indicted of larceny by inquests taken before sheriffs or bailiffs, by their office, or of light suspicion or for petty larceny, that amounteth not above the value of 12*d*. if they were not guilty of some other larceny aforetime, or guilty of receipt of felons, or commandment or force, or of aid in felony done, or guilty of some other trespass, for which one ought not to lose life nor member, and a man appealed by a provor after the death of the provor (if he be no common thief nor defamed),

(*a*) 3 T. R. 325. 4 Bla. Com. 298. 1 Wils. 299.

(*b*) 4 Burr. 2545. 2539.

(*c*) 6 Edw. 1. c. 9. Com. Dig. Bail, F. 1.

(*d*) 4 Bla. Com. 298.

shall from henceforth be let out by sufficient surety, whereof the sheriff will be answerable, and that without giving ought of their goods.—And if the sheriff or any other let any go at large, by surety that is not replevisable, if he be sheriff, a constable, or any other bailiff of fee, which hath keeping of prisons, and thereof be attainted, he shall lose his fee and office for ever.—And if the under-sheriff, constable, or bailiff of such as have fee for keeping of prisons, do it contrary to the will of his lord, or any other bailiff being not of fee, they shall have three years imprisonment, and make fine at the king's pleasure.—And if any withhold prisoners replevisable, after that they have offered sufficient surety, he shall pay a grievous amerciamment to the king, and if he take any reward for the deliverance of such, he shall pay double to the prisoner, and also shall be in the great mercy of the king.”

IN WHAT
CASES AND WHO
MAY BAIL.

The statutes 23 Hen. 6. c. 9, and the 1 & 2 Ph. & M. c. 13, contain further regulations upon this subject: and the latter statute extends the power of bailing to justices of the peace (a). The 24 Geo. 2. c. 55, enacts, that where a warrant has been backed, and the party accused has been taken out of the county where the supposed offence has been committed, any justice of the county where he was taken, may, if the offence be bailable, take bail; and the same provision is extended to Ireland, by 44 Geo. 3. c. 92. s. 1; and the 45 Geo. 3. c. 92, and the 48 Geo. 3. c. 58. s. 2, enact, that where the offender escapes from one part of the United Kingdom to the other, he may be bailed by any judge or justice of that part of the United Kingdom where he was apprehended, unless the judge who granted the warrant has written the words “*not bailable*” on the back of the process.

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We may therefore consider the power of justices to bail under the three following heads: 1st, when they *cannot* bail,—2dly, when they have a *discretionary* power,—3dly, when they *must* bail.

1st, *When justices cannot bail.* It may be collected from the preceding observations, and from the statute 3 Edw. 1. c. 15, that justices of the peace *cannot bail* in the following instances. Treason, whether relating only to the coin, or more immediately

When justices
cannot bail.

(a) Burn, J. Bail, IV.

WHEN JUSTICES
CANNOT BAIL.

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affecting the person of his majesty (*a*). Murder (*b*)—Homicide, if the prisoner be clearly the slayer, and not merely suspected to be so; and this is said not to beailable, although it appears to the justice that the killing was in self-defence (*c*): but the latter position seems questionable, and it should seem, that if it appear to have been by misadventure, or in self-defence, a justice may safely liberate the party on his finding sufficient sureties. Burglary (*d*)—felony (*e*)—persons committed for felony who have broken prisons (*f*)—outlaws (*g*)—persons who have abjured the realm (*h*)—approvers (*i*)—persons taken with the mainour or in the fact of taking the thing stolen (*k*)—persons charged with arson (*l*)—persons excommunicated (*m*)—forgers (*n*)—horse-stealers (*o*)—persons who on examination confess themselves guilty of the felony (*p*)—all these are clearly not admissible to bail by a justice of the peace.

When justices
may in their dis-
cretion bail.

2. *When justices may in their discretion bail.* The cases in which it is in the discretion of the justices to bail, and some of which are enumerated in the before-mentioned statute, 3 Edw. 1. c. 15, are, thieves openly defamed, and known (*q*)—persons charged with other felonies than those mentioned in the statute

(*a*) 4 Bla. Com. 298. 2 Hale, 134. Burn, J. Bail, IV.

(*b*) 4 Bla. Com. 298. 2 Hale, 139. Burn, J. Bail, IV. Comb. 298. 111.

(*c*) Id. ibid. 2 Hale, 139. Hawk. b. 2. c. 15. s. 33, 4, and sect. 6. 3. Burn, J. Bail, IV. Bac. Abr. Bail, B. Barlow, J. 51. Dick. J. Commitment, II. n. a. Examination, III. Homicide, III. and IV.

(*d*) Comb. 106.

(*e*) It appears from 2 T. R. 77, that the Court of King's Bench will not in general bail where a party is committed for felony on a sufficient commitment or depositions.

(*f*) 4 Bla. Com. 298. Hawk. b. 2. c. 15. s. 42. 2 Hale, 133. Burn, J. Bail, IV.

(*g*) 4 Bla. Com. 298. 2 Hale, 132. Burn, J. Bail, IV.

(*h*) 4 Bla. Com. 298. 2 Hale, 133. Burn, J. Bail, IV.

(*i*) 4 Bla. Com. 299. Hawk. b. 2. c. 15. s. 41. 2 Hale, 133. Burn, J. Bail, IV.

(*k*) 4 Bla. Com. 299. Hawk. b. 2. c. 15. s. 41. 2 Hale, 133. Burn, J. Bail, IV.

(*l*) 4 Bla. Com. 229. Hawk. b. 2. c. 15. s. 45. 2 Hale, 134. Burn, J. Bail, IV.

(*m*) 4 Bla. Com. 299. 2 Hale, 134. Burn, J. Bail, IV.

(*n*) Hawk. b. 2. c. 15. s. 45.

(*o*) 2 Stra. 1216.

(*p*) Hawk. b. 2. c. 15. s. 40. Burn, J. Bail, IV. Id. Confession. Com. Dig. Bail, F. 2.

(*q*) 3 Edw. 1. c. 15. Ante, 93. 4 Bla. Com. 299. Hawk. b. 2. c. 15. s. 44. Burn, J. Bail, IV.

3 Edw. 1. c. 15, or manifest or enormous offences, under the degree of felony, not being of good fame (*a*)—accessaries to felony who labour under the same want of reputation (*b*), but when there are strong presumptions of guilt against a person charged as accessory, he is not bailable (*c*).

WHEN JUSTICES
MAY IN THEIR
DISCRETION
BAIL.

Persons guilty of affrays may be bailed or not at the discretion of the magistrate, but it is said, that he ought to be very cautious how he takes bail if a wound has been given from which death may probably ensue (*d*).

So persons apprehended on slight suspicion of felony, not excepted in the statute, may be bailed or committed at the discretion of the justice, as for larceny, robbery, or burglary; but not for treasons mentioned in the statute, arson, or homicide (*e*). In prosecutions for obtaining goods by false pretences (*f*), or for receiving stolen goods (*g*), it seems discretionary in one justice to take bail.

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The third class are such as must be bailed, as persons of good fame charged with a bare suspicion of manslaughter or other inferior homicide (*h*). Persons charged with petit larceny of articles not exceeding the value of twelve pence if they have not been previously guilty of any similar offence (*i*). And by the express terms of the 3 Edw. 1. c. 15, persons accused of some trespass for which they ought not to lose life or member are to be bailed, and therefore individuals apprehended for assaults and other small misdemeanors, or any offence below felony, must be bailed unless they be excluded from it by some special act of parliament (*k*).

When justices
must bail.

(*a*) 3 Edw. 1. c. 15. Ante, 93, 4. Hawk. b. 2. c. 15. s. 45. 4 Bla. Com. 299. Burn, J. Bail, IV. Dick. J. Bail, II.

(*f*) 30 Geo. 2. c. 24. s. 2.

(*g*) 2 East P. C. 754. 39 & 40 Geo. 3. c. 87. s. 22. acc. 2 T. R. 77, semb. contra.

(*b*) 3 Edw. 1. c. 15. Ante, 94. 4 Bla. Com. 299. Hawk. b. 2. c. 15. s. 53. Burn, J. Bail, IV.

(*h*) 4 Bla. Com. 299.

(*i*) 4 Bla. Com. 299. 3 Edw. 1. c. 15. Hawk. b. 2. c. 15. s. 50. Dick. J. Bail, II.

(*c*) Id. ibid.

(*d*) Hawk. b. 1. c. 63. s. 19. Bac. Abr. Bail, B.

(*k*) 2 Hale, 127. 4 Bla. Com. 298. Burn, J. Bail, IV. Dick. J. Bail, II.

(*e*) Hawk. b. 2. c. 15. s. 49. Dick. J. Bail, II.

WHEN JUSTICES
MUST BAIL.

It is laid down, that in all cases where one justice by his warrant can apprehend, he may bail in cases where bail are allowable; and that the concurrence of two magistrates is not necessary (*a*). But the statute of Philip & Mary (*b*), requires every bailment for felony to be made by at least two justices, except in London, Middlesex, and other cities and towns corporate where bail may be taken, even in this case by a single justice as before the enacting of that statute (*c*).

Sheriff's bailing.

By the common law, the *sheriff* had power only to bail those persons who were indicted before him at his torn. By 1 Edw. 4. c. 2, he is required to return all indictments taken before him, at his torn, to the justices of the next sessions. At this day, therefore, he has no power of this kind, or at least it is never exercised in practice upon criminal charges (*d*). It has indeed been supposed (*e*), that he may take a recognizance, though not a bond; but it appears from the authorities, that he cannot, in any way, take on himself to set a prisoner at liberty on bail, whom he once obtains in his custody (*f*).

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Bailing by court
of K. B. or a
judge.

The Court of King's Bench, or any judge thereof, in vacation (*g*), not being restrained or affected by the statute 3 Edw. 1. c. 15, in the plenitude of that power which they enjoy at common law, may, in their discretion, admit persons to bail in all cases whatsoever, though committed by justices of the peace or others, for crimes in which inferior jurisdictions would not venture to interfere, and the only exception to their discretionary authority is, where the commitment is for a contempt, or in execution (*h*). Thus they may bail for high treason (*i*), murder (*k*), man-

(*a*) 6 Mod. 179. Com. Dig. Bail, F. 4.

(*b*) 1 & 2 P. & M. c. 13.

(*c*) Dick. J. Bail, III. Dick. Sess. 88.

(*d*) 2 Hen. Bla. 418. 4 T. R. 505. 2 Saund. 59 b. Hawk. b. 2. c. 15. s. 26, 27. Bac. Ab. Bail, A.

(*e*) 2 Saund. 59 b.

(*f*) 4 Term Rep. 505. 2 Hen.

Bla. 418. Lamb. 15. Dick. J. Bail, I.

(*g*) Skin. 683. Salk. 405. 2 Stra. 911.

(*h*) 3 East, 163. 2 Hale, 129. Hawk. b. 2. c. 15. s. 47. Bac. Abr. Bail, C. D. Com. Dig. Bail, F. 4. 4 Bla. Com. 299.

(*i*) Leach, 163. Comb. 111.

(*k*) 3 East, 163.

slaughter (*a*), forgery (*b*), rapes (*c*), horse-stealing (*d*), libels (*e*), and for all felonies and offences whatever (*f*).

BAILING BY A
COURT OR A
JUDGE.

But this power is to be exercised in the discretion of the court, and none can claim its benefits *de jure* (*g*). And though the judges are not compelled to observe the rules prescribed by the statute of Westminster the first, yet, in their uniform practice, they pay a due regard to them, and seldom admit a person to bail, who is there expressly declared to be irreplevisable by the inferior magistrates, without some particular circumstances are shewn to exist in his favor (*h*). And it is not usual for this court to bail in cases of felony, unless when, in consequence of the defect of the commitment, and of the examination and depositions, it appears doubtful whether any offence has been committed (*i*). And, however defectively the mittimus may have been framed, yet, if from the depositions the court can collect that a felony has been committed, they will not bail the prisoner, but remand him upon a special rule (*k*). And the ill health of the party in custody, is not of itself sufficient ground to induce this court to bail him (*l*). Where it appears to the court of K. B. that a prisoner ought to be bailed for felony, if he be unable to defray the expences of being brought to Westminster for that purpose, they will grant a rule to shew cause why he should not be bailed by a magistrate in the country, with a *certiorari* to return the depositions before them (*m*). In the case of an assault, the application to have the defendant bailed should be made to a judge at chambers, and not by motion to the court (*n*). We shall hereafter consider the necessity for bailing under the act of Habeas Corpus.

[99]

The sureties ought to be, at least, two men of ability, but whose sufficiency, as well as the sum to be expressed in their

What is sufficient bail.

(*a*) 2 Stra. 1242. Comb. 111.

(*b*) Cowp. 333.

(*c*) 4 Burr. 2179.

(*d*) 2 Chit. Rep. 110.

(*e*) 1 Wils. 29.

(*f*) 3 East, 163. 5 T. R. 169.

(*g*) 2 Hale, 129.

(*h*) Bac. Abr. Bail, D.

(*i*) 1 Leach, 484. 2 T. R. 257.

2 Leach, 583. 5 T. R. 169. In

2 T. R. 77, the offence of re-

ceiving stolen goods appears to have been considered as a felony, and therefore bail was refused; but see 2 East. P. C. 754.

(*k*) 3 East, 157.

(*l*) 1 Wils. 29.

(*m*) 1 B. & A. 209. This was a case of manslaughter. The rule was afterwards made absolute, see 1 Burn, J. 24th ed. 260.

(*n*) 2 Chit. Rep. 110.

WHAT IS
SUFFICIENT
BAIL.

recognizance, are, it is said, left in a great degree to the discretion of the magistrate, and therefore he may examine them, upon oath, as to the value of their property (*a*). And every one of the bail ought to be of ability, to answer the sum in which he is bound, which in times when money was more valuable than at present, was said ought never to be less than £40 for a capital crime, but might be as much higher as the justices in their discretion thought fit to require, upon consideration of the ability and quality of the prisoner, and the nature of the offence (*b*). And after the defendant has been admitted to bail, the court will not, on affidavit of aggravating facts, require the bail to be increased (*c*).

[100] And it is said not to be usual for the King's Bench to bail on a habeas corpus, on a commitment for treason or felony, without four sureties, but for any inferior offence, two are sufficient; in both cases, in that court, the number of the bail must be mentioned in the *notice*, otherwise the court will reject the application (*d*). And if a rule of court require two bail, and one of the bail appear and be insufficient, the defendant will be remanded (*e*). And though the commitment of the magistrate be informal, the court of King's Bench will not discharge the defendant in case it appears that a great offence is charged upon him, without ample security for his appearance; and in a late case of this nature, the prisoner was compelled to enter into a recognizance, himself in £1000, and four sureties in £500 each (*f*); and, after conviction for a libel, the defendant, who was bailed on the ground of illness, was obliged to find bail, himself in £2000, and two sureties in £1000 each (*g*). A person convicted of an infamous crime, as perjury, cannot be admitted as an adequate surety (*h*). But an attorney is not precluded from thus assisting his client, as the rule of court prohibiting him from becoming bail in general, does not

(*a*) 2 Hale, 125. Hawk. b. 2. c. 15. s. 4. Bac. Ab. Bail, F. Com. Dig. Bail, K. 1. Dalt. J. c. 114. Dick. J. Bail, II. and id. V.

(*b*) Id. *ibid.* and see language of the 31 Car. 2. c. 2. s. 3. and 2 Wils. 159, as to the description of the bail.

(*c*) 2 Chit. Rep. 109.

(*d*) Hawk. b. 2. c. 15. s. 4. n. 1. Bac. Ab. Bail, F. 2 T. R. 255. 1 Leach, 486. 1 Stra. 5. 2 Stra. 855. Com. Dig. Bail, K. 1. Gilb. L. & E. 4. Dick. J. Bail, V. See forms, Hand's Prac. 522, and post, last vol.

(*e*) Dougl. 466, in notes.

(*f*) 2 T. R. 257. 1 Leach, 486.

(*g*) 1 Stra. 9. Id. 5.

(*h*) 4 T. R. 440.

apply to cases of criminal accusation (*a*). A married woman cannot be bound by recognizance, because it is not capable of being estreated (*b*); but, in this respect, peers and commoners stand on the same footing (*c*).

WHAT IS
SUFFICIENT
BAIL.

In criminal cases, no justification being requisite, bail is absolute in the first instance (*d*). The magistrate may, however, examine them on oath as to the sufficiency of their estate (*e*). And it is said, that if he be deceived, he may require fresh sureties (*f*). And though in general, before a justice of the peace, no notice of bail is requisite; there is an express provision contained in 30 Geo. 2. c. 24. s. 17, that no person charged on oath, with having been guilty of obtaining any money or goods under false pretences, or any of the offences punishable under that act which require bail, shall be discharged on this security before twenty-four hours' notice at least shall be proved by oath, to have been given in writing to the prosecutor, of the names and places of abode of the persons proposed to be bail, unless the bail offered shall be well known to the justice, and he shall approve of them.

Proceedings as
to bail, &c.

[101]

Where an indictment is found at the sessions, and the prosecutor moves for a warrant, the court, when they grant it, will make a note by way of order at the foot of the warrant, that the defendant shall give twenty-four hours notice of bail to the prosecutor; which time the court will, in some cases, order to be extended to forty-eight hours, according to the circumstances stated, and a judge or justice of the peace after sessions will, upon producing a certificate of a bill having been found, grant a warrant on a similar order, the intent of which notice is, that the prosecutor may have an opportunity of inquiring into the sufficiency of the bail; that if they are not satisfactory, he may have an opportunity of opposing them (*g*). But where the defendant, in order to avoid being apprehended under a warrant upon indictment, found or preferred, voluntarily goes before a magistrate and

(*a*) Dougl. 466.

(*b*) Styles, 369. Hawk. b. 2. c. 15. s. 84. 3 M. & S. 1. Ante, 21.

(*c*) 1 Salk. 104.

(*d*) 2 Bla. Rep. 1110. Tidd's Prac. 250.

(*e*) 2 Hale, 125. Dick. J. Bail.

(*f*) Hawk. b. 2. c. 15. Dick. J. Bail.

(*g*) Cro. C. C. 15.

PROCEEDINGS AS TO BAIL, &c. offers bail to answer the supposed offence, it is said that no notice of bail is requisite (*a*).

[102] It appears that if a party is not ready with bail at the time he is apprehended, and the offence is bailable, he may, at any time before conviction, be released from imprisonment on finding sureties (*b*). And after the recognizances have been entered into, the justice before whom the transaction takes place, will issue his warrant called a *liberate*, to the gaoler to discharge him (*c*). And it is said, that justices of the peace will sometimes send the prisoner to some private prison for a short time, to afford him an opportunity of procuring bail before he is committed for trial; but that this practice has been disapproved of as inconvenient, and not agreeable to law (*d*). It is however the present practice, especially in cases where notice of bail is requisite, in order to prevent the necessity of committing defendant in the mean time.

Of the offence of taking insufficient bail.

We have before seen that the statutes 3 Edw. 1. c. 15. and 1 & 2 Ph. and M. c. 13. and 2 & 3 Ph. and M. c. 11. (*e*) subject parties to punishment for *improperly taking bail* in cases where the offence is not replevisable, and the admitting bail where it ought not to be taken, is punishable by the justices of assizes, by fine, or by the court of King's Bench by information, or it is liable to be visited as a negligent escape at common law (*f*). So, on the other hand, the offence of taking insufficient bail, subjects the parties offending to punishment, but if the prisoner who is bailed by insufficient sureties actually appear according to the condition of the recognizance, it seems that those who admitted him to bail will be excused, as the end of the law is answered by his appearance (*g*); if, however, such insufficient sureties were taken corruptly, the magistrate would continue liable to an information or indictment (*h*).

(*a*) Cro. C. C. 16.

(*b*) 1 Burr. 460. Hawk. b. 2. c. 16. s. 1. n. 1. This is analogous to proceedings in a civil suit. Imp. K. B. 200. 684, 7th edit. Imp. C. P. 179, 5th edit.

(*c*) Dick. J. Bail, VI. Where see form, and post, last vol.

(*d*) 1 Hale, 123. sed quære.

(*e*) Ante, 94.

(*f*) Hawk. b. 2. c. 15. s. 7 to 13. 2 T. R. 190. 2 Stra. 1206. Poph. 96. Com. Dig. Bail, F. 6. Bac. Ab. Bail, G. H. Dalt. J. c. 114. Dick. J. Bail, V.

(*g*) Hawk. b. 2. c. 15. s. 6. 4 Bla. Com. 297. Bac. Abr. Bail, G.

(*h*) 2 T. R. 190. Dick. J. Bail, V.

On the other hand, justices must take care that, in cases where they are bound by law to bail the prisoner, they do not, under the pretence of demanding sufficient surety, make so excessive a requisition, as, in effect, to amount to a *denial of bail*, which is a grievance expressly prohibited by the 1 W. & M. s. 2. c. 2. by which it is declared that excessive bail ought not to be required, and if it be, this is a misdemeanor, punishable not only by the statute (*a*), but also by the common law, as an offence against the liberty of the subject, and an action lies at the suit of the party wrongfully imprisoned, and an indictment may be supported (*b*); and if several persons conspire to persuade the justice to refuse the bail when sufficient, they may also be indicted (*c*). It is not, however, the duty of the justice to demand bail, but the prisoner is bound to tender it, otherwise the justice may commit him (*d*).

OF THE
OFFENCE OF
REFUSING BAIL.

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With respect to the *form of the recognizance* it is said, that it is left to the discretion of justices of the peace in admitting any person to bail for felony, to take the recognizance either in a certain sum, or else body for body; but that where the charge is for an inferior offence, the recognizance ought only to be expressed for the payment of a certain sum; and the taking a recognizance in any case body for body, is now obsolete. And when it was in use, the bail were not liable, as has been supposed from the mode of expression, on the forfeiture of the recognizance, to a similar punishment with that which the principal, if found guilty, would sustain, but only to be fined (*e*). The principal and the bail usually acknowledge themselves respectively to owe to the king a named sum, which it is said, should not be less than £40, to be levied of their lands and tenements, goods and chattels, if the former shall make default in the performance of the condition which is subscribed, and which requires him to appear at the place of trial, to answer the charge against him. But if the

Form of recognizance.*

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(a) Ante, 94.

(b) 6 Mod. 179. Hawk. b. 2. c. 15. s. 13 to 24. Bac. Ab. Bail, F. Com. Dig. Bail, F. 5. K. 6. 3 Bos. & Pul. 551.

(c) 6 Mod. 179.

(d) 2 Hale, 123. Hawk. b. 2. c. 15. s. 14.

(e) 2 Stra. 911. 2 Hale, 125.

Hawk. b. 2. c. 15. s. 83. Com. Dig. Bail, G. 1. K. 1. Bac. Ab. Bail, K. 1 Barnard. 41. See the form of Recognizance, post, last vol. Burn, J. Bail. Williams, J. Bail. Dick. J. Bail, II.

* See forms, post, vol. iv. 52 to 55.

FORM OF
RECOGNIZANCE.

party accused be an infant (*a*), or in gaol (*b*), or a married woman, then the recognizance is taken only from the sureties (*c*). This recognizance need not be signed by any of the parties bound in the condition (*d*). The practice of the King's Bench appears to be similar to this which we have stated, except that four sureties are required (*e*).

Power of bail.

A party who is thus bailed is still, in supposition of law, in custody of his sureties, who are considered as his keepers, and may therefore reseize, to bring him in if they fear his escape, and take him before the justice or court, and by whom he may be committed, and thus the bail may be discharged from their recognizance, but he is at liberty to find new sureties (*f*); and besides this power of bail to take and render the party accused of a crime, bail in a civil action may have an habeas corpus in some cases to render the defendant in custody on a criminal charge, in order to be relieved from further liability on their recognizance (*g*).

Of certifying the
recognizance.

The recognizances for the appearance of the defendant, must be certified in like manner as the recognizance to prosecute and give evidence. In case of manslaughter and felony, the recognizances are to be certified to the general gaol delivery of the county where the defendant is to take his trial (*h*). But, as we have before seen, for petty larcenies and small felonies, the party accused may be tried at the Quarter Sessions, the recognizance of bail may be certified there (*i*).

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What a forfeiture
of the recogni-
zance and pro-
ceedings thereon.

It was formerly supposed, that the recognizance was forfeited not only when the defendant did not appear, but also when he appeared and stood mute, because, by the condition of the recog-

(*a*) 2 Hale, 126. 1 Salk. 3. Bac. Abr. Bail, K. Com. Dig. Bail, K. 1. Dick. J. Bail, VI.

(*b*) Id. *ibid*. See the form in that case post, last vol. and Burn, J. Bail.

(*c*) Id. *ibid*. 3 M. & S. 1.

(*d*) Dick. Sess. 87. Dick. J. Recognizance.

(*e*) Hawk. b. 2. c. 15. s. 83. Com. Dig. Bail, K. 1. 2 Stra. 911.

(*f*) 2 Hale, 124. 7. Hawk. b. 2. c. 15. s. 3. Com. Dig. Bail, Q. 2.

(*g*) 15 East, 78. 9 East, 154. 3 East, 232. 2 N. R. 245. Tidd. Prac. 400, 5.

(*h*) 1 & 2 P. & M. c. 13. s. 4. 2 & 3 P. & M. c. 10. Dalt. J. c. 111. Dick. J. Bail, III. and see 38 Geo. 3. c. 52.

(*i*) Ante, 91. Dalt. J. c. 164. Burn, J. Examination.

nizance, the defendant is not only to appear, but to answer. But the later opinions hold the contrary, that by appearance, the terms of the recognizance are fulfilled (a). If, however, the sureties are bound by recognizance, that a defendant shall appear in the King's Bench, the first day of such a term to answer to a particular information against him, and not to depart till he shall be discharged by the court, and afterwards the attorney-general enters a *nolle prosequi* as to that information, and exhibits another on which the defendant is convicted, and refuses to appear in court after personal notice, the recognizance is forfeited by the default, for being express that the party shall not depart till he be discharged by the court, it cannot be satisfied unless he be forthcoming and ready to answer to any other information exhibited against him before he receives his discharge, as much as to that which he was particularly bound to answer (b). But, in such case, it seems that the recognizance will not be forfeited by the party's not appearing in court on the first day of every term after he has pleaded to the information, as it may be before he has pleaded (c).

WHAT A
FORFEITURE OF
THE RECOGNIZANCE AND
PROCEEDINGS
THEREON.

The 38 Geo. 3. c. 52. s. 5. provides, that every recognizance for the appearance to answer an indictment for any offence charged to have been committed within the county of any city or town corporate, shall be forfeited if the prosecutor shall, ten days previous to the holding of the next court of oyer and terminer and gaol delivery in the next adjoining, or other county, give notice to the person bound in such recognizance of the intention to prefer such indictment in the next adjoining, or other county, if the party bound in such recognizance shall not appear, but if he shall appear, then the recognizance shall be discharged, the same as if the party bound thereby had complied with the terms thereof; and the next section provides, that leaving such notice at the last place of abode of the party bound by the recognizance ten days before the holding of the sessions shall suffice, and that the recognizance shall not be estreated or returned into the exchequer,

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(a) Hawk. b. 2. c. 15. s. 84. Ab. Bail, L.
Bac. Ab. Bail, L.

(b) 10 Mod. 152. Fortes. 358. Bac. Ab. Bail, L.
Hawk. b. 2. c. 15. s. 84. Bac.

(c) Hawk. b. 2. c. 15. s. 84.

WHAT A
FORFEITURE OF
THE RECOGNIZ-
ANCE AND
PROCEEDINGS
THEREON.

until the next following session, in order that such recognizance may be discharged, in case the party bound shall show sufficient cause for discharging the same.

The consequences of the want of a strict compliance with the terms of the recognizance, and the practice of estreating into the exchequer, and the mode of being relieved from the forfeiture, appear to be the same as in case of forfeiture of a recognizance to prosecute or give evidence (*a*). Where a recognizance was estreated for defendant's non-appearance to an indictment against him for embezzlement of county bridge money received by him as constable, the court discharged the same conditionally, on producing consent of the county, he having been in gaol for a considerable time (*b*); but the court in another case held that the circumstance of the defendant's family having become burthensome to the parish was not a sufficient ground for discharging the recognizance, he having been committed on his forfeited recognizance (*c*). It appears to be a general rule, that the defendant and his bail cannot be called upon their recognizance, except on the day on which he is bound to appear; if he is called on any other day, notice must be given of the intention (*d*). The bail of a person acquitted of perjury, may move to be discharged from their recognizance before the acquittal is entered on the record, because it appears on the postea (*e*).

Of the commit-
ment.*

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When a person has been apprehended for an offence that is not bailable, and a *prima facie* case is made out against him by witnesses or evidence entitled to a reasonable degree of credit, or where the charge is for an offence which is bailable, and he neglects to offer sufficient bail, he must be committed (*f*). And this brings us to the consideration of the mittimus, or commitment, or warrant, to the gaoler to receive the defendant.

(*a*) Ante, 92. 4 Geo. 3. c. 10.
Cro. C. C. 23 to 27. Hawk.
b. 2. c. 15. s. 85.

(*b*) 6 Price, 102, and see 13
Id. 299.

(*c*) 3 Price, 261.

(*d*) R. T. II. 237.

(*e*) 1 Wils. 315.

(*f*) 1 Bar. & Cres. 43. 50.
Hawk. b. 2. c. 16. s. 1. 1 Hale,
583. Bac. Ab. Commitment, A.
Dick. J. Commitment, I. We
have already seen when a wit-
ness may be committed, ante, 91.

* As to the commitment in general, see Hawk. b. 2. c. 16. 1 Hale, 583.
2 Hale, 122. Bac. Ab. Commitment. Burn, J. Commitment. Dick. J.
Commitment.

A magistrate who has power to examine the defendant, has also in general, as incident to his office, power to commit him (*a*); and the several statutes relative to backing warrants, and enabling judges and justices to take the examination of a defendant, enable such judge and justice to commit him when the offence is not bailable, or where sufficient bail is not offered (*b*). These we have already considered (*c*). Justices have a power to commit any person in this country, who has offended against the law of Ireland, in order to be sent over there to take his trial (*d*). The privy council and secretaries of state, and some other persons in authority, have also the power of committing for treason and other offences affecting the public (*e*).

The prisoner ought to be committed to a prison within the realm of England, and it is expressly enacted by the habeas corpus act, that no subject shall be sent into Scotland, Ireland, Jersey, Guernsey, Tangier, or into parts beyond the seas, whether within or without the dominion of his Majesty; and if he be, the act gives him an action of false imprisonment, and provides that he shall recover treble costs, and not less than £500 damages (*f*). The party ought also to be committed to a common prison of the county in which the offence was committed and the warrant was granted, though backed into another district (*g*). And by the 4 Geo. 4. c. 64, vagrants are to be committed to the House of Correction, and not elsewhere. And it has been enacted, that all murderers and felons shall be imprisoned in the common gaol, and not elsewhere, and that the sheriff shall have the keeping thereof (*h*). It has been said, that in cases of felony, the prisoner should not be committed by justices of the peace to

To what prison.

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(*a*) 1 Ld. Raym. 66. Hawk. b. 2. c. 16. s. 3. Bac. Ab. Commitment, D. Dick. J. Commitment, I.

(*b*) 24 Geo. 2. c. 55. 44 Geo. 3. c. 92. 13 Geo. 3. c. 31. 45 Geo. 3. c. 92. 48 Geo. 3. c. 58.

(*c*) Ante, 45.

(*d*) 2 Stra. 848. 4 Taunt. 34.

(*e*) 7 T. R. 733, 742. Hawk. b. 2. c. 16. Dick. J. Commitment, I. Ante, 34.

(*f*) 31 Car. 2. c. 12. Hawk.

b. 2. c. 16. s. 5. Bac. Ab. Commitment, C.

(*g*) 24 Geo. 2. c. 55. s. 1. Hawk. b. 2. c. 16. s. 6 to s. 10. Bac. Ab. Commitment, C. and Gaol, C. Dick. J. Commitment.

(*h*) See recital in 6 Geo. 1. c. 19. s. 2. Comb. 403. 11 & 12 W. 3. c. 19. s. 3. 5 Hen. 4. c. 10. Hawk. b. 2. c. 16. s. 6. Burn, J. Commitment, and Gaol, C.

TO WHAT
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the new prison (*a*). But the House of Correction for the county of Middlesex, adapted to the separate reception of felons, pursuant to the 22 Geo. 3. c. 64. and other acts, is a legal prison for the safe custody of persons under a charge of high treason (*b*), and the Tower is a legal prison for state prisoners by immemorial usage (*c*); and it is provided, that persons charged with small offences may be committed by justices to the House of Correction, or to the common gaol (*d*). And the Court of King's Bench may commit defendants to any prison in England which they shall think most proper, and the party so committed, cannot be removed or bailed by any other court (*e*). The 60 Geo. 3. and 1 Geo. 4. c. 14, empowers justices acting in any place not being a county, to commit offenders to the gaol of the county. The party should be committed to the proper prison in the first instance; for, to prevent the vexation and danger of protracted imprisonment which might otherwise be occasioned by his removal from gaol to gaol, it is provided by the habeas corpus act, that if any subject shall be committed to any prison, or in custody of any officer for any supposed criminal matter, he shall not be removed from such prison and custody into the custody of any other officer, unless it be by habeas corpus or some other legal writ, or where he is delivered to a constable or other inferior officer to be conveyed to some common gaol, &c. on pain of forfeiture of £100 for the first offence, and £200 for the second (*f*).

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The 4 Geo. 4. c. 64, provides for the mode and places of imprisonment of persons committed for trial of various offences, and the admissions, at proper times, and under proper restrictions, of persons with whom such prisoners may desire to communicate. And the Court of King's Bench may compel the observance of this enactment, by mandamus, ordering the sheriff and gaoler to admit an attorney into the prison, to consult with the prisoner (*g*). On this act it has been decided, that prisoners committed to gaol for trial, who are able but refuse to work, are not entitled by law to have any food provided for them by the public;

(*a*) 1 Ld. Raym. 66. 2 Hale, 123. 1 Hale, 535, note 1.

(*b*) 8 T. R. 172.

(*c*) 5 Mod. 82. 3 T. R. 173. 1 Ld. Raym. 425.

(*d*) 6 Geo. 1. c. 19, s. 2.

(*e*) Moore, 666. Bac. Ab. Gaol, C.

(*f*) 31 Car. 2. c. 2. Hawk. b. 2. c. 16. s. 10.

(*g*) The King v. Thurtell and others, K. B. M. T. 1823.

TO WHAT
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and therefore where a magistrate reported as an abuse, to the justices at the quarter sessions, that untried prisoners had been compelled to work at the tread-mill, and the justices at the sessions ordered that the tread-mill should be applied to the employment of other prisoners as well as those sentenced to hard labour; and that those committed for trial who were able to work, and had the means of employment offered them, by which they might earn their support, but who refused to work, should be allowed bread and water only, this court refused to grant a mandamus to compel the justices to order such prisoners any other food (*a*).

The effect of a commitment to prison for a criminal charge, upon the proceedings in an action depending in the Court of Common Pleas, is different to that upon an action depending in the Court of King's Bench. The Court of Common Pleas has no jurisdiction to bring a defendant up out of a criminal custody, because it has none to remand him to it, and therefore no laches are imputable in that court to a plaintiff for not charging defendant in execution within two terms after his surrender, when he has been committed to a criminal custody for a misdemeanor, and continued in such custody (*b*). So when a debtor is in custody on a criminal charge, he cannot, in the Court of Common Pleas, be charged with a civil action (*c*); but it is otherwise in the King's Bench (*d*).

Though it has been said that a commitment need not be drawn with the same precision as an indictment (*e*), yet it is very important that it should be framed with accuracy, or the party may, though prosecuted for a felony, be discharged out of custody, or, if he escape, the officer may not be punishable (*f*). The formal requisites of the commitment may be considered under the following heads (*g*).

Form of commitment in general.

1st, Every final commitment must be in writing under hand and seal, and show the authority of the magistrate, and the time and

(*a*) 2 B. & C. 286. 3 Dow. & Ry1. 510. S. C.

(*b*) 1 Bing. 221.

(*c*) Id. *ibid*. 2 New R. 246.

(*d*) Id. *ibid*. and ante, 63.

(*e*) 5 T. R. 170. 2 Leach, 584.

(*f*) Bac. Abr. Commitment, E. Hawk. b. 2. c. 16. s. 16.

(*g*) See the forms, post, last volume. Burn, J. Commitment. Dick. J. Commitment.

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GENERAL.

place of making it (*a*). And a magistrate cannot commit for a contempt without a warrant in writing (*b*). A magistrate, however, may, by parol, order a party to be detained a reasonable time, until he can draw out a formal commitment (*c*). And it is said, that though advisable, it is not absolutely necessary to state that the commitment was made by the justice in that character, for though his authority do not appear at the beginning of the mittimus, it may be supplied by averment (*d*); and this point has been so decided (*e*). In order, however, to show the jurisdiction of the magistrate, to take cognizance of, and commit for an offence perpetrated out of his county, on the ground of the party having been apprehended there, as in case of a person arrested in one county for bigamy committed in another, it is usual to state the fact in the commitment (*f*).

2ndly, The mittimus may be made either in the king's name, or that of the justice awarding it (*g*), but the latter is the most usual.

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3dly, The mittimus should be directed to the gaoler or keeper of the prison (*h*), and not be generally, to carry the party to prison (*i*). But a commitment to the Tower of London, is said to be a good commitment to the lieutenant of the Tower (*k*). The magistrate's commitment at the police offices for the metropolis, is merely directed to the gaoler (*l*). But in other counties and places, the justice's warrant and commitment is usually directed to a constable, and to the keeper of the proper gaol, commanding the former to convey the prisoner into the custody of the latter, and the latter to receive and keep him (*m*).

4thly, The prisoner should be described by his name and surname, if known, and, if not known, then it may suffice to de-

(*a*) 2 Hale, 122. Hawk. b. 2. c. 16. s. 13. Bac. Abr. Commitment, E.

(*b*) 2 Marsh. Rep. 377.

(*c*) 7 East, 537. 2 Hale, 122.

(*d*) 2 Hale, 122. Dick. J. Commitment, IV.

(*e*) Kenyon's Rep. 122.

(*f*) 1 Jac. 1. c. 11. Toone, 63.

(*g*) Dalt. J. c. 125. Hawk.

b. 2. c. 16. s. 14. Dick. J. Commitment, IV.

(*h*) Hawk. b. 2. c. 16. s. 13.

(*i*) 2 Stra. 934. 1 Ld. Raym. 424.

(*k*) 1 Ld. Raym. 425.

(*l*) See form, post, last vol.

(*m*) Burn, J. Commitment. See form, post, last vol.

scribe the person by his age, stature, complexion, colour of hair, and the like, and to add, that he refuses to tell his name (*a*).

FORM OF
COMMITMENT IN
GENERAL.

5thly, It is said that it is safe to state, that the party has been charged upon oath, but this is not necessary, for it has been resolved, that a commitment for treason or for suspicion of it, without setting forth any particular accusation or ground of the suspicion, is valid (*b*). And it was recently decided not to be necessary, because a commitment may be *super visum*, and then an oath is not requisite (*c*); and for the same reason, it is not necessary to state any part of the evidence adduced before the magistrate, or to show the grounds on which he has thought fit to commit the defendant (*d*).

6thly, But it is necessary to set forth the particular species of crime alleged against the party, with convenient certainty, whether the commitment be by a justice of the peace, a secretary of state, the privy council, or any other authority (*e*). There appear to be several reasons for requiring that the cause of the commitment should be distinctly stated, for if no cause be shown, and the prisoner escape, it is said that the officer is not punishable (*f*), nor will it be an offence under the statute 16 Geo. 2. c. 31, to enable the prisoner to escape from the prison (*g*). And the sheriff is to make a calendar of the prisoners in his gaol, and deliver it to the justices of gaol delivery, stating the prisoners, and the crime for which they are detained in custody (*h*). And lastly, because the court before whom the prisoner is removed by habeas corpus, ought to discharge or bail him (*i*). And this rule applies not only where no cause at all is expressed in the commitment, but also

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(*a*) 1 Hale, 577. Burn, J. Commitment, III. See ante, 39, 40, as to a warrant against an unknown person.

(*b*) Hawk. b. 2. c. 16. s. 17. 1 Stra. 3 & 4. 2 Wils. 158. Dick. J. Commitment, IV.

(*c*) 1 Leach, 167.

(*d*) 2 Wils. 158.

(*e*) 11 St. Tr. 304. 318, 19. 2 Wils. 158, 9. Cro. Jac. 81, 2. Hawk. b. 2. c. 16. s. 16. 1 Hale,

584. 2 Hale, 122. 2 Inst. 52. 1 Stra. 3 & 4. 14 East, 70. 72, 73. Dick. J. Commitment, IV.

(*f*) Id. ib. 2 Inst. 52. But see 1 Hale, 584. 2 Hale, 123. Bac. Abr. Escape, A.

(*g*) 1 Leach, 97. 363.

(*h*) 2 Hale, 122. 55 Geo. 3.

(*i*) 2 Inst. 52. Hawk. b. 2. c. 16. s. 16. Dalt. J. c. 166. 2 Wils. 158, 9. Cro. Jac. 81, 2. 11 St. Tr. 318.

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GENERAL.

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when it is so loosely set forth, that the court cannot judge whether it were a reasonable ground of imprisonment (*a*). And, therefore, if the commitment be for felony, it ought not to be generally *pro felonia*, but it must contain the special nature of the felony, briefly as for felony of the death of J. S. or for burglary in breaking the house of J. S., &c. (*b*). But though it was formerly thought otherwise, it appears now to be settled, that a commitment for high treason, or suspicion of treason generally, or for treasonable practices, without stating any overt act or other particulars of the crime is sufficient (*c*). And it has been observed, that there are precedents of commitment for felony in general in good authors, without stating the specific accusation (*d*). So in Wilkes' case (*e*), a commitment for publishing "a most infamous " and seditious libel, entitled, 'the North Britons,' number 45, " tending to inflame the minds, and alienate the affection of the " people from his Majesty, and to excite them to traitorous insurrections against the government," was held sufficient, though it was urged that the libel ought to have been set forth, in order that the court on a habeas corpus might be able to fix the quantum of bail. So it has been held, that a commitment which charged the party generally with insulting justices of the peace in the execution of their office, without specifying what he said or did, is sufficient (*f*). It is, however, in general advisable to describe the offence concisely, but in substance as in an indictment (*g*). In the case of convictions, it has been recently decided, that though the conviction may be correct, yet if the commitment be for a different offence, or do not disclose any offence at all, the magistrate is liable to an action for the imprisonment, &c. under it (*h*). And a commitment for insulting a magistrate must be in writing (*i*), and must specify the time of imprisonment (*k*).

(*a*) 2 Hale, 122. Hawk. b. 2. c. 16. s. 16.

(*b*) 2 Wils. 158, 9. 2 Hale, 122. Dick. J. Commitment.

(*c*) 7 T. R. 736. Hawk. b. 2. c. 16. s. 16. 1 Stra. 3 & 4.

(*d*) Hawk. b. 2. c. 16. s. 16. See Dalt. J. c. 174.

(*e*) 2 Wils. 153. 159.

(*f*) 2 Barnard, 155. But see Hawk. b. 2. c. 16. s. 16.

(*g*) See the numerous precedents, post, last vol.

(*h*) 3 B. & C. 409. 1 Ryan & Moody's R. 129. S. C. 2 Bingham. R. 483.

(*i*) 2 Marsh. R. 377.

(*k*) 5 Barn. & Ald. 895.

FORM OF
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GENERAL.

When the facts of the case will warrant a commitment for felony, the mittimus should not be on suspicion of felony; for Lord Mansfield said, that on such a commitment, a party has a right to be bailed, under the act of habeas corpus (*a*). And a third person who facilitates the escape of a party so committed, would not be indictable under the statute 16 Geo. 2. c. 31. (*b*). And where the offence is created by statute, it should be described accordingly in the mittimus; and, therefore, a defendant who had been committed, “for having with force and arms made an assault on “the prosecutor, with intent feloniously to steal, take, and carry “away from the person, &c.” was bailed, because he was not charged with any offence within the statute 7 Geo. 2. c. 21, which relates to felonious attempts to rob (*c*). So a commitment should not be in the disjunctive (*d*).

It is not necessary, however, to allege in the mittimus, that the offence was “feloniously” committed; and it is sufficient, if it may be collected upon the face of it, that the charge was for a felony; and the Court of King’s Bench will, upon a habeas corpus, accordingly bail or remand the prisoner (*e*). And though the commitment itself be informal, yet, if the *corpus delicti* appear in the deposition returned to the court, the defendant will not be bailed, but remanded (*f*). And in a case where (*g*) it was stated to be a general rule, that upon application to bail upon a habeas corpus, the court requires to see the depositions; and from thence if they see just cause, without regarding the regularity or irregularity of the commitment, discharge or bail the prisoner, and the court, in such a case, never form any judgment whether the facts amount to felony or not, but merely whether enough is charged to justify a detainer of the prisoner, and put him upon his trial. The practice is, that even if the commitment be regular, the court will look into the depositions, to see if there were a sufficient ground laid to detain the party in custody; and if there were not, would bail him: and so, if the warrant of commitment were

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(*a*) 1 Leach, 98, n. a. 484. 2 T. R. 255. Dick. J.
 (*b*) 1 Leach, 97. 363. Commitment, IV. acc. 1 Leach,
 (*c*) 5 T. R. 169. 2 Leach, 533. 162, cont.
 2 T. R. 255. 1 Leach, 434. (*f*) 3 East, 157.
 (*d*) Cald. 26. (*g*) Cald. 295. 1 Leach, 270.
 (*e*) 2 Chit. Rep. 138. 1 Leach,

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informal, and a serious offence shown to have been committed, they will not discharge or bail the prisoner, without first looking into the depositions, to see whether there is sufficient evidence to detain him in custody. And it seems that the commitment omitting the cause for which the party is to be imprisoned, does not make it absolutely void, so as to subject the gaoler or officer to an action for false imprisonment, or excuse him for an escape, for he may plead, as an excuse, that the imprisonment was for felony (*a*).

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In the last volume is given a comprehensive statement of offences, as described in the commitment, arranged in a systematic order (*b*); and where a form is not there to be found applicable to the particular case, the precedents of indictments may be resorted to, from which the statement of the offence may be taken.

7thly, The commitment should point out the *place* of imprisonment, and not merely direct that the party should be taken to prison (*c*). We have already considered the proper prison to which he ought to be conveyed (*d*).

8thly, With respect to the *time* and *mode* of imprisonment, it is observed, that the commitment should have an apt conclusion; namely, to detain the party “until he shall be discharged by due course of law (*e*):” these words alone are proper where the party is committed for an offence not bailable, but where he is committed for want of sureties for a bailable offence, it is usual to direct the gaoler to keep the prisoner in his “said custody for want of sureties, or until he shall be discharged by due course of law.” When the offence is not bailable, the party may be committed until the time of trial, as “until the next general gaol delivery of the said county (*f*),” or “the next general quarter

(*a*) 1 Hale, 584. 2 Hale, 123. Bac. Ab. Escape, A. 2 Saund. 101. y. n. 2. acc. but see Cro. Jac. 81. Bac. Ab. Trespass, D. 3, contra.

(*b*) These are the approved forms used at the principal police offices.

(*c*) 2 Stra. 934. 1 Ld. Raym. 424.

(*d*) Ante, 107, 8.

(*e*) 2 Hale, 123. Hawk. b. 2. c. 16. s. 18.

(*f*) Toone, 100. Williams, J. Commitment, V.

sessions of the peace, to be held in and for the said county (a).” But the most usual and comprehensive words are, “until he shall be discharged by due course of law (b).” But where the commitment is in the nature of punishment, the time of imprisonment must be stated, and if it be until the party be discharged by due course of law it will be bad (c); but where in other respects the time of imprisonment is sufficiently stated, the unnecessary addition of the words “until he be discharged by due course of law,” will not vitiate (d). The mittimus may command the gaoler to keep the party “in safe custody,” for if every gaoler be bound by law to keep his prisoner in such custody, there can be no objection to a mittimus reminding him of his duty (e). And if the conclusion be irregular, it is said that it will not wholly vitiate the mittimus, and that therefore, if a commitment “till further order,” be made by a justice, yet a breach of prison under such warrant would be a felony; and if the party were removed by habeas corpus, yet if the matter appear to be such as will require his detention in custody, or his finding sureties, he shall be bailed or committed accordingly, and not discharged; because the informal conclusion will be rejected (f).

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In *practice*, the commitments made out at the police offices for the metropolis, differ in form from those issued by country magistrates (g). The first are addressed to the Keeper of the Gaol of Newgate, or the New Prison, Clerkenwell, or the Governor of the House of Correction at Cold Bath Fields, or the Governor of Tothill Fields Bridewell, &c. and to their respective deputies; and after stating the county or district in the margin, the justice commands such gaoler to receive the body of the defendant, describing him by name and addition, if they be known, or if not, by as minute a description as the case will allow, and adding, that he refuses to tell his name, brought before such justice by such a person, and charged before such justice upon the oath of such a person or persons upon oath or oaths, with such an offence

(a) Toone, 360. See 1 B. & A. 572, n.

(b) Dick. J. Commitment, IV.

(c) 5 B. & A. 895. 2 Bl. Rep. 806. See 7 Taunt. 63. 4 B. & A. 218.

(d) 3 M. & S. 203, 4.

(e) Hawk. b. 2. c. 16. s. 15.

1 Stra. 3.

(f) 1 Hale, 584.

(g) See forms, post, last vol.

FORM OF
COMMITMENT IN
GENERAL.

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(stating it concisely). No precise mode of introducing the statement of the offence appears material. The most usual form runs "with feloniously assaulting, &c." or it may be "with having on, &c." or "for unlawfully, &c." or "charged with a misdemeanor, to wit, with having, &c." or "with suspicion of having been guilty of, &c." or "for that he the said C. D. on, &c." The latter seems the preferable form, where the charge is long, and then the usual form of an indictment may be adopted in describing the offence. If the offence be against a statute, the description should close with the words "contrary to the form of the statute or statutes in such case made and provided." The commitment then proceeds with a direction, "him therefore safely keep in your said custody, until he shall be discharged by due course of law;" or if he was committed for a bailable offence and for want of finding sureties, "for want of sureties," or "until he shall be discharged by due course of law."

The form used in other places (*a*) states at the head, the style and jurisdiction of the justice, and is directed to the constable of a named parish or place, and to the keeper of a particular gaol, and commands the constable to convey into the custody of the gaoler the defendant charged upon oath of the offence described as in the other form, and commands the gaoler to receive and keep the party in his gaol until he shall thence be delivered by due course of law; and this form is subject to the same variations as that used at the police offices.

If the magistrate acting within the scope of his jurisdiction, but taking an erroneous view of the effect of the evidence, should come to a wrong conclusion, and commit the defendant, and he should be afterwards discharged by the superior court on a habeas corpus, yet he cannot on that account sue the magistrate (*b*). And a defective commitment will yet be a commencement of a prosecution for coming within the 8 & 9 W. 3. c. 26. s. 9. and not the preferring the bill (*c*).

Expence of conveyance to prison

The expences of conveying the prisoner to gaol, are to be defrayed, as pointed out by the statute 3 James 1. c. 10. and

(*a*) See form, post, last vol.
(*b*) 14 East, 32.

(*c*) 1 East P. C. 186.

27 Geo. 2. c. 3. and sect. 1 (*a*). The first of these statutes directs that every person who shall be committed to the common gaol by any justice, for any offence or misdemeanor, having means or ability thereunto, shall bear his own reasonable charges of sending him to gaol, and of his guard; and if he refuse, the justice may issue his warrant to seize and sell sufficient quantity of his goods. The latter act directs, that when the prisoner has not money or goods in the county where he is taken, sufficient to pay these expences, a justice may, by his warrant, order the treasurer of a county to pay the same. But in Middlesex, the expence is to be borne by the overseers of the poor of the parish where the party was apprehended. By the habeas corpus act (*b*), the charge of conveying an offender is limited not to exceed twelve pence per mile.

EXPENCE
OF CONVEYANCE
TO PRISON.

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It is the duty of the gaoler to receive the party; and if he refuse, or take any thing for receiving him, he is punishable by the justices of gaol delivery (*c*): If a party be committed for felony, and the gaoler will not receive him, the constable must bring him back to the town where he was taken, and that town will be charged with the keeping of him, until the next gaol delivery; or the person that arrested him may in such case keep the prisoner in his own house (*d*). It is provided that felons shall be imprisoned in distinct rooms from those who are confined as debtors (*e*). We have before seen that the gaoler is prohibited from removing the prisoner unless under a lawful authority (*f*). This officer is protected from liability, though he should receive, by mistake of the constable, a person whom it was not intended to confine (*g*).

Gaoler to receive
the prisoner, &c.

It is enacted by the habeas corpus act, that if any officer or gaoler shall, upon demand made by the prisoner or other person on his behalf, refuse to deliver, or within the space of six hours after demand, shall not deliver, to the person so demanding, a

Copy of commitment.

(*a*) Dick. Sess. 401. The provisions of 55 Geo. 3. c. 50. do not seem to affect these regulations. See also 18 Geo. 3.

(*b*) 31 Car. 2. c. 2. s. 2.

(*c*) Dalt. J. c. 170. 4 Edw. 3.

c. 10. 55 Geo. 3. c. 50.

(*d*) Dalt. J. c. 170.

(*e*) 22 & 23 Car. 2. c. 20. s. 13.

(*f*) 31 Car. 2. c. 2. s. 9.

(*g*) Ante, 60. Sir T. Jo. 214.

Cowp. 479. sed vide 3 Campb. 35.

COPY OF
COMMITMENT.

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true copy of the warrant of commitment or detainer of such prisoner, he shall forfeit to the prisoner or party aggrieved, for the first offence, £100, and, for the second, £200; and shall also be deprived of his office (a): and the prisoner suing as the party aggrieved, is entitled to the costs of action (b). And where a person is sent over from Ireland under a warrant from a Secretary of State for that country, charged with any offence, and is committed to prison until he can be brought before a judge, and the warrant is left with the gaoler, this is such a commitment as entitles the prisoner to a copy under the habeas corpus act, after it has been demanded (c). But where a person after appearing before a magistrate, and being unable to find bail, at his own request, is permitted to continue in the custody of the officer for a short time, he is not entitled to a copy of the commitment (d). And service of a demand of a copy of the commitment on the turnkey of a prison, is not sufficient to support an action against the gaoler for the penalty incurred by him under the habeas corpus act, if the gaoler himself were in the prison; but if he be not there, then the deputy may be served; and if the deputy have no deputy, then in the absence of the deputy, service may be made on the turnkey, or it may be left at the gaol: for it is the duty of the governor to leave some person in his place (e).

Certifying the
commitment.

The statute 3 Hen. 7. c. 3. enacts, that every sheriff and gaoler shall certify the names of every prisoner in his custody, at the next general gaol delivery, there to be calendared before the justices of gaol delivery, whereby they may as well for the king as for the party proceed to make deliverance of such prisoners according to the law, on pain of forfeiting 100 shillings (f).

Of the habeas
corpus, and pro-
ceedings thereon
(g).

When a person thus committed is advised that his commitment is illegal, or that he is entitled to be discharged or bailed by a superior jurisdiction, he may obtain relief by writ of habeas cor-

(a) 31 Car. 2. c. 2. s. 5. See a decision on the Scotch Act, 3 Dow. Rep. 169. 174.

(b) 1 H. Bl. 10.

(c) 3 Esp. Rep. 174. see precedent, 7 Wentw. 175. 2 Rich.

C. P. 202.

(d) 1 Str. 167.

(e) 2 Bos. & Pul. 530.

(f) Hawk. b. 2. c. 16. s. 21.

Dick. J. Commitment II.

(g) As to this writ and the

pus, and the proceedings thereon (*a*), which is the only course of proceeding, as a certiorari cannot be obtained, except for the purpose of removing the depositions and other proceedings (*b*). Indeed whenever a person is restrained of his liberty, by being confined in a common gaol, or by a private person, whether it be for a criminal or civil cause, and it is apprehended that the imprisonment is illegal, he may regularly by habeas corpus have his body, and the proceedings under which he is detained, removed to some superior jurisdiction, having authority to examine the legality of the commitment; and on the return, he will be either discharged, bailed, or remanded (*c*). The writ of habeas corpus, whether at common law or under the 31 Car. 2. c. 2. does not issue as a matter of course in the first instance upon application, but must be grounded upon affidavit, upon which the court are to exercise their discretion whether or not the writ shall issue (*d*). There are three descriptions of writs of habeas corpus, more immediately connected with criminal charges, viz. the habeas corpus ad subjiciendum, the habeas corpus ad deliberandum, et recipiendum, and the habeas corpus cum causâ; each of which we will now particularly examine.

The habeas corpus ad subjiciendum (so termed from the language of the writ (*e*), to undergo and receive all such things as the court shall consider of the party in that behalf) issues in criminal cases, and is deemed a prerogative writ, which the king may send to any place, he having a right to be informed of the state and condition of every prisoner, and for what reason he is confined. It is also, in regard to the subject, deemed his writ of right, to which he is entitled *ex debito justitiæ*, and is in the nature of a writ of error to examine the legality of the commitment, and therefore commands the day, the caption, and the cause of

proceedings in general, see 3 Bl. Com. 131 to 139. Bac. Ab. Habeas Corpus. Com. Dig. Habeas Corpus. Hand's Pra. 63 to 74. Williams, J. Habeas Corpus. The 56 Geo. 3. c. 100. extends the benefit of the writ to imprisonments not of a criminal nature.

(*a*) Id. *ibid*.
(*b*) 5 T. R. 158.
(*c*) Bac. Abr. Habeas Corpus, A.
(*d*) 2 Chit. Rep. 207.
(*e*) See form, post, last vol. Hand's Prac. 520. 3 Bl. Com. 131.

OF THE
HABEAS CORPUS,
AND
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THEREON.

detention, to be returned (a). The obligation on judges to issue this writ, is principally governed by the statute 16 Geo. 1. c. 11. and the celebrated act of habeas corpus (b).

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It is provided by the first of these enactments, that if any person be committed by the king himself in person, or by his privy council, or by any of the members thereof, he shall have granted to him without delay a writ of habeas corpus, upon demand or motion made to the court of King's Bench or Common Pleas; and on his giving security on his own bond, to pay the charge of carrying him back, if he should be remanded. The person to whom the writ is directed, is, upon due and convenient notice of the writ, on the return of it, to bring the body into court, and certify the cause of the detainer, and thereupon the court within three court days after such return is made, are to examine and determine the legality of such commitment, and do what to justice shall appertain in delivering, bailing, or remanding him.

The principal habeas corpus act, 31 Car. 2. c. 2. was passed in consequence of the delays which frequently arose from sheriffs, gaolers, and other officers having the king's subjects in their custody, neglecting to make returns to writs of habeas corpus, by standing out an alias and pluries habeas corpus, and sometimes more, and by evading obedience to the writs directed to them from the superior tribunals (c).

After reciting the inconveniences which had arisen from these oppressions, it proceeds to declare, that when any habeas corpus is directed to any ministerial officer or other person, who detains the applicant in his custody, after it has been served on the officer, or left at the gaol or prison with any of the under keepers or deputy of the officers or keepers, the party to whom the writ is awarded shall, *unless the commitment is for treason or felony, plainly and specially expressed in the warrant of commitment*, upon payment or tender of the charges of bringing up his pri-

(a) Id. ibid. Bac. Ab. Habeas Corpus, A.

(b) 31 Car. 2. c. 2. See the

analysis of the provisions in this act, 3 Bla. Com. 136.

(c) 3 Bla. Com. 135.

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soner, not exceeding twelve pence per mile, and upon security being given by his own bond, to pay the charges of carrying him back, if he shall be remanded by the court or judge to which he shall be brought(a), and that he will not make any escape by the way, make return of such writ, and bring the body of the party under restraint before the Lord Chancellor or Lord Keeper of the Great Seal of England for the time being, or the Judges or Barons of the said court from whence the writ of habeas corpus issued, or the other magistrates before whom it was made returnable, and at the same time shall certify the true causes of his detainer or imprisonment, unless the commitment of the said party within three days after the writ has been served upon him, if it be in any place beyond the distance of twenty miles from the place where it is to be returned; and if beyond the distance of twenty miles, and not above one hundred miles, within the space of ten days, and if beyond the distance of one hundred miles, then within the space of twenty days after such delivery(b).

And in order that no person thus required may pretend ignorance of the import of any such writ, the statute proceeds to enjoin, that all writs issued in pursuance of its directions, shall be marked in this manner, "*per statutum tricesimo primo Caroli Secundi Regis*," and be signed by the person who awards them. The act then comes to the most important of all its provisions. It directs, that when any person shall be committed or detained for any crime, unless *for felony or treason plainly expressed in the warrant of commitment*, or as accessory, or on suspicion of being accessory before the fact, to any petit treason or felony, or upon suspicion of such petit treason or felony plainly expressed in the warrant, or unless he is convicted or charged in execution by legal process, the individual conceiving that he has a right to his liberation, may appeal to the Lord Chancellor or Lord Keeper, or any of the twelve Judges in vacation, who upon view of the copy of the warrant of commitment and detainer, or upon oath made that such copy was denied, are hereby authorized and required, upon request made in writing by such person or persons, to grant a habeas corpus under the seal of the court,

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(a) But see 55 Geo. 3. c. 50. (b) Sect. 3.

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over which the judge has jurisdiction, directed to the officer, in whose custody the party so committed or detained, shall be, returnable immediately before the person who awards it, or any other of the judges. On the receipt of this writ, the party in whose custody the individual detained continues, must, within the times limited in the act specified, bring the prisoner before the judge or court, before whom the writ is made returnable, or such justices, barons, or one of them, with the return of the writ and the true causes of commitment and detainer. On this the magistrate, or court, is bound, within two days after the party is thus brought before them, to discharge the prisoner from his imprisonment, on proper sureties for his appearance, if it appear that the cause is bailable; and if not, the prisoner is to be remanded. If, however, the prisoner has wilfully neglected, for the space of two whole terms after his imprisonment, to pray a habeas corpus for his enlargement, he can have no habeas corpus in vacation time in pursuance of this act, but must wait till the commencement of the term ensuing (*a*).

By another section of the same statute, it is provided, that no one delivered by habeas corpus shall be re-committed for the same offence under penalty of £500 (*b*).

It is further directed, that any prisoner may move and obtain his habeas corpus as well out of the Court of Chancery or Exchequer, as out of the King's Bench or Common Pleas; and that the Lord Chancellor or Judges denying the same on sight of the warrant, or oath that it is refused, forfeit severally to the party grieved, the sum of £500, to be recovered in the manner therein directed (*c*).

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When the writ is
to be granted.

In the construction of this statute, it seems, that the cases in which it is compulsory on the court or judge to grant a habeas corpus, are rather dubious; thus it is reported that Lord Kenyon said in a case where the party applying for the writ had been committed by the House of Lords for a breach of privilege, that the Court of King's Bench were bound to grant a habeas corpus,

(*a*) Sect. 4.

(*b*) Sect. 6.

(*c*) Sect. 10.

WHEN THE
WRIT IS TO BE
GRANTED.

but that having seen the return to it, they were also bound to remand the defendant to prison, because the subject belonged to another tribunal (*a*). But this supposed obligation to issue a habeas corpus thus ineffectually, can only exist when the commitment is so general, that the court cannot know its real occasion from the terms in which it is worded, for the courts are not compelled to award it without some reasonable ground be shown by affidavit, for their interference, because if it were otherwise, a traitor, or felon, under sentence of death, a soldier, or mariner, in the king's service, a wife, a relation, or a domestic confined for insanity, might obtain a temporary enlargement by suing out a habeas corpus, though sure to be remanded as soon as brought up on its return (*b*). And the habeas corpus act (*c*) excepts persons committed for felony or treason plainly expressed in the warrant, as well as persons convicted, or in execution, or legal process, who are consequently not entitled to this writ, either in term time or vacation (*d*). And it is said, that none are at liberty to make their prayer, but such as are committed by warrant of a justice of the peace or secretary of state, and not those committed by rule of court (*e*). And a prisoner confined in Newgate on a charge of high treason, alleged to have been committed in North America, who is only triable before the King's Bench, under a special commission, cannot be admitted to bail under the habeas corpus act by justices of gaol delivery, or discharged by their proclamation for want of prosecution (*f*). And persons who are committed to the Tower for the same offence, cannot make their prayer at the Old Bailey under this statute, to be tried or admitted to bail (*g*). If a writ be improperly refused in the vacation, the judge is liable to a penalty of £500, by a provision in the habeas corpus act (*h*). But it has been observed, that this statute makes the judges liable to an action at the suit of the party grieved in one case only, which is the refusing to award

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(*a*) 8 T. R. 324. 14 East, 110, 111.

(*b*) 3 Bla. Com. 132. 3 B. & A. 420. 2 Chit. Rep. 207.

(*c*) 31 Car. 2. c. 2.

(*d*) Com. Dig. Habeas Corpus, C.

(*e*) Bac. Abr. Habeas Corpus, B. 4. Com. Dig. Habeas Corpus, C. 8 T. R. 324, 5.

(*f*) 1 Leach, 157.

(*g*) Fortes. 101.

(*h*) 31 Car. 2. c. 2. s. 10.

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WRIT IS TO BE
GRANTED.

a habeas corpus in vacation time, and seems to leave it to their discretion in all other cases (*a*).

Mode of obtain-
ing habeas corpus

Although the writ of habeas corpus is, unless in these excepted cases, demandable of right, it does not issue as a mere matter of course, but must be obtained by motion to the court in term time, and by application to a judge in vacation (*b*). In support of the application, unless it be founded on an apparent defect in the commitment, an affidavit should be made, stating the circumstances under which the applicant considers himself entitled to relief (*c*), for if, on a bare request this writ were issued, any person, even a felon, when under sentence of death, might procure a temporary suspension of his confinement (*d*). At common law, this writ could be obtained in term time only from the Court of King's Bench, which was one of the grievances the habeas corpus act was intended to remedy, though it seems that it might even then have been awarded by the Court of Chancery, which is always open (*e*). It seems to have been anciently disputed whether the Courts of Common Pleas and the Exchequer, had any power to issue this writ at common law, because those courts have jurisdiction only over civil matters, but it was at length held, that they were invested with this power, though no privilege relating to their own court was in question (*f*). At the present day, by the statute of Charles 2. any of the courts in term, and any one of the judges in vacation, are authorised to grant this remedy upon due cause being shewn them. By one of the provisions of that act, however, a prisoner who has for two whole terms after his imprisonment, wilfully neglected to apply for a habeas corpus, is precluded from obtaining it in vacation, and must wait till the term ensuing (*g*). In term time, the application grounded upon affidavits is made by the prisoner's counsel, and in vacation, his solicitor lays them before a judge at chambers, ac-

(*a*) Hawk. b. 2. c. 15. s. 24.

(*b*) 3 Bla. Com. 132. Hand's Prac. 73. Williams, J. Habeas Corpus. Bac. Abr. Habeas Corpus, B. 5. Fortes. 140.

(*c*) See form of affidavit, Hand's Prac. 519. Post, vol. iv.

(*d*) 2 Mod. 306. 1 Lev. 1.

3 Bla. Com. 132. Hand's Prac. 73. Williams, J. Hab. Corp.

(*e*) Bac. Abr. Habeas Corpus, B. 2 Hale, 147. 2 Inst. 53. 4 Inst. 182.

(*f*) Sir T. Jones, 15 Bac. Abr. Habeas Corpus, A.

(*g*) 31 Car. 2. c. 2. s. 4.

accompanied in both cases with a copy of the warrant, or of an affidavit that it has been denied (*a*). When the motion is made to the court, upon just cause being shown, a rule is granted for the writ to issue; and when an application is made to a judge in chambers, he grants his fiat, whereupon the clerk in court makes out the habeas corpus, and delivers it to the solicitor of the applicant (*b*). The writ will not, it is said, be granted on the mere affidavit of the prisoner; but the application must be supported by other evidence (*c*).

MODE OF
OBTAINING
HABEAS CORPUS.

The writ of habeas corpus thus obtained, must, according to a particular provision, be signed with the proper hand of the judge by whom it is granted, under a penalty of £5 (*d*). The statute of Charles 2. directs also, that it shall be signed by the person by whom it was awarded; and it has been held, that without this form it is altogether void, and no one is bound to obey it (*e*). And in order that no one shall plead ignorance of its nature, the same act directs that it shall be marked in this manner, "*per statutum tricesimo primo Caroli Secundi Regis*" (*f*). It is to be directed to the person in whose custody the applicant is actually detained, whether he be an officer concerned in the public administration of justice, or a private individual, who under any pretence, as that of lunacy, detains another against his will (*g*). An habeas corpus directed in the disjunctive to the sheriff or gaoler, is bad; but where a party is taken by a warrant of the sheriff, the writ must be directed to him; for in contemplation of law, the prisoner is in his custody, and the writ must be returned with the body; but where the prisoner has been immediately committed to the custody of the gaoler, as in all criminal cases, it must be directed to him (*h*). The writ is then delivered by the prisoner's solicitor to the proper person to whom it is directed (*i*).

Of the writ itself, its form, direction, and requisites.*

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(*a*) Hand's Prac. 73.

(*b*) Id. ibid.

(*c*) Cald. 246. 1 Leach, 255. S. C. but see form Hand's Prac. 519.

(*d*) 1 & 2 Ph. & M. c. 13. s. 7. Bac. Abr. Habeas Corpus, B. 5.

(*e*) Cowp. 672.

(*f*) 31 Car. 2. c. 2. s. 3.

(*g*) Godb. 44. Bac. Abr. Habeas Corpus, B. 6. Williams, J. Habeas Corpus.

(*h*) Salk. 350. Lord Raym. 586. 618. Bac. Abr. Habeas Corpus, 6. Williams, J. Habeas Corpus.

(*i*) Hand's Prac. 73.

* For the form of the writ, see 2 Inst. 52. 3 Hand's Prac. 520. Post, last volume.

OF THE RETURN
TO THE WRIT.*

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The party to whom the writ of habeas corpus is directed, is, by the provisions of the statute of Charles the Second, bound to return the body within the space of three days, if within twenty miles; ten days within a hundred miles; and within twenty days for any greater distance; and if he refuse so to do, he is liable for the first offence to a penalty of £100, and for the second of £200 (*a*). The method of compelling a return was formerly by taking out an alias and a pluries, but now those measures are seldom employed because an *attachment* will immediately issue on the first refusal (*b*). And it is no excuse for not complying with the requisition of the writ, that the prisoner has not paid to the gaoler the charges allowed by the act for his conveyance, but the court will allow them on the return (*c*). There are, however, some cases in which the person is warranted in returning, instead of the body, the reasons of the prisoners detention. Thus by the express exception of the statute, he is not obliged to bring up one who is charged with treason or felony, plainly expressed in the warrant of commitment; or in prison for any civil cause of action (*d*), or in execution upon process after judgment, from any court of competent jurisdiction (*e*). The return must show by whom and for what cause the prisoner was committed (*f*). A return, however, alleging him to have been committed on suspicion of treason, has been held sufficient (*g*). And it will not be rendered invalid by mere want of form, if it discloses a good cause of detainer (*h*). The remedy for a false or improper return, is by an action on the case against the officer, at the suit of the party aggrieved to recover damages; and by indictment for the injury to public justice (*i*).

(*a*) 31 Car. 2. c. 2. s. 2. See form of returns, Hand's Prac. 521. Post, vol. iv.

(*b*) 5 T. R. 89. Bac. Ab. Habeas Corpus, B. 8.

(*c*) Sir Thomas Jones, 433. 1 Keb. 272, 280. Bac. Ab. Habeas Corpus, B. 8. Com. Dig. Habeas Corpus, E. 1.

(*d*) This is altered by the stat. 56 Geo. 3. c. 100.

(*e*) 31 Car. 2. c. 2. s. 2 & 3.

(*f*) Cro. Car. 507. Vaugh. 37. 2 Inst. 55. Com. Dig. Habeas Corpus, E. 1.

(*g*) Palm. 558. Com. Dig. Habeas Corpus, E. 2.

(*h*) 5 Mod. 22. 1 Salk. 348. Com. Dig. Habeas Corpus, E. 2.

(*i*) Salk. 349. 6 Mod. 90. Bac. Ab. Habeas Corpus, B.

* As to the return in general, see Bac. Abr. Habeas Corpus, B. 8, 9, 10, 11, 12.

When the body is returned by the officer to whom the writ is directed, he is to certify the day and cause of the caption and detainer, as in case of an excuse for not bringing the individual (*a*). At the same time, the magistrate, in obedience to a certiorari usually issued from the crown office with the habeas corpus, returns the depositions upon which the commitment was founded, in order that the court may be furnished with the means of judging in what way they should dispose of the prisoner (*b*). But where the party is in custody under the sentence of a court of competent jurisdiction to try his offence, it is sufficient to return that fact, without stating the particulars of the original charge against him (*c*); nor, if the commitment were made out by order of a court of record, is it necessary to set it forth in its precise language, as must be done when it is merely given under the hand of an individual magistrate (*d*).

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TO THE WRIT.

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When the prisoner, with the depositions and warrant of commitment, with the habeas corpus, are duly returned, the court are to consider whether they will discharge, bail, or remand, him; and they may take a reasonable time for this purpose, and may bail him *de die in diem*, or direct him to be detained in custody, till they have come to a decision (*e*). And though, by the petition of right (*f*), the court must, within three days, discharge, bail, or remand the prisoner: it is said a commitment to the Marshalsea is a remanding within the statute, and it has been ruled, that the King's Bench may remand him to the same gaol from whence he came, and order him to be brought up from time to time, until they have determined to discharge, or order him to be detained in prison (*g*); upon the writ being returned, the counsel for the prisoner may move to file the return, and that the prisoner may be called into court and the return read, which being done, the counsel may proceed to argue the illegality of the commitment, and his right to be discharged or bailed (*h*). If the court ascertain

Proceedings on
the return.

(*a*) *Vangh.* 137. *Bac. Ab.* *beas Corpus*, B. 13.
Habeas Corpus, B. 9. (*f*) 17 *Car.* 1. c. 10.
(*b*) 3 *East*, 157. *Cald.* 295. (*g*) *Vent.* 330, 346. *Bac. Ab.*
Burn, J. *Certiorari*. *Habeas Corpus*, B. 13.
(*c*) 1 *East*, 306. (*h*) 8 *T. R.* 314. *Hand. Prac.*
(*d*) 3 *Salk.* 92, 3. 521, in notes.
(*e*) 5 *Mod.* 22. *Bac. Ab.* *Ha-*

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THE RETURN.

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that there was no pretence for imputing to the prisoner any indictable offence, they will discharge him; in which case, however, the discharge will not of itself enable the party to support any action against the committing magistrate or officer (*a*). But it is more usual to bail or remind him according to the nature of the charge, and the probability of his being ultimately convicted. If it appears from the return that the party was committed, even by the House of Commons, in a case palpably and evidently arbitrary, unjust, and contrary to law, the court may discharge or bail the party according to their discretion (*b*).

Of bailing the
prisoner.

The Court of King's Bench may bail any man according to their discretion, on the return of the habeas corpus, but in the rules which they observe they are guided by a series of decisions (*c*); for the discretion to be exercised by a court of justice is not a wild, but a sound discretion; and to be confined within those limits to which an honest man, competent to discharge the duties of his office, ought to confine himself (*d*). We do not find that the mere informality of the warrant of commitment is, of itself, a sufficient ground for discharging or admitting to bail; for the court will look into the depositions returned, and if the facts there sworn to, seem to amount to felony, they will remand the party to prison (*e*). And, on the other hand, even though the commitment be regular, the court will examine the proceedings, and if the evidence appear altogether insufficient, will admit him to bail; for the court will rather look to the depositions which contain the evidence, than to the commitment, in which the justice may have come to a false conclusion (*f*). A man charged with murder by the verdict of the coroner's inquest may be admitted to bail, if it appear by the depositions to amount only to manslaughter, though not after the finding of an indictment by the grand jury; the reason for which distinction may be, that

(*a*) 14 East, 82. 94, 5.
(*b*) 14 East, 150.
(*c*) See the cases Com. Dig. Bail, F. 1. to 10.
(*d*) 4 T. R. 757. 4 Burr. 2539.
(*e*) Ante, 113. 1 Bar. & Cres. 258. 3 East, 157. Cald. 295. 1 Leach, 270. id. 484. 2 T. R. 257. 2 East, P. C. 1018. 2 Stra. 911, note 1. See form of Remand, 3 East, 157. 1 Bar. & Cres. 262; and post, last vol.
(*f*) Id. ibid. Cald. 296, 7. 2 Stra. 911, n. 1. 2 Chit. Rep. 110. 138. Hand's Prac. 522.

in the first case the court have the depositions to examine, whereas in the latter case the evidence is secret, and does not admit of a summary revision (*a*). It is in fact to the depositions alone that the court will look for their direction, for where a felony is positively charged they will refuse to bail, though an alibi be supported by the strongest evidence (*b*). Nor will the court at all admit of extrinsic evidence, so, that they refused to examine whether a man, brought up before them, had been previously acquitted of a charge precisely similar (*c*). And the court refused to bail a person for receiving stolen goods, the defendant's affidavit admitting the receipt of the goods, but denying that he knew them to be stolen, because that was a fact triable only by a jury, and it would be of dangerous consequence to allow such proceedings, as it might induce prisoners generally to lay their case before the court, who, instead of the jury, would be called upon to try the truth of the fact for which they were committed (*d*). Nor will the court allow, at the request of the party accused, an inspection of a person whom he has stabbed, in order to ascertain that he is out of danger, that the prisoner may be admitted to bail (*e*). We may also gather, that the illness of the prisoner is not alone a sufficient reason to bail him (*f*); though a person convicted of a libel has been so indulged, between conviction and judgment, on account of very severe disease (*g*). And even where it is alike uncertain from the depositions and the commitment whether a felony is charged, if it appear that the defendant has been guilty of a great misdemeanor, the court will require very ample securities (*h*).

But the principal ground for bailing upon habeas corpus, and indeed the evil the writ was chiefly intended to remedy, is the neglect of the accuser to prosecute in due time. Even in case of high treason, where the party has been committed upon the warrant of the secretary of state, after a year has elapsed without prosecution, the court will discharge him, upon adequate security

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(b) 2 Stra. 911. 1242.

(b) 2 Stra. 1138.

(c) 2 Stra. 851. 1 Barnard, 250. S. C. 2 Barnard, 83, but see 2 Barnard, 271.

(d) Cases K. B. 96.

(e) 1 Stra. 546, 7.

(f) 1 Stra. 4, 5. 1 Leach, 117. Ante, 99.

(g) 1 Stra. 9.

(h) 1 Leach, 184. 2 T. R. 257. 1 Stra. 5. 1 Barnard, 41.

OF BAILING
THE PRISONER.

being given for his appearance (*a*). And, so also, after any unreasonable delay, in case of felony, or any inferior offences (*b*).

Formerly the course was to bring up the party into court, but of late, where the court think, upon hearing the affidavits on his behalf, that there is probable ground for his being discharged or bailed for a felony, if he be unable to defray the expence of being brought to Westminster for that purpose, the court will grant a rule to shew cause why he should not be bailed by a magistrate in the country, with a certiorari to return the depositions before them (*c*).

Amount of bail.

The habeas corpus act (*d*) directs, that where a judge bails in vacation, he shall discharge the prisoner, taking his recognizance, with one or more surety or sureties, in any sum according to their discretion, having regard to the quality of the prisoner, and nature of the offence, for his appearance in the King's Bench, or at the assizes, &c. or in such other court where the offence is properly cognizable, as the case shall require, and then shall certify the writ of habeas corpus, with the return thereof, and the recognizance, into the court where such appearance is to be made. The rule is, where the offence is *primâ facie* great, to require good bail; moderation, nevertheless, is to be observed, and such bail only is to be required as the party is able to procure; for otherwise the allowance of bail would be a mere colour for imprisoning the party on the charge (*e*), nor will the court at the instance of the prosecutor increase the amount of the bail after they have once been taken (*f*).

The number and sufficiency of the bail, and notice of bail, and form of the recognizance, when the habeas corpus is returnable in the court of King's Bench, have been considered when the subject of bailing before magistrates was examined (*g*). The recognizance of bail taken in the King's Bench upon a habeas corpus is to ap-

(*a*) 1 Stra. 4. Gilb. L. & E.
310.

(*b*) Andr. 64, 5.

(*c*) 1 Barn. & Ald. 209.

(*d*) 31 Car. 2. c. 2. s. 3.

(*e*) 2 Wils. 159.

(*f*) 2 Chit. Rep. 109.

(*g*) Ante, 99, 103. See also Com. Dig. Bail, G. 1. K. 1. See form of notice of bail at Judge's Chambers, Hand. Prac. 522. post, last vol.

pear at the next gaol delivery for the proper county, or other court in which the defendant is to be tried (*a*). If the warrant of commitment should prove to be defective, but it appears from the depositions that the defendant is charged with felony, the court will remand him upon a special rule (*b*).

AMOUNT OF
BAIL.

Besides the writ of habeas corpus ad subjiciendum there is another writ of habeas corpus ad deliberandum et recipiendum, which lies to remove a prisoner to take his trial in the county where the offence was committed (*c*); and which proceeding is recognized by the statute of Charles the Second (*d*), and also by the 38 Geo. 3. c. 52. By this writ a secretary of state may send a prisoner charged with having committed an offence in Ireland to that part of the kingdom to take his trial, or if the crime was perpetrated in England, and he is taken in Ireland, may send him here by a similar process (*e*). When a defendant is in execution at the king's suit, he cannot be brought up by habeas corpus to be charged with an indictment without notice to the Attorney-General (*f*).

Habeas corpus
ad deliberandum
et recipiendum.

The writ of habeas corpus cum causâ may, in the court of King's Bench, be issued by the bail of a prisoner who has been taken upon a criminal accusation, in order to render him in their own discharge (*g*). And upon the return of this writ the court will cause an exoneretur to be entered on the bail piece, and remand the defendant to his former custody (*h*). But the court of Common Pleas has no such jurisdiction (*i*).

Habeas corpus
cum causâ.

(*a*) Gilb. L. & E. 4.

(*b*) 3 East, 166, and 1 Barn. & Cres. 262, where see the form of a rule for this purpose, and post, last vol.

(*c*) Bac. Abr. Habeas Corpus, A.

(*d*) 31 Car. 2. c. 2. s. 16.

(*e*) 3 Esp. 174. where see form of Lord Castlereagh's warrant.

(*f*) 2 Barnard, 114.

(*g*) Tidd, 405, 408, 417. et post.

(*h*) Id. ibid.

(*i*) 3 J. B. Moore, 259. 1 Bing. 221. 2 New R. 246.

CHAPTER IV.

OF THE COURTS OF CRIMINAL JURISDICTION,
AND THE
TIME AND MODES OF PROSECUTION.

THE party suspected, being thus secured, it becomes material for the prosecutor to determine in what court he should institute the subsequent proceedings. It is not, however, proposed to consider every tribunal before which criminal matters may possibly arise, but only those courts which are more frequently resorted to for the trial and punishment of offenders. Of the inferior kind, are the general and quarter sessions of the peace. Of the superior order, the assizes, including the commissions of oyer and terminer, general gaol delivery, assize and Nisi Prius—courts under special commissions—the Admiralty sessions—and the court of King's Bench. A transient notice of some other courts of criminal jurisdiction of less note will close this part of our inquiries.

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The courts of general and Quarter Sessions of the Peace. *

We will commence our examination of the courts of criminal jurisdiction with the sessions of the peace, for though its jurisdiction is less extensive, it is the tribunal before which the greater number of criminal accusations are preferred, inasmuch as misdemeanors and clergyable felonies are more numerous than higher offences.

The term "Session of the Peace" is used to designate a sitting of justices for the execution of those purposes, which are confided to them by their commission, and by several acts of parliament (a).

(a) Dick. Sess. 1.

* As to this court in general, see Dalt. J. c. 185. 2 Hale, 42 to 53. Hawk. b. 2. c. 8. 4 Bla. Com. 271. Com. Dig. Justices of the Peace, D. 1. Bac. Abr. Court of Sessions. Burn, J. Justice of the Peace, II. and Sessions. Williams, J. Justice of the Peace, III. and Sessions. Imp. Off. Sher. Sessions, 2d edit. 349. Dick. J. Peace Justices. Dick. Sess. per tot. Gisb. Duties of Man, i. vol. 432. The 59 Geo. 3. c. 28. empowers magistrates to divide the court of Quarter Sessions.

Of these sessions there are four kinds—petit, special, quarter, and general sessions; the first of which is a mere private meeting of justices on their own motion, and the second, an assembly summoned for a particular purpose, as licencing alehouses, or appointing the overseers of a parish (*a*). We have, therefore, only to notice the two latter which only differ as to the times in which their sittings are holden.

The general quarter sessions of the peace is a court of record, holden before two or more justices, one of whom must be of the *quorum* (*b*), and the 59 Geo. 3. c. 28. empowers the justices to divide the court into two, for the despatch of business. This court must, by the statute 2 Hen. 5. c. 4. be held four times in every year, in every county of England, and oftener if occasion shall require. The times originally specified, were the first week after Michaelmas day, the first week after the Epiphany, the first week after the close of Easter, and the first week after the translation of St. Thomas the Martyr, or the seventh of July, and Tuesday has been the day usually chosen. On this statute it is, that the two kinds of general and quarter sessions are founded; the latter on the specific requisition, the former on the concluding words which allow of more frequent assemblies. The quarter sessions are indeed only a species of general sessions, but have the same power, and even, in some instances, a more extensive authority. They are both holden in every county throughout the kingdom, the former at the times directed by the statute, the latter in the intermediate periods. The 54 Geo. 3. c. 84. alters the time of holding the Michaelmas quarter sessions, except in London and Middlesex; and enacts, that in other counties and places in England and Wales, and in Berwick upon Tweed, the quarter sessions at this time of year shall be holden in the first week after the eleventh of October. The other sessions remain as appointed by the ancient provision. In the construction of this act, it is said, that if the feast day fall on

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(*a*) Burn, J. Sessions. Williams, J. Sessions. Dick. Sess. 3, 4.

(*b*) Dalt. J. c. 185. 2 Hale, 167. Burn, J. Indictment, IX. Burn, J. Sessions. Williams, J. Sessions. The term *quorum* is

from the commission when in Latin "*Quorum unum esse volumus, &c.*" See the meaning further explained, Burn, J. Justices of the Peace, II. 1 Bla. Com. 351.

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SESSIONS.

Sunday, the sessions are to be holden in the week following (*a*). In fact, however, they take place on different days in different counties, and are good as quarter sessions, though on different days from those named in the statute of Henry; for that provision is only directory, and in the affirmative; and, therefore, if taken once a quarter, according to the general direction of 17 Rich. 2. c. 10. they will be valid (*b*).

[136] The sessions for the county of Middlesex, and the cities of London and Westminster, are governed by regulations which differ in some respects from those which prevail in every other part of the kingdom. It is singular that the 14 Hen. 6. c. 4. provides that, in Middlesex, it should suffice, if the sessions were held twice in the year, leaving the magistrates at liberty to convoke them oftener, if circumstances should render it requisite. The change of times, by which the population of this county has been greatly increased, has made it necessary to hold the sessions eight times instead of twice. Four of these, called, as in other places, the quarter sessions, are held not exactly at the times prescribed by the statute, but as near to them as convenience will admit; the other four, termed general sessions, are taken in the intervening periods; but both have equal jurisdiction to take and try indictments, unless in cases excepted by particular statutes (*c*). In Middlesex also the justices have a commission of oyer and terminer, which they hold as often as the return of the sessions of the peace calls on them to hear and determine the offences within their district. They sit in both capacities at Hick's Hall, and exercise their several functions as occasion requires (*d*).

Within the county of Middlesex is the city, borough, and town of Westminster, which has a distinct commission of the peace, by which the justices hold four quarter sessions of the peace every year, and have power, by their commission, to take cognizance of offences committed in the precinct of St. Martin le Grand, London, and twice in every year, adjourn the session of the city and liberty

(*a*) 2 Hale, 49. Dick. J. Sessions.

(*b*) 2 Hale, 50. Dick. J. Sessions.

(*c*) Per De Grey, Ch. Justice,

2 Bla. R. 1051. 2 Hale, 49, 50. Bac. Abr. Court of Sessions.

Cro. C. C. 13.

(*d*) 1 Burr. 11. Hullock, 539, n. b. Cro. C. C. 14.

of Westminster, to the court-house of such precinct of St. Martin le Grand.

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At both the last-mentioned sessions, indictments are preferred for felonies, burglaries, &c. which, when returned by the grand jury into court, are, by the respective clerks of the peace, transmitted to the sessions-house in the Old Bailey; where the sessions of oyer and terminer and general gaol delivery of Newgate, for the City of London and the County of Middlesex, are holden eight times in the year, in the same weeks in which the sessions at the new sessions-house are holden. The practice in Middlesex was, in the case of the *King v. Atkinson (a)*, stated to be thus; that the sessions of the peace and of oyer and terminer for the county of Middlesex are holden at the same time, and in the same court, but opened and adjourned by separate proclamations: the jurors under both commissions are the same persons; and it is the general practice to swear such jury as well under the commission of the peace as of oyer and terminer; that at the sessions or a convenient time after, in the session-book are entered memorandums of the days of holding the sessions, as well under the commission of the peace as of oyer and terminer, the names of the justices and entries of the proceedings in respect to indictments, recognizances, &c. or a summary thereof from several official papers, documents, and memorandums taken at the time. [137]

Although the city and liberty of Westminster has a separate commission of the peace from that of the county of Middlesex, yet indictments for offences committed within such city and liberty, (except the precinct of St. Martin le Grand, London) are within the cognizance of the session of the peace of the county of Middlesex, and it is much better to prefer indictments at the county sessions for misdemeanors committed in the liberty of Westminster, than at the session for that liberty, because there are eight sessions yearly for the county, and but four for the liberty; and therefore an indictment may be determined at the sessions for the former, in half the time that it would be at the latter (*b*).

(*a*) 1 Saund. 249, note 1. C. C. 7th edit. 37. 8th edit.

(*b*) See the practice in Cro. 14, 15.

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And if a party is bound by recognizance to prefer a bill of indictment, and prosecute for an offence at the next session of the peace to be holden for the city and liberty of Westminster, and the party so bound prefers a bill for the same offence at the session for Middlesex, it is considered as a compliance with the terms of his recognizance (*a*). At common law, the sitting of the Court of King's Bench suspended the power of justices to hold their sessions in the county where it proceeded (*b*); but the 32 Geo. 3. c. 48. enacts, that when any session of the peace and session of oyer and terminer holden before the justices of the peace for the county of Middlesex shall have been begun before the essoign day of any term, that the session may be continued until the business thereof has been concluded, notwithstanding the happening of such essoign day, or the sitting of the Court of King's Bench in the county of Middlesex.

The court of general quarter sessions of the peace, as far as respects its jurisdiction to hear and determine indictments, appears to owe its origin to the statutes 18 Edw. 3. c. 2. and 34 Edw. 3. c. 1. At first, the justices were only conservators of the peace, and the subsequent power to hear and determine given by these statutes, means only that such an authority may be delegated to them by commission (*c*). For this reason it is that a caption of an indictment found at the sessions, must show that the commission gave the court jurisdiction over the offence, as this cannot be intended (*d*). It has been said, that the commission of the peace was altered into the present form immediately after making those statutes (*e*); but some authors state, that it was settled as we find it at present by the judges about the thirty-third year of Queen Elizabeth (*f*). The jurisdiction over indictments may be collected from the terms of the commission; the precedent of which is given in the last volume (*g*), and which directs the justices to inquire the truth by the oath of good and lawful men of their county, and to hear and determine "all

(*a*) Cro. C. C. 13, 14.(*b*) 9 Co. 118 b.(*c*) 1 Bla. Com. 351. 1 Stra. 442.(*d*) 1 Stra. 442.(*e*) 1 Stra. 442. 1 Bla. Com. 351.(*f*) Hawk. b. 2 c. 3. s. 3.(*g*) See form, post, last vol. and 1 Stra. 442.

" *felonies, poisonings, enchantments, sorceries, arts, magic, trespasses, forestallings, regratings, engrossings, and extortions,*
 " and all other crimes *and offences of which such justices may*
 " *or ought lawfully to inquire,*" subject to this caution; "that
 " if a case of difficulty shall arise, they shall not proceed to
 " give judgment except in the presence of some justice of one
 " of the benches or of assize (a)."

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High treason is not mentioned in the commission, and therefore the quarter sessions have no jurisdiction to try that offence, though the justices may commit the offender to take his trial before a higher tribunal (b). But by virtue of the express terms of the commission, this court has jurisdiction over all felonies, though in consequence of the caution not to proceed to judgment in cases of difficulty, it is now the common practice to try only petty larcenies and misdemeanors in this court; and felonies of a higher nature, as murders and felonies, upon conviction of which the prisoner must pray the benefit of clergy, or the benefit of the statute, are usually remitted for a more solemn trial to the assizes (c). The sessions however have jurisdiction over capital offences of this nature; and, if they do proceed to judgment, in cases of difficulty, their judgment is not void, but is effectual till reversed for real error by a superior tribunal (d). So an indictment lies at the quarter sessions for lighting fires on the coast, contrary to 47 Geo. 3. sess. 2. c. 66. for though in one section "the general quarter sessions" is omitted, yet it being in other parts of the act, the omission was merely a mistake (e). This court, however, has no jurisdiction over forgery (f) or perjury at common law (g), the principal reason of which exceptions is said to be,

(a) See post, last vol. and Hawk. b. 2. c. 8. s. 9. 2 Hale, 42, 43. The parts of the commission are ably commented upon in 2 Hale, 42, &c. Hawk. b. 2. c. 8. s. 37. 57. 59. and in Burn, J. Justices of the Peace, s. 2.

(b) 2 Hale, 44. Hawk. b. 2. c. 8. s. 59. Bac. Ab. Justices of Peace, E. Dick. Sess. 104.

(c) 4 Bla. C. 271, n. 2. 234, n. 6. 2 Hale, 46. Hawk. b. 2.

c. 3. s. 57. Bac. Ab. Justices of Peace, E. 2. Cro. C. C. 14. Dick. Sess. 104, 5.

(d) Lamb. 50. 2 Hale, 46.

(e) 4 M. & S. 71.

(f) Hawk. b. 2. c. 8. s. 64. 1 Salk. 406. 1 East, 173. Cro. Eliz. 601. 697. 2 East, 18. 22, 23.

(g) Id. ibid. 2 Stra. 1088. 2 Ld. Raym. 1144. 1 Salk. 406. Cro. C. C. 7th edit. 630, note. 8th edit. 376.

that as the chief end of the institution of the office of these justices was the preservation of the peace against personal wrongs, and open violences, and the word *trespass* in its most proper and natural sense, is taken for such kind of injuries, it should be understood in that sense only in the statute and commission, or at the most to extend only to such other offences, as have a direct and immediate tendency to cause a public disturbance (*a*). These exceptions, however, are now considered to rest more upon authority than principle (*b*).

The term *trespasses* in the commission, subject to these exceptions, not only includes direct breaches of the peace, but also all such offences as have *a tendency thereto*, and, on that ground, conspiracies have been holden to be cognizable by the sessions, not as actual breaches of the peace, but as tending to produce them (*c*). And, for the same reason, to solicit a servant to steal his master's goods, is an offence indictable in this court (*d*).

Assaults and batteries (*e*), barratry (*f*), libels (*g*), night-walking, and haunting of bawdy-houses (*h*), forestallings, regratings, engrossings, and extortions, are expressly named in the commission (*i*). So perjury upon the statute 5 Eliz. c. 9. is indictable before the justices of sessions, because it is so appointed by the particular provisions of that act (*k*). But the court of sessions cannot try any new created offence without express power given them by the statute which creates it (*l*). They have, therefore, no jurisdiction in the case of usury (*m*). But under the general words in the commission, "and of all and singular other crimes

(*a*) Hawk. b. 3. c. 8. s. 64.

(*b*) 2 East, 15. 18. 20. 22, 23.

(*c*) 2 East, 22, 23. 1 Bla. Rep. 368. 3 Burr. 1320. Hawk. b. 2. c. 8. s. 63. Dick. Sess. 105.

(*d*) 2 East Rep. 5.

(*e*) Hawk. b. 2. c. 8. s. 63. Bac. Ab. Justices of the Peace, E. 3.

(*f*) 2 Saund. 308, n.1. Hawk. b. 2. c. 8. s. 65. Bac. Ab. Justices of Peace, E. 3.

(*g*) 3 Salk. 194. 1 Lev. 139.

Hawk. b. 2. c. 8. s. 64.

(*h*) Hawk. b. 2. c. 8. s. 64.

(*i*) 1 Stra. 75. Hawk. b. 2. c. 8. s. 66.

(*k*) 1 Salk. 406. Burn, J. Perjury, I. and II. 4 Bla. Com. 271, n. 11.

(*l*) Hawk. b. 2. c. 8. s. 37. 2 Hale, 44. 4 Bla. Com. 271. 2 Stra. 1256. 2 Lord Raym. 1144. Dick. Sess. 105. 4 M. & S. 71.

(*m*) 1 Bla. Rep. 369. 2 Ld. Raym. 1144.

and offences of which the justices of our peace may, or ought lawfully to inquire," the vast number of offences over which justices have a jurisdiction given them by many statutes, and which are not particularly mentioned in the commission seem to be included (*a*).

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In practice, most of the prosecutions of smaller misdemeanors and offences not amounting to felony, ought to be instituted in this court, and not at the assizes (*b*), though they may be afterwards, in general, removed by certiorari into the King's Bench. In most corporate towns, there are quarter sessions kept before justices of their own, within their respective limits, which have exactly the same authority as the general quarter sessions of the county, except in a very few instances (*c*). Borough Justices and borough sessions, as far as they act upon what are at the same time borough and county offences, and borough and county offenders, act in ease and aid of the county justices and county sessions, and discharge that duty which must otherwise be discharged by the county magistrates. To a certain extent therefore they are, for that part of the county to which their power extends, county magistrates; they are put upon that footing by the 15 Geo. 2. c. 24. if that is merely an enacting law, and they were previously so if that is a declaratory law. That statute recites that doubts and questions had arisen touching the commitment of offenders by justices of liberties to houses of correction, of counties in which such liberties are situate, though such liberties contribute to the maintenance and support of such houses; and then it declares and enacts, that where any person liable by law to be committed to the house of correction shall be apprehended within any liberty, &c. whose inhabitants are contributory to the support and maintenance of the houses of correction of the county in which such liberty is situate, it shall be lawful for the justices of such liberty to commit such person to the house of correction of the county in which such liberty is situate, which person so committed shall and may be received, detained, dealt with, and ordered, and be set and

(*a*) Burn, J. Justices of the Peace, s. 2. Duties of Man, vol. i. 432.
(*c*) 4 Bla. Com. 272. 2 Hale,
(*b*) 4 Bla. Com. 271, 2. Gisb. 47.

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kept to hard labour, or conveyed and sent away or discharged, and be subject and liable to the same correction and punishment to all intents and purposes as if committed by any justice of the county (*a*); and it has been recently decided that the 15 Geo. 2. c. 24. is a declaratory law, and should have a liberal construction; and therefore where justices of a borough contributing to the county rate, have committed prisoners to the county house of correction for offences cognizable within the county, the justices at their borough sessions have a right to order such prisoners to be brought before them for trial there. *Quære* also, where a county magistrate having concurrent jurisdiction, has committed a prisoner for an offence within the borough, whether borough sessions have not the same power of ordering such prisoner to be brought before them for trial (*b*). The king may grant commissions of the peace, not only for the whole county, but for any particular district within it, exclusive of the jurisdiction of the justices for the county in which it lies; but the latter can only be affected by a non-intronnittant clause expressly prohibiting them from interfering in the courts held for the smaller division (*c*).

The assizes.

The courts held in every county, on the circuits commonly called the *Assizes*, next require our attention. They are held before the king's commissioners, among whom are usually two of the judges of the courts at Westminster, twice in every year, in every county of the kingdom, except the four northern ones, where they are held only once, and London and Middlesex, where they sit no less than eight times, in consequence of the number of offences which arise in the vicinity of the metropolis.

The division of England into six circuits or districts was made as early as the year 1176, at a general council of the realm, at which, according to an old historian, there were present not only the king, prelates, and nobles, but knights and others holding their lands immediately of the sovereign (*d*). Some small alterations have since been made, as to the counties included in each

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(a) 2 B. & A. 542.

(b) 2 B. & A. 533.

(c) 3 T. R. 279. 4 T. R. 456.

Dick. J. Sessions. Dick. Sess. 2.

(d) 1 Woodes. 110.

circuit, but the number is still unaltered (*a*). At first, three justices itinerant or in eyre were appointed for each circuit, to whom our modern commissioners have succeeded (*b*). These now sit by virtue of five commissions—the commission of the peace, which we have already considered—a commission of oyer and terminer—a commission of general gaol delivery—and the commissions of assize, and of *nisi prius*, which, though in general of a civil nature, give, in some cases, an extended criminal jurisdiction to the judges (*c*). Accompanied with these, are the patent of assize, the patent of association, the writ of assize, and the writ of *si non omnes* (*d*). Before we particularly consider these several authorities, it may be proper to premise, that the same persons being intrusted with them all, may proceed by one where they have no jurisdiction by another, and may execute them at the same time (*e*). Thus under the commission of *Oyer and Terminer*, as the judges are directed to *inquire* as well as to hear and determine the same, they can only proceed upon an indictment found at the same assizes, and before themselves; for they must first *inquire* by means of the grand jury or inquest, before they are empowered to hear and determine by the intervention of the petit jury (*f*). And, therefore, the second commission of *general gaol delivery*, empowers the judges to try and deliver every prisoner who shall be in the gaol when they arrive at the circuit town, whenever or by whomsoever indicted, or for whatever crime (*g*). The commissions of *assize and nisi prius*, are principally of a civil nature, but the justices have also under them by virtue of several statutes, a criminal jurisdiction, and where an indictment of treason, felony, or misdemeanor is removed out of the county by certiorari, the record is sent down by *nisi prius* to be tried; and the judges of *nisi prius* may, upon that record, proceed to trial, judgment, and execution, as if they were jus-

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(*a*) 1 Woodes. 112.

(*b*) 1 Woodes. 111.

(*c*) 3 Bla. Com. 58. 4 Bla. Com. 269. 1 Woodes. 110, 12. See the forms of all these commissions in all their varieties with explanatory notes, post, last vol.

(*d*) Id. *ibid*. See forms with notes, post, last vol.

(*e*) 2 Hale, 34. Hawk. b. 2. c. 5. s. 21. 1 Woodes. 111, and see 4 Bla. Com. App. 1.

(*f*) 2 Hale, 27. Hawk. b. 2. c. 5. s. 32. 4 Bla. Com. 270.

(*g*) 4 Bla. Com. 270.

THE ASSIZES.

tices of gaol delivery by virtue of the statute 14 H. 6. c. 1 (*a*). With respect to the *commission of the peace*, we have considered the jurisdiction of the justices at sessions, and it may suffice here to observe, that this commission usually accompanies that of oyer and terminer (*b*). We will proceed now to consider more particularly the jurisdiction under these several commissions.

Commission of
oyer and termi-
ner *.

The commission of *oyer and terminer* is the largest of all these five commissions (*c*). The commission is under the great seal directed to the chancellor, president of the council, lord president of the council, lord privy seal, several noblemen, two judges of the courts at Westminster, king's council, serjeants, and associates; but the judges, serjeants at law, and king's council therein mentioned, are to be of the quorum, so that the rest cannot act without the presence of one of them (*d*); and there must be four of the persons named in the commission present (*e*). The words of the commission, as already observed, are "*to inquire, hear, and determine*," so that by virtue of this commission, they can only proceed upon an indictment found at the same assizes, and not [144] upon an indictment taken before others than themselves (*f*). They have by the terms of the commission, jurisdiction to inquire the truth of all treasons (*g*), misprisions of treasons, felonies, and misdemeanors therein specially mentioned (*h*); and of all others in the counties named in the commission, and to hear and determine the same at certain days and places to be appointed by themselves; for which purpose the king acquaints them that he has sent a writ to the sheriffs of the counties where their sittings are to be held, commanding them to return a jury before them, at such days and places as shall be notified by them, in order to make in-

(*a*) 2 Hale, 39 to 42. 4 Bla. Com. 269.

(*b*) 2 Hale, 156, 57. 4 Bla. Com. 269. Id. Appendix, I.

(*c*) Burn, J. Assizes. 1 Saund. 249 a. n. 1.

(*d*) 2 Hale, 23. Cro. C. C. 1. 4 Bla. Com. 269. Hawk. b. 2.

c. 5. s. 2. Com. Dig. Justices, G. 1.

(*e*) 1 Saund. 249 a.

(*f*) Ante, 142. 4 Bla. Com. 269. 2 Hale, 27.

(*g*) 1 Saund. 249 a. note 1. 2 Hale, 27.

(*h*) 12 Co. 31. Com. Dig. Justices, G. 1.

* See the form, post, last vol. Hawk. b. 2. c. 5. s. 22. Bac. Abr. Court of Justices of Oyer, A.

quiry of such offences(a). Under this commission, persons may be tried whether they be in gaol or at large, and it seems agreed, that where a statute prohibits any thing, and does not appoint in what court it shall be punished, the offender may be indicted before justices of oyer and terminer; because the king has a prerogative of suing in that court which he prefers(b). It is said, that at the Old Bailey, there is a commission of oyer and terminer for London only, but no commission of oyer and terminer ever for Middlesex, and the commission of gaol delivery which is to deliver the gaol of Newgate(c).

COMMISSION OF
OYER AND
TERMINER.

At common law, the commissions of oyer and terminer, as well as that of gaol delivery, were suspended by the Court of King's Bench, sitting in the same county(d); but this has been rectified by the statute 25 Geo. 3. c. 18, which enacts, that the session of oyer and terminer and gaol delivery of the gaol of Newgate, for the county of Middlesex, should not be discontinued on account of the commencement of the term and the sitting of the Court of King's Bench at Westminster, but may be continued till the business is concluded. And where an offence has been committed within the county of any city or town corporate, the prosecutor may prefer his indictment to the jury of the next adjoining county at any sessions of oyer and terminer, or general gaol delivery; and the finding of such a bill will be valid except in London and Westminster, and some other excepted jurisdictions, if the prosecutor has first entered into a recognizance to pay the extra costs, in case it shall be ordered that he shall defray them(e).

[145]

The commission of *general gaol delivery* is directed only to the judges themselves, the serjeants, king's council, and the clerk of the assize and associate(f). It is a patent in nature of a letter from the king to certain persons constituting them his justices,

Commission of
general gaol de-
livery.*

-
- (a) Hawk. b. 2. c. 5. s. 22; Bac. Abr. Court of Justice of
see form, post, last vol. Oyer, &c. A. Ante, 137.
(b) Hawk. b. 2. c. 5. s. 33. (c) 38 Geo. 3. c. 32. ss. 2, 10,
(c) Fortes. 101; but see Cro. and 12. 51 Geo. 3. c. 100.
C. C. 13, 14. 4 East, 208.
(d) 9 Co. 118 b. 4 Inst. 163. (f) See form, post, last vol.

* As to this court and commission in general, see Cro. C. C. 2. Williams, J. and Burr, J. Assizes. Com. Dig. Justices, H.

COMMISSION OF
GENERAL
GAOL DELIVERY.

and commanding them, four, three, or two of them, of which number there must be one at least of the judges and serjeants specified, and authorizing them to deliver his gaol at a particular town of the prisoners in it; for which purpose, it commands them to meet at such place, at the time which they themselves shall appoint, and informs them that, for the same purpose, the king has commanded his sheriff of the same county, to bring all the prisoners of the gaol and their attachments before them, at the time they shall appoint pursuant to the discretion given them (*a*). And a recent act enables, in certain cases, the opening and reading of commissions under which the judges sit upon their circuit, after the day appointed for holding assizes (*b*).

[146]

Every description of offence, even high treason, is cognizable under this commission (*c*), and the justices may proceed upon any indictment of felony or trespass found before other justices (*d*), or may take an indictment originally before themselves (*e*); and, they have power to discharge, not only prisoners acquitted, but also such against whom, upon proclamation made, no evidence shall appear to indict them, which cannot be done either by justices of oyer and terminer, or of the peace (*f*). It is not imperative on a commissioner of gaol delivery to discharge all the prisoners in the gaol who are not indicted; but it is discretionary in him to continue on their commitments such prisoners as appear to him committed for trial, but the witnesses against whom did not appear, having been bound over to the sessions (*g*). But it seems clear from the words of the commission, that these justices cannot try any persons, except in some special cases, who are not in actual or constructive custody of the prison specifically named in the commission (*h*). But it is not necessary that the party should always be in actual custody, for if a person be admitted to bail,

(*a*) Hawk. b. 2. c. 6. s. 1.
4 Bla. Com. 270. Bac. Abr.
Court of Justices of Oyer, &c. A.

(*b*) 3 Geo. 4. c. 10.

(*c*) 2 Hale, 35. Hawk. b. 2.
c. 6. s. 4. Bac. Abr. Court of
Justices of Oyer, &c. B.

(*d*) 2 Hale, 32. Hawk. b. 2.
c. 6. s. 2. Bac. Abr. Court of

Justices of Oyer, &c. B. Cro.
C. C. 2.

(*e*) Hawk. b. 2. c. 6. s. 3.
2 Hale, 34.

(*f*) Hawk. b. 2. c. 6. s. 6.
2 Hale, 34.

(*g*) Russ. & Ry. C. C. 173.

(*h*) Hawk. b. 2. c. 6. s. 5.
Bac. Abr. Court of Justices of
Oyer, &c. B.

yet he is in law, in prison, and his bail are his keepers, and justices of gaol delivery may take an indictment against him, as well as if he were actually in prison (*a*). COMMISSION OF
GENERAL
GAOL DELIVERY.

The commissions of gaol delivery are the same on all the circuits. Unlike the commission of oyer and terminer, in which the same authority suffices for every county, there is a distinct commission to deliver each particular gaol, of the prisoners under the care of its keeper.

The course of proceeding before the commissioners of gaol delivery will more properly be considered hereafter. Here, however, we may in general observe, that, previous to the arrival of the judges, a precept is issued commanding the sheriffs to return juries to try the prisoners at the assizes (*b*). The panels being thus made up, and promptly returned, the court has only, when it sits, to call a jury without writ or precept, and it is immediately returned from the jurymen in readiness. And this court being instituted for the speedy delivery of the prisoners, and this preparation being made for its session, it is fully empowered to inquire and try without the lapse of any intermediate time (*c*). The court of general gaol delivery has jurisdiction to order that the proceedings on a trial from day to day, shall not be published till all the trials against different prisoners shall be concluded; and the violation of such orders is a contempt of court, punishable by fine or imprisonment; and if the party refuse to attend, to answer for such contempt, he may be fined in his absence (*d*).

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The commission of assize is a mandate of the king, directed to two of the judges and several serjeants, commanding them "to take all the assizes, juries, and certificates before whatever justices arraigned," at a day to be fixed by themselves, and informing them that, for that purpose, juries are to be returned by the respective sheriffs (*e*). That of nisi prius is annexed to the office of justices appointed under this commission by 13 Edw. 1. c. 30,

Commissions of
assize and nisi
prius.

(*a*) 2 Hale, 34, 35.

(*b*) See form of general precept, Rast. Ent. 384, 5. post, last vol. 4 Harg. St. Tr. 744, 5.

(*c*) See more fully post.

(*d*) 4 B. & A. 218. 11 Price, 68.

(*e*) See form, post, last vol.

COMMISSION OF ASSIZE AND NISI PRIUS. and empowers them to try all questions of fact issuing out of the courts at Westminster, that are then ripe for trial by a jury (*a*). These, by the course of the courts, are usually appointed to be tried at Westminster in some Easter or Michaelmas Term, by a jury returned from the county in which the cause of action arises; but with this proviso, *nisi prius*, unless before the day prefixed, the justices of assize come into the district (*b*). But as they are sure to do this in the vacations preceding those terms, the cause is tried at the assizes, and the parties avoid all the trouble and expence of conveying their witnesses to London.

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By virtue of several acts of parliament, a criminal jurisdiction is given to these justices of assize and nisi prius (*c*). But, independently of these provisions, they have not any original power of hearing and determining indictments of felony, without a special commission for that purpose; though, by virtue of the acts 27 Edw. 1. c. 3, and 14 Hen. 6. c. 1, they have power only to determine such felonies as are sent down to trial before them (*d*). And as to an indictment of felony or treason, removed out of the county by certiorari, we have before seen that the record is sent down by nisi prius to be tried, and the judges of nisi prius may, upon that record, proceed to trial, and judgment, and execution, as if they were justices of gaol delivery by virtue of the statute 14 Hen. 6. c. 1 (*e*).

Commission of the peace.

A *commission of the peace* ordinarily accompanies the commissions of oyer and terminer (*f*). The nature of the jurisdiction of justices of the peace, under their commissions, has already been considered (*g*):

These commissions are always accompanied with a commission of association, a writ of association, and a writ of *si non omnes* (*h*). The *commission of association* is a letter patent,

(*a*) 3 Bla. Com. 60.

(*b*) Id. *ibid*.

(*c*) 2 Hale, 39, &c. 4 Bla. Com. 269. Hawk. b. 2. c. 7. Bac. Ab. Court of Assize, &c.

(*d*) 2 Hale, 40.

(*e*) 2 Hale, 41; and see 5 T. R.

628, as to the trial.

(*f*) 2 Hale, 156, 157. 4 Bla. Com. 269. Id. Appendix, 1.

(*g*) Ante, 133.

(*h*) See forms and notes, post, last vol. 3 Bla. Com. 60. Jac. Dic. Si non omnes.

usually directed to the clerk of assize and some of his subordinate officers, directing them to *associate themselves* with the judges and serjeants named in the commission of assize, in taking the assizes, and doing that which appertains to justice. The *writ of association* commands the latter to receive the associates, thus appointed, into their society for the same purposes (*a*). Both are intended to prevent any deficiency in the number of commissioners necessary to proceed with the business of the court of assize. To the same purpose the writ of *si non omnes* directs the commissioners, that *if all of them cannot* conveniently attend, any two of them, one being of the quorum, may proceed to execute the commission (*b*).

COMMISSION OF
THE PEACE.

The judges who are, on every separate occasion, to take their circuits, are appointed to them by the fiat of the king, signed in general by himself, or, during a regency, by the regent, in the name and behalf of his majesty (*c*). The commissions are made out from this, and from a fiat of the Lord Chancellor, directing the names which shall be inserted (*d*). The fiat itself is made out by the secretary of commissions, who prepares it for the chancellor to sign; and, in so doing, inserts, as a matter of course, the chancellor himself, the president of the council, the lord privy seal, and the noblemen in the district, whose names he takes from the form of the last that was previously issued. If any alteration is to be made after this form is completed, it must be done by the fiat of a judge (*e*). Both these fiats are to be directed to the clerk of the crown or his deputy, from whose office the commissions are issued, having been first, at least in all special cases, settled by the attorney and solicitor-general.

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Besides these ordinary courts of oyer and terminer and gaol delivery, there are some *special commissions of oyer and terminer*, upon urgent occasions of offences standing in need of immediate inquiry and punishment, or where the offence has been committed

Special commis-
sions of oyer and
terminer.*

(*a*) See form, post, last vol.

(*d*) See form, post, last vol.

(*b*) See form, post, last vol.

(*e*) See form, post, last vol.

(*c*) See form, post, last vol.

* See form, post, last vol.

SPECIAL
COMMISSIONS OF
OYER AND
TERMINER.

[150]

out of the realm (*a*), though it is said that, in general, a trial under the general commission is preferable, as being more expeditious (*b*). At common law, offences must be tried in the county in which they were committed, and crimes committed out of the realm, cannot be punished here (*c*); but the statute 33 H. 8: c. 23, reciting the inconveniences ensuing from the remanding persons to be tried in the district where the offence was committed, enacts, that if any person being examined before the king's council, or three of them, upon any manner of treasons, misprisions of treasons, or murder, do confess any such offences, or be "vehemently suspected thereof, that then his majesty's commission of oyer and terminer, under his great seal, shall be made by the chancellor to such persons, and into such county or place as shall be named by the king, for the speedy trial, conviction, or delivery of such offenders; and that such commissioners shall have power and authority to inquire, hear, and determine all such treasons, misprisions of treasons, and murders within the county or place limited by the commission, by a jury of that county, in whatever county within the king's dominions or *without* such offence were committed, and that, in such case, no challenge for the shire or hundred shall be allowed." The object of this statute was to afford an immediate trial of the offences therein mentioned, in any county in England, and to authorize the trial of such offences committed out of the king's dominions by those who owe him allegiance. It was not introductory of a new law, it only introduced a better mode of trying according to the old law, and of carrying its principle into effect, a principle consonant to the laws of all nations, that subjects wherever they may be, are amenable to the laws of their own country (*d*). A British subject is indictable under the 33 Hen. 8. c. 23, for the murder of another British subject, though the murder was committed within the dominions of a foreign state: and the statement in the indictment, that the person murdered was at the time in the king's peace, is sufficient to shew he was a British subject: and the

(*a*) 4 Bla. Com. 270. 2 Hale, 22. Hawk. b. 2. c. 5. s. 24 to 32. How the authority with respect to the persons before whom the trial shall take place, must be strictly pursued, see

Plowd. 390.

(*b*) Kel. 7.

(*c*) 2 New Rep. 91. 1 Esp. Rep. 62.

(*d*) 1 Taunt. 27. 30, 31. Russ. & Ry. C. C. 134. S. C.

conclusion *contra pacem* is a sufficient allegation that the prisoner was a British subject, and the indictment need not conclude *contrâ formam statuti* (a). This statute, however, was repealed as to treasons committed in this realm by the 1st & 2d P. & M. c. 10. but it continues in force as to murders (b): and it was extended by the statute 43 Geo. 3. c. 113, to accessaries before the fact, and to manslaughter.*

SPECIAL
COMMISSIONS OF
OYER AND
TERMINER.

The statute 35 Hen. 8. c. 2, relative to high treasons, and misprisions and concealments of treason committed *out* of the realm of England, gives power to try such offences in the King's Bench, or by commissioners in any county, appointed by the commission, and continues in force, notwithstanding the statute 1 & 2 P. & M. c. 10, which directs the methods of trial for treason committed within the realm, to be according to the course of the common law (c).

So it was provided by the statute 11 & 12 W. 3. c. 12, that crimes and offences committed by any governor of any plantation, &c. beyond the seas, within his majesty's dominions, may be prosecuted in the King's Bench, or before special commissioners, in any county in England (d). In the special commission, as well as in the indictment, it seems proper to pursue the language of the act on which it is framed, and to aver that it was committed without the realm (e).

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Sometimes, also, upon urgent occasions, the king issues a special or extraordinary commission of oyer and terminer and gaol delivery, confined to those offences which stand in need of immediate inquiry and punishment, and not founded upon any particular act of parliament, but on the general prerogative of the king to grant them (f). Upon these special commissions, the course of proceeding is much the same as upon general and

(a) Russ. & Ry. C. C. 294.

(b) 2 Hale, 22. 43 Geo. 3. c. 113. s. 6.

(c) 1 Hale, 169, 170, note p. 2 Hale, 22. 1 Leach, 157. 1 Taunt. 27. 3 Salk. 358, 9.

(d) 1 Sess. Ca. 247.

(e) 1 Leach, 168. 3 Inst. 112.

1 East P. C. 369.

(f) 4 Bla. Com. 270. Hawk.

b. 2. c. 5. s. 31. 2 Hale, 21. See form against Despard, post, last vol.

SPECIAL
COMMISSIONS OF
OYER AND
TERMINER.

ordinary commissions (a). And, under a special commission, a treason or felony, taken before other commissioners of oyer and terminer, may be heard and decided (b).

The Admiralty
Sessions.*

[152]

Before the statute 28 Hen. 8. c. 15, offences being local, and by the common law triable only by a jury of the county in which they were committed, a person who had committed an offence on the high seas could only be prosecuted in the high court of admiralty, held before the lord high admiral or his deputy, according to the course of the civil law, and not by a jury; and, therefore, according to the maxims of Roman jurisprudence, he could not be convicted, or sentence of death given, without proof by two witnesses, or his own confession (c). But this statute, reciting these evils, enacts, "that all *treasons, felonies, robberies, murders, and confederacies* committed in or upon the sea, or in any other haven, river, creek, or place where the admiral or admirals have or pretend to have jurisdiction, shall be inquired, tried, heard, determined, and judged, in such shires and places in the realm, as shall be limited by the king's commission, in like form and condition as if such offences had been committed on land, and that such commissions shall be under the great seal directed to the admiral and his lieutenant or deputy, and to three or four more (among whom two common law judges are usually appointed), to be named or appointed by the lord chancellor for the time being, from time to time, and as often as need shall require, to hear and determine such offences after the common course of the laws of this realm, used for treasons, felonies, murders, robberies, and confederacies of the same, done and committed upon the land, and that the commissioners, or four of them, shall have full power to inquire of such offences by grand jury, and that the offender shall afterwards be tried by a

(a) 4 Bla. Com. 270. 268. Com. Dig. Admiralty, E. 5.
(b) 2 Hale, 27. 2 Hale, 12. 13. 1 Taunt. 29.
(c) See the recital of the stat. 2 New Rep. 91. 1 Esp. Rep. 62.
28 Hen. 8. c. 15. 4 Bla. Com.

* As to the jurisdiction of this court in general, see 4 Inst. 134. 147. 2 Hale, 11 to 20. Com. Dig. Admiralty, E. 1, &c. Bac. Abr. Court of Admiralty, D. 1. 4 Bla. Com. 268; and the statutes 28 Hen. 8. c. 15. 32 Geo. 2. c. 25. s. 20. 39 Geo. 3. c. 37. 43 Geo. 3. c. 113.

petit jury, and that the course of proceeding shall be according to the law of the land.”

THE ADMIRALTY
SESSIONS.

The admiralty commission of oyer and terminer and gaol delivery (*a*) is directed to three dukes of the royal family, the lord high admiral and his deputy, the commissioners of admiralty by name and for the time being, the judge and president of the admiralty court, the lord chancellor and commissioners for executing the office of chancellor for the time being, the president of the council, keeper of the privy seal, steward, and chamberlain of the household, two of the privy council, the principal secretaries of state and treasurer of the navy for the time being, the chancellor and under treasurer of the exchequer, and lord warden of the cinque ports by name and for the time being, the chief justice of the King's Bench and Common Pleas, one of the privy council, the master of the rolls, chief baron and all the rest of the twelve judges, four commissioners for executing the office of treasurer of the exchequer, the official principal of the arches court of Canterbury, and master, keeper, or commissary of the prerogative court of Canterbury, the advocate-general, the attorney-general, solicitor-general, and advocate-general of the admiralty for the time being, the secretaries of the admiralty, the comptroller of the navy and his deputy, the surveyors of the navy, the commissioners of the navy, two other of the privy council, the mayor, aldermen, and recorder of London, the mayors, recorders, and justices of the peace of the cinque ports, and to several other persons particularly enumerated. The commission refers to the statutes relative to the admiralty jurisdiction, and directs the commissioners, or four of them, of which some of those particularly named must be one, from time to time to be appointed to inquire, to hear and determine all the offences of which the court of admiralty has jurisdiction, as well those already committed as those which at any time after the issuing the commission may be committed, and to make gaol delivery. - This commission, therefore, being thus prospective, as to the commissioners for the time being, and as to future offences, is only issued once in several years.

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(*a*) See form, post, last volume, 160.

THE ADMIRALTY
SESSIONS.

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The jurisdiction of the commissioners appointed under this statute, was confined to the offences therein enumerated, viz. *treasons, felonies, robberies, murders, and confederacies*. The statute 39 Geo. 3. c. 37. however, extends the provisions of this early enactment to *every offence* committed upon the high seas, out of the body of any county of the kingdom. And as persons tried for murder under the first mentioned act, could not be found guilty of manslaughter; and, therefore, when the circumstances reduced the crime to that offence were acquitted entirely; the 39 Geo. 3. c. 37. enacts, that where persons tried for murder or manslaughter, committed on the high seas, are found guilty of the latter offence only, they shall be subject to the same punishment as if they had committed such manslaughter within the jurisdiction of the ordinary tribunals (*a*). The 43 Geo. 3. c. 113. s. 2 & 3. provides, that any person wilfully casting away any vessel, &c. or procuring it to be done, shall be guilty of felony without benefit of clergy; and shall, if the offence were committed on the high seas, be tried, &c. by a special commission, as directed by statute 28 Hen. 8. c. 15. The statute 11 & 12 W. 3. c. 7. contains provisions against accessaries to piracies and robberies on the high seas. This special commission is now the only method of trying marine felonies in a court of admiralty, the judge of the admiralty still presiding over it (*b*). Accessaries before the fact, on shore, to the wilful destruction of a ship on the high seas, were not triable by the admiralty jurisdiction under 11 Geo. 1. c. 29. s. 7 (*c*). But now by the statute 43 Geo. 3. c. 113, which repeals the statutes 4 Geo. 1. c. 12. s. 3. and 11 Geo. 1. c. 29. ss. 5, 6. and 7. it is enacted, "That if any person shall wilfully cast away, burn, or otherwise destroy, any vessel, or in any wise counsel, procure, or direct the same to be done, and the same shall be accordingly done, with intent to prejudice any owner of the vessel, or of her cargo, or any under-writer on the same, he shall suffer death without clergy; the principal to be tried by the common law court; or in the admiralty court, as the offence shall be respectively committed within the body of a county or on the high seas, and that accessaries before the fact,

(*a*) 1 Taunt. 32.(*c*) 2 Leach, 947. East, P. C.

(*b*) 4 Bla. Com. 269. Com. Addenda, 26. Russ. & Ry. C. C.
Dig. Admiralty, E. 6. 1 Taunt. 37. S. C.
31.

whether the principal felony be committed within the body of a county, or on the high seas, may be tried by the common law courts, if the principal felony was committed within the body of a county, and by the admiralty court, if committed on the high seas; but the accessory shall not be tried more than once for the same offence.” (a)

THE ADMIRALTY
SESSIONS.

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The 28 H. 8. c. 15. merely altered the mode of trial in the admiralty court, and its jurisdiction still continues to rest on the same foundations as it did before that statute (b). It is regulated by the civil law *et per consuetudines marinas*, grounded on the law of nations, which may possibly give to that court a jurisdiction with which our common law is not able to invest it (c). The statutes 28 H. 8. c. 15. and 39 Geo. 3. c. 37. do not, however, take away any jurisdiction as to the trial of offences, which might before have been tried in a court of common law; and, therefore, an indictment for a conspiracy on the high seas is triable at common law, on proof of an overt act on shore, in the county where the venue is laid (d). If a pistol be fired on shore, which kills a man at sea, the offence is properly triable at the admiralty sessions, because the murder is, in law, committed where the death occurs (e); but, if on the other hand, a man be stricken upon the high sea, and die upon shore after the reflux of the water, the admiral, by virtue of this commission, has no cognizance of that felony (f). And, it being doubtful whether it could be tried at common law, the statute 2 Geo. 2. c. 21. provides that the offender may be indicted in the county where the party died. So the courts of common law have concurrent jurisdiction with the admiralty, in murders committed in Milford Haven, and in all other havens, creeks, and rivers, in this realm (g). The statute 28 H. 8. c. 15. has already been so fully commented upon by Lord Hale, that any further observations are here unnecessary (h). Piratically stealing a ship's

(a) 2 Leach, 952.

(b) Com. Dig. Admiralty, E. 5.

(c) Per Mansfield, Chief Just.
1 Taunt. 29.

(d) 4 East, 164.

(e) 1 East, P. C. 367. 1 Leach,
388. 12 East, 246. 2 Hale, 17,
20.

(f) 2 Hale, 17, 20. 1 East

P. C. 365, 366.

(g) 2 Leach, 1093. 1 East, P.
C. 368. Russ. & Ry. C. C. 243.
S. C.(h) 1 East, P. C. 367. 2 Hale,
11 to 20. Com. Dig. Admiralty,
E. 1, &c. Bac. Abr. Court of
Admiralty, D. 1.

THE ADMIRALTY
SESSIONS.

anchor and cable is a capital offence by the marine laws, and triable under the 28 Hen. 8. c. 15, the 39 Geo. 3. c. 37, not extending to this case (*a*). The 1 Geo. 4. c. 90. s. 11. provides, that the crimes and offences mentioned in 43 Geo. 3. c. 58. which shall be committed on the high seas, out of the body of any county, shall be liable to the same punishment as if committed on land in England or Ireland, and shall be inquired of, &c. as treasons, &c. are by 28 Hen. 8. (*b*)

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By the statute 32 Geo. 2. c. 25. s. 20. a session of oyer and terminer, and gaol delivery, for the trial of offences committed upon the high seas, within the jurisdiction of the admiralty of England, must be holden, twice at least, in every year, viz. in March and October, at the Old Bailey, except, when sessions of oyer and terminer, and gaol delivery, for London and Middlesex, are held in the same place; or in such other places in England as the lord high admiral shall in writing, under his hand, directed to the judge of the court of admiralty, appoint. In prosecutions upon these provisions, the indictment is first found by a grand jury of twelve men, and afterwards tried by another jury, as at common law (*c*).

The court of
King's Bench.*

The court of *King's Bench* is the highest court of ordinary justice in criminal cases within the realm, and paramount to the authority of justices of gaol delivery, and commissions of oyer and terminer. It has jurisdiction over all criminal causes, from high treason down to the most trivial misdemeanor or breach of the peace (*d*). All offences committed in *Middlesex*, where the court sits, may be originally prosecuted in this court by *indictment*, and *misdemeanors* committed in any county in England, may be prosecuted by information, filed by the attorney-general *ex officio*, or by leave of the court, at the instance of a private in-

(*a*) Russ. & Ry. C. C. 123. 114. 2 East, P. C. 812.
 (*b*) Ibid. 286. (*d*) 9 Co. 118 a. b.
 (*c*) 4 Bla. Com. 269. 3 Inst.

* As to the criminal jurisdiction of this court in general, see 2 Hale, 1 to 7, & 12 & 13, & 154. Hawk. b. 2. c. 3. Bac. Abr. Court of King's Bench, A. 4 Bla. Com. 265 to 267. 4 Inst. c. 7. Com. Dig. Courts, B. 1. 9 Co. 118 a. b.

dividual, in the crown office (*a*); and by different acts of parliament, some offences, committed out of the kingdom, are here cognizable. And this court may proceed on indictments for any offences, removed by certiorari from inferior tribunals (*b*).

THE COURT OF
KING'S BENCH.
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In the county where the court sits, there is every term a grand inquest, who are to present all matters criminal, arising within that county, and then the same court proceeds upon indictments so taken, or if in term time or vacation, there be any indictment for felony before the justices of the peace, of oyer and terminer or gaol delivery, there sitting, it may be removed by certiorari into the King's Bench (*c*). But without some statute for that purpose, offences committed out of England are not cognizable by this court (*d*). If, however, any part of an offence be completed in Middlesex, though the rest were committed abroad, an indictment lies in this court, or, in case of misdemeanor, an information, if the offence were committed in any other county (*e*). And this though the defendant himself was out of the kingdom at the time, if he caused the offence to be committed here; as where the defendant sent over a libel from Ireland to be published at Westminster (*f*). Persons in his Majesty's service abroad, committing offences there, may be prosecuted in the King's Bench by indictment, or information, laying the venue in Middlesex (*g*). So offences committed in the East Indies are subject to this jurisdiction (*h*). So if high treason be committed out of the kingdom, it can only be tried in the court of King's Bench, or under a special commission (*i*). And this court has jurisdiction by information over offences committed in Berwick (*k*).

With respect to the mode of proceeding in this court, it is to be observed, that every term there are *two* grand juries for the

(*a*) Though the King's Bench has jurisdiction over all misdemeanors, yet, by the practice of the court, informations are not granted in every case. See post, ch. Informations, 841 to 877.

(*b*) 2 Hale, 2. Hawk. b. 2. c. 3. s. 6. 4 Bla. Com. 265.

(*c*) 2 Hale, 3.

(*d*) 1 Esp. Rep. 62. 1 Sess. Cas. 246.

(*e*) 1 Esp. Rep. 63. 2 New Rep. 91.

(*f*) 6 East, 589, 590.

(*g*) 42 Geo. 3. c. 85. s. 1. 8 East, 31.

(*h*) 24 Geo. 3. sess. 2. c. 25. s. 64, 78, 81. Tidd's Prac. 815. 5 T. R. 607.

(*i*) 33 Hen. 8. c. 23. 1 Leach, 157. 1 Hale, 1.

(*k*) 2 Burr. 860.

THE COURT OF
KING'S BENCH.

county of Middlesex summoned and sworn before the senior of the puisne judges, which, on some one day fixed by such judge, in the early part of the term, is the first business in the morning when the court assembles. When they appear, the judge gives them such a charge as he thinks the circumstances before them will most particularly require, after which they retire to the grand jury-room, Westminster Hall, or some other convenient place for the transaction of business, and afterwards adjourn to a future day in the same term. On these occasions, they are attended by the clerk of the grand juries, who reads the bills to them, and after their finding, they come into court, and present, in the usual form, the result of their inquiries (a).

The mode of proceeding in the Crown Office, where the whole of the criminal business of this court is transacted, as it relates principally to prosecutions by information, and indictments removed by certiorari, will be considered, when those subjects come minutely under our discussion.

Prosecutions in-
stituted in other
courts.

Besides these courts of criminal jurisdiction, of a more general nature, prosecutions may be instituted in some *other courts*, which it may be proper slightly to notice. Thus a defendant may be prosecuted for murder by *coroner's inquest* super visum corporis (b). The finding of such inquest is equivalent to the finding of a grand jury, and a woman tried on the coroner's inquest for the murder of her bastard child may be found guilty under 43 Geo. 3. c. 58. s. 4. of endeavouring to conceal its birth; there being no distinction in this respect between the coroner's inquisition, and a bill of indictment returned by the grand jury (c); but, in order to found an indictment on a coroner's inquest, the jurors, and not merely the coroner must have subscribed it (d). The coroner has a right to go on board a man of war in commission, lying in harbour, and hold inquest on board the ship, upon a person who has hanged himself in the cabin, if no inquisition has previously been held by the admiralty coroner; and an informa-

Coroner's inquest

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(a) Hand's Practice, Introduction, xx. Office, G. 11, 12. Bac. Ab. Coroner, C.
(b) 1 Leach, 43. As to coroner's inquests in general, see 371. Russ. & Ry. C.C. 240, S. C.
(c) 2 Leach, 1095. 3 Campb.
(d) Imp. Off. Cor. 65.

tion in the court of King's Bench lies, if the coroner be obstructed in the performance of his duty (a). So a *court leet* may receive indictments for felony, and apprehend the parties indicted, though it cannot hear and determine such indictments, and must send them to the gaol delivery, there to be decided, if the offenders are in custody, or remove them by *certiorari* into the King's Bench, so that process to outlawry may be issued against them (b).

PROSECUTIONS
INSTITUTED IN
OTHER COURTS.

The *time* in which the prosecution should be commenced, and in which it may be instituted, now demands our attention.

The habeas corpus act, in order to prevent the party accused from being detained in prison an unlimited time before he is brought to trial, provides, that if any person committed for treason or felony be not indicted in the term or sessions ensuing, the court shall, upon motion, bail him, unless it be shewn upon oath, that the witnesses for the prosecution could not be produced at the preceding session (c).

Of the time
within which
to prosecute.

This regulation applies, however, only to persons actually confined upon suspicion, and is solely intended to prevent the protracting of arbitrary imprisonment, so that it does not preclude the crown from preferring an indictment at any distance of time from the actual perpetration of the offence, unless some particular statute limits the time of prosecuting.

There is no general statute of limitations applicable to criminal proceedings; so that instances have frequently occurred in which parties have been convicted and punished, many years after the crime had been forgotten (d). And it has been repeatedly held, that no length of time can legalize a public nuisance, although it may afford an answer to an action of a private individual (e).

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(a) Andr. 231.

(b) Williams, J. Burn, J. tit. Leet.

(c) 31 Car. 2. c. 2. s. 7. Williams, J. Habeas Corpus. Leach, 158, 170, 1.

(d) 2 Hale, 158. Burn, J. In-

dictment, III. Lieut. Col. Wall was tried, convicted, and executed, for a murder committed twenty years before. 4 Bla. Com. 305, n. 2. 15th edit.

(e) 7 East, 199. 3 Campb. 227. 4*Esp. 109. Peake J. N. P. 91.

OF THE TIME
WITHIN WHICH
TO PROSECUTE.

Anciently, indeed, indictments for felony were seldom preferred, till after a year and a day had elapsed, because the law favored the proceeding by appeal, which must be brought within that period, upon which alone a restitution of stolen goods could be obtained, and which would be barred by an acquittal. In order to remedy the evils produced by this delay, the statute 3 Hen. 7. c. 1. enjoined an immediate prosecution for *murder*, and enacted that, though the prisoner should be acquitted at the suit of the king, he should still be liable to a writ of appeal. And the delay, in case of robbery, was effectually prevented by the 21 Hen. 8. c. 11. which gave the restitution of goods to the owner from whom they were stolen, upon an indictment as well as an appeal; in consequence of which provision, the appeal of robbery fell into disuse (*a*).

There are, however, some offences which, by particular statutes, must be prosecuted within specific periods. Thus every indictment for high treason, unless for attempting the king's life, found by the grand jury, must be within three years after the offence was committed (*b*); and although this provision originally applied only to England and Wales, it seems to have been extended to Scotland by the act of union, and would now probably be regarded as affecting treasons alleged to have been committed in Ireland (*c*). By the provisions of the Black act, all proceedings under it must be commenced within the same period (*d*). So it was enacted by the 23 Eliz. c. 1. that the offences of not attending church and sacrament, should be inquirable within a year and a day after they are committed (*e*); and the 31 Eliz. c. 5. provides, that all indictments upon any penal statute, whereby the forfeiture is limited to the king, shall be sued within two years after the offence is committed; and if the forfeiture be limited to the king and prosecutor, the suit shall be in one year, and in default thereof, the same shall be sued for the king within two years after that year ended; but that where a statute limits a shorter time, the proceeding be brought within the time limited (*f*).

(*a*) 3 Salk. 314. By the stat. 57 Geo. 3. c. 46. s. 1. appeals of murder, treason, felony, or other offence, are abolished.
(*b*) 7 W. 3. c. 3. s. 5. & 6.

(*c*) Fost. 249.
(*d*) 9 Geo. 1. c. 22. s. 13.
(*e*) 1 East P. C. 18.
(*f*) Burn, J. Indictment, III.

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So a prosecution on the 8 & 9 W. 3. c. 26. for knowingly and traitorously having in possession a die, made of iron and steel, for coining money, must by the terms of the act be commenced within three months, and the prosecutor must prove that it was so commenced (*a*). However, an information on this act before a magistrate, though his commitment be informal, is a sufficient commencement in time (*b*). And it has been held, that a criminal information against a magistrate must, in general, be moved for in the second term after the offence is alleged to have taken place, and sufficiently early to allow him to shew cause before its conclusion (*c*).

OF THE TIME
WITHIN WHICH
TO PROSECUTE.

OF THE MODES OF PROSECUTION.

The next step towards bringing the parties suspected to justice, is their prosecution, or the manner of their formal accusation; and this is either upon a previous finding of the fact, by an inquest or grand jury, or without this preliminary sanction. Of the former description, the proceedings which are now in force are indictments, presentments by a grand jury of any offence from their own knowledge or observation, without any bill of indictment laid before them, coroners' inquests in cases of homicide, and the verdict of a jury in a civil cause. Of the latter description are informations in the King's Bench, by the Attorney-General, *ex officio*, or by leave of the court; presentments either by justices of the peace, under particular acts of parliament, as, for a highway or bridge being out of repair, under the highway act (*d*); and informations at the assizes or sessions, under other particular acts of parliament, as under the statute of apprentices (*e*).

Of the modes of
prosecution.

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An *indictment* is a written accusation of one or more persons, of a crime preferred to, and presented upon oath, by a grand jury, returned to inquire of all offences in general in that

(*a*) Russ. & Ry. C.C. 639.

(*b*) 1 East, P. C. 186, 7.

(*c*) 13 East, 270. 322.

(*d*) 13 Geo. 3. c. 73. s. 24.

(*e*) 4 Bla. Com. 301. Bac.

Ab. Indictment, B. Hawk.

b. 2. c. 25. See the forms of these several modes of prosecution, post, vol. Indictments.

* See forms, post, vol's. ii. and iii.

BY INDICTMENT. county(a). It is the most constitutional, regular, and safe, as well as by far the most usual mode of proceeding upon criminal charges (b). Although it would be foreign to our present design, to enter into the cases in which this proceeding can or cannot be supported(c), it may be proper to observe in general, that where a statute prohibits an act to be done under a certain penalty, though no mention is made of indictment, the party offending may be indicted and fined to the amount of the penalty; but where it is merely provided, that if any person do a certain act, he shall forfeit a sum to be recovered by action of debt, &c. no indictment can be supported(d). And where a statute creates an offence, and points out a particular mode of punishment, as by information or conviction before a magistrate, this proceeding cannot be maintained; but the specific mode pointed out in the act must be observed(e). Before the grand jury have found the accusation to be true, it is merely a bill, and to be so termed in pleading, and not described as an indictment (f).

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By presentment
of a grand jury.

A *presentment*, in its limited sense, differs only from an indictment, in being taken in the first instance by the grand jury, of some offence within their own knowledge, and into which it is their duty to inquire(g). After the presentment has been delivered into court by the grand inquest, an indictment is framed upon it by the officer of the court; for it is regarded merely as instructions for an indictment, to which the party accused must answer(h). When it is drawn up by jurors specially returned to inquire of that offence only, it is called an *Inquisition* (i).

(a) 4 Bla. Com. 102. Hawk. b. 2. c. 25. s. 1. Bac. Ab. Indictment, A. Com. Dig. Indictment, A. Cro. C. C. 32.

(b) 2 Hale, 151. 2 Woodes. 560. 11 Harg. St. Tr. 271. See this elucidated by Lord Erskine, vol. i. Speeches, 275.

(c) This would lead to an inquiry into the whole criminal law; see general rules as to what offences are indictable. Com. Dig. Indictment, D. and E. Bac. Abr. Indictment, E. Burn, J. Indictment. Russell on Crimes and Misdemeanors.

(d) 2 Hale, 171. Bac. Ab.

Indictment, E. Cro. C. C. 33.

(e) 1 Saund. 250, e. note 3. 4 Mod. 144.

(f) 1 Salk. 376. Com. Dig. Indictment, B.

(g) 4 Bla. Com. 301. Bac. Ab. Indictment, A. 2 Inst. 739. Com. Dig. Indictment, B. Burn, J. Presentment.

(h) 4 Bla. Com. 301. Burn, J. Presentment. Bac. Ab. Indictment. Com. Dig. Indictment, B. 2 Inst. 739. Cro. C. C. 32. Dick. J. Presentment.

(i) Bac. Ab. Indictment. Cro. C. C. 32. Hawk. b. 2. c. 25. s. 1.

Besides these modes of indictment and presentment, there is another species of finding, upon which a prisoner may, in cases of death, be arraigned—the inquisition of a *coroner's inquest*. If, in any instance of violent death, the coroner, and jury impanelled, believe an individual to be guilty of manslaughter or murder, they are bound to frame their inquisition, containing the result of their inquiries, and to return it to the justices at the next assizes(a). Upon this inquisition we have already seen that the party accused may be tried without the intervention of the grand jury(b); and if an indictment be found for the same offence, and the defendant be acquitted on the one, he must be arraigned on the other, to which he may, however, effectually plead his former acquittal(c). The finding of a grand jury is regarded as of more weight than an inquisition taken before the coroner; as the court will, in their discretion, bail after the latter, but always refuse after the former; the reason of which may be, that in the one case they can look into the depositions, to see if the evidence supports the charge of murder, whereas in the other, the investigation is secret, and does not admit of a summary revision(d). It is the practice to prefer an indictment to the grand jury, and to try the party accused, upon both proceedings at the same time, by which means the form of a second trial is rendered unnecessary(e). When a coroner's jury have found that a party has murdered the deceased, the coroner may issue his warrant to apprehend him(f), and may commit him to prison(g); he has also power to summon witnesses and bind over persons to prosecute and give evidence(h).

BY CORONER'S
INQUESTS.

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There is, however, one mode by which a person may be put on his trial, without any written accusation, viz. the *verdict of a jury in a civil cause*; because the oath of twelve men has

By verdict of a
jury in an action.

(a) Ante, 158. 3 Hen. 7. c. 1. and 2 Ph. & M. c. 13. Burn, J. Coroner. Williams, J. Coroner, where see the form, and post, vol. ii. 7.

(b) 2 Hale, 61. 3 Campb. 371. 1 Salk. 382. 2 Leach, 1095.

(c) 2 Hale, 61. 1 Salk. 382.

Williams, J. Coroner.

(d) Stra. 911, 1242.

(e) 1 Salk. 382. Williams, J. Coroner.

(f) See form, Imp. Off. Coroner, 1st edit. 103.

(g) Id. 109.

(h) See further form, id. 110 to 117.

BY VERDICT
OF A JURY IN AN
ACTION.

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then afforded at least a reasonable presumption of his guilt, sufficient to justify the crown in calling upon him for his defence (*a*). Thus anciently it was laid down, that if in an action of trespass, *de uxore raptâ cum bonis viri*, the defendant were found guilty, the verdict served as an indictment, which he might immediately be called upon to answer (*b*). And in an action for taking away goods, if the jury found that they were taken feloniously, the verdict served also as an indictment (*c*). And, at the present day, in an action for slander, in which the plaintiff is charged with a criminal offence, and the defendant justifies; if the jury find that the justification is true, the plaintiff may be immediately put upon his trial for the crime alleged against him, without the intervention of a grand jury (*d*). But the verdict must be found in some court, which has competent jurisdiction over criminal matters, or otherwise it seems to have but little force (*e*). An affidavit taken at nisi prius on a trial, may also be received by the court of King's Bench, as the foundation of a criminal information against another (*f*). Formerly, it was considered, that when a thief was taken with the mainour, and brought immediately into the court, he might be arraigned and tried without indictment, as by the Danish law he might be taken and executed upon the spot, without accusation or trial (*g*). But this summary mode of proceeding was abolished by several statutes, passed in the reign of Edward the Third, and now the only remaining modes of prosecution, besides these already enumerated, are by criminal information (*h*) and by presentments of justices; except that judges of assize, nisi prius, and general gaol delivery, are by 23 Geo. 2. c. 11. s. 2. empowered to direct a

(*a*) 2 Hale, 150. 4 T. R. 293, 285. 3 Esp. 134. Bac. Ab. Indictment, B. Hawk. b. 2. c. 25. s. 6. Com. Dig. Indictment, C.

(*b*) 2 Hale, 151. Hawk. b. 2. c. 25. s. 6. Bac. Ab. Indictment, B. 5.

(*c*) 2 Hale, 151. Hawk. b. 2. c. 15. s. 6. Com. Dig. Indictment, C. Bac. Ab. Indictment, B. 5.

(*d*) 4 T. R. 293. Hawk. b. 2. c. 25. s. 6. 2 Hale, 151. 3 Esp.

Rep. 134. Com. Dig. Indictment, C. Bac. Ab. Indictment, B. 5. Com. Dig. Indictment, C.

(*e*) 2 Hale, 151. Hawk. b. 2. c. 25. s. 6. Bac. Ab. Indictment, B. 5.

(*f*) 4 T. R. 285.

(*g*) 2 Hale, 156. 4 Bla. Com. 307.

(*h*) 25 Edw. 3. stat. 5. c. 4. 28 Edw. 3. c. 3. 42 Edw. 3. c. 3. 2 Hale, 156. 4 Bla. Com. 308. Com. Dig. Indictment, C.

prosecution for perjury, against any person examined as a witness on a trial before them.

BY VERDICT
OF A JURY IN AN
ACTION.

Informations, in the King's Bench, can be filed for misdemeanors only, as no man can be put on his trial for a capital offence, or for misprision of treason without the accusation against him being found sufficient by twelve of his countrymen, in some of the methods we have just enumerated (*a*). Informations are of two kinds, first, those which are partly at the suit of the king, and partly for the benefit of a subject; and secondly, those which are only in the name of his majesty (*b*). The former are usually brought upon particular acts of parliament, which inflict a penalty upon conviction, one part to the use of the king, and the other to the use of the informer; and are a sort of penal actions, only carried on by criminal instead of civil process (*c*). Those which are at the suit of the king only, are either filed *ex officio*, by the attorney-general, where the offence immediately affects the crown or the public safety, or filed in the name of the master of the crown office, when the injury more immediately affects the rights of individuals (*d*). By information.* [166]

No information of the latter description can be filed without previous leave of the court, in which it is to be exhibited; because instead of being presented on the finding of twelve men, it is merely the allegation of the officer (*e*). The cases in which this mode of prosecution may be adopted, and the proceeding under it, will be considered in detail hereafter.

By the general highway act, justices of assize, justices of the counties Palatine, and all justices of the peace are authorized By presentment of a justice of the peace.

(*a*) 2 Hale, 151. 1 Erskine's Speeches, 275. Hawk. b. 2. c. 26. s. 3. Com. Dig. Indictment, C. Bac. Ab. Indictment, B. 2 Woodes. 560. Hand. Prac. 1. 4 Bla. Com. 310. Burn, J. Information. 1 Show. 109, 10. As to the legality of informations in general, see 5 Mod. 459; and as to the discretionary power of

the court, 9 East, 527, 8; and for the full law relating to informations, see post, 841 to 877.

(*b*) 4 Bla. Com. 308. 11 Harg. St. Tr. 271.

(*c*) Id. *ibid*.

(*d*) 4 Bla. Com. 308. Bac. Ab. Information, A.

(*e*) Bac. Ab. Information, A. Burn, J. Information.

BY
PRESENTMENT
OF A JUSTICE
OF THE PEACE.

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upon their own view, or upon information upon oath before them by a surveyor of the highways, *to make presentment* at the assizes, general sessions, or quarter sessions, of any highway, causeway, or bridge, not well and sufficiently repaired and amended, or for any other offences committed against the provisions of that statute, within the jurisdiction where the nuisance arises, and that the same shall be as efficient, as if presented on oath by the grand jury (*a*). These presentments are, however, traversable by the party accused, and not in the nature of convictions, which suppose the merits to be determined, though a contrary opinion seems to have formerly prevailed (*b*). They must, except in those cases in which a form is prescribed by the act, as for not repairing, conclude, "contrary to the form of the statute," or they will be invalid (*c*), and the road must be accurately described (*d*). But when every requisite is observed, these presentments have, in all respects, the force and the qualities of an indictment (*e*). Informations in the nature of penal actions, are sometimes carried on by criminal process, preferred at the sessions or assizes, in order to recover the penalties which statutes have given to the informer or his Majesty (*f*).

(*a*) 13 Geo. 3. c. 78, s. 24.
See form, 2 Saund. 157, post,
vol. iii. 569.

(*b*) 1 Bla. Rep. 467. 2 Saund.
178, n. b.

(*c*) 13 East, 258.

(*d*) Cowp. 111.

(*e*) 1 Bla. Rep. 467. 2 Saund.
178, n. b.

(*f*) See form, Cro. C. C. 237.
Post, vol. iii. 11.

CHAPTER V.

OF THE INDICTMENT.

AN indictment is defined to be a written accusation of one or more persons of a crime, presented upon oath by a jury of twelve or more men, termed a grand jury (*a*). In the language of Lord Hale, it is a plain, brief, and certain narrative of an offence committed by any person, and of those necessary circumstances that concur to ascertain the fact and its nature (*b*). In general, the rules and principles of pleading with respect to the structure of a declaration are applicable to an indictment (*c*), and therefore, where the criminal law, as to the form of an indictment in a particular case, is silent, resort may be had to decisions on the requisites of pleading in civil actions. An indictment may be considered with reference to the facts to be stated, and the formal mode of stating those facts. We will first consider the general requisites which all indictments must contain, and then examine their more minute parts in the order in which they occur.

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The first general rule respecting indictments is, that they should be framed with sufficient certainty (*d*). “For this purpose the charge must contain a certain description of the crime of which the defendant is accused, and a statement of the facts by which it is constituted, so as to identify the accusation, lest the

General requisites.
Certainty.

(*a*) Co. Lit. 126. b. Terms de ley, 293. Jac. Dic. Indictment. 4 Bla. Com. 302. 2 Hale, 152. Bac. Abr. Indictment. Hawk. b. 2. c. 25. s. 1. Com. Dig. Indictment, A. Williams, J. Indictment. Burn, J. Indictment, I. 2 Woodes. 554. Ante, 168. If twelve agree, and find the bill, though the rest dissent, the finding will be valid. 2 Hale, 161. Post, 322.
(*b*) 2 Hale, 169.
(*c*) 2 Stra. 904.
(*d*) As to certainty in general, 2 Hale, 167. Cowp. 682, 3. Com. Dig. Indictment, G. 1. 4 Bla. Com. 306. Bac. Abr. Indictment, G. 1. Cro. C. C. 37. 2 Woodes, 554, 5.

GENERAL
REQUISITES.

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Observations as
to degree of cer-
tainty requisite.

grand jury should find a bill for one offence, and the defendant be put upon his trial in chief for another, without any authority. These precautions are also necessary in order that the defendant may know what crime he is called upon to answer, and may be enabled to claim any right or indulgence incident to the prosecution of some crimes, as treasons, &c. as well as that the jury may appear to be warranted in their conclusion of 'guilty or not guilty' upon the premises to be delivered to them; and that the court may see such a definite offence on record, that they may apply the judgment, and the punishment, which the law prescribes; they are also important in order that the defendant's conviction or acquittal may insure his subsequent protection, should he again be questioned on the same ground, and that he may be enabled to plead his previous conviction, or acquittal of the same offence, in bar of any subsequent proceedings; the certainty essential to the charge consists of two parts, the matter to be charged, and the manner of charging it (*a*).” On the application of this rule, and the degree of certainty, there are a variety of decisions in the books, and very great niceties have been allowed to prevail, as we shall see in the course of our inquiries. This circumstance has frequently been regretted by able judges, as offering too many opportunities for the escape of prisoners, to the encouragement rather than the depression of crime (*b*). Thus Lord Hale observed, that the strictness required in indictments was grown to be a blemish and inconvenience in the law, and the administration thereof; that more offenders escape by the over easy ear given to exceptions to indictments, than by the manifestation of their innocence, and that the grossest crimes had gone unpunished by reason of these unseemly niceties (*c*). And this opinion has been since confirmed by Lord Kenyon (*d*), and Lord Ellenborough (*e*); the former of whom observed, that the natural leaning of the mind

(*a*) Cowp. 682, 3. Staunf. 181. 5 T. R. 611, 623. 1 Leach, 249. Fost. 194. 2 T. R. 586. 3 Inst. 41. 2 M. & S. 386. And yet, as observed in Woodeson, vol. ii. p. 555, 6, the defendant is not, in cases of felony, al-

lowed a copy of the indictment.

(*b*) 2 Woodes. 555. Eden. Pr. Pen. S. 164, n.

(*c*) 2 Hale, 193.

(*d*) 1 East, 314.

(*e*) 5 East, 260. 2 M. & S. 386.

is in favour of prisoners, and in the mild manner in which the laws of this country are executed, it has been a subject of complaint with some, that the judges have given way too easily to mere formal objections on behalf of prisoners, and have been too ready, on slight grounds, to make favorable representations of their cases. And Lord Mansfield, while he admits "that tenderness ought always to prevail in criminal cases; so far at least as to take care that a man may not suffer otherwise than by due course of law:" maintains, that tenderness does not require such a construction of words (perhaps, not absolutely and perfectly clear and express) as would tend to render the law nugatory and ineffectual, and destroy or evade the very end of it: nor does it require of us, that we should give into such nice and strained critical objections, as are contrary to its true meaning and spirit. And, on another occasion, the same judge declared his opinion, that it was almost as bad to let a crime go unpunished, as to permit an innocent man to suffer (*a*). In civil proceedings indeed, Lord Chief Justice Eyre seems to have entertained a contrary opinion, for he observed, that infinite mischief had been produced by the facility of the courts in overlooking errors in form: that it encouraged carelessness, and placed ignorance too much on a footing with knowledge, among those who practice the drawing of pleadings (*b*). But, in criminal cases, where the public security is so deeply interested in the prompt execution of justice, it seems the minor consideration should give way to the greater, and technical objections be overlooked, rather than the ends of society should be defeated.

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But it is more important for us to consider the *degree* of certainty, which is still considered as requisite (*c*). On this subject, the indictment must state the facts of the crime, with as much certainty as the nature of the case will admit (*d*). Therefore, an indictment charging the defendant with obtaining money by false pretences, without stating what were the particular pretences, is insufficient (*e*). The cases of an indictment for being a common

Degree of certainty.

(a) 1 Leach, 383.

(d) Id. *ibid*.

(b) 1 Bos. & Pul. 59.

(e) 3 T. R. 581. 2 M. & S.

(c) Ante, 169. Cowp. 682, 3. 5 T. R. 611. 623. 1 Leach, 249. 2 T. R. 536.

387; and see post, 229, 30, for further instances.

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scold or barrator, or for keeping a disorderly house, or a common gambling-house, may be considered as exceptions to the general rule, but they differ materially from prosecutions for offences which consist of individual acts, as the very ground of complaint in these peculiar cases consists of a series of transgressions (*a*). And an indictment for endeavouring to incite a soldier to commit an act of mutiny, or a servant to rob his master, without stating the particular means adopted, may also be considered as an exception (*b*).

[172] It is further laid down, that an indictment ought to be certain to every intent, and without any intendment to the contrary (*c*); and that it ought to have the same certainty as a declaration (*d*); for that all the rules that apply to civil pleadings are applicable to criminal accusations (*e*). The last observation does not indeed sufficiently express the degree of precision required; for technical objections have been much more frequently admitted to prevail in criminal, than in civil proceedings, and it was expressly laid down by Lord Mansfield (*f*), that a greater strictness is required in the former, than is necessary in the latter; and, in the first, a defendant is allowed to take advantage of mere formal exceptions. But this strictness does not so far prevail, as to render an indictment invalid in consequence of the omission of a letter, which does not change the word into another of different signification, as *undertood* for *understood*, and *recev'd* for *received* (*g*); and if the sense be clear, nice objections ought not to be regarded (*h*): and in stating mere matter of inducement, not so much certainty is required as in stating the offence itself (*i*).

The charge must be sufficiently explicit to support itself; for no latitude of intention can be allowed to include any thing more than is expressed (*k*). And it is further stated, that every crime

(*a*) 2 T. R. 586. 1 T. R. 754; and see post, 230.

(*b*) 1 B. & P. 180. Willes, 583. 2 East, 5.

(*c*) Cro. Eliz. 490. Cro. Jac. 20.

(*d*) Comb. 460.

(*e*) 2 Stra. 904.

(*f*) 1 Leach, 134.

(*g*) 1 Leach, 134. 145; and see post, 239.

(*h*) 5 East, 259, 260, and 2 East, 33, 4.

(*i*) 1 Vent. 170. Com. Dig. Indictment, G. 5. And for elucidations of this rule, see post, vol. iii. 372, in stating matter of inducement in indictments for libels. As to what are variances, see post, 293 to 297.

(*k*) 2 Burr. 1127. 2 M. & S. 381.

must appear on the face of the record with a scrupulous certainty (a). It is also laid down, that every indictment must charge the crime with such certainty and precision that it may be understood by every one, alleging all the requisites that constitute the offence; and that every averment must be so stated, that the party accused may know the general nature of the crime of which he is accused, and who the accusers are, whom he will be called upon to answer (b); and as a branch of this rule it is to be observed, that in describing some crimes, technical phrases and expressions are required to be used, to express the precise idea which the law entertains of the offence (c). Thus every indictment for treason must contain the word "*traitorously*;" every indictment for burglary, "*burglariously* and *feloniously*;" every indictment for murder, that the defendant feloniously "*of his malice aforethought*" did kill and "*murder*" (d). To the same purpose it was perspicuously observed by Lord Ellenborough, that every indictment or information ought to contain a complete description of such facts and circumstances as constitute the crime without inconsistency or repugnancy; but that, except in particular cases, where precise technical expressions are required to be used, there is no rule that other words shall be employed than such as are in ordinary use, or that in indictments, or other pleadings, a different sense is to be put upon them than what they bear in ordinary acceptation; and if where the sense be ambiguous, it is sufficiently marked by the context, or other means, in what sense they are intended to be used, no objection can be made on the ground of repugnancy, which only exists where a sense is annexed to words, which is either absolutely inconsistent therewith, or being apparently so, is not accompanied by any thing to explain or define them: and we have already seen, if the sense be clear, that nice objections ought not to be regarded (e): and it seems that a sentence to a certain extent, being ungrammatically constructed, in describing the offence, is not a sufficient objection on which judgment will be arrested; if, from the whole tenor of the charge, the statement be sufficiently

[173]

(a) Cald. 187.

(b) 1 T. R. 69. 1 Leach, 249.

(c) See 1 T. R. 69; and post, 239.

(d) See the cases and other instances on this rule, post, 239 to 245.

(e) Ante, p. 172.

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clear to furnish an intelligible description of the manner of committing the offence (*a*). The word "*aforesaid*," in general, refers to the last antecedent, but not so invariably as the word *same*, which is more explicit (*b*); and matter stated in a parenthesis, saves the rule of grammar, that the words "*the said*" and "*aforesaid*" refer to the last antecedent; and it is not necessary to repeat the nominative case to all the allegations in one continuing sentence (*c*).

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As a part of this rule, repugnancy, in a material matter, may be fatal to the indictment (*d*). But though the indictment must in all respects be certain, yet the introduction of averments altogether superfluous and immaterial will seldom prejudice. For if the indictment can be supported without the words which are bad, they may on arrest of judgment be rejected as surplusage (*e*). The particular instances of repugnancy and surplusage, to which this rule applies, will be stated when we consider the various parts of an indictment (*f*).

In the further developement of this rule, it is to be observed, that the offence must be positively charged, and not stated by way of recital, so that the words "that whereas" prefixed, will render it invalid (*g*). But it has been holden that the statement, that the defendant "knowingly" committed any act is a sufficient averment of knowledge (*h*). And in some cases the *quod cum* is sufficient for mere matter of inducement (*i*); as in an indictment for forging the assignment of a lease, the lease itself may be set out by this mode of recital (*k*), and the words "*afterwards, to wit*" do not seem liable to objection, because time and place may be stated under a *videlicet* (*l*). So in an indictment for taking illegal brokerage, the amount of the monies received may be laid under a

(*a*) 13 Price, 172. 1 Ry. & Mo. C. C. 5. S. C. 9 Price, 397.

(*b*) 11 East, 513.

(*c*) 4 Harg. St. Tr. 747.

(*d*) 5 East, 254, 5. 1 Chit. on Plead. 4th edit. 209 to 211.

(*e*) 1 Leach, 474. 1 T. R. 322. Com. Dig. Pleader, C. 28. 4 Co. 41 a. 5 Co. 121 b. and see 3 Stark. 26. 1 Chit. on Plead. 4th ed. 210.

(*f*) See post, 232. 233, &c.

(*g*) 2 Stra. 900, n. 1. 2 Ld. Raym. 1363. Sess. Ca. 159. 415, 16. Cro. C. C. 41.

(*h*) 2 Stra. 904, n. 1.

(*i*) 2 Ld. Raym. 1364. 2 Stra. 904.

(*k*) 2 Ld. Raym. 921.

(*l*) 5 T. R. 616. 16 East, 419. See post as to *scilicet* at large.

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videlicet, as, at all events, it will not be necessary to prove, that the precise sum stated was taken (*a*). And, it is usual, in an indictment for forgery to state, that the bill is as follows, "that is to say, &c." (*b*) The statement of an entry into a house, describing it as a messuage or dwelling-house, is good, because their signification is similar; but messuage or tenement would be bad, because the import of the latter word is uncertain (*c*). Upon the same ground, stating an offence in the disjunctive is bad, thus an indictment for a nuisance, charging the defendants with doing or causing to be done the act complained of, is defective (*d*). The further instances under this rule will be hereafter more fully considered. [175]

The next general rule respecting the structure of indictments is, that they must be in English. Formerly, like all other legal proceedings, they were in Latin;—a practice, which Lord Hale considered as of excellent use, because that being a fixed and regular language, is not capable of so many changes and alterations as happen in modern languages (*e*). But this in the improvement of later times was regarded as but an inferior consideration, when compared with the inconveniences it occasioned to an illiterate prisoner, who was wholly incapable of understanding the charge alleged against him; and by recent statutes, all indictments are required to be framed in the English tongue, and written in a legible hand under a penalty of £50 to the informer (*f*). But if any document in a foreign language, as a libel, be necessarily introduced, it should be set out in the original tongue, and then translated shewing its application (*g*); but it has been said to be both needless and dangerous to translate it (*h*). In practice, however, the former is more usual (*i*). Must be in English.

By the statutes 4 Geo. 2. c. 26. and 6 Geo. 2. c. 14. all indictments must be in words at length, and therefore no abbrevia- [176] Must not contain abbreviations or figures.

(*a*) 6 T. R. 265.

(*b*) 1 Leach, 145.

(*c*) Cro. Jac. 634. 1 East, 441. 8 East, 357. 2 Stra. 891; and see 2 Ro. Rep. 263.

(*d*) 2 Stra. 901. 200; and for further instances of the rule, see post, 236.

(*e*) 2 Hale, 169.

(*f*) 4 Geo. 2. c. 26. 6 Geo. 2. c. 6. Burn, J. Indictment, VIII.

(*g*) 6 T. R. 162. 7 J. B. Moore, 1. Russ. & Ry. C. C. 473. S. C.

(*h*) 1 Saund. 242, note 1. 1 Whitw. 9.

(*i*) See post, vol. iii. 874.

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tions can be admitted (a). Nor can any figures be allowed in indictments, but all numbers must be expressed in words at length; but to this rule there is an exception, in case of forgery, and threatening letters, when a *fac simile* of the instrument forged must be given in the indictment (b).

Form, parts, and
particular re-
quisites.

We come now to consider the more minute parts of the indictment, as they occur upon the record. And in order the better to examine them, it will be proper here to give the common form, in which this proceeding is expressed (c).

“ Essex, (to wit.) The jurors for our lord the king upon their
“ oath present, that C. D. late of the parish of West Ham, in
“ the county of Essex, labourer, on the thirty-first day of De-
“ cember, in the sixth year of the reign of our Sovereign Lord
“ George the Fourth, by the grace of God, of the United King-
“ dom of Great Britain and Ireland king, defender of the
“ Faith, with force and arms, at the parish of West Ham afore-
“ said, in the county of Essex aforesaid, did,” &c. [*setting forth
the particular offence, and at the commencement of every fresh
sentence stating, “ and the jurors aforesaid, on their oath afore-
“ said, do further present that, &c.”* (d) and concluding, if it be
for an offence at common law, injurious to a particular individual,
as well as to the community, as follows] “ to the great scandal,
“ infamy, disgrace, and damage of the said A. B., to the evil and
[177] “ pernicious example of all others, in contempt of our said lord
“ the king, and his laws, and against the peace of our said lord
“ the king, his crown, and dignity.”

Of the venue.

We have first to consider the *venue*, expressed in the margin, and which, in general, determines the county, in which the prisoner is to be put upon his trial. At common law, the venue should always be laid in the county where the offence is committed, although the charge is in its nature transitory, as seditious words

(a) 2 Hale, 170, n. g.

(b) 2 Hale, 170. And. 146.
2 Sess. Cas. 315, &c. Cro. C. C.
33. Burn, J. Indictment, IX.
See post, 230.

(c) See the forms post, vols.

ii. and iii. per totum.

(d) That this statement is proper, and does not necessarily indicate a new count, see 4 M. & S. 221.

or battery (*a*); and it does not lie on the prisoner to disprove the commission of the offence in the county in which it is laid, but it is an essential ingredient in the evidence on the part of the prosecutor, to prove that it was committed within it (*b*). And in the earlier periods of our history, it was even necessary that the offence should be tried by a jury of the visne or neighbourhood, who were then regarded as more likely to be qualified to investigate and discover the truth, than persons living at a distance from the scene of the transaction; it being a maxim of the common law, *quod ibi semper debet fieri triatio ubi juratores meliorem possunt habere notitiam* (*c*). It seems, indeed, that even at this day, the right to challenge for want of hundredors exists, and has rather fallen into disuse, than been actually rescinded (*d*). The venue was always regarded as a matter of substance, and therefore, at common law, when the offence was commenced in one county and consummated in another, the venue could be laid in neither, and the offender went altogether unpunished (*e*). Thus under the statute of 8 Hen. 6. c. 12. against stealing records it was holden, that if the offence were committed partly in one county, and partly in another, the offender could be punished in neither, except for the misprision of felony (*f*). Thus also under the 3 Hen. 7. c. 2. against the forcible abduction and marriage of an heiress, it appears to have been considered, that if the forcible abduction were confined to one county, and the marriage took place in another, no trial could be had in either; though if the forcible abduction had been continued into the county where the marriage took place, the offence would be there completed, and there the offender might be tried (*g*). And thus also, if a mortal blow was given in one county, and the party died in consequence of the blow in another, it was doubted whether the murder could be punished in either, for it was supposed that a jury of the first could not take notice of the death in the second, and a jury of the

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(*a*) Hawk. b. 2. c. 25. s. 35.

(*b*) 2 New Rep. 92. 2 Leach, 634. 2 East P. C. 605.

(*c*) Co. Litt. 125. a. & b. n. 1. 6 Co. 14 b. 2 T. R. 240. 2 Hale, 163.

(*d*) Id. *ibid*.

(*e*) 1 Hale, 651, 652. Hawk.

b. 2. c. 25. s. 36. Bac. Ab. Indictment, F. And see the preamble of the 2d & 3d Edw. 3. c. 24.

(*f*) 1 Hale, 652, 653. Hawk. b. 2. c. 25. s. 36. 40.

(*g*) Cro. Car. 438. Hob. 133. Hawk. b. 2. c. 25. s. 40.

OF THE VENUE. second could not inquire of the wounding in the first (*a*). So also before the stat. 28 Hen. 8. c. 15. the offences therein mentioned, if committed on the high seas, could not be tried on shore (*b*); and a felonious taking in Scotland or Ireland could not be tried here, though the party brought the goods with him into this part of the United Kingdom (*c*). And the same objection arose in case of accessaries in one county, to a felony committed in another (*d*).

[179] At common law, however, if a party steal goods in the county of A. and carry them into the county of B. he may be indicted or appealed of larceny in the latter county. But this does not contradict the general rule, but is founded upon another principle, viz. that the possession of goods stolen by the thief is a larceny in every county, into which he carries the goods, because the legal possession still remaining in the true owner, every moment's continuance of the trespass and felony amounts, in legal consideration, to a new caption and asportation (*e*). So although matter of inducement constituting no part of the offence happen abroad, but the crime itself be committed in any county in England, the offender may be indicted here; as where a man marries one wife in France, and afterwards another in England, during the life-time of the former (*f*).

Where it may be laid.

The inconveniences arising from the strictness of the common law principle respecting the locality of offences, have been however, in a great degree, remedied by several acts of parliament, which, with the decisions upon them, we will consider under the following heads, viz. 1st, When the venue may be laid in a county of England where the offence was commenced or consummated. 2ndly, When the venue may be in the county where the offender was apprehended, though the offence was committed in

(*a*) 1 East P. C. 361. Bac. Abr. Indictment, F. Hawk. b. 2. c. 25. s. 36. See recital in 2d & 3d Edw. 6. c. 24. s. 2.

(*b*) 2 New Rep. 91. Dougl. 791. 1 Taunt. 26.

(*c*) 2 East P. C. 772. 13 Geo. 3. c. 31. s. 4, 5. 44 Geo. 3. c. 92. s. 7, 8.

(*d*) 1 Hale, 62, 63. Staundf. b. 1. c. 46. And see preamble, 2 & 3 Edw. 6. c. 24.

(*e*) 2 East, 771, 2.

(*f*) Kel. 15, and see post, 189 to 194, for these rules of common law.

another. 3rdly, When the venue may be in the adjacent county. OF THE VENUE.
 4thly, When in any county. 5thly, When venue may be in either county where offence was committed on the boundaries. 6thly, When the offence was committed in Wales. 7thly, When in Scotland or Ireland. 8thly, When on the high seas. 9thly, When beyond seas.

To remove the great evil which resulted from the inadequacy of the laws to punish an offence commenced in one county, and completed in another, the 2 & 3 Edw. 6. c. 24. reciting the great failures in justice which arose from this extreme nicety, enacts, that in cases of striking or poisoning in one county, and death ensuing in another, the offender may be indicted, tried, and punished in the district where the death happened, as if the whole crime had been perpetrated within its boundaries, that in such case, an appeal may be sued in the county where the party died, both against principals and accessaries, in which ever county the accessory shall have been guilty; and that where a felony has been committed in one county, and any other person shall be accessory in another, the latter may be indicted where his particular criminality existed, as if the felony itself had been committed within the same jurisdiction (*a*). And by the 43 Geo. 3. c. 113. s. 5. it is provided, that accessaries before the fact to felonies committed within the body of any county within the realm, may be indicted and tried either in the county in which the principal felony was committed, or in that, where the acts of procurement, advice or counsel, or other circumstances by which the guilt was contracted, had their origin. It should seem, in the case of murder, that if the stroke be in England, and the death in Wales, the indictment should be in the latter; and if the stroke were in Wales, and the death in England, then the offender should be indicted in the latter (*b*). And as at common law, where a blow was given on the high seas and the party stricken died in England, or *vice versâ*, no inquisition could be had against the murderer, either in the county, or before the admiral, under 28 Hen. 8. c. 15. (*c*) the statute 2 Geo. 2. c. 21. enacts (*d*), that where any person feloni-

1. In county where offence commenced or completed.

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(*a*) 1 East P. C. 361, 2.

(*c*) 2 Hale, 163. 3 Inst. 48.

(*b*) 1 East P. C. 363 to 365.

(*d*) 1 East P. C. 364. 5, 6, 7.

OF THE VENUE. ously stricken, or poisoned at any place out of England, shall die of the same in England, or being feloniously stricken, or poisoned in England, shall die of such stroke, or poisoning out of England, an indictment thereof, found by the jurors of the county in which either the death or the cause of death, shall respectively happen, shall be as good and effectual in law, as well against principals as accessaries, as if the offence had been completed in the county where such indictment shall be found: but where the offender being on shore shoots at a person on the sea, who there dies, the felony is triable according to the admiralty jurisdiction (*a*). It seems, however,

[181] that independently of the enactments in these statutes, 2 & 3 Edw. 6. c. 24. and 2 Geo. 2. c. 21. a party may, under a special commission, founded on the 33 Hen. 8. c. 23. and 43 Geo. 3. c. 113. s. 6. be indicted in any county in England for a murder, where the stroke is on the high seas, or in one county of England, and the death in another (*b*). And in a late case it was adjudged that a British subject is indictable under the 33 Hen. 8. c. 23. for the murder of another British subject, though the murder was committed within the dominion of a foreign state (*c*).

It appears to be a general rule, that where a statute creates a new felony, which consists of an act partly within the kingdom, and partly without, and limits it to be tried where the offence is committed, the party may be indicted in the county where the part of the offence committed within the realm arose. Thus upon the statute 1 Jac. 1. c. 2. (now expired) for passing the sea, and serving a foreign prince without taking the oath of obedience, the offender might be indicted and tried in that county from which he embarked (*d*).

Besides these provisions, there are a variety of statutes which authorize an inquiry in counties *wholly unconnected* with the offence, which we must briefly enumerate. Some of these direct the trial to take place in the county where the offender was apprehended; others in the county adjoining; and others in any

(*a*) 1 Leach, 383. 1 East P. C. 367. 12 East, 246.

(*b*) 1 East P. C. 366. Stark. 12, 13.

(*c*) Russ. & Ry. Crim. Ca. 294.

(*d*) 1 Hale, 706. 3 Inst. 80.

county at the option of the prosecutor; and this brings us to the second division, viz. when the venue and indictment may be in the county where the offender is arrested. OF THE VENUE.

The statute against bigamy, 2 Jac. 1. c. 11, directs that persons guilty of that offence, shall be tried in the county where they are arrested, which has been construed to mean, that in which they are confined in prison (*a*); and where prisoner was apprehended for another offence, and was detained in the same county for bigamy, it was held that the detainer was such an apprehension as would warrant the indicting him in that county under this act (*b*). If a warrant be issued, the apprehension in the county where the venue is laid, must be proved by producing it, in order to give the court jurisdiction under this act, or the prisoner will be entitled to his discharge (*c*). And, if the party escapes, and is never apprehended, he may, under this statute, be indicted in the county where the offence was committed, and be prosecuted to outlawry (*d*). By the 53 Geo. 3. c. 108. s. 25. all criminal offences against any of the stamp acts may be determined, either in the place where the offence is committed, or in that where the parties, or either of them were arrested. In case of the offence of robbing the mail, it being found very difficult to prove the commission of the robbery, in any particular county, through which it might pass, and this having been held material on the general principle of locality (*e*), it was enacted by the 42 Geo. 3. c. 81. s. 3. that the offence might be prosecuted, if committed in England, either in the county where the offence was committed, or that in which the party was apprehended; and if in Scotland, either in the justiciary court of Edinburgh, or in the court of the circuit where the felony was effected or the felon arrested. It is a general rule, that where a statute creating a new felony directs that it may be tried in the county where the offender is apprehended, without containing any negative words, the provision is only cumulative, and he may still be tried in the county where the offence was committed (*f*). 2. Venue in county where defendant arrested.

[182]

(*a*) Hut. 131. 2 Inst. 49.

(*b*) Russ. & Ry. C. C. 48.

(*c*) 2 Leach, 826.

(*d*) 1 Hale, 694. 3 Inst. 87.

(*e*) 2 Leach, 634. 2 East P. C. 605.

(*f*) 1 Hale, 694. 3 Inst. 87.

OF THE VENUE.
3. Venue in adjacent county.

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Besides these statutes, there are some which, with a view to secure an impartial trial, direct the venue to be laid in the county *adjacent* to that in which the crime took place. Thus under the 26 Geo. 2. c. 19. s. 8. an indictment for plundering vessels wrecked on the sea shore may be tried either in the county where the plunder was effected, or in any county adjoining; and if in Wales, in the nearest county of England (*a*). So by the 8 Geo. 2. c. 20. s. 3. and 13 Geo. 3. c. 84. s. 42. felonies in destroying turnpikes, or works upon navigable rivers, erected by the authority of parliament, may be tried in any county adjacent to that where the felony was completed; and by the 38 Geo. 3. c. 52. and 51 Geo. 3. c. 100. it is provided that bills of indictment for offences committed within the county of any city or town corporate, may be preferred to the jury of the county next adjoining, at any sessions of oyer and terminer or general gaol delivery (*b*); and indictments found in the county of a city or town corporate may be removed at the instance of the prosecutor or defendant, and tried at the sessions of oyer and terminer and gaol delivery for the adjoining county (*c*).

4. Venue in any county.

There are also statutes which authorize the trial of particular offences in *any* county, at the option of the prosecutor. Of this kind is the 33 Hen. 8. c. 23, which provides that persons examined before the king's privy council, or three of them, and by them vehemently suspected of any treason, misprision of treason, or murder, committed either within or without the dominions of his majesty, may be tried in any county, by virtue of a special commission under the king's seal, and upon such trial, no challenge shall be allowed for want of hundredors. It seems to be the better opinion, that this provision was repealed as far as it respects treasons and misprisions, by the 1 & 2 P. & M. c. 10, which enacts, that all treasons shall be tried by the course of the common law, and in no other way whatsoever (*d*). But with respect to murder, it seems to be still in force (*e*). It does not,

(*a*) 1 East P. C. 772, 3. 649. What is the next county, see 2 M. & S. 270.

(*b*) S. 1 & 2.

(*c*) S. 1, 2, 3, & 4.

(*d*) 1 Hale, 282, 3. 2 Hale, 164. 3 Inst. 27, *acc.* Staundf.

b. 2. f. 90, *contra*.

(*e*) 1 Hale, 283. 374. 2 Hale, 22. 164. 3 Inst. 27, 1, 2, 3, & 4. 1 East P. C. 361 & 369, and see recital in 43 Geo. 3. c. 113, s. 6.

however, seem ever to have extended to accessaries (*a*), though it appears to have embraced every description of murder, whether committed within or without the kingdom (*b*). Accessaries to murder and principals in manslaughter have, however, been included in the same regulation (*c*). The Black Act (*d*) allows the prosecutor on every proceeding under it, to lay the venue in any county he may think most expedient; but he must not abuse this power, which was given "for a better and more impartial trial," to the purposes of injustice and oppression (*e*). And by the 9 Geo. 2. c. 35. s. 26, an indictment for assaulting officers of the customs or excise may be laid in any county. But this regulation applies only to assaults committed on them, when actually engaged in the duties of their office, and not on any other occasions (*f*). By the 19 Geo. 2. c. 34. s. 5. all offences relating to the revenue may be prosecuted in any county (*g*). And by the 59 Geo. 3. c. 69. s. 5. all offences in hiring and retaining a British soldier, to enlist in the service of a foreign potentate, &c. may, if committed out of the realm, be tried in any superior court, competent to try criminal offences. And the 37 Geo. 3. c. 70. s. 7. (made perpetual by 57 Geo. 3. c. 7.) enacts, that any of the treasonable practices therein referred to, viz. seducing sailors or soldiers from their allegiance, or inciting them to mutiny, or committing any traitorous practice, whether on the high seas or in England, shall be indictable in any county of England, before the justices of oyer and terminer or gaol delivery at the assizes.

By a late important act, the 59 Geo. 3. c. 96. s. 2. after reciting that "felonies are sometimes committed on or so close to the boundaries of two or more counties, that the offenders escape unpunished from the defect of proof that the felony with which they are charged was actually committed within the county in which such offenders may be indicted," it is enacted, that in any indictment for any felony committed on the boundary

5. Venue, when offence committed on boundaries of counties, &c.

(*a*) 1 Anderson, 195. 1 East P. C. 369.

(*b*) 1 East P. C. 369. 8 Mod. 144.

(*c*) 43 Geo. 3. c. 113. s. 6.

(*d*) 9 Geo. 1. c. 22. s. 14.

(*e*) 1 Leach, 73. 2 Bla. Rep.

(*f*) 4 T. R. 490.

(*g*) 12 East, 244.

OF THE VENUE. “ or boundaries of two or more counties, or within the distance
 “ of five hundred yards of any such boundary or boundaries, it
 “ shall be sufficient to allege that such felony was committed in
 “ either or any of the said counties, and every such felony shall
 “ and may be inquired of, tried, and determined, in the county
 “ within which the same felony shall be so alleged to have been
 “ committed, and all and every person and persons who shall be
 “ convicted of any such felony so to be inquired of, tried, and
 “ determined as aforesaid, shall be subject and liable to all such
 “ pains of death and other pains, penalties, and forfeitures, as
 “ such person or persons, so convicted of such felony, would
 “ have been subject and liable to, in case such felony had been
 “ inquired of, tried, and determined, in the county in which the
 “ same felony was actually committed.” And by the same act,
 s. 1. indictments for felonies committed on stage coaches, stage
 waggons, stage carts, and other such carriages employed in carrying
 goods, &c. may allege the offence to have been committed,
 and may be tried in any county through which such carriage passed,
 in the course of the journey during which such felony was committed;
 and in all cases where any highway shall form the boundary of any
 two counties, the felony may be alleged to have been committed,
 and may be tried in either county through which the carriage passed
 in the course of the journey during which the felony was committed.
 And by 59 Geo. 3. c. 27. felonies committed in vessels on canals,
 navigable rivers, or inland navigations, may be alleged to have been
 committed, and may be tried in any county or city through which
 such vessel passed, in the course of the voyage or journey during
 which such felony was committed; and where the sides or banks of the
 canal, &c. or the centre thereof, constitutes the boundary of any two
 counties or cities, the felony may be alleged to have been committed,
 and may be tried in either of such counties or cities through which
 such vessel passed in the course of the voyage or journey during which
 such felony was committed; but the act does not affect the admiralty
 jurisdiction, or commissioners authorized under the statute 28 Hen. 8. c. 15.

We will now take a summary view of the statutes relative to crimes committed in Wales, on the high seas, and in foreign dominions.

The trial of offences committed in *Wales* has also been influenced by several acts of parliament. At common law, no offence committed in Wales could be tried in England, and was only inquirable before justices or commissioners assigned by the king in the county of Wales, where the offence was committed (*a*). But by the 26 Hen. 8. c. 6 (*b*), confirmed and explained by 34 & 35 Hen. 8. c. 26. s. 75, all treasons and felonies in Wales, and accessaries of the same, may be indicted before the justices of gaol delivery in the next adjoining county of England, where the king's writ runneth: that is at present in the county of Hereford (*c*) or Salop (*d*), and not, as it should seem, in Chester or Monmouth; the first being a county palatine, where the king's writ did not run, and the other a part of Wales, at the time of passing the statute (*e*): and this act extends to all felonies subsequently created (*f*). It should seem, that in the case of murder, if the stroke be in England, and the death be in Wales, the indictment should be in Wales; and if the stroke in Wales, and the death in England, the venue should be in the latter (*g*). This act is not confined to the Lordship's Marchers, whom it particularly mentions; but the justices of assize have a concurrent jurisdiction with those of great sessions (*h*). It does not, however, extend to appeals of murder, and as far as respects treason, is repealed by the 1 & 2. P. & M. c. 10. Nor is Wales within the statute 35 Hen. 8. c. 2, for the punishment of foreign treasons, as it was always regarded as a part of England (*i*), and is now expressly declared to be so by act of parliament (*k*).

OF THE VENUE.
6. Venue, where offence in Wales.

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In the case of plundering the effects of any vessel wrecked or in distress, which is ousted of clergy by the 26 Geo. 2. c. 19,

(*a*) 1 Hale, 156.

(*b*) See observations thereon, 1 East P. C. 363.

(*c*) 2 M. & S. 276.

(*d*) Offences in the Isle of Anglesea, to be tried in Shropshire. 1 Leach, 108. 1 East P. C. 363.

(*e*) 4 Bla. Com. 394, and in notes. 2 East P. C. 773. 1 East P. C. 363. 1 Leach, 108.

Hawk. b. 2. c. 25. s. 45. 2 M. & S. 270.

(*f*) 3 Campb. 78. Rus. & Ry. C. C. 197. S. C. 1 Leach, 109.

(*g*) 1 East P. C. 363, 4, 5, and see 1 Hale, 706. 3 Inst. 80; but see 1 Stark. Cr. L. 14, n. p.

(*h*) 8 Mod. 144. 1 Hale, 157. Hawk. b. 2. c. 25. s. 45.

(*i*) 1 Hale, 158. 2 Roll. 28.

(*k*) 20 Geo. 2. c. 42. s. 3.

OF THE VENUE. it is enacted (*a*), that if the fact be committed in Wales, the prosecution may be carried on in the next adjoining county of England (*b*).

7. Venue, where offence in Scotland or Ireland.

In general, offences committed in *Scotland and Ireland*, are indictable only there, and if the party be apprehended here, he must be sent thither for trial (*c*). And, though we have seen, that at common law, a party who has stolen goods in one county may be indicted in any other county into which he carries them, it was doubted, whether if goods were stolen in Scotland or Ireland, and brought by the offender into England, he could be indicted here (*d*); and indeed it was decided that an indictment in England was not in such case sustainable (*e*). To remedy this defect, it was provided by the 13 Geo. 3. c. 31. s. 4 & 5, and 44 Geo. 3. c. 92. s. 7 & 8, that offenders escaping with stolen property, from one part of the United Kingdom to another, may be indicted in the county where the same is found; and that persons guilty of receiving only, may be tried in the place where they receive, without reference to the place where the goods were originally taken (*f*); and we have seen, that if a mail be robbed in Scotland, the offender may be indicted in any county in England, in which he was arrested (*g*).

8. Venue, where offence on high seas.

We have already seen, that at common law, no offence committed *on the high seas*, or beyond the realm, could be inquired of. But by the statutes 28 Hen. 8. c. 15, and 39 Geo. 3. c. 37, all offences committed on the high seas, or in any haven, river, creek, or place, where the admiral has or *pretends to have* jurisdiction, may be tried in any county of England, according to the king's special commission (*h*); and the first mentioned statute with respect to treasons committed at sea, is not repealed by the

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(*a*) Section 8.
 (*b*) 2 East P. C. 772, 3.
 (*c*) 13 Geo. 3. c. 31. 44 Geo. 3. c. 92. 1 East P. C. 772.
 (*d*) See recitals, 13 Geo. 3. c. 31, and 44 Geo. 3. c. 92.
 (*e*) 2 East P. C. 772; and see 3 Inst. 113. 13 Co. 53; but see

1 Stark. Crim. Law, 2, note g.
 (*f*) 1 East P. C. 772.
 (*g*) Ante, 182. 42 Geo. 3. c. 81. s. 3.
 (*h*) 1 Leach, 388. 12 East, 246. 2 New Rep. 91. 1 East P. C. 367, 8. 2 Hale, 11 to 20. Ante, 151, 153, &c.

25 Hen. 8. c. 2 (a). Upon the construction of the statute OF THE VENUE.
 28 Hen. 8. c. 15, a doubt having arisen whether an accessory to a felony committed on the sea, was triable by the admiral, within the purview of it (b), the statute 11 & 12 W. 3. c. 7. s. 10, made perpetual by 6 Geo. 1. c. 19 (c), enacts, that all accessories to acts of piracy shall be tried under the provisions of the statute of Henry; and by the first section of the same statute, all offences committed at sea are triable by a special commission in any part of his majesty's dominions. So the 1 Anne, stat. 2. c. 9. s. 4, for preventing the destruction of ships by masters and mariners, and the 11 Geo. 1. c. 29. s. 7, and the 33 Geo. 3. c. 67, direct, that the offences created by the statute of Anne, and referred to in the succeeding acts, shall be triable as provided by the 28 Hen. 8. c. 15. And the 39 Geo. 3. c. 37, extends the provisions of the statute of Henry to all offences committed on the high seas, out of the body of any county of this realm, and which are therefore now triable under the special commission of his majesty. But piratically stealing a ship's anchor and cable, is a capital offence by the marine laws, and triable under the 28 Hen. 8. c. 15, the 39 Geo. 3. c. 37, not extending to such case (d); and the statute 43 Geo. 3. c. 113, after reciting certain parts of the prior statutes, provides, that the offences of destroying, or procuring to be destroyed, any ship, within the body of a county of this realm, shall be inquired of, tried, and determined in the same manner as other felonies within the body of the county: but if committed on the high seas, they shall be indicted and tried as directed by the 28 Hen. 8. c. 15; and the 5th section provides, that accessories before the fact, to felonies committed on the high seas, may be indicted as prescribed by the statute 28 Hen. 8. c. 15, that is, by special commission, in any county in England; and the 37 Geo. 3. c. 70, provides, that treasonable practices committed on the high seas, shall be indictable in any county in England, at the assizes (e).

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Under the above acts, the offences must be tried in this kingdom; but this is remedied by the 46 Geo. 3. c. 54, which enacts,

(a) 3 Inst. 112.

43 Geo. 3. c. 113.

(b) Yelv. 134, 5. See post,
43 Geo. 3. c. 113.

(d) Russ. & Ry. C. C. 123.

(e) See further provisions,

(e) Ante, 152, &c.

OF THE VENUE. that all treasons, &c. and other offences whatever, committed on the sea, or in any haven, river, creek, or place where the admiral has jurisdiction, may be tried according to the course of law used for offences committed on land within the kingdom, in any of the king's islands, plantations, colonies, dominions, forts, or factories under his majesty's commission, as therein directed to be issued, and the commissioners appointed, shall have the same powers as commissioners appointed under the 28 Hen. 8. c. 15.

9. Venue where offence beyond the seas.

Offences committed *beyond the seas*, have also been made subject to regulations nearly similar. Although it appears that at common law, treason in adhering to the king's enemies abroad, might be tried where the offender had lands in England (*a*); by the statute 35 Hen. 8. c. 2, all doubts on this subject are removed; for it is enacted, that all treasons or misprisions of treason, committed out of the realm, may be tried in the King's Bench, by a jury of the county in which the court sits, or by special commission in any county of England, which the king may think proper to specify, with a proviso that peers shall still be tried according to their privilege. This statute is not repealed by the 1 & 2 Ph. & Mary, c. 10, because that act applies only to treasons within the realm (*b*). It is not absolutely necessary that the king should sign the special commission issued under this statute, for it is sufficient if he sign the warrant to the lord keeper, by whom the commissioners may be appointed (*c*). It has also been holden, that Ireland is without the realm, for the purposes of this statute; and, therefore, treason committed there may be tried as directed by its provisions (*d*). The same observation applies also to the Isle of Man, Jersey, Guernsey, Sark, and Alderney, which are without the realm, though part of the dominions of England (*e*). And it seems, that before the union, an Irish peer might be tried in England for treason committed in Ireland, though he thereby lost the benefit of trial by his peers (*f*).

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(*a*) Co. Lit. 261 b. 3 Inst. 11. 2 Hale, 164.

(*b*) Hawk. b. 2. c. 25. s. 45. Co. Lit. 261 b.

(*c*) 3 Inst. 11. Hawk. b. 2. c. 25. s. 51. Bac. Abr. Indictment, D.

(*d*) 3 Inst. 11. 1 Hale, 155. 7 Co. 23. Co. Lit. 261 b.

(*e*) 1 Hale, 156.

(*f*) 1 Hale, 155. 1 St. Tr. 928. acc. Dyer, 360 b. Hawk. b. 2. c. 25. s. 52. Bac. Abr. Indictment, F. contra.

But there is little doubt but that at the present day, it would be OF THE VENUE. holden otherwise, especially since the provisions of 39 Geo. 3. c. 44. s. 7, 8. (a) By the before mentioned statutes, 33 Hen. 8. c. 23, and 43 Geo. 3. c. 113. we have also seen, that murderers and accessaries before the fact, and manslaughter committed abroad, may be indicted and tried by a special commission, in any county in England (b), and this though the offence be committed in the dominion of a foreign state, if the defendant and deceased be both British subjects (c). By 57 Geo. 3. c. 53. s. 1. all murders and manslaughters committed on land at Honduras by persons residing there, or in the islands of New Zealand and Otaheite, or other places not within the king's dominions, nor subject to any European power or state, nor within the territories of the United States, by any person sailing or belonging to any British vessel, or that have sailed or quitted any British ship, to live in such islands, &c. shall be punished in any of his majesty's islands, colonies, &c. under his majesty's commission, issued under the 46 Geo. 3. c. 54. in the same manner as if the offence had been committed on the high seas; and by 59 Geo. 3. c. 44. s. 1. all murders, manslaughters, rapes, robberies, and burglaries committed on land at Honduras, may be tried within such settlement, under his majesty's commission, in the same manner as is provided with respect to crimes directed to be determined by the 46 Geo. 3. c. 54. in any of his majesty's islands, &c. But these acts do not in any way repeal the provisions of the 33 Hen. 8. c. 23. (d) By 7 Ann. c. 21. s. 5. Scotchmen are punishable for all treasons and misprisions of treason, committed on the high seas, or out of the realm of Great Britain, by a special commission. By 10 & 11 Wm. 3. c. 25. s. 13. robberies, murders, felonies, and other capital crimes, committed in Newfoundland, may be tried in any county of the realm, at the assizes, by the common commissioners of oyer and terminer and gaol delivery (e); but it should seem that this act does not extend to prosecutions for assaults or other misdemeanors (f). And by the 12 Geo. 3. c. 24. s. 2. setting on fire ships, arsenals, magazines, &c. out of the realm, may be in-

(a) 1 East, P. C. 104.

(d) 57 Geo. 3. c. 53. s. 2.

(b) Ante, 150. 153. 1 Taunt. 59 Geo. 3. c. 44. s. 3.

27. 1 East, 359.

(e) 1 East, P. C. 370.

(c) Russ. & Ry. C. C. 294.

(f) 1 Sess. Ca. 246.

OF THE VENUE. dicted in any county within the kingdom, or at the place where the offence was committed. The crimes of governors of his majesty's plantations may, under 11 & 12 Wm. 3. c. 12. be tried in any county of England by special commission (*a*). And all offences, not felonious (*b*), committed by persons in public capacities in our East Indian possessions may, by 42 Geo. 3. c. 85. be indicted and tried in Middlesex (*c*).

Rules as to the venue at common law.

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It will now be proper to inquire into the rules which, at the present day, determine the venue in cases not particularly affected by the above mentioned acts of parliament. The general common law rule is still the same that the venue must be laid in the county where the offence is alleged to have arisen (*d*). And even the king cannot by charter authorize the trial of an offence in another county (*e*). But though the court of King's Bench has no jurisdiction over offences committed abroad, unless under some particular legislative provision; yet if any part of the offence be completed in Middlesex where the court sits, it may inquire of the whole transaction (*f*). It is the constant practice for offences committed in the county of Middlesex to be tried at the Sessions House in the Old Bailey, which is within the city, but it does not appear upon what foundation the custom is supported (*g*). In case of an indictment for forging notes, it seems not to be sufficient to shew an uttering in the county where the venue was laid in order to support the locality required for the trial (*h*); and a forged bill being found upon a prisoner in one county, bearing date at the time when he resided in another, on an indictment for forgery, is not sufficient to maintain the indictment, the venue being laid in the latter county (*i*). And in a case where the prisoner being indicted in the county of Wilts, it appeared that whilst he was in London his lodgings in Wiltshire were searched in the presence of his wife, and in a pocket-book (in which his name had been written by himself) the note in question was found, bearing date two months before, at which time he was in another

(*a*) 1 Sess. Ca. 247.

(*b*) 5 M. & S. 403.

(*c*) 3 East, 31.

(*d*) Co. Lit. 125 a. & b. n. 1. Hawk. b. 2. c. 25. s. 35.

(*e*) Dougl. 796. Hawk. b. 2. c. 25. s. 51.

(*f*) 1 Esp. Rep. 62, 3. 2 Hale, 12.

(*g*) Dougl. 796, 7.

(*h*) 2 East, P. C. 992. 2 New Rep. 87.

(*i*) Id.

county, a majority of the judges were of opinion, that this was OF THE VENUE.
 not sufficient evidence of the commission of the offence within
 the county (*a*). Where the prisoner delivered in one county a box,
 containing amongst other things forged stamps, to his own ser-
 vant, that he might carry them, and who did so, to an inn, situate
 in another county, to be forwarded by a carrier to a customer in
 the country, it was considered that he might be indicted in the
 county where the first delivery took place, and not where the inn
 was situate (*b*). In an indictment for a libel, if the defendant has
 once authorized the publication, he is guilty of a publication in
 whatever county the libel is afterwards in consequence published,
 and he may be indicted accordingly (*c*). And if a party writes
 and composes a libel in one county, with an intent to publish,
 and afterwards publishes it in another, he may be indicted in
 either (*d*). A mere acknowledgment by the defendant in the
 county in which the venue is laid, of the fact of publication,
 which in truth was in another county, is not sufficient to warrant
 the trial in the first county (*e*). Nor is the post mark on a libel-
 lous letter, of a particular place within the county where the venue
 is laid, sufficient evidence of the publication there by the de-
 fendant; but if it be sent to the prosecutor at a place without
 the county, and yet actually received by him within it, that will
 be sufficient to support the indictment (*f*). And if a man writes
 a letter, with intent to provoke a challenge, and puts it into
 the post office at Westminster, addressed to a person within
 the city of London, who receives it there, the writer may be
 indicted in Middlesex (*g*); and if the libel be dated of a par-
 ticular place, it is evidence that it was written there (*h*). So, [191]
 on trials for high treason, intercepted letters are received in
 evidence as overt acts of treason in the county where they were
 written (*i*). And if a person in Ireland procures another to pub-
 lish a libel at Westminster, he may be indicted in Middlesex (*k*).

(*a*) Russ. 1500.

(*b*) Russ. & Ry. C. C. 212.

(*c*) Bull. N. P. 6. 7 East, 65.

(*d*) 4 B. & A. 95; and see 3 B. & A. 717.

(*e*) 7 East, 68.

(*f*) 1 Campb. 215, 6.

(*g*) 2 Campb. 506.

(*h*) 4 B. & A. 95.

(*i*) 2 Campb. 507. 4 St. Tr. 409. Fost. 218. 6 T. R. 527.

(*k*) 7 East, 68. 3 Smith, 97. 99. 1 Esp. Rep. 63. 6 East, 589. 590.

OF THE VENUE.—And where a person, by means of an innocent agent, procures a felony to be done in another county, he may be indicted there, though not personally present; thus in case of a threatening letter, sent by the hands of a person ignorant of its contents, the defendant may be indicted in the place where the letter was received (*a*). The inference from which cases seems to be that the defendant may be indicted either in the county where he put the letter in the post, or in that where it was received. And if a loaded pistol be fired from the land which kills a man at sea, the offender must be tried by the Admiralty jurisdiction; for the crime is committed where the death happens, and not where the cause of death arises (*b*). And, on the same principle, if a shot be fired in one county, or poison administered, which becomes fatal in another, the venue must be laid in the latter; but it would be otherwise if A. in one county should procure B. a guilty agent, to commit a murder in the second, because in that case A. would be an accessory before the fact, and triable as such in the county where he was guilty of the murderous contrivance (*c*). On the other hand, if a person, unconscious of the guilty design, as a child without discretion, be employed in the commission of a murder, the venue must be laid in the county where the death happens, for they are merely the instruments, and the contriver is the principal (*d*).

[192] With respect to the description of overt acts of treasons committed within the realm, one overt act must be stated, and proved to have taken place in the county where the indictment is laid; but afterwards any overt acts of treason may be given in evidence of the same species of treason though committed elsewhere, and not alleged in the indictment (*e*). A distinction has been taken, that where a levying war is laid as an overt act of compassing the king's death, though laid within the county, it may be proved elsewhere; but that where the levying war is laid as the substantive treason, it is local and must be laid in the proper

(*a*) 1 Leach, 142. 2 East Fost. 349.
P. C. 1120.

(*b*) 1 Leach, 383.

(*c*) 2 & 3 Edw. 6. c. 24.

(*d*) 1 Hale, 514, 616, 617.

(*e*) Fost. 10. Dyer, 132, a.
Kel. 14, 15. 4 St. Tr. 447, 8.
6 St. Tr. 260. 1 East P. C.
125.

county :—for a levying war in Surrey may be good evidence of a *OF THE VENUE.* compassing the king's death in Middlesex, and so tend to establish the treason there; but a levying war in Surrey does not prove a levying war in Middlesex, though it may be adduced to show the nature of the act laid as treason in the proper county (*a*). And after the proof of one overt act of treason, by levying war in the proper county, proof of levying war in another county is admissible (*b*). So in the case of conspiracies, the venue may be laid in the county where any overt act by any one of the conspirators can be proved, and evidence may be there given of transactions in other counties (*c*). In larceny, if a man steal in one county and carry into another he may be indicted in the latter, though the goods were not carried into it until long after the original asportation (*d*). If a servant receive money for the master's use in one county, and on being called on to account for it in another, deny that he has received it, he may be indicted for the embezzlement in the latter county, even though there were evidence that he had spent the money in the former; for the illegality of his conduct does not necessarily appear from his spending the money, as he might pay the amount over in other coin than that which he actually received (*e*). And if a servant receive money for his master in the county of A. and being called upon to account for it in the county of B., there deny the receipt to it, he may be indicted for the receipt of it in the latter county (*f*). In case of perjury committed in the booth hall of the city of Gloucester, which is a city and county of itself, on the trial of a cause before a jury of Gloucestershire at large, the indictment may be found and tried either before a jury of the county at large, or of the city and county of Gloucester (*g*). And, in general, where a statute creates a new felony or offence, consisting partly of an act within the kingdom, and partly of one without, and limits it to be tried where the offence is committed, it must be tried where

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(*a*) Kel. 14, 15.

(*b*) Kel. 14, 15. Fost. 9. 3 St. Tr. 218. See the observations in 1 East P. C. 126. Stark. 20, note p. Kelynge, 15.

(*c*) 4 East, 171. 6 East, 590. acc. 1 Salk. 174, cont.

(*d*) 1 Ry. & Mo. C. C. 45, and

cases there collected in notes. Ante, 178.

(*e*) 3 B. & P. 596. 1 East P. C. Addenda, xxiv. Russ. & Ry. C. C. 56. S. C. 2 Leach, 974. 4 Taunt. 303.

(*f*) Russ. & Ry. C. C. 63.

(*g*) Dougl. 791.

OF THE VENUE. that part of the offence is committed which is within the kingdom; so that an offender against 1 Jac. 1. c. 2, by passing the sea, and entering into the service of a foreign prince, without taking the oath of allegiance, shall be tried in that county from whence he set sail for the foreign state (*a*).

The rule of common law, restraining jurors from inquiring into facts arising in another county, was not, at any time, so strictly observed in *misdemeanors*, as in capital cases. Thus we have seen that a party committing acts constituting a felony in two distinct counties, might have been indicted for the misprision in either, though the jury must necessarily have taken cognizance of the entire transaction (*b*). So if a nuisance be committed in one county, and it affect the public in another, the defendant may be indicted in either (*c*). And where a person, by reason of the tenure of certain lands in one county, is bound to repair a road in another, he may be indicted in the latter for the dilapidated state of the road, though his estate may lie out of the jurisdiction of the Quarter Sessions (*d*).

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Mode of stating
venue.

Having thus examined in what county an indictment may be preferred, and the venue laid, we have now to consider how the venue is to be stated both in the margin, and in the body of the indictment. The county is stated in the margin thus:—“*Middlesex*,” or “*Middlesex to wit*” (*e*), but the latter method is the most usual. In the body of the indictment also, the facts should in general be stated to have arisen in the county in which the indictment is preferred, so that it may appear that the offence was within the jurisdiction of the court; and, therefore, if a parish, vill, or other place, where the offence, or part of it, occurred, be stated without naming the county in the margin, or expressly referring to it by the words “the county aforesaid,” the indictment will be defective (*f*). And where two counties are

(*a*) 1 Hale, 706. 3 Inst. 89. Ante, 181.

(*b*) 1 Hale, 652. Ante, 177, 178.

(*c*) Hawk. b. 2. c. 25. s. 37. Staundf. b. 2. 91. 19 Edw. 3. Ass. pl. 6. 2 T. R. 211. 2 B. & P. 331.

(*d*) 5 T. R. 502. acc. 5 H. 7. 3. cont.

(*e*) 2 Hale, 166.

(*f*) 3 P. Wms. 496. Cro. El. 101. 137. 606. 751. 1 Sid. 345. Hawk. b. 2. c. 25. s. 34. 123. 1 Bulst. 205. 2 Hale, 166. 2 Sess. Cas. 3. 4. 219.

mentioned, as Surrey, in the margin, and then a fact is described as having happened in Middlesex, and afterwards the offence is stated to have been committed at a place "in the county aforesaid," without shewing which county is intended; this will refer to the last antecedent county, Middlesex, and the indictment will be insufficient, for the rule in civil actions, that the venue in the margin will aid it, does not extend to criminal proceedings (*a*). When, however, only one county is named, the words "county aforesaid," will have sufficient reference to the county in the margin (*b*).

It may, in general, be observed, that in indictments founded upon the statutes we have already enumerated, which authorize a mode, or place of trial, that did not exist at common law; all facts within the realm should be laid in the county where they actually happened (*c*). Thus, in case of murder, if the stroke or poison be given in one county, and the death occur in another, the facts should be stated according to their actual existence (*d*). And in prosecutions on the black act, which we have seen may be carried on in any county, it is usual to state the crime to have been committed in that where it actually occurred, though the venue be laid in any county (*e*). So, when an assault upon a revenue officer is tried in a foreign county, it should be laid in that where it took place (*f*). And in an indictment against an accessory, under the statute 2 & 3 Edw. 6. c. 24, for procuring the commission of a murder in another county, it should be averred, according to the fact, that the principal committed the murder in the county where it was actually perpetrated (*g*). And, in an indictment against a party in one county, for having goods there which he feloniously *robbed* in another, it may be advisable, though not absolutely necessary, to state the acts as they actually arose (*h*). Offences committed in Wales, and indicted in the

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(*a*) 2 Ld. Raym. 833. 1304.
2 Hale, 180. Cro. Eliz. 184.
1 Saund. 308, n. 1. 1 Chitty on
Plead. 4th edit. 249. 2 East,
66. 1 Bulst. 205.

(*b*) 3 P. Wms. 496. 2 Hale,
180. 1 Saund. 308, n. 1. Com.
Dig. Indictment, G. 2. Hawk.
b. 2. c. 25. s. 34.

(*c*) Ante, 179 to 184.

(*d*) 3 Inst. 48, 9. 3 Campb.
178. Cro. C. C. 278.

(*e*) 1 Leach, 73. 2 Bla. Rep.
733.

(*f*) 4 T. R. 490.

(*g*) 9 Co. 114. Hawk. b. 2.
c. 29. 3 Inst. 49.

(*h*) 2 East P. C. 776.

OF THE VENUE. next adjoining county of England, under the 26 Hen. 8. c. 6. s. 5, should be laid to have happened in the proper county in Wales (*a*), though it is said, that this is not absolutely necessary (*b*). 'Offences committed in the county of a city or town corporate, and indicted in the county next adjoining, under the 38 Geo. 3. c. 52, should be laid to have been committed in the county of the county of the town (*c*); but it need not be averred that the county where the indictment is brought is the next adjoining county (*d*). So indictments for offences committed upon the high seas, should allege the crimes to have been committed there, in order to shew the admiralty jurisdiction (*e*). And an offence committed in a foreign country should be stated to have been committed "in parts beyond the seas without the realm" (*f*), though it is said, that it may be laid to have been committed in the county where the offence is to be tried (*g*). We have already seen (*h*), that in indictments for felonies committed on or near the boundaries of counties, the 59 Geo. 3. c. 96. s. 2, enacts, that the offence may be alleged to have been committed in the county where the indictment is brought; and by the same act, s. 1, indictments for felonies committed in stage coaches, &c. may allege the offence to have been committed in any county through which the stage passed in the course of the journey, during which such offence was committed; and that where the highway forms the boundary of any two counties, the offence may be alleged to have been committed in either county through which the stage passed; and a similar provision is made by the 59 Geo. 3. c. 27, in indictments for felonies committed in vessels on canals or inland navigations.

In general, it is also essential to lay every issuable and triable fact to have happened at some particular *parish*, vill, hamlet, or place within the county, to which a venire may be awarded, and it will not suffice merely to state the county (*i*). But in indictments for offences against the 48 Geo. 3. c. 144; and 31 Geo. 3.

(a) 3 Campb. 78.	168. 1 Taunt. 26. 3 Inst. 112.
(b) 8 Mod. 141.	(g) 8 Mod. 141.
(c) Russ. & Ry. C. C. 144.	(h) Ante, 184.
(d) Russ. & Ry. C. C. 179.	(i) 5 T. R. 620. 2 Hale, 180.
(e) 3 Inst. 112. Bac. Abr. Admiralty, D. 1 Leach, 388.	3 Campb. 77. Hawk. b. 2. c. 25. s. 83. Bac. Abr. Indictment, G. 4.
(f) 1 East P. C. 369. 1 Leach,	

c. 51, relating to fisheries, there is no necessity to state the offence to have been committed in any particular parish, it will suffice to describe, either by name or otherwise, the bed, laying, or fishery in which such offence was committed (*a*). The ancient reason why a particular vill was requisite, has indeed long ceased to operate in practice; for the jury are no longer summoned from the neighbourhood, but from the county at large, and the right to challenge for hundredors has long fallen into disuse, though it has never been denied or taken away, and might probably be still exerted (*b*). The form, therefore, still continues; and besides the county, some particular place or parish in it should be laid (*c*), which is not so extensive but that all who live within its limits may be reasonably presumed to have a knowledge of the transaction to be made the subject of inquiry (*d*). Thus it may be laid in a town (*e*), a ward (*f*), a parish (*g*), hamlet (*h*), burgh (*i*), manor (*k*), castle (*l*), forest (*m*), or any place known out of a town (*n*). And formerly, if the sheriff returned that there was no such vill or parish, the practice was to award the venire from the body of the county (*o*). So also a visne may come from the neighbourhood of a city, without specifying any more particular division (*p*). But London, on account of its size and population, has always been an exception to this last rule, and it is always necessary to lay the offence either in some parish or ward within it (*q*). And it is not even sufficient to state the crime to have been committed in the guildhall of the city of London; for, if the prisoner be convicted upon such an indictment, judgment will

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(*a*) 43 Geo. 3. c. 144. s. 3.

(*b*) Co. Lit. 125 a & b. n. 1. 2 Hale, 272; and see 3 Campb. 77. 1 Stra. 593. 8 Mod. 245.

(*c*) Id. ibid. 1 Chit. on Plead. 4th ed. 249.

(*d*) Hawk. b. 2. c. 23. s. 92.

(*e*) Hawk. b. 2. c. 23. s. 92.

(*f*) Id. ibid. Yelv. 159. 1 Sid. 178. Cro. Jac. 222.

(*g*) Hawk. b. 2. c. 23. s. 92. 6 Co. 14. 1 Burr. 337.

(*h*) Hawk. b. 2. c. 23. s. 92. 6 Co. 14.

(*i*) Hawk. b. 2. c. 23. s. 92. Cro. Eliz. 836.

(*k*) Co. Lit. 125. 1 Sid. 326.

Hawk. b. 2. c. 23. s. 92.

(*l*) 2 Rol. Abr. 612, 613, 614. Co. Lit. 125. Hawk. b. 2. c. 23. s. 92.

(*m*) Co. Lit. 125. 2 Rol. Abr. 618. Hawk. b. 2. c. 23. s. 92. Cro. Eliz. 200.

(*n*) Hawk. b. 2. c. 23. s. 92. 2 Inst. 319. 1 Sid. 326.

(*o*) Cro. Eliz. 200.

(*p*) Hawk. b. 2. c. 23. s. 92. 2 Rol. Abr. 622, 3. Cro. Jac. 307, 8. 2 Hale, 260. Cro. Eliz. 490.

(*q*) Hawk. b. 2. c. 23. s. 92. Cro. Jac. 150. 308. 1 Burr. 333. 2 Leach, 800.

OF THE VENUE. be arrested (*a*). And in some cases, where the offence is of a peculiar local description, more particularity in the statement of the venue is necessary; thus an indictment under the 57 Geo. 3. c. 90, for being armed at night in a close to kill game, &c. must shew the particular close by name, or otherwise, in which the offence was committed (*b*). If the offence was committed within the liberty of Westminster, the venue in the margin should be "city, borough, and town of Westminster, in the county of Middlesex," and afterwards be "at the parish of Saint James, in the liberty of the dean and chapter of the collegiate church of St. Peter, Westminster, the city, borough, and town of Westminster, in the county of Middlesex, and Saint Martin-le-Grand, London." And no visne can come from a thing which is incorporeal, as from a liberty (*c*), nor from the scite of a manor, which is not a place, but rather the limits and situation of a place (*d*). It has also been alleged, that no visne can come from the weald of Sussex (*e*), but this has been regarded as questionable (*f*). If the indictment be preferred to a jury returned only for a *special division*, or precinct or part of a county, as in Yorkshire and Lincolnshire, where there are different districts and distinct juries; and in the Cinque Ports at Dover (part of Kent), it must be shewn in the body of the indictment, that the offence was not only committed in a parish and the county, but within the particular district (*g*). Wherever the place is generally alleged, the law will intend it to be a vill, unless the contrary appears on the record, and therefore where a parish is mentioned which contains several vills, this will never be supposed, but must be pleaded in abatement (*h*). It must be shewn that the vill or place is within the county, for if

[198] there be no such place, the defendant may plead the error in abatement (*i*); and by the statutes 7 Hen. 5. c. 1, continued by 9 Hen. 5. c. 1, and confirmed by 18 Hen. 6. c. 12, all process upon such indictment is void.

(*a*) Id. *ibid*.

(*b*) Russ. & Ry. C. C. 515.
Three of the Judges diss.

(*c*) 1 Sid. 326. Hawk. b. 2.
c. 23. s. 93.

(*d*) 2 Rol. Abr. 618. Hawk.
b. 2. c. 23. s. 93.

(*e*) 1 Sid. 83. 2 Rol. Abr.
617.

(*f*) Hawk. b. 2. c. 23. s. 93.

(*g*) Cro. Jac. 276. Hawk. b. 2.
c. 25. s. 34. 2 Hale, 166.
Kielw. 89. See also Paley on
Convictions, 52. 64. 1 East,
282. 8 T. R. 182.

(*h*) Hawk. b. 2. c. 23. s. 92.
Co. Lit. 125 b. 1 Salk. 59,
1 Burr. 337. 6 Co. 14 b.

(*i*) Hawk. b. 2. c. 23. s. 92.
2 Hale, 180.

Where a mere omission or nonfeasance is alleged, as in an in- OF THE VENUE.
dictment for not attending church, no vill need be stated in the body of the indictment, though it would be otherwise if the duty were local (*a*). So also in indictment for being a common barrator, it is unnecessary to allege any place where the defendant was guilty, for from the nature of the offence, which consists of the repetition of several acts, it must be supposed to have happened in several places; and, therefore it is holden, that the trial may be out of the body of the county (*b*).

In general, however, where any positive fact is averred, it should be stated to be done "*then and there*," after the county and the vill have been clearly expressed in the body of the indictment (*c*); and the allegation of time and place, "*then and there*," should be repeated to every material fact which is issuable and triable (*d*). And, therefore, if an indictment state that the defendant at the venue "made an assault, and with his sword feloniously struck," &c. without saying *then and there* feloniously struck, it will be insufficient (*e*). And where it was necessary to describe the place where corn was delivered, stating that a mill was situate at a parish, and afterwards averring a delivery of the corn at the mill, without shewing a parish, was held bad (*f*). But an indictment for stealing in a dwelling-house, stating that the prisoner, "at Liverpool, in the county aforesaid, one coat, &c. of, &c. in the dwelling-house of W. T. then and there being, then and there did feloniously steal, &c." not averring, "in the dwelling-house of W. T. *there situate*," was held good (*g*). It is not necessary to repeat the whole description of the venue, and therefore, "at Fort St. George aforesaid," was held sufficient, it having been previously more particularly described (*h*); and an indictment for a misdemeanor against a receiver of stolen goods need not allege time and place to the fact of stealing the goods,

(*a*) 5 East, 376, 8. 5 T. R. 616, 620. Hawk. b. 1. c. 10. s. 5. 4 East, 393.

(*b*) Cro. Eliz. 195. Cro. Jac. 527. Palm. 450. Hawk. b. 1. c. 81. s. 11. 2 Saund. 308, n. 1.

(*c*) 1 Sess. Cas. 178. Com. Dig. Indictment, G. 1.

(*d*) Id. ibid. 8. 5 T. R. 620.

Cro. Eliz. 200, 5. 1 Chitty on Pleading, 4th edit. 251. 14 East, 300, 1. Rep. temp. Hardw. 288.

(*e*) Dyer, 69 a. 2 Hale, 180.

(*f*) 4 M. & S. 214.

(*g*) 1 Ry. & Mo. C. C. 44.

(*h*) 5 T. R. 616.

OF THE VENUE. for it is sufficient if these circumstances be alleged to the fact of the receipt(*a*); and it should seem, that, as in the statement of time, there does not appear to be so much strictness required in indictments for misdemeanors, as for felonies; the same rule might prevail in such prosecutions as to the repetition of place (*b*). Where a transitory act, or matter of inducement, does not happen within the county in which the venue is laid, it may nevertheless be laid there (*c*), and though it may be laid out of that county, and in the place where it really happened, yet in that case the venue in the indictment should be added under a videlicet, or the proceedings will be insufficient (*d*). In cases of public nuisance, it is sufficient to lay it near to the highway and dwelling-houses which it annoys (*e*). It will not suffice to state the defendant as late of Wolhampton, and then to refer to the venue as “the parish aforesaid,” without shewing that Wolhampton is a parish, and if the indictment be so framed, judgment will be arrested (*f*). And so, if the offence be laid “at the town aforesaid,” when no town has been mentioned, the defect will be fatal (*g*). And though it is in general unnecessary to aver a mere conclusion of law, either with time or place, yet if it be so averred improperly, the indictment will be defective (*h*). In general, circumstances which are not material need not be laid with any venue (*i*). Thus under the statute which made it treason for a person born within the realm in popish orders to remain here, the indictment need not shew any venue for the birth or denization (*k*). If the offence be laid to have been committed in a city which is a county of itself, but the jurisdiction of the latter is not co-extensive with the former, it should be laid within both of them (*l*). The words “*from and into*,” when applied to legal description, are construed in an exclusive sense; thus the allegation from Hatley *into* Gamlingay has been holden to exclude the latter, and the words “to

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(*a*) 2 East P. C. 780, 1.

(*b*) Cro. Jac. 345. 2 Hale, 178.

(*c*) Kel. 15. Stark. 222, 3; ante, 184.

(*d*) Cro. Jac. 17; but see Stark. 23, n. h.

(*e*) 1 Burr. 337.

(*f*) 5 T. R. 162, 3.

(*g*) Cro. Car. 465. Hawk.

b. 2. c. 25. s. 83.

(*h*) Hawk. b. 2. c. 25. Stark. 61.

(*i*) Com. Dig. Indictment, G. 2.

(*k*) Hawk. b. 2. c. 25. s. 84.

(*l*) Andr. 162.

and from the town of Battel," have been held to exclude that OF THE VENUE. town itself (*a*).

If the facts be stated as to place with repugnancy or uncertainty, the indictment will be invalid (*b*) on demurrer, motion in arrest of judgment or writ of error, and a verdict will not aid the defect (*c*), as if two places are previously named, and afterwards a fact is only laid "then and there." The indictment is defective because it is uncertain to which it refers (*d*), or if it be laid at B. aforesaid, when B. was not previously named (*e*), or if the stroke be in one county and the death in another, and the indictment conclude that so the prisoner murdered the deceased in the county where the cause of the death proceeded (*f*). But though such great strictness is in general necessary in the averment of a parish, vill, or place, it is somewhat singular that it is, in no case, not even in the instances of treason and murder, necessary to prove that the offence was committed at the precise vill, parish, or place, laid in the indictment; and when a variance between the allegation and the proof of local description is immaterial, provided there be such a place in the county as stated in the indictment (*g*), it is sufficient to shew in evidence that it happened any where within the proper county, except, indeed, where the place is the essence of the crime, as in striking in a church yard (*h*), or in indictments for burglary, or not repairing, or any other nuisance to a public thoroughfare (*i*); or in an indictment on the 57 Geo. 3. for being found armed in a close at night (*k*). Where an indictment for robbery stated that it was in a field near the king's highway, and the robbery was not proved to be near any highway, it was considered sufficient (*l*).

Consequence of venue being defectively stated.

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(*a*) 2 Rol. Abr. 81. 3 T. R. 513. 1 Burr. 376.

(*b*) Hawk. b. 2. c. 25. s. 83. Bac. Abr. Indictment, G. 4.

(*c*) 4 T. R. 490. 5 T. R. 162. 1 Rol. Abr. 781. l. 35. 2 Leach, 800.

(*d*) 2 Hale, 180. Bac. Abr. Indictment, G. 4.

(*e*) Cro. Car. 465. Bac. Abr. Indictment, G. 4. Cro. Eliz. 739. Hawk. b. 2. c. 25. s. 83.

(*f*) Hawk. b. 2. c. 25. s. 83.

Bac. Abr. Indictment, G. 4. Cro. Eliz. 196.

(*g*) 3 Burn, J. 24th edit. 56; and the disproof lies on defendant, id.

(*h*) 2 Hale, 179. 244, 5. 4 Bla. Com. 306. Hawk. b. 2. c. 25. s. 84. c. 46. s. 181, 182. 1 East P. C. 125. Holt, 534.

(*i*) Id. ibid. 1 Burr. 333.

(*k*) Russ. & Ry. C. C. 515, three of the Judges diss.

(*l*) Russ. & Ry. C. C. 9.

CHANGING
PLACE OF TRIAL.

At common law, when a fair and impartial trial cannot be obtained, and the indictment has been removed into the King's Bench by certiorari, the court have a power of directing the trial to take place in the next adjoining county when justice requires it (*a*). Thus an indictment against a county for not repairing a bridge will be thus removed, because the jury by whom it would be tried, would form part of the defendants (*b*). And, therefore, upon a suggestion entered by leave of the court upon the roll, that a fair and impartial trial cannot be had in the county of the city of Chester, the court will award the trial to be had in the adjoining county palatine (*c*). This suggestion, when once entered, is not traversable, and therefore, the court will require very strong evidence of probable unfairness, before they will allow it to be entered (*d*). Where the indictment is removed, the venue in it remains the same, and the place of trial alone is changed (*e*). And by the 38 Geo. 3. c. 52, if the venue in any indictment or information be laid in the county of any city or town corporate, with the exception of a few enumerated in the statute (*f*) the court in which such proceeding is depending, may, on the application of either party, direct the issues joined to be tried by a jury of the county next adjoining, upon the applicant entering into a recognizance in the sum of £40, to pay the extra costs arising from the removal. But this last clause does not apply to indictments removed into the King's Bench by certiorari, and sent down from thence to be tried in a county adjoining, but only to offences committed within a limited jurisdiction, where the indictment is

(*a*) 4 East, 210. 2 Stra. 374. Clift. Ent. 741. 2 Burr. 859. 6 Mod. 307. Hawk. b. 1. c. 77. s. 6; and for further information as to the removal of indictments by certiorari, &c. see post, 371 to 402. It is not a sufficient ground for the issuing of a certiorari to remove an indictment, that prejudices existed against the defendant, unless there was some prejudice in the court below, 1 Chit. Rep. 571, notes. It will not be granted merely on the ground that the court below are supposed to be

incompetent to decide an important question of law, *id.* In a case where the defendant was a public officer, (a deputy register) and his personal attendance was daily necessary, the court granted a certiorari to remove an indictment from the Old Bailey to Gloucester, where the defendant resided, *id.*

(*b*) 6 T. R. 194.

(*c*) 7 T. R. 735.

(*d*) 1 Bla. Rep. 378. 3 Burr. 1330.

(*e*) 1 Bla. Rep. 379.

(*f*) Sect. 10. 7 T. R. 735.

committed within a limited jurisdiction, and removed by the authority of commissions of oyer and terminer and gaol delivery (*a*). The 51 Geo. 3. c. 100, in further pursuance of the design of the last-mentioned statute, directs that punishment may, in the discretion of the court, be inflicted on the offender either in the city or town corporate in which the offence was committed, or in the county into which the proceedings have been removed, and judgment pronounced against him.

CHANGING
PLACE OF TRIAL.

Immediately after the statement of the venue in the margin, the indictment proceeds to shew the presentment of the jury upon oath, in these terms, "*the jurors for our lord the king, upon their oath present.*" It must appear in the caption that the indictment was taken upon oath, and the names of all the jurors should be stated by whom it is taken, but it is not usual to insert them in the indictment itself (*b*). And it must be expressed in the present tense, for if the word *did* present be inserted instead of *do*, the objection will be fatal (*c*).

Presentment of
the grand jury.

The name and addition of the party indicted ought regularly to be truly inserted in every indictment; but whatever mistake may be made in these respects, if the defendant appears and pleads not guilty, he cannot afterwards take advantage of the error (*d*). A plea in abatement has always been allowed when the Christian name of the defendant is mistaken (*e*), but it seems formerly to have been supposed that an error in the surname was not thus pleadable (*f*). But it has been since held that a mistake in the latter is equally fatal with one in the former (*g*). It seems, however, if the sound of the name is not affected by the mis-spelling, the error will not be material (*h*). And if two names are, in ori-

Name of defend-
aut.

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(*a*) 1 Smith, 31. 4 East, 208.

(*b*) 2 Hale, 165, 6, 7, 8.

(*c*) Andr. 162, 3. Hawk. b. 2. c. 22. s. 127. Burn, J. Indictment.

(*d*) Bac. Abr. Misnomer, B. Indictment, G. 2. 2 Hale, 175. Cro. C. C. 34.

(*e*) 2 Hale, 176. 237, 238. Hawk. b. 2. c. 25. s. 68. Bac. Abr. Indictment, G. 2. Misnomer, B. Burn, J. Indictment.

Gilb. C. P. 217. 1 Stark. Rep. 42.

(*f*) 2 Hale, 176. Hawk. b. 2. c. 25. s. 69. Burn, J. Indictment. Williams, J. Misnomer. Bac. Abr. Misnomer, B. 1 Stark. Rep. 43.

(*g*) 10 East, 83. Kel. 11, 12.

(*h*) 10 East, 84. 16 East, 110. Hawk. b. 2. c. 27. s. 81; and see Russ. & Ry. C. C. 412. post, 216.

NAME OF
DEFENDANT.

ginal derivation, the same, and are taken promiscuously in common use, though they differ in sound, yet there is no variance (*a*). It has been holden, that a defendant cannot be described with an *alias dictus* of the *Christian* name (*b*), but a man may be described by a second surname, if laid under an alias (*c*). An attainder by act of parliament, in which the party attainted is described by a wrong name, may be avoided (*d*). But if the defendant plead misnomer of his surname, the prosecutor may reply, that the defendant is known as well by one name as the other (*e*), though it is said to be the best and most usual practice to allow the plea, as the defendant must set forth his right name therein, and a new and more regular indictment may be immediately preferred against him, and he will be concluded by his own averment (*f*). If the name of the prisoner be unknown, and he refuse to disclose it, an indictment against him "as a person whose name is to the jurors unknown, but who is personally brought before the jurors by the keeper of the prison," will be sufficient: but an indictment against him as a person to the jurors unknown, without something to ascertain whom the grand jury mean to designate, is insufficient (*g*). But it should be observed, that some indictments are good at common law without naming any particular person, as against a parish for not repairing a highway, though none of the inhabitants are specifically enumerated (*h*). The name of the defendant committing the offence should be repeated to every distinct allegation, but it will suffice to mention it once, as the nominative case in one continuing sentence (*i*).

Addition of de-
fendant.

It seems that, even at common law, before the statute of additions, it was necessary to state the rank and degree of the de-

(*a*) 2 Rol. Abr. 135. Bac. Abr. Misnomer, where the instances of this principle are stated at large.

(*b*) 1 Ld. Raym. 562. Willes, 554. Burn, J. Indictment. 3 East, 111. but *semble* that this doctrine is not well-founded, for admitting that a person cannot have two Christian names at the same time, yet he may be *called* by two such names, which is sufficient to support a

declaration, or indictment, baptism being immaterial. Rep. temp. Hardw. 286. 6 Mod. 116. 1 Campb. 479.

(*c*) 1 Leach, 420. 1 Hen. 7. 28. Bro. Misnomer, 47.

(*d*) 1 P. Wms. 611.

(*e*) 2 Hale, 238. Kel. 11, 12.

(*f*) 2 Hale, 176, 238.

(*g*) Russ. & Ry. C. C. 489.

(*h*) Roll. Abr. 79. Hawk. b. 2. c. 25. s. 68.

(*i*) 4 Harg. St. Tr. 747.

fendant, if he were a knight or any higher dignity, in addition to the surname and name of baptism, and, if he were a lord, to supply the place of the surname (*a*). So if he were indicted in respect of his office, that addition should be given him (*b*). But the statute 1 H. 5. c. 5. very much extended this rule; by that statute it was enacted, that in all original writs of actions, personal appeals, and indictments, and in which the exigent shall be awarded, “additions shall be made in the names of the defendants” of their estate, or degree, or mystery, and of the towns, or hamlets, or places and counties, of which they were or be or in which he or they were conversant;” and that, if these additions be omitted, any outlawries founded thereon shall be void, and the proceedings shall be abated *by the exception of the party*. It is, therefore, “by the exception of the party” only, that the indictment can be abated; and if the defendant appear and plead not guilty, the defect will be of no importance (*c*). If the addition be absolutely bad, on the face of it, or be omitted, the defendant may before plea move the court to quash the indictment (*d*), on the defendant producing an affidavit giving his addition, and it seems that an indictment for perjury would be quashed for an objection of this nature (*e*). But it should seem that the defendant cannot demur (*f*); and if the objection do not appear on the indictment, then advantage must be taken of the defect by a plea in abatement (*g*).

In the construction of this statute, it has been holden, that the words “estate or degree,” have the same signification, and include the titles, dignities, trades, and professions of all ranks and descriptions of men (*h*). The defendant ought to be described according to his present degree, and not as “*nuper armiger*,” &c.

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(*a*) 2 Inst. 666. Com. Dig. Indictment. Bac. Abr. Misnomer, B. 2.

(*b*) Id. *ibid*.

(*c*) Cro. Jac. 482. 610. 1 Ld. Raym. 345. 420. 1 Leach, 420, note a. And. 146. 2 Hale, 175. 2 Inst. 670. Com. Dig. Indictment, G. 1. Burn, J. Indictment. Williams, J. Misnomer, II. Cro. C. C. 34. Bac. Abr.

Misnomer, E.

(*d*) 1 Leach, 420.

(*e*) 3 D. & R. 621.

(*f*) And. 148. 150. Cro. Jac. 610. Rol. Abr. 780. But see 4 Bla. Com. 391, where it is said that the omission is ground of error.

(*g*) Andr. 148. 150.

(*h*) 2 Inst. 666.

ADDITION
OF DEFENDANT.

which is insufficient (*a*). And it is wrong to describe a man as possessed of any dignity which he holds in any nation, except England (*b*), though it was anciently said, that an Irish bishop may be indicted by the addition of his diocese (*c*).

A nobleman may be described by his dignity obtained by creation, as earl (*d*); by his name of dignity, as garter (*e*); an inferior person by his reputed degree of *gentleman*, if so reputed, though only a *yeoman*, in legal understanding (*f*), but if he be not so reputed the mistake will be fatal (*g*).

Addition of de-
grees.

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The following additions of *degree* are sufficient—serjeant at law (*h*), esquire (*i*), knight (*k*), gentleman, yeoman, labourer (*l*), as well as all titles, whether by birth or creation (*m*); all degrees taken at the university (*n*); and widow, single woman, spinster, and gentlewoman, are good in respect of females to whom they may respectively be adapted (*o*). On the other hand, burgess, citizen, farmer, and servant (*p*), are too general, and, therefore, cannot be applied either to a man or woman. Labourer (*q*), and yeoman (*r*), though both good additions for a man, are bad when applied to a female; but she may be described as the wife of A. B. *yeoman* (*s*), because that term applies with certainty to the husband, but not as the wife of A. B. *spinster*, because that may

(*a*) 2 Inst. 670. 9 E. 4. 2.
22 E. 4. 13. 21 H. 6. 3.

(*b*) 2 Leach, 547. 2 Salk.
451. Hawk. b. 2. c. 23. s. 109.

(*c*) Year Book, 21 Hen. 6.
c. 3. s. 4. Hawk. b. 2. c. 23.
s. 109. Bac. Abr. Misnomer,
B. 2.

(*d*) 2 Inst. 666. Com. Dig.
Indictment, G. 1.

(*e*) Hawk. b. 2. c. 25. s. 69.
Cro. Eliz. 542. Bac. Abr. In-
dictment, G. 2.

(*f*) 2 Inst. 668. Com. Dig.
Indictment, G. 1.

(*g*) Id. ibid.

(*h*) 2 Inst. 668. Hawk. b. 2.
c. 3. s. 110. Bac. Abr. Misno-
mer, B. 2.

(*i*) Id. ibid. Com. Dig. In-
dictment, G. 1.

(*k*) Id. ibid.

(*l*) Bro. Add. 3. 5. Bac. Ab.
Indictment, G. 2.

(*m*) Id. ibid.

(*n*) Hawk. b. 2. c. 23. s. 110.
2 Inst. 668.

(*o*) 2 Inst. 668. 2 Hale, 177.
Hawk. b. 2. c. 23. s. 111. Bro.
Add. 64. 66.

(*p*) 2 Inst. 668. Hawk. b. 2.
c. 23. s. 111. Bro. Add. 5. 42.
50. Bac. Ab. Indictment, G. 2.
but contra as to *servant*, 2 Ld.
Raym. 968, there held to be
a good addition, because cer-
tain.

(*q*) 2 Inst. 668. Bro. Add. 5.
59. Hawk. b. 2. c. 23. s. 111.

(*r*) Hawk. b. 2. c. 23. s. 111.

(*s*) Dyer, 46, 7. a. Cro. Eliz.
750. 2 Hale, 177.

refer either to the wife or the husband (*a*). Where the defendant has two titles or names of dignity, he should be described by the highest (*b*), or otherwise he may plead in abatement (*c*). But an esquire may be indicted by the addition of gentleman, for all degrees below knights are names of worship only (*d*). It should be observed, that for offences which do not amount to treason, felony, or actual breach of the peace, in indictments against a peer, no addition is necessary, because no process of outlawry can be awarded against him (*e*). And, indeed, upon the construction of this statute, it has been holden, that the addition of residence is only necessary where process of outlawry lies in default of appearance, and that, therefore, in an indictment for mere forcible entry, no addition is required (*f*). And gentleman and esquire are convertible terms, and may be used for each other without variance (*g*). With respect to the mode of stating a title, it has been laid down, that where the defendant is of the higher order of nobility, the addition of quality precedes that of place, as Edward, Duke of Buckingham, late of R., but where he is only a knight or baronet, the place precedes the degree, as A. B. late of G. baronet (*h*). If a gentlewoman be denominated spinster, she may plead in abatement, as if the same description had been applied to a lady of title (*i*).

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OF DEFENDANT.

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With respect to the addition of mystery, the following are sufficient: husbandman (*k*), merchant (*l*), taylor (*m*), broker (*n*), point-maker (*o*), hostler (*p*), smith (*q*), miller (*r*), manufactu-

Addition of
mystery.

- | | |
|--|--|
| <p>(<i>a</i>) Dyer, 47. a. 2 Hale, 177.
 (<i>b</i>) 2 Inst. 669.
 (<i>c</i>) Hawk. b. 2. c. 23. s. 103.
 (<i>d</i>) 1 Wils. 244.
 (<i>e</i>) 2 Hale, 177. 199. Cro. Eliz. 148. 1 Wils. 244. 5 Comb. 70. Cro. C. C. 35.
 (<i>f</i>) Comb. 70. Bac. Abr. Indictment, G. 2. Misnomer, B. 2. Cro. Eliz. 148. 35. 2 Hale, 177. 1 Wils. 244.
 (<i>g</i>) Bro. Add. 44. Fortes. Rep. 354. Bac. Abr. Misnomer, B. 3.
 (<i>h</i>) 2 Inst. 669.
 (<i>i</i>) 2 Inst. 668.
 (<i>k</i>) 2 Inst. 668. Bro. Add. 39. Hawk. b. 2. c. 23. s. 114.</p> | <p>Bac. Abr. Indictment, G. 2. Misnomer, B. 3.
 (<i>l</i>) 2 Inst. 668. Bro. Add. 50. Hawk. b. 2. c. 23. s. 114.
 Bac. Abr. Misnomer, B. 3.
 (<i>m</i>) 2 Inst. 668. Bac. Abr. Misnomer, B. 3. Bro. Add. 15. 39. Hawk. b. 2. c. 23. s. 114.
 (<i>n</i>) Hawk. b. 2. c. 23. s. 114. Bac. Abr. Misnomer, B. 3.
 (<i>o</i>) Id. ibid.
 (<i>p</i>) Bro. Add. 35. Bac. Abr. Misnomer, B. 3.
 (<i>q</i>) Hawk. b. 2. c. 25. s. 114. Bac. Abr. Misnomer, B. 3.
 (<i>r</i>) Bro. Add. 39. Hawk. b. 2. c. 23. s. 114. Bac. Abr. Misnomer, B. 3.</p> |
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rer (*a*), carpenter (*b*), cook (*c*), brewer (*d*), baker (*e*), butcher (*f*), parish clerk (*g*), mercer (*h*), fishmonger (*i*), dyer (*k*), schoolmaster (*l*), scrivener (*m*), and all other lawful trades and professions (*n*). But all epithets which charge the defendant with improper or unlawful practices are insufficient, as maintainer (*o*), extortioner (*p*), abettor (*q*), vagabond (*r*), heretic (*s*), common informer (*t*), thief (*u*), and all terms of a similar description. So also the addition of an office is bad, unless the defendant is prosecuted for something done in his official capacity (*x*); and, therefore, chamberlain, butler, pantler, page, and groom, have been holden to be insufficient additions (*y*). For the same reason the addition of "*farmer*" is questionable, because it is of equivocal signification, and if any act be implied by it, the term "*husbandman*" is the proper description (*z*). It is said, that where the defendant is engaged in several occupations, he may be described by either of them; but if a gentleman by birth engage in trade, he should be described as a gentleman and not by his art or mystery (*a* 1).

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- (*a*) 3 B. & P. 550.
 (*b*) Bro. Add. 15. 39. Hawk. b. 2. c. 23. s. 114. Bac. Abr. Misnomer, B. 3.
 (*c*) Hawk. b. 2. c. 23. s. 114. Bac. Abr. Misnomer, B. 3.
 (*d*) Id. *ibid*.
 (*e*) Id. *ibid*.
 (*f*) Bro. Add. 42. 2 Hale, 177. Hawk. b. 2. c. 23. s. 114. Bac. Abr. Misnomer, B. 3.
 (*g*) Bro. Add. 52. 62. Hawk. b. 2. c. 23. s. 114. Bac. Abr. Misnomer, B. 3.
 (*h*) 2 Inst. 668, 9. Hawk. b. 2. c. 23. s. 114. Bac. Abr. Misnomer, B. 3.
 (*i*) Hawk. b. 2. c. 23. s. 114. Bac. Abr. Misnomer, B. 3.
 (*k*) Id. *ibid*.
 (*l*) 2 Leon. 186. Hawk. b. 2. c. 23. s. 114. Bac. Abr. Misnomer, B. 3.
 (*m*) Hawk. b. 2. c. 23. s. 114. Bac. Abr. Misnomer, B. 3.
 (*n*) 2 Inst. 668. Bac. Abr. Misnomer, B. 3.
 (*o*) 2 Inst. 668. Bac. Abr. Misnomer, B. 3. Indictment, G. 2 Bro. Add. 8. Hawk. b. 2. c. 23. s. 115. Cro. C. C. 35.
 (*p*) 2 Inst. 668. Hawk. b. 2. c. 23. s. 115. Bac. Abr. Misnomer, B. 3.
 (*q*) Bac. Ab. Misnomer, B. 3. 2 Inst. 668. Cro. C. C. 35.
 (*r*) Hawk. b. 2. c. 23. s. 115. Cro. C. C. 35. Bac. Abr. Misnomer, B. 3.
 (*s*) Id. *ibid*. 2 Inst. 668.
 (*t*) Hawk. b. 2. c. 23. s. 115. Bac. Abr. Misnomer, B. 3.
 (*u*) Id. *ibid*.
 (*x*) Com. Dig. Indictment, G. 1.
 (*y*) Bro. Add. 50, 58. 2 Inst. 668. Hawk. b. 2. c. 23. s. 117. Bac. Abr. Misnomer, B. 3.
 (*z*) 2 Inst. 668. Bro. Add. 10. Hawk. b. 2. c. 23. s. 116. Bac. Abr. Misnomer, B. 3.
 (*a* 1) 2 Inst. 668, 9.

As to the addition of the *residence* of the defendant, it seems that a county, as well as a place (*a*), must be distinctly laid in the indictment in all cases where process of outlawry would lie against the defendant (*b*); but in indictments against peers and others, in case where no process of outlawry can issue, it has been held, that addition of place is unnecessary (*c*). And where a city is a county of itself, it will be sufficient to state the defendant to be of the place generally, as of London (*d*), or Norwich; and, even though they are not co-extensive, he will be presumed to be an inhabitant of both, until the contrary appear (*e*). Where a hamlet is parcel of a town, and therefore an inhabitant of the former is also an inhabitant of the latter, he may be described as residing in either (*f*). So if he occasionally live in two places, the addition of either will suffice (*g*). And, if he live in a place which has a certain name, though it is neither a town nor a hamlet, as the statute uses the general word *place*, it will be sufficient to describe him as of the same (*h*), and he may be described as of his parish, if it contains no more than one town or hamlet, which will always be presumed until the contrary appear (*i*). But, if it includes more than one town or hamlet, the proper place should be specified (*k*). If there are two towns in the same county, the names of which are partly similar, as Great Dale and Little Dale, the defendant cannot be indicted as of Dale only, for he may plead that there are two places to which the common name applies, and neither without the addition (*l*). So, if the same place be sometimes called North Dale and sometimes East Dale, but never Dale simply, he may plead that there is no such

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sidence.

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(*a*) *Sed quere* if it is necessary to state the addition of a town, &c. in a county. In an affidavit to hold to bail the addition of deponent as "of the city of London, merchant," was held sufficient, 3 M. & S. 166.

(*b*) Cro. Jac. 167. 2 Inst. 669. Hawk. b. 2. c. 23. s. 120.

(*c*) Ante, 204.

(*d*) 3 M. & S. 165.

(*e*) 2 Inst. 669. Hawk. b. 2. c. 23. s. 120. Com. Dig. Indictment, G. 2. Bac. Abr. Misnomer, B. 4.

(*f*) 2 Inst. 669. Bac. Abr. Misnomer, B. 4.

(*g*) Hawk. b. 2. c. 23. s. 103.

(*h*) 2 Inst. 669. Bac. Abr. Misnomer, B. 3.

(*i*) 2 Inst. 669. Com. Dig. Indictment, G. 2. Hawk. b. 2. c. 23. s. 120. Bac. Abr. Misnomer, B. 4.

(*k*) Id. *ibid.* 2 Anders. 124. 1 Burr. 337, 8.

(*l*) 2 Inst. 669. Rast. Ent. 47. Hawk. b. 2. c. 23. s. 21. Com. Dig. Indictment, G. 2. Bac. Abr. Misnomer, B. 4.

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town, because a part of the name is not equal to the whole (*a*). But it seems, that if there are two places of precisely the same name, in the same county, and never otherwise denominated, it will be sufficient to allege the defendant to be of the town generally, without adding any distinction (*b*).

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It is universally agreed, that it is sufficient to describe the defendant as *late* of a particular parish, and in this respect the addition of place differs from that of degree and mystery (*c*); and it is said, that if a man be described as of A. late of B., proof of either allegation may be admitted (*d*). And the place where he is conversant is sufficient, though he be neither commorant nor inhabitant (*e*). But he must be positively described as late of the place in question, and therefore to describe him as *merchant of London* will be bad, as it may merely signify that he carries on trade, and not that he personally resides in the metropolis (*f*); and, upon the same principle, it has been said that it is enough to state a clergyman as rector of a parish, because he may be rector without residing; the law, however, will presume residence (*g*). But the residence of the wife is sufficiently shewn by stating that of the husband, unless it is expressly proved that they live separate (*h*).

In practice, where a felony or other offence has been committed at A. in the county of B., the usual and better course is, to state the defendant's addition of the same place, viz. I. S. late of A. in the county of B., although his place of abode may be in another county; because he is considered as having been conversant in the county where the offence was committed; and when this course is adopted, the process of outlawry, which will hereafter be considered, will go as at common law, and there is no occasion for writs of *capias* into different counties, as is neces-

(*a*) Hawk. b. 2. c. 23. s. 121.

(*b*) Id. *ibid.* 2 Inst. 669. Rast. Ent. 47.

(*c*) 2 Inst. 670. Hawk. b. 2. c. 23. s. 119. Com. Dig. Indictment, G. 1. Bac. Abr. Misnomer, B. 4. per Lord Kenyon. 4 T. R. 541. 18 How St. Tr. 461.

(*d*) Hawk. b. 2. c. 23. s. 119.

(*e*) Bac. Ab. Misnomer, B. 4.

(*f*) Com. Dig. Indictment, G. 1. Hawk. b. 2. c. 23. s. 120.

(*g*) 2 Inst. 669. Com. Dig. Indictment, G. 1.

(*h*) 2 Inst. 669. Hawk. b. 2. c. 23. s. 124. Cro. Eliz. 198. 750.

sary when the indictment states the defendant's addition to be of a county, different to that in which the offence is charged to have been committed (*a*). If, however, the indictment state the defendant's addition to be of the county in which the offence was committed, and then another addition of a different county is stated under an alias, one writ of *capias* will in general suffice (*b*).

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The addition should never be added after the alias dictus, where that is introduced, but after the first surname, or the mistake will vitiate the proceedings, for the addition regularly refers to the last antecedent (*c*). And an addition to the second name subjoined to the alias dictus is not requisite (*d*). Where several defendants are jointly indicted, it is advisable to repeat the addition after each name, though similar (*e*); and where a father and son have the same name, and are both indicted, some distinction as elder and younger should be adopted (*f*). It has been said, that where no addition is stated in the indictment as to one of the defendants, it will be quashed as to all (*g*), but this seems incorrect, because the law regards the indictment in that case, as several against each of the defendants (*h*).

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The statute of additions extends to the defendant alone, and does not at all affect the description either of the prosecutor, or any other individuals whom it may be necessary to name (*i*); and, therefore, no addition is in any case necessary, unless more than two persons are referred to, whose names are similar (*k*); and even this does not seem absolutely necessary, for where upon an indictment for assaulting Elizabeth Edwards it appeared that there were mother and daughter of that name, and that the assault was

Name and addition of third persons.

(*a*) Hawk. b. 2. c. 27. s. 125, 126. 2 Hale, 196. per Buller, J. 3 T. R. 502.

(*b*) 2 Hale, 196. Hawk. b. 2. c. 27. s. 125, 6.

(*c*) 1 Leach, 420. Cro. Eliz. 198. 583. 3 Salk. 19, 20. 1 Saund. 14, n. 1. 2 Hale, 177. 2 Inst. 669. Hawk. b. 2. c. 25. s. 70. c. 2. s. 126. Bac. Abr. Indictment, G. 2. Dyer, 50. b.

(*d*) Hawk. b. 2. c. 25. s. 70.

(*e*) Id. ibid. 1 Bulst. 183.

(*f*) Id. ibid. Salk. 7. but see 3 B. & A. 579, *infra*, n. (*a*).

(*g*) Hawk. b. 2. c. 25. s. 70. 1 Bulst. 183; but see 2 Hale, 177.

(*h*) 2 Hale, 177. Bac. Abr. Misnomer, G. Indictment, G. 2. per Ld. Kenyon, 4 T. R. 536, 7.

(*i*) 2 Leach, 861. 2 Hale, 182. Burn, J. Indictment. Bac. Abr. Indictment, G. 2.

(*k*) Id. ibid.

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upon the daughter, it was held sufficient (*a*). Indeed, with respect to this matter, certainty to a common intent is all that the law requires, and if the description be sufficiently explicit to inform the prisoner who are his accusers, the indictment may be supported (*b*). But it is, in general, necessary to set forth the names of third persons with sufficient certainty; and, therefore, it seems to be generally agreed at this day, that an indictment for suffering divers bakers to bake, &c. against the assize, when that offence was indictable, or for distraining divers persons without just cause, or for taking divers sums of money of divers persons for toll, cannot be supported (*c*).

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There are indeed some cases in which the name of third persons cannot be ascertained, in which it is sufficient to state "a certain person or persons to the jurors aforesaid unknown (*d*)."

Thus an indictment for harbouring thieves unknown is sufficient, from the necessity of the case, and the fair presumption which exists that their names cannot be ascertained (*e*). So upon the same ground, if the dead body of a person murdered be found, and it is impossible to discover who he was, an indictment for having killed some one unknown would be valid (*f*). And if stolen goods be found upon a highwayman, and it is not known to whom they belong, he may be indicted for stealing the goods and chattels of some one or certain persons unknown (*g*). And in treason or in trespass it is enough to say, that he hath procured some one unknown because all are principals (*h*). And the receiver of stolen goods may be indicted without naming the principal felon (*i*). Thus also in the indictment of the regicides for

(*a*) 3 B. & A. 579.

(*b*) 1 Leach, 248. 2 Leach, 861. Hawk. b. 2. c. 25. s. 72.

(*c*) Hawk. b. 2. c. 25. s. 71. Bac. Abr. Indictment, G. 2. Bro. Indictment, 21. 2 Rol. Abr. 89; but in an indictment for lodging poor persons in an unhealthy place, it was held not necessary to state the names of such persons. Cald. 432.

(*d*) Hawk. b. 2. c. 25. s. 71. 2 East P. C. 651. 781. Cro. C. C. 36. Plowd. 85, b. Dyer,

97, 286. 2 Hale, 181.

(*e*) Id. *ibid*. Stra. 497. 186.

(*f*) 2 Hale, 181. Dyer, 99. a. 285. Plowd. 85. 129. Hawk. b. 2. c. 23. s. 78. Hawk. b. 2. c. 25. s. 71. Bac. Abr. Indictment, G. 2. Burn, J. Indictment. Cro. C. C. 36.

(*g*) Id. *ibid*. Keilw. 25. 2 East P. C. 651, 781.

(*h*) Com. Dig. Indictment, G. 1.

(*i*) 2 East P. C. 781. 3 Campb. 264, 5.

having procured the death of Charles the First, the fact was agreed to be well laid as done by some one unknown whose face was concealed by a vizor (*a*). And thus if a man steal the goods of an abbey during a vacancy, he may be prosecuted for stealing *the goods of the church*, though the church can have no property (*b*).

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But these cases are exceptions to the general rule, and are supported by the particular circumstances which render a strict observance of the common maxim incompatible with the purposes of justice. For wherever the name of the party injured is known, it is absolutely necessary to insert it (*c*). Thus in an indictment for larceny, though the goods may be laid to be the property of *persons unknown*, if that is actually the case, yet if the owner be really known, the allegation will be improper, and the prisoner must be discharged from that indictment, and tried upon a new one rectifying the mistake (*d*). And an indictment will be bad against an accessory, stating the principal to be unknown contrary to truth, and the judge will direct an acquittal (*e*). And where the parties names may be ascertained on inquiry, it seems they must be named; and where property was stated in one count to belong to certain persons, naming them specifically, but in another count to belong to *persons unknown*, and the prosecutor by defect of evidence could not prove the christian names of the persons as described in the first count, it was considered he could not recur to the other count (*f*); but the finding of a grand jury of a bill for receiving goods, imputing the same to have been stolen by J. S., does not of itself negative, in another indictment for the same offence, an averment that the goods were stolen by *persons unknown* (*g*). In an indictment for larceny, the owner of the property stolen must if known be accurately stated, and a

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(*a*) Kel. 10. Hawk. b. 2. c. 25. s. 71. Com. Dig. Indictment, G. 1.

(*b*) Hawk. b. 2. c. 25. s. 71.

(*c*) 3 Campb. 264, 5. 2 Russ. 1313. Hawk. b. 2. c. 25. s. 71. Burn, J. Indictment. Cro. C. C. 36. Sum. 95. Plowd. 85. Keil. 25. Dyer, 99. Dalt. J. c. 131, 9 H. 6, 45.

(*d*) 2 East, P. C. 651. 781. 3 Campb. 265, note. 1 Hale, 512. Hawk. b. 2. c. 25. s. 71.

2 Leach, 578. Kenyon, 598.

(*e*) 3 Campb. 264, 5. 2 East, P. C. 781. 2 Russ. 1313.

(*f*) Holt, C. N. P. 595.

(*g*) Russ. & Ry. C. C. 372.

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variance would be fatal (*a*). And it was anciently decided, that where a man is indicted for murdering another, the name of the party killed ought to be disclosed by the inquest; but this could only mean where the name was capable of discovery (*b*). And, upon the same principle, in indictments for burglary and stealing in a dwelling-house to the value of forty shillings, stealing from lodgings and for arson, the name of the owner of the house must be truly inserted (*c*); but if he be known by one name as well as by another, the indictment may describe him of either (*d*). So, in an indictment on the black act, for maliciously shooting at the prosecutor, if the offence be laid in the house of a third person, an error in his name will be a fatal variance (*e*). But it has been holden, that a church is a building within the meaning of 4 Geo. 2. c. 32, and that an indictment for stealing lead affixed to it need not state the person in whom the property or freehold was vested (*f*). Upon this subject, it was formerly the practice, if sacrilege was committed on the goods in a consecrated place, not being a church, to lay them as the property of the chapel, &c. in the custody of the managers; if it was done when no managers were appointed, to term them the goods of the chapel in time of vacancy; but if the furniture of a church were stolen, to lay the property in the parishioners (*g*). It has also been laid down, that an indictment against a thief, that he found a dead body and stole from it certain property, is good, without calling them the goods and chattels of any one (*h*). And if a grave be opened in the night, and the shroud be stolen, the indictment cannot lay the goods as the property of the deceased, but must state them to belong to his executors, or those who buried the deceased (*i*).

(*a*) See the cases collected, post, vol. iii. 948.

(*b*) Hawk. b. 2. c. 25. s. 71. Staundf. 181. b. 2. c. 18.

(*c*) Leach, 89. 21. 78, 9. 237. 252. 336. 338. 545. 774. 2 East, P. C. 513. 780. 2 Hale, 244, 5. See the cases collected, post, vol. iii. 1096 to 1093.

(*d*) 2 Hale, 244, 5. Hawk. b. 2. c. 35. s. 3.

(*e*) 1 Leach, 351. 1 East, P. C. 415. 2 Hale, 244, 5; but see

Stark. 178, notes (*f*) and (*g*).

(*f*) 1 Leach, 318. 2 East, P. C. 593.

(*g*) 2 Hale, 181. Hawk. b. 1. c. 33. s. 29. Cro. Eliz. 145. 179. Bac. Abr. Indictment, G. 2.

(*h*) 2 Hale, 181. Bac. Abr. Indictment, G. 2.

(*i*) 12 Co. 113. 3 Inst. 110. 2 Hale, 181. Cro. C. C. 36. Bac. Abr. Indictment, G. 2. 2 East, P. C. 652.

And if goods be stolen from the custody of one who has them as executor, the offender may either be indicted for stealing the goods of the testator in the custody of the executor, or the goods of the executor without naming him in that capacity (*a*). A corporation must prosecute in their corporate name, and the names of the individuals composing it will not suffice (*b*). But, on the other hand, where property is vested in trustees under an act of parliament, if they are not incorporated, they must be described by their proper names as individuals, and their character as trustees subjoined as a description of the capacity in which the legislature authorized them to act (*c*).

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There are various acts of parliament remedying the difficulty experienced in describing the persons names. Thus, in some cases of numerous unincorporated adventurers, it would be impracticable to describe all the names; it has therefore been recently enacted, that in case of felony, or crime relating to a mine, it shall suffice to lay the property as that of one or more of the adventurers by name, and others, his or their partners or adventurers (*d*), without naming such other partners or adventurers by name; and the enactment has since been extended to burglaries, felonies, grand or petty larceny, or criminal breach of trust, committed on any personal property of any partners whatever (*e*). The 55 Geo. 3. c. 137. enacts, that the property in goods, &c. provided for the use of the poor is to be considered as vested in the overseers for the time being, and that the property in such goods, &c. may in an indictment be described to be the property of the overseers of the poor for the time being, without stating or specifying the name of any of such overseers (*f*). And by the 43 Geo. 3. c. 59. property belonging to counties for the repair of roads, &c. may be described as belonging to the surveyor for the time being.

As to the mode in which the parties injured, or any third persons should be mentioned, we have already seen, that if a person

(*a*) 2 Hale, 181. Bac. Abr. Indictment, G. 2.

(*b*) 1 Leach, 253. 2 East, P. C. 1059; and see 1 Ry. & Moo. C. C. 15. in case of a foreign corporation.

(*c*) 1 Leach, 514.

(*d*) 56 Geo. 3. c. 73.

(*e*) 1 Geo. 4. c. 102.

(*f*) See infra, 216, n. (i), as to what a sufficient description.

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is described with such certainty, that it is impossible to mistake him for any other, such a description will in general suffice; and a person may be described by the name by which he is usually known (*a*). Thus it has been adjudged, that an indictment for an assault on John, parish priest of D. is sufficiently certain, and if the defendant after verdict of not guilty, be indicted again, with the addition of the prosecutor's surname, he may plead his former acquittal (*b*); and an indictment for larceny, laying the goods stolen to be the property of Victory Baroness Tuckheim, by which appellation she had always acted and was known, was held good, though her real name was Selima Victoire (*c*). So an indictment for forgery of a draft addressed to Messrs. Drummond and Company, Charing Cross, by the name of Mr. Drummond, Charing Cross, without stating the names of Mr. Drummond's partners, was held sufficient (*d*). But a mere statement of the christian name, without any addition to ascertain the precise individual, is bad, because uncertain (*e*). The son of a duke or earl, who during the life of his father is called marquis or lord, must not be described as really possessing those titles, but must be called by the family name; and the words "commonly called Marquis, &c." may be added by way of addition (*f*). So it was holden before the Union, that a peer of Ireland should be thus described: "James Hamilton, esquire, Earl of Clanbrassil, in the Kingdom of Ireland," because no dignity in another country can give a higher title here than that of esquire (*g*); and that in such an indictment the words "commonly called," &c. were untechnical, but may be rejected as surplusage (*h*). An indictment stating goods to be the property of the overseers of the poor *for the time being*, is a sufficient description that the property was in the overseers at the time of the offence (*i*). An indictment for robbery committed on a woman in her maiden name

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(*a*) Ante, 211. Hawk. b. 2. c. 25. s. 72. 2 Leach, 248. Russ. & Ry. C. C. 510.

(*b*) Dyer, 285 a. Keilw. 25. Hawk. b. 2. c. 25. s. 72. Bac. Abr. Indictment, G. 2.

(*c*) 2 Leach, 361.

(*d*) 1 Leach, 248. 2 East, P. C. 990.

(*e*) Hawk. b. 2. c. 25. s. 71.

Bac. Abr. Indictment, G. 2; but see Starkie, 184. 6 St. Tr. 805. Moor, 466.

(*f*) 2 Salk. 451. 2 Leach, 547.

(*g*) 2 Leach, 547.

(*h*) Id. *ibid*.

(*i*) Russ. & Ry. C. C. 359. 3 J. B. Moore, 22. 3 Burn, J. 24th ed. 254.

is good, though she marry before the finding of the indictment by the grand jury (*a*). A bastard should be described of the name he has gained by reputation, describing him of his mother's name, he not having gained that name by reputation, would be bad (*b*). If a party be known by one name as well as another, he may be described of either (*c*). And it seems if the sound of the name is not affected by the mis-spelling, such mis-spelling will be immaterial; and where a party was indicted for an offence upon one *Whyneard*, whose real name was *Winyard*, but pronounced *Winnyard*, the indictment was held good (*d*); so "*Benedetto*" for "*Beneditto*" is no variance (*e*), nor is "*Segrave*" for "*Seagrave*." (*f*) But an indictment charging the prisoner with having personated "*M'Cann*" instead of "*M'Carn*" is bad (*g*), and "*Tarbart*" for "*Tabart*" (*h*), "*Shakpear*" for "*Shakespeare*" (*i*), and "*Shutliff*" for "*Shirtliff*" (*k*), are variances.

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A variance in the name will not be fatal, if the name be immaterial to constituting the offence, and may be rejected as surplusage (*l*). But where there is a repugnancy or absurdity in the description of the party injured, the error will be fatal, as where one is indicted for stealing the goods and chattels of the said I. S. where I. S. had not been previously mentioned (*m*), although those words have in some cases been rejected as surplusage (*n*). And it should be observed, that a material error in the names of the persons aggrieved, or in whom property stolen ought to be laid, is much more important than a mistake in the name or addition of the defendant; for the latter can only be objected to by a plea in abatement, which can only delay the trial, while the former will be sufficient ground for arresting the judgment, when the objection appears on the face of the indictment; or, if it be an error in fact, will be a ground of ac-

Consequence of
defective state-
ment of name of
third persons, &c.

(*a*) 1 Leach, 536.

(*b*) Russ. & Ry. C. C. 358.

(*h*) 5 Taunt. 514.

(*i*) 10 East, 83.

(*c*) 2 Hale, 244, 5. Hawk. b. 2. c. 35. s. 3. Russ. & Ry. C. C. 510.

(*k*) 4 T. R. 611. For other instances see 3 Stark. on Evid. 1578.

(*d*) Russ. & Ry. C. C. 412; and see ante, 203.

(*l*) 1 Ry. & Moo. C. C. 1. 2 East, P. C. 593.

(*e*) 2 Taunt. 401.

(*m*) Hawk. b. 2. c. 25. s. 72.

(*f*) 2 Stra. 889.

(*n*) 1 Leach, 109.

(*g*) 3 Stark. Evid. 1578.

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quittal on the trial at least, as far as respects that part of the charge (*a*), though the mistake only affects the higher offence, the indictment may still be valid as to the inferior crime, as if a party be indicted for burglariously breaking and entering the dwelling-house of Jno. Snoxall, and stealing therein goods, the property of Ann Lock; if the name of the owner of the house be mistaken, the defendant cannot be found guilty of the capital part of the indictment, viz. the burglary, yet he may be convicted of the simple larceny (*b*); so in an indictment for stealing to the amount of forty shillings in the dwelling-house of A. B. under the 12 Ann. c. 7. the defendant may be acquitted of the capital part of the charge, when not strictly proved, and found guilty of the simple larceny (*c*).

Statement of
time.*

We come now to consider the *time* when it is necessary to state that the offence was committed. It is, in general, requisite to state, that the defendant committed the offence for which he is indicted, on a specific year and day (*d*). And if the day of the month alone, without the year, be inserted, it will be bad, and cannot be supplied by intendment (*e*). There is, however, an exception to this rule, where a mere negative or omission is averred, in which case no time need, in general, be stated (*f*). And, in an impeachment before the High Court of Parliament, no time is requisite (*g*). It is usual to specify the year of the king's reign, but it is sufficient if the time be ascertained by any other means; and, therefore, in the case of the regicides, no year of any reign was laid for the king's murder, but the compassing of his death was laid in January, in the twenty-fourth year of Charles the First, and the murder was laid on the thirtieth day of the

(*a*) 1 East P. C. 514. 2 Leach, 774. 1 Leach, 252. 286. 351. 390. 1 East P. C. 415.

(*b*) Leach, 252. 339, n. (*a*).

(*c*) Leach, 339, n. (*a*).

(*d*) 2 Hale, 177. Hawk. b. 2. c. 25. s. 77. Hawk. b. 2. c. 23. s. 88. Dyer, 164, b. Com. Dig. Indictment, G. 2. Bac. Abr. Indictment, G. 4. 4 Bla.

Com. 306. Burn, J. Indictment. Williams. J. Indictment, IV. Cro. C. C. 35.

(*e*) Id. *ibid*.

(*f*) 5 T. R. 616. Hawk. b. 2. c. 25. s. 79. Com. Dig. Ind. G. 2. Lamb. b. 4. c. 5. f. 492.

(*g*) 16 St. Tr. 17. 19. Lords Journals, 116.

* As to alleging time in general, in pleading, see 1 Chitty on Pleading, 4th edit. Index, tit. Time.

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same month of January (*a*). So the year is sufficiently expressed, by shewing the year of the king, without adding that of the Lord (*b*). And where an indictment was tried at the Summer Assizes, in the year 1820 (A. R. 1 Geo. 4.) stated, that the prisoner "on the 20th of *July*, in the 4th year of the reign of King George the Fourth," stole a mare, against the peace of our lord the now king, it was held the words "4th year of the" might be rejected as surplusage, and that the indictment was good (*c*). So where the time of the caption of the indictment was stated, and the offence laid to have been committed on the day after Pentecost, the time was held to be sufficiently expressed (*d*). And upon the same ground, it seems to follow, that an indictment laying the time on the *ut*as of Easter, which will be taken for the eighth day after the feast, or on the 10th day of March last, if it can be ascertained by the style of the sessions before which the indictment was taken, is valid (*e*). But though it is sufficient in a conviction to lay the offence between two days specified, it is otherwise in indictments and informations (*f*); and, therefore, an indictment for battery, setting forth that the defendant beat so many of the king's subjects between two specified days, would be insufficient (*g*). But if an indictment charge a man with keeping a common gaming house on divers days, and only one day be particularly specified, it will be good, for only one penalty can be inflicted (*h*). The time should be stated with such certainty, that no doubt can be entertained as to the period really intended; and therefore it is bad to state the crime to have been committed on the feast of Saint Peter, because there are two feasts of that name, and both have

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(*a*) Kcl. 10, 11. Hawk. b. 2. c. 25. s. 80. Burn, J. Indictment. Williams, J. Indictment, IV.

(*b*) 2 Hawk. P. C. 264. 3 Inst. 318. Bac. Abr. Appeal, H.

(*c*) Russ. & Ry. C. C. 431.

(*d*) Com. Dig. Indictment, G. 2. Hawk. b. 2. c. 25. s. 78. Bac. Abr. Indictment, 94.

(*e*) Hawk. b. 2. c. 25. s. 78. Bac. Abr. Indictment, G. 4. Burn, J. Indictment. Wil-

liams, J. Indictment, IV.

(*f*) 1 Ld. Raym. 581. 10 Mod. 249. Hawk. b. 2. c. 25. s. 82. Cro. C. C. 36. Burn, J. Indictment. Williams, J. Indictment, IV.

(*g*) 4 Mod. 101. Hawk. b. 2. c. 25. s. 82. Burn, J. Indictment. Williams, J. Indictment, IV.

(*h*) 10 Mod. 338. Hawk. b. 2. c. 25. s. 82. Williams, J. Indictment, IV.

TIME.

additions to distinguish them (*a*); so it is insufficient to allege, that the defendant, on the first day of May, and also on the second day of May, made an assault on the prosecutor, and *then and there* feloniously took, &c. because two days having been mentioned before, it is not evident to which of them the felonious taking relates (*b*). It is a general rule, that where time is necessary to be stated, it must be laid with a venue; and whenever a venue is necessary, time must also be mentioned (*c*).

[219] It does not appear to have been at any time necessary to state the *hour* in the indictment, for the statute of Gloucester, which some think rendered it necessary in an appeal, does not extend to proceedings in which the crown is the actual prosecutor (*d*). But where the offence derives its complexion from the time when it was committed, it is proper to aver it. Thus in an indictment for burglary, though the word *burglariously* seems to carry with it a sufficient expression that it was done in the night, it has been holden necessary to state some hour, though it is not material to prove that the offence was committed at that precise hour (*e*). So in an indictment for breaking into a house in the day-time, in order to oust the offender of his clergy, under the statute 39 Eliz. c. 15, it is necessary to state that the offence was committed "*in the day time*," for otherwise, though the indictment will be valid, the benefit of clergy will not be taken away (*f*). But as it is, in general, unnecessary to name any hour, if it be stated imperfectly, no objection can be made on the part of the defendant (*g*).

Time as well as place ought, in general, not merely to be mentioned at the beginning of the indictment, but to be repeated to every issuable and triable fact; for, wherever a venue is necessary,

(*a*) 2 Hale, 178. Bac. Abr. Indictment, G. 4. Hawk. b. 2. c. 23. s. 88.

(*b*) 2 Hale, 178. Bac. Abr. Indictment, G. 4.

(*c*) 5 T. R. 620.

(*d*) 2 Inst. 318. Hawk. b. 2. c. 25. s. 76. Bac. Abr. Indictment, G. 4. in notes. Com. Dig.

Indictment, G. 2. Burn, J. Indictment.

(*e*) 2 Hale, 179. Waddington's case, reported in Burn, J. Burglary, 2 East P. C. 513. Hawk. b. 2. c. 25. s. 76, in notes. Bac. Abr. Indictment, G. 4, in notes.

(*f*) 2 Hale, 179. Bac. Abr. Indictment, G. 4. Cro. C. C. 35.

(*g*) 1 Bulst. 203.

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time should be united with it (*a*). But after the time has been once named with certainty, it is afterwards sufficient to refer to it by the words *then and there*, which have the same effect as if the day and year were actually repeated (*b*). But the mere conjunction *and*, without adding *then and there*, will in many cases be insufficient. Thus, in an indictment for robbery, these words must be connected with the stroke or the robbery, and not merely with the assault (*c*); and, in a case of murder, it is not sufficient to allege, that the defendant, on a certain day, made an assault, and struck the party killed, but the words *then and there* must be introduced before the averment of the stroke (*d*), and the word “immediately” is too uncertain an allegation when time constitutes part of the offence; and, therefore, where, on an indictment for a highway robbery, the special verdict found the forcible assault, and then in a distinct sentence that the prisoners “then and there *immediately*” took up the prosecutor’s money, this was held to be insufficient to fix the prisoners with the offence of robbery, because the word “immediately” has great latitude, and is not of any determinate signification, and is frequently used to import “as soon as it conveniently could be done” (*e*). So it is said, that the word *being* (*existens*) will, unless necessarily connected with some other matter, relate to the time of the indictment rather than of the offence; and, therefore, an indictment for a forcible entry on land, *being* the prosecutor’s freehold, without saying “then being” was held insufficient (*f*). But if the indictment allege that the defendant feloniously and of malice aforethought, made an assault, and with a certain sword, &c. *then and there* struck, the previous omission will not be material,

(*a*) 5 T.R. 620. Dyer, 68, 9. Hawk. b. 2. c. 23. s. 88. Cro. Com. Dig. Indictment, G. 2. Eliz. 739.

Burn, J. Indictment. Williams, Just. Indictment, IV. 14 East, 300, 301; see ante, 198, as to repetition of place. (*d*) 2 Hale, 178. Dyer, 69. Hawk. b. 2. c. 23. s. 88. Cro. C. C. 35.

(*b*) 2 Hale, 178. 2 Stra. 901. Keilw. 100. Hawk. b. 2. c. 25. s. 78. c. 23. s. 88. Bac. Abr. 529. Dougl. 212.

Indictment, G. 4. Williams, J. Indictment, IV. Comyns, 480. (*e*) Rep. temp. Hardw. 114, 115. Comyns, 480. 1 Leach, 1467, 8. 2 Rol. Rep. 225. Com. Dig. Indictment, G. 2.

(*c*) Id. ibid. 2 Hale, 178. Dig. Indictment, G. 2.

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for the words *feloniously and of malice aforethought*, previously connected with the assault, are by the words *then and there* sufficiently applied to the murder (a). So where in an indictment for poisoning, it was alleged that the prisoner did *wilfully, feloniously, and of malice aforethought*, mix poison with other ingredients, with intent that the same should be afterwards eaten by the deceased, and with the intent aforesaid did *then and there* deliver the same to the deceased, it was holden sufficient by all the judges, without adding the words *feloniously and of malice aforethought*, to the allegation of the delivery of the poison (b). And, in some cases, the words *then and there* are more certain than even a repetition of the day and year, for the latter will not be sufficient where, in order to complete the offence, connected acts must be shewn to be done *at the same time*, but the terms *then and there* must be adopted. Thus, in an indictment upon the 6 Geo. 1. c. 28, for feloniously assaulting a person with intent to spoil his clothes, where the assault and spoiling must be shown to be continuous, the repetition of the day and place is insufficient, because it does not appear that the acts were not on different hours of the day; but the words *then and there* fix them to have been effected together (c).

It seems, however, that the nicety which requires these words to be cautiously inserted to every material allegation, is not so strictly observed in indictments for inferior offences, as in cases where the life of the prisoner is in danger (d). Thus, where a mere trespass is charged, it is sufficient to state that the defendant at a certain place and time, made an assault on the prosecutor and beat him, without inserting *then and there*, because the time and place named in the beginning refer to all the subsequent averments (e). So also, in an indictment for a forcible entry, it is enough to state that the defendant entered and dispossessed, without any second averment of time or venue (f).

(a) 4 Co. 41 b. Dyer, 69 a.
Godb. 65, 6. 1 East P. C. 346.

(b) 1 East P. C. 346.

(c) 1 Leach, 529. Comyns,
430.

(d) 2 Hale, 178. Cro. C. C.
35. Burn, J. Indictment. Cro.
Jac. 41. 345. Dyer, 69.

(e) Id. ibid.

(f) Cro. Jac. 41.

But, in such case, the place unlawfully entered must be stated to have been then and there the property of the party complaining, and the omission will be fatal (*a*).

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In case of homicide, the day of the stroke as well as of the death should be expressed, the former because the escheat and forfeiture of lands relate to it, the latter because it should appear that the death was within a year and day after the stroke (*b*). And, even then, the indictment will be vitiated by a repugnancy in the conclusion, as if the assault and stroke be alleged on the tenth of December, and the death subsequent on the twentieth of December following, and then it be alleged that so the prisoner feloniously murdered the deceased on the tenth of December aforesaid, because the felony is not complete till the death occurs (*c*). But, on the other hand, if in the conclusion it had been stated, that the defendant so murdered the deceased on the twentieth day of December aforesaid, it would have been sufficient (*d*). It is, however, said to be the better way to conclude generally that the defendant in such manner feloniously committed the murder (*e*). Nor is it, in homicide alone, that distinct periods must be laid for the commission of particular acts, for it has been holden, that a sheriff's return of a rescue as well as indictment for that offence, are bad, without shewing the day and year both of the arrest and the rescue, and that the time of the latter is not sufficiently shewn by shewing that of the former (*f*). And where an indictment for rescue set forth, that a third person at a certain time and place committed a felony, for which the officer took and arrested him, *and in his safe custody then and there had and kept him*, it is doubtful whether it be not insufficient, because no time of the arrest is alleged in the same sentence, and it is not clear whether the time of the cus-

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(*a*) Cro. Jac. 214.

(*b*) 2 Hale, 179. 2 Inst. 313. Hawk. b. 2. c. 23. s. 90. Hawk. b. 2. c. 25. s. 77. Bac. Abr. Indictment, G. 4. Burn, J. Indictment.

(*c*) 4 Co. 42. Hawk. b. 2. c. 23. s. 88. Bac. Abr. Indict-

ment, G. 4. Com. Dig. Indictment, G. 2.

(*d*) 4 Co. 42. Hawk. b. 2. c. 23. s. 88.

(*e*) Id. ibid.

(*f*) Hawk. b. 2. c. 25. s. 77. Dyer, 164 b. acc. 2 Bulst. 208. contra.

TIME. today can, by force of the conjunction, be applied to the arrest ; but the contrary seems to be the better opinion (a).

When the time is material, as of the death, in case of homicide, or where the time for the prosecution is limited, as under 7 W. 3. c. 3, which provides that no prosecution shall be had for certain treasons therein mentioned, unless the bill of indictment be found within three years after the crime is committed: the time, as averred in the indictment, should appear to be within the limit, but it is not necessary to aver that it occurred within that period (b). And it has been holden, that the word *until* in an indictment, may be construed either exclusive or inclusive of the day to which it is applied, according to the context or subject-matter. Where, therefore, in an information upon the statute 33 Geo. 3. c. 52. s. 62, prohibiting officers of the East India Company *residing* in India, from receiving presents of the natives, it was charged that the defendants, from a certain day *until* the 29th day of November, 1795, held certain offices under the company, and *during all that time resided in the East Indies*, and during that time, to wit, on the said 29th day of November, 1795, received certain presents, it was holden that the context shewed that the word *until* was to be taken inclusive of the 29th of November, 1795 (c). But if it had been incapable of receiving an inclusive construction, the words under the first videlicet "*until the 29th November, 1795,*" could not have been rejected as surplusage; for that can never be done where the allegation is sensible, and consistent in the place where it occurs, and not repugnant to *antecedent* matter, though laid under a scilicet and inconsistent with a subsequent allegation (d). So the word *to*, when applied to time, may have either an inclusive or exclusive signification. And it will depend upon the sense in which it is legally construed how far the proceedings are valid (e).

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(a) Dyer, 164; and see 3 P. 242. 2 East, 333. 362.
Wms. 484. 497. Russ. & Ry. (c) 5 East, 244.
C. C. 276. (d) Id. ibid.

(b) 5 East, 259. 1 Saund. (e) 5 East, 255, 556. 2 Mod.
309, n. 5. Fitzg. 136. Bac. 280. Owen, 50. Burr. 719.
Abr. Usury, K. Gilb. L. & E.

TIME.

Though the allegation of a specific time is thus important, it is in no case necessary to prove the precise day, or even year laid in the indictment, except where the time enters into the nature of the offence (*a*). And therefore an overt act or acts of high treason may be proved to have been committed on a different day from that mentioned in the indictment (*b*); so, in an indictment for burglary, though it is necessary to state at or about what hour of the night it happened, it is not necessary that the evidence should strictly correspond with the allegation (*c*). And if an unnecessary allegation as to time be introduced and not proved, it may be rejected, and the defendant convicted; as in an indictment for setting fire to a barn, if it be stated that the defendant committed the offence in the night-time, that allegation is immaterial, and the indictment, though intentionally framed on the statute 22 & 23 Car. 2. c. 7, was held valid on the 9 Geo. 1. c. 22 (*d*). But it is better, though not necessary, to state the time as nearly as possible, at least in an indictment for treason, because the forfeiture of lands relates to the time when the offence was committed, so as to avoid subsequent alienations, and the day laid in the indictment will, after a general verdict, be considered as correct (*e*). And it seems that where there are several offences, and they are described as having been committed on such a day, and on divers other days and times afterwards, evidence cannot be admitted to prove more than one offence prior to the day named (*f*). But where an offence is committed by the doing of several acts at separate times, they may be stated to have been done at the same time; therefore where, on a prosecution under the statute 7 Geo. 3. c. 50. s. 1, against secreting letters

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(*a*) Per Lawrence, J. in 9 East, 162. 2 Inst. 318. 3 Inst. 230. 9 State Trials, 587. Fost. 8, 9. 1 Hale, 361. 2 Hale, 179. 244. 291. Hawk. b. 2. c. 23. s. 88. c. 35. s. 3. c. 25. s. 81. c. 46. s. 179, 180. Com. Dig. Indictment, G. 2. Bac. Abr. Indictment, G. 4. Burn, J. Indictment, Williams, J. Indictment, IV. 5 T. R. 620. Cro. C. C. 36. 1 East P. C. 125. 2 Id. 513. 1021. 1035. 2 Stark. Rep. 224. 1 Stark. Rep. 54. 3 M. & S. 548.

(*b*) Fost. 8, 9. 1 East P. C. 125. Kel. 16.

(*c*) 2 East P. C. 513.

(*d*) 2 East P. C. 1021. 1035.

(*e*) 1 Hale, 361. 2 Hale, 179. 3 Inst. 330. Bac. Abr. Forfeitures, D.

(*f*) Bul. N. P. 86. 1 Saund. 24, n. l. 1 Stark. Rep. 351.

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containing bank notes, it appeared that a bank note had been cut in two parts, that the parts had been sent at different times, and at different times had been secreted by the prisoner, the indictment was holden good, though it stated that the defendant, on the same day, secreted the letters containing the divided bank note (*a*). And, in an indictment for high treason, overt acts committed at different times may all be laid on one day (*b*). And, therefore, upon a second indictment, the defendant may, by proper averments, show that he has been already acquitted of that offence upon the first, though the two indictments allege the offence to have been committed on different days; for it would be hard indeed if the prosecutor might vary from the day laid, for the purpose of conviction, and the prisoner could not do the same in order to show a previous acquittal (*c*).

[226] But if the indictment lay the offence to have been committed on an impossible day, as on the 30th day of February or 31st day of June, or on a future day, this will be as objectionable as if no day at all had been inserted (*d*). So the indictment will be insufficient, if, on the face of it, the same offence be alleged to have been committed at different periods (*e*), or on such a day as renders it repugnant to itself (*f*). And no defect of this nature is aided by verdict (*g*). And though the precise day is, as we have seen, in general, not necessary to be proved, yet if a person be charged with a burglary and stealing the goods, the prosecutor, on failing to prove that these facts were committed on the day laid in the indictment, cannot be admitted to prove that a distinct larceny was committed on a prior day (*h*).

(*a*) 2 Leach, 575.

(*b*) Fost. 8.

(*c*) 2 Inst. 318, 319. 3 Inst. 230. 2 Hale, 179.

(*d*) Rast. Ent. 263. Moore, 555. 1 T. R. 316. Hawk. b. 2. c. 23. s. 88. Id. c. 25. s. 77. Burn, J. Indictment. 5 East, 244. In *Rex v. Goddard*, East. Term, 1784. Russ. & Ry. C. C. 432, note a. the prisoner was indicted for burglary on 18th Oc-

tober, 23 Geo. 3. and the indictment was found in August, 23 Geo. 3. and the offence was really committed 18th October, 22 Geo. 3. the conviction was held wrong.

(*e*) 1 T. R. 316. Hawk. b. 2. c. 25. s. 77.

(*f*) Hawk. b. 2. c. 25. s. 7. 5 East, 244.

(*g*) Id. *ibid*.

(*h*) 2 Leach, 708.

In setting forth the time when facts occurred, as well as place, number, quantity, &c. it is very usual, in criminal as well as civil proceedings, to introduce the statement under what is termed a *videlicet*, or *scilicet*, as “*that afterwards, to wit, on, &c. at, &c.*” the defendant did, &c. or a fact occurred, which it is thought proper to mention. Lord Hobart, speaking of a *videlicet* says (*a*), “that its use is to particularize that which was before general, or to explain that which was before doubtful or obscure; that it must not be contrary to the premises, and neither increase nor diminish but that it may work a restriction where the former words were not express and special, but so indifferent that they might receive such a restriction, without apparent injury.” Respecting the use of this mode of statement, it has been said, that where the time when a fact happened is immaterial and it might as well have happened at another day; there, if alleged under a *scilicet*, it is absolutely nugatory, and therefore, not traversable; and if it be repugnant to the premises, it will not vitiate, but the *scilicet* itself will be rejected as superfluous and void, but that where the precise time, &c. is material, and enters into the substance of the description of the offence, there the time, &c. though laid under a *scilicet*, is conclusive and traversable, and it will be intended to be the true time, and no other, and if impossible or repugnant to the premises, it will vitiate (*b*). Either the allegation must exactly correspond with the fact, or it may vary; if the former it will be well laid with a *scilicet*, which may be rejected; and, if the latter, though the *scilicet* were omitted, evidence of a different day, quantity, or place, may be admitted (*c*). Thus in indictments for extortion, or taking a greater sum for brokerage than is allowed by act of parliament, though the sum be stated without a *videlicet*, it is not necessary to prove it with precision (*d*). And, on the other hand, where the true sum must be set forth, it will not relieve the prosecutor from strict proof though he allege a different sum under a *scilicet* (*e*). There are, however, authori-

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(*a*) Hob. 172. 5 East, 252.
see also 2 Wils. 335.

(*b*) 1 Bla. Rep. 495. 2 Saund.
291, note 1. 1 Saund. 169.
1 Stra. 233. 2 Wils. 332. 6 T. R.
462. 3 Burr. 1730. 4 T. R.
590. 4 Esp. Rep. 152. 5 T. R.
71. 3 T. R. 68. 2 B. & P.
118. 2 Campb. 231. 5 East, 244.

(*c*) Stark. 253, 4. 2 ed. and
see 1 Chitty on Pleading, 4th ed.
276, n. (g).

(*d*) 6 T. R. 265. 1 Chitty on
Pleading, 4th edit. 276, note (g).
1 Esp. Rep. 285.

(*e*) 6 T. R. 462. 4 T. R. 590.
1 Chitty on Pleading, 4th edit.
276, n. (g).

USE OF A
SCILICET.

rities which afford an inference that the adoption of a *scilicet*, will, in the discription of a contract, excuse the party from strict proof, when, if it were omitted, it would be otherwise (*a*).

Description of
the offence.

We come now to consider the general rules relative to the description of the offence; and which we will examine, First, as to the substantial circumstances which it is necessary to state in order to show the nature of the crime; and next, as to the formal allegations and terms of art with which it must be described; and here it becomes peculiarly important to keep in view the general rules we have already stated, relative to the certainty required in an indictment (*b*).

General rules.

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It is a general rule in indictments, that the special manner of the whole fact ought to be set forth with such certainty, and so specifically that it may judicially appear to the court, that the indictors have gone upon sufficient premises: in order that the court may know what judgment is to be pronounced upon conviction, that the defendant may clearly understand the charge he is called upon to answer, and that posterity may know what law is to be derived from the record (*c*). On the other hand, as observed by Mr. Justice Buller, it is the duty of a good pleader not to clog the record with unnecessary matter, and thereby throw a greater burthen of proof on his client than the law requires; and it is still more his duty not to state things which on the face of the indictment are repugnant, inconsistent, or absurd (*d*), and the statement of unnecessary matter is censurable and dangerous. The indictment must charge the crime with certainty and precision, and must contain a complete description of such facts and circumstances as will constitute the crime, a statement of a legal result is bad. As an instance of this rule it has been holden, that an indictment for escaping from prison without showing the original cause of imprisonment, is not maintainable (*e*).

(*a*) 3 T. R. 67. 3 M. & S. G. 3. 5 T. R. 634. 5 East, 173. 258.

(*b*) Ante, 169, &c.

(*d*) 2 Leach, 660.

(*c*) 2 Hale, 183, 84. Hawk. b. 2. c. 25. s. 57. Cro. Eliz. 147. 201. Bac. Ab. Indictment, G. 1. Com. Dig. Indictment,

(*e*) 2 Stra. 1226. Hawk. b. 2. c. 25. s. 57. Bac. Ab. Indictment, G. 1.

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So an indictment for traitorously coining alchemy like to the current coin of the realm, is bad, unless it show the particular kind of money the metal was intended to resemble (*a*). So, in the case of perjury, it is necessary to set out the oath as an oath taken in a judicial proceeding and before a proper person, in order to see whether it was an oath which the court had jurisdiction to administer (*b*). And in the prosecution of a constable for not serving, it is necessary to set out the mode of his election, because if he was not legally elected to the office, he cannot be guilty of a crime in refusing to execute its duties; and in an indictment for the disobedience of a justice's order, it must appear that the order disobeyed was a legal one, and such previous acts as were the foundation of the magistrate's authority must be recited, or at least referred to (*c*). And where the circumstances are constituent parts of the offence they must be set out, but where the crime exists without them, they may be alleged in aggravation, but are not absolutely requisite (*d*). And it is a general rule that where the act is not, in itself, necessarily unlawful, but becomes so by its peculiar circumstances and relations, all the matters must be set forth in which its illegality consists (*e*). Thus, in an indictment for a nuisance in the erecting an inn, some circumstances must be shown which render it a nuisance (*f*); but where the act is manifestly an offence, as for keeping a house of ill-fame, this precaution is needless (*g*).

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It is also a general rule, that all indictments ought to charge a man with a particular specified offence, and not with being an offender in general, for no one can know what defence to make to a charge which is thus uncertain; it cannot be pleaded in bar or abatement of a subsequent prosecution, nor can it appear that the facts given in evidence against a defendant on such a general accusation are the same of which the indictors have accused him,

(*a*) Hawk. b. 2. c. 25. s. 57.
Bac. Abr. Indictment.

(*b*) Cro. Eliz. 137. Cowp. 683.

(*c*) Cald. 183, when defect in this respect cured, *id.* 536.

(*d*) Cowp. 683. 5 Mod. 96.
See post, vol. ii.

(*e*) Hawk. b. 2. c. 25. s. 57.
Bac. Abr. Indictment, G. 1.

Cowp. 683.

(*f*) *Id.* *ibid.* Palm. 368. 374.
2 Roll. Rep. 345.

(*g*) Hawk. b. 2. c. 25. s. 57.
Cowp. 683.

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nor will it judicially appear to the court what punishment is proper upon conviction (*a*). It is, therefore, insufficient to charge the defendant with having spoken false and scandalous words of the mayor of a certain city (*b*). So it is bad to accuse him with being a common defamer, vexer, or oppressor, of many men (*c*), or with being a common disturber of the peace, and having stirred up divers quarrels (*d*), or with being a common forestaller (*e*), a common thief (*f*), or with being a common evil doer (*g*), a common champertor (*h*) or with being a common conspirator, or any other such indistinct accusation (*i*); and an indictment for a libel must set forth the libel itself (*k*). Upon the same principle, in an indictment for obtaining money by false pretences, it will not suffice merely to state that the defendant falsely pretended certain allegations, but it must also be stated by express averment what parts of the representation were false, for otherwise the defendant will not know to what circumstances the charge of falsehood is intended to apply (*l*). And in cases of indictments for forgery and threatening letters, the law requires an exact copy of the instrument to be inserted in the indictment, in order that the court may see that it is the subject of forgery, or threat, within the meaning of the statutes (*m*). The principal exceptions to this rule, at the present day, are the cases of a common barretor (*n*), and scold (*o*), and the keeper of a com-

(*a*) 2 Hale, 182. Hawk. b. 2. c. 25. s. 59. Com. Dig. Indictment, G. 3. Bac. Abr. Indictment, G. 1. Cro. C. C. 37. 6 T. R. 754. 3 T. R. 100, 1. Carth. 226.

(*b*) 1 Roll. Rep. 79. 2 Roll. Abr. 79. 2 Stra. 699. Hawk. b. 2. c. 25. s. 59. Com. Dig. Indictment, G. 3. Bac. Abr. Indictment, G. 1.

(*c*) 2 Rol. Abr. 79. 1 Mod. 71. 2 Stra. 848. 2 Stra. 1246, 7. 2 Hale, 182. Hawk. b. 2. c. 25. s. 59. Com. Dig. Indictment, G. 3. Bac. Abr. Indictment, G. 1.

(*d*) Id. *ibid*.

(*e*) Moor, 302. Hawk. b. 2. c. 25. s. 59. Bac. Abr. Indictment, G. 1.

(*f*) *Ibid. id.* 2 Rol. Abr. 79.

2 Hale, 182. Cro. C. C. 37.

(*g*) Hawk. b. 2. c. 25. s. 59. Bac. Abr. Indictment, G. 1.

(*h*) 2 Hale, 182. Hawk. b. 2. c. 25. s. 59. Bac. Abr. Indictment, G. 1.

(*i*) Id. *ibid*.

(*k*) 3 M. & S. 116. 3 Taunt. 169. 1 M. & S. 287.

(*l*) 2 M. & S. 379.

(*m*) 2 Leach, 661. See post, 234.

(*n*) 6 T. R. 752. 4. Cro. Jac. 527. 6 Mod. 311. 2 Rol. Abr. 79. 1 Sid. 282. 2 Keb. 409. 2 Stra. 1246. 2 Hale, 182. Hawk. b. 2. c. 25. s. 59. Com. Dig. Indictment, G. 3. Bac. Abr. Indictment, G. 1. Cro. C. C. 37.

(*o*) 6 Mod. 311. 2 Stra. 1246. 2 Keb. 409. 2 Hale, 182. Hawk.

mon bawdy-house (*a*), who may be indicted by these general words, without setting forth any particular acts of barratry or scolding, because the charges include in their nature a succession and continuation of acts which do not belong to any particular period, but form the daily habit and character of the individual offending; and upon the same principle it seems an indictment merely charging the defendant with keeping a common gaming-house would be good (*b*); but in the case of an indictment against a common barretor, though it may be general, the prosecutor must give the defendant notice before the trial of the particular instances that are meant to be proved (*c*).

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Another general rule relative to the mode of stating the offence is, that it must not be stated in the *disjunctive*, so as to leave it uncertain what is really intended to be relied upon as the accusation (*d*). Thus an indictment stating, that the defendant murdered, *or* caused to be murdered, or that he murdered, *or* wounded is bad, because uncertain (*e*). So to say that the defendant forged, *or* caused to be forged an instrument (*f*); that he erected, *or* caused to be erected a nuisance (*g*); that he carried and conveyed, *or* caused to be carried and conveyed, two persons having the small pox, so as to burthen the parish of Chelmsford (*h*), is not sufficiently positive.

It is also a general rule that the charge should be expressed *positively*, and not with a "*that whereas*," or by way of recital (*i*). Thus an indictment for not obeying an order of justices if

b. 2. c. 25. s. 59. Com. Dig. Indictment, G. 3. Bac. Abr. Indictment, G. 1. Cro. C. C. 37.

(*a*) 1 T. R. 754.

(*b*) 1 B. & C. 272.

(*c*) Hawk. b. 2. c. 25. s. 59. 4 T. R. 754. 2 T. R. 586.

(*d*) See ante, 174. Hawk. b. 2. c. 25. s. 57. 5 Mod. 137, 8. Bac. Abr. Indictment, G. 1. Com. Dig. Indictment, G. 3. Cro. C. C. 40. Burn, J. Indictment, IX.

(*e*) Id. *ibid*.

(*f*) 5 Mod. 137. 1 Salk. 342. 371. 8 Mod. 32. Stra. 747. 900. 1 Burr. 399. Dick. J. Distress, 411.

(*g*) 2 Stra. 900. 2 Sess. Cas. 25.

(*h*) 1 Sess. Cas. 307.

(*i*) 1 Sess. Cas. 159. 416. 2 Sess. Cas. 3. 8. 2 Stra. 900. 1 Salk. 371. 3 Mod. 53. Hawk. b. 2. c. 25. s. 60. Bac. Ab. Indictment, G. 1. Cro. C. C. 41. 2 Lord Raym. 1363. 1 Burr. 400.

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the order be set forth with a *quod cum*, is invalid (*a*). But where mere matter of inducement is stated, it will be good by way of recital (*b*); nor must the charge be stated argumentatively, but alleged in express and positive language (*c*). Above all, it is essential that the charge should not be repugnant nor inconsistent with itself, for the law will not admit of absurdity and contradiction in legal proceedings (*d*). Thus, if an indictment charge the defendant with having forged a certain writing, whereby one person was bound to another, the whole will be vicious, for it is impossible any one can be bound by a forgery (*e*). So if it state that the defendant disseised the prosecutor of land, when it appears that he had no freehold whereby he could be disseised, or that the former entered peaceably upon the latter, and then and there forcibly disseised him, or charge the prisoner with feloniously cutting down trees, which is only a trespass, the indictment will be insufficient (*f*). And a relative pronoun, referring with equal uncertainty to two antecedents, will make the proceedings bad, in arrest of judgment (*g*). So, an indictment for forging a bill of exchange, stating it as directed to John King, by the name and addition of John Ring, Esq. will be defective, and cannot be cured by the evidence (*h*). But where the contradictory or repugnant expressions do not enter into the substance of the offence, and the indictment will be good without them, they may be rejected as surplusage as may be seen hereafter (*i*). It is also laid down, that where the repugnant matter is inconsistent with any preceding averment, it may be rejected as superfluous (*k*); but where the objectionable words are not contradicted by any thing which goes before, but are merely irreconcilable, with some subsequent allegation, they cannot be thus rendered neutral (*l*). And it is laid down (*m*), that where a matter

(*a*) 2 Lord Raym. 1363.

(*b*) 2 Lord Raym. 920.

(*c*) 1 Salk. 375.

(*d*) Hawk. b. 2. c. 25. s. 62.

Bac. Abr. Indictment, G. 1. Burn, J. Indictment, IX. Cro. C. C. 41. 2 Leach, 660.

(*e*) Id. *ibid.* 3 Mod. 104. 2 Show. 460.

(*f*) Alleyn, 50. Hawk. b. 2. c. 25. s. 62. Bac. Abr. Indictment, G. 1.

(*g*) 1 Leach, 37.

(*h*) 2 Leach, 590.

(*i*) As to repugnant matter, and surplusage in general, see 5 East, 254, and 1 Chitty on Pleading, 4th edit. 196. 210, 11.

(*k*) Gilb. C. P. 131, 2. Co. Lit. 303. b. 3 East, 142.

(*l*) 5 East, 254, 5.

(*m*) 5 East, 257.

is capable of different meanings, that will be taken by the court which will support the proceedings, and not that which would defeat them; but it must be clearly capable of two significations, for the court cannot, to support the indictment, arbitrarily give it a meaning with which the use, habits, or understanding of mankind would plainly disagree; where, however, it is evidently ambiguous, it does not seem to clash with any rule of construction applied even to criminal proceedings to construe it in that sense, in which the party framing the charge must be understood to have used it, if he intended his accusation to be consistent.

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Presumptions of law need not be stated (*a*), neither need *facts of which the court will ex officio* take notice (*b*).

It is not necessary to state *a conclusion of law* resulting from the facts of a case, it suffices to state the facts and leave the court to draw the inference (*c*); and therefore an indictment on the 15 Geo. 2. c. 28. s. 3. for uttering counterfeit money, having at the same time other counterfeit money in the custody of the prisoner, need not allege him to be a common utterer, because in such case the statute says that the offender shall be deemed a common utterer, which is consequently a mere conclusion of law (*d*). The usual conclusion of an indictment for murder, "and so they the said defendants murdered, &c." as hereafter observed, is not an exception to this rule (*e*).

Neither is it necessary to state mere *matter of evidence*, which the prosecutor proposes to adduce, unless it alters the offence; for if so, it would make the indictment as long as the evidence (*f*). And upon this principle it has been held, that an indictment charging the defendants with conspiring "by divers false pre-

(*a*) See 4 M. & S. 105. 2 Wils. 147; and see the cases in 1 Chit. on Pleading, 4th edit. 204, 5.

(*b*) See the cases on this subject, 1 Chit. on Pleading, 4th edit. 196 to 203; and see case in Russ. & Ry. C. C. 483.

(*c*) 2 Leach, 941.

(*d*) 2 B. & P. 127. 2 Leach, 942, 4th ed. 858. Russ. & Ry. C. C. 5. S. C. 1 East, P. C. 183; and see Russ. & Ry. C. C. 7. 2 Leach, C. C. 938, 4th edit. Russ. & Ry. C. C. 29. S. C.

(*e*) See post, 243.

(*f*) 1 Stra. 139. 140. Fost. 194.

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tences and undue means and devices to obtain money of A. B., and to cheat and defraud him thereof," is sufficient, without setting forth the particular means or pretences (*a*). And in stating matter of aggravation the distinction seems to be, that where the aggravating matter cannot be made the subject of a distinct charge, it may, though not stated, be shewn on the trial, but where it may another proceeding must be adopted (*b*).

In general, all *matters of defence* must come from the defendant, and need not be anticipated or stated by the prosecutor (*c*). In an indictment for disobedience of a justice's order, it need not be averred that the order was not revoked; nor is it necessary to negative the commission of a higher offence (*d*). And it is never necessary to negative all the exceptions which by some other statute than that which creates the offence, might render it legal, for these must be shewn by defendant for his own justification (*e*). Thus an indictment for a misdemeanor against a receiver of stolen goods, need not aver that the principal has not been convicted (*f*). We shall hereafter consider when it is necessary to negative the exceptions in a statute in an indictment thereon (*g*).

Facts which lie more peculiarly within the defendant's than the prosecutor's knowledge, need not be shewn with more than a certainty to a common intent. Thus in an indictment against a public officer for a breach of duty, it is sufficient to state generally he is such officer, without setting forth his appointment to the office (*h*). Nor where a public officer is charged with a breach of duty, in certain acts within the limits of his office, is it necessary to state they were within his knowledge, for this will be inferred from the nature of the trust reposed in him (*i*).

Notice and request.

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If *notice* be necessary to raise the duty which the defendant is alleged to have broken, it should, of course, be averred; but

(*a*) 2 B. & A. 204. 6 T. R. 628. Leach, C. L. 274, last edit.

(*b*) 1 Stra. 140.

(*c*) 5 T. R. 84. 2 Leach, 580.

(*d*) 2 East, 19, 20.

(*e*) 2 Burr. 1036. 1 Bla. Rep. 230. 2 Leach, 580.

(*f*) 2 Leach, 579.

(*g*) Post, 283, and see for further elucidation of this principle in civil cases, 1 Chit. on Plead. 4th edit. 205 to 207.

(*h*) 5 T. R. 607. Hawk. b. 2. c. 25. s. 112. Post, vol. ii. 257, note.

(*i*) 5 T. R. 607.

where knowledge must be presumed, and the event lies alike in the knowledge of all men, it is never necessary either to state or prove it (*a*). This rule has indeed already been partially considered when observing that facts which lie peculiarly in the defendant's knowledge, need not be stated (*b*). Where a constable is indicted for not following upon hue and cry, it must be alleged that notice was given him (*c*). If a *request* or *demand* is necessary to complete the offence, it must be stated; thus in an indictment for the disobedience of a justice's order, it is necessary to state that the defendant was requested to perform the order, and at all events that it was served on him (*d*).

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Where an *evil intent* accompanying an act is necessary to constitute such act a crime, the intent must be alleged in the indictment and proved. Thus where a libel has not been published, but merely sent to the prosecutor, it is necessary to state in the indictment that it was sent to him with an intention to provoke him to a breach of the peace; so where a letter containing a libel is sent to the wife, the indictment ought to allege it was sent with intent to disturb the domestic harmony of the parties (*e*); and in an indictment on the 43 Geo. 3. c. 58. where the intent laid in several counts, was to murder, to disable, or do some grievous bodily harm, and the intent found by the jury was, to prevent being apprehended, it was held bad, and that the intention should be stated according to the fact (*f*); so in burglary, if the entry be alleged to have been made with intent to commit a specific felony, the indictment will not be supported by evidence of an entry with intent to commit another kind of felony (*g*). It is, usual, therefore, in these cases, to lay the same fact with different intents, as one count for a burglarious entry, with intent to steal the goods of P. D. and another count for the same entry with intent to kill and murder him (*h*). If an indictment omit to state that defendant committed the burglary *with intent to steal*, &c. the defendant may be convicted of the burglary, if the larceny be

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Evil intent.

(*a*) 5 T. R. 621.

(*b*) Ante, 231.

(*c*) Cro. Eliz. 654, 5.

(*d*) 8 East, 52, 53. 1 T. R. 514. 2 Leach, 774. 702.
316. Cald. 554.

(*e*) 2 Stark. Rep. 245.

(*f*) Russ. & Ry. C. C. 365.

(*g*) 1 Hale, 561. 2 East P. C.

(*h*) 2 East P. C. 515.

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proved, but not so if the larceny be not (a). And if the intention is necessary to constitute the offence, it must be alleged in every material part where it so constitutes it; and where an indictment for presenting a forged order to W. L. treasurer, &c. pretending it was genuine, and obtaining from W. L. under it £4 10s. 6d. after charging that the prisoner, with intent to cheat, &c. the treasurer presented the order, and that he knowingly, &c. pretended it was a genuine order, proceeded "and so the jurors, &c. say, that the prisoner, on the day and year, &c. at, &c. did obtain the said sum of £4 10s. 6d." but the intent to cheat and defraud W. L. was not stated in that part of the indictment, nor was the obtaining charged to have been effected knowingly and designedly, the indictment was held bad (b). Where the act is in itself unlawful, an evil intent will be presumed, and need not be averred, and if averred, is a mere formal allegation which need not be proved by extrinsic evidence (c). Thus, in an indictment for seditious words, it need not be shown that they were uttered with intent to alienate his majesty's subjects, for it is manifest they have that tendency (d). And it is not necessary to prove the whole intention as stated in the indictment, if it be divisible, it will suffice to prove that necessary to constitute the offence; and on an indictment charging an assault, with intent to abuse and carnally know, the defendant may be convicted of an assault with an intent to abuse simply (e). So where a libel is stated to have been published with intent to defame certain magistrates, and also to bring the administration of justice into contempt, it is sufficient to prove a publication with either of those intentions (f).

Setting forth
written instru-
ments.

When it is necessary to set forth an instrument, or writing, as in case of forgery or threatening letters (g), it may be prefaced by the words, "*to the tenor following,*" or "*in these words,*" or "*as follows,*" or "*in the words and figures following,*" for though the setting forth the instrument by the tenor which

(a) Russ. & Ry. C. C. 445.

Ry. C. C. 207.

(b) 1 Stark. Rep. 396. Russ. & Ry. C. C. 317. S. C.

(d) 2 Ld. Raym. 379.

(e) 3 Stark. 62.

(c) 6 East, 474. See post, vol. iii. 875, in cases of libels. 1 B. & P. 186, 7. and Russ. &

(f) 3 Stark. 35. (g) 2 Leach, 661. 6 East, 418 to 426.

imports an accurate copy (*a*), has been considered to be most technical, yet it has been holden that "*as follows*," is equivalent to the words, "*according to the tenor following*," or "*in the words and figures following*," and that if, under such an allegation, the prosecutor fail in proving the instrument verbatim, as laid, the variance will be fatal (*b*); and unless the indictment by these, or similar expressions, profess to set out a copy of the instrument in words and figures, it will be invalid (*c*). It would be improper to state in these cases, or in an indictment for a libel, that the writing was "*to the effect following* (*d*)," or "*to the substance following* (*e*)." There is no judicial decision that, in an indictment for forgery, the purport and the tenor should both be stated. Purport means the substance of an instrument as it appears on the face of it to every eye that reads it; tenor means an exact copy of it (*f*). The words "*in manner and form following*, that is to say," do not profess to give more than the substance, and are proper in an indictment for perjury (*g*); but the word "*afore-said*," binds the party to an exact recital (*h*). In forgery, the indictment may run, that the prisoner forged a paper writing, stating what it was (*i*), to the tenor and effect following, &c. (*k*). An exact copy (*l*) of the instrument, in words and figures (*m*), must then be set forth to enable the court to see that it is one of those instruments the false making of which the law considers as forgery (*n*); and if the instrument be in a foreign language, it must be translated (*o*); and the same rule applies to indictments for threatening letters (*p*). But in setting forth even the *tenor* of an instrument a mere variance of a letter will not vitiate, provided

(*a*) 2 Leach, 660, 1. 3 Salk. 225. Holt, 347, 8, 9, 350. 425. 11 Mod. 96, 7. Doug. 193, 4.

(*b*) 1 Leach, 78. 2 Leach, 660. 661. 2 East P. C. 976. 2 Bla. Rep. 787.

(*c*) 2 Leach, 597. 660, 1.

(*d*) 2 Salk. 417. 600. 11 Mod. 78. 84, 5. 1 Marsh. 522. 6 Taunt. 169. S. C.

(*e*) 3 B. & A. 503. 3 M. & S. 115.

(*f*) 2 Leach, 661.

(*g*) 1 Leach, 192. Doug. 193, 4.

(*h*) Id. ibid. Doug. 97.

(*i*) Russ. & Ry. C. C. 50.

(*k*) 2 Leach, 660, 1.

(*l*) 2 Leach, 624. 2 East P. C. 928. 977.

(*m*) 1 Leach, 78. 145. 2 East P. C. 976.

(*n*) 2 Leach, 624. 657. 661. 2 East P. C. 975. See post, vol. iii.

(*o*) 7 J. B. Moore, 1. 3 Brod. & Bing. 201. Russ. & Ry. C. C. 473. S. C.

(*p*) 2 East P. C. 976. 1 Marsh. 522. 6 East, 413. See post, vol. iii.

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the meaning be not altered by changing the word mis-spelt into another of a different meaning ; thus, in an indictment for forging a bill of exchange, the tenor was "value receivd," the bill as produced in evidence, was "for value reiceved," and the judges upon the reserved question were of opinion that the variance was not material, because it did not change one word into another, so as to alter the meaning (*a*). And in an indictment for perjury, it was assigned for perjury that the defendant swore he "undertood and believed," instead of "understood," and the mistake was held to be immaterial (*b*), and where in setting forth a libel the word "not" was inserted for "nor" the variance was held immaterial (*c*); but "William" for "Wm." is a fatal variance (*d*). When the *purport* may be adopted instead of *tenor*, it is not necessary to state the matter with such verbal accuracy, as the former term merely signifies *substance*, while the latter imports an exact copy (*e*). But if the paper forged does not on the face of it appear to be that which the indictment states it *purports* to be, the proceedings will be invalid (*f*). In stating a libel or perjury it is necessary only to set forth so much of the matter as renders the offence complete; provided the part omitted does not in any way alter the sense of that which is set out (*g*). In stating a libel, with the omission of a reference, from which on reading the libel it appeared to be a quotation, the variance was held fatal (*h*). In stating a libel or perjury, where different parts of the written instrument not following each other, are set forth in the same count, they should not be professedly stated continuously, and as immediately following each other; for if they be so stated, and a part should not be proved, the whole count will fail; the proper course is to allege that "in one part of which affidavit or libel, there were and are the words following, &c." and in another part thereof, the words following, &c. (*i*)

Statement of
quantity, kind,
and value of pro-
perty.

It is frequently necessary, in the description of an offence, to state the quantity, number, kind, and value of the personal property

(*a*) 1 Leach, 145.

(*b*) 1 Leach, 133. Doug. 193,
194.

(*c*) 2 Salk. 660. 3 Salk. 224.
2 Marsh. 98.

(*d*) 3 Stark. on Evid. App.

to p. 859.

(*e*) 2 East P. C. 983.

(*f*) Dougl. 300.

(*g*) See post, vol. iii. 875, (*a*).

(*h*) 5 B. & A. 615.

(*i*) 2 Campb. 134.

which is essential to the constitution of the offence, or necessary to the right understanding of the indictment (a). In this statement, certainty, to a common intent, as it is technically termed, is generally sufficient, which seems to mean such certainty as will enable the jury to decide in case of theft, whether the chattel proved to have been stolen, is the very same with that upon which the indictment is founded, and show judicially to the court that it could have been the subject-matter of the offence charged, and thus secure the defendant from any subsequent proceedings, for the same cause after a conviction or acquittal. And in general, at least as great a degree of certainty is required in an indictment respecting goods, as in trespass, for what will be defective in the latter, will be still more material in the former (b). Where the *number* or *quantity* of any property should be stated, it should be so done with certainty (c); thus an indictment for regrating, &c. stating that defendant regrated “a great quantity” of goods, &c. will be bad (d). So an indictment for stealing twenty sheep and ewes is bad, because the number of each sort is not stated (e). So it is bad to say *felonice furatus est oves* or *columbas*, without expressing their number (f); but an indictment for murder with stones need not state the number of them (g). An indictment stating that defendant stole “six handkerchiefs” is supported in evidence, though the handkerchiefs were in one piece, the pattern designating each handkerchief, and thus being described in the trade as so many handkerchiefs (h). It is not necessary to prove the whole of the property stated, if by the rejection of the part not proved the offence would be complete; and on an indictment for embezzling one pound notes, and other monies, &c. describing them, though the evidence be that other property than that described was embezzled, yet if it be proved that one pound notes were embezzled it will suffice (i). So in an indictment for usury it is not necessary to state the exact sum laid

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(a) 2 Hale, 182, 3. Bac. Abr. Indictment, G. 3. Hawk. b. 2. c. 25. s. 74. Burn, J. Indictment, IX.

(b) 2 Hale, 183.

(c) See the cases collected on this point, in case of Larceny, post, vol. iii.

(d) 1 East, 583. 1 Ld. Raym. 475.

(e) 2 Hale P. C. 182.

(f) Id. 183.

(g) 13 Price, 172.

(h) 1 Ry. & Moo. C. C. 25.

(i) Russ. & Ry. C. C. 303, and see 3 M. & S. 548.

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in the indictment (*a*); nor is it necessary in an indictment for extortion to prove the precise sum alleged to have been extorted (*b*); but if the whole property stated be necessary to constitute the offence, the whole must be proved as stated (*c*). The *description* of the property itself should be with certainty; thus an indictment that the defendant took and carried away such a person's goods and chattels, without shewing what in certain, as one horse, one cow, &c. is not good (*d*). And in an indictment on the 9 Geo. 1. c. 22. it was held necessary that it should state the species of the cattle wounded or injured, and stating that the prisoner wounded *certain* cattle was insufficient (*e*). So an indictment against a bankrupt for concealing his effects, stating part of the effects concealed to be "100 other articles of household furniture," and "a certain debt due from one A.B. to the said prisoner to the value of £20 and upwards" was held bad (*f*). In an indictment for larceny of bank notes, it seems sufficient to describe them as "bank notes," without adding for the payment of money (*g*). An indictment for horse-stealing should give the animal stolen one of the descriptions mentioned in the statute, and stating it was a colt, without saying it was a horse or a mare would not suffice (*h*). An indictment for stealing a dead animal should state that it was dead (*i*). The description of the property, at least as to part of it, must be borne out in evidence, and a variance would be fatal, stating that the prisoner embezzled "one pound eleven shillings," without shewing in evidence it was a one pound note and eleven shillings, or any part of it in silver, would be bad (*k*). In an indictment on the black act 9 Geo. 1. c. 22. (repealed by 4 Geo. 4. c. 54.) stating that the defendant maimed certain cattle, to wit, a *mare*, it was held necessary to prove that the cattle maimed was a mare (*l*); and in larceny for stealing a live animal, evidence cannot be given of stealing a dead

(*a*) 6 T. R. 265.

(*b*) 1 Ld. Raym. 149. 6 T. R. 267.

(*c*) *Semb.* Russ. & Ry. C. C. 274.

(*d*) 2 Hale, 182, and see the cases, post, vol. iii. 947. Larceny.

(*e*) Russ. & Ry. C. C. 258.

(*f*) *Ibid.* 274.

(*g*) 3 M. & S. 547, 8; and see post, vol. iii. 947.

(*h*) Russ. & Ry. C. C. 416.

(*i*) Russ. & Ry. C. C. 497. 1 Carr. N. P. Rep. 128.

(*k*) Russ. & Ry. C. C. 335; and see *id.* 403.

(*l*) Russ. & Ry. C. C. 258.

one (a). But in the case of murder, if the act of the prisoner, and the means of the death proved, agree in substance with those alleged, a mere variance in the description of the instrument used will be immaterial (b). Upon an indictment for having in possession a die made of iron and steel, proof of a die made of either material is sufficient (c). Where the property is of a nature to warrant that description it should be termed "the goods and chattels" of the owner, and without these, or equivalent words, the indictment will be defective (d). On the same principle it should be averred to be "of the monies" "of the cattle," &c. when those terms apply, at all events, if these words be unnecessary, they might be rejected as surplusage, and it is best to insert them (e). We have already considered how the prosecutors and other third persons names are to be stated, and it will be unnecessary here to repeat it (f). Where the *value* is essential to constitute the offence, it must be stated; thus in the case of theft, the value must be shown, that it may appear whether the offence is grand or petit larceny (g). In stating larceny of pound notes, or money, it seems the value of them should be stated; stealing "ten pounds in monies numbered" without more, would be bad (h). It is usual, though not absolutely necessary in an indictment for murder, to set forth the value of the instrument by which the death was effected, because it is regularly forfeited as a deodand (i). In general it is not necessary to prove the precise value as stated, provided the value proved when necessary to be stated, is sufficient to constitute the offence. Where value to a particular amount is essential to constitute the offence, and the value is ascribed to many articles collectively, the offence must be made out as to every one of those articles, for the grand jury has only ascribed that value to those articles collectively (k).

We have now to consider *the technical phrases and terms of art* to be used in the description of the offence. There are some

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Of the technical
language of stat-
ing the offence.

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- (a) Russ. & Ry. C. C. 497. C. 531. Russ. & Ry. C. C. 407.
1 Carr. N. P. Rep. 128. (b) Russ. & Ry. C. C. 482.
(c) See cases, post, vol. iii. 834. (i) 2 Hale, 185. Burn, J.
(d) Russ. & Ry. C. C. 282. Indictment, IX. Post, vol. iii.
(e) Cro. Eliz. 490. 734.
(f) 1 Leach, 468. (k) Russ. & Ry. C. C. 274;
(g) See ante, 211 to 217. and see 1 Saund. 286 2 Saund.
(h) 2 Hale, 185. 1 Hale P. 379, 4th edit.

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terms, which are so appropriated by the law to express the precise idea which it entertains of the offence, that no other terms, however synonymous they may seem, are capable of doing it, while there are other expressions, which, though usual, are not necessary to be inserted. Of the latter description is the inducement, which, in cases of treason and felony, usually precedes the statement of the crime, that the prisoner "*not having the fear of God before his eyes, but being moved and seduced by the instigation of the devil,*" perpetrated the crime for which he is indicted, for there is no authority to show, that the omission would be material (*a*); and where the common law, or a statute, forbids the doing of a thing, the doing it wilfully is indictable, though without any corrupt motive, and consequently, it need not in such case be averred (*b*).

The words "*with force and arms,*" anciently, "*vi et armis,*" were, by the common law, necessary in indictments for offences which amount to an actual disturbance of the peace, or consist, in any way, of acts of violence (*c*); but it seems to be the better opinion, that they were never necessary where the offence consisted of a cheat, or non-feazance, or a mere consequential injury (*d*). Formerly, they were followed by the words "*videlicet baculis cultellis arcubus et sagittis*" (*e*). But the stat. 27 Hen. 8. c. 8. reciting, that several indictments had been deemed void for want of these words, when in fact no such weapons had been employed, enacted, "that the words, *vi et armis videlicet cum baculis cultellis arcubus et sagittis,*" shall not of necessity be put in any indictment or inquisition. Upon the construction of this statute, there seems to have been entertained very great doubts, whether the whole of the terms were intended to be abolished in all indictments, or whether the words following the *videlicet*, were alone excluded. Many indictments for trespasses and other wrongs accompanied with actual violence, have been deemed

(*a*) Burn, J. Indictment, IX.
6 East, 472, 3, 4.

(*b*) 4 T. R. 457.

(*c*) Cro. Jac. 472, 3. 2 Hale,
187. Hawk. b. 2. c. 25. s. 90.
Bac. Abr. Indictment, G. 6.

Cro. C. C. 42.

(*d*) 7 T. R. 4, 5. 1 Keb. 652.
Poph. 206. Hawk. b. 2. c. 25.
s. 90. Bac. Abr. Indictment,
G. 1.

(*e*) Hawk. b. 2. c. 25. s. 90.

insufficient for want of the words “*with force and arms* (a);” and on the other hand, the court has frequently refused to quash the proceedings where they have been omitted (b); and the last seems to be the better opinion, for otherwise the terms of the statute appear to be destitute of meaning. It seems to be generally agreed, that where there are any other words implying force, as in an indictment for a rescue, the word “rescued,” the omission of *vi et armis*, is sufficiently supplied (c). But it is, at all times, safe and proper to insert them, whenever the offence is attended with an actual or constructive force, or affects the interests of the public (d).

The term, “*unlawfully*,” which is frequently used in the description of the offence, is unnecessary, wherever the crime existed at common law, and is manifestly illegal (e). So it has been adjudged, that it need not be used in an indictment for a riot, because the illegality is sufficiently apparent, without being expressly averred (f). But if a statute, in describing an offence which it creates, uses the word, the indictment founded on the act will be bad, if it be omitted (g); and it is, in general, best to insert it, especially as it precludes all *legal* cause of excuse for the crime (h).

The word “*knowingly*,” or “well knowing,” will supply the place of a positive averment, that the defendant knew the facts subsequently stated (i). It is absolutely necessary to constitute

(a) 2 Lev. 221. 1 Sid. 140.
1 Bulst. 205. 1 Keb. 101.
2 Keb. 154.

(b) 1 Lev. 126. 2 Bulst. 208.
3 P. Wms. 464. 498.

(c) Cro. Jac. 345. 2 Bulst.
208. 3 P. Wms. 464. Hawk.
b. 2. c. 25. s. 90. n. 16. Bac.
Abr. Indictment, G. 1.

(d) Cro. Car. 377, 8. Hawk.
b. 2. c. 25. s. 90. Bac. Abr.
Indictment, G. 1. Burn, J. In-
dictment, IX. As to the words
“force and arms” see 4 Burr.
2557, 8, et alii.

(e) Hawk. b. 2. c. 25. s. 96.

Bac. Abr. Indictment, G. 1.
Cro. C. C. 38.

(f) 2 Rol. Abr. 82. Hawk.
b. 2. c. 25. s. 96. Bac. Abr. In-
dictment, G. 1. Cro. C. C. 43.

(g) Hawk. b. 2. c. 25. s. 96.
Bac. Abr. Indictment, G. 1.
Cro. C. C. 43. *Sed quære* see
2 Marsh. 362.

(h) See 4 M. & S. 274.

(i) 2 Stra. 904. Com. Dig.
Indictment, G. 6. See Russ.
& Ry. C. C. 317. 1 Stark. C.
N. P. 390; and see ante, 222,
223, as to the statement of de-
fendant’s evil intent.

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guilt, as in indictments for uttering forged tokens, or other attempts to defraud, or for receiving stolen goods, and offences of a similar description; but if notice or knowledge be unnecessarily stated, the allegation may be rejected, as surplussage (*a*).

There are certain terms which are usually inserted in the part of the indictment we are now examining, which mark out the colour of the offence with precision, and which are absolutely necessary to determine the judgment (*b*). Thus every indictment for *treason* must contain the word “traitorously (*c*);” every indictment for burglary, “*burglariously* (*d*);” and “*feloniously*” must be introduced in every indictment for felony (*e*). And these words are so essential, that if the word *feloniously* be omitted in an indictment for stealing a horse, it will be only a trespass (*f*), or a misdemeanor of which the defendant may be convicted under such indictment (*g*). In case of treason against the king’s person, the offence must also be laid against the duty of the defendant’s allegiance (*h*); and the word “*natural*” is generally added, if he is born within the realm, and omitted if he is an alien and only resident in England; but it does not seem, in any case, necessary to state more than the term “allegiance” in general (*i*). The word “*traitorously*” having been well laid to the statement of the treason itself, it is not necessary to state

(*a*) 2 East, 452.

(*b*) 3 Inst. 15. Carth. 319.
2 Hale, 172. 184. 4 Bla. Com.
307. Hawk. b. 2. c. 25. s. 55.
1 East P. C. 115. Bac. Abr.
Indictment, G. 1. Com. Dig.
Indictment, G. 6. Cro. C. C.
37.

(*c*) Id. *ibid*.

(*d*) 4 Co. 39. 40. 5 Co. 121.
Cro. Eliz. 920. 2 Hale, 172.
184. Bac. Abr. Indictment,
G. 1. Com. Dig. Indictment,
G. 6. Cro. C. C. 37. Burn, J.
Indictment, IX.

(*e*) 2 Hale, 171. 184. Cro.
Eliz. 193. 5 Co. 121. Hawk.
b. 2. c. 26. s. 55. Com. Dig.
G. 6. Bac. Abr. Indictment,

G. 1. Cro. C. C. 37. Burn, J.
Indictment, IX. Williams, J.
Indictment, IV. Russ. & Ry.
C. C. 62.

(*f*) 2 Hale, 184. Bac. Abr.
Indictment, G. 1. Cro. C. C. 37.

(*g*) Cald. 400, 1.

(*h*) 3 Lev. 396. 7 Co. 5, 6.
Skin. 442. Carth. 319. 4 Mod.
165. Hawk. b. 2. c. 25. s. 55.
Com. Dig. Indictment, G. 6.
Bac. Abr. Indictment, G. 1.
4 Bla. Com. 307.

(*i*) Fost. 186. 2 Salk. 633.
1 Hale, 59. 69. 77. 92. 7 Co.
5, 6. Hawk. b. 1. c. 17. s. 5.
1 East P. C. 115. 4 Harg. St.
Tr. 700. 4 Mod. 163. Dyer,
145.

every overt act to have been *traitorously* committed (*a*). In indictments for inferior treasons, as those which relate to the coin, it is usual to lay the offence to have been *feloniously* as well as *traitorously* committed; but there is no authority which renders this essential. It is, however, always proper to lay petit treason in this way, as well as to state in conclusion, that the defendant did traitorously and feloniously kill and *murder*, because then, though he be acquitted of the petit treason, he may be convicted as for a common murder (*b*). If these phrases appear in any part of the indictment it will suffice so that they by the mode of insertion shew that the offence was complete; therefore in an indictment for embezzlement, it is sufficient to state in the conclusion of the indictment, that the defendant *feloniously* did steal, take, &c. though the word "feloniously" be not inserted in the former part of the indictment, before the word "embezzlement" (*c*).

The crime of *murder*, which is next in point of degree, has, as well as treason, terms peculiarly appropriate to its own description. Like other felonies, the word "feloniously" must be inserted (*d*). As a conclusion from the facts averred, it must be stated, that so the defendant feloniously of his *malice aforethought* did kill and *murder* the deceased; for without the terms "malice aforethought," and the artificial phrase *murder*, the indictment will be taken to charge manslaughter only (*e*). Where the death arises from any wounding, beating, or bruising, it is said, that the word "*struck*" is essential (*f*), and the wound or bruise must be alleged to have been *mortal*; nor is the latter word supplied by the allegation, which is at all times necessary, that the deceased died in consequence of the violence inflicted upon him (*g*). The allegation that the person murdered was, at

(*a*) 2 Salk. 683. 4 Harg. St. Tr. 701, 2. 1 East P. C. 116.

(*b*) Fost. 328, 9. 2 Hale, 184. Cro. C. C. 37.

(*c*) Russ. & Ry. C. C. 62.

(*d*) Cro. Eliz. 193.

(*e*) Fost. 424. Yelv. 205. 2 Hale, 184. Cro. Jac. 283. 1 Bulst. 144. Dyer, 69, a. 261. Cro. Eliz. 920. Kel. 124. 1 Hale, 450, 466. 2 Hale, 187. Hawk. b. 2. c. 25. s. 55. Com. Dig.

Indictment, G. 6. Bac. Abr. Indictment, G. 1. 4 Bla. Com. 307. 1 East P. C. 345. Cro. C. C. 37. Burn, J. Indictment, IX. Williams, J. Indictment, IV.

(*f*) 1 Bulst. 184. 5 Co. 122. 3 Mod. 202. Cro. Jac. 655. Palm. 282. 2 Hale, 184. 6, 7. Hawk. b. 2. c. 23. s. 82.

(*g*) 1 Leach, 96. Kel. 125. 2 Hale, 186. Hawk. b. 2. c. 23. s. 82. Cro. C. C. 38.

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the time, *in the king's peace*, is sufficient to shew that he was a British subject (*a*).

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So also in indictments for *rapes*, the words "*feloniously ravished*," and "*carnally knew*" are necessary; nor is the want of the former supplied by the insertion of the latter (*b*). And though some have inclined to think, that the words "*carnally knew*" are not absolutely necessary, it would certainly be very unsafe to omit them (*c*). And in an indictment for an *unnatural crime*, the words of the statutes taking away clergy, must be followed (*d*). So also in all indictments of *mayhem*, the words "*feloniously did maim*," must of necessity be inserted (*e*).

The essential words in an indictment for *burglary*, are "*feloniously and burglariously broke and entered the dwelling-house in the night-time*," about a named hour (*f*). And, besides these requisites, the felony committed or intended, must be set forth in technical language (*g*); so in an indictment for *simple larceny*, the words "*feloniously took and carried away the goods*," or "*took and led away the cattle*," are necessary (*h*); and in case of *robbery* from the person, the words "*feloniously and against the will*," must be introduced; and it is usual to aver a *putting in fear*, though this does not seem to be requisite (*i*). And the word "*violently*" was formerly regarded as essential, but has been holden not to be necessary" (*k*). And *feloniously*, and *piratically*, are both necessary in an indictment for *piracy* (*l*).

(*a*) Russ. & Ry. C. C. 294.

(*b*) 1 Hale, 628. 2 Hale, 184.

Co. Lit. 124, n. p. 2 Inst. 130.

1 East P. C. 447. Com. Dig.

Indictment, G. 6. Bac. Abr.

Indictment, G. 1. Hawk. b. 2.

c. 25. s. 56. Cro. C. C. 37.

(*c*) 1 East P. C. 448.

(*d*) Fost. 424. Co. Ent. 351 b.

3 Inst. 59. Hawk. b. 1. c. 4.

s. 2. 5 Eliz. c. 17. 3 & 4 W. &

M. c. 9. s. 2.

(*e*) 3 Inst. 118. Hawk. b. 2.

c. 23. s. 17. 18. 77. Hawk. b. 2.

c. 25. s. 55.

(*f*) 4 Co. 39 b. 1 Hale, 549,

550. 2 Hale, 184. Hawk. b. 2.

c. 25. s. 55. Com. Dig. Indict-

ment, G. 6. Bac. Abr. Indict-

ment, G. 1. Cro. C. C. 37.

(*g*) 1 Hale, 550.

(*h*) 1 Hale, 504. 2 Hale, 184.

Bac. Abr. Indictment, G. 1.

Cro. C. C. 37.

(*i*) 3 Inst. 68. Fost. 128.

1 Hale, 534. 2 East P. C. 783.

(*k*) 2 East P. C. 784.

(*l*) Hawk. b. 1. c. 37. s. 15.

3 Inst. 112.

There are also some *misdemeanors* which require to be described with particular language. Thus common *barretors* and *scolds* must be indicted as such (a). The word "*riot*" must be inserted in all indictments for rioting, and *maintained* in all indictments for *maintenance* (b), and "*with strong hand*" in an indictment for a *forcible entry* (c).

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The words "*wickedly, maliciously, of his own wicked and corrupt mind, being a person of evil disposition, &c.*" are in general mere matter of aggravation, and not material (d). But where an act must be done with a particular *intent*, in order to render it criminal, an evil intention must be averred upon the record (e); and we have already seen what would be a variance in the statement of the intent, and when it is advisable to insert counts to meet the case in this respect (f).

In the conclusion of the indictment, or each count, there are several sentences in common use, which do not seem to be at all material. Of this description, are "*to the great damage of the party*" particularly injured by the offence, "*to the evil example of all others*" (g), and "*to the great displeasure of Almighty God*;" and though it is usual to conclude an indictment for treason "*contrary to defendant's allegiance*;" yet, it will suffice, if that allegation be in the body of the indictment (h). But the words "*to the common nuisance of all the liege subjects of our lord the king*" seem, according to the better opinion, to be necessary in all indictments for common nuisances (i), and against scolds and barretors (k). The words "*in contempt of our said lord the king and his laws*," are frequently used in indictments in superior courts, in informations of obtrusion, and in

Conclusion of
the indictment.

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(a) 6 Mod. 11. 178. 213. 239.
Com. Dig. Indictment, G. 6.

(b) 1 Wils. 325.

(c) 8 T. R. 357.

(d) 6 East, 472.

(e) Ante, 233. 6 East, 473.
2 East P. C. 1021. Andr. 162.

(f) Ante, 233.

(g) 2 Ld. Raym. 1462. It has
been usual to add the words
"in the like case offending,"

but they seem improper.

(h) Comb. 259.

(i) 2 Stra. 688. Com. Dig.
Indictment, G. 6. It is said, if
the indictment conclude to the
damage of *divers* subjects, it
will be insufficient. Cro. Eliz.
148.

(k) 2 Stra. 1246, acc. Hawk.
b. 2. c. 25. s. 59, contra.

CONCLUSION. actions upon statutes, but they have been frequently omitted, and the proceedings held valid (*a*). And there seems to be no other authority to prove the necessity of their insertion in any case, than the fourth Year Book of Henry the Sixth, where it is admitted to be necessary in an action on a penal statute (*b*). In general, therefore, in indictments for offences at common law, they may be safely omitted.

Every indictment, except for mere nonfeazance, must conclude *against the peace of the king*, in whose reign the offence was committed; because all crimes which are the subjects of a criminal prosecution, are injurious to public peace and order, and the injury done to the commonwealth is considered as done to the sovereign (*c*). Therefore an indictment for felony must contain this averment (*d*). And it is laid down, that every indictment on a statute, whether for a nonfeazance or a direct injury, must have these words; and therefore an indictment for using a trade, without having served an apprenticeship, under the statute of Elizabeth, will be bad, if they are omitted (*e*); and in an indictment for stealing articles, the stealing of which is made felony by statutes; and in this case the laying the offence to have been against the form of the statute, will not supply the defect (*f*). But in indictments which alleged mere nonfeazance at common law, these words need not be inserted (*g*). When they are necessary, it is [247] also requisite to state the peace to be the king's, for the words "against the peace" alone, will not be sufficient (*h*). The conclusion *contra pacem*, shows sufficiently that the prisoner was a British subject, on an indictment for murder abroad (*i*); and where an indictment tried at the Summer Assizes, 1820, stated

(*a*) 2 Rol. Abr. 82. Hawk. b. 2. c. 25. s. 95. Bac. Abr. Indictment, G. 9. Cro. C. C. 43.

(*b*) Id. ibid.

(*c*) Cro. Car. 377, 8. 584. Cro. Jac. 527. 6 Mod. 128. 3 Salk. 190. 2 Hale, 138. Hawk. b. 2. c. 25. s. 92. Bac. Abr. Indictment, G. 7. Com. Dig. Indictment, G. 6. Cro. C. C. 42. Burn, J. Indictment, IX. Williams, J. Indictment, IV. 2 B. & C. 507.

(*d*) Russ. & Ry. C. C. 176.

(*e*) 2 Hale, 138. 2 Ld. Raym. 1034. Cro. Jac. 527. 11 Mod. 53. Fortes. 127. 6 Mod. 128. 3 Salk. 190. Bac. Abr. Indictment, G. 7, in notes. Cro. C. C. 43.

(*f*) Russ. & Ry. C. C. 176.

(*g*) Fortes. 131. 1 Vent. 103. 111.

(*h*) 2 Hale, 138. Cro. C. C. 43.

(*i*) Russ. & Ry. C. C. 294.

that the defendant "*on 20th July, in the fourth year of the reign of King George the Fourth,*" stole a mare, against the peace of our lord the now king, it was considered the words "fourth year of the" might be rejected as surplusage, the words "against the peace," &c. shewing the mistake was in the year, and not in the reign (*a*).

CONCLUSION.

When the offence was committed in a reign preceding that in which the indictment is presented, it must conclude against the peace of the *late* sovereign; and if it merely conclude generally against the peace of our lord the king, it cannot be supported (*b*). But if the party be indicted in a former reign, the proceedings will be good in the time of his successor; for the death of the king does not abate them (*c*). If the offence take place partly in one reign and partly in another, as if a weir be built in the reign of one king, and continued in that of another, the indictment must conclude against the peace both of the late and the present sovereign, or it will be altogether bad (*d*). So, if an indictment be for compassing the king's death, and one of the overt acts be the actual murder of the king, the conclusion should be "against the peace of our late lord the king, and also against the peace of our lord the now king" (*e*); but if it be laid against the peace of the late king, when three kings have been previously mentioned, the general conclusion will not vitiate (*f*). And though the crime occurred altogether in a reign preceding, if the indictment conclude "against the peace of the late *and of the present king,*" the latter words may be rejected as surplusage (*g*). And where an indictment for a rape, stated to have been committed on 9th March, 1 Geo. 4, concluded "against the peace of our said *late* lord the king," it was held that the word "*late*" might be rejected as surplusage (*h*).

(*a*) Russ. & Ry. C. C. 431.

(*b*) 3 Burr. 1903. 2 Hale, 189.
Hawk. b. 2. c. 25. s. 93. Bac.
Abr. Indictment, G. 7. Burn, J.
Indictment, IX. Williams, J.
Indictment, IV.

(*c*) 7 Co. 30, 1. Dalt. J. 184.
2 Hale, 189. Cro. C. C. 43.

(*d*) Yelv. 66. Rex v. Taylor,
2 B. & C. 507. 2 Hale, 189.

Hawk. b. 2. c. 25. s. 93. Bac.
Abr. Indictment, G. 7. Cro. C.
C. 43. Williams, J. Indictment,
IV.

(*e*) Kel. 11.

(*f*) 2 Ld. Raym. 879.

(*g*) Cro. Jac. 377. 2 Hale,
189.

(*h*) Russ. & Ry. C. C. 415.

CONCLUSION.

After the words "*against the peace of our lord the king,*" the indictment, at common law, usually concludes with "*his crown and dignity,*" though their omission would be immaterial (*a*).

Of several
counts.

It is frequently advisable, when the crime is of a complicated nature, or it is uncertain whether the evidence will support the higher and more criminal part of the charge, or the charge precisely as laid, to insert two or more counts in the indictment. This practice indeed is the more necessary, because, though the petit jury may find the prisoner guilty of a part, and acquit him of the residue, the grand jury cannot separate the parts of a count, but must either find a true bill, or throw out the whole; while they may find some whole count, and reject others from the indictment (*b*). Thus where circumstances render the evidence dubious, it is usual to join a count for feloniously breaking out, with larceny in a dwelling-house (*c*). For the same reason, it is usual to add to an indictment under the 39 Geo. 3. c. 85, for embezzlement, a count for stealing at common law (*d*). And, in an indictment for burglary, to insert one count for a burglarious entry with intent to steal the goods of A. B. and stealing them, and another count for the same burglary with intent to steal the goods of another person, and sometimes a third or more for a burglary, with intent to kill and murder (*e*). And no doubt can now be entertained, that this course is as legal as it is advantageous; for it is even no objection, either upon demurrer, or upon arrest of judgment, that separate offences of the same nature are joined against the same defendant, as we shall see more particularly hereafter (*f*). And the only mode of objecting to a joinder of such offences in case of felony, is by an application to the court to quash the indict-

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|-------------------------|-------------------|-------------------|-------------------------------|
| (a) Comb. 258. | 2 Rol. Abr. | vide 3 T. R. 106. | 8 East, 41. |
| 82. | 2 Hale, 188. | Hawk. b. 2. | (c) Cro. C. A. 27. |
| c. 25. s. 94. | Bac. Abr. Indict- | | (d) 2 Leach, 1103. |
| ment, G. Cro. C. C. 43. | Burn, J. | | (e) 2 East P. C. 515, and see |
| Indictment, IX. | Williams, J. | | 2 Stark. C. N. P. 489. |
| Indictment, IV. | | | (f) 3 T. R. 106, 7. |
| (b) 5 East, 304. | 2 Campb. 134. | | 1 Leach, |
| 584, 5. | 2 Leach, 708. | | 510, 11. |
| | Sed | | 3 East, 41. |

ment before plea, or to compel the prosecutor to elect, which charge he will try in a subsequent stage of the proceedings. But the court will only listen to such a request in cases of felony, &c. and when they see that the charges are actually distinct, and may confound the prisoner, or distract the attention of the jury (*a*); and they will not listen to it in a case of misdemeanor; and it is the common practice to receive evidence of several libels, and of several assaults under the same indictment (*b*). However, where the indictment comprehends several distinct misdemeanors charged against different persons, it may be a good ground of application to the discretion of the court to quash the indictment, on account of the inconvenience which might result at the trial from joining different counts against different offenders (*c*). The introduction of several counts, therefore, which merely describe the same transaction in different ways, cannot in general be made the subject of objection; for the defendant can neither demur, apply to the court to relieve him, or move in arrest of judgment. It seems also to follow from these principles, that every separate count should charge the defendant, as if he had committed a distinct offence, because it is upon the principle of the joinder of offences, that the joinder of counts is admitted (*d*); and to the supposed second or third offence in each count should be prefixed a statement, that the jury *super sacramentum suum ulterius presentant* (*e*). Nor will the defect of some of the counts affect the validity of the remainder, for judgment may be given against the defendant upon those which are valid (*f*); though in a civil action, if one part of the declaration be ill, and the jury find entire damages, the judgment must be arrested; and the reason of this distinction is, that in the latter case the jury find entire damages, and the court cannot apportion them; whereas, in the former, the court themselves regulate the severity of the sentence, and can do so according to their discretion upon those parts of the

(*a*) 3 T. R. 106, 7. 1 Leach, 510, 11. 8 East, 41. Post, 253.

(*b*) See Lord Ellenborough's observations in 2 Campb. 132; and post, 254.

(*c*) Id. and see 2 Stark. C. N. P. 460, notes. Trem. 111, 248, 55.

(*d*) 3 T. R. 106, 7. 2 Campb. 132.

(*e*) Holt, 687. 4 St. Tr. 686. 6 St. Tr. App. 56. 2 Salk. 632.

That this statement must not necessarily be taken as the commencement of a second count, see 4 M. & S. 221.

(*f*) 2 Sess. Cas. 32. 1 B. & P. 187.

SEVERAL
COUNTS.

indictment which are supported (*a*). So that in case of perjury, if all the assignments are wrong except one, that will be sufficient to authorize a judgment against the defendant (*b*). Nor can the court, after the indictment is presented by the grand inquest, strike out any part of it, however numerous the counts of which it is composed, for they cannot alter the finding of the jury (*c*). And though every count should appear upon the face of it, to charge the defendant with a distinct offence, yet one count may refer to matter in any other count so as to avoid unnecessary repetitions, as for instance to describe the defendant as "*the said, &c.*" and though the first count should be defective, or be rejected by the grand jury, this circumstance will not vitiate the residue (*d*); but if the other counts refer to a writ, or warrant improperly set forth in the first, the whole indictment will be invalid (*e*).

When a part of
a count may be
found.

It is, however, proper to observe, that without the addition of several counts, the jury may frequently find the prisoner guilty only of a minor offence included in the charge, or a part of the offences there stated; and it is a general rule which runs through the whole criminal law, that it is sufficient to prove so much of the indictment as shews that the defendant has committed a substantive crime therein specified (*f*); and in the case of redundant allegations it is sufficient to prove part of what is alleged according to its legal effect, provided that that which is alleged, but not proved, be neither essential to the charge, nor describe or limit that which is essential (*g*). Thus, if an indictment for burglary be laid, also, with a felony to the amount of forty shillings, the prisoner may be acquitted of the former, and convicted of the latter (*h*). And under an indictment for burglariously breaking in and stealing, the charge may be modified by shewing a stealing alone, and the burglarious entry be abandoned (*i*). So under an indictment for a highway robbery, the offender may be found

(*a*) 1 Salk. 384.

(*b*) 2 Ld. Raym. 887.

(*c*) 2 Stra. 1026. Rep. Temp. Hardw. 203. 209. Bac. Abr. Indictment, K.

(*d*) 2 Hen. Bla. 131. 2 Sess. Cas. 96.

(*e*) 2 Sess. Cas. 96.

(*f*) 2 Campb. 584. 646. 1 Burr. 399.

(*g*) See observations of Abbott, C. J. 2 B. & A. 363.

(*h*) 1 Leach, 88. 2 Leach, 711. 2 Hale, 302.

(*i*) 2 Leach, 711. 2 East, P. C. 515, 16. Post, 638.

guilty only of larceny (*a*). So also if the prisoner be indicted for stealing in a dwelling-house and putting in fear, he may be convicted of simple larceny (*b*); or if he be indicted for horse-stealing, he may be convicted of simple larceny (*c*). And, on an indictment for petit treason, he may be found guilty of murder or of manslaughter only, for both these offences are included in the charge (*d*); as is also the offence of manslaughter in a charge of murder (*e*). So also on an indictment for privately stealing from the person the defendant may be found guilty of stealing generally (*f*), on an indictment upon the statute 1 James 1. c. 8. for stabbing "contrary to the form of the statute," may be acquitted as to the offence against the statute, and found guilty of manslaughter at common law (*g*); and, upon an indictment for stealing above the value of a shilling, may be convicted of stealing to a less amount (*h*). Under an indictment charging an assault with intent to abuse and carnally know, the defendant may be convicted of an assault with intent to abuse simply (*i*). So where a libel is alleged to have been published with intent to defame certain magistrates, and also to bring the administration of justice into contempt, it is sufficient to prove a publication of either of these intentions (*k*); and if an indictment for treason charge several overt acts, it is sufficient to prove one (*l*). Upon an indictment for obtaining money under false pretences, it is not necessary to prove the whole of the pretence charged, proof of part of the pretence, and that the money was obtained by such part, will suffice (*m*); and, in case of perjury, it will suffice to prove one of the assignments to authorize a conviction (*n*). An indictment on the 7 Geo. 3. c. 50. s. 1. stating the prisoner to have been employed in two branches of the post-office, proof of his having been employed in either will be sufficient; and if the

WHEN PART
OF A COUNT
MAY BE FOUND.

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(*a*) 1 Hale, 534, 5. 2 East, P.C. 736. 734.

(*b*) 2 Leach, 671.

(*c*) Russ. & Ry. C. C. 416.

(*d*) Fost. 328. 2 Hale, 184. 2 Hale, 302. Hawk. b. 2. c. 47. s. 6.

(*e*) 1 Hale, 449. 2 Hale, 302. Post, 638; and see the 43 G. 3. c. 113. s. 6. containing an enactment to this effect.

(*f*) 1 Leach, 473. 2 Hale, 203. Hawk. b. 2. c. 47. s. 6.

(*g*) 2 Hale, 302. Hawk. b. 2. c. 47. s. 6.

(*h*) Id. *ibid*.

(*i*) 3 Stark. C. N. P. 62. Ante, 233.

(*k*) 3 Stark. C. N. P. 35.

(*l*) Fost. 194.

(*m*) Russ. & Ry. C. C. 190.

(*n*) 2 Ld. Raym. 887.

WHEN PART
OF A COUNT
MAY BE FOUND.

letter embezzled is described as having contained several notes; proof of its having contained any one of them will suffice (*a*). Where the prisoner was described in two counts as a person employed in sorting and charging letters, he was found guilty, though it was proved he was a sorter only (*b*). We have already (*c*) seen how far it is unnecessary to prove the entire number, description, or value of property, according to the statement of it in the indictment. If an indictment charge that the defendant did, and caused to be done, a particular act, it is enough to prove either (*d*). Thus, under an indictment for forgery, stating that the defendant forged and caused to be forged, it suffices to prove either (*e*). So a defendant may be found guilty upon a count in an information, which charges him with having composed; printed, and published a libel, if he be proved to have published without having composed it (*f*). Lord Hale advised that the indictment for burglary should be framed, stating a burglarious entry with intent to steal, then an actual stealing, and a capital felony within the 5 & 6 Edw. 6. c. 9. for stealing in a dwelling-house to the value of forty shillings, the owner or some of his family being therein, either waking or sleeping. So that the defendant may be convicted of burglary with actual stealing—of burglary with intent to steal—of capital felony under the statute—or of a simple larceny, according to the evidence (*g*); and the same mode of framing the indictment may be observed with respect to many other crimes.

The principal reason, therefore, in these cases, for the introduction of second counts applicable to the inferior charge is, as before observed, that the grand jury cannot, like the petit jury, select parts of counts as true, but must either find or reject the whole of every distinct count in the indictment. The rule, however, as to finding an inferior degree of guilt, must be understood with some limitation; for a *felony* cannot, it is said, upon the trial, be modified into a *misdemeanor*, since the defendant would

(*a*) Russ. & Ry. C. C. 189.

(*b*) 2 Bla. Rep. 789. 3 M. & S. 371.

(*c*) Ante, 235 to 238.

(*d*) 2 Campb. 584. 1 Burr. 399.

(*e*) 1 Burr. 399. Dick. J. Distress, 411.

(*f*) 2 Campb. 584. 646.

(*g*) 1 Hale, P. C. 260. 2 East, P. C. 313 to 520. See form, post, vol. iii. 1100.

thereby lose the benefit of making his full defence by counsel, a copy of the indictment, and a special jury (*a*). Judgment, therefore, cannot be given as for a misdemeanor, when the prisoner is indicted for feloniously stealing things attached to the realty, which, from their nature, cannot be the subject of felony; and if the indictment charge a felony, and a special verdict find the facts, which amount only to a misdemeanor, no judgment can be given against the defendant upon such indictment (*b*). So if two defendants are indicted for felony, and it prove to be felony in one and a trespass in the other, the latter is entitled to an acquittal (*c*). So in an indictment for burglary, as a mere breaking is not sufficient to complete the offence, but a felonious intent is necessary, if the intent charged be not proved, the jury cannot find any part of the accusation; and therefore it is the practice in cases where there is the least doubt to insert several counts stating different intents (*d*). So where the jury find a verdict generally against the defendant on a count for an assault, false imprisonment, and rescue, which is bad in part, because it is not sufficiently stated that the arrest was lawful, the court cannot give judgment as for a common assault and false imprisonment (*e*). So also if on an indictment for highway robbery, the jury find a special verdict, raising a doubt only whether the prisoner was guilty of robbery, though they find the taking (*f*), yet the court will not give judgment as for a larceny, but will direct a new indictment to be preferred for the minor offence, in case the higher offence should not have been completed (*g*).

WHEN PART
OF A COUNT
MAY BE FOUND.

(*a*) 1 Leach, 14. 2 Stra. 1133. Sed vide Cro. Jac. 497. Kel. 29. Stark. 1st edit. 169. Cald. 401.

(*b*) Id. *ibid.* 1 Leach, 702. 2 East, P. C. 737. 778.

(*c*) Hawk. b. 2. c. 47. s. 8.

(*d*) 2 Leach, 702. 2 East, P. C. 702. Ante, 251. However, in an indictment for burglary and stealing in a dwelling-house, not stating that defendant entered

the dwelling-house with the intent to steal, if the larceny be found by the jury, the indictment will suffice, Russ. & Ry. C. C. 445.

(*e*) 5 East, 304.

(*f*) Comyn, Rep. 481. Rep. temp. Hardw. 115. sed quære that decision.

(*g*) 2 East, P. C. 708, n. z. 784.

Joinder of several offences.

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In cases of Felony, no more than one distinct offence or criminal transaction at one time should regularly be charged upon the prisoner in one indictment; because, if that should be shown to the court before plea, they will quash the indictment lest it should confound the prisoner in his defence, or prejudice him in his challenge to the jury; for he might object to a juryman's trying one of the charges, though he might have no reason so to do in the other; and if they do not discover it until afterwards, they may compel the prosecutor to elect on which charge he will proceed (*a*). But this is only matter of prudence and discretion which it rests with the judges to exercise (*b*). For, in point of law, there is no objection to the insertion of several distinct felonies of the same degree, though committed at different times, in the same indictment against the same offender (*c*); and it is no ground either of demurrer or arrest of judgment (*d*). Upon this ground it has been holden that an indictment on 37 Geo. 3. c. 70 (*e*), may, without any repugnancy, charge the double act that the defendant endeavoured to incite a soldier to commit mutiny, and also to incite him to traitorous practices (*f*). Thus too in arson, counts at common law and on the statute may be joined without danger (*g*); a count for a robbery may be joined with another for stealing privately from the person (*h*); and burglary and theft, forcible entry and detainer, have been frequently united in the same proceeding (*i*). And where several forged receipts have been uttered at one and the same time, and might constitute only one offence, several counts for each receipt have been allowed (*k*); and, as before observed, a count for embezzlement on the 39 Geo. 3. c. 35, may be joined with a count for a larceny on the 2 Geo. 2. c. 25, because both these offences are felonies (*l*); and a count for embezzling bank notes, upon the

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(*a*) 3 T. R. 105, 6. 2 East P. C. 515. 2 Campb. 131. 3 Campb. 132. Cro. C. C. 41. Burn, J. Indictment, IV.

(*b*) Id. *ibid*.

(*c*) 2 Hale, 173. 2 Leach, 1103.

(*d*) Id. *ibid*. 8 East, 41. 2 East P. C. 515. 3 T. R. 106. Cro. C. C. 41. Burn, J. Indictment, IV.

(*e*) Revived and made perpetual by 57 Geo. 3. c. 7.

(*f*) 1 B. & P. 130. 2 Leach, 799.

(*g*) Cald. 218. 2 Leach, 1103.

(*h*) 1 Leach, 473.

(*i*) 2 Hale, 162. 173. Yelv. 99. Cro. C. A. 27.

(*k*) 2 East P. C. 935, 6.

(*l*) 2 Leach, 1108.

39 Geo. 2. c. 85. may be joined with a count for larceny at common law (*a*).

JOINDER OF
OFFENCES.

In the case of *misdemeanors*, the joinder of several offences will not, in general, vitiate in any stage of the prosecution (*b*). For, in offences inferior to felony, the practice of quashing the indictment or calling upon the prosecutor to elect on which charge he will proceed, does not exist (*c*). But on the contrary, it is the constant practice to receive evidence of several libels and assaults upon the same indictment (*d*). It was indeed formerly held that assaults on more than one individual could not be joined in the same proceeding (*e*), but this is now exploded (*f*); for though two persons cannot join in a civil action, the reason is, that the damages are several, which cannot apply to criminal proceedings where no compensation is given to the prosecutor, and public security is the object to be obtained.

For the same reason an indictment for a libel on a body of trustees will be good, though it profess to be for a libel on three of them only (*g*). And it has been held, that it is no objection on demurrer that several defendants are charged in different counts of the same indictment with several offences of the same nature, though it may be a ground for applying to the court in its discretion to quash the indictment (*h*). But care must be taken that the offences be not charged in such a manner as to confound the evidence, and that no counts be joined upon which the judgments must necessarily be different, as a charge of felony with another of mere misdemeanor; for it may operate like a misjoinder in civil actions, and if so, the indictment will be bad on demurrer, or on motion in arrest of judgment (*i*). But the rule that where there is a different judgment counts cannot be joined, is not always the cri-

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(*a*) 3 M. & S. 539.

(*b*) 3 T. R. 105, 6. 2 Campb. 132. 2 Burr. 984. 3 East, 41. Burn, J. Indictment, IV. Cro. C. C. 41.

(*c*) 2 Campb. 132.

(*d*) *Id.* *ibid.*

(*e*) 2 Stra. 870. 2 Ld. Raym.

1572. 2 Sess. Cas. 24.

(*f*) 2 Burr. 984. Com. Dig. Indictment, E. Burn, J. Indictment, IV.

(*g*) 1 Sess. Cas. 262.

(*h*) 3 East, 41.

(*i*) 3 T. R. 103. 435. But see 1 East P. C. 408, 9, 10.

JOINDER OF
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terion whether the offence may not be laid in different ways; at all events it does not apply to all cases; for instance, in the offence of embezzling naval stores, the having in possession new stores, or stores not more than one third worn, is subject to transportation for fourteen years (*a*); but if they be not new or more than one third worn, the punishment is different (*b*); yet counts for both these offences may be included in the same indictment (*c*). So in conspiracy, the judgment upon conviction is, that the party is infamous, and yet nothing is more familiar than to add to counts for a conspiracy other counts which do not include a charge of conspiracy (*d*); and according to Lord Hale, a person who commits petit treason, may be indicted for murder; yet there are different judgments upon each, as well as different challenges (*e*). But when the prosecutor wishes to prevent the removal of an indictment from the sessions, for obtaining goods by false pretences under 30 Geo. 2. c. 24, he should not insert counts for conspiracy, as that would take the case out of that statute (*f*). It is no objection to an indictment that the punishment for one of the offences is positive, and for the other discretionary (*g*); and after a general verdict the objection of misjoinder may be avoided by entering up judgment upon a particular count (*h*). And, therefore, where a defendant was indicted on 9 Anne, c. 14. for an assault, on account of money won at gaming, the punishment of which is prescribed by the statute, and for an assault at common law, after a general verdict, a motion in arrest of judgment was abandoned by the counsel for the prisoner (*i*). And if two distinct offences are charged, and one of them is not indictable or laid without sufficient precision, judgment will be given for the crown if the other be sufficient upon general demurrer; for we have already seen, that part of an indictment may be good, though the other part be defective (*k*).

(*a*) See 39 & 40 Geo. 3. c. 89. s. 1.

(*b*) *Id.* s. 2.

(*c*) 3 M. & S. 550.

(*d*) *Id.*

(*e*) 1 Hale P. C. 378. Fost. 325. 328; but the circumstances there stated do not sufficiently shew whether it was the same person.

(*f*) *The King v. Godfrey and Others*, 1825.

(*g*) 4 East, 174. 1 East P. C. 408, 9, 10. 2 M. & S. 533.

(*h*) 4 East, 179. 1 East P. C. 408, 9, 10.

(*i*) 4 East, 179.

(*k*) 2 Sess. Cas. 32.

We have now to consider the joinder of several persons as defendants in the same indictment, as to the law both respecting the joinder of principals and those which are distinguished as accessories. And, here, although it is not our purpose to examine the nature of crimes or the liability of offenders to punishment, it will be necessary to state the leading rules and distinctions relative to principals and accessories in general, in order more clearly to understand the structure of indictments against them, and the rules of joinder by which they are respectively affected.

JOINDER OF
SEVERAL
DEFENDANTS
AND OF
PRINCIPAL AND
ACCESSORIES.

Offenders are either *principals* in the *first* degree, principals [256] in the *second* degree, or *accessories before* or *after* the fact, in which order we shall first briefly consider them (*a*).

A man may be a principal in one of two degrees. A *principal* Of principals in first and second degree. in the *first* degree is he that is the actor or actual perpetrator of the crime; and in the *second* degree, he who is present aiding and abetting the fact to be committed (*b*). It is a question of law whether a person is guilty as a principal in the first or second degree (*c*).

Principals in the *second* degree were formerly denominated and regarded as only *accessories at the fact* (*d*). And it seems that he who actually committed the crime was alone guilty as principal, and those who were present aiding and assisting, were but in the nature of accessories, and could not be put upon their trial until the principal was first convicted (*e*). This distinction has, however, been long since exploded, and now the stroke is constructively given by all who consent and who are present at its infliction, and they may be put upon their trial though the actual slayer is neither outlawed nor found guilty (*f*). In order, however, to make the aiders and abettors thus highly culpable, three requisites must combine; they must be present—aiding and assisting—with a felonious intention to the felony (*g*).

(*a*) 1 Hale, 232.

(*b*) 1 Hale, 233. 615. 4 Bla. Com. 34. 4 Burr. 2074.

(*c*) 2 Burr. 2076.

(*d*) 4 Burr. 2074.

(*e*) 1 Hale, 437.

(*f*) 9 Co. 67. b. Plowd. 98. a.

1 Hale, 437, 8. Hawk. b. 2. c. 29. s. 7.

(*g*) 1 Hale, 438, 9. Fost. 349, 50.

PRINCIPALS IN
FIRST AND
SECOND DEGREE.

1. *They must be present*—But the presence need not be an actual standing within sight or hearing of the fact ; but an active co-operation in the crime at the time of its commission, as where one stands to keep watch at a convenient distance while another completes the felony (*a*). Where a person stood outside a house, to receive goods which a confederate was stealing in the house, he was held a principal (*b*) ; and in the case of privately stealing in a shop, if several are acting together, some in the shop, &c. and some out, and the property is stolen by the hands of one of those who are in the shop, those who are outside are equally guilty as principals (*c*). And if several combine to forge an instrument, and each executes by himself a distinct part of the forgery, and they are not together when the instrument is completed, they are nevertheless all guilty as principals (*d*). If several act in concert to steal a man's goods, and he is induced by fraud to trust one of them, in the presence of the others, with the possession of such goods, and another of them entices him away that the man who has his goods may carry them off, all are guilty of felony (*e*). And it is not necessary to shew that one indicted as a principal was present during the whole of the transaction, it is sufficient to shew that he originally assented to the robbery, and was present aiding and abetting when the offence was consummated, although he was not at the inception ; as where the servants of A. feloniously removed goods in A.'s warehouse, from one part of it to another, and B., several hours afterwards, assisted in removing the goods *from* the warehouse, it was held B. was a principal, since it was a continuing transaction (*f*). So if several persons come to a house with intent to make an affray, and one be killed, while the rest are engaged in riotous and illegal proceedings, though they are dispersed in different rooms, all will be principals in the murder (*g*).

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There are some cases in which a criminal, though absent at the time his contrivances produce their fatal effects, is a principal in the first degree ; thus in case of murder by poisoning, a man

(*a*) 1 Hale, 439. 3 Inst. 64. (e) Russ. & Ry. C. C. 305.
Fost. 350. Hawk. b. 2. c. 29. (f) 2 East P. C. 763 ; and
s. 8. 1 East P. C. 257, 8. see id. 767. Post, 257 a, n. a.
(*b*) 1 Ry. & Moo. C. C. 96. (g) Dalt. J. c. 161. 1 Hale,
(c) Russ. & Ry. C. C. 343. 439. Hawk. b. 2. c. 29. s. 8.
(d) Russ. & Ry. C. C. 446. 1 East P. C. 258.

may be a principal felon by preparing and laying the poison (*a*), or by giving it to an innocent person to administer, who is ignorant of its pernicious quality (*b*), though he be not present when the very deed of poisoning is committed. And the same rule will apply to other murders committed in the absence of the murderer, by means which he had prepared before hand, and which probably could not fail to prove fatal. Thus, by laying a trap or pitfall for another, whereby he is killed; turning out a wild beast with intent to do mischief; or exciting a madman or child to commit murder, so that death thereupon ensues, the party offending is guilty of murder as in the first degree (*c*). For he cannot be called an accessory, because that supposes some other person to have been principal; and the poison, the innocent conveyer, the pitfall, the madman and the child cannot be principals, for they are the guiltless instruments of death in the hand of their employer. As, therefore, he must be certainly guilty either as principal or as accessory, and cannot be so as the latter, he must be the former; and if a principal then in the first degree, for there is no other criminal, much less a superior in the guilt, whom he could aid, abet, or assist.

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SECOND DEGREE.

But where a man incites a guilty agent to commit murder, and he is neither actually nor constructively present, the perpetrator is the principal felon, and the former only an accessory before the fact (*d*). And if several persons are out with the intention of committing a felony, and upon an alarm run different ways, and one of them maim a pursuer to avoid being taken, the others are not to be considered principals in such acts (*e*); and persons not present, nor sufficiently near to give assistance, are not principals (*f*). Thus going towards a place where a felony is to be committed, in order to assist in carrying off the property and assisting accordingly, will not make a man a principal if he was at such a distance at the time of the felonious taking as not to be able to assist in it (*g*). And where H. & S. broke open a warehouse and

(*a*) 3 Inst. 138. Kel. 52, 3. 4 Bla. Com. 35. Hawk. b. 2. Fost. 349. 4 Bla. Com. 349. c. 29. s. 11.
Hawk. b. 2. c. 29. s. 11. (*d*) 1 Hale, 435. 3 Inst. 49.
(*b*) Fost. 349. 1 Hale, 616. (*e*) Russ. & Ry. C. C. 99.
Hawk. b. 2. c. 29. s. 11. (*f*) Russ. & Ry. C. C. 363.
(*g*) Fost. 349. 1 Hale, 514. (*g*) Russ. & Ry. C. C. 421.

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SECOND DEGREE.

stole thereout thirteen firkins of butter, &c. which they carried along the street thirty yards, and then fetched the prisoner, who was apprized of the robbery, and he assisted in carrying the property away, he was considered only as an accessory, and not a principal, the felony being complete before the prisoner interfered (*a*). Persons privy to the uttering of a forged note by previous concert with the utterer, but who were not present at the time of uttering, or so near as to be able to afford aid or assistance, are not principals, but accessories before the fact (*b*). And if several plan the uttering of a forged order for payment of money, and it is uttered accordingly by one in the absence of the others, the actual utterer is alone the principal (*c*). And it is not sufficient to make a person a principal in uttering a forged note, that he came with the utterer to the town where it was uttered, went out with him from the inn at which they had put up a little before he uttered it, and joined him again in the street a short time after the uttering, and at some little distance from the place of uttering, and ran away when the utterer was apprehended (*d*). And where a wife by her husband's order and procuration, but in his absence, knowingly uttered a forged order and certificate for the payment of prize-money, it was held that the presumption of coercion at the time of uttering did not arise, as the husband was absent, and that the wife was properly convicted of the uttering, and the husband of procuring (*e*).

[258] Secondly. They must also be *aiding, assisting, and abetting*, to constitute them principals in the second degree. For mere presence is not enough to implicate them thus deeply in the guilt. Thus, if two persons are fighting, and a third comes by and looks on, but assists neither, he is not guilty of homicide in any degree, though he may be fined for a misprision if he neglect to exert himself to apprehend the offenders (*f*). But, if several come with intent to do mischief, though only one does it, all the rest are

(*a*) Russ. & Ry. C. C. 332. Id. 333, in notes; and 2 East P. C. 767. Ante, 256, n. f.

(*b*) Russ. & Ry. C. C. 25. 2 East P. C. 974. S. C. and see Russ. & Ry. C. C. 365.

(*c*) Russ. & Ry. C. C. 249.

(*d*) Russ. & Ry. C. C. 113; and see id. 142.

(*e*) Russ. & Ry. C. C. 270.

(*f*) 1 Hale, 439. Hawk. b. 2. c. 29. s. 10.

principals in the second degree (*a*). So, if one present command another to kill a third, both the agent and the contriver are guilty (*b*). And where many are engaged in the perpetration of a criminal act, and one of them is guilty of murder in the pursuit of their common object, all who were engaged in the riot or disorder, are principals in the second degree (*c*). And if a man encourage a woman to murder herself, and is present abetting her while she does so, such a person is guilty of murder as a principal; and if two encourage each other to murder themselves together, and one does so, but the other fails in the attempt upon himself, he is a principal in the murder of the other; but if it be uncertain whether the deceased really killed herself, or whether she came to her death by accident before the moment when she meant to destroy herself, it will not be murder in either (*d*).

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SECOND DEGREE.

Thirdly. But to constitute a principal in the second degree there must be not only a presence, and an aiding and abetting, but a *participation in the felonious design*, or, at least, the offence must be within the compass of the original intention (*e*). For if a master assaults, with malice prepense, and the servant, being ignorant of his master's malignant design, takes part with him, the servant is not an abettor of murder, but of manslaughter only. So if an affray arise between two parties, and constables interfere and are killed, those who killed them, knowing their office, are principals in the first degree, those who abetted them, not knowing or having the possibility of knowing their situation, are guilty in the second degree, of manslaughter only; and those who were present, and concerned in the original affray, but desisted from interfering on the approach of the officers, are not at all criminal; for this was a new outrage, independent of the original quarrel (*f*); and, in order to render persons liable as principals in the second degree, the killing, or other act, must be in pursuance of some unlawful purpose, and not collateral to it (*g*).

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(*a*) 1 Hale, 440. Hawk. b. 2. c. 29. s. 8.

(*b*) Id. *ibid*.

(*c*) 1 Hale, 442, 3, 4. Hawk. b. 2. c. 29. s. 8.

(*d*) Russ. & Ry. C. C. 523.

(*e*) 1 East P.C. 257, 8, 9. Kel. 109. 117. 1 Hale, 442, 3, 4. Dougl. 211, 12.

(*f*) 1 Hale, 446; and see Russ. & Ry. C. C. 99. Ante, 257.

(*g*) 1 East P. C. 258.

Punishment of
principals in first
and second de-
gree.

Where the principals in the second degree are thus implicated in the guilt, they are generally liable to the same punishments with the actual perpetrators of the crime. And this, not only in offences at common law, but in cases of felony created by statute, to which the same implication extends (*a*). But where the act is necessarily personal, as in stealing privately from the person, he whose hand took the property can alone be guilty under the statute, and aiders and abettors are only principals in a simple larceny (*b*). So, on an indictment on the statute against stabbing (*c*), only the party who actually stabs is ousted of clergy (*d*). On this subject it was observed by Lord Mansfield, that the distinction between principals in the first and second degree relates to the priority of trial (*e*), by which must be understood, that principals in the second degree may be arraigned and tried before the principal in the first degree has been outlawed or found guilty (*f*); whereas, at common law, accessories cannot be tried till after the principal has been convicted, or, at least, must be tried at the same time, though that law has, as we shall hereafter see, been much altered (*g*).

[260] If an indictment be framed against one for murder, as the actual perpetrator, and another for aiding and assisting, as principal in the second degree, the latter may, it seems, be convicted, though the former be acquitted (*h*); and, if A. be indicted as having given the mortal stroke, and B. and C. as present, aiding and assisting, and upon the evidence it appears that B. gave the stroke, and A. and C. were only aiding and assisting, the evidence will maintain the indictment, and judgment be given against all the defendants, for it is only a circumstantial variance, as, in law, the mortal blow is the act of all that are present aiding and

(*a*) 1 Leach, 64. 4 Burr. 2076.

(*b*) 1 Hale, 529. 1 Leach, 7. 266. 473. 2 East P. C. 701. Cro. C. C. 49; see Russ. & Ry. C. C. 343.

(*c*) 1 Jac. 1. c. 8.

(*d*) 1 East P. C. 348. 350. 1 Hale, 463. 2 Hale, 344. 4 Burr. 2076. 2 Lord Raym.

842. Hawk. b. 2. c. 33. s. 98. Stark. 77, note u.

(*e*) 4 Burr. 2076.

(*f*) 1 Hale, 437. 2 Hale, 223. 9 Co. 67. b. Plowd. 97. 100. Hawk. b. 2. c. 29. s. 7.

(*g*) 4 Bla. Com. 40.

(*h*) 1 Leach, 360. 1 Salk. 334, 5.

abetting (*a*). And on the same principle where an indictment on the 43 Geo. 3. c. 58. charging in one count that A., *feloniously*, wilfully, maliciously, and unlawfully, and of his malice aforethought, did shoot at B. with intent *feloniously*, &c. to kill, &c. and that C. and D. were then and there aiding and abetting A. the felony aforesaid, *in manner and form aforesaid*, to do and commit, against the form, &c.; and in another count charging the act of shooting on a person unknown, in the same words as before, and that all three A., C., and D. were then and there aiding and abetting him, the felony aforesaid, *in manner and form aforesaid*, to do and commit (*omitting the word feloniously*) to the aiding and abetting, it was held on the whole good, notwithstanding that omission, the statute having made aiders and abettors principal felons, although the jury having found A. guilty generally, and acquitted the others, afterwards expressly negatived that A.'s was the hand that fired (*b*). So the indictment may charge all the parties as principals in the first degree (*c*), and it was held by all the judges of England, that an indictment against three, for the single act of shooting at the prosecutor under the black act was sufficient (*d*). But there are exceptions to this rule as to the structure of the indictment under particular statutes, as in an indictment on the statute against stabbing (*e*), whereas no other is ousted of clergy, but he who actually stabs or thrusts, it must be laid truly which of the offenders stabbed the party, and which merely aided and abetted; for otherwise neither of them could be convicted of the capital part of the charge (*f*). And if two persons are indicted, and it appears that one of them is altogether innocent, having repented of his purpose, and left his companion before the felony, but it is uncertain which is

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FIRST AND
SECOND DEGREE.

(*a*) 1 Hale, 437, 8. 463. 521, 522. 2 Hale, 185. 292. 344. 1 Leach, 360. 1 East P. C. 350, 351. Hawk. b. 2. c. 46. s. 39. Fost. 351. 2 Show. 510. 3 Mod. 121.

(*b*) 3 Price, 145. 2 Marsh. 466. Russ. & Ry. C. C. 314. S. C. under the 57 Geo. 3. c. 127. s. 4. all persons aiding and abetting the personating a

seaman are principals. Russ. & Ry. C. C. 353.

(*c*) Fost. 351. 425. Hawk. b. 2. c. 23. s. 76. 2 Hale, 344.

(*d*) 3 T. R. 105. 1 Leach, 359, n. a.

(*e*) 1 Jac. 1. c. 8.

(*f*) 1 East P. C. 348. 350. 2 Hale, 344. 4 Burr. 2076. 1 Hale, 468. 2 Ld. Raym. 842. Hawk. b. 2. c. 33. s. 98.

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guilty, both must be acquitted (*a*). So on an indictment upon 8 Eliz. c. 4. for privately stealing from the person, no one can be capitally convicted, but he whose hand actually takes the property, and, therefore, where a man was prosecuted for this offence, but it did not appear whether he or an accomplice actually took the articles in question, he was acquitted of the statutable offence, and convicted of simple larceny (*b*).

Of accessories.

An *accessary* is not the chief actor in the offence, nor present at its performance, but is, in some way, concerned therein (*c*). In considering the nature of this degree of guilt, we will first examine, what offences admit of accessories, and what not; who may be accessories before, and who after, the fact which constitutes the crime.

What offences
admit of acces-
saries.

There can be no accessories in high treason, for all who are concerned are principals; the same acts which make a man accessory in felony, make him a principal in treason, because of the heinousness of the crime (*d*). Besides, it is to be considered, that the bare intent to commit treason, is, in many cases, actual treason; as imagining the death of the king, or conspiring to depose him from the throne (*e*). And, as no one can advise or abet such a crime, without an intention to have it done, there can be no accessories before the fact, since the very advice and abetment amount to principal treason (*f*). But this rule does not hold in case of inferior treasons, such as those which relate to the coin; for in these no advice to commit them, unless they are actually performed, can make a man a principal traitor (*g*). So also in petit larceny, and all offences below the degree of felony, there can be no accessories either before or after the fact, but all persons concerned therein, if guilty at all, are principals (*h*).

(*a*) 1 Leach, 387.

(*b*) 1 Leach, 473.

(*c*) 4 Bla. Com. 35. 1 Leach, 515.

(*d*) 3 Inst. 21. 438. 1 Hale, 233. 613. Dalt. J. c. 161. Fost. 341. 12 Co. 81, 2. Co. Lit. 57. Hawk. b. 2. c. 29. s. 1. 4 Bla. Com. 35. Cro. C. C. 49.

(*e*) 4 Bla. Com. 35.

(*f*) 4 Bla. Com. 35. acc. Fost. 342, &c. cont.

(*g*) Fost. 342. 4 Bla. Com. 35.

(*h*) 12 Co. 82, 3. 2 Inst. 183. Dalt. J. c. 161. Co. Lit. 57. 1 Hale, 613. 616. Hawk. b. 2. c. 29. s. 1. Cro. C. C. 50. 4 Bla. Com. 35, not even under the statutes of William and Anne, Fost. 73.

Thus the highest and lowest offences are alike in this respect; the former, because of the magnitude and danger of the guilt; the latter, because the crime is so small that the law does not condescend to mark the minor shades of distinction. So also in manslaughter there can be no accessaries before the fact, because it is in its nature sudden and unpremeditated, arising from the heat of blood and the violence of the passions(*a*). But in the case of forgery(*b*) and all other intermediate offences, there may be accessaries both before and after the fact, which we are now shortly to consider.

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1st. An accessory *before* the fact, is he that being *absent* at the time of the actual perpetration of the felony, procures, counsels, commands, incites, or abets another to commit it(*c*). If a person be *present*, and aiding and abetting, he cannot be indicted as an accessory(*d*). Words that seem to imply mere permission, as if one person informs another that he is about to commit a felony, and the latter replies "you may do your pleasure for me," this does not implicate him as an accessory, but it only fixes him with the guilt of a misprision(*e*). If one hire another to lay poison in order to kill a third, and he take it and die, the party hired is guilty, though absent, as principal, and the contriver is accessory; but, if the latter were present at the laying and disposing of the poison, both would be principals(*f*). And whoever procures a felony to be committed, though, through the intervention of a third person, without any personal communication with the principal, is an accessory before the fact(*g*). So if the reputed father of a child unborn advise the mother to kill it on its birth, and she acts according to his persuasion, he is an accessory to the murder, though the object of his malice was not in being at the time of his advice(*h*). He who com-

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(*a*) 1 Hale, 616. Moore, 461. Cro. Eliz. 540. Hawk. b. 2. c. 29. s. 24. 4 Bla. Com. 36.

(*b*) 2 East, P. C. 973, 974. 2 Leach, 1096. See ante, 257 a.

(*c*) 1 Hale, 615. 4 Bla. Com. 36. Com. Dig. Justices, T. 1.

(*d*) 1 Leach, 515. 3 P.W. 476.

(*e*) 1 Hale, 616. Hawk. b. 2. c. 29. s. 23. and s. 28.

(*f*) 1 Hale, 616. Fost. 349. Kel. 52, 3. Com. Dig. Justices, T. 1.

(*g*) Fost. 125. 4 Bla. Com. 37. Com. Dig. Justices, T. 1.

(*h*) Dyer, 186 a. 1 Hale, 617. Dalt. J. c. 161. 3 Inst. 51.

Hawk. b. 2. c. 29. s. 18. 4 Bla. Com. 37.

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BEFORE
THE FACT.

mands or counsels another to commit an unlawful act, is liable to all the natural and probable consequences which may arise from its perpetration; thus, if A. commands B. unlawfully to beat C., and B. beat C. till he dies, A. is accessory to the murder (*a*). So if A. command B. to rob C. and he kill in the attempt; or to burn one house, and the fire destroys more, A. will be accessory to the subsequent felonies (*b*). But the procurer will not be liable, if the agent commit a crime of a different complexion, or upon a different object than that to which he was incited. Thus if A. commands B. to burn a certain house, with which he is well acquainted, and he burns another, or to steal a certain horse, and he steals a different horse, or a cow, or to rob a man of plate on a journey, and he breaks open his house in the night, in order to steal it, and thereby commits burglary, A. will not be liable to be indicted as accessory to the crimes committed, because B. knowingly acting contrary to the commands of A., it is, on his part, a mere ineffectual temptation, and the specific crime he planned was never completed (*c*). But if the variance of B. be merely a deviation in circumstance or place, as if A. procure him to murder C. by poison, and he kills him with a sword, A. will be an accessory to the crime, for the means used are immaterial, so that the criminal object be effected (*d*). And though it has been said (*e*), that if A. command B. to poison C. and B. in mistake poisons D., that A. is not answerable, this seems a position hardly reconcileable to the reason of the case, nor borne out by the authority cited to support it; for the true criteria to determine whether the instigator of a felony is guilty, as accessory, to a felony somewhat different, are, that if the principal committed the crime in consequence of the flagitious advice—and if the event, in the ordinary course of things, was the natural consequence of the acts suggested, A. is unquestionably guilty, but if

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(*a*) 1 Hale, 417. Plowd. 475. Hawk. b. 2. c. 29. s. 18. Fost. 370. Com. Dig. Justices, T. 1. *Query*, This must mean where the direction was to beat violently, see 1 Hale, 442, 3, 4. 1 East, P. C. 257, 8, 9. Kel. 109. 117.

(*b*) *Id.* *ibid.*

(*c*) Plowd. 475. 1 Hale, 617. Hawk. b. 2. c. 29. s. 18. Fost.

360. Com. Dig. Justices, T. 1. See principle in trespass, 1 East, 106.

(*d*) Plowd. 475. 1 Hale, 617. Fost. 369. Hawk. b. 2. c. 29. s. 20. 4 Bla. Com. 37. Com. Dig. Justices, T. 1.

(*e*) 1 Hale, 617. Plowd. 475. Hawk. b. 2. c. 29. s. 18. Com. Dig. Justices, T. 1.

the agent, from the mere wickedness of his own mind, intentionally commits a different offence, A. will not be implicated in the guilt of the principal (a). If the crime solicited to be committed be not perpetrated, then the adviser can only be indicted for a misdemeanor (b).

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2. *An accessory after the fact*, may be where a person knowing a felony to have been committed by an individual, receives, relieves, comforts, or assists the felon (c). This, it must be observed, arises in cases of felony alone, for there can be no accessories after the fact at common law to any petit larceny, misdemeanor, or trespass (d). In order to charge a person as accessory after the fact, the felony must be completed—he must know the felon to be guilty—and he must receive, relieve, comfort, or assist him.

Accessories after
the fact.

The felony must be completed. If, therefore, A. gives B. a mortal stroke, and C. receives or relieves A. or helps him to escape before the death of B., and B. afterwards dies, C. is not an accessory, because at the time when he harboured A. no felony had been completely committed (e).

He must know that the felon is guilty (f); and this, therefore, is always averred in the indictment (g). And though it seems to, have been doubted whether an implied notice of the felony, will not, in some cases, suffice, as where a man receives a felon in the same county in which he has been attainted, which is supposed to have been a matter of notoriety (h), it seems to be the better opinion, that some more particular evidence is requisite to raise the presumption of knowledge (i). Such an attainder may indeed, under certain circumstances, afford some evidence to a jury against a person charged with *knowingly* receiving, but cannot

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(a) *Fost.* 372. *Com. Dig. Justices, T. 1.* 1 *East Rep.* 106.

(b) 2 *East Rep.* 5; and see *Russ. & Ry. C. C.* 106, 7. notes.

(c) 1 *Hale*, 618. 4 *Bla. Com.* 37. *Com. Dig. Justices, T. 2.*

(d) 1 *Hale*, 618.

(e) 1 *Hale*, 622. *Hawk. b. 2. c. 29. s. 35.*

(f) 1 *Hale*, 622. *Hawk. b. 2. c. 29. s. 32.* *Com. Dig. Justices, T. 2.*

(g) *Hawk. b. 2. c. 29. s. 33.*

(h) *Dyer*, 355. *Staundf.* 41 b.

(i) 1 *Hale*, 323. 622. 3 *P. Wms.* 496. *Hawk. b. 2. c. 29. s. 33.* 4 *Bla. Com.* 37.

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excuse the omission of that allegation in the indictment, or supply the want of proof upon the trial (*a*).

As to what shall be esteemed a *receiving, relieving, comforting, or assisting* a felon, it may be observed, generally, that any assistance whatever given to him, to hinder his being apprehended, tried, or suffering punishment, is sufficient to convict the offender (*b*). So lending him a horse to ride away in order to enable him to escape his pursuers, assisting him to escape from prison, or rescuing him from the officers of justice, will make a man accessory to a felony (*c*). But the assistance or support must be given in order to favor an illegal escape; so that to support a criminal in prison, to receive or comfort him when he is out on bail, or to afford him advice and assistance to procure his legal acquittal, are not unlawful, but frequently humane and laudable (*d*). To receive stolen goods, knowing them to be stolen, not falling under any of the descriptions of the common law, did not constitute the receiver an accessory, but was a distinct misdemeanor punishable by fine and imprisonment (*e*). But by the several statutes (*f*), the receivers were made accessaries after the fact, and subjected to severer judgment; and by another provision (*g*), the receivers of linen stolen from bleaching grounds, are made felons without benefit of clergy. The only relation which excuses the harbouring a felon, is that of a wife to her husband, because she is considered as subject to his controul, as well as bound to him by affection (*h*). But no other ties, however near, will excuse; for if the husband protect the wife, the father his son, or a brother his brother, they

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(*a*) 3 P. Wms. 496. Hawk. b. 2. c. 29. s. 33. note a.

(*b*) 1 Hale, 618. Hawk. b. 2. c. 29. 4 Bla. Com. 37. Com. Dig. Justices, T. 2.

(*c*) 1 Hale, 618. Hawk. b. 2. c. 29. s. 26, 7. 4 Bla. Com. 38. Com. Dig. Justices, T. 2.

(*d*) 1 Hale, 620, 21. Hawk. b. 2. c. 29. s. 23. 4 Bla. Com. 38. Dalt. J. c. 161. Com. Dig. Justices, T. 2.

(*e*) Yelv. 4. 1 Hale, 620. Com. Dig. Justices, T. 2.

(*f*) 3 & 4 Wm. & Mary, c. 9. 5 Anne, c. 31. 4 Geo. 1. c. 11. 3 Geo. 4. c. 24.

(*g*) 18 Geo. 2. c. 27.

(*h*) 1 Hale, 621. Hawk. b. 2. c. 29. s. 34. 4 Bla. Com. 39. Com. Dig. Justices, T. 2. See ante, 257 a. a case where the wife was considered as the principal, and the husband as accessory only.

contract the guilt, and are liable to the punishment of accessaries to the original felony (*a*).

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There may be an accessory to a person who was accessory before the fact, as if A. advise and procure B. to murder C.: by this A. is accessory *before* the fact; and though but accessory, yet if D. receives and conceals him from justice, D. hereby becomes an accessory; but there cannot be an accessory to a person who was accessory *after* the fact (*b*).

Formerly the accessory could never be *tried* without his own consent, before the conviction or outlawry of this principal, unless they were tried together (*c*). But the statute 1 Anne, stat. 2. c. 9. s. 2. enacts, that whoever shall buy or receive stolen goods, knowing the same to have been stolen, may be prosecuted for a misdemeanor, and punished by fine and imprisonment, though the principal felon be not convicted. And this provision is extended by 22 Geo. 3. c. 58. s. 1. (*d*) to cases of petit larceny, and all persons guilty as accessaries of receiving in grand larceny, are liable to be indicted as such, at any time before the conviction of the principal. And the provision is still further extended by the 3 Geo. 4. c. 38. s. 3, to accessaries before the fact, in cases of burglary, robbery, and larceny (*e*). And by recent statutes, receivers of goods, metals affixed to houses, &c. and articles of plate or jewellery, may be tried, found guilty, and transported for fourteen years, although the thief has neither been tried nor prosecuted to outlawry (*f*).

Time of trial of
accessary.

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The *punishment* of accessaries *before* the fact is, in general, the same with that of principals, for they are frequently the most deeply criminal (*g*). By 3 Geo. 4. c. 38. s. 3. persons convicted of advising children or others to commit thefts, may, instead of

Punishment of
accessaries.

(*a*) 1 Hale, 621. Hawk. b. 2. c. 29. s. 34. 4 Bla. Com. 39. Com. Dig. Justices, T. 2. We have already seen where accessaries may be tried, ante, 180.

(*b*) 3 P. Wms. 475.

(*c*) Fost. 369. 1 Hale, 623. Hawk. b. 2. c. 29. s. 36. 4 Bla. Com. 40.

(*d*) And see the 3 Geo. 4. c. 24. s. 3.

(*e*) See *infra*.

(*f*) 4 Geo. 1. c. 11. 29 Geo. 2. c. 30. s. 1. 10 Geo. 3. c. 48.

(*g*) Dalt. J. c. 161. 3 P. W. 475.

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the punishment then in force, at the discretion of the court, be transported for seven years, or imprisoned only, or imprisoned and kept to hard labour for any term not exceeding three years; and by the 4th section of that act, passed for the punishment of accessaries before the fact to burglary, robbery, and larceny, in cases where the principals are not discovered, it is enacted, that an accessory before the fact to any burglary, robbery, or larceny whatever, of the degree of grand larceny (except where the principal has been convicted), shall be deemed guilty of a misdemeanor, and may be imprisoned only, or imprisoned and kept to hard labour, for any term not exceeding two years, although the principal be not discovered, or be not convicted; provided such accessory shall not be afterwards punished as an accessory before the fact, if the principal be afterwards convicted. Accessaries *after* the fact are, in most cases, allowed the benefit of clergy, and the punishment is often trivial (*a*). In the case of horse-stealing, however, the statute 32 Eliz. c. 12. s. 5. has taken away clergy from accessaries, as well after as before the fact; but this is to be understood to relate only to those who were accessaries at the time that act was passed, and not to receivers or others who have been made so by subsequent statutes (*b*). By the 29 Geo. 2. c. 30, receivers of stolen lead, &c. may be transported for fourteen years.

Of the joinder of
several as principals.

Having thus considered the leading distinctions between principals and accessaries, and partially the structure of the indictment against them, we return to examine when and in what manner several defendants may be joined in an indictment, in whatever degree they are guilty. And first, we will inquire when several principals in the first degree or second degree, may, or must be joined in one indictment.

Where the act is such as several may join in, all the offenders may be included in the same indictment (*c*). Thus, though torts

(*a*) Fost. 372. 3 P. W. 475, 426. Hawk. b. 2. c. 25. s. 89. Com. Dig. Indictment, F. Bac.

(*b*) Fost. 373. Abr. Indictment, G. 5. Cro. C.

(*c*) See generally, 2 Hale, C. 41, 2. Burn, J. Indictment, 173. 2 Burr. 984. 1 Sess. Cas. IV.

are in their nature several, and each one must answer for his own individual crime; yet where several keep a common gaming or other disorderly house, or are guilty of deer stealing, maintenance, extortion, trespass, or other offences which admit of the agency of several, they may be either jointly or severally indicted (*a*). But where the criminality arose in consequence of some personal disqualification to do an act in itself lawful, as for exercising a trade under the stat. of Elizabeth, not having served an apprenticeship, each individual might have been prosecuted alone (*b*). So also, several cannot be joined in an indictment for perjury, because the assignment must be of the very words spoken, and the words uttered by one cannot possibly be applied to those which proceed from another; besides, one of the defendants may be desirous of obtaining a certiorari, while the others are anxious for an immediate trial (*c*). Upon the same principle, no indictment can be supported against several for being common scolds or barrators (*d*), nor for absenting themselves from church (*e*), nor can several parishes be indicted together for suffering a highway to be out of repair (*f*). So neither can several individuals be jointly indicted for omitting to repair the pavement before their respective houses (*g*). But several may be indicted for the same libel, if they all joined in publishing it (*h*). And the same persons being concerned as principals in the same offence, may all be joined in the same indictment, though the degrees of guilt may differ. Thus, in case of felony, where several are present aiding and abetting, they may be joined with the principal in the first degree, and charged in the indictment either as the actual perpetrators, or

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(*a*) 2 Hale, 173, 4. 10 Mod. 335, 336. 1 Vent. 302. 1 Salk. 382. 2 Ld. Raym. 1248. Hawk. b. 2. c. 25. s. 89. Com. Dig. Indictments, F. Bac. Abr. Indictment, G. 5. Burn, J. Indictment, IV. 8 East, 47.

(*b*) 2 Roll. Abr. 81. 1 Stra. 623. 5 Mod. 181. 2 Sess. Cas. 221. 4 Burr. 2046. 10 Mod. 335, 6. 1 Vent. 302. 1 Salk. 382. 2 Hale, 184. Hawk. b. 2. c. 25. s. 89. Com. Dig. Indictment, F. Bac. Abr. Indictment, G. 5. Burn, J. Indictment, IV.

Chitty's Apprentice Law, p. 137.

(*c*) 3 T. R. 103, 4. 2 Stra. 921. 1 Sess. Cas. 424. 2 Burr. 983, 984. 2 Barnard. 24. 80. Hawk. b. 2. c. 25. s. 89, in notes. Bac. Abr. Indictment, G. 5. Com. Dig. Indictment, F.

(*d*) 2 Stra. 921.

(*e*) Trem. P. C. 267.

(*f*) Rep. temp. Hardw. 105. Styles, 157.

(*g*) 2 Rol. Abr. 81. Hawk. b. 2. c. 25. s. 89.

(*h*) 2 Burr. 985. Burn, J. Indictment, IV.

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as aiders and abettors (*a*). And, in all cases of high treason, petit larceny, mayhem, and offences inferior to felony, the act of one being in law the act of the rest, they may all be charged as having jointly committed the offence (*b*); except in the case of becoming a traitor, by harbouring another traitor, in which case the indictment must be specially framed (*c*). Where the principal in the second degree is charged as an aider or abettor, it is not necessary to set forth in the indictment the means or manner by which he became thus guilty, but merely to describe him generally as being present aiding and abetting at the felony and murder (as the case may be) committed, in manner and form aforesaid (*d*). But merely to charge him with being present, will not suffice, because he may possibly be innocent (*e*). In indictments for homicide, it is safer to aver the abetment generally; but if it be laid specially, it should refer to the stroke, and not to the death (*f*). And it seems proper to aver the abetting with malice prepense, and then to draw the conclusion that all present murdered the deceased (*g*). But care must be taken, if the stroke and death were on different days, to lay the murder on the latter, though the abetting was on the former, for till then no felony was completed (*h*).

[270] If money or goods be obtained upon false pretences, all who are present aiding may be included in one indictment under the statute (*i*). And if the crime arise out of the same act, though the parties stand in different relations, they may be joined in the same indictment; thus, if a wife join with a stranger in the murder of her husband, they may be prosecuted together, though the wife is guilty of petit treason, and the stranger of murder

(*a*) 3 T. R. 305. 1 Leach, 64. 350. 505. Hawk. b. 2. c. 25. s. 64; and see ante, 260.

(*b*) 7 East, 65. 1 Hale, 615. 521, 2. 4 Bla. Com. 36. Ante, 260.

(*c*) Fost. 345.

(*d*) 2 Id. Raym. 846. 1 Hale, 521, 2. Hawk. b. 2. c. 25. s. 64. Id. b. 2. c. 29. s. 17. 4 Co. 42. 3 Price, 145. 2 Marsh. 466. Russ. & Ry. C. C. 314. S. C.

Ante, 260. See form, Leach, 360. Post, vol. ii. 5.

(*e*) Hawk. b. 2. c. 25. s. 64. Fost. 351. 4 Co. Rep. 42.

(*f*) 4 Co. 42.

(*g*) 9 Co. 62.

(*h*) 4 Co. 42.

(*i*) 1 Leach, 505; and so in the case of personating seamen, against the 57 Geo. 3. c. 127. s. 4. Russ. & Ry. C. C. 353.

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only (a). And in that case, the indictment may conclude that they "*feloniously, traitorously, and of their malice aforethought, did kill and murder,*" which will be good for both of them, applying to each their appropriate terms (b). So, several present at the death of a man may be charged with different degrees of homicide in the same indictment; thus if A, with malice, abet B, who gives the blow *without malice*, it is murder in the former, and but manslaughter in the latter; and thus it may be stated in the proceedings (c). And in an indictment for burglary and larceny against two, one may be found guilty of the burglary and larceny, and the other of larceny only (d). And it seems that on the trial, if two be indicted for murder, the jury may not find it murder as to one, and manslaughter as to the other: but if this distinction appear to the grand inquest upon the evidence to support the bill, a new bill for the inferior offence should be presented against the less guilty individual (e). And on an indictment against two charging them with a joint offence, either may be found guilty, but they cannot be found guilty of the separate parts of the charge subjecting the prisoners to distinct punishments (f).

Several offenders may also, for different offences of the same kind, be in some cases included in the same indictment, the word "*severally*" being inserted, which makes it several as to each of them, though the court will, in its discretion, quash the indictment if any material inconvenience appear to rise from the mode in which it is preferred (g). Thus it has been holden that four persons may be joined for erecting four inns, which prove to be common nuisances, if the word "*severally*" be inserted, though the want of that word will vitiate (h). And the same rule applies to the keeping of disorderly houses, the same term being in-

(a) Fost. 106. 329. Com. Dig. Indictment, F. Burn, J. Indictment, IV.

(b) Id. ibid.

(c) 9 Co. 67. 3 Bulst. 206. 1 Leach, 360.

(d) Russ. & Ry. C. C. 520.

(e) 3 Bulst. 206. 2 Hale, 162. 2 Rol. Rep. 408. 1 Sid. 230.

Hawk. b. 2. c. 29. s. 7.

(f) Russ. & Ry. C. C. 344.

(g) 3 T. R. 106. 8 East, 46. Burn, J. Indictment, IV.

(h) 2 Rol. Rep. 345. 2 Hale, 174. 8 East, 47. Com. Dig. Indictment, F. Bac. Abr. Indictment, G. 5. Burn, J. Indictment, IV.

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serted (a). But it seems that to warrant such joinder, the offences must be of the same nature, and such as will admit of the same plea and sentence, or it may operate like a misjoinder in civil proceedings, and be bad upon demurrer, or after a general verdict, in arrest of judgment (b). In all these cases, however, the charge is several against each individual, and the jury may acquit some, while others are found guilty (c). But there are some exceptions to this rule, as in cases of conspiracy and riot, where one cannot be indicted for an offence committed by himself alone, and the acquittal of so many as shall render it impossible for the rest to have committed the offence must, of course, extend to him (d). And if several be concerned in executing a treasonable or seditious design, it is best to include them in one proceeding that the evidence for the crown may not be disjointed (e). On the other hand, an indictment may be defective for including too many; as for indicting a woman for the murder of her illegitimate child, and another person being present aiding and abetting; if the only evidence of guilt be the concealment, both the prisoners might be acquitted (f). As each individual is, in all cases, responsible only for his own criminal actions or omissions, the result whether the defendant be indicted alone or with others will be similar, and no inconvenience can arise to the defendants from being jointly indicted; for if, on the trial, the evidence affects them differently, the judge, in his discretion, will select such parts of it as are applicable to each, and leave their cases separately to the jury in order that each individual may have an impartial trial, unprejudiced by the case of his associates (g). If two be improperly found guilty separately on a joint indictment, the objection may be cured by producing or entering a *nolle prosequi* as to the one of them who stands second on the verdict (h).

(a) Id. *ibid.* 2 Hale, 174. Burn, J. Indictment, IV.

(b) 3 T. R. 103. 6. 1 East, 46. 2 Campb. 132. Ante, 254, 5.

(c) Kel. 9. Burn, J. Indictment, IV.

(d) 1 Stra. 193. 12 Mod. 262.

2 Salk. 593. Com. Dig. Information, D. 7. 13 East, 412.

(e) Kel. 9.

(f) 1 East P. C. 229.

(g) 3 T. R. 106. 8 East, 46.

(h) Russ. & Ry. C. C. 344.

As, at common law (a), the accessory cannot be tried Joinder of accessories.
before the principal, without his own consent, and as the crime of the former depends upon the guilt of the latter, and an accessory must be convicted of a felony of the same species as the principal, it is both usual and proper to include them in the same indictment (b). In this case, if the principal plead the general issue, the accessory will be required to plead also; and if he plead the same plea, both may be tried by the same inquest, but the principal must be first convicted; and the jury will be charged, if they find the former not guilty, that the latter must also be acquitted (c). Where the parties are thus joined in the same proceeding, the proper course is first to state the guilt of the principal, as if he alone had been concerned, and then in case of accessories *before* the fact, to aver "that C. D., late of, &c. (the procurer) " before the committing of the said felony and murder (or burglary, as the case is) in form aforesaid, to wit, on, &c. with " force and arms, &c. did maliciously and feloniously (d) incite, " move, procure, aid, and abet (or ' counsel, hire, and command') " the said A. B. (the principal felon), to do and commit the said " felony, in manner aforesaid against the peace, &c. (e)" And where a man is indicted as an accessory *after* the fact together with his principal, the original felony is to be stated in the same way, and the conclusion must aver that the accessory *did receive, harbour and maintain, &c.* the principal felon, *well knowing* that he had committed the felony (f). The averment of knowledge is indispensably requisite; because without it, the guilt does not manifestly appear (g). But it is in no case necessary to use the word "*accessary*" in the indictment (h), or to set forth the means by which the accessory before the fact incited the principal

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(a) In some cases altered by statute, as vide ante 266, 7.

(b) Fost. 365. 1 Hale, 623. Burn, J. Accessories, IV. Williams, J. Accessary, V. Com. Dig. Justices, T. 3.

(c) 1 Hale, 624. 2 Hale, 222, 3. Hawk. b. 2. c. 29. s. 47. Com. Dig. Justices, T. 3. Burn, J. Accessary, IV. Williams, J. Accessary, V.

(d) As to the omission of this word, in the case of joinder of

principals, see ante, 260.

(e) See form, 1 Leach, 515. Williams, J. Accessories, V. post, vol. ii. 5.

(f) Id. ibid. See form, post, vol. ii. 5.

(g) 1 Hale, 622. Com. Dig. Justices, T. 2. Hawk. b. 2. c. 29. s. 33. Burn, J. Indictment, III. Hawk. b. 2. c. 25. s. 67. 2 Lev. 208.

(h) 3 P. Wms. 477.

JOINDER
OF ACCESSARIES.

to commit the felony, or the accessory after, received, concealed, or comforted him; for it is perfectly immaterial in what way the purpose of the one was effected, or the harbouring of the other secured; and as the means are frequently of a complicated nature, it would lead to great inconvenience and perplexity if they were always to be described upon the record (*a*). The felony of which the principal was guilty must be set forth according to the facts; it has been questioned whether in an indictment against A., &c. for a burglary, and B. for being accessory thereto, that if A. is acquitted of the burglary, B. can be found guilty as accessory to the larceny (*b*).

In an indictment against the *accessary alone*, after the conviction of the principal, it is not necessary to aver that the latter committed the felony, or on the trial to enter into a detail of the evidence adduced against him; but it is sufficient to recite with certainty the record of the conviction, because the court will presume every thing on the former occasion to have been rightly and properly transacted (*c*). But this presumption must give way to positive evidence of the innocence of the principal, which it is fully competent to the supposed accessory to produce (*d*). And, therefore, if it appear on the trial, that the principal was erroneously convicted, the defendant indicted as accessory is entitled to an acquittal (*e*).

Where triable.

Where the accessory became guilty in a county different from that in which the principal felony was committed, it was anciently doubted, from the strict locality of offences at common law, whether he could be indicted in either (*f*). But by the statute 2 & 3 Edw. 6. c. 24. s. 3 & 4. in case of murder the accessory may be indicted in the county where the death happens, and in case of any other felony, where his individual guilt arises.

(*a*) Co. Ent. 56, 57. Rast. Ent. 48, 51, 2. 9 Co. 114. Hawk. b. 2. c. 29. s. 17.

(*b*) Russ. & Ry. C. C. 310. 2 Marsh. 571. S. C.

(*c*) 7 T. R. 465. Fost. 365. Com. Dig. Justices, T. 3. See

form, post, vol. ii. 5.

(*d*) Fost. 121. 365. 3 Campb. 265. Com. Dig. Justices, T. 3. 4 Bla. Com. 324.

(*e*) Id. ibid.

(*f*) Hawk. b. 2. c. 29. s. 48. Ante, 178.

But when the accessory is indicted, under this statute, in a different county from that in which the felony was committed, it is not, as in other cases, sufficient to state that the principal was *convicted*, but it must be averred, that he was actually guilty in the other county (*a*). And, in this case, the indictment should first describe the offence to have been committed by the principal in the *second county*, according to the fact (*b*); and then aver that the accessory did *procure* or *receive* according to the nature of his crime, and the degree in which he was guilty. In further pursuance of the statute of Edw. 6. two recent acts of parliament direct that accessories may be indicted either in the county where the felony was completed, or where they were themselves guilty, and that receivers of stolen goods may be indicted in the county where they were guilty of receiving (*c*). So that they may, at the present day, be legally indicted in either.

It is in no case necessary in a separate indictment against the accessory, to aver the judgment pronounced on the principal (*d*). Formerly, indeed, it was thought that the latter must be attainted before the former could be prosecuted; and, therefore, when the principal stood mute, obtained his pardon, or was allowed the benefit of clergy, the accessory escaped unpunished (*e*). But by the statute 1 Ann. statute 2. c. 9. s. 1. if the principal stand mute, or peremptorily challenge more than twenty, or be convicted, but for some extrinsic cause not attainted, the accessory shall be compelled to answer. Thus the reason of the law ceasing, the law itself has ceased, and the great bar to the punishment of accessories is removed by the statute; and this ancient law is still further altered by the 22 Geo. 3. c. 58. s. 1. and 3 Geo. 4. c. 38. (*f*). So even though the principal felon be unknown, a receiver of stolen goods may be indicted for the misdemeanor (*g*). But if the original offender be known, an aver-

(*a*) 9 Co. 114. 3 Inst. 49.
Hawk. b. 2. c. 29. s. 51. 1 St.
Tr. 351.

(*b*) 3 Inst. 49.

(*c*) 43 Geo. 3. c. 11. s. 5 & 6.
44 Geo. 3. c. 92. s. 8. See ante,
180.

(*d*) 2 Leach, 925. 2 East
P. C. 782.

(*e*) Fost. 362, 3, 4. Com. Dig.
Justices, T. 3.

(*f*) For these enactments, see
ante, 266, 7.

(*g*) 3 Campb. 264. See form,
post, vol. ii.

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ment that he is unknown will be fatal (*a*). It is not necessary to allege in such indictment that the principal cannot be taken, or has not been convicted (*b*).

Although accessaries before the fact are, in general, in the judgment of the law, equally criminal with principals (*c*), accessaries after the fact are admitted to clergy, except where it is taken away by some particular statute, as in cases of horse-stealing (*d*), and stealing linen from bleaching grounds (*e*), when the receivers are ousted of clergy. For a statute which takes away clergy from aiders and abettors, does not by those words include accessaries after the fact (*f*); so that the punishment of the latter is often comparatively trivial (*g*).

Indictments upon
statutes.

We have hitherto spoken of indictments, without making any distinction between those which are preferred for offences at common law, and those which are framed upon the provisions of particular acts of parliament. It is now proper to examine those peculiar requisites which the latter kind of indictments must contain. It will, however, be only necessary to show the cases in which they differ from indictments at common law; for all the rules that affect the former, relate also, in general, to the latter; whatever precision is required in the one is also necessary in the other; and it is often insufficient merely to pursue the description of the offence given in the statute by which it is created (*h*). Thus in an indictment for obtaining money by false tokens, upon 33 Hen. 8. or for obtaining goods and money under false pretences, upon 3 Geo. 2. c. 24. the false tokens or pretences, and other means by which the crime was effected, must appear on the face of the record (*i*). And though it was

(*a*) 3 Campb. 264. See form, post, vol. ii.

(*b*) 5 T. R. 83. 2 East P. C. 781.

(*c*) 1 Hale, 615. 4 Bla. Com. 39.

(*d*) 31 Eliz. c. 12. s. 5. Ante, 267.

(*e*) 18 Geo. 2. c. 27.

(*f*) 2 Ld. Raym. 846.

(*g*) Fost. 372.

(*h*) Hawk. b. 2. c. 25. s. 99.

(*i*) 1 Leach, 487. 2 East P. C. 837. 2 T. R. 581. 2 Stra. 1127. 7 Mod. 316. Hawk. b. 2. c. 25. s. 57. n. 10. 2 East P. C. 1123, 4. 2 M. & S. 379.

formerly holden (a), that in convictions it was sufficient to pursue the description of the statute, it is now settled that this will not dispense with observing the general requisites of that summary proceeding, unless a particular form be expressly given by the statute (b). We shall now, therefore, proceed to examine the features which an indictment on the statute must contain peculiar to itself, viz.; when it is necessary to recite the statute—what misrecital will vitiate—how far the description of the offence must be brought within the words of the act—when the proceedings will be good at common law—and how far it must conclude contrary to the form of the statute or statutes in such case made and provided (c).

It has long been perfectly settled, that there is no necessity in any indictment or information on a *public* statute, whether the offence be evil in its own nature, or only becomes so by the prohibitions of the legislature, to recite the statute upon which it is founded; for the judges are bound *ex officio*, to take notice of all public acts of parliament, and where there are more than one by which the proceeding can be maintained, they will refer it to that which is most for the public advantage (d). But if the indictment profess to recite the statute, and there be a material variance, and the indictment conclude “contrary to the form of the *said* statute,” such variance will be fatal, and therefore it is in no case advisable to recite it (e); though if, after such misrecital of a public act, the indictment conclude generally as “contrary to the statute in such case made and provided,” omitting any reference to the statute recited, the recital may be rejected as surplusage (f).

Recital of or reference to statute

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(a) 1 Ld. Raym. 582.

(b) 2 Leon. 38. 39. 2 Burr. 679. 1037. 2 East, 340. Bosc. on Con. 42. Hawk. b. 2. c. 25. s. 111.

(c) See Hawk. b. 2. c. 25. s. 99 to 119.

(d) Dyer, 155. a. 346. b. 6 Mod. 140. Cro. Eliz. 187. 236. Hob. 310. 2 Hale, 172. Hawk. b. 2. c. 25. s. 100. 1 Saund. 135, n. 3. Bac. Abr. Indictment, I. Burn, J. Indictment, IX.

1 Chitty on Pleading, 4th edit. 197.

(e) Cro. Eliz. 236. 249. Plow. 79. 83. 4. 1 Stra. 214. Dougl. 94. 4 Co. 48. Fost. 372. Cro. Car. 135. 1 Rol. Rep. 49, 50. Sir Wm. Jones, 194. 2 Hale, 172. Hawk. b. 2. c. 25. s. 101. Bac. Abr. Indictment, H. Statute, L. 5. Burn, J. Indictment, IX. Ld. Raym. 382. 6 T. R. 776.

(f) Id. ibid. 1 Ld. Raym.

ON STATUTES. But the parts of a *private* act upon which an indictment is framed must be set out specially, the same as other facts, and a variance if properly shewn to the court will be fatal (*a*). But the error must be properly shewn to the court by the defendant, for they will presume the statute of which they cannot *ex officio* take notice to be correctly recited (*b*). It will therefore be necessary to inquire what in such case would be deemed a variance, so as to vitiate the proceedings.

It is in no case necessary to set forth the day on which the statute was enacted, and therefore it is better altogether to omit it (*c*); for a mistake, in this respect, will frequently prove fatal. Thus if a parliament was first holden on the 28th day of April, 32d year of Henry the Eighth, and afterwards holden on the 12th day of April in the next year, and a statute passed on the last of these days be recited as made at a parliament holden on the first of them, the mistake will be fatal (*d*). So if parliament be summoned for the 23d, and afterwards prorogued to the 25th, it would be a misrecital of an act passed during its sitting, to describe it as holden on the former (*e*). And in some cases the

[278] averment that a statute was made at a parliament holden in a year when it sat by prorogation instead of the session of parliament, has been considered as a fatal variance; because the court will not make any case stronger than the party himself has done upon the record (*f*). But the indictment may be supported, if it has

382. Cro. Car. 232, 3. 2 Hale, 172, 3. Hawk. b. 2. c. 25. s. 104. 6 T. R. 773, *acc.* but see 1 Saund. 133, n. 3, in which this distinction is not noticed.

(*a*) 1 Sid. 356. 2 Hale, 172. Hawk. b. 2. c. 25. s. 103. Bac. Abr. Indictment, H. 2. Burn, J. Indictment, IX.

(*b*) Hawk. b. 2. c. 25. s. 103. Bac. Abr. Indictment, H. 2. Burn, J. Indictment, IX. 1 Chit. on Plead. 4th edit. 197.

(*c*) Dyer, 203. Hawk. b. 2.

c. 25. s. 104. Bac. Abr. Indictment, H. 2.

(*d*) Hawk. b. 2. c. 25. s. 104. Plow. 79, 83, 4. Cro. Car. 232. Cro. Jac. 139. Burn, J. Indictment, IX.

(*e*) 2 Dyer, 203. Hawk. b. 2. c. 25. s. 104. Bac. Abr. Indictment, H. 2. and see 2 Chit. Rep. 513.

(*f*) 4 Inst. 27. Cro. Jac. 111. Lutw. 140. 1 Dyer, 95 a. 2 Dyer, 171 a. Skin. 110, 111. Hawk. b. 2. c. 25. s. 104. Bac. Abr. Indictment, H. 2.

been the constant course of precedents thus to refer to the statute ON STATUTES. by which the offence was created (*a*).

A repugnancy in setting forth the time when the parliament was holden, as if a statute be recited to have been made in the first and second year of the king, will vitiate the proceedings under it (*b*). And so a mistake in the day from which the statute began to operate, will be material if a particular period be specified in its provisions (*c*); but now by a recent act (*d*), the day, month, and year of passing a statute, and of its receiving the royal assent, are to be indorsed upon it, and to be regarded as the time of its commencement, unless some other date be particularly expressed in its body. It has been said, that an indictment was in one instance discharged for not shewing the county in which the parliament was holden (*e*); but as the time need not be averred, it is probable the omission of the place would be regarded as equally immaterial (*f*). If, however, the indictment profess to set forth the county, and mistake it, it cannot be supported (*g*).

The title and preamble of the act need not, in any case, be recited, for they form no part of the law; the title is mere matter of description given by the maker, and the preamble is no part of the statute, but generally contains the reasons and inducements for its being enacted (*h*). But although the contrary seems to have been thought by Lord Hale (*i*), it is the better opinion that if a party undertake to recite them, he must set them forth with correctness, or otherwise the variance will be fatal, if the indict-

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(*a*) Yelv. 107. Dyer, 171 a. Cro. Jac. 139. Brownl. and Goldsb. 100. 2 Keb. 34. Hawk. b. 2. c. 25. s. 104. Bac. Abr. Indictment, H. 2.

(*b*) Moor, 302. Hawk. b. 2. c. 25. s. 104. Bac. Abr. Indictment, H. 2.

(*c*) 2 Rol. Abr. 465. Hawk. b. 2. c. 25. s. 106. Bac. Abr. Indictment, H. 2.

(*d*) 33 Geo. 3. c. 13.

(*e*) Cro. Eliz. 106. Bac. Abr. Indictment, H. 2.

(*f*) 2 Dyer, 203. Hawk. b. 2. c. 25. s. 104. Bac. Abr. Indictment, H. 2. And the courts are bound to take judicial notice of the place where any parliament sat. 1 Ld. Raym. 210. 343.

(*g*) Cro. Eliz. 853. Cowp. 474. 1 Chitty on Pleading, 4th edit. 198.

(*h*) Holt, 662, 3. 6 Mod. 62. 2 Salk. 609. 3 Salk. 331. Hawk. b. 2. c. 25. s. 106, 7. Bac. Abr. Indictment, H. 2.

(*i*) Hardr. 324.

ON STATUTES. ment conclude contrary to the statute *aforesaid*; because if the prosecutor think fit to state, that he founds his indictment on a particular statute, and then sets forth a title and preamble as part of it, and no act of parliament be found with which they coincide, the result must be that there is no foundation for such a proceeding (*a*). And, therefore, it has been holden, that the substitution of the word *indicari* instead of *indictari*, in the recital of the preamble of the statute of hue and cry, in a writ founded upon that provision was fatal; but this is liable to question, upon the ground that so small an alteration could not be deemed a variance (*b*). Indeed it has been holden in a declaration upon the same statute, that if in reciting the preamble, "the burning of houses" be expressed, though the act speaks only of *arsons* generally, it will be sufficient (*c*); and in the case of the slander of an earl upon the 2 Ric. 2. c. 5. it is good if the declaration mention "earls" only, though the preamble professes to recite "other great officers." (*d*) By these decisions the authority of the former seems to be considerably shaken (*e*).

[280] But it is more material to consider the accuracy with which the purview of the statute must be stated, because this recital is necessary in proceedings on a private enactment. If any material part be omitted or misrecited, the indictment will be bad, because it will, in the case of a public act, judicially appear to the court that the charge is professedly grounded upon a vicious foundation (*f*). Thus, if the indictment in case of forcible entry, substitute the word *vi* for *manu forti* (*g*), if, in the case of scandalum magnatum, *nuncia* be used instead of *mendacia* (*h*), expelled and

(*a*) Holt, 662. 6 Mod. 62. 3 Salk. 331. 2 Salk. 609. Hawk. b. 2. c. 25. s. 105. Bac. Abr. Indictment, H. 2. Burn, J. Indictment, IX. 1 Chit. on Plead. 4th edit. 322.

(*b*) Hut. 56, 7. 3 Keb. 648, 662.

(*c*) 3 Keb. 647, 648, 661, 62. Sir T. Jones, 51.

(*d*) Sir T. Jones, 50, 1. 3 Keb. 647, 8, 661, 2.

(*e*) Hawk. b. 2. c. 25. s. 107.

(*f*) 1 Ld. Raym. 382. 1 Dougl. 97. Hawk. b. 2. c. 25. s. 101. Bac. Abr. Indictment, H. 2.

(*g*) Cro. Car. 93. 2 Bulstr. 258. Hawk. b. 2. c. 25. s. 101. Bac. Abr. Indictment, H. 2.

(*h*) 4 Co. 12, 13. Hawk. b. 2. c. 25. s. 101. Bac. Abr. Indictment, H. 2.

disseised for expelled or disseised (*a*), *admitterent* for *amitteret* (*b*), ON STATUTES. it was formerly holden that the proceedings would be defective. But it seems to be a general and established rule, that a variance which does not alter the sense of a material part of the statute will not vitiate. Thus to write *sea* of Rome for *see* of Rome, in the recital of an oath prescribed by a statute, I do declare in conscience instead of I do declare in *my* conscience, maliciously and contemptuously for maliciously or contemptuously, or in *aliquâ curiâ* instead of *aliquibus curiis*, are not material variances (*c*). And notwithstanding the nicety required by some of the older decisions just cited, the strictness formerly required is now considerably relaxed (*d*). For the present rule seems to be, that, if the variance consist in the introduction or alteration of words purely superfluous and unnecessary, it will not be material, unless, indeed, the alteration render the whole repugnant to the intent of the statute; for then the superfluous words cannot be rejected (*e*).

If any defect arise in the recital of a public statute, which there was no occasion to set out, and the indictment would be good without it, if the indictment conclude generally "contrary to the form of the statute in such case made and provided," we have seen that the recital may be rejected as surplusage, and judgment may be given against the defendant; but if it be referred to as *the said* statute, the proceedings will be altogether defective (*f*). As it is necessary to recite private statutes, the same rule will not apply to them, and the omission of the word "*said*" cannot aid them. And yet in one respect it is more dangerous to misrecite a public than a private statute; for in the former case, the court being bound *ex officio* to take cognizance of all public laws, will of themselves notice the variance, whereas in the latter it must be specially pleaded or given in evi-

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(*a*) Cro. Eliz. 697. acc. id. 307, cont. and see Hawk. b. 2. c. 25. s. 108.

(*b*) Cro. Jac. 133.

(*c*) Cro. Car. 135, 6. 522, 3. 1 Vent. 172. Palm. 565. Sir Wm. Jones, 194. Hawk. b. 2. c. 25. s. 102, 6.

(*d*) Hawk. b. 2. c. 25. s. 108.

(*e*) Hawk. b. 2. c. 25. s. 109. 4 Co. 12, 13. and see post.

(*f*) Ante, 276. Dougl. 94. Fost. 372. 1 Stra. 214. 1 Ld. Raym. 382. Cro. Car. 232, 3. 2 Hale, 172, 3. Hawk. b. 2. c. 25. s. 104.

ON STATUTES. dence, under a plea of *nul tiel record*, for the court will presume the recital to be correct, until the contrary is formally shown (a).

Of stating offence as in the statute.

We have now to inquire how far the indictment must state the facts of the offence, so as to bring it within the description of the statute, both as to circumstances stated, and the particular terms used by the legislature in framing the provision.

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It is a general rule, that all indictments upon statutes, especially the most penal, must state all the circumstances which constitute the definition of the offence in the act, so as to bring the defendant precisely within it; and this rule applies as well to those which take away the benefit of clergy from offences which exist at common law, as those by which new felonies are created, and a conclusion contrary to the form of the statute, &c. will not aid a defect in this respect (b). And not even the fullest description of the offence, were it even in the terms of a legal definition, would be sufficient without keeping close to the expressions of the statute (c). And, therefore, where a man was indicted for robbery "in a certain king's *footway* leading from London to Islington," he was admitted to his clergy, because the statute (d) which takes it away from the crime, describes the place as "in" or "near a king's *highway*," which ought to have been stated in the proceedings (e). So in an indictment for assaulting with intent to rob, as the statute (f) states, that if the defendant "shall with any offensive weapon or instrument, unlawfully and maliciously assault, or shall by menaces, or in or by any forcible or violent manner, demand any goods or chattels, he shall be ad-

(a) 1 Lord Raym. 381, 382.
1 Doug. 97, in notes.

(b) 1 Hale, 517. 526. 535.
2 Hale, 170. Staundf. 130 b.
Fost. 423, 424. Hardr. 20.
Dyer, 304. Kel. 8. Com. Dig.
Justices, G. 1. 1 Chitty on
Plead. 4th edit. 322. 2 Marsh.
364, n. c.

(c) Fost. 424.

(d) 23 Hen. 8. c. 1.

(e) Moor, 5. 1 Hale, 535.
Sed quære, it has been decided
that where an indictment for a

robbery stated it to have been committed in a field *near the king's highway*, and the robbery proved did not take place near any highway, the allegation of its being near the highway, was immaterial, for the 3 & 4 W. & M. c. 9, took away clergy, let the robbery be where it might. 2 East P. C. 785. Russ. & Ry. C. C. 9, and notes.

(f) 7 Geo. 2. c. 21.

judged guilty of felony:" it is not sufficient to state an assaulting and menacing with intent to rob, but it must be averred either that the assault was made with an offensive weapon, or that money or goods were demanded (*a*). So in an indictment for aiding, one being a principal maintainer of the see of Rome, before the repeal of the statute of premunire, against the form of the statute (*b*), if the words "upon purpose, and to the intent to rob, set forth, and to extol, the authority," &c. were omitted, the omission would vitiate the proceedings (*c*). So if a conviction charge the defendant with killing deer in a certain place where they have been usually kept, without saying "inclosed place" (*d*), or "with unlawfully killing fish," omitting to add "without the consent of the owner of the water" (*e*), insuring a ticket in the lottery, without saying "the state lottery" (*f*), or with having a gun in his house, when the words of the statute are, *use to keep a gun in his house* (*g*), it will be invalid. So an indictment for horse stealing, must give the animal one of the descriptions mentioned in the act; stating the animal stolen to have been a colt, without stating it was a horse or a mare, will not suffice (*h*). So an indictment on the 9 Geo. 1. c. 22, must state the species of the cattle wounded or injured (*i*). So describing a bank note as "a certain note commonly called a bank note," is not such a description as will warrant a conviction on the 2 Geo. 2. c. 25, for stealing it (*k*). Where, however, a prisoner ousted of his clergy (by 25 Hen. 8. c. 3, and 2 W. & M. c. 9), is indicted for felony committed in another county, it is not necessary to state in the indictment, the examination before justices in the first county, in order to deprive him of his clergy, though it is usual to write in the margin, that it is for a robbery or burglary in another county (*l*).

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It is in general necessary, not only to set forth on the record all the circumstances which make up the statutable definition of the

(*a*) 1 Leach, 264. 1 East P. C. 419. 2 Hale, 189, 190.

(*b*) 1 Eliz. c. 1. s. 25.

(*c*) 3 Dyer, 363. 2 Hale, 193.

(*d*) 2 Id. Raym. 791.

(*e*) 2 Burr. 679.

(*f*) 1 T. R. 222.

(*g*) 1 Show. 48.

(*h*) Russ. & Ry. C. C. 416.

(*i*) Russ. & Ry. C. C. 258.

(*k*) 2 East P. C. 601. Russ. & Ry. C. C. 14. S. C.

(*l*) 1 Anders. 114. 1 Hale, 518.

ON STATUTES. offence, but also to pursue the precise and technical language in which they are expressed (*a*). And upon this ground, an indictment for rape must contain the word "*ravished*" nor will any expressions of force and carnal knowledge, excuse its omission (*b*). So in an indictment for perjury, upon the statute (*c*), the word "wilfully" must be inserted, because it is part of the description the act gives of the crime (*d*); though, in an indictment for the same offence at common law, that precise term is not essential, but may be supplied by others, which convey the same idea (*e*). And in an indictment upon the black act (*f*), the term "wilfully" is also essential, as being used by the legislature, and "maliciously" will not suffice (*g*). Upon the same principle, indictments upon the statute 5 & 6 Edw. 6. c. 4, for striking in a church, omitting the words "with intent to strike," &c. (*h*); for forestalling, on 5 & 6 Edw. 6. c. 14, not expressly stating "that the goods were then coming to market to be sold" (*i*), and for engrossing on the same act, averring that the defendant bought so much corn, instead of stating, that "he engrossed by buying," &c. have been holden to be invalid (*k*). And even in a commitment, which need not be drawn with the same precision as an indictment, upon the statute 7 Geo. 2. c. 21, which makes it felony to assault with an offensive weapon, or by menaces to demand money or goods, it was holden insufficient to state a mere assault with a felonious attempt to steal, and the prisoner was admitted to bail (*l*). And so necessary has it been deemed to pursue precisely

(*a*) Fost. 424. Cro. Jac. 607. 11 Co. 58. 2 Hale, 170. 2 Leach, 1107. Hawk. b. 2. c. 25. s. 110. Bac. Abr. Indictment, H. 2. Hardr. 21. 8 T. R. 536.

(*b*) Hawk. b. 2. c. 23. s. 77. Id. c. 25. s. 110. Bac. Abr. Indictment, H. 2.

(*c*) 5 Eliz. c. 9.

(*d*) 1 Leach, 494, n. a. 2 Hale, 87. Cro. Eliz. 147. 201. Cro. Jac. 508. 3 Inst. 167. Show. 190. 2 Leon. 211. Keb. 12. Hawk. b. 2. c. 25. s. 110. Bac. Abr. Indictment, H. 2.

(*e*) Id. *ibid*. 1 Leach, 71.

(*f*) 9 Geo. 1. c. 22.

(*g*) 1 Leach, 493. 1 East P. C.

412; but it appears the word "*feloniously*" would suffice without any other. 3 Wils. 318. 2 Bla. Rep. 842. 5 East, 244. 2 Marsh. 364.

(*h*) Cro. Eliz. 231. 307. 697. 2 Leon. 188. Noy, 171. Hawk. b. 2. c. 25. s. 110. Bac. Abr. Indictment, H. 2.

(*i*) 2 Rol. Rep. 421. Gilb. L. & E. 276. Hawk. b. 2. c. 25. s. 110. Bac. Abr. Indictment, H. 2.

(*k*) 2 Leon. 39. Hawk. b. 2. c. 23. s. 110. Bac. Abr. Indictment, H. 2.

(*l*) 5 T. R. 169. 2 Leach, 583.

the language of the statute, that in an indictment against traitors ON STATUTES.
for the actual murder of the king, the compassing and imagining
is laid as the treason in the terms of the statute, and the king's
death itself laid only as an overt act of treason (*a*).

These rules respecting the exact words of the statute by which the offence was created, apply equally to acts of parliament by which the benefit of clergy was taken away from offences which existed at common law; for if the crime be not in general brought within its exact words, the prisoner can receive judgment only, as if no alteration had taken place, and the statute had never been enacted (*b*).

But there are some cases in which this verbal strictness has been relaxed, and a different interpretation pursued, where, indeed, the words used are in effect equivalent to those contained in the act. Thus it has been holden, that in an indictment against an accessory before the fact in murder, the words "excite, procure, and move," were equivalent to "command, hire, or counsel," which are used in the statute (*c*); and that therefore the variance was not material (*d*). And the reason assigned for this departure from the general principle is, that the statutes respecting accessories make use of a great variety of terms to designate them, and therefore they may all be expressed by their legal import (*e*). This opinion does not seem to have ever been expressly recognized in any later decision; but it has been holden, that an indictment upon the statute for obtaining money under false pretences (*f*), need not say that the defendant *falsely pretended*, but it is sufficient if it be stated, that the defendant pretended, and then to aver that the pretence was false, and that by means of the *false pretences* aforesaid, the money was obtained (*g*). At all events however, it is in every case advisable to attend, with the greatest nicety, to the words contained in the

(*a*) Kel. 8. Hawk. b. 2. c. 25. s. 110. Bac. Abr. Indictment, H. 2.

(*b*) 1 Hale, 525. 1 Saund. 135 a, n. 3.

(*c*) 4 & 5 Ph. & M. c. 4.

(*d*) 1 Anders. 195. Fost. 130.

1 Hale, 521, 522.

(*e*) Fost. 130, 1. 1 Hale, 521, 522; but see Stark. 214, 15.

(*f*) 30 Geo. 2. c. 24.

(*g*) 2 East, 30. 2 M. & S. 379; and see 3 Stark. C. N. P. 26.

ON STATUTES. act, for no others can be so proper to describe the crime; the exceptions, if any, are doubtful; and the broad principle which renders a strict adherence essential, is supported by too strong a number of decisions to be shaken.

When a statute contains provisoes and exceptions in distinct clauses, it is not necessary to state in the indictment, that the defendant does not come within the exceptions, or to negative the provisoes it contains (*a*). Nor is it even necessary to allege that he is not within the benefit of its provisoes, though the purview should expressly notice them; as by saying that none shall do the act prohibited, except in the cases thereafter excepted (*b*). For all these are matters of defence, which the prosecutor need not anticipate, but which are more properly to come from the prisoner (*c*). Thus in an indictment against the receiver of stolen goods on 5 Ann. c. 31, whereby he is liable as for a misdemeanor, if the principal be not taken, it is not necessary to aver that the principal is not taken (*d*), or on the 22 Geo. 3. c. 58. s. 1. to state, that he has not been convicted (*e*). So also in an indictment for not going to church, it is not necessary to aver that the defendant had no reasonable excuse for his absence, on account of the words in the act (*f*), “having

[284] no reasonable excuse to be absent;” but as the necessity for proving the excuse lies upon the defendant, the contrary need not be averred by the prosecutor (*g*). An indictment on the 48 Geo. 3. c. 128, need not negative the force or fear necessary to constitute a robbery (*h*).

But on the contrary, if the exceptions themselves are stated in the enacting clause, it will be necessary to negative them, in

(*a*) 1 Sid. 303. 2 Hale, 171.
1 Lev. 26. Poph. 93, 4. 1 Burr.
148. 2 Burr. 1037. 2 Stra.
1101. 1 East Rep. 646, in
notes. 5 T. R. 83. 1 Bla. Rep.
230. Hawk. b. 2. c. 25. s. 112.
Bac. Abr. Indictment, H. 2.
Burn, J. Indictment, IX. 1 Chit.
on Plead. 4th ed. 322; and see
3 B. & C. 186.

(*b*) Poph. 93, 4. Hawk. b. 2.
c. 25. s. 113; and see 1 B. & A.

94, and 3 B. & C. 186.

(*c*) 2 Burr. 1037. 5 T. R. 83.
1 Bla. Rep. 230. Hawk. b. 2.
c. 25. s. 113.

(*d*) 2 Ld. Raym. 1378.

(*e*) 5 T. R. 83. 2 Leach, 578.

(*f*) 1 Eliz. c. 2.

(*g*) Hawk. b. 2. c. 25. s. 112.

(*h*) Russ. & Ry. C. C. 174.

2 Leach C. C. 1046. S. C. Russ.
& Ry. C. C. 321. S. P.

order that the description of the crime may in all respects correspond with the statute (*a*). Thus in an indictment on the statute (*b*), which enacts, that if any person shall take, receive, pay, or put off any counterfeit milled money, or any milled money whatsoever unlawfully diminished, and *not cut in pieces*, for a lower rate than its nominal value, he shall be guilty of felony: it is absolutely necessary to state, that the money was not cut in pieces, and if those words be omitted, the informality will be fatal (*c*). And in an indictment upon the first section of the same act, for keeping a press for coinage, or other crimes thereby created, all the exceptions by which, under that clause, the possession might be lawful, or the defendant in any way derive authority to exculpate him, must be expressly negatived (*d*). Upon the same ground, an information for importing goods from Holland is insufficient, unless it aver that they were not of the growth of that country (*e*).

Convictions upon penal statutes require in this respect much greater strictness than indictments; for, in general, it is necessary to show by negative averments, that the defendant is not within any of the provisos or exceptions of the statute (*f*). It has indeed, been said, that where the proviso is subsequent to, and independent of the enacting clause, it is unnecessary to negative its exceptions (*g*); but this seems contrary to the whole course of the decisions. The reason for this distinction, may be, that the former are summary proceedings before an inferior jurisdiction, and do not afford to the defendants those advantages that the common course of law allows them; and, therefore, it is reasonable, that it should appear on the face of the proceedings, that they have no statutable defence on which they can rely (*h*).

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(*a*) 2 Hale, 170. 1 Burr. 148. Fost. 430. 1 East Rep. 646, in notes. 1 T. R. 144. 1 Lev. 26. Com. Dig. Action. Statute. 1 Chitty on Pleading, 4th edit. 322; when not, 3 B. & C. 186.

(*b*) 8 & 9 W. 3. c. 26. s. 6.

(*c*) 1 Leach, 102.

(*d*) Fost. 430; where see Indictment. 1 Burr. 148. 1 East P. C. 167.

(*e*) Hardr. 217, 18. Vin. Abr. Information, F. 6.

(*f*) 1 East, 639. 1 Burr. 148. 613. 2 Burr. 1037. 1 Stra. 66. 496. 1 Bla. Rep. 230. 6 T. R. 559. Dougl. 345. 2 Ld. Raym. 1386. 1415. 1 Saund. 262 a, n. 1. Hawk. b. 2. c. 25. s. 113. Bac. Abr. Indictment, H. 2.

(*g*) 2 Stra. 1101. Burn, J. Indictment, IX.

(*h*) Hawk. b. 2. c. 25. s. 113. Bac. Ab. Indictment, H. 2. See arguments, 1 East Rep. 649.

ON STATUTES.

Where the prohibiting statute is recent, it is usual to allege expressly, that the offence was committed after the making of the statute, but where the statute is ancient, this is not usual, and does not seem to be in any case necessary (*a*). And though where a particular time is limited for the prosecution, it should appear on the face of the proceedings, that it was commenced within that period, no express averment to that effect is requisite (*b*); so in setting forth the description of the defendant in those particulars which bring him within the purview of the act on which he is indicted, it is not necessary to set forth the place where those things occurred, which bring him within its language. Thus, when it was high treason for a person born within the realm, and in popish orders to come into, or remain in the kingdom, there was no need in an indictment on the statute, to show the place where he was born or ordained (*c*). And it has also been holden, that it is sufficient in describing the defendant, to say that he *being* so and so, as the statute mentions, did the fact, without any more positive averment that he was in that office or situation (*d*). And where several circumstances are mentioned disjunctively in a statute, any one of which is sufficient to oust the offender of his clergy, it is enough to charge him *disjunctively* in the indictment. Thus in case of a highway robbery, it is sufficient to aver that it was committed in *or* near the highway, for they are part of the description of the offence, as set forth in the statute (*e*).

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It has been said, that if the statute be particularly recited, the general conclusion contrary to the form of the statute will aid a single variance from its precise language, or an omission of one of the circumstances required in the statute (*f*). Because it is urged that since the act itself is set forth, and the defendant charged with having acted contrary to its provisions, the crime may be referred to the act itself, as if its very words had been re-

(*a*) 1 Bur. 366. 1 Saund. 309, 226. Moor, 606. 2 Leon. 5. n. 5. 1 Chitty on Plead. 4th ed. 323. Gilb. C. L. & E. 242. Hawk. b. 2. c. 25. s. 111. 12.

(*b*) 2 East, 333. 362.

(*c*) Poph. 93, 4. Hawk. b. 2. c. 25. s. 84. 112.

(*d*) Cro. Jac. 610. 2 Rol. R.

(*e*) 1 Hale, 535. 2 East P. C. 785.

(*f*) Hawk. b. 2. c. 25. s. 114. Bac. Abr. Indictment, H. 2.

peated (*a*). But the better opinion and decisions appear to re-
fute this doctrine (*b*), which leads to conclusions so singular as
may well induce a suspicion of its fallacy; for if the omission
of one material circumstance may be aided by the statute itself,
there is no reason why the whole description of the offence should
not be omitted, and so the indictment be made to consist only of
a recital of the statute, and an allegation that the defendant has
broken the recited provisions. By this means it would be left to
the jury to determine, not only of the truth of the evidence, but
whether the crime proved amounted in law to that prescribed in
the statute, which is contrary to that line of separation which dis-
tinguishes the functions of the court and the jury. Besides there
could be no averment of time or place to the circumstance
omitted, by which omission alone the indictment would have been
rendered invalid. As, however, it has never been usual to recite
the statute, this point has very seldom arisen, and is, in point
of practice, of no great importance.

ON STATUTES.

It was formerly holden, that where an indictment was pro-
fessedly framed upon a statute, and concluded contrary to its
form, if the terms and circumstances of the act were not pursued
with sufficient accuracy, it could not be maintained at common
law, because the foundations upon which the proceedings were
professedly founded proved to be defective (*c*). But it is now
perfectly settled, that the conclusion may be rejected as surplus-
age, and that where the indictment upon the facts stated could
have been supported at common law, judgment may be given
against the defendant for the common law offence, as if no cu-
mulative provision had been enacted (*d*).

(*a*) Hawk. b. 2. c. 25. s. 114.
c. 23. s. 63. Bac. Abr. Indict-
ment, H. 3. 2 Rol. Rep. 227.
Sav. 33. Dyer, 312, a.

(*b*) 2 Hale, 192, 3. 170. Dyer,
363, a. 1 Hale, 517, 525.
Hardr. 20. 1 T. R. 251. 2 Rol.
Abr. 81. 1 Saund. 135, n. 3.

(*c*) Cro. Eliz. 231. 307. 697.
Noy, 171, 2. Cro. Car. 654.

2 Rol. Abr. 82.

(*d*) 2 Hale, 191. Alleyn, 42, 3.
1 Salk. 212, 213. 5 T. R. 162.
2 Leach, 584. 2 Salk. 460.
1 Ld. Raym. 149. 2 Ld. Raym.
1163. 4 T. R. 202. 1 Saund.
135, n. 3. Hawk. b. 2. c. 25.
s. 115. Bac. Abr. Indictment,
H. 2. Burn, J. Indictment, IX.

ON STATUTES.
Of the conclu-
sion *contra for-*
mam statuti.

But whenever the offence is entirely created by statute, and did not exist at common law, it is always necessary to conclude the indictment, information, or presentment, "*contrary to the form of the statute in such case made and provided;*" and, if this clause be omitted, the proceeding is altogether bad, and no judgment can be given against the defendant (*a*). And the same rule applies where an offence at common law is made a crime of a higher nature, as where a misdemeanor is made a felony, or a felony treason (*b*). So where the offence existed at common law, and an additional punishment is inflicted by a statute, this averment should be inserted, for, if omitted, the offender can receive judgment only for a common law punishment, and not for that prescribed by the statute (*c*). But where the offence existed at common law, and a statute, under particular circumstances, deprives the offender of some benefit, as of clergy, to which he was at common law entitled, the averment would be unnecessary, for the statute neither creates a new offence, nor adds a new penalty; and it cannot be said with propriety, that the offence was committed contrary to the provisions of such an enactment (*d*). But the averment in such case, though unnecessary, would not prejudice, but may be rejected as surplusage (*e*), because though the statute does not inflict a new punishment, it takes away an old privilege (*f*). So for a common law felony committed abroad, but made triable here under the 33 Hen. 8. c. 23. the indictment need not conclude, *contra formam statuti* (*g*). So if a statute merely alters a rule of evidence for the discovery of a particular species of crime, as for concealing the birth of an illegitimate child (*h*),

(*a*) 1 Hale, 172. 139. 192. Dougl. 441. 1 Salk. 370. 13 East, 258. 5 Mod. 307. 2 Ld. Raym. 1104. 1 Saund. 135, a. n. 3, 4. Hawk. b. 2. c. 25. s. 116. c. 23. s. 99. Bac. Abr. Indictment, H. 4. Burn, J. Indictment, IX. Cro. C. C. 39. 3 B. & C. 186. 5 D. & R. 13. 1 Chitty on Pleading, 4th edit. 323. The same strictness is not required in informations by the Attorney-General, 9 Price, 397.

(*b*) 2 Hale, 139. Hawk. b. 2. c. 25. s. 116. 1 Salk. 370.

(*c*) 2 Hale, 190. 1 Saund. 135. a. n. 6. 2 Roll. Abr. 82.

(*d*) 2 Hale, 190. 1 Saund. 135, a. n. 3.

(*e*) 2 Hale, 190. Alleyn, 43. 1 Salk. 212, 13. 5 T. R. 162. 2 Leach, 584. 2 Salk. 460. 1 Ld. Raym. 1163. 4 T. R. 202. 1 Saund. 135, n. 3. Hawk. b. 2. c. 25. s. 115. Bac. Abr. Indictment, H. 2. Burn, J. Indictment, IX.

(*f*) 2 Hale, 190.

(*g*) Russ. & Ry. C. C. 294.

(*h*) 21 Jac. 1. c. 27.

this averment though harmless is not requisite (*a*). And where the offence existed at common law, and is declared by a statute as 25 Edw. 3. concerning treasons, the same observation will apply, and the averment may either be omitted or inserted (*b*). ON STATUTES.

Where there are *two statutes* which relate to the offence, there have been various distinctions taken respecting the conclusion against the form of the statutes in the plural, or statute in the singular only. Thus it was formerly holden by several authorities, that where an offence is prohibited by several independant statutes, it was necessary to conclude in the plural (*c*); but now the better opinion seems to be, that a conclusion in the singular will suffice, and it will be construed to refer to that enactment which is most for the public benefit (*d*). And where a statute is discontinued or expires by effluxion of time, and is revived by another, and also where a temporary act is made perpetual, the conclusion in the singular will be sufficient (*e*), though it is said to conclude in the plural (*f*). So if a statute qualify the manner of proceeding upon a former act, without altering the substance of its purview, the indictment against the form of the statute will be valid (*g*). And if one statute subject an act to a pecuniary penalty and a subsequent statute makes it a felony, it is not requisite in an indictment for the felony, to conclude against the form of the statutes (*h*), nor is this necessary in the case of a penal action (*i*); where an offence be at common law, and also prohibited by statutes, the indictment may conclude against the form of the statutes either in the singular or plural (*k*).

(*a*) 2 Hale, 190. 288. Kel. 32. Hawk. b. 2. c. 46. s. 43.

(*b*) 2 Hale, 189.

(*c*) Cro. Jac. 142. 2 Leon. 5. Alleyn, 49, 50. 2 Bulst. 258.

(*d*) 1 Hale, 173. Sid. 348. Owen, 135. 2 Leach, 827. Dyer Rep. 347, a. 4 Co. 48. Hawk. b. 2. c. 25. s. 117.

(*e*) 2 Hale, 173. 1 Lutw. 212. 1 Saund. 135, n. 3. 2 East P. C. 601.

(*f*) 2 Hale, 173. Hawk. b. 2. c. 25. s. 117.

(*g*) Yelv. 116. Cro. Jac. 187.

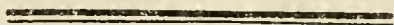
Hawk. b. 2. c. 25. s. 117. Bac. Abr. Indictment, H. 5. Burn, J. Indictment, IX.

(*h*) Russ. & Ry. C. C. 425. 3 Burn, J. 25th edit. 64. S. C. Sed vide 2 East, 339. Owen, 135. 2 Hale, 173. Cro. Jac. 142, where it was considered that if one act creates an offence, and another directs the penalty, the indictment should conclude in the plural.

(*i*) 7 East, 516. 6 Mod. 17. Sed vide 2 East, 338.

(*k*) 2 Hale, 191.

ON STATUTES. A distinction was formerly taken between the case where an offence is prohibited by two statutes, and where the indictment cannot be supported upon one singly, as where by a subsequent provision it is enacted, that a former statute shall be executed in a new case, or an additional penalty inflicted (*a*). But according to the later opinions, even in this case, a conclusion in the singular will be valid (*b*). And where one statute continues a former in part (*c*), or explains what was doubtful (*d*), or regulates its operation (*e*), the conclusion should be in the singular, and this will be more important, as it is laid down, that where the plural is used instead of the singular, the mistake will be fatal (*f*). In order, therefore, to avoid the danger of a mistake, and the trouble of investigating the subject, it was seriously recommended by grave authorities, to state the conclusion in Latin *contra formam statut.* which might stand for either *statuti* or *statutorum* (*g*). But this easy mode of evading the difficulty is destroyed, now that all indictments must be in English, and no abbreviations are admitted (*h*).



[293] Having thus considered the forms of indictments, and the principal rules by which they are governed, we have now only to take notice of some circumstances which may arise after their presentment, from their length, or the deficiency of any of their requisites.

Consequences, of unnecessary length, &c. of indictment. Where the indictment is of a vexatious length, independently of the censure that may be passed upon it, the court will refer it

(*a*) Cro. Jac. 142. 2 Hale, 173. 2 Leon. 5.

(*b*) 5 Mod. 191. 3 Lev. 61. 1 Lutw. 212. Hawk. b. 2. c. 25. s. 117.

(*c*) Cro. Eliz. 750.

(*d*) 2 Saund. 377, note 12. 1 Saund. 135, n. 3.

(*e*) Cro. Jac. 187.

(*f*) Yelv. 116. Cro. Car. 187. Hawk. b. 2. c. 25. s. 117, acc.

2 Hale, 173, contra; and yet why not reject the unnecessary allegation of the plural, as in cases where an indictment concluding against the statute, is held good at common law, ante, 238, 9.

(*g*) Hawk. b. 2. c. 25. s. 117. 1 Hale, 170.

(*h*) 4 Geo. 2. c. 26. 6 Geo. 2. c. 6.

to the master to see what part of the record was unnecessary, and make an order that the clerk of the peace shall pay the expence of the unnecessary matter (*a*); as where an indictment removed by certiorari from the quarter sessions for Middlesex, appeared to be of an improper length, stating all the continuances in the former prosecution, &c. which is rendered unnecessary by the express words of the statute, 23 Geo. 2. c. 11. s. 1. it was ordered, that it should be referred to the master to see what part of the record was unnecessary, and that the clerk of the peace should pay the expence incurred by the insertion of the extra matter (*b*). And if the indictment be defectively drawn by the clerk of the peace, he must draw another without receiving a further fee, which in strictness, when for treason or felony, is only two shillings for drawing each indictment (*c*); though there is no precise limitation of the fees for drawing indictments for misdemeanors (*d*). He is also liable to punishment, if he conceals or discharges the indictment (*e*), or is guilty of extortion (*f*). And it seems questionable whether the clerk of assize has such a lien on the record of an indictment, as to justify the detention thereof, even for his reasonable fees (*g*), his proper remedy being an action (*h*).

ON STATUTES.

It is a general rule, that to sustain the indictment, if the proofs correspond with the allegations in respect of those facts and circumstances, which are, in point of law, essential to the charge, it will suffice, allegations which are wholly redundant and useless (not operating by way of a material description of others which are essential) may be rejected as surplusage. In elucidation of this rule we have already pointed out what degree of strict proof is necessary to support allegations and descriptions of place (*i*),

OF VARIANCES.*

(*a*) Dougl. 193, 4. 1 Mod. 249. 2 Stra. 1026. 1 Leach, 201. Rep. temp. Hardw. 203. 2 Barnard. 1. Hullock, 644.

(*b*) Doug. 193, 4.

(*c*) 10 & 11 Wm. 3. c. 23. ss. 7 & 8.

(*d*) Burn, J. Indictment, X. Dick. J. Clerk of the Peace. Indictment, VI.

(*e*) 22 & 23 Car. 2. c. 22. s. 9. 4 & 5 W. & M. c. 24. s. 4. 3 Geo. 1. c. 15. 1 Leach, 201. Dougl. 193, 4.

(*f*) Co. Lit. 368. 2 Rol. Abr. 263.

(*g*) Dougl. 193, 4, note 26. 1 Leach, 201.

(*h*) 1 Ld. Raym. 703.

(*i*) Ante, 194 to 201.

* As to variances in general, see Mr. Starkie's valuable Treatise on Evidence, vol. iii. part iv. p. 1526 to 1607. 1 Chitty on Pleading, 4th edit. Index, Variance, and Addenda.

OF VARIANCES. persons (*a*), time (*b*), magnitude, number, and quantity (*c*); also some instances where averments are divisible, and part of a count may be found (*d*). And in describing the offence at common law, as well as upon statutes (particularly in stating the statute itself) (*e*) many instances as to what will amount to a variance, will be found dispersed in the preceding matter, but as a collection of them, together with many others on this important head may be useful, we will here give it. We shall, however, confine ourselves principally to examples of what have been adjudged variances in criminal cases, it would go beyond the limits of the work to point them out in civil cases.

Where the indictment does not profess to state, and it is not necessary to state a document with more than a substantial description, a technical and formal variance, not altering the sense of the document, nor rendering the meaning obscure; will not be fatal; and, generally speaking, mere clerical and grammatical errors will not vitiate the indictment (*f*); as in an indictment for perjury committed upon the trial of an indictment for an assault, if the latter proceeding is set forth, and the word "*depai*red" used for "*despai*red," the mistake will not be material (*g*).

(*a*) Ante, 202 to 217.

(*b*) Ante, 224, 5.

(*c*) Ante, 235.

(*d*) Ante, 250 to 252.

(*e*) Ante, 279, 280.

(*f*) 5 T. R. 317, 18. 1 Leach, 477. Cowp. 229. 1 Leach, 77. 145. 2 Marsh. 100. And we have before seen that a sentence to a certain extent, ungrammatically constructed, is not a sufficient objection to found a motion in arrest of judgment if from the whole tenor of the charge, the statement be sufficiently clear to furnish an intelligible description of the averment, 13 Price, 172. There is much learning in the older authorities as to how far indictments were vitiated by bad Latin, or by the introduction of English words, Hawk. b. 2. c. 25.

s. 86; as, however, all law proceedings are now drawn in the mother tongue, it is now obsolete, but it seems to have been the better opinion that even then false or inelegant Latin would not vitiate, *id.* At the present day certainty to a common intent is all that is requisite, Leach, 248; but this is so rigidly demanded that the ends of justice have been too often frustrated by nice and technical objections, 2 Hale, 193. 1 East, 314, 5th edit. 260. 4 Burr. 2082. 1 Leach, 333.

(*g*) 1 Leach, 192. Dougl. 193, 4. The words "in manner and form following, that is to say," 1 Leach, 192, or "in substance and to the effect following," 2 Campb. 138. Cro. C. C. 7th edit. 573.

If however the indictment profess to state the matter exactly and literally, according to the precise facts, it must be so proved, and a variance would be fatal (*a*). Thus, under such a statement, in stating a document "nec" instead of "non" (*b*), "air" for "heir" (*c*), "William" for "Wm." would be fatal (*d*). So if an indictment for perjury profess to set forth the title of the bill in chancery, in the answer to which the perjury was committed, and state the bill to be against A., B., and C., and the bill, on being produced, appears to be against A., B., and D., it would be a variance, though not so if the title to the bill was not professed to be set out accurately (*e*). So an indictment stating the substance and effect of the bill to which the answer was put in, and upon which the perjury was assigned, stated an agreement respecting *houses*, and in the original it appeared to be *house*, in the singular number only, it was held a fatal variance (*f*). But even in this case in an indictment for perjury, in setting out the perjury, the term "undertood" instead of "understood," is not a fatal mistake (*g*); and "receivd" instead of "received," in setting forth a forged bill of exchange, and "Segave," for "Seagrave," in a plea of *nul tiel record*, have been holden immaterial (*h*).

And though an indictment does not profess to state matter exactly and literally, according to the precise facts, yet a variance from its legal effect, and altering the sense, would be fatal, if the matter be material to the charge, or cannot be rejected as surplusage. Thus where a judgment is the ground of proceeding, and it is stated to have taken place in a wrong term, it is fatal (*i*). Where in an indictment for perjury in setting forth the *Nisi Prius*

(*a*) The words "to the tenor following," or "as follows," or "in the words and figures following," bind to an exact recital, Dougl. 97. 2 Bla. Rep. 788. Salk. 660. Hob. 272.

(*b*) Salk. 660.

(*c*) Stra. 201. 231.

(*d*) 3 Stark. on Evid. App. to p. 859.

(*e*) 1 Ry. & Moo. N. P. 101; and see 1 Stark. 518. 1 B. & A. 224.

(*f*) 1 Ry. & Moo. N. P. 98.

(*g*) 1 Leach, 184. Dougl. 193, 4.

(*h*) 1 Leach, 145. 2 Stra. 889.

(*i*) 1 Hen. Bla. 49; but see 3 B. & C. 2. 4 D. & R. 624. S. C. See case in Russ. & Ry. C. C. 241. 3 Campb. 265. S. C. where objections on ground of variance to record of conviction, in indictment against a receiver of stolen goods, were overruled.

OF VARIANCES. roll, the name of the associate is mistaken, it is fatal (a). And where an indictment for perjury in setting out the record of a conviction, stated an adjournment to have been made by "C., Esq., and A., B., C., and D. and others their fellows, &c. justices," when the adjournment was made by "C., Esq. and E., F., G. and others," &c. the variance was held fatal (b). If in an indictment for perjury the oath is stated to have been at the assizes before justices *assigned to take the said assizes* before A. B. one of the said justices, the said justices then and there having power, &c. it will be fatal if the oath was administered when the judge was sitting *under the commission of oyer and terminer and gaol delivery* (c). Where in an action for a malicious prosecution, the acquittal is alleged to have taken place "on Wednesday next after fifteen days of, &c. in the court of our lord the king, before the king himself at Westminster, before the Lord Chief Justice," when it appears from the record that the trial was at Nisi Prius, it was held fatal (d). Where an indictment for being at large, after an order for transportation, stated the terms upon which the royal mercy was extended, to have been upon a condition, when it did not contain such condition, it was held fatal (e). If the pronoun I, be inserted in the description of a will forged by the defendant, he will be entitled to an acquittal (f). Where an indictment for obtaining money by false pretences stated that the defendant pretended "that *he* had paid a sum of money into the Bank of England," and the evidence was, that the defendant said, generally, "that the money had been paid into the Bank of England," this was held a fatal variance (g). Evidence of the words "you are a broken-down justice," does not support an indictment for speaking of the magistrate the words, "he is a broken-down justice" (h). In an indictment for not repairing a highway, the description of the highway should be proved as laid, an averment that the highway leads from A. to C. will not be satisfied by evidence of a road leading from A. to B., and communicating by means of a cross road (i).

(a) 1 Esp. Rep. 98, 9.

(b) 1 Ry. & Moo. N. P. 171.

(c) Russ. & Ry. C. C. 421.

(d) 2 Campb. 193.

(e) Russ. & Ry. C. C. 512.

(f) 1 Leach, 448.

(g) 1 Campb. 494.

(h) 4 T. R. 217. *Sed vide*
Cro. Eliz. 503.

(i) 6 Esp. Rep. 136.

On the other hand, a statement according to the legal effect of matter material to the charge will in general suffice. Thus in an indictment for perjury, where it stated that the evidence on which the perjury was assigned was given at the court of the palace *at* Westminster, but on producing the record of the proceedings, the court was described as the court of the palace *of* Westminster, the variance was held immaterial (*a*). An indictment for perjury, where the oath was alleged to have been taken, and the matter sworn by the defendant, before E. W. one of the justices of assize, &c.; and it appeared in evidence, that the oath had in fact been taken before Willes, J., in a cause tried at the assizes, it was held sufficient, though another justice was mentioned in the indictment as a commissioner, and the *Nisi Prius* record alleged the trial to have been before both (*b*). Where an indictment for perjury alleged a bill of discovery filed in the Exchequer (in the answer to which the perjury was assigned), to have been filed on a day specified, viz. the 1st December, 1807, and it appeared, on the production of the bill, to have been filed in the preceding Michaelmas term, according to the practice of the court where a bill is filed in vacation, it was held the variance was immaterial, the day not having been alleged as part of the document (*c*). And where perjury was assigned in an answer to a bill alleged to have been filed in a particular term, and a copy produced was of a bill amended in a subsequent term, by order of the court, it was held to be no variance, the amended bill being part of the original bill (*d*). Where an indictment alleged, an action was depending between A. & B. and the judgment produced began "B. sued by the name of C. was summoned," &c. it was held, the omission of the name by which B. was miscalled in the process was immaterial (*e*).

If any unnecessary averments, wholly disconnected with the circumstances which constitute the stated crime, be introduced, they need not be proved, but will be rejected as surplusage (*f*).

SURPLUSAGE.

(*a*) 3 D. & R. 235.

(*e*) 1 Campb. 406.

(*b*) Leach, 150, 3d edit. 179.
14 East, 213, n. a.

(*f*) 2 Leach, 593. And as
to surplusage in general, see
1 Chitty on Plead. 4th edition,
Index, Surplusage. 5 East, 254.

(*c*) 1 Stark. C. N. P. 521.

(*d*) 3 Stark. on Evid. 1138.

SURPLUSAGE. Thus if an indictment conclude "contrary to the form of the statute in such case made and provided," when the crime is indictable at common law, the conclusion may be rejected, and the proceedings supported (*a*). So the words "commonly called," before the addition of an Irish peer, though untechnical, will not render the proceedings invalid (*b*). And the word "there," when place need not be averred, may be rejected as immaterial, if there be no preceding matter to which it could refer (*c*). And where an indictment for robbery stated that it was in a field "*near* the king's highway," and the robbery was proved, but not near the king's highway, the statement was held immaterial and was rejected as surplusage (*d*). So in an indictment for murder by casting stones, alleging that the defendants, *with* certain stones then and there did cast and throw against the deceased, the word "*with*" was rejected as surplusage (*e*). An indictment for perjury, alleging the cause to have come on to be tried by a jury of the county, in due manner, &c. but from the record it appeared "that the jury came out of the neighbourhood of Westminster," it was held that the words "of the county" might be rejected as surplusage (*f*). The introduction of the word *if*, into the statement of a writ to the sheriff, in case of bribery at an election, will not prejudice, but may be rejected as surplusage (*g*). And so where the indictment charged the defendant with robbery in the dwelling-house of Josh. Johnstone, and there was no evidence of the Christian name, it was considered the name ought to be rejected as surplusage (*h*). The words "to have" and "chattels" have been thrown out, and the proceedings held maintainable (*i*). We have also already seen that where contradictory or repugnant expressions do not enter into the substance of the offence, and the indictment will be good without them, they may be rejected as surplusage. Thus, if an act be charged to have been done with a felonious intent to commit a crime, and it appears upon the face of the indictment that

(*a*) Cowp. 683. 5 T. R. 162.
 2 Leach, 585. 2 Lord Raym.
 879. 1163. Salk. 460. Cro. Eliz.
 148. Cro. Car. 140. 2 Saund.
 308, n.; and see instances in
 case of indictments for libels,
 perjury, &c. post, vols. ii. & iii.
 (*b*) 2 Leach, 549.

(*c*) 2 Sess. Cas. 7.
 (*d*) Russ. & Ry. C. C. 9.
 (*e*) 13 Price, 172.
 (*f*) 3 D. & R. 235.
 (*g*) 1 T. R. 235.
 (*h*) Russ. & Ry. C. C. 10, in
 notes.
 (*i*) 1 Leach, 477. 468.

the crime, though perpetrated, would not have amounted to a felony, the word "felonious" being repugnant to the legal import of the offence charged, may be rejected as surplusage (*a*). Where an indictment against Francis Morris, for having received stolen goods, stated, "he the said Thomas Morris well knowing, &c." the words "the said Thomas Morris," were rejected, because the sense was complete without them (*b*). Where an indictment tried at the summer assizes, 1820, stated, that the prisoner, on the 20th July, in the 4th year of the reign of King George the Fourth, stole a mare, against the peace of our lord the now king, it was held the words *fourth year of the* might be rejected as surplusage (*c*). Where matter not proved may be rejected as surplusage, the petit jury on the trial may find a verdict on so much as is proved, rejecting that part in which the evidence fails, if there still remains sufficient foundation for a legal charge (*d*). It is best to be cautious in inserting allegations which cannot ultimately be supported, not only on account of the censure that may be incurred, but because they may embarrass the grand jury, who are bound to find the indictment upon oath, and who may reject a whole count (*e*), cannot find one part of the same count to be good, and return *ignoramus* to the residue (*f*).

SURPLUSAGE.

It seems to be settled both by the express exceptions in the statutes of amendments, and the current of authorities, that indictments are not within their operation; and they therefore stand upon the same principles with respect to amendment, as those to which all pleadings were subject at common law (*g*). And as the indictment is the finding of a jury upon oath, it cannot be amended by the court without the concurrence of the grand inquest, by whom it is presented (*h*). To this rule, however, there

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(*a*) 2 East P. C. 1023. Cald. 397.

(*b*) 1 Leach, 109.

(*c*) Russ. & Ry. C. C. 431; and see ante, 217.

(*d*) 5 East, 304. 2 Campb. 134. 584, 5.

(*e*) Cowp. 325. Hawk. b. 2. c. 25. s. 2. n. 1.

(*f*) Id. 2 Roll. Rep. 52.

(*g*) 4 Burr. 2569, 70. 3 Mod. 167. 1 Keb. 252. 2 Ld. Raym. 1061. 1307. 2 Stra. 1026. Rep. Temp. Hardw. 203. 12 Mod. 229. 6 Mod. 281. 1 Salk. 51, 2. 1 Hale, 193. Hawk. b. 2. c. 25. s. 97. Bac. Abr. Indictment, G. 11. Cro. C. C. 44.

(*h*) 4 Burr. 2570. Hawk. b. 2. c. 25. s. 98. 6 Mod. 281.

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is an exception in case of indictments removed from London, because by the charters of that city only, the substance of the record can be removed from it, and the original remains a certain guide for the amendment(*a*). And it is the common practice for the grand jury to consent, at the time they are sworn, that the court shall amend matters of form, altering no matter of substance; and mere informalities may, therefore, be amended by the court before the commencement of the trial(*b*); though it was formerly the practice to award process to the grand jury to come into court and amend them(*c*).

But criminal informations which are not found upon the oath of a jury may be amended by the court, and even by a single judge at chambers, at any time before trial(*d*): and a mere clerical error in the caption, and not the body of the information, may be rectified even after verdict(*e*). And the reason assigned for this difference is, that the latter are originally framed by an officer of the crown, while the former are the accusations of a number of men sworn to inquire, and to decide according to evidence(*f*). This reason seems decidedly to establish the position, that no indictment is amendable by the court without leave of those by whom it is found; but it has been said, that whenever amendments are made by the common law, there is no distinction between criminal and civil cases(*g*); and a distinction has been suggested between felonies and misdemeanors, and that an amendment is allowable in the latter, though not in the former(*h*). But it is manifest that every description of indictment is alike the finding of a grand jury, and the reason being similar, the conclusion cannot vary. It must indeed be granted, that instances are to be found where the court have taken upon themselves to amend(*i*); but these cases prove nothing in favor of the distinction, as they

(*a*) 1 Keb. 252. Hawk. b. 2. c. 25. s. 97. Bac. Abr. Indictment, H. 11.

(*b*) Hawk. b. 2. c. 25. s. 98. Bac. Abr. Indictment, H. 11.

(*c*) Id. *ibid.* Cro. C. C. 44.

(*d*) 4 Burr. 2527, 2568, 2569. 12 Mod. 229. 6 Mod. 281. 1 Stra. 135. 1 Salk. 47. 50. 2 Stra.

371. 1 Leon. 189. 4 T. R. 457.

(*e*) 3 Mod. 167.

(*f*) 4 Burr. 2569, 2570.

(*g*) 1 Saund. 250, d. note 1.

(*h*) Stark. 252, 3, 4, 5.

(*i*) 11 Hen. 6. f. 2 and f. 14.

2 Bulst. 35. 6 Mod. 285. See also cases, 1 Saund. 250, d. e. note 1.

are for capital felonies; and, therefore, if they shew any thing, they prove that criminal proceedings may, in any case, be amended, which can never be contended at the present day. Upon principle, therefore, as well as the current of authorities, it seems, that no indictment can be amended without the consent of the jury, who act as accusers.

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When the indictment or the caption is defective, the court have a discretionary power to quash it immediately, or to oblige the defendant to plead or demur, which rests entirely with the court (*a*). But though this is matter for their discretion, they are guided by certain rules, in its exercise, which we shall proceed to examine (*b*). The application may be made to the court either by the prosecutor or the defendant; or, any one, as *amicus curiæ*, may suggest the error to the court, in order that they may exercise their discretion (*c*).

When indictment
may be quashed.

When the application is made by the *prosecutor*, the court will not quash the indictment as a matter of course, unless it appear to be clearly insufficient (*d*); nor even then after the defendant has pleaded, unless another good indictment has been found against him (*e*); nor where he has been put to extra expence, unless the costs are first paid him (*f*). But where the indictment is insufficient, and the defendant is not put to inconvenience, the court will quash it upon the motion of the prosecutor without the consent of the defendant, though it is for a crime, in which they never shew the same indulgence upon the application of a prisoner (*g*). And if an indictment removed by certiorari is at issue, and the prosecutor procures another indictment to be found, alleging the first to be defective, the court will, by consent of

(*a*) 2 Burr. 1127. 1 Sid. 54.
247. 1 Salk. 372. 2 Keb. 128.
Cro. Car. 584. Palm. 389.
1 Wils. 325. 2 East, 226. 2 Sess.
Cas. 1. Hawk. b. 2. c. 25. s. 146.
Com. Dig. Indictment, H. Bac.
Abr. Indictment, K.

(*b*) 4 Burr. 2539.

(*c*) Comb. 13.

(*d*) Dougl. 240. Com. Dig.
Indictment, H.

(*e*) 2 East. Rep. 226. 1 Leach,
11. 6 Mod. 262.

(*f*) 3 Burr. 1469. 2 Stra. 946.
Com. Dig. Indictment, H. Bac.
Abr. Indictment, K. MSS. Mich.
Term, 53 Geo. 3. Stark. 282,
note h.

(*g*) 2 Sess. Cas. 19. 2 East,
226, 7.

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all parties, order the first to be quashed, and the second to be substituted in its place, and to stand in the same condition (*a*). But otherwise in case of removal by certiorari, the court will not quash the indictment after the forfeiture of the recognizance, by neglecting to carry down the record for trial (*b*).

When an information is filed by the *attorney-general* ex officio, the court will quash it upon motion, if they see cause; but if it be exhibited by a private individual, they will not thus dispose of it, because the defendant is entitled to costs (*c*).

When the motion is made on the part of the *defendant*, the rules by which the court are guided are more strict, and their objections are more numerous; because, if the indictment be quashed, the recognizances will become ineffectual (*d*); and the courts usually refuse to quash on the application of the defendant when the indictment is for a serious offence, unless upon the clearest and plainest ground, but will drive the party to a demurrer, or motion in arrest of judgment, or writ of error (*e*). It is, therefore, a general rule, that no indictments which charge the higher offences as treason or felony (*f*); or those crimes which immediately affect the public at large, as perjury, forgery, extortion, conspiracies, subornation, keeping disorderly houses, or offences affecting the highways, not executing legal process, will be thus summarily set aside (*g*). So the court refused to quash

(*a*) 3 Burr. 1468. 1 Bla. Rep. 460. Com. Dig. Indictment, H. Bac. Abr. Indictment, K. And in a late case, on an indictment for perjury against the defendant, who had been prosecutrix of an indictment for a conspiracy where there was another indictment for perjury against one of the witnesses, in the prosecution for the conspiracy, the court refused to quash the indictment against the defendant, unless the prosecutor was named, and the second indictment should stand in the same situation as the first would have done, 3 B. & A. 373.

(*b*) 1 Salk. 380. Com. Dig.

Indictment, H.

(*c*) 1 Sid. 152. Com. Dig. Information, D. 4. Vin. Abr. Information, E. Dougl. 240, 241. Hawk. b. 2. c. 25. s. 149.

(*d*) 2 Sess. Cas. 1.

(*e*) Cald. 432. 554. Nolan, P. L. 261.

(*f*) 1 Salk. 372. Com. Dig. Indictment, H. But see 4 Harg. St. Tr. 697, 8.

(*g*) 1 Salk. 372. 5 Mod. 13. 2 Sess. Cas. 1, 2, 4, 8. 1 Sess. Cas. 337, 8, 9. 2 Stra. 1210. Com. Dig. Indictment, H. Bac. Abr. Indictment, K. Hawk. b. 2. c. 25. s. 146. Burn, J. Perjury, III. Williams, J. Perjury, II. 5 Mod. 13, as to extortion.

an indictment against a number of persons for breaking and entering a lead mine, though it was defective, because there were large numbers of persons met together, and the judges were trying others in the same county for similar offences (*a*). Upon the same ground, the court will refuse to quash an indictment for a nuisance, without a certificate that it is removed (*b*); and the court have refused to quash an indictment against a parish for not repairing a highway, on an affidavit that the way was in repair, but the defendants were directed to plead guilty, and pay a nominal fine (*c*); and the court will refuse to quash an indictment against overseers for not paying money over to their successors, for that is a growing evil, and affecting the interests of the community (*d*). Neither will the court, as it has been held in general, quash indictments for forcible or fraudulent injuries, as for a forcible entry (*e*); for a disturbance in church (*f*), or against a bankrupt for his embezzling his effects (*g*), or for enticing away a servant (*h*), for though some of these are private in their nature, they are public in their consequences (*i*). And, in an indictment for using false weights and measures, the court will not thus interfere, even where it appears the scale for goods is the lightest, and though it is not stated where the supposed offence was committed (*k*). And as informations are rarely allowed, except for offences endangering the public welfare, it is said that the court will never quash them at the instance of the defendant (*l*). And it is no ground to quash an indictment that there be another pending against defendant for the same offence, unless indeed there be some vexation which the

(*a*) 1 Wils. 325. Com. Dig. Indictment, H. Bac. Abr. Indictment, K.

(*b*) 2 Ld. Raym. 1164. Andr. 139, 220. 4 Burr. 2116. 1 Salk. 372. 1 Vent. 370. Cro. Car. 584. 1 Barnard. K. B. 45. Com. Dig. Indictment, H. Bac. Abr. Indictment, K.

(*c*) 2 Chit. Rep. 216.

(*d*) 2 Stra. 1268. Com. Dig. Indictment, H. Bac. Abr. Indictment, K.

(*e*) 6 Mod. 96. Com. Dig. Indictment, H.

(*f*) Cro. Car. 584. 1 Sid. 54. Com. Dig. Indictment, H.

(*g*) 1 Leach, 10. 3 J. B. Moore, 656.

(*h*) 1 Salk. 372. Com. Dig. Indictment, H.

(*i*) 6 Mod. 42. 3 Burr. 1841. Com. Dig. Indictment, H.

(*k*) 3 Burr. 1841. Com. Dig. Indictment, H. Bac. Abr. Indictment, K.

(*l*) 1 Vin. Abr. Information, E.

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court will judge of and determine; and in a case where there was a joint indictment against two for perjury, which on the trial the court inclined to think bad, and the trial was postponed, pending which a separate indictment against one of the parties was preferred, the court refused to quash the latter indictment, no vexation appearing (*a*).

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There are some cases, however, in which the court will thus interfere on the behalf of the defendant upon a proper application, made upon affidavit of the objection, and pointing it out so that it may be cured in another indictment. Thus, where the court, in which the indictment was found, have no jurisdiction, it will be quashed; as if an indictment for perjury, at common law, be presented at the quarter sessions which they have no power to determine (*b*). And it seems the court will quash an indictment for perjury for want of an addition to defendant's name, if the objection be properly taken by affidavit (*c*). And if from the facts stated, it appear, that no indictable offence has been committed, the indictment will be thus set aside in the first instance (*d*). So an indictment for exercising a trade, contrary to the custom of the city, will be quashed, as it manifestly cannot be supported (*e*). And an indictment when not for any of the public offences we have already mentioned, may also be quashed for the omission of a material averment: as where an indictment for not receiving a parish apprentice did not aver the binding to be within the 43 Eliz. c. 2. (*f*) or before the repeal of the statute, the proceeding for maintaining a cottage without four acres of land, neglected to state that it was inhabited (*g*); or, where the defendant was charged with speaking words of a magistrate, not in themselves actionable, and they were not stated to be said of him in the execution of his office (*h*). And the same rule applies

(*a*) Per Abbott, J. Nov. 1816, Adolphus moved to quash the indictment.

(*b*) 1 Burr. 389. 2 Stra. 1038. Hawk. b. 2. c. 25. s. 146, n. 25. Com. Dig. Indictment, H. Bac. Abr. Indictment, K.

(*c*) 3 D. & R. 621.

(*d*) Dougl. 253.

(*e*) Comb. 243.

(*f*) 2 Stra. 1268. Com. Dig. Indictment, H. Bac. Abr. Indictment, K.

(*g*) Andr. 230. Com. Dig. Indictment, H.

(*h*) Andr. 226. Com. Dig. Indictment, H. Bac. Abr. Indictment, K.

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to evident misjoinder, and gross deficiency in the formal requisites. Thus where six persons were jointly and severally charged with exercising a trade without having served an apprenticeship, the indictment was quashed as altogether vicious (*a*). So where the indictment alleged it was presented, without adding "by the oath of twelve men;" (*b*) where in the caption, it was said, "that the several *indictments* to this schedule annexed are true bills," whereas they are only *bills* till they are found (*c*); and where the charge is expressed merely by way of recital (*d*), the proceedings may be thus disposed of. But the court will not quash an indictment on a statute, merely because it does not conclude "*against the form*," &c. but leave the defendant to demur (*e*). And the defect, in general, must be very gross and apparent to induce the court to dismiss the indictment in this summary way, instead of leaving the party to the more usual remedies of demurring or moving in arrest of judgment (*f*); where however a defect is shewn which induces the court thus to interfere, they must quash the whole indictment, for they cannot strike out some counts, and leave others to be determined on the trial (*g*). If the defendant did not duly appear, or has forfeited his recognizance, his application to quash the indictment will be ineffectual (*h*); and although the court may, in their discretion, quash the indictment at any time before the jury are charged to try the prisoner, they commonly, in order to avoid collusion, refuse to do so after he has pleaded (*i*), at least unless another good indictment has been found (*k*); if, therefore, the prosecutor desire to quash, he must apply in an early stage of the proceeding. And by a particular provision of the legislature (*l*), in all cases of treason, except for counterfeiting the coin, seal, sign, or signet, no indictment shall be quashed for any formal defects, unless before evidence given

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(*a*) 1 Stra. 623. Com. Dig. Indictment, H.

(*b*) Andr. 230.

(*c*) 1 Salk. 376.

(*d*) 1 Sess. Cas. 3.

(*e*) 2 Stra. 702. Bac. Abr. Indictment, K.

(*f*) 1 Bla. Rep. 275. Dougl. 240, 241. Hawk. b. 2. c. 25. s. 146, in notis. Cro. Car. 147. Fost. 104.

(*g*) 2 Stra. 1026. Rep. temp. Hardw. 203. Com. Dig. Indictment, H. Bac. Abr. Indictment, K.

(*h*) 1 Barnard. K. B. 44. 1 Salk. 380.

(*i*) 1 Leach, 11. 420. 2 East, 226.

(*k*) 2 East, 226.

(*l*) 7 W. 3. c. 3.

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which has been construed to mean before the defendant pleads (a), nor can any such exception be taken in arrest of judgment. What, therefore, in other cases, is a rule which the discretion of the courts have adopted for their own guidance, and from which, of course, they may vary, is, in case of the higher treasons, made the subject of a positive enactment. The motion however to quash an indictment may be made on the last day of the term (b).

After the indictment against the defendant has been quashed, a new and more regular one may be preferred against him (c). He can gain, therefore, in general, very little advantage, except delay, by such an application; and therefore usually reserves his objections till after the verdict (d), when, if the indictment be found to be insufficient, the court are bound, *ex debito justitiæ*, to arrest the judgment (e).

Power of court
of equity to stay
indictment.

A court of equity has originally no jurisdiction whatever, either to inquire or regulate the proceedings upon an indictment; but circumstances may give it that jurisdiction; as where the relators in an information, or the plaintiffs in a bill, are also prosecutors in an indictment, in some respects relating to the matter in litigation in the court of equity, or where the defendants in the proceeding in equity have come in, and are also parties to such indictment (f); and in a case where the plaintiffs claiming an exclusive right of fishery, brought their bill to be quieted in the possession of it, and to prevent multiplicity of actions, and the defendants, by answer, insisted on a custom they had of fishing on the borders of this land, and pending the suit the plaintiffs indicted several persons in the courts of Sessions for the city of York, for fishing under an authority from defendants, and upon affidavit that the mayor and aldermen, plaintiffs, were in the

(a) 4 St. Tr. 673. And see 1 East P. C. 110. Hawk. b. 2. c. 25. 3. 148.

(b) 1 Burr. 651. Bac. Abr. Indictment, K. Com. Dig. Indictment; H.

(c) 2 Woodes. 555. 3 P. W. 480. 499. 2 Leach, 420. And see most of the cases before re-

ferred to, where the indictment has been quashed.

(d) That he cannot take advantage of them at the trial, see 2 Stark. C. N. P. 423. 1 Ry. & Moo. C. C. 27.

(e) 2 Burr. 1127.

(f) 18 Ves. 211. 220.

commission of the peace for York, and consequently would be judges of their own case, the defendants moved for an injunction to stay the proceedings on those indictments: the Lord Chancellor thought the court of equity could not grant an injunction to stay a criminal proceeding at the suit of the crown, so as to restrain the Attorney-General; yet, as the indictment in question was an indictment for a trespass, in which there was no violence, and was to try a civil right, which was the subject of an action, it could order the prosecutor, who was plaintiff, then before them, not to proceed (a).

INJUNCTION
TO STAY
INDICTMENT.

(a) 9 Mod. 273. 1 Atk. 282. S. C. 2 Chitty's Game Laws, page 1089.

CHAPTER VI.

*OF THE GRAND JURY—AND THE PRESENTMENT
AND FINDING OF THE BILL.*

[306] THE bill being framed according to the rules we have considered in the preceding chapter, it is to be presented to a grand jury of the county in which the offence was committed; except, in those cases where by particular legislative provisions, the inquest of another county may take cognizance of the accusation (*a*). There is indeed one exception to this rule introduced by 38 Geo. 3. c. 52 (*b*), and 51 Geo. 3. c. 100, which is too important to pass without particular notice. It is provided by that statute, that where an offence has been committed within any city or town corporate, except a few places which it enumerates, the bill of indictment may be preferred before the grand jury of the county adjoining, at any session of oyer and terminer or general gaol delivery, on the prosecutor's entering into a recognizance to pay the extra costs, occasioned by such a course of proceeding, in case the court shall so direct. But, in general, he should prefer his bill of indictment according to the terms of his recognizance to prosecute, or it will be forfeited; though, we have seen, that if he be bound to proceed at the sessions of the peace for the city and liberty of Westminster, the terms of the recognizance will be fulfilled by the presentment of the accusation before the grand jury of Middlesex (*c*).

The number of
grand jurors.

The grand jury must consist of twelve at least, and may contain any greater number not exceeding twenty-three, in order that twelve

(*a*) See ante, 177, as to the venue.

(*b*) Sections 2. 10. 12. 7 T. R. 735. 4 East, 208. 1 Smith's

Reports, 31. Tidd, 8th edit. 780, 1.

(*c*) Ante, 137. Cro. C. C. 13, 14.

may form a majority of the jurors (*a*). There must be twelve at least, because the concurrence of that number is absolutely necessary, in order to put a defendant on his trial (*b*); and there must not be more than twenty-three, because otherwise there might be an equal division, or two full juries might differ in opinion (*c*). The number of twelve, as well as the constitution of the grand jury itself are very ancient, being discoverable in the institutions of Ethelred (*d*). In the time of King Richard the First, according to Hoveden, the mode of electing the grand jury was altered, and the following arrangement adopted: four knights were taken from the county at large, who chose two more out of every hundred, which two associated to themselves ten other principal free-men, and those twelve were to answer concerning all particulars relating to their own district (*e*). The number thus obtained was probably found too large and inconvenient; though the traces of the original regulations still exist in the practice of summoning some of the jury from every hundred. On this subject, we shall consider the qualifications of the grand jury—their power and jurisdiction—the mode in which they are summoned—the presentment of the bill for their examination—the evidence adduced in its support—and the finding, by which their deliberations are concluded.

NUMBER OF
GRAND JURORS.

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At common law it is perfectly clear that all persons serving, upon the grand inquest, must be good and lawful men; by which it is intended, that they must be liege subjects of the king, and neither aliens (*f*); nor persons outlawed even in a civil action (*g*); attainted of any treason or felony; or convicted of any species of *crimen falsi*, as conspiracy or perjury, which may render them infamous (*h*). And now by the third section of the recent act (*i*),

Qualifications of
grand jurors.

(*a*) Cro. Eliz. 654. 2 Hale, 151. Hawk. b. 2. c. 25. s. 16. Bac. Abr. Indictment, C. Juries, A. 4 Bla. Com. 302. Burn, J. Jurors. Williams, J. Juries, I. Dick. Sess. 79.

(*b*) Cro. Eliz. 654.

(*c*) 2 Burr. 1088.

(*d*) Co. Lit. 155 b. Wilk. Leges Angl. Sax: 117. 4 Bla. Com. 302.

(*e*) 4 Bla. Com. 302.

(*f*) 3 Inst. 32. Poph. 202. Sir Wm. Jones, 198, 9. 2 Hale, 155. Hawk. b. 2. c. 25. s. 16. Willes Rep. 667, 8. Bac. Abr. Juries, A. Indictment, C.

(*g*) Id. *ibid.* Cro. Car. 134, 147.

(*h*) Id. *ibid.*

(*i*) 6 Geo. 4. c. 50.

QUALIFICATIONS OF GRAND JURORS. it is provided, that aliens shall not be qualified, except on juries *de medietate* (a), and persons attainted of treason or felony, or convicted of any crime that is infamous, unless having obtained a free pardon, nor any outlawed or excommunicated person shall be qualified to serve. An Irish peer ought not to serve upon a grand jury unless he is a member of the House of Commons (b).

The annual estate of the grand jury does not seem to have been fixed at common law by any particular standard; but, in the times of the feudal system, as no villein was eligible to the office (c), none but those who possessed land as freeholders could obtain it. And, indeed, it has been frequently taken for granted, that none but freeholders can be returned on the panel (d), though this has been controverted in a recent case (e).

Now, however, the qualifications of grand jurors are pointed out by the recent important statute, viz. the 6 Geo. 4. c. 50, by the first section of which act it is enacted, “ that every man (except as thereafter excepted) between the ages of twenty-one and sixty years, residing in any county in England who shall have in his own name, or in trust for him, within the same county, £10 by the year above reprises, in lands or tenements, whether of freehold, copyhold, or customary tenure, or of ancient demesne, or in rents issuing out of any such lands or tenements, or in such lands, tenements, and rents, taken together, in fee simple, fee tail, or for the life of himself or some other person, or who shall have within the same county £20 by the year above reprises, in lands or tenements, held by lease or leases, for the absolute term of twenty-one years, or some longer term, or for any term of years determinable on any life or lives, or who, being a householder, shall be rated or assessed to the poor rate, or to the inhabited house duty in the county of Middlesex, on a value not less than £30, or in any other county on a value

(a) As to which, see post, Burn, J. Jurors, I. Williams, J. Juries, I. 525.

(b) Russ. & Ry. C. C. 117.

(c) Russ. & Ry. C. C. 177;

(d) Poph. 202. Co. Lit. 156.

and see Hawk. b. 2. c. 25. s. 19.

(e) 4 Bla. Com. 302. 2 Hale, 155. Bac. Abr. Juries, A.

21. 2 Woodes. 557, 8.

not less than £20, or who shall occupy a house containing not less than fifteen windows, shall be qualified, and shall be liable to serve on juries for the trial of all issues in the civil and criminal courts, such issues being respectively triable in the county in which every man so qualified respectively shall reside, and shall also be qualified and liable to serve on *grand juries*, in courts of sessions of the peace, and on petty juries, for the trial of all issues joined in such courts of sessions of the peace and triable in the county, riding, or division, in which every man so qualified respectively shall reside.” And with respect to the qualifications of grand jurors in Wales, the same section proceeds to enact, that every man, except as thereafter excepted, being between the aforesaid ages, residing in any county in Wales, and being there qualified to the extent of three-fifths of any of the foregoing qualifications, shall be qualified, and shall be liable to serve on juries for the trial of all issues joined in the courts of great sessions, and on grand juries, in courts of sessions of the peace, and on petty juries, for the trial of all issues joined in such courts of sessions of the peace, in every county of Wales. In practice, as observed by Mr. Justice Blackstone, the jurors are usually gentlemen of the best figure in the county (*a*).

There are various exemptions allowed in favour of particular individuals or professions; thus, by the second section of the 6 Geo. 4. c. 50. all peers (*b*), all judges of the king’s courts of record at Westminster, and of the courts of great session in Wales, all clergymen (*c*); all priests of the Roman Catholic faith who shall have duly taken and subscribed the oaths and declarations required by law (*d*); all persons who shall teach or preach in any congregation of protestant dissenters, whose place of meeting is duly registered, and who shall follow no secular occupation, except that of a schoolmaster, producing a certificate of some justice of the peace of their having taken the oaths required by

(*a*) 4 Bla. Com. 302.

(*b*) An Irish peer, unless a member of parliament, cannot serve on a grand jury, Russ. & Ry. C. C. 117.

(*c*) See Bac. Abr. Juries, E. 6. 3 Bla. Com. 364. Dick. J. Sess. 85.

(*d*) See 31 Geo. 3. c. 32. 43 Geo. 3. c. 30.

QUALIFICATIONS OF GRAND JURORS. law (*a*); all serjeants and barristers at law actually practising; all members of the Society of Doctors of law, and advocates of the civil law, actually practising; all attorneys, solicitors, and proctors, duly admitted in any court of law or equity, or of ecclesiastical or Admiralty jurisdiction actually practising, and having duly taken out their annual certificates; all officers of any such courts, actually exercising the duties of their respective offices (*b*); all coroners, gaolers, and keepers of Houses of Correction; all members and licenciates of the Royal College of Physicians in London, actually practising (*c*); all surgeons being members of one of the Royal Colleges of Surgeons in London, Edinburgh, or Dublin, and actually practising; all apothecaries, certified by the court of examiners of the apothecaries' company, and actually practising (*d*); all officers in his majesty's navy or army, on full pay (*e*); all pilots licensed by the Trinity House of Deptford Strond, Kingston-upon-Hull, or Newcastle-upon-Tyne; and all masters of vessels in the buoy and light service employed by either of those corporations; and all pilots licensed by the lord warden of the Cinque Ports, or under any act of parliament or charter, for the regulation of pilots in any other port; all the household servants of his majesty; all officers of customs and excise; all sheriff's officers, high constables, and parish clerks, shall be and are thereby freed and exempted from being returned, and from serving upon *any juries* or inquests, whatsoever: provided also, that all persons exempt from serving upon juries in any of the courts by virtue of any prescription, charter, grant or writ, shall continue to enjoy such exemption in as ample a manner as before the passing of this act. Quakers are exempt from serving on juries (*f*), so are visitors of work-houses (*g*).

In order that too much burthen shall not be cast on grand jurors by their frequent attendance on grand juries, it is enacted (*h*), that no man shall be returned to serve upon any grand jury at any

(*a*) See 1 Wm. & M. c. 18. Com. 364.
s. 11. 19 Geo. 3. c. 44. 52 Geo. 3. c. 155.

(*b*) See Dick. Scss. 84, 85. 35.
Lamb. 396.

(*c*) See 18 Geo. 2. c. 15.

(*d*) See Lamb. 396. 3 Bla.

(*e*) See Bac. Abr. Juries, E. 6.
3 Bla. Com. 364. Dick. Sess.

(*f*) 7 & 8 Wm. 3. c. 34. s. 6.

(*g*) 22 Geo. 3. c. 83.

(*h*) By 6 Geo. 4. c. 50. s. 62.

sessions of the peace in England or Wales who has served as a juror at any such session within one year before in Wales, or in the counties of Hereford, Cambridge, Huntingdon, or Rutland, or two years before in any other county, and has a certificate of the clerk of the peace of having so served; and a fine is to be imposed on the officer making a return of such person, but the provision does not extend to grand jurors at the assizes or great sessions. A justice of the peace is not to be summoned as a juror to serve at any sessions of the peace for the jurisdiction of which he is a justice (*a*); and the inhabitants of the city and liberty of Westminster, are exempt from serving as jurors at the sessions of the peace for the county of Middlesex (*b*). No person shall be summoned but those named in the warrant, under a fine, to be imposed on the officer summoning (*c*). It is said to be the practice at sessions, not to summon those who are on the sheriff's list to serve at the assizes. These exceptions are cases not of disqualification, but of privilege; and, therefore, any of the parties returned may lawfully serve without objection, if they take the oath required, and possess all other qualifications of grand jurymen. And if duly summoned, they must attend and claim their privilege, for the sheriff cannot return it (*d*).

It is absolutely necessary at common law, that all the grand inquest should be inhabitants of the county for which they are sworn to inquire (*e*). But it is not necessary that any part of a grand jury finding a bill against an alien, should be aliens (*f*).

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If a man who is disqualified be returned, he may be challenged by the prisoner before the bill is presented (*g*); or, if it be discovered after the finding, the defendant may plead it in avoidance, and answer over to the felony; for which last purpose he may be

(*a*) By 6 Geo. 4. c. 50. s. 62. 32, 3, 4. Hawk. b. 2. c. 25.

(*b*) 6 Geo. 4. c. 50. s. 63. Id. s. 16. Bac. Abr. Juries, A. E. 4.

(*c*) 6 Geo. 4. c. 50. s. 63. (*f*) Hawk. b. 2. c. 43. s. 36.

(*d*) 2 Inst. 448. Hawk. b. 2. Bac. Abr. Juries, E. 8.

c. 25, s. 20. Tr. per Pais, 87. (*g*) Hawk. b. 2. c. 25. s. 16.
2 Woodes, 557. Burn, J. Jurors, I. Bac. Abr. Juries, A. Burn, J. Williams, J. Juries, I.

(*e*) 2 Rol. Abr. 32. 2 Inst.

QUALIFICATIONS allowed the assistance of counsel, on producing in court the ^{OF} GRAND JURORS. record of the outlawry, attainder, or conviction, on which the incompetence of the juryman rests (*a*). This necessity for the grand inquest to consist of men free from all objection existed at common law, and was affirmed by the statute 11 Hen. 4. c. 9. which enacts, that any indictment taken by a jury, one of whom is unqualified, shall be altogether void and of no effect whatsoever. So that if a man be outlawed upon such a finding, he may, on evidence that one of the jury was incompetent, procure the outlawry against him to be reversed (*b*). It is clear that a defendant before issue joined, may plead the objection in avoidance (*c*); but if he take no such exception before his trial, it seems doubtful how far he can afterwards take advantage of it (*d*), except it can be verified by the records of the court in which the indictment is depending, as in case of an outlawry of one of the indictors in the same court; in which case, any one, as *amicus curiæ*, may inform the court of the objection (*e*).

[310] If improper persons are discovered to be inserted in the panel returned by the sheriff, justices of the peace at the sessions, and justices of gaol delivery at the assizes, have power to reform the panel, by taking out their names and inserting those of others (*f*).

Mode of summoning, &c. the grand jury.*

The mode of summoning and procuring the attendance of persons duly qualified to serve on the grand jury, must next be considered. Upon the summons of any sessions of the peace, and in cases of commissions of oyer and terminer and gaol delivery, there issues a *precept* (*g*) either in the name of the

(*a*) 2 Hale, 155. 3 Inst. 34. b. 2. c. 25. s. 26. Bac. Abr. Cro. Car. 134. 147. Hawk. Juries, A.

b. 2. c. 25. s. 18. 26. 29, 30. (*d*) 3 Inst. 34. Hawk. b. 2. Bac. Abr. Juries, A. e. 25. s. 27. Bac. Abr. Juries, A.

(*b*) 11 Hen. 4. pl. 21. 3 Inst. 32, 3, 4. 12 Co. Rep. 99. Hawk. (*e*) Id. *ibid*. (*f*) 3 Hen. 8. c. 12. Hawk. b. 2. c. 25. s. 18. 28. 33. Bac. Abr. Juries, A. b. 2. c. 25. s. 32.

(*g*) See form, last volume, a mere award of the court won't

* The mode of making and returning the lists of jurors is now simplified and pointed out by the 6 Geo. 4. c. 50.

MODE OF
SUMMONING, &c.
THE
GRAND JURY.

king or of two or more justices directed to the sheriff, upon which he is to return twenty-four or more out of the whole county, namely, a sufficient number out of every hundred, from whom the grand jury is selected (*a*). Upon this precept, although it generally specifies only twenty-four, the sheriff usually returns forty-eight (*b*). The practice varies in some degree in particular counties, thus, in Middlesex (*c*) we have seen, that every term there are two grand juries summoned and sworn before the senior of the puisne judges, on some day fixed by such judge in the early part of the term; who, after receiving their charge from such judge, adjourn to the grand jury room, and then appoint subsequent days of meeting; and precepts are issued from the crown-office to the constables in the different districts, to make returns of all nuisances, &c. which, on their return, are considered as presentments, and are prosecuted as indictments or presentments. The two juries appoint separate days for receiving the constables' returns. The jury who receive the presentments of constables for the more remote parts of the county assemble at the grand jury room, to find indictments on the last day but two of the term; and the jury acting for the metropolis and the adjacent parts, in the like respect, assemble at the like place, for the same purpose, on the last day but one of the term: and after returning their respective presentments, and indictments, the jurors are discharged. In Suffolk also, there are two grand juries chosen (*d*). In Yorkshire, on the other hand, only one panel of forty-eight freeholders and copyholders can be returned to serve at the assizes; and, at the sessions, only forty can be returned on the panel (*e*).

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do, 2 Hawk. c. 4. s. 1. precept is to bear teste, or be dated fifteen days before the return, Nels. Introd. 35. If precept-day, any two justices cannot be superseded by any of their fellows, but only by a writ out of Chancery, Hawk. b. 2. c. 8. s. 43.

(*a*) 2 Hale, 153, 4. Bac. Ab. Juries, A. B.

(*b*) 2 Hale, 263. Burn, J. Jurors, 111.

(*c*) Ante, 157, 158. Hand's Prac. Introd. XX. In 2 Lil. Reg. 156. 2 Hale, 26. 156. Bac. Abr. Juries, A. it is stated that there are *three* juries for Middlesex.

(*d*) Bac. Abr. Juries, A. 2 Lil. Reg. 156; and 2 Hale, 26. 154.

(*e*) 7 & 8 W. 3. c. 32. s. 3. Burn, J. Jurors, 111.

MODE OF
SUMMONING, &c.
THE
GRAND JURY.

Every summons of grand jurors is to be made by the sheriff, his officer, or lawful deputy, ten days before, at the least, shewing the warrant under the seal of the office wherein they are appointed to serve; and, if the juror be absent, notice is to be left in writing at his dwelling-house, with some inmate, under the hand of the officer, containing the substance of such summons (*a*). And in Wales eight, and in the counties palatine fourteen days notice was requisite (*b*). In London and Middlesex it seems six days only is required (*c*). The whole of this number must be returned by the sheriff or proper officer without the nomination of any person whatsoever (*d*); and, if any person not returned, procure his name to be read among those who are returned, and is, in consequence, sworn, he may be indicted for a contempt of the statute (*e*). Though the number of jurymen, thus returned to the court, amount to forty-eight or more, not more than twenty-three are to be sworn, as the contrary practice might produce much inconvenience and confusion; for, if a number amounting to two full juries or more should be sworn, it might happen that a complete jury of twelve might find a bill to be a true one, though the other twelve might reject it as destitute of foundation (*f*). At the sessions, it is not an unusual practice after fifteen or sixteen names have been called, to consider the inquest as complete, and not to insist upon the service of the rest, who may happen to be in attendance (*g*).

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Mode of proceeding to swear and charge grand jury, &c. at sessions.

At the sessions, the court being assembled before twelve o'clock at noon, the bailiff of the court proclaims the sessions (*h*).

(*a*) 6 Geo. 4. c. 50. s. 25. s. 24.
Burn, J. Jurors, III.

(*b*) 3 Geo. 2. c. 25. s. 9, 10;
but see 6 Geo. 4. c. 50.

(*c*) The 6 Geo. 4. c. 50. s. 25.
does not affect the former provision of 7 & 8 W. 3. c. 32. ss. 5 & 11. as to London and Middlesex.

(*d*) 11 Hen. 4. c. 9. Hawk.
b. 2. c. 25. s. 16. 33. 2 Woodd.
557.

(*e*) 11 Hen. 4. c. 9. 12 Co.
99. 3 Inst. 33. Bac. Abr.
Juries, A. Hawk. b. 2. c. 25.

(*f*) 2 Burr. 1088. 4 Bla. Com.
302, 3. Williams, J. Juries, 1.
Ante, 306.

(*g*) Dick. Sess. 79.

(*h*) Dalt. J. c. 185. s. 9.
Burn, J. Sessions. Dick. Sess.
106. Williams, J. Sessions.
See form Proclamation, post,
last vol. and Dick. Sess. 106.
By the 25 Car. 2. c. 2. s. 2. the
qualification oaths for offices
must be taken between 9 and 12
o'clock.

The commission of the peace is then read (*a*), and the grand jury called; who having taken their places in the box assigned to them, are sworn by the clerk of the peace; first, the foreman, and then the others by three at a time (*b*), all laying their hands on the gospel, proclamation is then made to keep silence while the charge is given to the grand jury. After this, the chairman of the sessions usually delivers his charge to them, relative to the bills about to be submitted to their consideration, the state of the county, and the duties they have to fulfil (*c*). In the performance of this duty, the judicious magistrate will take care not only that his remarks are, in general, suited to the offices which a grand jury have to discharge, but have a plain reference to local objects, events, discussions, and concerns, as far as they properly fall within the limits of his jurisdiction, and seem entitled to his notice. He will strive to allay animosities, to destroy the spirit of party, to discountenance every receptacle of idleness and vice, as well as every vestige of popular barbarity and grossness (*d*). When the charge is concluded, the recognizances to prosecute and give evidence are then called, so that bills may be drawn and prepared (*e*); which being ready, the parties bound to give evidence upon them, are sworn, and sent to the grand jury to give their evidence to them, in the room to which they have retired (*f*); though it is said, that if the matter be weighty or difficult, or if it appear that the prosecution is too indulgently, or too vindictively conducted, the evidence may be heard in court, so that the jury may be the better assisted in the performance of their duty (*g*).

MODE OF
PROCEEDING TO
SWEAR AND
CHARGE
GRAND JURY, &c.

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The dispatch of the business of the sessions is greatly facilitated by the 59 Geo. 3. c. 28. allowing two or more justices to form a court to sit apart from the sessions, by which act it is enacted, "that whenever, and as often as any court of quarter session or general

(*a*) Dick. Sess. 106.

(*b*) Dick. Sess. 113, 14. See form of oath, Dick. Sess. 113, 14. Williams, J. Sessions, post, last vol.

(*c*) Dick. Sess. 113, 14.

(*d*) See Gisborne, Duties of Man, vol. i. 392.

(*e*) Dick. Sess. 115.

(*f*) Dalt. J. c. 185. s. 9. Dick. Sess. 116.

(*g*) Dalt. J. c. 185. s. 9. 3 Hargr. St. Tr. 417. 4 Bla. Com. 303, n. 1. 2 Hale, 159, 160. Hawk. b. 2. c. 25. s. 145, in notes. Jac. Dic. Grand Jury.

MODE OF
PROCEEDING TO
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session of the peace shall be assembled for the dispatch of business thereunto belonging, the justices then present may, on the first day of their being so assembled, take into their consideration the state of the business likely to be brought before them, at such quarter session or general session, and if it shall appear to them that such business, if heard and determined by the whole court, is likely to occupy more than three days, including the day of their being so assembled, it shall and may be lawful for the said justices to appoint two or more justices, one of whom shall be of the quorum, to sit apart from themselves in some place in or near the court, there to hear and determine such business as shall be referred to them, whilst others of the justices are at the same time proceeding in the dispatch of the other business of the same court; and that the proceedings so had by and before such two or more justices so sitting apart, shall be as good and effectual in the law, to all intents and purposes as if the same were had before the court assembled and sitting as usual in its ordinary place of sitting, and shall be enrolled and recorded accordingly." By the second section of the act these regulations for the apportionment of business, need not be renewed at each succeeding session, and by the third section the clerk of the peace is to appoint a person to record the proceedings of such separate court.

Mode of proceeding
at assizes.

At the assizes, the practice is stated to be thus:—When the judges first come into the court, the crier makes proclamation for keeping silence, whilst the commissions of assize and nisi prius, oyer and terminer, and general gaol delivery for the county are read (*a*), and which are thereupon accordingly read by the clerk of the assize, or the clerk of the arraigns (*b*). Then the crier requires the sheriff to return the precepts and writs of assize and nisi prius (*c*); who, if he be absent, may be fined for his non-attendance (*d*). This being done, the clerk of assize calls the *nomina ministrorum*, or names of the justices of the

(*a*) Cro. C. C. 6. See form, post, last vol.

(*b*) Cro. C. C. 6. See forms of commissions, post, last vol.

(*c*) See form of proclamation,

Cro. C. C. 6. 479. Post, last vol.

(*d*) 8 T. R. 615, where see form.

peace, coroners, constables, &c. (*a*) and then the grand jury are called by the crier by their names and additions, and if any one does not appear upon second calling, the crier declares that he will lose one hundred shillings in issue (*b*). Then the marshal or crier swears the jury, the foreman by himself (*c*), and the rest by three at a time, in the same way as the inquest are sworn at sessions (*d*). Proclamation is then made by the crier for silence, whilst his majesty's proclamation against profaneness and immorality is openly read (*e*); after which, proclamation is made for keeping silence whilst the judge delivers his charge to the grand jury (*f*). This charge from the judge is of the same nature as that from the presiding magistrate at sessions, except that it is usually longer, and more elaborate, from the graver nature of the occasion (*g*). Proclamations for justices, coroners, &c. to deliver inquisitions and recognizances taken by them, is then made (*h*). The recognizances to prosecute and give evidence are then called, that the bills may be drawn and prepared in order that they may be presented (*i*). And when these are ready, the parties bound to prosecute and give evidence are called and sworn in court, and sent before the grand jury, who retire to proceed in the duties of their office (*k*). A bailiff is sworn to keep the jury (*l*).

MODE OF
PROCEEDING TO
SWEAR AND
CHARGE
GRAND JURY, &c.

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When the grand jury are thus duly returned, charged, and sworn, they usually serve the whole of the sessions or assizes (*m*). But the court may, in their discretion, command another grand

Time of service.

(*a*) Cro. C. C. 6. See form, C. 7. Burn, J. Sessions. Dick. Cro. C. C. 480 Post, last vol. Sess. 114, and note. Gisb. Dut.

(*b*) Cro. C. C. 480. See form, Man, vol. i. 392.

(*c*) Cro. C. C. 6. 480. See form, Cro. C. C. 6. 481. Post.

(*d*) Ante, 312. Cro. C. C. 7. 481. See form, Cro. C. C. 7. 481. Post, last vol.

(*e*) Cro. C. C. 480. Dick. Sess. 106, 7. See form, Cro. C. C. 480. Post, last vol.

(*f*) Cro. C. C. 7. 481. See form, Cro. C. C. 481. Post, last vol.

(*g*) 4 Bla. Com. 303. Cro. C. C. 7. 481. Post, last vol.

(*h*) Cro. C. C. 7. 481. See form, Cro. C. C. 481. Post, last vol.

(*i*) Burn, J. Sessions. Dick. Sess. 115. See form, Cro. C. C. 481. Post, last vol.

(*k*) 4 Bla. Com. 303. Dalt. J. c. 185. Burn, J. Sessions. Dick. Sess. 116. See forms of calling and swearing, Cro. C. C. 481, 2. Post, last vol.

(*l*) Cro. C. C. 8th edit. 485.

(*m*) 2 Hale, 156. Williams, J. Juries, 1.

TIME OF
SERVICE.

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jury to be returned and sworn, and usually do so on two occasions. The first of these occasions is, when, before the end of the sessions, the grand jury having brought in all their bills are discharged by the court, and after that discharge, either some new offence is committed, and the party taken and brought into gaol, or when, after the discharge of the grand inquest, some offender is taken and brought in before the conclusion of the sessions (*a*). In the former case, there is a necessity to make a special record of the adjournment of the court from day to day; because, otherwise, as the whole sessions are, in contemplation of law, only the first day, the trial will appear to have taken place before the offence was committed, which will be erroneous (*b*). The same observation applies, if it appear upon record, that the grand inquest returned their finding, after the first day of the sessions, without the entry of the adjournment (*c*). And the other instance of a new grand jury being sworn, it is said, is when it is to inquire under the statute (*d*), of the concealment of a former inquest, which provision, though it expressly mentions justices of the peace, extends to the King's Bench, and the sessions of oyer and terminer, for the latter are holden by virtue of a commission of the peace, as well as their higher authorities (*e*). And this was formerly the proper mode of punishing the grand jurors if they refused to present such things as were within their charge, and of which they had sufficient evidence (*f*); but this proceeding is no longer in use, and now the practice is to prefer a bill to another grand jury; or, in case of misdemeanors, where the influence of the party accused may prevent a grand jury from finding the bill, to apply to the Court of King's Bench, for leave to file a criminal information (*g*).

Extent of juris-
diction to pre-
sent.

The grand jury can, in general, inquire of nothing but what arises within the county for which they are sworn to inquire, un-

(*a*) 2 Hale, 156. Williams, J. Juries, I.

(*b*) Sir William Jones, 420. 1 Barnard. 328. 2 Hale, 24. 156. Williams, J. Juries, I.

(*c*) Id. *ibid*.

(*d*) 3 Hen. 7. c. 1.

(*e*) 2 Hale, 156. Williams, J. Juries, I.

(*f*) 2 Hale, 157. 159, 160. Burn, J. Jurors, VI.

(*g*) 1 Sess. Cas. 163.

less expressly enabled to do so by act of parliament(*a*). We have already considered the circumstances in which the legislature have authorized an inquiry into offences, in a different county from that in which they arise (*b*); and, therefore, it is here only necessary to observe, that where a statute authorizes a *trial* in a different county, the grand jury acquire, of course, the right to investigate the complaint.

EXTENT OF
JURISDICTION
TO PRESENT.

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The grand jury being thus sworn, charged, and empowered to execute the duties of their office, the bill must be preferred before them. Previous to this, the prosecutor must cause it to be properly prepared and engrossed on parchment. If the defendant is accused of an offence committed within the county of a city or town corporate, and he elects to prefer his charge, as we have seen he may do, to the assizes for the county adjoining (*c*), he must, ten days before the holding of the sessions, give notice in writing to the defendant, as well as to all those witnesses who have entered into recognizances to give evidence, or the recognizances will not be forfeited by the non-appearance of the parties bound at the time of trial (*d*). If the parties cannot be found to be personally served with the notice, it may be left at their places of residence; but, in such case, though the service will be effectual, the recognizances will not be estreated till the ensuing sessions, in order to enable the parties to excuse their default, by proving that they never were really informed of the prosecutor's design (*e*). In preferring the bill, it should also be observed, that if the offence seem to amount to a felony, and certainly include a misdemeanor, the prosecutor should determine which charge he will bring forward: for the court will discountenance the preferring two indictments for the same offence, one for a felony, and the other for a misdemeanor (*f*), though it does not seem to be absolutely illegal (*g*). And, on an indictment for felony, if the

Of preferring the
bill to the grand
jury.

(*a*) 2 Hale, 162, 3. 4 Bla. Com. 303. Dick. Sess. 117.

(*b*) Ante, 179, &c. as to the venue, and ante, 305, as to the jury of adjoining county taking cognizances of offences committed in county of city or town corporate.

(*c*) Ante, 305.

(*d*) 38 Geo. 3. c. 52. s. 5, 6, 7. 57 Geo. 3. c. 100. See form of notice, post, last vol.

(*e*) 38 Geo. 3. c. 52. s. 6. 51 Geo. 3. c. 100.

(*f*) 2 Leach, 538.

(*g*) 2 Ld. Raym. 922,

OF PREFERING
THE BILL TO
THE GRANDJURY

circumstances amount only to a misdemeanor, the defendant must be acquitted; because, by framing the charge in this manner, he is deprived of the full assistance of counsel, a copy of the indictment, and a special jury (*a*).

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Evidence, &c.
before the grand
jury.

It is not unusual, except in the King's Bench, where the clerk of the grand juries attends them, to permit the prosecutor to be present during the sitting of the grand jury to conduct the evidence on the part of the crown. So on indictments for high treason, where the sovereign himself is the party immediately injured, any of the king's counsel may attend for the same purpose on his behalf, as he cannot prosecute in person (*b*). It seems the defendant has no right to have a counsel or attorney, or any person skilled in the law present, as an advocate, on his behalf, it being a preliminary investigation only, and not conclusive on him (*c*). Any person who may be present on the occasion, is bound not to disclose what may transpire (*d*); and the jurors themselves are, by the terms of their oath, laid under the same obligation; and if they transgress it they are fineable (*e*). Formerly, indeed, they became accessaries to the offence if felony, and if treason, principals (*f*). And, at this day, it is, in general, a high misprision (*g*). But where a witness, examined on the trial, swears directly the reverse of the evidence given before the grand jury, they are at liberty to state this circumstance to the judge, who may direct him to be prosecuted for perjury on the testimony of the grand inquest (*h*). And it has been held that the true object of the secrecy required, is to prevent the evidence produced before the grand jury from being counteracted by subornation of perjury on the part of the defendant (*i*). In the case of an accomplice, who is desirous of giving evidence, the practice is, before the bill is presented to the grand jury, for a brief to be given to

(*a*) 2 Stra. 1133. 1 Leach, 538.
2 Sess. Cas. 378. Cro. C. C. 33.
Ante, 251, 2, and see post, 322,
as to the finding of the grand
jury.

(*b*) Kel. 8.

(*c*) 1 B. & C. 37. 51. and see
3 B. & A. 432. 1 Chit. Rep. 217.

(*d*) Trials, per Pais, 387.

Hawk. b. 2. c. 46. s. 93.

(*e*) 2 Hale, 161. Gisb. Du-
ties of Man, vol. ii. 420.

(*f*) 4 Bla. Com. 126.

(*g*) Id. *ibid*.

(*h*) 4 Bla. Com. 126, Mr. Chris-
tian's note (5).

(*i*) Id. *ibid*.

counsel, to move that the prisoner C. D. may be admitted evidence for the crown, and then the counsel will read the depositions, and if he be satisfied that the evidence of the accomplice C. D. is essential, he makes the motion.

EVIDENCE, &c.
BEFORE THE
GRAND JURY.

The grand jury, in general, hear evidence only in support of the charge, and not in exculpation of the defendant, and it has been said that they ought never to hear any other than that which is produced for the crown (a). But it may be doubted whether, as they are sworn to present the truth which necessarily requires investigation, in case they may not be able to elicit truth from the witnesses for the prosecution, and are actually convinced of that circumstance, they may not require other testimony to assist them in forming their decision (b). The true intention seems to be, that *primâ facie* the grand jury have no concern with any testimony but that which is regularly offered to them with the bill of indictment, on the back of which the names of the witnesses are inserted; their duty being merely to inquire whether there be sufficient ground for putting the accused party on his trial, before another jury of a different description. But if they are unable to satisfy themselves of the truth sufficiently to warrant their determination, they may properly seek other information relative to mere facts, but further than this they cannot proceed (c). Formerly, indeed, it was laid down that the grand jury ought to find the bill if probable evidence be adduced to support it, because it is only an accusation, and the prisoner will afterwards defend himself before a more public tribunal (d). But great authorities have taken a more merciful view of the subject, and considering the ignominy, the dangers of perjury, the anxiety of delay, and the misery of a prison, have argued that the grand inquest ought, as far as the evidence before them goes, to be convinced of the guilt of the defendant (e). What was, therefore, anciently said

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(a) 2 Hale, 157. 4 Bla. Com. 303. Hawk. b. 2. c. 25. s. 145. in notes. As to the duty of a grand juror, see Gisb. Duties of Man, vol. ii. 419, 20.

(b) Dick. Sess. 116. and see Jac. Dic. Indictment. Gisb. Duties of Man, vol. ii. 419, 20.

(c) Dick. J. Indictment, IV. Dick. Sess. 117. Burn, J. Indictment, V.

(d) 2 Hale, 157.

(e) Per Sir John Hawles, 4 St. Tr. 183. 3 St. Tr. 416. 5 St. Tr. 3. 4 Bla. Com. 303. 2 Woodes. 559. 2 Hale, 61.

EVIDENCE, &c. BEFORE THE GRAND JURY. respecting petit treason (*a*), may be applied to all other offences, that since it is preferred in the absence of the prisoner, it ought to be supported by substantial testimonies.

[319] With respect to the *kind* of evidence which a grand jury may receive, it should be observed, that they are bound to take the best legal proof of which the case admits, and it must be given on oath (*b*); and, therefore, the jury cannot, on suspicion that a witness has been tampered with by the prisoner, receive in evidence his written examination in lieu of his parol testimony, and the court will resist an application for the depositions (*c*). And, upon the same ground, on an indictment for perjury in an affidavit made in chancery, they should have the original document, and a mere office copy will not suffice (*d*); so evidence of what third persons said will not be good, in order to support a bill before the grand inquest (*e*). But an accomplice may give evidence before them to support a bill of indictment against the partaker of his guilt; and a bill so found will be sufficient, even though he had not been previously admitted as king's evidence, but had been taken from prison to give evidence by means of an order altogether surreptitious and illegal (*f*). But the grand jury ought not to find an indictment upon the testimony of incompetent witnesses, as of those who have been convicted of conspiracy, or other infamous crime; and, therefore, if in case a bill be presented to them, with such witnesses alone indorsed, on application to the court they will be directed to reject it (*g*). It may, however, be proper to observe, that the prosecutor, however injured by the crime alleged to have been committed, is, in general, a competent witness, except in case of forgery, because the finding of the jury cannot be given in evidence in his favor upon the trial

(*a*) 3 Inst. 25. and see Gisb. Duties of Man, vol. ii. 419, 20.

(*b*) Hawk. b. 2. c. 25. s. 138. If witnesses go before the grand jury without being sworn, and the bill is found, and the prisoner is tried and convicted, it is proper to recommend him for a free pardon, Russ. & Ry. C.C. 401; but see post, 320, n. h.

(*c*) 1 Leach, 514. Hawk. b. 2.

c. 25. s. 138, 139.

(*d*) 1 Sch. & Lef. 232. 3 Camp. 401. As to what sufficient proof of the defendant's having been duly sworn, see 2 Burr. 1189: 2 Campb. 508.

(*e*) 6 T. R. 294. Hawk. b. 2. c. 25. s. 139.

(*f*) 1 Leach, 155.

(*g*) Hawk. b. 2. c. 25. s. 145: in notes.

of a civil action, and the proceedings are regarded as for the public benefit, and not the gratification of private feelings, or the recovery of private property (*a*). And even in the excepted case of forgery, the party whom the fictitious instrument is intended to defraud, may be rendered competent by a release (*b*). If the jury have any doubt with respect to the propriety of admitting any part of the evidence offered to them, they may pray the advice of the court which is sitting (*c*).

EVIDENCE, &c.
BEFORE THE
GRAND JURY.

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In case of high treason against the king's person or government, no indictment can be found without the oath of two witnesses, or a voluntary confession (*d*). For all the statutes on this subject extend as well to the finding as to the trial in open court by the petit jury (*e*); however, one witness to one overt act, and another witness to another overt act will suffice (*f*). The particular shades of distinction which arise in the construction of the statutes of treason will be more fully shewn when we consider the evidence on the trial; and, in general, it is sufficient here to observe, that the rules relating to the evidence, and the competency of witnesses then produced, are equally operative in this stage of the proceedings (*g*). If the grand jury find the bill upon incompetent or improper evidence, yet if the prisoner be afterwards tried on legal and sufficient testimony, it seems that the conviction cannot be shaken (*h*).

All witnesses who are material to the finding of an indictment, are compellable to appear before the grand jury, and give evidence both at the quarter sessions and assizes (*i*). At the assizes or Old Bailey sessions, they may be compelled to attend by subpoena, out of the crown office (*k*); and at sessions the mode is

Mode of compelling attendance of witnesses, and production of documents.

(*a*) Hawk. b. 2. c. 25. s. 145, 2 Ph. & M. c. 10. 7 W. 3. c. 3. in notes. 4 East, 582. (*e*) 1 East P. C. 128. 168.

(*b*) 1 Leach, 150. 157. 2 East P. C. 1003; and see post, chap. on Evidence. (*f*) 1 East P. C. 129. Hawk. b. 2. c. 25. s. 141.

(*c*) Hawk. b. 2. c. 25. s. 145, in notes. Dalt. J. c. 185. s. 9. (*g*) Post, chap. on Evidence.

3 Harg. St. Trials; 417. 4 Bla. Com. 303, n. 1. 2 Hale, 159, 160. (*h*) Hawk. b. 2. c. 25. s. 145. in notes. 1 Leach, 156, 7; but see ante, 318, 19, n. h.

(*i*) 1 Salk. 278. 6 T. R. 295. 8 T. R. 585. Bac. Abr. Evidence, D. Dick. Sess. 118.

(*d*) 1 Edw. 6. c. 12. s. 22. 5 & 6 Edw. 6. c. 11. s. 12. 1 & (*k*) See form, post, vol. iv.

MODE OF
COMPELLING
ATTENDANCE OF
WITNESSES, &c.

also to proceed by subpoena, either from that court or from the crown office (*a*). Another and most usual course is for the justices or coroners who take the informations, examinations, and depositions, to bind the witnesses, under the statutes of Philip & Mary, by recognizance to appear at the next gaol delivery or quarter sessions, to give evidence (*b*); and if the witness refuse to enter into such recognizance, the justice or coroner may commit him, or bind him to his good behaviour to appear at the next gaol delivery or quarter sessions (*c*). But in general, justices have no power to issue a warrant to compel the attendance of a witness refusing to come and appear before them to be examined, preparatory to trial, however material the facts may be which such witnesses could prove (*d*); however, in cases of felony, the statute 2 & 3 Ph. & Mary, c. 10. incidentally gives them such power (*e*). By statute (*f*), any judge or baron of the courts of King's Bench, Common Pleas, or Exchequer, or other superior courts of England or Ireland, is empowered to issue a habeas corpus (*g*) to bring any person detained in prison, who is a material witness, to give evidence before the grand jury, in any court of record. The terms of this provision, of course, extend to the sessions; and, by the same act, justices of great sessions in Wales, and the county palatine of Chester, have the same authority within the limits of their jurisdiction (*h*). And, by a subsequent enactment, the service, in any part of the kingdom, of a subpoena issued out of any court of competent jurisdiction, is equally good service in the county, where the party is required to attend; and, if he neglect to obey its requisition, he may be punished by the court of King's Bench (*i*). If it be necessary to procure an affidavit filed in another court, a motion must be made in that court to take it off the file, and deliver it to the clerk of the

(*a*) 8 T. R. 585. See form, Williams, J. Evidence, III. post, vol. iv.

(*b*) 2 St. Tr. 580. 5th edit. 37. Dalt. J. 111.

(*c*) 2 Hale P. C. 52. 232. Dalt. J. 111. 3 M. & S. 1.

(*d*) 1 Burn, J. 24th edit. 1000.

(*e*) See 3 M. & S. 1. Dalt. J. c. 6. Lamb. 517.

(*f*) 44 Geo. 3. c. 102. s. 1, 2. As to the mode of applying for the writ, see post, chapter on Evidence.

(*g*) See form of habeas corpus, post, last vol.

(*h*) Sect. 2.

(*i*) 45 Geo. 3. c. 92. s. 3. 8 T. R. 585.

crown (*a*). When an offender who has escaped from one part of the United Kingdom, is to be tried in another, under the 51 Geo. 3. c. 100. (13 Geo. 3. c. 31.) and 44 Geo. 3. c. 92, by virtue of the statute 45 Geo. 3. c. 92. s. 3. service of a subpœna on a witness in one part of the United Kingdom to give evidence in another part, is as effectual as if the witness had been served with the subpœna in that part of the United Kingdom where he is required to appear, and upon default notified, by a certificate under the seal of the court whence the subpœna issued, to the court of King's Bench in England or Ireland respectively, or of the high court of Justiciary in Scotland, he is liable to be punished as for a contempt of those courts respectively. In general, in criminal cases, it is not necessary to tender the expences of the witness, in order to compel him to attend (*b*). By the 4th section, however, of the 45 Geo. 3. c. 92, above-mentioned, the witness cannot be punished for a default in the case within the provision of that act, unless the reasonable expences of coming and attending to give evidence, and of returning, have been tendered to him.

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If a witness neglect to obey a subpœna, on an affidavit that he was material to the prosecutor's case, and was duly served with the subpœna, the court of King's Bench will grant an attachment against him, on which he may be taken and committed till after the trial of the offender, when an order will be made for his discharge (*c*). If he neglect to appear after a recognizance entered into by him, such recognizance will be forfeited, and he will be subject to the consequences of such forfeiture (*d*). So if he be bound over to appear, and neglect to do so, he may be committed for a contempt. So if he appears but refuses to be sworn, he may be committed for a contempt, from which liability not even the privilege of peerage can excuse him (*e*). But though in general all must obey a subpœna, it has been holden that it is

(*a*) 1 Sch. & Lef. 232. See 295. 3 Burr. 1687. Dick. Sess. form, post, vol. iv. 118.

(*b*) 2 St. Tr. 124. 1 Burn, J. 24th ed. 1001. Hawk. b. 2. c. 46. s. 173, and see post, as to the expences of witnesses.

(*c*) 8 T. R. 585. 6 T. R.

(*d*) See ante, 91, 2.

(*e*) 1 Salk. 278. Bac. Abr. Evidence, D. Dick. Sess. 90. 3 M. & S. 1.

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not incumbent on an attorney to deliver up papers confidentially entrusted to him by his client on a subpoena duces tecum (*a*); though he ought to attend, and when called, object to their production (*b*). Each witness, before he leaves the court, is sworn that the evidence he shall give to the grand inquest upon the bill of indictment against the defendant, shall be the truth, the whole truth, and nothing but the truth (*c*); and, if he be guilty of perjury, he will be subject to a prosecution for that offence (*d*). In case of high treason, the defendant is entitled to a copy of the names of the witnesses examined before the grand jury by virtue of a particular statute (*e*), but the right extends to no inferior offences, nor can the court grant it in their discretion (*f*). And though the names of the prosecutor and witnesses usually appear on the back of the bill, this is not essential (*g*).

Of the finding of
the grand jury.

After the grand jury have heard the evidence, they are to decide whether the bill shall be found or rejected. In the finding, twelve of the jurymen, at least, must concur, but if the rest of the jury dissent, the finding will still be valid (*h*). The jury cannot find one part of the same charge to be true, and another false, but they must either maintain or reject the whole; and, therefore, if they indorse a bill of indictment for murder, "*billa vera se defendendo*," or *billa vera* for manslaughter and not for murder, the whole will be invalid, and may be quashed on motion (*i*). It has indeed been said, that if a grand jury find a bill for manslaughter on an indictment for murder, the words "of malice aforethought," and "did murder," may be struck out, and the indictment amended by reducing it to a mere accusation of

(*a*) 3 Burr. 1687. The court of Chancery will not compel a clerk of commission to attend at the Old Bailey with documents, 1 Atk. 222.

(*b*) 9 East, 485, 6.

(*c*) Cro. C. C. 482.

(*d*) See post, vol. ii. 318 to 474, precedents of Indictments for perjury.

(*e*) 7 Anne, c. 21. s. 11.

(*f*) 4 T. R. 693.

(*g*) 4 M. & S. 208, 9.

(*h*) 2 Hale, 161. 4 Bla. Com.

306. Bac. Abr. Juries, A.

(*i*) 2 Rol. Rep. 52. 3 Bulst. 206. 1 Rol. Rep. 407, 8. 1 Sid. 230. Cowp. 325. 2 Hale, 158. Hawk. b. 2. c. 25. s. 2. Com. Dig. Indictment, A. Bac. Abr. Indictment, D. Cro. C. C. 32. Burn, J. Indictment, VII. But in 3 Burn, J. 24th edit. 44, a case is cited where it is said the jury may find a true bill for manslaughter only on an indictment for murder.

the inferior offence in the presence of the jury (*a*). This, however, seems questionable, and it is agreed, that it is the safer course to prefer a fresh indictment for manslaughter; and so where the bill is originally for burglary, to prefer an indictment for theft, which is, in substance, included (*b*). This rule, however, does not extend to the finding of different counts; for, as each count contains a distinct charge, the jury may return a true bill upon one of them only, and the finding will be as valid as if no other had ever been inserted (*c*). And an indictment against several may be found, against one or more, and rejected as to the rest. It is said indeed, that in case of an indictment for murder being presented, though it appears to the jury that the facts amount only to manslaughter or justifiable homicide, yet if the fact of the killing by the defendant be established, they ought to find the bill for murder, in order to ensure the future security of the defendant; for, if they throw out the bill, he may, at any distance of time, be again indicted, which can never take place after an open acquittal (*d*). It is a rule, that the finding of the jury must be absolute and not conditional: and therefore a finding "*si domus non fuit in possessione dominæ reginæ tunc billa vera*," is of no avail, and cannot be made the foundation of any further proceedings (*e*). So, if in case of libel, they find "*billa vera*," as to the words "*sed utrum maliciose ignoramus*," for nothing can be done upon such a presentment (*f*).

OF THE FINDING
OF THE
GRAND JURY.

During the whole of their proceedings, the grand jury are protected in the discharge of their duty, and no action or prosecution can be supported against them in consequence of their finding, however it may be dictated by malice, or destitute of probable foundation (*g*). If the grand jury will not find a bill,

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(*a*) 2 Hale, 162. Bac. Abr. Indictment, D.

(*b*) 2 Hale, 162. Bac. Abr. Indictment, D.

(*c*) 1 Cowp. 325. Hawk. b. 2. c. 25. s. 2. Com. Dig. Indictment, A. in notes. Bac. Abr. Indictment, D. Cro. C. C. 32. Burn, J. Indictment, VII. and Jurors, VI. Ante, 248.

(*d*) 2 Hale, 158. Bac. Abr. Indictment, D.

(*e*) Yelv. 15. Hawk. b. 2. c. 25. s. 2. Com. Dig. Indictment, A. Bac. Abr. Indictment, D.

(*f*) 1 Leon. 287. Hawk. b. 2. c. 25. s. 2. Com. Dig. Indictment, A. Bac. Abr. Indictment, D.

(*g*) Hawk. b. 1. c. 72. s. 5. 2 Hale, 162. 1 T. R. 513, 14. 535. 1 Lord Raym. 469.

OF THE FINDING OF THE GRAND JURY. the court may impanel another inquest, according to the 3 Hen. 7. c. 1, to inquire of their concealments; but fines cannot be set on them (a).

The mode in which the grand jury formerly returned the result of their inquiries to the court, was, by indorsing on the back of the bill, if thrown out, "*ignoramus*," or "we know nothing of it," intimating, that though the accusation might possibly be true, no facts had appeared in evidence to warrant that conclusion; and if found "*billa vera*," or, if there were several returned at the same time, "*quod separales presentes sunt billæ veræ*" (b). And it was holden, that if the indorsement was "*quæ est billa vera*," instead of "*quod est*," the finding was defective (c). But, at the present day, the indorsement is in English absolutely; if found, "a true bill," and if rejected, "not a true bill," or, which is the better way, "not found;" in which case the party is discharged without further answer (d). The indorsement "a true bill," made upon the bill, becomes part of the indictment, and renders it a complete accusation against the prisoner (e). When the jury have made these indorsements on the bills, they bring them publicly into court; and the clerk of the peace at sessions, or clerk of assize on the circuit, calls all the jurymen by name, who severally answer to signify that they are present; and then the clerk of the peace or assize asks the jury whether they have agreed upon any bills, and bids them present them to the court (f); and then the foreman of the jury hands the indictments to the clerk of the peace, or clerk of assize, who asks them if they agree the court shall amend matter of form, altering no matter of substance, to which they signify their assent (g). This form is necessary, in order to enable the court to alter any clerical mistake, because they have no authority to change the form of the accusation, with-

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(a) 2 Hale, 160, 1; and see post, as to the indemnity and punishment of jurors.

(b) Com. Dig. Indictment, A.

(c) 8 Mod. 296. Com. Dig. Indictment, A.

(d) 4 Bla. Com. 305.

(e) Yelv. 99. Com. Dig. Indictment, A.

(f) 4 Bla. Com. 306. Cro. C. C. 7; see form, Cro. C. C. 7, and post, last vol.

(g) Cro. C. C. 7. Dick. Sess. 158; see form, Cro. C. C. 7. Dick. Sess. 158. Post, last volume.

out the consent of the accusers (*a*). After this is done, the clerk of the peace reads over the names of offenders and offences in every indictment, and whether the bill be found or thrown out, as indorsed by the grand jury, and makes a private mark or cross upon those which are rejected, and usually files the bill, though this is not necessary (*b*). At the close of the sessions or assizes, all those prisoners against whom no bills are found, are discharged by proclamation (*c*).

OF THE FINDING
OF THE
GRAND JURY.

If the bill be not found, or if the indictment is defective, a new and more regular one may be framed, and sent to the same or another grand jury for their finding (*d*). And thus, after the finding of a bill for murder, when the facts amount to petit treason, the crown may procure the indictment to be quashed, and prefer another for the petit treason (*e*). The mere insufficiency, therefore, of the finding, affords no future indemnity to the party indicted.

Of preferring a
fresh indictment.

(*a*) Ante, p. 297. Rep. temp. Hardw. 203. 2 Stra. 1026.

(*d*) 4 Bla. Com. 305, 6. Bac. Abr. Indictment, D. 2. Woodes.

(*b*) Dick. Sess. 158. 4 Harg. St. Tri. 745.

555, 6. Ante, p. 304.

(*e*) Fost. 104. 106.

(*c*) Cro. C. C. 8.

CHAPTER VII.

OF THE CAPTION OF THE INDICTMENT.

WE have now to consider the *caption* of the indictment, for although, in general, this form does not appear until the return to a writ of certiorari, or a writ of error, yet, in case of high treason, the defendant is entitled to a copy of it in the first instance, after the finding of the indictment, in order that he may be acquainted with the names of the jurors by whom it was presented (*a*). The caption is no part of the indictment itself, it is only a copy of the style of the court at which the indictment was found (*b*). It is a formal statement of the proceedings, describing the court before which the indictment was found, the time and place where it was found, and the jurors by whom it was found, and these particulars it must set forth with sufficient certainty (*c*). The record of the prosecution will not be perfect without the caption, and would not be admissible in evidence (*d*). The following form is given by Lord Hale (*e*); other more modern precedents will be found in the following volume.

[327] “Norfolk. At a general sessions of the peace, holden at S. in the county aforesaid, on the fifth day of October, in the twenty-fifth year of the reign, &c. before A. B., C. D., and their fellows, justices of our said lord the king, assigned to keep the peace of our said lord the king, and also to hear and determine divers felonies, trespasses, and other misdemeanors in the same county committed, by the oath of G. H., E. F., &c. good and lawful men of the said county, sworn and charged to inquire

(*a*) 1 East P. C. 113. Fost. 2. Abr. Caption.
 (*b*) 1 Saund. 250, d. n. 1. (*d*) 2 Stark. 183.
 (*c*) 2 Hale, 165. Hawk. b. 2. (*e*) 2 Hale, 165. See forms,
 c. 25. s. 16, 17. 113, 119, 120. Burn, J. Indictment, IX. Post,
 Williams, J. Indictment, IV. last vol.
 Burn, J. Indictment, IX. Bac.

for our said lord the king, and the body of the said county, it is presented," &c.

When the indictment is returned from an inferior court, in obedience to a writ of certiorari, the statement of the previous proceeding sent with it, is termed the *schedule*, and from this instrument the caption is extracted (*a*). When thus taken from the schedule, it is entered upon the record, and prefixed to the indictment, of which, however, it forms no part, but is only the preamble, which makes the whole more full and explicit (*b*). In cases of removal by certiorari, its principal object is to show that the inferior court had jurisdiction, and therefore a certainty in that respect is particularly requisite (*c*). Care must be taken duly to set it forth, for if there be no caption, or a defective one, the proceedings may be demurred to for its omission (*d*); though the courts will, as we shall hereafter see, allow an amendment. We will now consider the parts of the caption in the order in which they occur.

The name of the county in which the indictment was presented, as "Middlesex," must either be stated in the margin, or appear in the body of the caption (*e*). It is always usual to state it, not only in the margin, but in the body of the caption; and, therefore, it is safest to adhere to this form, although the better opinion is, that if it be referred to as the *county aforesaid*, as in the preceding form, no objection on that account can be supported (*f*).

The caption must also set forth the court where the indictment was found, as at "a general session of the peace," "the general session of oyer and terminer for Middlesex," &c. so that it may appear to have jurisdiction (*g*). It is sufficient to allege the in-

County in margin.

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Court where indictment found.

(*a*) 1 Saund. 309, a. n. 2.

(*b*) 2 Hale, 165. Bac. Abr. Indictment, J. Burn, J. Indictment, IX. Williams, J. Indictment, IV.

(*c*) 2 Sess. Cas. 316. Andr. 138.

(*d*) 3 Salk. 188. 1 T. R. 319.

(*e*) 2 Hale, 165, G. Burn, J.

Indictment, IX.

(*f*) 1 Saund. 308, n. 1. Cro. Eliz. 490. 3 P. Wms. 439. Ante, 327, acc. Cro. Eliz. 606. 733. 751, semb. contra.

(*g*) 2 Hale, 166. Hawk. b. 2. c. 25. s. 16, 17. 118, 119, 120. Williams, J. Indictment, IV.

COURT WHERE
INDICTMENT
FOUND.

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dictment to have been taken at the general sessions of the peace of the county (a), but if it merely allege it to have been taken at a sessions *in* the county, it seems to be the better opinion that the caption will be invalid, though perhaps it might be cured by reference to the venue in the margin (b); so, if it be stated that the indictment was taken before I. S. steward, without showing to whom or in what court (c), or that an inquest of death was taken upon view of a body, before I. S. without adding that he was coroner; and, even stating that, and yet omitting to shew that he acted in that capacity for the district in which the inquisition was taken, the caption will be erroneous (d); but it is sufficient if he be described as coroner *in* the county, because the court will intend him to hold that office for the whole (e). It is laid down, that if the session be holden by virtue of three commissions, as of gaol delivery, of oyer and terminer, and of the peace, if it be returned at a session holden before the justices, and the record be made up, as upon all three commissions, if they have jurisdiction to take the indictment by one of these; the caption will be good, though they are not enabled so to do by the others (f). But a caption setting forth that the indictment was taken "*ad magnam curiam cum leta tentam*" is bad, though "*ad magnam curiam et ad letam*," would be good, for *cum letâ* does not describe any court possessing jurisdiction (g); so it would be sufficient to allege that it was taken at a court leet holden with a court baron, though it would be otherwise if both courts had jurisdiction, and their modes of proceedings were different (h). And the caption of an indictment taken at a court-leet need not show how the court was constituted, whether by grant or prescription (i); but this precaution may be necessary when it

(a) 1 Sid. 147. Hawk. b. 2. c. 25. s. 120. Bac. Abr. Indictment, 1.

(b) 1 Keb. 668. 2 Keb. 133. 128. 1 Lev. 304. Hawk. b. 2. c. 25. s. 120. Bac. Abr. Indictment, 1. 1 Keb. 635. Cro. Eliz. 490.

(c) Hawk. b. 2. c. 25. s. 119. Bac. Abr. Indictment, 1.

(d) Cro. Eliz. 193. 2 Rol. R. 82. Hawk. b. 2. c. 25. s. 119. Bac. Abr. Indictment, 1.

(e) 4 Co. 41. Hawk. b. 2. c. 25. s. 119. Bac. Abr. Indictment, 1.

(f) 2 Hale, 166.

(g) 2 Keb. 139. 1 Salk. 195. Hawk. b. 2. c. 25. s. 124. Bac. Abr. Indictment, 1.

(h) 1 Salk. 195. Hawk. b. 2. c. 25. s. 124. Bac. Abr. Indictment, 1.

(i) 1 Salk. 200. Hawk. b. 2. c. 25. s. 125. Bac. Abr. Indictment, 1.

is holden by virtue of a special commission (*a*). "Indeed it is in no case necessary to set forth the foundation of the court's authority, if it be exercised in the course of its ordinary jurisdiction (*b*).

COURT WHERE
INDICTMENT
FOUND.

Next to the statement of the court, follows the name of the *place* and *county* where it was holden, and which must, in all cases, be inserted (*c*); and, though it may suffice, after naming a place, to refer to "the county aforesaid," yet unless there be such express reference to the county in the margin, or it be repeated in the body of the caption, it will be insufficient (*d*). This is essential in order to show that the place is within the limits of the jurisdiction; and, therefore, whether the caption wholly omit the place, or do not state it with sufficient certainty, the proceedings will be alike invalid though amendable (*e*); as if it state to be taken only at the town, without adding "*the county aforesaid*," the omission will vitiate (*f*). And in York, where there are three ridings, it will not be even sufficient to state the county in general, but the particular district must also be specified (*g*); so also in Lincolnshire where there are three divisions, viz. the part of Holland, the part of Kesteiven, and the part of Linsey, the like specification must be adopted (*h*). But the caption of an inquisition, alleging that it was taken at B. before I. S. coroner, of the king's liberty, at B. aforesaid, is good without expressly showing that B. is within the liberty of B. for it must be intended (*i*).

Place where
court holden.

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After the statement of the place, the caption must proceed to specify the day and year on which the indictment was pre-

Time of taking
indictment.

(*a*) Fost. 3; see form, post, last vol. 193.

(*b*) 4 Burr. 2085.

(*c*) Dyer, 69 a. Cro. Jac. 276. 2 Hale, 166. Hawk. b. 2. c. 25. s. 128. Bac. Abr. Indictment, I.

(*d*) Ante, 327, 8. 2 Hale, 180. 3 P. Wms. 439. 1 Saund. 308, n. 1. Cro. Eliz. 137. 606. 733.

(*e*) Cro. Jac. 276. 2 Hale, 166. Hawk. b. 2. s. 25. s. 128. Bac. Abr. Indictment, I.

(*f*) Cro. Eliz. 137. 606. 733. 751. 2 Hale, 166. Hawk. b. 2. c. 25. s. 128. Bac. Abr. Indictment, I. Williams, J. Indictment, IV.

(*g*) 2 Hale, 166. Hawk. b. 2. c. 25. s. 34. Cro. Jac. 276, 7. See forms, post, last vol.

(*h*) Cro. Jac. 256, 7.

(*i*) 5 Co. 120, 1. Hawk. b. 2. c. 25. s. 128. Bac. Abr. Indictment, I.

TIME OF TAKING
INDICTMENT.

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sented (a). And if it describe the session to have been holden on an uncertain or impossible day, as *ad Festum Epiphaniæ* instead of *Epiphaniæ* (b), or if it merely lay the day of the week (c), or lay the year as the year of the king, without stating what king (d), or set forth the time in any figures but Roman (e), it has been held, that the caption will be invalid. So if the time expressed be repugnant or contradictory, the mistake will be fatal (f). And if the indictment was taken at an adjourned sessions, it must be shown when the original sessions commenced, as well as when the bill was preferred, in order to show that it is within the time prescribed by the statute (g); but if the year of the king be inserted, it is not necessary to state the year of our Lord; and if the latter be erroneously mentioned, it may be rejected as surplusage (h). The indictment should be alleged to be taken in the *present* and not in the *past* tense (i), though perhaps at the present day the objection might not be material (k).

Names of justices, addition, and authority.

The averment of time is followed by a proper description of the justices before whom the indictment was presented. The names of the justices should be set out (l), but it is not necessary to state all of them, and it will suffice to name so many as the law requires to form the session at which the indictment was preferred, and to allude to the rest by the terms "and others their fellows (m)." Thus a caption of an indictment at the

(a) Hawk. b. 2. c. 25. s. 127. Bac. Abr. Indictment, I. Williams, J. Indictment, IV.

(b) 2 Stra. 698. 2 Sess. Cas. 5. Hawk. b. 2. c. 25. s. 127, n. 22. Bac. Abr. Indictment, I. Williams, J. Indictment, IV.

(c) 4 Co. 48. Hawk. b. 2. c. 25. s. 127. Bac. Abr. Indictment, I. Williams, J. Indictment, IV.

(d) 2 Keb. 582. Hawk. b. 2. c. 25. s. 127. Williams, J. Indictment, IV.

(e) 2 Keb. 123. 1 Mod. 78. Hawk. b. 2. c. 25. s. 127. Bac. Abr. Indictment, I. Williams, J. Indictment, IV. 1 Stra. 261.

(f) 1 T. R. 316. 1 Leach, 425. Kenyon's Rep. 255.

(g) 2 Stra. 865. 2 Sess. Cas. 17. 20. 1 Barnard, 327, 8. Hawk. b. 2. c. 22. s. 127, n. 22. Bac. Abr. Indictment, I. Williams, J. Indictment, IV.

(h) 1 Mod. 78. Hawk. b. 2. c. 25. s. 127. Bac. Abr. Indictment, I. Williams, J. Indictment, IV.

(i) 1 Sid. 229, 230. 1 Keb. 37. 823. 4 Co. 48. Hawk. b. 2. c. 25. s. 127. Bac. Abr. Indictment, I. Williams, J. Indictment, IV.

(k) 1 T. R. 316. 320.

(l) Cro. Eliz. 738. Williams, J. Indictment, IV.

(m) 2 Hale, 166. Williams, J. Indictment, IV.

sessions of the peace should name at least two (*a*), and under a commission of oyer and terminer four at least must be named (*b*); But although in all commissions of oyer and terminer, gaol delivery, and of the peace, there are some that are of the quorum, without whom no session can be held, no particular mention need be made of those who are of the quorum; but it is sufficient, if *in fact*, there was one of them actually present at the session (*c*). If, however, an act of parliament expressly limits the offence which it creates to be heard and determined by two or more justices, one of whom must be of the quorum, the caption should state whereof A., &c. is one of the quorum, and this is the usual course in the return of orders made by two justices, concerning illegitimate children, upon the 18 Eliz. c. 3, because the provisions of the statute are express, and must be strictly pursued (*d*). The power of the persons so constituting the court to take the indictment must also appear, and they must be described as justices of the peace, justices of gaol delivery, assigned, &c. “to deliver the gaol,” “to hear and determine,” “to keep the peace, &c.” (*e*). And, therefore, if the word “*assigned*” be omitted, the caption will be invalid (*f*). It ought also to notice the authority of the justices to hear and determine felonies, &c. and several indictments have been quashed in consequence of this omission (*g*), though if the justices of the peace before whom the indictment was found, necessarily as such, had jurisdiction over the offence, the statement of the authority in the caption seems unnecessary, as in case of an indictment at sessions for a forcible entry (*h*). It should seem also sufficient to allege, that the justices were assigned to hear and determine offences of the same nature as that for which the indictment was found, without stating the whole of their power. Anciently it was thought necessary to describe them either as the king’s justices or as

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(*a*) 2 Hale, 116. Burn, J. Indictment, IX. b. 2. c. 25. s. 123. Bac. Abr. Indictment, I.

(*b*) 1 Saund. 249 a. n. 1.

(*g*) 2 Hale, 166. 1 Vent. 33.

(*c*) 2 Hale, 166. Hawk. b. 2. c. 25. s. 124. 4 Burr. 2034, 5.

1 Stra. 442. 1 Saund. 263, n. 5.

(*d*) 2 Hale, 167.

Hawk. b. 2. c. 25. s. 121. Bac. Ab. Indictment, I. Williams, J.

(*e*) 2 Hale, 166.

Indictment, IV.

(*f*) 1 Saund. 263, n. 5. Hawk.

(*h*) Cro. Jac. 634.

NAMES OF
JUSTICES, &c.

justices of the public peace (*a*), but this is not now regarded as requisite (*b*), nor is it necessary to show by whom the justices were appointed (*c*); and if any mistakes arise in relation to the names of the justices, the court may order them to be amended (*d*).

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Oath and names
of jurors.

We come next to the statement of the oath, and the names of the jurors, "by the oath of, &c." The indictment must in all cases be shown to have been taken *upon oath*, and if this allegation be omitted, the caption cannot be supported (*e*). The names of the jurors are, in cases of treason, inserted, and although there are some precedents which do not specify them (*f*), it seems to be settled that the *schedule* returned to the writ of certiorari with the indictment, will be bad without them (*g*). But it is quite clear that there is no occasion to set forth the names upon the record in the King's Bench, or to annex them to the indictment; but that in the caption, as it appears in the court, they may be wholly omitted, this being the established practice of the crown office (*h*). It must, however, be shown on the face of the record, that the bill was found by at least twelve jurors, or it will be insufficient (*i*). And it has also been laid down, that they must be described as "good and lawful men," (*k*) but this does not seem to be absolutely essential, especially when the indictment is found in a superior court, because all men shall be so regarded until the contrary appear (*l*). The caption must then state that they are

(*a*) 1 Lev. 175. 2 Keb. 647.
1 Sid. 247. 422.

(*b*) 2 Keb. 385. Hawk. b. 2.
c. 25. s. 122. Bac. Abr. Indict-
ment, I.

(*c*) 4 Burr, 2084, 5.

(*d*) 4 East, 174.

(*e*) 2 Keb. 676. 1 Keb. 329.
1 Sid. 140. 3 Mod. 202. 2 Hale,
167. Hawk. b. 2. c. 25. s. 126.
Bac. Ab. Indictment, I. Burn, J.
Indictment, IX. Williams, J.
Indictment, IV.

(*f*) 1 Saund. 249.

(*g*) 2 Roll. Ab. 82. 2 Hale,
167. 1 Saund. 248, n. 1. Hawk.
b. 2. c. 25. s. 126. Bac. Ab. In-
dictment, I. Burn, J. Indict-
ment, IX. Williams, J. Indict-

ment, IV.

(*h*) 1 Saund. 248, n. 1. 249,
n. 1. 2 Stra. 702. 4 East, 174.
id. n. b. Andr. 143.

(*i*) Cro. Eliz. 654. 2 Hale,
167. Hawk. b. 2. c. 25. s. 16,
126. 1 Saund. 248, n. 1. 4 East,
175, 6. Andr. 230. Bac. Abr.
Indictment, I. Burn, J. Indict-
ment, IX. Williams, J. Indict-
ment, IV.

(*k*) 2 Hale, 167. Cro. Eliz.
751. 1 Keb. 629. Cro. Jac. 635.

(*l*) 2 Keb. 366. Hawk. b. 2.
c. 25. s. 16. 126. Bac. Ab. In-
dictment, I. Burn, J. Indict-
ment, IX. Williams, J. Indict-
ment, IV.

"of the county aforesaid," or other vill or precinct for which the court had jurisdiction to inquire; and if these words are omitted, the whole will be vicious (*a*).

OATH AND
NAMES OF
JURORS.

The jurors are further described as *sworn and charged to inquire for our said lord the king and the body of the said county* (*b*). Formerly, indeed, it was considered to be necessary to prefix the words "*then and there*" to the word "*sworn*" (*c*), but they are not now usual, and indeed if the words "*by or upon their oath*" be introduced, the omission of the whole clause will not prejudice (*d*), and the term "*impanelled*" need not ever be used, for this will be sufficiently intended (*e*). But if it proceed "*who say*" without saying "*upon their oath*," the caption will be invalid (*f*). The conclusion should be it *is* presented, in the *present* and not in the *past* tense (*g*), though a mistake in this respect would probably not now be regarded as material (*h*). In an indictment in the next adjoining county for an offence within a city and county, when the record is regularly drawn up, it seems necessary to state in the caption that the former is the next adjoining county, though this is not necessary in the indictment itself (*i*).

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The caption formerly concluded "it is presented that, &c." but the preferable form is "it is presented in manner following," that is to say, "Middlesex, to wit. The jurors, &c." and then copy the indictment. But this mode of stating the county seems to be unnecessary, when the body of the indictment refers to it as the county aforesaid, without having mentioned any other county to which it might be referred, because the intention cannot be mistaken (*k*).

Conclusion of
caption.

(*a*) Cro. Eliz. 677. 2 Keb. 160. 2 Hale, 167. Hawk. b. 2. c. 25. s. 16. 126. Bac. Ab. Indictment, I. Burn, J. Indictment, IX. Williams, J. Indictment, IV.

(*b*) 2 Hale. 167, 8.

(*c*) 2 Stra. 901. 1 Mod. 27. 1 Vent. 51. 2 Keb. 583. Hawk. b. 2. c. 25. s. 126. Bac. Ab. Indictment, I.

(*d*) 1 Ld. Raym. 710, acc. 3 Salk. 187, cont.

(*e*) 3 Salk. 191. Gilb. L. & E. 242.

(*f*) 2 Hale, 168. 1 Ld. Raym. 710. Cro. Eliz. 654. 3 Salk. 187.

(*g*) 1 Sid. 229, 230. 1 Keb. 37. 823. Hawk. b. 2. c. 25. s. 127. Bac. Ab. Indictment, I. Williams, J. Indictment, IV.

(*h*) 1 T. R. 320.

(*i*) Russ. & Ry. C. C. 179.

(*k*) 1 Saund. 308, n. 1; but see Cro. Eliz. 606, 738, 751.

CONCLUSION OF
CAPTION.

If two or more indictments are affixed to the same schedule, and it is intended to describe them as several and distinct, they should not be stated as several "*indictments*" but as "*bills*," for they only become entitled to the former appellation after they have been presented (*a*).

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Of quashing and
demurring.

When there is any material defect in the caption, the court may in their discretion either quash it, or leave the defendant to demur, as in case of the indictment itself (*b*); so that the observations we have already made on that subject, will also be applicable here, and therefore it would be useless to repeat them (*c*). Any objection to the jurisdiction of the inferior court, apparent from the caption as well as to the subject-matter of the indictment itself, may be taken advantage of upon demurrer (*d*).

Of amending the
caption.

But though the caption, like the indictment itself, may, if defective, be either quashed by the court or demurred to on the part of the defendant, it differs materially from it in its capacity of amendment, for the return to the court is merely a ministerial act, and ministerial acts may be amended at any time according to the common law (*e*). It has, indeed, been frequently holden, that a mistake of the clerk in making up the record can be amended only in the term in which the return is made, and not at any subsequent period (*f*); but the contrary has also been often determined (*g*), and is so settled after considerable investigation, upon the ground that ministerial acts are at any time amendable, and that the alteration in the caption is not to alter the return, but to make the copy correspond with the original (*h*). And agreeably to this resolution, the return to the writ of cer-

(*a*) 1 Ld. Raym. 592. 1 Salk. 376.

(*b*) Hawk. b. 2. c. 25. s. 146. Bac. Ab. Indictment, K.

(*c*) See ante, 299.

(*d*) 1 T. R. 316. 2 Leach, 425.

(*e*) 1 Saund. 249. 250, a. 3 Mod. 167. Comb. 70, 73.

(*f*) Sir W. Jones, 420. 1 Roll. Ab. 196. Style, 85. 8 Co. 156, 157. Bro. Ab. Amendment, 32. 2 Sess. Cas. 9. 1 Sid. 155, 175.

2 Hale, 168. 2 Ld. Raym. 963, 1039. 6 Mod. 273, 278. 1 Vent. 344. Hawk. b. 2, c. 25. s. 97. Bac. Abr. Indictment, G. 11.

(*g*) 3 Mod. 167. Comb. 73. Cro. Jac. 502. 276, 7. 1 Stra. 138. 2 Ld. Raym. 1518. 4 Burr. 2527. 1 Sid. 244. 2 Bulstr. 35. 2 Stra. 343. 4 Bla. Com. 407. 2 Roll. Rep. 59.

(*h*) 1 Saund. 249, n. 1. 4 East, 175. 3 Mod. 167.

tiorari has been amended by rule of court, by inserting the time when the quarter sessions were holden, and the names of the justices who were present, and the names of the jurors by whom the indictment was presented, though the latter is now unnecessary (*a*); and the entry-roll and record of Nisi Prius have been altered to make them agree with the amended caption after the term in which the certiorari was returned, and even after a general verdict of guilty (*b*). But it has been said, that the caption of an inquisition cannot be amended at any time after it is filed, any more than the body, because it is drawn at the time with the indictment itself, and forms a part of the accusation, while in other cases it is merely made up from the schedule by the clerk of the court, as its ministerial officer (*c*).

OF AMENDING
THE CAPTION.

(*a*) Ante, 333.

(*c*) Hawk. b. 2. c. 25. s. 97;

(*b*) 4 East, 175, 6. 3 Mod. but see Stark. 261.
167.

CHAPTER VIII.

OF PROCESS.

WE are to inquire, in the next place, into the manner of issuing process after indictment found, to bring in the party accused to answer it. We have hitherto supposed him to have found bail, or to be in custody before the finding of the indictment; in which case he is, as soon as convenience admits, arraigned and put upon his trial. But, if he be not taken, or do not appear, process must issue, for the purpose of bringing him into court, in order to defend himself against the charge; for though a bill may be preferred and found against a person in his absence, this being merely an *ex parte* proceeding, to which, if present, he could make no opposition, yet in general no indictment can be tried unless he personally appear; a provision founded upon a principle of equity in all cases, and the express enactment of the statute 28 Edw. 3. c. 3. in capital ones, that no man shall be condemned without being brought to answer by due process of law (*a*).

[338] *Process* is so denominated because it *proceeds* or issues forth By whom issued. in order to bring the defendant into court, to answer the charge preferred against him, and signifies the writs or judicial means by which he is brought to answer (*b*). That proceeding which is called a warrant before the finding of the bill, is termed process when issued after the indictment has been found by the jury (*c*). Wherever the king grants an authority of oyer and terminer, the power to issue process is incidentally given; for as there can be no inquiry respecting offences, without the presence of the party,

(*a*) 4 Bla. Com. 318.

(*b*) Dalt. J. c. 193. Com. Dig. Process, A. 1. Burn, J. Pro-

cess. Williams, J. Process.

(*c*) Dalt. J. c. 193. Burn, J. Process. Williams, J. Process.

BY WHOM
ISSUED.

wherever the power is entrusted of determining the former, there must also be authority to compel the latter (*a*). For the same reason, justices of the peace, whenever they are authorized to inquire, hear, and determine, may thus compel the defendant to appear; and, indeed, this is expressly declared by the words of their commission (*b*). The same observations apply, of course, to all magistrates whatsoever, who are invested with the power to try offenders; but it is said, that under the commission of gaol delivery, a *capias* cannot be issued, as the jurisdiction is limited and confined to the delivery of the gaol (*c*). It seems a coroner may (*d*).

From the very nature and object of process, it follows that there can be no necessity for it when the defendant is present in court, but only when he is absent (*e*). If therefore an indictment be found in the King's Bench against a party already in custody, he may be brought up and charged with the indictment (*f*); but if the defendant, not being in actual custody, voluntarily appear in court, it is discretionary, and not obligatory in the court to detain him; but they may leave him to be taken by the ordinary legal process (*g*). When not necessary. [339]

Whenever process issues from the king's courts, it ought to be in the name of his majesty (*h*). And if it issue from the court of King's Bench, it should be tested by the chief justice, or in case of the vacancy of that office, by the senior judge (*i*). And if it be issued from any other court, it ought, upon the same principle, to be tested by the first in the commission; and even though a single magistrate may not have authority to determine an indictment, it seems he may thus authorize the process (*k*). Teste of.

(*a*) Com. Dig. Process, A. 1. Burn, J. Process. Williams, J. Process. And see 2 Bing. Rep. 63.

(*b*) Dalt. J. c. 193. Williams, J. Process. 5 Edw. 3. c. 11. 1 Edw. 4. c. 1. See form, post, last vol.

(*c*) 2 Hale, 198.

(*d*) Per Lord Hale, 2 Hale, 199.

(*e*) Hawk. b. 2. c. 27. s. 1.

Burn, J. Process. Williams, J. Process.

(*f*) See form, post, last vol.

(*g*) 4 Burr. 2531.

(*h*) Hawk. b. 2. c. 27. s. 8. Com. Dig. tit. Process, A. 2. 27 H. 8. c. 24. s. 3.

(*i*) Cro. Car. 393. Hawk. b. 2. c. 27. s. 8. 2 Hale, 199. Williams, J. Process.

(*k*) Hawk. b. 2. c. 27. s. 8. Williams, J. Process.

TESTE OF. If it issue within a county palatine or liberty, it must be attested in the name of the owner of such county palatine or liberty (*a*).

We will now proceed to consider the various kinds and gradations of process which are issued both when the defendant is immediately to be brought into court, and when it is necessary to proceed to outlawry; which we shall examine with as much conciseness as the subject will, without injury, admit; because it would extend this chapter to much too great a length to enter into so copious a subject, with all the detail, which a very minute investigation would require.

Different kinds
of process.

At common law, and by the practice of the courts, the usual mode of bringing a defendant into court upon an indictment found against him, when it was not considered necessary to pursue him to outlawry, was by a *writ of capias*, which all courts, having power to try, are also authorized to issue; and unless in proceedings to outlawry or against peers, corporations, and a parish, no previous process seems to have been necessary (*b*). So, independently of the statutes which we shall presently notice, it appears to be the established practice, upon an indictment found for a misdemeanor during the assizes or sessions, to issue a bench warrant signed by a judge or justices of the peace, or two of the latter, to apprehend the defendant (*c*); and when the assizes and sessions are over, the clerk of assize and clerk of

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(*a*) 27 Hen. 3. c. 24. s. 3. Stark. 273.

(*b*) 4 T. R. 694, 506. 2 Hen. Bla. 419. 4 Bla. Com. 319. Williams, J. Process. See form of Capias, Burn, J. Process. Williams, J. Process. For forms, see post, last vol. See form and alias capias, 11 Hargr. St. Tr. 200. By the 25 Edw. 3. c. 14. process on an indictment for treason or felony is two capias's, and then an exigent, Hawk. b. 2. c. 27. s. 115. At common law the first ordinary process upon indictment for misdemeanors is nominally a venire and distrin-

gas, and if nihil was returned on the venire, then three capias's, viz. a capias, alias, and pluries, Hawk. b. 2. c. 27. s. 10; but the practice, before the 48 Geo. 3. where it was not intended to outlaw the defendant, was for any judge of K. B. to award a writ of capias immediately, see 4 Bla. Com. 319.

(*c*) Cro. C. C. 9. 15. 4 Bla. Com. 419. Cowp. 289. 3 T. R. 110. Toone, 61. Hawk. b. 2. c. 27. s. 8. See forms of bench warrants, Toone, 62. Post, last vol.

the peace respectively will, on the application of the prosecutor, grant a certificate of the indictment having been found, upon which any judge of the King's Bench or justice of the peace of the proper county will grant a warrant for apprehending the defendant, and will oblige him to enter into a recognizance to answer, or for want of sureties will commit him (*a*).

The statute 26 Geo. 3. c. 77. s. 18. in case of obstructions of revenue officers, further provides, that any judge or justice of the peace may grant his warrant upon indictment found to apprehend the offender, and either to hold to bail or commit him. And by the 35 Geo. 3. c. 96. (*b*) which recognizes the last-mentioned statute, some further regulations are made relative to the subsequent treatment of persons so indicted, by which the prosecutor may, after delivery of a copy of the indictment, enter an appearance for them, and proceed to trial if they refuse to attend. These provisions having been found beneficial, they were, by 48 Geo. 3. c. 58. s. 1, extended to every species of crime below the degree of felony, when prosecuted by indictment or information in the King's Bench. This statute enacts, that whenever any person shall be charged with any offence for which he may be prosecuted by indictment or information in his majesty's court of King's Bench (not being treason or felony), and the same shall be made appear to any judge of the same court, by affidavit, or by certificate of an indictment or information being filed against such person in the said court for such offence, it shall and may be lawful for such judge to issue his warrant under his hand and seal, and thereby to cause such person to be apprehended and brought before him or some other judge of the same court, or before some one of his majesty's justices of the peace, in order to his or her being bound to the king's majesty with two sufficient sureties, in such sum as in the said warrant shall be expressed, with condition to appear in the said court at the time mentioned in such warrant, and to answer to all and singular indictments or informations for any such

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(*a*) Cro. C. C. 9. 15. 4 Bla. Process. 6 Went. 437. 4 Went. Com. 419. Cowp. 283. 8 T. R. 118. Hand. Prac. 289. Toone, 110. See forms of judges' and justices' warrants, 8 T. R. 110. 62. Post, last vol. (*b*) See rule on this statute, Burn, J. Process. Williams, J. Tr. T. 35 G. 3. s. 3. 6 T. R. 400.

DIFFERENT
KINDS
OF PROCESS.

offence; and in case any such person shall neglect or refuse to become bound as aforesaid, it shall be lawful for such judge or justice respectively, to commit such person to the common gaol of the county, city, or place, where the offence shall have been committed, or where he shall have been apprehended, there to remain until he shall become bound as aforesaid, or shall be discharged by order of the said court in term time, or of one of the judges of the said court in vacation; and the recognizance to be thereupon taken, shall be returned and filed in the said court, and shall continue in force until such person shall have been acquitted of such offence, or in case of conviction, shall have received judgment for the same, unless sooner ordered by the said court to be discharged.

There are also several other statutes (*a*) relative to warrants against persons indicted in one part of the United Kingdom, and escaping into another part, or another county of the same part. These have already been partially considered (*b*). The statute 38 Geo. 3. c. 52. s. 4. (extended by 51 Geo. 3. c. 100,) enables courts of oyer and terminer, and general gaol delivery for a county at large, to issue process for apprehending a defendant on indictment found for offences committed within the county of any city or town corporate, in like manner as in case of indictment found for offences committed in the county at large.

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The practice in issuing the bench warrants is, that where the parties are not under recognizance, the prosecutor has a right, during the assizes or sessions to this process against them, to bring them immediately into court to answer. But, when the parties are under recognizance, no process can be had against them during the assizes or sessions, because it is looked upon in law as but one day, and the defendant has the whole to make his appearance (*c*). In such case, however, the prosecutor may, if the defendant has not appeared, bespeak a bench warrant during the assizes or sessions, which will be issued at the close thereof (*d*). If the assizes or sessions are over, and no bench warrant has been

(*a*) 24 Geo. 2. c. 55. 13 Geo. 3. c. 31. 44 Geo. 3. c. 92. 45 Geo. 3. c. 92. 48 Geo. 3. c. 58. s. 2.
 (*b*) Ante, 45, 6.
 (*c*) Cro. C. C. 9, 15. 2 Salk. 607. Williams, J. Process.
 (*d*) Id. *ibid*.

previously applied for, then a warrant from a single judge or justice of the peace may be obtained (*a*); and in order to make the application effectual, it must be grounded upon the *certificate* of the clerk of assize or the clerk of the peace, that the indictment has been found against the defendant, upon which the warrant will be granted (*b*), or under the before mentioned statutes there may be either an affidavit or certificate (*c*). The warrant of a judge is directed to his tipstaff, and to all constables and other peace officers, and extends all over England, and if backed, into Scotland and Ireland; but a justice's warrant thus obtained can be executed only in that county, over which he has jurisdiction (*d*), unless when backed by a magistrate for another district (*e*). If the warrant be to arrest the party, to the end that he may become bound, &c. to appear at the *next* sessions, &c. this means the next sessions after the arrest, and not after the date of the warrant; and, therefore, the officer may justify an arrest after the sessions next ensuing the date of the warrant; and though it is the practice to renew the warrant at every sessions, if not executed before, this seems unnecessary (*f*).

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The observations as to the arrest under a warrant before an indictment, here for the most part apply (*g*). In cases of treason, felony, or breach of the peace, the warrant may be executed on a Sunday (*h*). If the process be issued from the sessions, and the defendant goes out of the county before he has been apprehended or served, it is said that no effectual proceedings to outlawry can be had against him in that court; but that the proper course is to remove the indictment to the court of King's Bench, and issue process from thence (*i*). When the defendant is brought into

The arrest.

(*a*) Cro. C. C. 9, 15. See Hawk. b. 2. c. 21. s. 8. where it seems to have been formerly doubted, whether a single judge could grant a warrant. See forms, post, last vol.

(*b*) 4 Bla. C. 319. Cowp. 233. 8 T. R. 110. Cro. C. C. 15. Williams, J. Process. See form, Williams, J. Process. 6 Wentw. 437. Post, last vol.

(*c*) Ante, 340. 48 Geo. 3. c. 58.

(*d*) Cro. C. C. 15, 16. Williams, J. Process.

(*e*) 24 Geo. 2. c. 55. As to backing, see ante, 45.

(*f*) 8 T. R. 110.

(*g*) As to arrest, see ante, 47 to 59.

(*h*) Hawk. b. 2. c. 27. s. 17.

(*i*) 5 T. R. 503. 505. Sed quære, may not the warrant be backed into another county?

THE ARREST. court upon this warrant, or upon a *capias* in case of felony, he is either to be committed or bailed to appear, and answer at a subsequent sessions or assizes. The defendant must continue in custody although the prosecutor removes the indictment by *certiorari* unless he find bail, though if he had found bail, such removal would have discharged his recognizance (*a*).

Of bailing the defendant.

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We have already considered so fully the nature of bail, and the cases in which it is allowed, the persons who may bail, and the sufficiency of the bail (*b*), that it will not here be necessary to state more than the practical mode in which the bail is taken after the finding of the indictment. When the bail is put in upon arrest before indictment, we have seen (*c*), that the prosecutor is not, in general, except in the King's Bench, entitled to notice of bail; but, in the present stage of the proceedings, the court or magistrates by whom the bench warrant is issued, will, if it appear reasonable, upon motion of counsel, make an order at the foot of the warrant, that the defendant shall give twenty-four or forty-eight hours notice of bail to the prosecutor, according to the circumstances before them (*d*). And the 30 Geo. 2. c. 24. s. 17, enacts, that no person charged on oath with an offence punishable by that act, viz. obtaining money, &c. by false pretences, or sending a threatening letter with intent to extort money, &c. and which shall require bail, shall be admitted to bail, before twenty-four hours notice at least shall be proved by oath to have been given in writing to the prosecutor, of the names and places of abode of the persons proposed to be bail for such offender, unless the bail offered shall be known to the justice or justices, and he or they shall approve of them (*e*); and independently of these regulations, it seems that in all cases, where the defendant is brought before a magistrate on a warrant issued on an indictment found, the magistrate, if not satisfied of the sufficiency of the bail, may require at least twenty-four hours notice to be given to the prosecutor, of the names and additions of the bail, and when

(*a*) 2 Leach, 560.

(*b*) Ante, 92 to 105.

(*c*) Ante, 100, 101. Cro. C. C. 16.

(*d*) Cro. C. C. 15, 16. 5 T. R.

628. Ante, 101. See form of notice of bail. Cro. C. C. 298. Hand's Prac. 380. Toone, 43. Post, last vol.

(*e*) Toone, 42. Ante, 101.

and where, and before whom the bail is intended to be put in (a). The intention of this notice is, that the prosecutor may inquire into the sufficiency of the bail, and whether they are housekeepers or freeholders, and if they are not so, it is said, that the prosecutor or his solicitor may object to them before the court, judge, or justice of the peace, as the application may be (b); but, pending the inquiry into the bail, and immediately after the arrest under the warrant, it is usual, especially in prosecutions for trifling misdemeanors, to let the defendant go at large upon the undertaking of his solicitor, when known and respectable, for the defendant's appearance and render, in case sufficient bail be not found; and if on inquiry, the bail prove insufficient, then fresh notice of other bail may be given.

OF BAILING.

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If a defendant should be arrested on a judge's warrant, in any place remote from the judge's chambers, or in the vacation time, when the judges are out of town or on their circuits, a justice of peace may take bail, and the defendant must give the like notice of bail as in other cases (c). If the judge or justice refuse to bail, the defendant must apply for a writ of certiorari to remove the indictment, in order to be bailed, or issue a habeas corpus upon which the court of King's Bench will, when they think fit, bail him (d), on his entering into a proper recognizance (e). In the Duchess of Kingston's case, the latter course was adopted, the indictment not being removable by certiorari, and she was discharged on her recognizance in £4000, and each of her four bail in £1000 (f). The proceedings on a writ of habeas corpus have already been sufficiently considered (g).

If the bail be accepted, a recognizance, and not a bond (h), is taken, both from the principal and sureties, for the appearance of the former (i); except when the principal is a married woman or

(a) Toone, 61, 2. Ante, 100. Post, last vol.

(b) Cro. C. C. 15. Toone, 61, note. It is sufficient if they are freeholders, though not housekeepers.

(c) Cro. C. C. 17.

(d) Cowp. 283.

(e) Cowp. 283, 4. See forms of Recognizance, Cowp. 284.

(f) Cowp. 283.

(g) Ante, 118 to 132.

(h) 4 T. R. 505. 2 Hen. Bla. 418. 2 Saund. 59 b.

(i) Cowp. 284. See form of Recognizance, Cowp. 284. Post, last vol.

OF BAILING. infant, when the recognizance is taken only from the sureties. After such recognizance has been taken, if the prosecutor remove the proceedings by certiorari, the sureties and the principal will
 [346] be discharged from their liability under it (*a*). The before mentioned statutes (*b*), in case of indictments or informations in the King's Bench, for offences not being treason or felony, enact, that when a warrant of a judge has been issued according to the provisions of the acts, and the party has been apprehended upon the same, he shall be taken before a judge of the same court, or a justice of peace, in order to his being bound with two sufficient sureties, in such sum as the warrant shall express, with condition to appear in the said court, at the time mentioned in the warrant, and to answer to all indictments or informations for such offences.

Supersedeas.

If a person be apprehensive that an indictment has been found, and that a warrant will be issued to apprehend him for some trivial misdemeanor, and is desirous of preventing an arrest, he may, whether he is under recognizance to appear or not, apply to the clerk of the peace, or search his office, to see if any indictment has been found against him, and procure a certificate of such finding, and thereupon attend a judge of the King's Bench, or one of the justices of peace at the police offices in town, or a justice of the peace in the country, and produce the certificate, together with two sufficient bail, who will take a recognizance to appear and answer, and grant him a supersedeas, which will protect him from arrest (*c*). After this has been granted, it is said that no judge's or justice's warrant, or even a *capias* or *exigent*, in proceeding to outlawry, can be of any avail, as the defendant has only to produce it, and it must be respected by the officer (*d*).

Commitment.

If the party be taken on the bench or other warrant or *capias*, and cannot procure bail, he must be committed for trial (*e*); the

(*a*) 2 Leach, 560.

(*b*) 26 Geo. 3. c. 77. s. 18.
 48 Geo. 3. c. 58. s. 1.

(*c*) Ante, 46. 47. Dalt. J.
 c. 193. 175. Lamb. 500. Cro.
 C. C. 16. See forms of Super-

sedeas, Cro. C. C. 17. Dalt. J.
 c. 175. Post, last vol.

(*d*) Cro. C. C. 16. sed quære.

(*e*) See form of commitment,
 post, last vol.

particulars relating to which measure we have already considered, OF BAILING.
and, therefore, need here only refer to them (*a*).

When these summary modes of proceeding prove ineffectual Of process to
to the apprehension of the defendant, it will become necessary to outlawry.
proceed against him to outlawry; which is an essential part of
the criminal law. The rules and method of proceeding are wisely
calculated to prevent ignorance and surprise; the consequences
are made severe, because the offence is heinous, and it imports the
state, that no man should fly from the laws and justice of his
country (*b*). Premising, that in this course of proceeding the
most scrupulous exactness is required (*c*); we will inquire in what
cases, against whom, and by what courts it may be issued—into
what counties it may extend—what are the gradations by which it
is pursued, both in cases of misdemeanor and felony, and what
are its effects when outlawry actually takes place, as well as the
means of avoiding them.

Process of outlawry lies in all cases of treason and felony, in When may be
all appeals of felony or mayhem, and on all indictments for issued.
forcible injuries, deceit, conspiracy, or other offence more heinous
than a forcible trespass (*d*). And in case of criminal informations
for misdemeanors affecting the public, a process of outlawry may
be supported; for it is the heinous and dangerous nature of the
crime, rather than the degree of force with which it may be
actually attended, that forms the criterion to discover whether it
subjects the defendant to this proceeding (*e*). And though it has [348]
been doubted whether it lies for an inferior offence created by
statute, unless it is expressly given by its provisions, as for
forestalling (*f*), the better opinion seems to be, that it is sus-
tainable in a prosecution for any crime whatever (*g*).

(*a*) Ante, 106 to 118.

(*b*) Per Ld. Mansfield, 4 Burr. 2551, 2.

(*c*) 5 T. R. 204, 5.

(*d*) 2 Hale, 194. Hawk. b. 2. c. 27. s. 109. Williams, J. Outlawry. Burn, J. Process.

(*e*) 4 Burr. 2555, 6, 7, 8, 9.

Williams, J. Outlawry.

(*f*) Hawk. b. 2. c. 27. s. 109, 110. 2 Hale, 194.

(*g*) 4 Burr. 2537. Bac. Abr. Outlawry, A.

PROCESS
TO OUTLAWRY.
Against whom.

However, except in case of treason, felony, or actual breach of the peace, no peer is liable to this process, nor can a parish, a corporation, or a hundred, be otherwise proceeded against, than by venire and distringas (*a*). But for treason, felony, or any actual violence, a peer is equally liable with any other individual (*b*). An infant above the age of fourteen may be outlawed, but if he be under that age, the proceedings cannot be supported (*c*), though in the latter case the outlawry is not absolutely void, but must be reversed by writ of error (*d*). Women are equally subject to this proceeding; but they are said to be *waived*, and not *outlawed* (*e*).

What courts may
issue it.

It is clear that the courts at Westminster may issue this description of process, and the Court of King's Bench, either upon an indictment originally taken there, or removed thither by certiorari, may issue it into any county of England (*f*). So also justices of oyer and terminer may award it, and justices of the peace on indictments taken before them (*g*). But it is said that the latter cannot issue a *capias utlagatum*, but must return the record unto the King's Bench, from whence that writ should issue (*h*).

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Into what coun-
ties it extends.

The Court of King's Bench may, by virtue of their inherent jurisdiction, issue process of outlawry into any county of England, upon a return of non est inventus by the sheriff of the county where the defendant was indicted, and a testatum that he is in some other county (*i*). And justices assigned to hear and determine felonies, have the authority invested in them by an express act of the legislature (*k*). And though it has been doubted whether justices of the peace are included in this provision (*l*); it

(*a*) Bac. Abr. Outlawry, C. 2 Hale, 199, 200. Cro. Eliz. 503. 2 T. R. 670. Burn, J. Process. Williams, J. Outlawry.

(*b*) Id. ibid.

(*c*) 2 Dyer, 104. 2 Hale, 207, 8. Williams, J. Outlawry. Burn, J. Process.

(*d*) 3 Dyer, 239. 2 Rol. Ab. 305. Williams, J. Outlawry.

(*e*) Co. Lit. 122 b. Williams, J. Outlawry. Burn, J. Process.

(*f*) 2 Hale, 198. Williams,

J. Outlawry.

(*g*) 2 Hale, 52. 199. Williams, J. Outlawry.

(*h*) Dalt. J. c. 193. Lamb. 590. 2 Hale, 52. Williams, J. Outlawry; but see 12 Co. 102. Dick. Sess. 413.

(*i*) 2 Hale, 199. Williams, J. Outlawry.

(*k*) 5 Edw. 3. c. 11. 2 Hale, 199. Williams, J. Outlawry.

(*l*) Hawk. b. 2. c. 27. s. 3.

should seem that the words of the statute are sufficient to include them (*a*). By the common law, an exigent was never to be awarded to any other county than that in which the venue was laid, and there was no necessity for issuing process to the sheriff of any other county (*b*). This practice was attended with very great and vexatious inconvenience to the defendant; for he was often conversant in some other county at the time of issuing process, and before he had any opportunity of obeying it, he was put in exigent, and his goods and chattels forfeited. To remedy, in some degree, this grievance, it was enacted by 6 Hen. 6. c. 1. that in case of treason or felony indicted in the King's Bench, process should be directed to the county of which the defendant was stated in the indictment to be conversant, as well as to that in which he was indicted; and that six weeks at least, or longer, at the discretion of the justices, shall be allowed for its return by the sheriff. And by 8 Hen. 6. c. 10. this provision is applied to all other tribunals; except in Chester (*c*), the time is enlarged to three months, where the counties are holden from month to month, and to four months where they are holden from six weeks to six weeks; and its operation is extended to every description of offences. By 10 Hen. 6. c. 6. indictments removed into the King's Bench by certiorari, are made subject to the same regulations. And although indictments of treason and felony originally taken in the King's Bench, were hold not to be included in the extended privileges conferred by 8 Hen. 6. c. 10. upon other defendants; by a special provision of 6 Hen. 6. c. 1. the space of six weeks must elapse before the second writ, directed to the party's residence, can be returned "non est inventus (*d*)."
The statute 8 Hen. 6. c. 10. however, only applies to indictments in one county, against offenders described in the indictment to be conversant in another, and only to cases where it appears on the face of the indictment, that he does reside out of the county, and then the legislature have required that a proclamation shall issue with a second capias, and go into the county where the person indicted lives, and in such case, the writ must require the person indicted, to appear before

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(*a*) Stark. 259, 260.

(*b*) Hawk. b. 2. c. 27. s. 119.
Dyer, 295 b.

(*c*) See sect. 6.

(*d*) See cases on these statutes, 2 Hale, 196. Hawk. b. 2. c. 125. s. 119, &c. c. 27. s. 120 to 127. 1 Burr. 639, 40.

PROCESS
TO OUTLAWRY.

the justices at the return of the writ, but that return is before the time of the outlawry, for there must be a pluries capias before the outlawry can issue; all these are preparatory steps to the outlawry, and the defendant's appearance is required in order to prevent the outlawry (*a*). However, to avoid the necessity for writs into two counties, it is usual, as already observed, to state the defendant's addition of place, at the place where the offence is charged in the indictment to have been committed (*b*).

Stages of process
to outlawry, in
indictments for
misdemeanors.

The stages of process to outlawry, which it is now proper to examine, differ in case of misdemeanors and felonies, in several important particulars; the first being more tedious, and the latter more summary. We will first consider the proceedings to outlawry in case of misdemeanors, and then in case of treason or felony.

Venire.

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When an indictment has been found for a *misdemeanor*, or crime inferior to felony, and the defendant does not appear, and it becomes necessary to proceed to outlawry, a *venire facias ad respondendum* is first issued, which is only in the nature of a summons to appear (*c*). This writ may be made returnable immediately before justices of oyer and terminer, and in the King's Bench for all offences committed in Middlesex; but upon an indictment before justices of the peace at sessions, there must be fifteen days between the teste and the return of the *venire facias*, unless the parties consent, and then it may be returnable immediately (*d*). And it is said, that in all process from the King's Bench, into a county in which it does not sit, there must be fifteen days between the teste and return (*e*). This is the proper process in proceedings against a parish for not repairing a highway, and it may be served on any two of the persons inhabiting the parish (*f*).

(*a*) Per Buller, J. 3 T. R. 502.

(*b*) Ante, 210. 2 Hale, 194, 195, 6. Hawk. b. 2. c. 27. s. 125, 6.

(*c*) 4 Bla. Com. 318. Hawk. b. 2. c. 27. s. 9. Burn, J. Process. Williams, J. Process.

See form of Venire, Williams, J. Process. Burn, J. Process. Post, last vol.

(*d*) 3 Salk. 371. Hawk. b. 2. c. 27. s. 16.

(*e*) Hawk. b. 2. c. 27. s. 16.

(*f*) 5 T. R. 503. 505.

If the defendant does not appear, and the sheriff returns to the venire, that he has summoned him, a distringas is awarded, and is repeated by alias distringas from time to time; whereby the defendant forfeits issues on every default (*a*). PROCESS
TO OUTLAWRY.
Distringas and
alias.

But if the sheriff return to the venire that the defendant is not found, then upon his non-appearance, a *capias* issues without any previous distringas, and then an alias *capias*, and after that, a pluries *capias*; for without these three successive writs of *capias*, there can be no outlawry before conviction, for any crime under the degree of capital (*b*). But, in proceedings to outlawry after judgment, one *capias* suffices (*c*), and it should seem that in general one *capias* will suffice on an indictment for treason or felony (*d*), though it is usual to issue three writs of *capias* in all cases (*e*). The *capias* (*f*), as well as all other process, founded on an indictment, is with a non omittas propter aliquam libertatem; and, therefore, the sheriff may enter into any liberty to execute it (*g*), and which, as well as the exigent, must be in the king's name, and under the judicial seal of the king, appointed to that court which issues the process, and with the teste of the chief justice or chief judge of the court (*h*). Capias.
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If the sheriff return non est inventus to the *capias*, there is then awarded and issued, an alias *capias* (*i*). The statute 25 Edw. 3. s. 5. c. 14. enacts, that when a person is indicted of felony before justices in their sessions, after the return of non est inventus to the *capias*, another *capias* shall issue returnable at three weeks after, and directing the sheriff to seize the defend- Alias capias.

(*a*) 4 Bla. Com. 318. Hawk. b. 2. c. 27. s. 10. Burn, J. Process. See form of distringas, and alias, Burn, J. Process. Post, last vol.

(*b*) 4 Bla. C. 318, 19. Hawk. b. 2. c. 27. s. 9. 111. Bac. Abr. Outlawry, E. Burn, J. Process.

(*c*) Hawk. b. 2. c. 27. s. 11. 5 T. R. 204.

(*d*) Hawk. b. 2. c. 27. s. 112.

(*e*) 4 T. R. 524. 538.

(*f*) See form of *Capias*,

Dalt. J. c. 193. Burn, J. Process. Williams, J. Outlawry, 3 T. R. 502. 4 T. R. 522, 3, 4. 530. Post, last vol.

(*g*) 2 Hale, 202. Hawk. b. 2. c. 27. s. 5, 6.

(*h*) Bac. Abr. Outlawry, B. 2 Hale, 199. Cro. Eliz. 592.

(*i*) Ante, 351. 4 Bla. Com. 318, 19. See form of Alias *Capias*, Dalt. J. c. 193. 4 T. R. 520. Hand's Prac. 400. 451. Williams, J. Outlawry. Post, last vol.

PROCESS
TO OUTLAWRY.

ant's chattels; but this statute is confined to the indictments for felony before justices at sessions, and does not apply to a court of oyer and terminer, or to misdemeanors (*a*). It seems usual however, to issue an alias and pluries capias, in cases not affected by this statute (*b*); but it need not in that case contain any direction to seize the defendant's goods (*c*).

Pluries capias.
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After the return of non est inventus to the alias capias, a pluries capias may be issued, commanding the sheriff, as oftentimes he hath been commanded, to take the defendant (*d*).

Writ of exigent.

If these various proceedings prove ineffectual, then a writ of exigent is awarded (*e*). So if the defendant has been taken, and the sheriff return an escape, an exigent may be issued (*f*). This writ must be directed to the sheriff of the county, where the offence is laid in the indictment (*g*). By it, the sheriff is commanded to cause to be called the defendant from county court to county court, until he, according to the laws and customs of England be outlawed, if he shall not appear; and, if he should appear, then that the sheriff keep him in safe custody, so that he have him before the justices, &c. at, &c. on, &c. to answer, &c. The exigent ought not to be issued against an accessory and the principal offender at the same time; but if it be so issued, and both be outlawed, the outlawry will be valid against the principal (*h*). Upon this writ, the sheriff calls or exacts the defendant at five successive county courts before the return of the exigent (*i*). If there be the least interruption, the whole is void, and an *exigi facias de novo* must be awarded and

(*a*) 4 T. R. 521. 537, 538. 2 Hale, 194, 5.

(*b*) 4 T. R. 523. Hand. 431. 440.

(*c*) 4 T. R. 538.

(*d*) See form of Pluries Capias, Dalt. J. c. 193. 4 T. R. 524. Hand's Prac. 442. Williams, J. Outlawry. Post, last vol.

(*e*) 4 Bla. Com. 313, 19. See form, Dalt. J. c. 193. Burn, J.

Process. Williams, J. Process. 4 T. R. 525. Post, last vol.

(*f*) Hawk. b. 2. c. 27. s. 117.

(*g*) Hawk. b. 2. c. 27. s. 119.

(*h*) 4 T. R. 521. 535, note a. 2 Hale, 209. Hawk. b. 2. c. 27. s. 128, 129, 130. 3 Edw. 1. c. 14.

(*i*) 4 T. R. 535. See forms of statement of the exactions, 4 T. R. 526.

issued (*a*). But if there be not five county court days between the delivery of the writ to the sheriff and the return day, and he has called the defendant twice or oftener, without his appearing, then upon this being returned to the exigent, an allocatur exigent is issued, allowing the former exactions, and requiring the sheriff to proceed and complete the requisite number (*b*).

PROCESS
TO OUTLAWRY.

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Pending the writs of *capias*, alias *capias*, and *pluries capias*, or exigent, it seems, that the defendant may, in bailable cases, prevent an outlawry by finding bail before other justices, and obtaining a *supersedeas* as before pointed out (*c*), or may come in and render himself upon the exigent (*d*).

This was all that the common law required at the utmost, before the outlawry of the defendant; but the 31 Eliz. c. 3. (*e*) requires the sheriff to make three proclamations, one in his open county court, another at the general quarter sessions of the peace in those parts where the defendant resided at the time of the award of the exigent, and another upon a Sunday immediately after divine service, one month at least previous to the fifth exaction, at or near the most usual door of the church or chapel of that town or parish where the defendant was dwelling at the time the exigent was awarded. This act applied only to civil proceedings, but it became the basis of another provision of which criminal matters formed the particular design. The 4 & 5 W. & M. c. 22. s. 4. enacts, that upon the issuing of the exigent in all criminal cases before judgment or conviction, a writ of proclamation (*f*)

Writ of proclamation, and proceedings thereon.

(*a*) 2 Hale, 201, 2. Imp. Off. Sher. 481.

(*b*) 2 Hale, 201, 2. 4 T. R. 528. Hand's Prac. 448. See form of Allocatur Exigent, 4 T. R. 528. In civil cases it is necessary that the writ of exigent must be in the sheriff's hands at the time the defendant is demanded; therefore in a civil cause, where a sheriff returned to a writ of exigent and allocatur exigent, that he had demanded a defendant at the hustings upon five several days, on three of which the writs

could not, by possibility, have been in his hands, the court held that the returns were irregular. 3 Dowl. & Ry. 55.

(*c*) Dalt. J. c. 193. Williams, J. Outlawry. Ante, 346.

(*d*) 5 T. R. 478. As to practice in civil cases, see Tidd's Prac. 8th edit. 130, 1.

(*e*) See the Writ, 4 T. R. 525, 526, and observations as to the writ and proclamations, 4 T. R. 539 to 541.

(*f*) See form of Writ, Williams, J. Outlawry. 4 T. R. 524, 540. Post, last vol.

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shall be issued, bearing the same teste and return as the exigent to the sheriff of the defendant's county, to be delivered to him three months before the return according to the form of the last-mentioned statute. But this act has been construed not to extend to outlawries after judgment, in which case no writ of proclamation is necessary (*a*). Though the act requires that one of the proclamations shall be in the open county court, it suffices if the writ of proclamation require the sheriff to proclaim the defendant in open court in the sheriff's county, without expressly saying "county court (*b*);" and though one of the proclamations must by the act be made on a Sunday immediately after divine service (*c*), this direction is not usually inserted in the writ of proclamation, though on the return of the proclamation, it is stated to have been so made (*d*). This writ, however, should direct the proclamation to be made, that the defendant render himself to the sheriff, on or before the day of fifth exaction, or that on which the outlawry will be pronounced, so that he may have his body before the justices on the return day of the exigent, which is of a subsequent day; for if it command him to be before the justices on the return day of the exigent, which is after the fifth exaction and outlawry, the proceedings will be erroneous, because it will thereby be shown that the defendant had a day to appear after his outlawry was complete (*e*). It will however suffice, if the writ of proclamation require generally the defendant to render himself to the sheriff, so that he may have his body before the justices on the return day of the exigent, and this is the accurate and correct mode of proceeding (*f*).

Supposing that all the three proclamations have not been made under the writ of proclamation which accompanied the first exigent

(*a*) 4 Burr. 255. 9. 3 T. R. 503.

(*b*) 4 T. R. 521. 539; but see the form, Hand's Prac. 433.

(*c*) 31 Eliz. c. 3. s. 1.

(*d*) 4 T. R. 531. 539.

(*e*) 3 T. R. 501.

(*f*) 4 T. R. 521. 535. See form, *id.* 525, 6. Williams, J. Outlawry, post, last vol. In a civil case where the proclamations returned by the sheriff

could not by possibility have been made between the day of issuing the writ and the day of the return, inasmuch as there was no county court or general quarter sessions of the peace held, at which the defendant could have been proclaimed, while the writ was running, the court seemed to think the proceedings were irregular, 3 D. & Ry. 55.

before the return of that writ, a *second writ of proclamation* is issued with the second exigent, allowing the proclamation already made, and directing the sheriff to complete the prescribed number (a).

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TO OUTLAWRY.

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If the defendant does not appear nor is taken on or before the fifth county court, or day of exaction under the writ of exigent, *judgment of outlawry*, or if a woman, of waiver is given by the proper coroners (b) or one of them (c). It is the duty of the sheriff to take the defendant, or cause him to be duly outlawed before the return day of the writ of exigent (d). It is said that the coroners' names must be subscribed to the judgment of outlawry (e), but it need not appear in the record of outlawry that the names were so subscribed (f), though the names must be stated (g). Their name of office should, however, be stated, except in outlawries in London (h). When the judgment of outlawry is thus complete, the sheriff *returns* the writ of exigent and the proceedings thereon, and the coroner's judgment of outlawry (i).

Judgment of
outlawry.

Indictments from inferior courts of criminal jurisdiction are sometimes removed by writ of certiorari into the court of King's Bench, for the purpose of proceeding to outlawry against the offender into those counties or places where the process of the inferior court will not reach him; in such cases, therefore, when the indictment has been removed, the clerk in court in the crown office makes out the writ of *capias alias pluries exigent* and proclamation, which the solicitor gets returned (k).

With respect to the sheriff's *returns* to these writs of *capias exigent* and *proclamation*, it has been observed, that no precise

Form of Returns
to the writs of
capias exigent
and proclamation

(a) 4 T. R. 528, 9. See form of second writ of Proclamation, 4 T. R. 528, 9.

(b) 4 Bla. Com. 319. Bac. Ab. Outlawry, E. 4. Dyer, 223. 3 Inst. 212. 10. Palm. 230. Cro. Jac. 660. See form of judgment described, 4 T. R. 530.

(c) 2 Hale, 204. Bac. Abr. Outlawry, E. 1.

(d) 4 T. R. 535.

(e) 2 Hale, 204. *Sed vide* 4 T. R. 542.

(f) 4 T. R. 542.

(g) Id. *ibid.* Cro. Jac. 528.

(h) Bac. Abr. Outlawry, E. 4. 1.

(i) 4 T. R. 529, 30. See form of Return and Judgment, 4 T. R. 529, 30.

(k) Hand's Prac. 46.

FORM OF
RETURNS TO THE
WRITS OF
CAPIAS EXIGENT
AND
PROCLAMATION.

technical form of words is necessary, and though certain requisites must be attended to, yet if they be observed in substance, and the return be not in equivocal terms, it will suffice (*a*). It should seem, however, that the strictness required in proceedings to outlawry in general, extends also to the certainty required in the sheriff's return (*b*). If there has been a change of sheriffs, and one sheriff on the exigent has exacted the defendant twice, and then hands over the writ to his successor, and the latter returns the writ, it is not in such return necessary to show by express averment, that the sheriff returning the writ was the immediate and next successor of the former sheriff, for this may be intended (*c*).

The sheriff's return to the writ of exigent (*d*) must be certain as to the *place* of holding the county court, so as to show that it was within the county (*e*); and, therefore, though a return by the sheriff of Middlesex, that he called the defendant "at his county court of Middlesex, holden at the Three Tons, in Brook Street, near Holborn, in and for the county of Middlesex," would be a sufficient allegation that the county court was held in Middlesex (*f*); yet if the return omit the words "held in and for the sheriff's county into which the exigent was issued," or do not otherwise show that the court at which the defendant was exacted was the court of, and held for the proper county, it will be void, and the judgment of outlawry thereon will be reversed (*g*). However, after the place of holding the court has been once duly specified, the words "same place" afterwards will suffice, and the name need not be repeated to all the subsequent exactions (*h*). With respect to the time also, the return must be very precise and certain, and repeat the year of the king's reign, as well as the day upon which each successive exaction was made; and if, on the return of a second or subsequent exaction, the day merely be

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(*a*) Per Buller, J. 3 T. R. 502.

(*b*) 5 T. R. 202. See 4 Burr. 2535. 2563, 4, 5, 6. Hawk. b. 2. c. 27. s. 127. Bac. Abr. Outlawry, E. 4. 3.

(*c*) 6 T. R. 575. 579. 4 T. R. 527.

(*d*) See form, Williams, J. Outlawry. Post, last volume, 4 T. R. 526. 530.

(*e*) 2 Hale, 203. 2 Roll. Abr. 862. 4 Burr. 2560. 3 T. R. 499. Latch, 210.

(*f*) 4 Burr. 2560, 1.

(*g*) 4 Burr. 2535. 2563, 4, 5, 6. 3 T. R. 500. Hawk. b. 2. c. 27. s. 127. Bac. Abr. Outlawry, E. 4. 3. See the proper form, 4 T. R. 526.

(*h*) 4 Burr. 2560.

FORM OF
RETURNS TO THE
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stated, without the year,⁶ the outlawry will be reversed; and the return should not merely state the year of the king, but show what king is intended (*a*); and if the interval between any of the exactions appear to be less than a month, the return will be defective (*b*). It has been said that the coroner's name should be shown to have been subscribed to the judgment of outlawry (*c*); but it has been holden to be sufficient if it appear upon the record (*d*). If the return be made by two sheriffs for the same county, as in Middlesex, it is correct to use the pronoun "my" as applicable to both of them jointly, in respect of their office (*e*). But the name and office of the sheriff must be subscribed at the foot of each return, in order to authenticate the proceedings (*f*). The sheriff must also in his return to the writ of exigent, state that the defendant did not appear and render himself (*g*), and if the writ be against two, the return should be, that neither of them appeared (*h*).

In the return to the writ of *proclamation*, the sheriff must specially show how the proclamations were made, so as to enable the court to judge whether they were properly made; but if a proclamation after judgment be unnecessarily and superfluously stated, then an uncertain return to it will not prejudice (*i*). But the return to the writ of proclamation need not allege the default of the defendant to appear as required by such writ, though we have seen it is otherwise in the return to the exigent (*k*).

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(*a*) 5 T. R. 202. 2 Rol. Abr. 802. 2 Hale, 203. Hawk. b. 2. c. 27. s. 127.

(*b*) 2 Rol. Abr. 802. 2 Hale, 203. We have also seen that in civil cases as the writ of exigent must be in the sheriff's hands at the time the defendant is demanded, a return, shewing it could not have been in his hands on the particular days mentioned when the defendant was demanded, is bad, 3 Dowl. & Ry. 55. Ante, 352.

(*c*) 2 Hale, 204. 2 Rol. Abr. 802.

(*d*) 4 T. R. 521. 541, 42. Cro. Jac. 528. 531. 521. 6 T. R. 575.

(*e*) 4 Burr. 2560. Hawk. b. 2. c. 27. s. 127.

(*f*) 2 Hale, 204.

(*g*) 4 T. R. 521. 541. 2 Hale, 204.

(*h*) 2 Hale, 204. 5 T. R. 202. See forms, 4 T. R. 526, 527. 530.

(*i*) 4 Burr. 2559. 4 T. R. 527. 538, 9. The form in Williams, J. Outlawry, appears to be too concise. See form of return to writ of proclamation, 4 T. R. 527. 538, 9. Post, last vol.

(*k*) 4 T. R. 521. 541. 2 Hale, 204. Cliff. Ent. 560. Thes. Brev. 172.

Record of proceedings and judgment of outlawry.

The *record of the judgment of outlawry*, is merely a summary of the proceedings against the defendant, and contains the minutes made by the officers of the court, recording the proceedings of that court (*a*). The proper forms of such record are to be found in several modern precedents (*b*). The greatest accuracy must be observed in drawing up the judgment, for as we have seen, the most scrupulous exactness is required in all proceedings relative to outlawry (*c*).

The record of the outlawry begins with a statement of the caption of the assizes or sessions, and the finding of the indictment against the defendant (*d*); and then states the award of the *capias* and return of *non est inventus*, the award of the *alias*, and *pluries capias*, and returns thereto of *non est inventus*, and the award of the *exigent* and writ of proclamation, and returns of the five exactions or callings of the defendant, and his non-appearance at the five successive county courts, and the three proclamations; and if there were an *allocatur exigent* and proclamation, they also and the proceedings thereon are shown, and then follows the statement of the coroner's judgment of outlawry (*e*).

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It is usual to state, that the sheriff, by a writ of *capias*, was commanded to take the defendant, so that the sheriff might have him in court on the return-day (*f*). But it need not be stated in express terms on the record, that a writ of *capias* issued against the defendant; it is sufficient if it appear that the sheriff was

(*a*) 6 T. R. 576.

(*b*) If at the assizes for outlawry, before conviction for a felony, where there were two writs of *exigent*, and two writs of proclamation, see 4 T. R. 521 to 531. Hand's Prac. 436 to 453, and post, last vol. See a record of outlawry at quarter sessions, on indictment for a felony, where there was only one writ of *exigent* and proclamation, and a change of sheriffs. Hand's Prac. 421 to 435. Co.

Ent. 358. *b*. See a record of outlawry, on an information in K. B. after judgment, where there was one *exigent* but no writ of proclamation, with a change of sheriffs. Hand. Prac. 453 to 460. 6 T. R. 573.

(*c*) Ante, 347. 5 T. R. 204. 4 Burr. 2545.

(*d*) See Hand's Prac. 421 to 436. Post, last vol.

(*e*) Id. *ibid*.

(*f*) 4 T. R. 521, 2. 6 T. R. 576.

commanded to take the defendant (*a*). In stating the exigent, the time and place of issuing it must be expressly shown (*b*); but it has been held not to be necessary in stating every writ, to repeat the day and year when each issued, and that it will suffice if it appear by referring to the preceding parts of the record, as if after stating that the *capias* was returned on such a day, it proceed thus, "Whereupon," the exigent was awarded: the word "whereupon" being considered as necessarily referring to the day when the *capias* was returned (*c*).

It is not necessary to state on the record that the *capias* or exigent were sealed by the justices of oyer and terminer (*d*); and it suffices to show that the exigent was returnable before the justices of the king, assigned by letters patent under his seal of Great Britain, &c. without saying "great seal" (*e*). It is necessary to state and repeat the year of the king's reign, in which every execution under the exigent and other transaction happened, (though that is not required in other records (*f*)); and therefore, if in the record, the day and year of the king be inserted in stating the first, second, third, and fifth exaction, but omitted in stating the fourth, it is erroneous, and cannot be supplied by intendment (*g*). It must also appear from the record, that each exaction or calling of the defendant was at a county court of the sheriff, held in and for the county (*h*); and it must appear that the writ of exigent was in the sheriff's hands when the defendant was demanded (*i*). If the exigent was delivered over by the sheriff who executed it to his successors, and the return of the latter is stated in the record, it is not necessary expressly to show that the present sheriff was the immediate successor of the first, it will suffice if the return by the present sheriff be, "This writ, as it is above indorsed, was delivered to me, the under-named present sheriff, by the above-named sheriff, at the time of his going out of his office (*k*)."

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(*a*) 6 T. R. 572.

(*b*) See form, 4 T. R. 525. Post, last vol.

(*c*) 6 T. R. 573. 578. Hand. Prac. 453.

(*d*) 4 T. R. 521. 533, n. a. 2 Hale, 199.

(*e*) 4 T. R. 533, n. a.

(*f*) 5 T. R. 205.

(*g*) 2 Hale, 203. 5 T. R. 202.

2 Rol. Abr. 802, pl. 3.

(*h*) Ante, 357. 4 Burr. 2563, 2564, 5, 6.

(*i*) 3 Dowl. & Ry. 55. Ante, 352.

(*k*) 4 T. R. 527. 6 T. R. 575. 579.

RECORD OF
PROCEEDINGS
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the record that the writ of proclamation was delivered to the sheriff three months before the return of it, it is sufficient, though it be not so expressly alleged (*a*).

When it is necessary to state in the record the return to the writ of proclamation, as in case of an outlawry before conviction, each proclamation must be particularly stated, in order that it may appear that they were properly made, and it will not suffice to state generally that the sheriff returned that he had caused proclamation to be made as commanded by the writ (*b*). In point of order, it seems that even the second and third proclamation may on the record be stated after the judgment of outlawry (*c*). If it be stated that the proclamations were made on impossible days, it will be bad (*d*). The names of the coroners, though they must in general be stated (*e*), need not be set forth in the record as having been subscribed to the judgment of outlawry; it will suffice if it appear that the judgment of outlawry was given by them (*f*); and in London, where the mayor for the time being is perpetual coroner, and the judgment of outlawry is given by the recorder, it is said to be sufficient to return generally, “*ideo utlagatus est*,” without showing the name of the mayor (*g*).

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Stages of process
to outlawry, in
case of felony
and treason.

In case of *felony and treason*, the first part of the process before the exigent and writ of proclamation, is different from that which we have considered with regard to inferior offences. In consequence of the higher degree of the crime, the proceedings are more summary and expeditious. The first step here, instead of a *venire*, is a *capias* (*h*), by which the sheriff is commanded that he omit not, on account of any liberty, &c. to take the defendant, and bring him into court at the return, to answer to the charge against him (*i*). Upon this writ, the sheriff, if the defen-

(*a*) 4 T. R. 521.

(*b*) 4 Burr. 2559; see proper form, 4 T. R. 527, 531. The form in Williams, J. Outlawry, is defective.

(*c*) 4 T. R. 530, 1.

(*d*) Semb. 3 Dow. & Ry. 55. Ante, 355.

(*e*) 4 T. R. 530, 1. Cro. Jac. 523.

(*f*) 4 T. R. 521, 42. See form, 4 T. R. 530.

(*g*) Cro. Jac. 531. Com. Dig. Utlagaty. Bac. Abr. Outlawry, E. 4, 1.

(*h*) 3 Mod. 265. 2 Hale, 194. Hawk. b. 2. c. 27. s. 15.

(*i*) See form, Burn, J. Process. Williams, J. Outlawry. Post, last vol.

dant does not appear, returns “*non est inventus*.” When this return is made, in case of treason and homicide, the writ of exigent may, it is said, issue immediately, without an alias or pluries capias, which was probably the case in all felonies at the common law (*a*). And, in the time of Lord Hale, it was the constant practice to issue the exigent on the return to the first capias (*b*); but the present practice seems to be to issue an alias and pluries capias, in order to outlaw a person before judgment (*c*).

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PROCESS TO
OUTLAWRY, &c

There are, however, some cases in which, from the particular circumstances of the case, more than one writ of capias is necessary before the exigent is awarded. Among the principal of these are accessaries who, as we have already seen (*d*), cannot be convicted before their principal; and, therefore, cannot be outlawed before his outlawry (*e*). The statute 1 West. (3 Ed. 1. c. 14.) directs, that the exigent against the accessary shall *remain* until the principal be outlawed (*f*). So that where one is charged in an indictment as principal, and another as accessary, the capias may issue against both, but the exigent must, in the first instance, be awarded only against the former, and the process continued against the latter by *capias infinite* until the principal be outlawed, when the accessary may be put in exigent, as the outlawry of the principal is equal to a conviction (*g*). And if the accessary appear to the capias, he should be admitted to bail, and have the same day given him till process be determined against the principal (*h*).

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There is also another exception to this rule, created by statute 25 Edw. 3. st. 5. c. 14, in favor of defendants indicted for *felony* before justices of the peace at their sessions. By that act, if the first capias be returned *non est inventus*, another is to issue

(*a*) 4 Bla. Com. 319. 2 Hale, 194. 4 T.R. 533; but see Hawk. b. 2. c. 27. s. 112. Bac. Abr. Outlawry, E.; and it seems still to be the practice to issue two, and even three capias's. 4 T. R. 523, 4.

(*b*) 2 Hale, 194, 195. 4 Bla. Com. 319.

(*c*) See 4 T. R. 523. Hand's Prac. 421,

(*d*) Ante, 266. 4 T. R. 521.

(*e*) 3 Edw. 1. c. 14. 2 Hale, 200. Hawk. b. 2. c. 27. s. 128, 129, 30. Ante, 266.

(*f*) 2 Hale, 200. 2 Inst. 183. Hawk. b. 2. c. 27. s. 129. 4 T. R. 521, 535.

(*g*) Id. *ibid*. 4 T. R. 521. 9 Co. 119.

(*h*) Id. *ibid*.

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PROCESS TO
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returnable in three weeks, and which is to direct the sheriff to cause the goods and chattels of the party indicted to be seized, and to keep them till the return; when, if the owner does not appear, they will be forfeited, and the exigent will be awarded. But this statute does not extend to treason; and therefore, for that crime, one *capias* only need be issued (*a*), nor does it extend to indictments found in any of the superior courts, being restricted, by its evident language, to the justices who preside at the Quarter Sessions (*b*). The direction to take the goods, in the second *capias*, upon this statute, though, perhaps, at the sessions it should be inserted, is not essential to the validity of the process, when issued from the superior courts (*c*).

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The last exception to this rule is where the defendant is named in the indictment as resident in a different county from that in which the venue is laid. We have already seen, that by several statutes, another *capias* is then requisite, as well as the time which must intervene before an exigent can be awarded (*d*). The observations we have already made relative to the writs of *capias*, exigent and proclamation, the judgment of outlawry, returns and record in prosecutions for misdemeanors, are equally applicable to the proceeding to outlawry for felonies; and, therefore, it is unnecessary to repeat the rules by which they are governed.

Defects in proceedings to outlawry, how available.

All these proceedings ought to be exceedingly nice and circumstantial, because outlawry is a proceeding so severe, sometimes exceeding what would be the punishment upon the conviction itself, that the courts favor any objection taken to the process in order to avoid it (*e*). Where, however, the party appears and pleads, any immaterial variance will be cured, because the end of the process is to bring him to answer, and it would be absurd to dismiss, in order more regularly to retake him. Where, indeed, there is an actual discontinuance—a chasm in the proceedings—whether on the roll or on the process, as

(*a*) 2 Hale, 194. 4 T. R. 538. c. 27. s. 120 to s. 127. 2 Hale,

(*b*) 4 T. R. 537, 3. 2 Hale, 195. Hawk. b. 2. c. 27. s. 115. (*e*) 4 Bla. Com. 320. 5 T. R.

(*c*) 4 T. R. 538. Trem. Ent. 204, 205. 4 Burr. 2545, 2548, 2551.

(*d*) Ante, 349. Hawk. b. 2.

by not giving a fresh continuance instanter, on the determination of the precedent, or where the second writ is not tested on the return of the first; this will not be aided by an appearance or pleading over (*a*). A mere miscontinuance, on the contrary, that is, a *defect* and not an *omission* in the process, will, according to the best opinions, be aided by appearance, even though it be manifestly erroneous (*b*); but, where the defendant has suffered any inconvenience by reason of defective process, as forfeiture of goods, he will be entitled to a restoration of his rights on appearing (*c*). Where the justices, before whom the cause is depending, do not come on the day to which it is continued, the consequence is a discontinuance, or the cause, as some more accurately express it, is "*put without day*" (*d*). But the proceedings may be revived (*e*). And, the same process was, at common law, requisite at the demise of the king, to revive all the proceedings subsequent to the indictment (*f*); but now, by particular legislative provisions, that event does not alter the general course of process (*g*).

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This process may at any time be avoided by the appearance of the defendant, and his putting in bail, or being committed to answer (*h*). But if he does not appear, he is at length outlawed, which punishment we must briefly consider.

Outlawry, in *capital* offences, amounts to a conviction of the crime of which the defendant is indicted, as much as if he had been actually found guilty by the verdict of a jury (*i*). And, if

Punishment and
consequences of
outlawry.*

(*a*) 1 Bulstr. 143. Yelv. 204.
1 Salk. 51. Hawk. b. 2. c. 27.
s. 102. Williams, J. Process.

(*b*) 1 Bulstr. 143. 1 Sid. 100.
260. 10 Mod. 36. 1 Salk. 59.
Hawk. b. 2. c. 27. s. 102. Wil-
liams, J. Process.

(*c*) Hawk. b. 2. c. 27. s. 106.

(*d*) Dyer, 226G. Keilw. 2.
Cro. Eliz. 12. Hawk. b. 2. c. 27.
s. 101. Williams, J. Process.

(*e*) Dyer, 226. b. Hawk. b. 2.
c. 27. s. 101.

(*f*) 2 Hale, 208.

(*g*) 4 & 5 W. & M. c. 18. s. 7.
1 Ann. st. 1. c. 8. s. 3.

(*h*) Dalt. J. c. 193. Williams,
J. Process.

(*i*) 4 T. R. 521. 543. Co. Lit.
128 b. 4 Burr. 2549. 2 Hale,
205, 6. Hawk. b. 2. c. 48.
s. 22, 4 Bla. Com. 314, 19. Bac.
Abr. Outlawry. Com. Dig.
Forfeiture, B. 1. Williams, J.
Outlawry. Burn, J. Process.

* See post, 723 to 756, as to Attainder, and its consequences.

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he be subsequently taken, and committed to prison, the justices of gaol delivery may award execution against him (*a*). And attainder, corruption of blood, and forfeiture of all estates real and personal, accrue, at once, from the judgment being pronounced against him (*b*). But he is not subject to any severer punishment than he would have suffered upon a regular conviction; and, therefore, where benefit of clergy would have been allowed him on his trial, it will also be granted after outlawry (*c*). Formerly, indeed, it was thought that his life was placed entirely out of the protection of the laws, so that he was considered as bearing about "*caput lupinum*," and might lawfully be killed by any one who should happen to meet him. But this barbarous doctrine has long been rejected, and there is now no doubt that any one who should wantonly put an end to his life, would be guilty of murder (*d*). Any person may, however, arrest him, in order to bring him to execution (*e*).

In *misdemeanors* inferior to felony, the consequences, though not so penal are highly serious, and generally more severe than would be inflicted for the crime of which the outlaw stands accused or convicted. It does not, indeed, operate as a conviction of the offence, for the party may be afterwards tried and acquitted; but it operates as a conviction of the contempt in not answering (*f*). It subjects the party to forfeiture of goods and chattels, the loss of the profits of all real estate, and restraint of liberty (*g*). Its consequences do not materially differ from those which ensue on civil process (*h*). Besides the forfeiture, the outlaw is incapable of suing in any action for the redress

(*a*) 4 Burr. 2549. 2 Hale, 35. Williams, J. Outlawry. Burn, J. Process. Hawk. b. 2. c. 48. s. 22.

(*b*) Co. Lit. 128 b. Bac. Abr. Outlawry. Williams, J. Outlawry. Burn, J. Process.

(*c*) Hawk. b. 2. c. 33. s. 27. Bac. Abr. Outlawry, D. Burn, J. Process. Williams, J. Outlawry.

(*d*) Co. Lit. 128 b. Bac. Abr. Outlawry. 4 Bla. Com. 320. Burn, J. Process. Williams, J.

Outlawry.

(*e*) 4 Bla. Com. 320.

(*f*) 2 Salk. 494. Bac. Abr. Outlawry, D. 4 Bla. Com. 319. 4 Burr. 2533. 2549.

(*g*) Plowd. 541. 4 Burr. 2549. Bac. Abr. Outlawry, D. 4 Bla. Com. 319. Williams, J. Outlawry. Burn, J. Process.

(*h*) 4 Bla. Com. 319. Bac. Abr. Outlawry. Burn, J. Process. Williams, J. Outlawry. Tidd, 130.

of any injury (*a*), and of serving on a jury to try any issue (*b*). But he may be allowed to give evidence as a witness, though not to try as a juror (*c*). And he may make a will and appoint executors (*d*), by whom the outlawry may be reversed if the proceedings are defective (*e*), and he may sit in the House of Commons, as a member. He cannot, however, become an auditor to take accounts (*f*); or execute an office in a corporation (*g*); or redeem goods which he pledged before his outlawry (*h*).

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When the defendant is thus outlawed, a writ of *capias utlagatum* may be awarded to take him into custody (*i*); or a judge, upon the certificate of the clerk of the peace, will grant his warrant to apprehend him (*k*); or if in court, he may be committed; but this is discretionary in the court, and it is more usual to leave the defendant to be taken under the ordinary process (*l*); nor can the defendant be bailed upon application, before he has been taken under the process (*m*). The writ of *capias utlagatum*, when issued from the crown office, should be delivered to the sheriff, and, when he returns it, be filed, together with the return, in the crown office, and not, as in civil proceedings, with the clerk of the exigents (*n*). Upon this process, any doors may be broken, to apprehend the outlaw, for he who has defied the laws is no longer entitled to any peculiar protection (*o*). When he is taken under this writ, though the offence be only a misdemeanor, he cannot be admitted to bail after con-

Capias utlagatum

(*a*) Co. Lit. 128. Bac. Abr. Outlawry, D. 3. Burn, J. Process. Williams, J. Outlawry.

(*b*) Co. Lit. 6. b. 2 Hale, 155. Hawk. b. 2. c. 25. s. 16. Hawk. b. 2. c. 43. s. 25. Bac. Abr. Outlawry, D. 4. Burn, J. Process.

(*c*) Co. Lit. 6. b. Hawk. b. 2. c. 46. s. 107.

(*d*) Cro. Eliz. 575. Burn, J. Process.

(*e*) 1 Leon. 325. Burn, J. Process.

(*f*) Co. Lit. 6. b. Bac. Abr. Outlawry, D. 4.

(*g*) Carth. 199. 1 Show. 288.

Comb. 145. Bac. Abr. Outlawry, D. 4. Burn, J. Process.

(*h*) 1 Bulstr. 29. Bac. Abr. Outlawry, D. 4.

(*i*) See form, Burn, J. Process. Post, last vol.

(*k*) Hand's Prac. 460, 461, where see form, and post, last vol.

(*l*) 4 Burr. 2531.

(*m*) 4 Burr. 2532, 3.

(*n*) 3 T. R. 573. Hawk. b. 2. c. 27. s. 127.

(*o*) 2 Hale, 202, 3. Williams, J. Process.

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How outlawry
may be avoided
or reversed.

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viction, without the consent of the prosecutor, and in case of information *ex officio*, of the attorney-general (*a*).

In one instance, though the outlawry be perfectly regular, its consequences may be avoided; thus, it is provided by 5 & 6 Edw. 6. c. 11. s. 8. that if a party who has been outlawed for high treason, shall within one year yield himself to the chief justice, and offer to traverse the indictment on which he was outlawed, he shall be admitted so to do, and being acquitted of the indictment, shall be discharged of the outlawry; and though the party be apprehended, and do not voluntarily surrender, yet he may apply under the statute (*b*).

There are also many cases in which, even after the defendant has been actually taken and in custody on the *capias utlagatum*, the outlawry may be reversed upon plea or writ of error. Thus, it may be avoided for an extrinsic error, by plea or by writ of *identitate nominis*, when a wrong person is taken upon the subsequent process (*c*). But where the objection is not to the identity of the person, but to some extrinsic defect, as the mistake of the process, the mode of taking advantage of it is, by writ of error (*d*); and any one as *amicus curiæ* may inform the court, and the party shall have counsel assigned to him to take advantage of the error (*e*). The errors assigned are either errors in fact, or technical objections to the process. The former are where the defendant had a good excuse for not appearing, as where he was in prison, or went beyond seas on his own business before the award of the exigent, or even after the exigent is awarded was sent thither in the service of his majesty, in which cases the outlawry will be reversed (*f*). As to the last class of errors, it would ex-

(*a*) 4 Burr. 2545.

(*b*) 3 Mod. 47, n. a. 2 Stra. 824, 5. Com. Dig. Utlagaty, C. 1.

(*c*) 2 Hale, 207. Hawk. b. 2. c. 50. s. 10. Co. Lit. 259. Burr. 638.

(*d*) *Id.* *ibid.* 2 Hale, 207. Fitz. Utlagat. 37. Com. Dig. Utlagary. See form of writ of error,

Hand, 484. Assignment of errors, Hand's Prac. 477, 480, 483, 485, 6. 4 T. R. 531, 533. 6 T. R. 575. Plea to assignment, 4 T. R. 533. Hand, 486. Post, last vol.

(*e*) Hawk. b. 2. c. 48. s. 23.

(*f*) 2 Roll. Abr. 304. 2 Hale, 208. Hawk. b. 2. c. 50. s. 6. See form of record of reversal,

ceed the object of this treatise to attempt a minute statement of them; it may suffice to observe, that the least defects, even those which are cured by appearance, will be fatal in this stage of the proceedings (*a*). And the defendant may also cause the outlawry to be set aside, by showing that he procured a supersedeas before the fifth exaction (*b*).

HOW OUTLAWRY
MAY BE
AVOIDED OR
REVERSED.

But in order to obtain the writ of error, it is necessary in case of treason or felony, that the applicant should render himself into custody, and come in person to the bar to pray it to be allowed him (*c*). Though by statute (*d*), in inferior offences he may appear and obtain the writ by attorney, if the outlawry was before conviction (*e*); but, if after conviction, the defendant must be present (*f*). Nor can a defendant after conviction be bailed, pending proceedings to reverse outlawry, without the consent of the prosecutor (*g*). The writ of error cannot be issued without the fiat of the attorney-general (*h*), to obtain which, it seems to be the practice, after the defendant has been taken on the *capias utlagatum*, to state a case and have counsel's opinion as to the ground of error, and to lay the same, with the proceedings, before the attorney-general; and, if he signifies his consent, then a *præcipe* is framed and the attorney-general's fiat is obtained, as in case of a writ of error after judgment (*i*). When this is granted, the record is removed, the defendant assigns the errors, for which purpose the record of outlawry may be read slow and taken down

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Hand. Prac. 482. Post, last vol. For grounds of reversal in civil cases, see Tidd's Prac. 8th edit. 136, 7.

(*a*) Hawk. b. 2. c. 27. s. 107. See also Starkie, Crim. L. 275 to 281.

(*b*) Hawk. b. 2. c. 40, s. 1. Bac. Abr. Outlawry, F.

(*c*) 2 Hale, 209. 4 Burr. 2527. Burn, J. Process. Hand's Prac. 50, 1.

(*d*) 4 & 5 W. & M. c. 18.

(*e*) 2 Salk. 496. Burn, J. Process. Fortes. 37. Bac. Abr. Outlawry, G. Com. Dig. Attorney, B. 6. It seems an attorney

making an affidavit to support a motion to set aside an outlawry against a defendant who has not appeared, must shew he is authorized to act for defendant, 3 Dow. & Ry. 55.

(*f*) See 4 Burr. 2539, 2540, 1. 3 T. R. 503. Hand, 51.

(*g*) 4 Burr. 2539, 2540, &c.

(*h*) 4 Burr. 2550. Hawk. b. 2. c. 50. s. 13.

(*i*) Hand's Prac. 50, 48, 487, in note. 4 Burr. 2534. See form of *Præcipe* and fiat in Error, Hand's Prac. 462. Post, last vol.

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MAY BE
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in short hand, and time for assigning error obtained; and a day is then given to the prosecutor's counsel to reply (*a*). If the outlawry be then reversed, he is restored to his rights; and if it be before plea, he is compellable immediately to plead to the indictment or information; if after conviction, he shall receive the sentence of the law; for, all the other proceedings, except only the process of outlawry for his non-appearance, remain good and effectual as before (*b*). If the indictment has been removed by certiorari before conviction, then a procedendo issues to send back the proceedings to the inferior court (*c*); but if after conviction, the court immediately proceed to pass their sentence on the defendant unless his counsel are successful in an application, which they are then at liberty to make in arrest of the judgment, for any defect appearing on the record of conviction where the outlawry was in the King's Bench, or the court commit him till a future day in the term, if they wish for time to consider of the sentence (*d*).

(*a*) 2 Hale, 209. 4 Burr. 2527. Burn, J. Process. Hand's Prac. 50, 1, 484, 487. See Record of Reversal, Hand, 482; and post, last vol.

(*b*) Law of Error, 4. 2 Hale, 209. Bac. Abr. Outlawry, H. 4 Bla. Com. 320. 1 Salk. 371.

495. 5 Mod. 141. Com. Dig. Utlagary, C. 4. Burn, J. Process. Williams, J. Outlawry.

(*c*) See Hand's Prac. 486, in note and page 50, 51, form of procedendo.

(*d*) Hand's Prac. 50, 1.

CHAPTER IX.

OF THE REMOVAL OF INDICTMENTS BY CERTIORARI.

IT is during the various stages of the process, that writs of *certiorari* are most commonly obtained, to certify and remove the indictment, and all the proceedings thereon, into the King's Bench, though they may be issued at any time previous to the trial (*a*).

The writ of *certiorari* is an original writ, issuing out of Chancery or the King's Bench, directed in the king's name to the judges or officers of inferior courts, commanding them to return the records of a cause depending before them, in order that the party may have more sure and speedy justice, before him, or such of his justices as he shall assign, to determine its merits (*b*). It is frequently used in order the better to consider and determine the validity of indictments, and proceedings thereon, and to prevent a partial and insufficient trial, which it is thought would take place in the original jurisdiction (*c*). For, when the proceedings have been removed, the trial will be either at bar or at *nisi prius*, by a jury of the county out of which the indictment is brought (*d*); and if a fair and impartial trial cannot be had in such county, the court will, on a suggestion entered on the record, order it to be tried in the next adjoining one (*e*). So a special jury may be obtained in the superior court (*f*), and more time for

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Certiorari.

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(*a*) 4 Bla. Com. 320. Hand's Prac. 37.

(*b*) Fitz. Nat. Brev. 245, A. Bac. Abr. Certiorari, A. Com. Dig. Certiorari, A. 1. Burn, J. Certiorari. Williams, J. Certiorari.

(*c*) 2 Hale, 210. 4 Bla. Com. 320. Dick. Sess. 381.

(*d*) 4 Bla. Com. 320, 1.

(*e*) 3 Burr. 1330. 6 T. R. 195.

(*f*) 5 T. R. 626.

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CERTIORARI.

the trial may be thus obtained, or it may be brought on more expeditiously than in the inferior court (*a*). It may also be requisite to issue process of outlawry against the defendant in those places where the justice's authority does not extend, but where the writ of the court of King's Bench can reach him, as we have seen, that court may issue process in any part of the kingdom (*b*). Thus it seems to be absolutely necessary, where the offender has escaped from the county in which he committed the offence, before any process is issued against him; for, though a magistrate's warrant may be backed into any other county, yet it may be uncertain in what county he may be; and every difficulty is obviated by removing the proceeding into the supreme court of criminal jurisdiction (*c*). And, in case of felony, if after the removal and the issuing process, the defendant come in upon the exigent, the King's Bench will grant a procedendo, by which the record may be carried back to the place where the indictment was taken (*d*). So that, by this means, effectual process is obtained, and a trial, in the most convenient place, secured to the prosecutor: so after a special verdict on an indictment at the Old Bailey, for murder, the proceeding may be removed by certiorari, in order to obtain the opinion of the superior court (*e*).

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On the part of the *defendant* too this writ may frequently be advantageous; as for the purpose of obtaining the judgment of the court as to the validity of the proceedings, and to have a decision of the superior court on a demurrer (*f*). So also to enable the defendant to plead his Majesty's pardon (*g*). So also where the defendant is a public officer, and his attendance is necessary where he resides (*h*), this will be desirable. It may also be desirable where he is indicted at the assizes for a nuisance, in order to compel a view of the premises, so as to enable him to shape his defence, which he cannot obtain from the judges in the country, without the prosecutor's consent (*i*). Another ground

(a) 5 T. R. 626.

(b) Ante, 342. 349. 5 T. R. 478. 503. 505. 2 Hale, 210. 4 Bla. Com. 320, 1. Dick. Sess. 381. Hand's Prac. 46.

(c) 5 T. R. 503.

(d) 6 Hen. 8. c. 6. 5 T. R. 478.

(e) 2 Ld. Raym. 1577.

(f) Hand, 40. Cowp. 460.

(g) 2 Hale, 210. 4 Bla. Com. 320. Dick. Sess. 381.

(h) 1 Chit. Rep. 571, notes.

(i) 1 Sess. Cas. 180. 2 Barnard, 214.

for desiring this writ on the part of the defendant may be, that an inferior court cannot, in criminal cases, grant a new trial upon the merits, but only for irregularity in the formal proceedings, and this advantage may be gained by the removal (*a*). So if after a verdict against the defendant at the assizes, if the judge entertain doubts as to the nature of the offence, the defendant may be brought up by habeas corpus, and committed to Newgate, and the indictment removed into the King's Bench by certiorari, for the opinion of the court (*b*). If, however, the defendant be out on bail, and the proceedings be removed at the instance of the prosecutor, it seems that the original recognizances will be discharged (*c*). But he may be compelled to put in fresh bail, before the higher tribunal, in the manner hereafter noticed (*d*).

THE USE OF A
CERTIORARI.

We will now proceed to examine from and to what court this writ lies—what indictments are thus removable, by whom, and what discretion the courts exercise—the time and mode of the application—the form of the writ itself—the return made to it, and its general effect on the proceedings.

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It is agreed that the court of King's Bench having a general superintendancy over all courts of inferior jurisdiction, may award a certiorari to remove the proceedings from any of them, except some particular statute or charter invest them with absolute judicature (*e*). And where a statute does not expressly take away a certiorari, and direct that "no certiorari shall issue," the court will grant one (*f*), the writ of certiorari being considered as beneficial to the subject (*g*). And even where it expressly takes it away, this does not extend to the crown (*h*). And when taken away on an indictment for a particular crime, as for false pretences, and the prosecutor in his indictment includes counts for

From, and to,
what courts it
lies.

(*a*) 13 East, 416, n. b. 2 Salk. 650. 7 Mod. 85, n. a. 1 Dougl. 380. 1 Stra. 113. 392. Fost. 198. Sayer, 202.

(*b*) Rep. temp. Hardw. 371. 1 Salk. 149. Hawk. b. 2. c. 27. s. 31. Burn, J. Certiorari, I.

(*c*) 2 Leach, 560.

(*d*) Hand's Prac. 43.

(*e*) Hawk. b. 2. c. 27. s. 22. Bac. Abr. Certiorari, B. Carth. 494. 12 Mod. 386. Com. Dig. Certiorari, A. 1.

(*f*) 2 Burr. 1040.

(*g*) 8 T. R. 543, 4. 580. Bac. Abr. Certiorari, E. 1 Bla. Rep. 233.

(*h*) 2 Chit. Rep. 136.

FROM AND TO
WHAT COURTS
IT LIES.

conspiracy, the defendant is not precluded from removing by certiorari (*a*). And although the Conventicle Act (22 Car. 2. c. 1.) enacted, that “no other court whatever should intermeddle with any causes of appeal upon that act, but that they should be *finally* determined in the quarter sessions *only*, yet it was decided that the court of King’s Bench was not ousted of its right by certiorari (*b*). And where a new jurisdiction is created, to proceed according to the course of common law, it is always implied it shall be liable to such removal (*c*). But where a new special jurisdiction is to decide according to other rules, the implication will not include it (*d*). We shall presently see in what cases the power of the superior court is modified by act of parliament (*e*). Certiorari lies to justices of oyer and terminer and gaol delivery (*f*), not excepting the Old Bailey (*g*); to justices of the peace, even where they are empowered by statute finally to hear and determine (*h*); to the college of physicians, having special power to try offences by mal-practice (*i*); to the courts of session in Wales and the counties palatine (*k*); and it seems to be the better opinion that the Cinque Ports, in criminal cases, are not exempted from this requisition (*l*). It lies also to the assizes at Durham (*m*); the town of Berwick upon Tweed (*n*); the city of London, notwithstanding its ancient charters (*o*); to the city of Rochester (*p*); to a court leet to remove a presentment for

(*a*) *Rex v. Godfrey and others*, MSS. Trinity Term, 1825.

(*b*) 2 Burr. 1040.

(*c*) 8 T. R. 543, 544. 1 Lord Raym. 469. 580. Bac. Abr. Certiorari, E. 1 Bla. Rep. 231. 3.

(*d*) Cowp. 524.

(*e*) Post, 376.

(*f*) 1 Salk. 144. Bac. Abr. Certiorari, B. Hawk. b. 2. c. 27. s. 23. Com. Dig. Certiorari, A. 1.

(*g*) 2 Stra. 1049. 2 Ld. Raym. 1577.

(*h*) 3 Mod. 94, 5. Com. Dig. Certiorari, A. 1. Hawk. b. 2. c. 27. s. 23. Bac. Abr. Certiorari, B.

(*i*) 1 Salk. 144, 5. 396. Hawk. b. 2. c. 27. s. 23. Bac. Abr. Certiorari, B. Com. Dig. Certiorari, A. 1. 4 Burr. 2456.

(*k*) Cro. Jac. 284. 3 T. R. 657. Cro. Car. 331, 2. 2 Stra. 704. Dougl. 751. Gilb. Rep. 160. Hawk. b. 2. c. 27. s. 23, 25. Bac. Abr. Certiorari, B. Com. Dig. Certiorari, A. 1.

(*l*) Hawk. b. 2. c. 27. s. 24. Com. Dig. Certiorari, A. 1. Cro. Car. 252, 3, 264. 291. Bac. Abr. Certiorari, B.

(*m*) 2 Barnard, 177. Bac. Abr. Certiorari, B.

(*n*) 2 Burr. 857. Com. Dig. Certiorari, A. 1. Bac. Abr. Certiorari, B. Hawk. b. 2. c. 27. s. 25.

(*o*) 1 Burr. 336. Com. Dig. Certiorari, A. 1. Hawk. b. 2. c. 27. s. 26. Bac. Abr. Certiorari, B.

(*p*) 4 M. & S. 442.

keeping a disorderly house (*a*); and, generally, to every part of his Majesty's dominions (*b*).

FROM AND TO
WHAT COURTS
IT LIES.

Where an indictment is found against a peer, it lies also to transmit and certify the proceedings into the high court of Parliament, or into the court of the Lord High Steward of Great Britain, that the defendant may claim his privilege of trial by his peers (*c*). And where particular courts have exclusive jurisdiction, the indictments must be delivered upon challenge and claim of cognizance to those courts, to be there respectively determined (*d*). The writ of certiorari is generally to be returned into the court of King's Bench, in order that the issue may be tried at bar or nisi prius (*e*).

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A writ of certiorari lies to remove all judicial proceedings, except where otherwise directed by the express provisions of some particular statute (*f*); and even where a statute takes away a certiorari, it does not extend to the crown (*g*). A presentment at a court leet for a nuisance (*h*), and an information at the quarter sessions, for exercising a trade without having served an apprenticeship (*i*), are removable by this writ. So is an indictment found at the quarter sessions, upon statute 51 Geo. 3. c. 155. s. 12, for disturbing a religious assembly, removable into the King's Bench, before trial, by certiorari (*k*). But a certiorari does not lie to remove other than judicial acts; therefore it does not lie to remove a mere order of court or warrant of a magistrate (*l*).

What kind of
proceedings may
be removed.

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The power of the superior court is, however, modified in certain cases by act of parliament. Thus by 1 & 2 P. & M. c. 13,

(*a*) Cowp. 458, 9.

Prac. 37.

(*b*) 2 Burr. 857. Com. Dig. Certiorari, A. 1. Bac. Abr. Certiorari, B.

(*f*) 8 T. R. 543, 4. 1 Lord Raym. 469. 580. Bac. Abr. Certiorari, E. Burn. J. Certiorari, I. 1 Bla. Rep. 231. 233.

(*c*) 1 Leach, 146. Fost. 1. 4 Bla. Com. 321.

(*g*) 2 Chit. Rep. 136. 5 T. R. 542. 626.

(*d*) 4 Bla. Com. 321.

(*h*) Cowp. 458.

(*e*) Hawk. b. 2. c. 27. s. 1. Com. Dig. Certiorari, A. 1. Bac. Abr. Certiorari, A. 4 Bla. Com. 320. Burn. J. Certiorari. Williams, J. Certiorari. Hand's

(*i*) Cowp. 369.

(*k*) 4 M. & S. 508.

(*l*) Cald. 309. Say. 6.

WHAT KIND
OF PROCEEDINGS
MAY BE
REMOVED.

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no writ of certiorari can be granted to remove any prisoner, or recognizance, unless signed with the proper hand of the chief justice; or, if he be absent, of one of the judges of the court from which it is awarded. And by 5 W. & M. c. 11, no certiorari can be granted in term time, to remove any indictment from the sessions before trial, but upon motion and rule in open court, though it may be issued by any single judge in vacation. According to 12 Car. 2. c. 23. s. 35, proceedings relating to the excise, before justices of the peace, cannot be removed by certiorari; and the same provision is, by other acts, extended to the revenue (*a*). So also no proceedings upon the statute for the recovery of small tithes, before justices, can be thus superseded, unless the title to the tithes come in question (*b*). The general highway act (*c*) directs, that no indictment for offences thereby created, shall be removed from the county where the cause arose, until after traverse, except where the obligation to repair the highways is disputed, and it is afterwards provided in the same act, that no certiorari shall abate any proceedings taken under it (*d*). And by 1 Anne, c. 18. s. 5, no indictment for the non-repair of a bridge, can be removed by the defendant by certiorari from the county in which the defective bridge is situated, if the proceeding be against the county at large (*e*). So by the statute 25 Geo. 2. c. 36. s. 10, no indictment for keeping a disorderly house is removeable (*f*), and there is a similar provision in the statute 30 Geo. 2. c. 24. s. 20, against obtaining money or goods by false pretences (*g*). But these acts apply only to writs of certiorari on the part of the defendants, and, therefore, the crown and a private prosecutor may still obtain them without affidavit or recognizance, unless expressly prohibited by particular statute (*h*); and where a magistrate's presentment of an highway was

(*a*) Bac. Abr. Certiorari, E.

(*b*) 7 & 8 W. 3. c. 6.

(*c*) 13 Geo. 3. c. 78. s. 24.
5 W. & M. c. 11. s. 6. Cowp.
73. 5 T. R. 626, 7.

(*d*) Section 80. The right to repair the highway may come in question, so as to entitle the parish to remove the indictment by certiorari, though the parish plead not guilty only, 3 M. & S. 465.

(*e*) 6 T. R. 194. 3 B. & P.
354. 2 Stra. 900. 5 W. & M.

c. 11. s. 6.

(*f*) 5 T. R. 626.

(*g*) Cowp. 24. 2 T. R. 472.
5 T. R. 627.

(*h*) 5 T. R. 626. 6 T. R. 194.
3 B. & P. 354. 2 Stra. 900.
1209. Cowp. 73. 1 East, 305.
15 East, 337. Bac. Abr. Cer-
tiorari, E. and see 2 Chit. Rep.
136.

removed at the instance of a third person, but with the concurrence of the magistrate, the court refused to quash the certiorari (*a*). We shall hereafter see at what time the writ may be applied for.

WHAT KIND
OF PROCEEDINGS
MAY BE
REMOVED.

The writ of certiorari is demandable, of *absolute right*, only by the *king* himself, and to him the court is bound to grant it (*b*). And, therefore, when it is applied for by the attorney-general, or other officer of the crown, either as a prosecutor, or when he takes up the defence of the party indicted, on account of his being an officer of the crown, or for some other reason, it must issue as a matter of course, and the court has no discretion to exercise (*c*); and even where a statute takes away the certiorari, it does not extend to the crown (*d*). But when the king's name is only used by a *private prosecutor*, a material distinction arises; for though the writ is usually awarded as a matter of course, even from the Old Bailey (*e*), it is in the power of the judges to refuse it, or award a *procedendo*, if cause be shown why it ought not to have been issued (*f*). And when it is applied for on the part of the *defendant*, the court will never grant it unless he show strong reason for the removal, a practice which has prevailed since the time of Charles 2 (*g*).

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To whom and on
what grounds
granted.

It is, therefore, in the case of applications, on the part of the *defendant*, that the court are most frequently called upon to exercise that discretion, with which, in all cases, except where the crown itself is concerned, they are invested. And in the exercise of this discretion, they seldom grant the writ of certiorari at the request of the defendant, when the offence charged

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(*a*) 2 T. R. 260.

(*b*) 4 Burr. 2458. 2 T. R. 89. Hawk. b. 2. c. 27. s. 27. 1 East, 303, n. d. Hand's Prac. 37. Dick. Sess. 332.

(*c*) Id. *ibid*. 4 Burr. 2458. 1 East, 303, n. d. Hand's Prac. 37. Rex v. Thomas, Mich. Term, 1815.

(*d*) 2 Chit. Rep. 136.

(*e*) Cases in K. B. 36.

(*f*) 4 Burr. 2458. 2 Burr. 752. 1 East, 298. Hand's Prac. 37.

Hawk. b. 2. c. 27. s. 27. Dick. Sess. 381. 2 T. R. 260. See 1 Kenyon's Rep. 135, where the king's attorney-general consented to, and actually made the motion for a certiorari on behalf of the defendant.

(*g*) 2 T. R. 89. 4 Burr. 2453. 2458. Hawk. b. 2. c. 27. s. 27. Hand's Prac. 37, 8. Burn, J. Certiorari, I. Williams, J. Certiorari, II. Ante, 375.

TO WHOM
AND ON WHAT
GROUNDS
GRANTED.

against him is serious, and particularly affecting the public. Thus they generally refuse to remove an indictment for forgery, or any heinous misdemeanor, because the delay tends to discourage, if not wholly to defeat the prosecution (*a*). So they are still more reluctant to grant these applications without the assent of the prosecutor, when they are made to remove proceedings before justices of assize or gaol delivery (*b*), or from the Old Bailey, or from the Middlesex sessions, or any other court where any of the judges preside (*c*). Therefore the removal of an indictment for felony from Hicks's Hall, which is before the justices, as justices of oyer and terminer, was refused, without the concurrence of the party by whom it was preferred (*d*). And where there are several defendants, all must concur in the application (*e*). The court of King's Bench have repeatedly declined to issue the writ to judges at the assizes (*f*). And the court will not, in general, at the instance of a defendant, grant a certiorari to remove proceedings from any of the higher jurisdictions, as from the assizes, without very strong grounds being produced for the application (*g*). Thus a certiorari will not be granted to remove an indictment from the Old Bailey, on the ground that the defendant is a person of fortune and character, and ought not to be tried with common malefactors (*h*), because judges sit there, and there can be no fear of partiality or want of skill (*i*); and the court will not, at the instance of defendant, grant the writ to remove an indictment from the sessions, on an affidavit that it is an unusual proceeding, and that defendant is advised that several matters of law, of the greatest importance, will arise upon the trial, and that it is fit and proper it should be tried before per-

(*a*) 1 Sid. 51. 2 Stra. 717. Hawk. b. 2. c. 27. s. 28. Bac. Abr. Certiorari, A. Burn, J. Perjury and Subornation, III. Id. Certiorari, I.

(*b*) 1 Kenyon's Rep. 135.

(*c*) 1 Salk. 144. 1 Sess. Cas. 314, 315. 321. 323. Burr. 877. 1202. Rep. temp. Hardw. 369. 370. Cas. K. B. 38. 1 Stra. 580. 2 Stra. 717. 1049. 1202. 2 Barnard, 447. Gilb. Rep. 13. Com. Dig. Certiorari, D. Hand's

Prae. 37. Ante, 375.

(*d*) Cowp. 283. 3 Burr. 1462.

(*e*) 2 Chit. Rep. 130.

(*f*) 2 Stra. 1202. 1 Sess. Ca. 323. Dick. Sess. 381.

(*g*) 1 Salk. 144.

(*h*) 1 Sess. Cases, 314. 315. 2 Stra. 716, 17.

(*i*) 1 Sess. Cases, 321. Rep. temp. Hardw. 369. 370. Cas. K. B. 38. 2 Barnard, 447. Gilb. Rep. 13. Com. Dig. Certiorari, D.

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sons learned in the law (*a*); and it is not a sufficient ground for issuing a certiorari that prejudices exist against the defendant, unless there is some prejudice in the court below (*b*). But, if it be shewn that there is a probability of partiality or unfairness in the trial, the certiorari will be awarded even to these courts (*c*). Thus, if the prosecutor's attorney be under-sheriff, and attended the grand jury at the time of finding the bill, the writ will be granted (*d*). So, if a defendant, indicted at the Old Bailey, show that there is a partiality and prejudice against him in the lord mayor and aldermen (*e*). So if the evidence of probable unfairness be strong, the court will award a writ into Wales, in order to remove the proceedings (*f*). And if the prosecution appear to rest on slight foundation, or it be doubtful whether in point of law it be sustainable, and the defendant's general character be good (*g*), or if the prosecution seem to originate in malice (*h*), or where there has been vexatious delay, and by reason of the absence of the judges, a trial has not been obtained (*i*), the court will allow a certiorari. So, if the prosecutor put the defendant to unnecessary delay and expence, and harass him by continuing the proceedings, without bringing the matter to trial, the certiorari will be awarded (*k*). So even after conviction, if weighty objections be taken to the proceedings, or a special verdict be taken, they may be removed for the consideration of a superior tribunal (*l*). Where the bill is preferred within a private juris-

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(*a*) 1 Chit. Rep. 571.

(*b*) 1 Chit. Rep. 571, notes.

(*c*) 2 Stra. 704. 2 Ld. Raym. 1452. 4 T. R. 499. 1 Salk. 150. Bac. Abr. Certiorari, A. Burn, J. Certiorari, I. Williams, J. Certiorari, II. 3 B. & A. 44. See a case where in an indictment for murder it was refused, 3 D. & R. 301.

(*d*) 2 Stra. 1068. 1 Stra. 580. Bac. Abr. Certiorari, A. Williams, J. Certiorari, II.

(*e*) 1 Salk. 150.

(*f*) 2 Stra. 704.

(*g*) 1 Stra. 549. 1 Salk. 151. Bac. Abr. Certiorari, A. Williams, J. Certiorari, II.

(*h*) 1 Barnard, 41. Bac. Abr.

Certiorari, A. Williams, J. Certiorari, II.

(*i*) 2 Stra. 1049. Rep. temp. Hardw. 370. 2 Barnard, 447. Hawk. b. 2. c. 27. s. 28.

(*k*) 2 Stra. 1049. Hawk. b. 2. c. 27. s. 28. Com. Dig. Certiorari, D.

(*l*) 1 Barnard, 415. Hawk. b. 2. c. 27. s. 27. Bac. Abr. Certiorari, A. 2 Lord Raym. 1574. In a case after conviction, for selling with other than the Winchester bushel, a certiorari was allowed, on the ground of the vendee having been rejected as a competent witness, 2 Chit. Rep. 137.

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diction, it may be thus transferred to the body of the county for trial (*a*). And, in case of a nuisance, where it is necessary to the defendant to have a view of the premises, the court will allow him a certiorari for the purpose, upon affidavit that he cannot otherwise obtain it (*b*); and where the defendant was a public officer (a deputy register), and his personal attendance was daily necessary, the court granted a certiorari to remove an indictment from the Old Bailey to Gloucester where the defendant resided (*c*); and there may be other grounds for inducing the court to interfere.

Of the time when
the application
should be made.

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The proper time for either party to apply for a certiorari, is before issue has been joined on the indictment (*d*). For unless some special cause be shown, it will not be granted after verdict, though it be suggested that it will appear from the judge's report, that the verdict was against evidence and his direction (*e*). But where there has been a special verdict even at the Old Bailey, it may be removed, in order to be argued, and more solemnly decided in the superior court (*f*); however, though there are instances of the removal of indictments by this method between verdict and judgment, in order that the King's Bench may give the judgment, for greater example, yet the court, in general, discourage such applications, leaving the defendant, if he have any objection to the indictment itself, to bring a writ of error after judgment (*g*); and we have seen that after the defendant has confessed the indictment, even the prosecutor cannot remove same (*h*). Indeed the courts have refused to grant it after the swearing of the jury (*i*), but the interval between the finding of the verdict, and the judgment is regarded as particularly unfavourable for the purpose, because the court who are called upon to pronounce sentence have

(*a*) 2 Barnard, 7.

(*b*) 1 Barnard, 214. 1 Sess. Cas. 180. Ante, 373.

(*c*) 1 Chit. Rep. 571, notes.

(*d*) Hawk. b. 2. c. 27. s. 30. 4 Bla. Com. 321. Burn, J. Certiorari, I. Williams, J. Certiorari, II.

(*e*) 7 T. R. 373. 1 Salk. 149. Carth. 6. 13 East, 411. 6 Mod. 17. Hawk. b. 2. c. 27. s. 31.

Bac. Abr. Certiorari, A. Burn, J. Certiorari, I. Williams, J. Certiorari, II. 2 Chit. Rep. 137. Ante, 380, n. (l).

(*f*) 2 Ld. Raym. 1574. Hawk. b. 2. c. 27. s. 31.

(*g*) 6 T. R. 145. Rep. temp. Hardw. 371. 2 Ld. Raym. 938.

(*h*) 2 Burr. 752.

(*i*) 1 Sess. Cas. 313, 19. Comb. 391.

not heard the witnesses by which the charge is supported (*a*). It is for this reason that a certiorari will not lie to the sessions to remove a conviction for a misdemeanor before judgment where the punishment is discretionary, but it may be obtained where the penalty is certain, and, therefore, no circumstances disclosed in the trial can affect the severity of the sentence (*b*). In all cases it seems the application should be made time enough, for the trial to take place at the next holding of the court in which it is the object to have it heard (*c*). If it should have been neglected until after judgment in the inferior court, the only regular mode of removing the proceeding is by writ of error, upon which advantage can only be taken of defects apparent on the face of the indictment or other proceedings (*d*).

OF THE TIME
WHEN THE
APPLICATION
SHOULD BE
MADE.

The mode of applying for the writ of certiorari in general, on the part of the defendant, is regulated by several legislative provisions (*e*). It is, in the first place, by the 13 Geo. 2. c. 18. s. 5. in the case of convictions, orders, and summary proceedings, necessary to give six days notice in writing of the intention to apply for the writ to the justices before whom the prosecution was originally commenced (*f*); but this act has been holden to apply only to summary proceedings, and not to extend to indictments (*g*). In order to remove an indictment, the *defendant* must make an

Mode of applying
for certiorari by
the defendant.

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(*a*) 2 Stra. 1228. 1 Salk. 149. Hawk. b. 2. c. 27. s. 31.

(*b*) 13 East, 414, n. 1 Salk. 149.

(*c*) In the *King v. Perkins*, where an indictment for a nuisance to a highway was found at the Spring Assizes, 1819, and the defendant traversed at the Summer Assizes, and on the last day of Hilary Term, 1820, moved for and obtained a certiorari into the King's Bench. A summons was taken out, returnable before Abbott, C. J. to shew cause why a procedendo should not issue, on the ground

that the writ had issued so late, that there was not time to try it at the assizes, and an order was made for a procedendo.

(*d*) 7 T. R. 373. 1 East, 302. See 1 B. & C. 142. 2 Dow. & Ry. 206. 209, S. C. fully establishing this point.

(*e*) 21 Jac. 1. c. 8. s. 6, 7. 5 W. & M. c. 11. 8 & 9 W. 3. c. 33. 5 Geo. 2. c. 19. 13 Geo. 2. c. 18. s. 5.

(*f*) Williams, J. *Certiorari*, VI. Cro. C. C. 299, 8th edit. Dick. Sess. 391.*

(*g*) 1 East, 293. 304, 5.

* The six months must be computed from the date of the conviction, 4 T. R. 281. See 5 T. R. 279, that the six days notice should be given. The notice must state the name of the party applying for the writ, 4 B. & A. 239.

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affidavit, stating the grounds upon which his application is founded (*a*), except where the attorney-general applies, on the behalf of a revenue officer, or other defendant, in which case no affidavit will be requisite (*b*). But where the attorney-general moved on behalf of defendant for a certiorari to remove an indictment, relating to the stopping up a highway, it was considered necessary that an affidavit should be made, according to the 3 W. & M. c. 12. that the freehold came in question (*c*). The affidavit should be entitled only "In the King's Bench," and not in the name of the prosecution in the court below (*d*). After this has been effected, if the application be made in term time, the defendant must move the court, by his counsel, for a rule to shew cause why a writ of certiorari should not issue (*e*). If the court then think sufficient cause is shewn, they grant a rule for the writ to issue (*f*). In vacation, on the other hand, the affidavit is merely laid by the solicitor for the defendant before a judge at chambers, who, if he think fit, may grant his *fiat* for the certiorari (*g*), to which fiat the signature of the judge is absolutely requisite (*h*). But in term time, the latter mode of application will not suffice, and the former must be adopted (*i*).

[383] When the rule, or fiat, is thus obtained, the clerk in court makes out the writ, and delivers it to the solicitor, with the recognizance, into which it is requisite for the defendant to enter (*k*).

To prevent the undue removal of indictments and presentments for crimes less than felonies, from the *general or quarter sessions*, it was enacted by the 5 W. & M. c. 11. s. 2. (*l*) that, in term time, no writ of certiorari, at the prosecution of any party indicted, shall

(*a*) 1 East, 303. 2 T. R. 89. Hand's Prac. 38. Dick. Sess. 383. See form, Hand's Prac. 352. Post, last vol.

(*b*) 4 Burr. 2458. 4 T. R. 161. 1 East, 303, 4, n. d. Sed vide 1 Kenyon's Rep. 135.

(*c*) 1 Kenyon's Rep. 135. Sayer, 128. S. C.

(*d*) See 1 B. & C. 267. But see 2 Stra. 704.

(*e*) 5 W. & M. c. 11. Hawk.

b. 2. c. 27. s. 36. Hand's Prac. 38.

(*f*) 5 W. & M. c. 11. Hawk. b. 2. c. 27. s. 36. Hand's Prac. 38.

(*g*) Id. *ibid*.

(*h*) 3 Salk. 80.

(*i*) 1 Barnard, 96.

(*k*) Hand's Prac. 38.

(*l*) See observations on this statute, 15 East, 571, 2.

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CERTIORARI BY
THE DEFENDANT.

be granted, to remove any indictment or presentment of *trespass* or *misdemeanor*, before trial had, from before the said justices in the courts of general or quarter sessions of the peace, unless such certiorari shall be granted upon motion of counsel, and by rule of court made for the granting thereof, before the judge or judges of the said court of King's Bench, sitting in open court, and that all the parties indicted, prosecuting such certiorari, before the allowance thereof, shall find two sufficient manucaptors, who shall enter into a recognizance (a) before one or more justices of the peace of the county or place, in the sum of twenty pounds, with condition at the return of such writ, to appear and plead to the said indictment or presentment, in the said court of King's Bench, and at his or their own costs and charges, to cause and procure the issue that shall be joined upon the said indictment or presentment, or any plea relating thereunto, to be tried at the next assizes to be held for the county wherein the said indictment or presentment was found, after such certiorari shall be returnable, if not in the cities of London, Westminster, or county of Middlesex; and, if in the said cities or county, then to cause or procure it to be tried the next term after wherein such certiorari shall be granted, or at the sitting after the said term, if the court of King's Bench shall not appoint any other time for the trial thereof; and if any other time shall be appointed by the court, then at such other time, and to give due notice of such trial to the prosecutor, or his clerk in court; and that the said recognizance, taken as aforesaid, shall be certified into the said court of King's Bench, with the said certiorari and indictment, to be there filed, and the name of the prosecutor, (if he be the party grieved or injured) or some public officer to be indorsed on the back of the said indictment; and if the person prosecuting such certiorari being the defendant shall not, before allowance thereof, procure such manucaptors to be bound in a recognizance as aforesaid, the justices of the peace may and shall proceed to trial of the said indictment at the said sessions, notwithstanding such writ of certiorari so delivered: and by section 4 it is enacted, that in any of the vacations, writs of certiorari may be granted by any of the justices of

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(a) See form of recognizance, Hand's Prac. 354, 381. 8 T. R. Williams, J. Certiorari, VI. 409, n. a. 3 Burr. 1461.

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the King's Bench, whose names shall be indorsed on the said writ, and also the name of such person at whose instance the same is granted, and that the party, or parties, indicted, prosecuting such certiorari, shall, before the allowance of such writ or writs of certiorari, find such sureties, in such sum, and with such conditions, as are before mentioned ; and by the 8 & 9 W. 3. c. 33. s. 2. it is enacted, that the party prosecuting any certiorari, to remove any indictment or presentment from the quarter or general sessions of the peace, may find two sufficient manucaptors, who shall enter into a recognizance before any one of his Majesty's justices of the court of King's Bench, in the same sum, and under the same condition as is required by the said act, whereof mention shall be made on the back of such writ, under the hand of the justice taking the same, which shall be as effectual and available to all intents and purposes, to stay or supersede any further proceedings upon any indictment or presentment, for the removal of which the said writ of certiorari shall be granted, as if the recognizance had

[385] been taken before any one of the justices of the peace of the county or place where such indictment was found, or presentment made ; and also it shall be added to the condition of every recognizance, taken by virtue of this and the said act, that the party or parties prosecuting such writ of certiorari, shall appear from day to day in the said court of King's Bench, and not depart until he or they shall be discharged by the said court." The like in effect is enacted by the 5th section of 5 W. & M. c. 11. concerning the removal of indictments by certiorari, within the counties of Chester, Lancaster, and Durham.

The regulations of these statutes extend only to the removal of indictments from the sessions, and do not affect an indictment at Hicks's Hall, or before justices of oyer and terminer, or gaol delivery (*a*), and even at the sessions, as these statutes are in the affirmative as to the taking of recognizances, they do not take away the power which the justices of the King's Bench have at common law, of taking a recognizance upon their granting a certiorari ; and, therefore, if a judge granting a certiorari should take a recognizance variant from that prescribed by the acts, either as

(*a*) 3 Burr. 1462. 2 Stra. 1165. 1 Burr. 10.

to the sum or condition, such recognizance will be as effectual as if these statutes had not been made; but, it is said, that in such case the certiorari, if procured by the defendant, will be no super-sedeas, because the statutes seem to be express that the sessions may proceed, notwithstanding any certiorari procured by a defendant, whereon such recognizance is not given, as is expressly prescribed (*a*). If the bail be not found before the justices or the judge, as thus prescribed, the certiorari ought not to be allowed (*b*). If the persons offering to be sureties appear to be worth twenty pounds, the justices cannot refuse them (*c*), and if several persons be included in the same indictment, and some of them find sureties, and the others not, it is said that the proceedings as to the first will be valid (*d*), and it seems that a married woman need not enter into the recognizance (*e*). Although the recognizances be entered into, yet if they be insufficient, the court of King's Bench may, on the removal by certiorari, discharge them on motion, and compel the defendant to enter into better securities (*f*). After the recognizance has been acknowledged, the solicitor delivers it with the writ of certiorari, to the clerk of the peace at the sessions, or clerk of the arraigns at the Old Bailey, or clerk of assize at the assizes, who must return it without delay, or may be proceeded against by attachment (*g*). Unless good cause be shown, the defendant will not be admitted to defend in formâ pauperis (*h*). If there be an indictment to be removed, and the party be in custody, it is usual to have an habeas corpus to remove the prisoner, and a certiorari to remove the record, for without the latter the defendant must continue in the same custody (*i*).

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THE DEFENDANT.

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If the *prosecutor* desire to remove the indictment, these forms are not essential, for he is not included in the statutes by which

Mode of applying
on the part of the
prosecutor.

(*a*) Hawk. b. 2. c. 27. s. 53.
Williams, J. Certiorari, VI.

(*b*) 1 Salk. 149. Com. Dig.
Certiorari, B.

(*c*) Hawk. b. 2. c. 27. s. 50.
Com. Dig. Certiorari, B.

(*d*) Hawk. b. 2. c. 27. s. 51.

(*e*) 2 Hale, 213. Ante, 104.

(*f*) 1 Chit. Rep. 491.

(*g*) Hand's Prac. 30. 39.

(*h*) 1 Bla. Rep. 230. Hullock,
228, n. 1.

(*i*) 2 Hale, 210, 1. Cowp. 283.

1 Salk. 149.

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APPLYING ON
THE PART OF
THE
PROSECUTOR.

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they are required under the words "the parties indicted" (*a*). And though the courts may, in their discretion, refuse the removal, if it should appear to be oppressive or unjust, it issues of course in ordinary cases, and will be made out by the clerk in court, on the application of the prosecutor's solicitor, without any affidavit or recognizance, and without any fiat or order of a judge (*b*). Indeed, it may be issued even before the indictment is preferred, ready to be delivered to the clerk of the peace, on the finding of the grand jury, as it returns all the matter between its teste and return (*c*). Where summary proceedings are removed by the prosecutor, he is not bound under the 13th Geo. 2. c. 18. s. 5. to give six days notice of his design to the inferior magistrates (*d*).

Of the writ of
certiorari, its
form and requi-
sites *.

The writ of certiorari runs in this form: George the Fourth, &c. to the keepers of our peace, &c. We being willing, for certain reasons, that all and singular indictments, of whatsoever riots, assaults, and misdemeanors, whereof B. and two others are on the prosecution of A. H. indicted before you as is said, be determined before us, and not elsewhere, do command, &c. that you, &c. send under your seals, &c. before us, on, &c. all and singular the said indictments, &c. (*e*). This writ must not materially vary in its description of the record which it is intended to remove (*f*). If, therefore, it profess to remove an indictment only, it will not be effectual to remove the whole record after conviction (*g*). And even more formal objections have sometimes been holden to be material. Thus, if it describe the indictment to be taken before seven justices, when the proceeding itself mentions eight (*h*). So, if a different justice is named before the words "*others his companions*," than he who appears on the re-

(*a*) 6 Mod. 246. 7 T. R. 196, 7.
Bac. Abr. Certiorari, D. Hand's
Prac. 41. Dick. Sess. 337.
Hawk. b. 2. c. 27. s. 48.
(*b*) Ante, 378. 7 T. R. 196, 7.
2 Stra. 1209. 4 Burr. 2458.
Hand's Prac. 41, 2.
(*c*) 1 East, 298. Hand's Prac.
42.

(*d*) 1 East, 298. Dick. Sess.
388.
(*e*) 1 East, 299, n. a.
(*f*) Hawk. b. 2. c. 27. s. 75.
(*g*) 2 Ld. Raym. 971. Hawk.
b. 2. c. 27. s. 75.
(*h*) Cro. Jac. 254, 5. Yelv. 42.
Hawk. b. 2. c. 27. s. 76.

* See forms, Certiorari, 10 Wentw. 473. Hand's Prac. 359: 354. 6 Wentw. 24. 428. Cro. C. C. 100, 101. Cro. Cir. Ass. 29. 1 East, 299, n. a. 1 Saund. 134. Post, last vol.

cord (*a*); or if the magistrates are denominated *our justices*, when the indictment was taken in a former reign (*b*), the mistake will render it ineffectual. So where the writ describes the indictment for stealing two horses, and that certified is for stealing one only (*c*); where an order is stated as concerning *foreign* salt, and that certified respects salt in general (*d*); where it mentions indictments against A. B. and C. and those returned are against one or two of them only (*e*), the proceedings will be invalid. A material variance in the names or additions will also prejudice, as if the wrong surname be inserted (*f*); if the writ say *knight and baronet*, and the record be *baronet* only (*g*); if the Christian name be mistaken (*h*); or if the addition either of the place or the trade vary (*i*), the writ will be erroneous. But if the mistake be only in the spelling, and the sound remains unaltered, as *Bird* for *Burd*, *Shebury* for *Shelbery*, it will not be material (*k*). And it should seem that the omission of the addition will not vitiate (*l*). But if more defendants are named than appear on the record, the variance will be fatal (*m*). And if it be to remove an indictment against two persons, it will only remove that in which they are jointly indicted (*n*); but it seems to be generally agreed, that a certiorari to remove all indictments against a defendant, will remove all of them as far as they respect him, though not any other party who may be joined in the several accusations of a distinct nature (*o*). Where it is intended to remove the record after verdict, it must be expressly framed for that purpose, or it will be

(*a*) 1 Sid. 448. 1 Rol. Abr. 753. Hawk. b. 2. c. 27. s. 76.

(*b*) 1 Rol. Abr. 754. 2 Dyer, 105. b. Yelv. 212. Hawk. b. 2. c. 27. s. 76.

(*c*) Hale, 214, 5. Hawk. b. 2. c. 27. s. 77.

(*d*) 1 Salk. 145. Hawk. b. 2. c. 27. s. 78.

(*e*) 2 Ld. Raym. 1199. 1 Salk. 146. 151. Hawk. b. 2. c. 27. s. 80.

(*f*) 1 Salk. 264. 1 Rol. Abr. 754. Hawk. b. 2. c. 27. s. 81.

(*g*) Cro. Jac. 633. Hawk. b. 2. c. 27. s. 81.

(*h*) Cro. Jac. 477. 2 Rol. Abr. 329. Hawk. b. 2. c. 27. s. 81.

(*i*) 1 Sid. 193. Dyer, 173. 1 Rol. Abr. 753. Hawk. b. 2. c. 27. s. 81.

(*k*) Cro. Eliz. 172, 3. 1 Rol. Abr. 797. 2 Rol. Abr. 329. Hawk. b. 2. c. 27. s. 81.

(*l*) Hawk. b. 2. c. 27. s. 81.

(*m*) 1 Stra. 116. Hawk. b. 2. c. 27. s. 81, n.

(*n*) 1 Ld. Raym. 609.

(*o*) Id. ibid. 2 Ld. Raym. 1203. 10 Mod. 205. Hawk. b. 2. c. 27. s. 80. 2 Hale, 212, 3.

OF THE WRIT OF
CERTIORARI, ITS
FORM AND
REQUISITES.

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invalid (a). It is not, however, necessary in case of an indictment on a statute, to shew in the writ that the offence was committed *contrary to the form of the statute, in such case made and provided* (b). The defendant must have a day given him in the superior court, when an indictment, after verdict, is removed by this writ (c).

The writ, thus framed, must, whenever it removes any recognizance, or when the defendant is in actual custody, be *signed* by the chief justice; or, in his absence, by one of the judges of the court from whence it is awarded (d). But, in all other cases, it seems that there is no necessity for the judge to sign the writ, but only the fiat by which it is ordered to issue (e). If it be taken out in vacation, and tested, as it may be, of the preceding term, the fiat must be signed some time before the essoign day of the subsequent term, or the whole will be irregular (f).

The writ ought regularly to be *directed* to the judge or magistrates of the inferior court, before whom the proceedings were originally taken (g). But, in some cases, it may be directed to the proper officer, known to have the actual custody of the record, as is most agreeable to the course of the ancient precedents, which are said to furnish the best rules for the direction (h). And if the person who ought to certify the record as a justice of the peace, or judge who has taken a recognizance, a judge of nisi prius who has taken a verdict, or a coroner who has taken an inquest, happen to die while it remains in his custody, the certiorari may be directed to his personal representatives, who must

(a) 2 Ld. Raym. 938. 971. 13 East, 417, note. Hawk. b. 2. c. 27. s. 75.

(b) 2 Stra. 845. Hawk. b. 2. c. 27. s. 81, n.

(c) Ld. Raym. 971. Hawk. b. 2. c. 27. s. 81.

(d) 1 & 2 Ph. & M. c. 1307.

(e) Hawk. b. 2. c. 27. s. 37. Williams, J. Certiorari, III. Holt, 132, *acc.* but see 3 Salk. 80. 1 Salk. 150. *semb. contra.*

Com. Dig. Certiorari, B.

(f) Salk. 150. Holt, 133. Hawk. b. 2. c. 27. s. 37. 1 East, 301, 304.

(g) 3 Keb. 13. Hawk. b. 2. c. 27. s. 38. Bac. Abr. Certiorari, F. Williams, J. Certiorari, IV. 4 T. R. 499.

(h) Dyer, 163, b. Hawk. b. 2. c. 27. s. 38. Bac. Abr. Certiorari, F. Williams, J. Certiorari, IV.

certify (*a*). And it may be directed to a justice of assize, to certify a record of assize, taken before his companion in his absence (*b*). When the certiorari is intended to remove an indictment or recognizances from the sessions, it is directed either to the justices generally, or to some of them in particular, and not to the *custos rotulorum*, though it seems that it may be returned by him, especially if he stile himself a justice of the peace (*c*). And a certiorari to remove an order made by two justices, may be directed to the sessions, and by them returned to the superior jurisdiction (*d*). If, by any mistake, it be directed to the wrong person, it has been holden that no other party can take any advantage of the error, provided the proceedings are duly returned by the parties to whom it was directed (*e*).

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ITS FORM AND
REQUISITES.
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The writ of certiorari is always indorsed at whose instance it was issued, and, when in term time, the words "by rule of court" are added (*f*).

This writ should be *delivered* to the chairman of the sessions, in open court, or other chief judge of the court, though if it appear that it any how came to the knowledge of the justices or judges it must be obeyed by them (*g*). In practice it is delivered to the clerk of the peace, or clerk of assize.

It is clearly settled that, after a certiorari is allowed, and served by the court below, all subsequent proceedings on the record are erroneous (*h*). And before the 21 Jac. 1. c. 8. which requires

How far certiorari operates as a supersedeas.

(*a*) 2 Keb. 750. Dyer, 163, b. 2 Rol. Abr. 629. 2 Inst. 424. Hawk. b. 2. c. 27. s. 39. Bro. Abr. Certiorari, 9. Bac. Abr. Certiorari, F. Williams, J. Certiorari, IV.

(*b*) Hawk. b. 2. c. 27. s. 39. Bac. Abr. Certiorari, F. Williams, J. Certiorari, IV.

(*c*) Hawk. b. 2. c. 27. s. 40. Bac. Abr. Certiorari, F. Williams, J. Certiorari, IV.

(*d*) 1 Stra. 470. Bac. Abr. Certiorari, F. Williams, J. Certiorari, IV.

(*e*) 4 T. R. 499. Bac. Abr. Certiorari, F.

(*f*) 5 & 6 W. & M. c. 11. s. 2. 4; see forms, Hand's Prac. 354. 359.

(*g*) Hawk. b. 2. c. 27. s. 57. 1 East, 299. 301, 2.

(*h*) 1 Salk. 148. 2 Hale, 215. Cro. Car. 261. Cro. Eliz. 915. 2 Ld. Raym. 838. 1 East, 302. Hawk. b. 2. c. 27. s. 57. Bac. Abr. Certiorari, F. Burn, J. Certiorari, III. Williams, J. Certiorari, VII.

HOW FAR
A SUPERSEDEAS.

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that all certioraries upon indictments for forcible entry at sessions, shall be delivered in open court, the delivery of the writ to any one justice of the peace for the same place, made all subsequent proceedings void, and even an execution of a prior award would have been set aside (*a*). It seems also that the justice ought in such case to have awarded a supersedeas to the sheriff to have stopped any execution already awarded (*b*). And it is said to be the better opinion that at common law a certiorari being once delivered, makes all subsequent proceedings on the record erroneous by force of the words, "we being willing that the indictments, &c. be determined before us, and not elsewhere," whether such proceedings are had before or after the return, and even though the party who prosecutes the writ, never make any other application to have the record certified, or exerted himself farther than to deliver it to those to whom it is directed (*c*). At the present day, however, it is clear that the certiorari can never operate as a supersedeas until the defendant has complied with the directions of the statutes (*d*), by entering into the proper recognizances previous to the removal (*e*), and it operates only as a supersedeas from the time of its being actually served, and not from the time of its being issued (*f*). And if the writ be not delivered before the jury are sworn to try the issue, the justices may proceed (*g*). And it will altogether lose its effect unless delivered before the period appointed for its return (*h*); and though issued before judgment, yet if not served until after it, the certiorari will be quashed (*i*). It seems also to be the stronger opinion, although it was anciently holden otherwise (*k*), that a certiorari for the removal of recognizances for good behaviour, or appearance at

(*a*) Cro. Eliz. 915. 2 Keb. 306. 1 Salk. 151. 2 Hale, 213. Hawk. b. 2. c. 27. s. 57. Bac. Ab. Certiorari, F.

(*b*) Moor, 677. Cro. Eliz. 915. Hawk. b. 2. c. 27. s. 57. Bac. Abr. Certiorari, F.

(*c*) Yelv. 32. 2 Hale, 213. 5. Hawk. b. 2. c. 27. s. 59. Bac. Abr. Certiorari, F. Williams, J. Certiorari, VII.

(*d*) 21 Jac. 1. c. 8. s. 7, 8. 5 W. & M. c. 11. 8 & 9 W. 3.

c. 33.

(*e*) Hawk. b. 2. c. 27. s. 59. Bac. Abr. Certiorari, F. Williams, J. Certiorari, VII.

(*f*) 7 T. R. 373.

(*g*) 1 Salk. 144. 150. Hawk. b. 2. c. 27. s. 59. Williams, J. Certiorari, VII.

(*h*) 1 Keb. 944. Hawk. b. 2. c. 27. s. 59. Williams, J. Certiorari, VII.

(*i*) 7 T. R. 373.

(*k*) 2 Roll. Abr. 492.

sessions, does not supersede their obligation, because it might be very prejudicial to the public interests, to release persons whom it was necessary thus to restrain, by the mere prosecution of a writ (*a*). If the indictment be removed after issue by certiorari, and afterwards remanded, the inferior courts may proceed to trial upon it in the same way as if the writ had never been awarded (*b*). But if they go on after the due delivery of the writ, where such conduct is illegal, they may be punished by attachment for contempt of the superior jurisdiction (*c*); and, if the clerk of assize refuse to obey a writ of certiorari to remove an indictment for murder and a special verdict thereon, under pretence of a lien for exorbitant fees, the court will grant an attachment against him (*d*).

HOW FAR
A SUPERSEDEAS.

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The return to the writ of certiorari is to be made *by the party to whom it is directed*; for if it be sent to the justices, and the clerk of the peace only return it (*e*); if to the constable or recorder, and the deputy constable or deputy recorder make the return to it (*f*); or if to the steward of St. Paul, and it be returned by the steward of the churches of St. Peter and St. Paul, the intended removal will be frustrated (*g*). But if it be directed "to the justice of Chester," it may be returned by A.B. chief justice, for it is manifest that the same officer is intended (*h*). And regularly a recognizance taken by a justice of the peace,

Of the return to
the writ of cer-
tiorari *.

(*a*) Cro. Jac. 282. Yelv. 207. 1 Bulstr. 155. Hawk. b. 2. c. 27. s. 60. Bac. Abr. Certiorari, F. Williams, J. Certiorari, VII.

(*b*) Hawk. b. 2. c. 27. s. 61. Williams, J. Certiorari, VII.

(*c*) 1 Salk. 148. Sir T. Raym. 186. 1 Vent. 66. Yelv. 32. Hawk. b. 2. c. 27. s. 62. Crompt. 116. Williams, J. Certiorari, VII.

(*d*) Dougl. 194, note 26.

(*e*) 2 Salk. 479. Hawk. b. 2. c. 27. s. 66. Com. Dig. Certiorari, C. Bac. Ab. Certiorari, H.

Burn, J. Certiorari, IV. Williams, J. Certiorari, VIII.

(*f*) 1 Roll. Ab. 752. 4. 2 Keb. 385. Hawk. b. 2. c. 27. s. 66. Bac. Abr. Certiorari, H. Williams, J. Certiorari, VIII.

(*g*) 2 Keb. 385. Hawk. b. 2. c. 27. s. 66. Bac. Abr. Certiorari, H. Williams, J. Certiorari, VIII.

(*h*) 1 Sid. 64. 1 Lev. 50. 2 Salk. 452. 1 Keb. 165. 187. Hawk. b. 2. c. 27. s. 66. Bac. Abr. Certiorari, H. Williams, J. Certiorari, VIII.

* For form of return, see Hawk. b. 2. c. 27. s. 64. Dalt. J. c. 73. Lombard, b. 2. c. 2. 107, 8. Burn, J. Certiorari, VI. Williams, J. Certiorari, VIII. Dick. Sess. 394, 5, 6. Hand's Prac. 359, 356. 1 Saund. 134. Dick. J. Certiorari, V. Post, last vol.

OF THE RETURN. whether it still continue in his hands or have been sent by him to the clerk of the peace, ought to be certified on a certiorari for the removal of it by such justice only, until it be made a record of the sessions, after which it may be certified in the same manner as is usual with such records (*a*); and the justices at sessions must return the proceeding, although no recognizance has been given, and consequently the certiorari be no supersedeas (*b*).

What is to be returned.

In the return, the *record itself*, or the *tenor*, or the *tenor of the tenor* is to be certified, according as the writ requires (*c*). And, therefore, ²if on a certiorari to return an order of justices, the tenor only be certified, the return will be altogether defective (*d*). But a return of the tenor of an indictment from London, is good by the charter of that city (*e*). And wherever the purport of a certiorari is not to proceed upon the record to be removed, but only to try an issue of nul tiel record, it is sufficient to certify the tenor of the record whatever the words of the writ may require (*f*). It is also clear, that when the court which grants the certiorari has no jurisdiction to proceed on the record which it commands to be removed, as where the court of Common Pleas awards a certiorari to remove an indictment on the issue of nul tiel record, the court below ought only to certify the tenor lest there should be a failure in justice (*g*). If any thing is inserted in the return, by way of explanation or otherwise, which was not commanded, it will not vitiate, but be rejected as merely extraneous (*h*).

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(*a*) Cro. Jac. 669. Hawk. b. 2. c. 27. s. 67. Bac. Abr. Certiorari, H. Williams, J. Certiorari, VIII.

(*b*) Hawk. b. 2. c. 27. s. 47.

(*c*) Fitzh. N. B. 245. 3 Keb. 13. Hawk. b. 2. c. 27. s. 71. Bac. Abr. Certiorari, II. Williams, J. Certiorari, VIII. Burn, J. Certiorari, IV. Dick. Sess. 392.

(*d*) 1 Salk. 147. 2 Salk. 492, 493. Com. Dig. Certiorari, C. Bac. Abr. Certiorari, H. Williams, J. Certiorari, VIII. Dick. Sess. 392.

(*e*) 1 Keb. 252. 1 Sid. 155,

230. Hawk. b. 2. c. 25. s. 97. Id. b. 2. c. 27. s. 26, 71. Bac. Abr. Certiorari, H. Williams, J. Certiorari, VIII.

(*f*) 3 Keb. 13. 1 Keb. 107. 2 Dyer, 186 b. 187 a. Hawk. b. 2. c. 27. s. 71. Bac. Abr. Certiorari, H. Williams, J. Certiorari, VIII.

(*g*) 1 Rol. Abr. 395. Hob. 135. Hawk. b. 2. c. 27. s. 71. Bac. Abr. Certiorari, H. Williams, J. Certiorari, VIII.

(*h*) 2 Salk. 493. Bac. Abr. Certiorari, H. Williams, J. Certiorari, VIII.

The proper *mode of making the return* seems to be to indorse Mode of making return. on the back of the writ, "the execution of this writ appears in a certain schedule hereunto annexed," and then to write the schedule on a distinct piece of parchment, annex it to the record of the indictment, and transmit them together to the superior jurisdiction (*a*); and the words "humbly certify, &c." are unnecessary and improper (*b*). The schedule must be made on parchment, for it will be quashed if on paper (*c*). It is, in general, advisable, that where a certiorari is directed to justices of the peace for the removal of indictments taken before them, the return should have the clause "to hear and determine divers felonies, &c." as well in the description of the magistrates who make the certificate, as of those before whom the indictment is said to be taken in its caption (*d*). And if the words, "the jurors of our lord the king upon their oath present," be omitted, the return will be invalid (*e*). It is also said that the return must be under the seal of the inferior court, to whom it is directed; and, if they have no proper seal, under any other seal they may think fit to employ (*f*); but it seems that, at the present day, the total absence of the seal would not be material (*g*). It is, however, said that, where only a single justice returns it, a seal is requisite (*h*). If the return be defective, it may nevertheless be amended by leave of the court (*i*). [395]

If any improper delay arise, the return may be *enforced by a side-bar rule*, whereby the parties to whom the writ was directed, are commanded to return it after six days notice given them; but, if this side-bar rule be obtained without sufficient ground, the

(*a*) 1 Saund. 134. Burn, J. Certiorari, IV. Williams, J. Certiorari, VIII. Hand's Prac. 39. 356.

(*b*) Carth. 223.

(*c*) 1 Barnard, 113. Burn, J. Certiorari, IV. Williams, J. Certiorari, VIII.

(*d*) Dalt. J. c. 195. Hawk. b. 2. c. 27. s. 68. Bac. Abr. Certiorari, H. Burn, J. Certiorari, IV. Williams, J. Certiorari, VIII.

(*e*) Carth. 223. Bac. Abr.

Certiorari, H.

(*f*) Cro. Eliz. 821. 1 Leon. 311. Hawk. b. 2. c. 27. s. 65. Bac. Abr. Certiorari, H. Burn, J. Certiorari, IV.

(*g*) Cald. 297. Williams, J. Certiorari, VIII.

(*h*) Williams, J. Certiorari, VIII.

(*i*) 4 East, 175. Id. note b. 1 Saund. 249, note 1. See form of rule to amend, 4 East, 175; and post, last vol.

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OF MAKING
RETURN.

defendant may move to have that rule discharged (*a*). After this side-bar rule and notice, in general, the inferior jurisdiction are bound to make return, even though it should appear that the writ was improperly granted (*b*). And a clerk of the peace cannot refuse to transmit the records in his custody, on account of fees due to him, for he has no lien upon them to justify his detainer (*c*). If the return be still withheld, an alias, then a pluries, or a *causam nobis significes* issue, and then an attachment (*d*). But the party to whom a certiorari is directed, may make what return to it he pleases, and the court will not refuse to file it upon affidavits of its falsity, unless in some particular cases where the public good requires such an interference, as in the case of the commissioners of the sewers, or for some other special reason; but the only remedy is an action on the case at the suit of the party injured, or information for the impediment to public justice (*e*); and matter by way of explanation, or otherwise unnecessarily introduced on the return, will not be regarded by the court above (*f*).

[396] When the return is completed, it is sent by the clerk of the peace to the crown office, and delivered to the proper officer (*g*).

Of quashing the
writ.

If after the issuing of the writ of certiorari, it appear to have been improperly granted, as after judgment in the inferior court, it will be quashed, *quia improvide emanavit*, upon cause being shown to the jurisdiction from whence it was awarded (*h*). But, however improper the writ may have been, it is not for the party to whom it is directed to urge that in excuse for not obeying it; for it rests entirely with the King's Bench to recal its own process (*i*). And where, in consequence of an improper removal after verdict the court are doubtful what judgment they ought to pass, they will award a procedendo to the original jurisdiction (*k*). And when,

(*a*) 1 East, 299. See form of side-bar rule, post, last vol.

(*b*) 1 East, 306. 5 T. R. 543.

(*c*) 1 Leach, 201.

(*d*) Fitzh. N. B. 245. Com. Dig. Certiorari, C. Burn, J. Certiorari, IV. 2 Nolan, 357. Dick. Sess. 393. See forms of alias, &c. post, last vol.

(*e*) 6 Mod. 90. 1 Stra. 63. Hawk. b. 2. c. 27. s. 69. Bac.

Abr. Certiorari, H. Williams, J. Certiorari, VIII.

(*f*) 2 Salk. 492, 3. Hawk. b. 2. c. 27. s. 70.

(*g*) 2 Nolan, 359. Dick. Sess. 396.

(*h*) 7 T. R. 373.

(*i*) 1 East, 306. 5 T. R. 543. 13 East, 416, in notes.

(*k*) 6 T. R. 145.

OF QUASHING
THE WRIT.

in consequence of an error in the return, the record is not removed, they will either quash the writ, and order a new one (*a*); or they will allow the court below to proceed, and take such order for the defendant's appearance before either tribunal, as the circumstances of the case may require (*b*). Or, if the court think they issued the writ improperly, they may order it to be superseded, and the return taken off the file (*c*). Or if the writ be issued too late for the trial to take place at the next holding of the court into which the prosecution was removed, the court will quash the writ, and order a procedendo (*d*). As soon as the writ is returned to the crown office, the prosecutor's clerk in court makes out a *venire* for the defendant to appear; upon which the solicitor gets him *summoned* by the sheriff, and upon the return of it, the defendant usually appears, when he is entitled to an imparlance to the following term: but if he does not then appear, the prosecutor's clerk in court, upon the production of the sheriff's return to the *venire*, makes out a *distringas*, upon which 40s. issues are levied on the defendant's effects; and if there is no appearance on the return of that, on an affidavit of the writ's having issued, and being returned as above, the court award an *alias*; and, after that, a *pluries*, &c. enlarging the issues on every writ until the defendant appears, when they will compel him to pay the costs of the writs of *distringas* out of the issues levied. But if the sheriff returns the *venire*, *non est inventus*, then, upon the production of such return, the clerk in court makes out a *capias* for the sheriff to take the defendant into custody, which he will do; whereupon the defendant, to procure his enlargement, must enter an appearance, upon which he will be discharged by supersedeas. If the defendant be taken on a warrant, which a judge may grant on the return of the *venire*, the defendant must then put in bail before he is discharged (*e*).

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When the return to the certiorari has been made, and the indictment removed to the King's Bench at the instance of the

Subsequent proceedings in superior courts, &c.

(*a*) 1 Salk. 147. 2 Stra. 1228. Hawk. b. 2. c. 27. s. 82. Williams, J. Certiorari, X.

(*b*) 2 Keb. 142. Hawk. b. 2. c. 27. s. 82. Williams, J. Cer-

tiorari, X.

(*c*) 1 Burr. 488. 2 Hale, 215. Hawk. b. 2. c. 27. s. 63.

(*d*) See ante, 381, note (*c*).

(*e*) Hand's Prac. 42, 3.

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PROCEEDINGS IN
SUPERIOR
COURTS, &c.

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defendant, if the bail in the recognizance are exceptionable, the prosecutor's solicitor may compel the defendant to add sufficient bail, by taking out and serving on the defendant's clerk in court a *judge's summons* for a *procedendo*, unless better bail be put in (a). And if the recognizances be insufficient, the court of King's Bench may discharge them on motion, and compel the defendant to enter into better securities (b). But the court will not, after the defendant has been admitted to bail, &c. increase such bail on an affidavit of aggravating facts (c). If he do not find sufficient sureties, then, upon the attendance of the summons, the judge will order the *procedendo* to issue, and by which the indictment and proceedings will be sent back to the court in which the prosecution was begun (d); and, if the indictment were removed after issue joined, the inferior court is to proceed to trial as if no certiorari had been issued (e). The prosecutor's solicitor may compel the defendant to proceed to trial, according to the terms of his recognizance, by taking out and serving on his clerk in court a *side-bar rule*, to estreat the recognizance, unless he appears and pleads within the term and proceeds to trial at the sitting of *nisi prius* after the term, if in town, and in the country at the next assizes (f); and, unless the prosecutor, by obtaining and serving the usual rules, compels the defendant to proceed to trial, the recognizance will not be considered as forfeited (g); and if the cause be not tried on account of a defect of jurors, and the prosecutor will not pray a *tales*, the defendant is not liable to costs (h). In a late case where the defendant being taken up on the 8th of June, upon an indictment for a libel, entered into a recognizance to appear, and plead within the first eight days of Trinity Term; and to try the cause at the sittings after that term, the defendant pleaded not guilty, but did not give notices of trial, or make up the record either for the sittings after Trinity or Michaelmas Term, nor were the recognizances respited. The prosecutors gave notice of trial after Trinity and Michaelmas Term, but the causes were not tried; the defendant was ready and willing to take his trial. On both these occasions the

(a) Hand's Prac. 39.

(b) 1 Chit. Rep. 491.

(c) 2 Chit. Rep. 109.

(d) Hand's Prac. 39.

(e) Hawk. b. 2. c. 27. s. 61.

(f) Hand's Prac. 40.

(g) Hawk. b. 2. c. 27. s. 54.

(h) Stra. 937.

recognizances were estreated in Hilary Term without any notice to the defendant, or any motion by the prosecutor; it was held that this estreat was regular (*a*). When the recognizance has been forfeited, the court will not hear any motion to quash the indictment or certiorari (*b*). All the subsequent process is exactly the same as if the cause had originally been commenced in the court to which the certiorari has removed it (*c*). If the proceedings be removed from the assizes, the place of trial will be the same; only on the civil, instead of the criminal side of the hall, where they are holden (*d*).

SUBSEQUENT
PROCEEDINGS IN
SUPERIOR
COURTS, &c.

It is laid down, that, whether the defendant or prosecutor removes the indictment, the proceedings from the trial to the defendant's coming up for judgment are the same as upon informations for misdemeanors (*e*), except that the notice of the motion for the judgment of the court is given to the bail as well as to the defendant, and if the defendant is convicted where he removes the indictment from the sessions, and the prosecutor be the party injured, or is a civil officer and prosecutes on account of any thing that concerns him as such, and that appears either by an indictment or an affidavit of the circumstances (*f*), he is entitled to his costs; and, if they are not paid within ten days after they are taxed and demanded, he may have an attachment for the recovery of them, and the recognizance cannot be discharged till the costs are paid (*g*).

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The court above cannot alter, or in any way amend the indictment certified to them, because they have not the concurrence of the jurors by whom it was presented (*h*); and, therefore, however long it may appear, they cannot strike out a count from the record (*i*). But they may make an alteration in the caption, for

Of amendments.

(*a*) 5 B. & A. 728.

(*b*) Hawk. b. 2. c. 27. s. 55.

(*c*) Hand's Prac. 40, 43, 9. Hawk. b. 2. c. 27. s. 83. Williams, J. Certiorari, X. As to the rules to plead, see 6 East, 583. 586. Id. note c. 587; and id. note b. and post.

(*d*) 5 T. R. 628.

(*e*) Hand's Prac. 43, 4.

(*f*) 1 Burr. 54.

(*g*) 5 & 6 W. & M. c. 11.

(*h*) Ante, 297.

(*i*) 2 Stra. 1026. Com. Dig. Amendment, 2. c. 1.

OF
AMENDMENTS.

that is a mere history of the prior stages of the cause, and is therefore liable to be corrected (*a*).

Of the costs on
this proceeding.*

The 5 & 6 W. & M. c. 11. s. 3. enacts that, if the defendant prosecuting a certiorari from the sessions be *convicted*, the King's Bench shall give reasonable *costs* to the prosecutor, if he be the party grieved or injured, or a justice of peace or other civil officer who prosecutes by virtue of his office, to be taxed according to the usual practice of the court, and if they are not paid after ten days subsequent to demand, an *attachment* shall issue and the recognizance shall not be discharged until the costs are satisfied. In the construction of this statute it has been holden that the term "*convicted*," means convicted by *judgment*, and that consequently, though after the removal the defendant be found guilty by a jury, yet if the judgment be afterwards arrested no costs can be taxed for the prosecutor (*b*). The costs of conveying a defendant to gaol in execution of his sentence, are reasonable costs, within the act (*c*). The master of the crown office ought only to include the costs subsequent to the issuing of the writ in his taxation (*d*). And the prosecutor, in accepting the costs so taxed, is not restrained from moving to increase the fine, because he has a right to them by the express words of the statute; but in cases to which the act does not apply, he cannot do so after payment of costs, because having no right to demand them, if he takes them it will be regarded that they are given in satisfaction of the injury, after which it is unreasonable to harass the defendant (*e*). To entitle the prosecutor to costs under this act of Parliament, he must be either a civil officer acting in the discharge of his peculiar duty, or the party actually injured; and, if he fall under neither of these descriptions, he cannot demand them though he was

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(*a*) 4 East, 175. Id. note b.
1 Saund. 249, note 1. Ante,
335.

(*b*) 15 East, 570.

(*c*) 5 M. & S. 520. Sed vide
2 Chit. Rep. 159, S. C. contra.

(*d*) 1 Salk. 55. Hawk. b. 2.
c. 27. s. 52. Bac. Abr. Certio-

rari, D. Burn, J. Certiorari, II.
Williams, J. Certiorari, VI.

(*e*) 1 Salk. 55. 2 Ld. Raym.
854. 2 Stra. 1165. Hawk. b. 2.
c. 27. s. 53. Bac. Abr. Certio-
rari, D. Williams, J. Certio-
rari, VI.

* See Hullock, 2d edit. 536, &c. 15 East, 570, 1, 2.

bound over by a magistrate (*a*). And it is not sufficient that the party who conducts the prosecution be an officer unless it be for some offence which it is peculiarly his duty to prosecute (*b*). Thus, if a justice of the peace indict for an escape against which it is not particularly his office thus to proceed, he will not come within the statute (*c*), but if he prosecute, whether by indictment or presentment, on the ground of a road being out of repair, which it is his duty to present, he will be entitled to costs from the defendant (*d*). And the prosecutor of an indictment for stopping up a public footway, which he has been accustomed to use, is a party injured within the statute (*e*); and where the prosecutors of an indictment against a parish for not repairing a highway were a constable, whose duty it was to look to the repairs of highways, and who was directed to present the road in question; and the others were parties living in the neighbourhood, and their road to the nearest market town lay over the highway indicted, and in consequence of its being out of repair, they were obliged to take a circuitous rout, they were entitled to the costs as prosecutors (*f*). But where the prosecutor of an indictment for obstructing a highway, did not apply for the costs until two years after judgment, and it did not appear he had ever used the highway before it was stopped, and whilst it was stopped declared he did not care about it, the court held he was not entitled to costs, though the prosecution was at his expense; for it was not enough to constitute a right to costs that he was the prosecutor, there should also be some special and peculiar injury accruing to him from the obstruction, besides that which affects all the subjects in common with him (*g*). Persons who prosecute a party for keeping a steam engine emitting noxious vapours near their houses, are entitled to costs under the act (*h*); but a person who indicts merely for an attempt to commit a crime, is not a party injured within the act (*i*). If the party fall within the descriptions of the statute, the circumstance

(*a*) 1 Wils. 139. 1 Burr. 431.
Hawk. b. 2. c. 27. s. 53. Bac.
Abr. Certiorari, D. Burn, J.
Certiorari, II. Williams, J. Cer-
tiorari, VIII. Dick. Sess. 399.

(*b*) 2 T. R. 47. 5 T. R. 33.
Burn, J. Certiorari, II. Wil-
liams, J. Certiorari, VIII. Dick.
Sess. 399. Hullock, 242, 3.

(*c*) 2 T. R. 47.

(*d*) 5 T. R. 33.

(*e*) 7 T. R. 32. Burn, J. Cer-
tiorari, II. Williams, J. Certio-
rari, VI.

(*f*) 3 M. & S. 465.

(*g*) 1 M. & S. 268.

(*h*) 16 East, 194.

(*i*) 1 Wils. 139.

COSTS ON. of his name not being indorsed on the indictment will not prejudice the rights with which he is invested (*a*).

If the court, on the certificate of the King's Coroner, have given to the prosecutor one third of the *fine*, they will order that sum to be deducted from the amount of the taxation (*b*). But the payment of the fine does not discharge the recognizance for the costs (*c*). And if the defendant forfeit his recognizance under the statute, by not going to trial at the time specified, it will not be discharged on the application of the bail, until the costs of not proceeding to trial have been paid, notwithstanding the defendant was afterwards acquitted and taken in execution for the amount of the taxation (*d*). And if the amount of the costs exceed the sum named in the recognizance, the obligation of the latter will not be discharged by payment of the sum therein mentioned; but it will stand in force until the whole amount is satisfied to the prosecutor (*e*). The sum, when duly ascertained by the master, becomes a vested debt; and, if the prosecutor die before it is paid, his personal representatives may proceed to recover it (*f*). Whilst, on the other hand, if the defendant die, after conviction, but before the day in bank (*g*), his bail will remain liable, and the recognizance may still be estreated (*h*).

But as the costs are given only by the statute, which relates only to removal of indictments from the sessions, the recognizance must be such as the act requires, or it will not be allowed to stand as a security for the costs, after its condition has been fulfilled (*i*). And, therefore, a recognizance to remove an indictment from the

(*a*) 1 Burr. 54. Hawk. b. 2. c. 27. s. 53. Bac. Abr. Certiorari, D. Burn, J. Certiorari, II. Williams, J. Certiorari, VI. Hullock, 546.

(*b*) 4 Burr. 2125. 1 Salk. 55. Bac. Abr. Certiorari, D. Com. Dig. Certiorari, B. Williams, J. Certiorari, VI.

(*c*) Bac. Abr. Certiorari, D. Williams, J. Certiorari, VI. Hawk. b. 2. c. 27. s. 53.

(*d*) 3 Burr. 1461. 15 East, 572. Bac. Abr. Certiorari, D.

Williams, J. Certiorari, VI.

(*e*) 13 East, 4. 15 East, 572. 3 Burr. 1461.

(*f*) 1 T. R. 104. 15 East, 573. Bac. Abr. Certiorari, D. Williams, J. Certiorari.

(*g*) 3 B. & C. 160. 4 Dow. & Ry. 816, S. C.

(*h*) 8 T. R. 409. 15 East, 573.

(*i*) 1 Burr. 11. 2 Stra. 1165. 3 Burr. 1463. Bac. Abr. Certiorari, D. Williams, J. Certiorari, VI. Hawk. b. 2. c. 27. s. 53.

court of oyer and terminer in a larger sum than £20 is a recognition at common law, and will be discharged when complied with, though the costs remain unpaid (*a*).

COSTS ON.

If the prosecutor, after the removal of the indictment by certiorari from the sessions to the King's Bench, give notice of trial, but afterwards withdraws the record, without having countermanded the notice in due time, he will have to pay the costs of the trial, as in other cases (*b*).

(*a*) *Id. ibid.* 3 Burr. 1461. (*b*) 8 East, 269. 2 Chit. Rep. 159.

CHAPTER X.

**OF OBTAINING A COPY OF THE INDICTMENT—
ASSIGNING COUNSEL—DEFENDING IN FORMA
PAUPERIS—AND OF ARRAIGNMENT AND ITS
INCIDENTS.**

Of obtaining
copy of indict-
ment.

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IT is a remarkable circumstance, that the English law should allow so much nicety to prevail with respect to formal defects in the indictment, and yet afford the defendant so little opportunity of discovering them. At common law, he is never, in case of treason or felony, entitled to a copy of the indictment (*a*); though, if any legal exception be taken to its form, the court will, as a favor, allow a copy to be taken of the part which it is material to examine (*b*). And he is, in all cases, allowed to have the record read over to him with sufficient distinctness, or even twice in English (*c*); as is the case at the present day where the prisoner desires to plead autrefois acquit to an indictment for felony (*d*). And in a case where the defendant's object was to reverse an outlawry before conviction for murder, the record of outlawry was read so slow, as to afford an opportunity of taking it down in short-hand (*e*). In offences inferior to felony, on the other hand, it seems that the right of having a copy of the indictment has at all times been admitted (*f*). And now, by 60 Geo. 3. and 1 Geo. 4. c. 4. s. 8, in prosecutions for misdemeanors, instituted by the attorney or solicitor-general, in any of the courts therein mentioned, the court shall, if required, make order that a copy of the

(*a*) 1 Lev. 68. Moor, 666.
1 Show. 131. 1 Sid. 85. 2 Hale,
236. 4 T. R. 692, 3. 3 Burr.
1811. Hawk. b. 2. c. 39. s. 13.
Fost. 40. 228. 4 Bla. Com. 352.
2 Woodes. 556. 1 East, P. C.
112.

(*b*) 1 Lev. 68. 1 Sid. 85.

Hawk. b. 2. c. 39. s. 13.

(*c*) 1 Lev. 68. 1 Sid. 85. Fost.
40. 2 Hale, 236. Hawk. b. 2.
c. 39. s. 13. Hand's Prac. 487,
note *.

(*d*) 2 Leach, 711.

(*e*) Hand's Prac. 487, note.

(*f*) Cro. Car. 483.

information or indictment shall be delivered, after appearance, to the party prosecuted, or his clerk in court, or attorney, upon application made for the same, free from all expense to the party so applying; provided that such party, or his clerk in court, or attorney, shall not have previously received a copy thereof.

OF OBTAINING
COPY OF
INDICTMENT.

As far as respects *high treason*, this ancient rule against allowing a copy of the indictment has been greatly relaxed by the provisions of the legislature. The 7 W. 3. c. 3. enacted, that all persons indicted for high treason, except for counterfeiting the coin, sign manual or signet, should have a true copy of the whole indictment, but not the names of the witnesses, five days at least before the trial, upon the application of his attorney or agent, and the payment of reasonable fees to the officer, not exceeding five shillings for the copy required. And, by the seventh section of the same act, every defendant is entitled to a copy of the panel of the jurors who are to try him, duly returned by the sheriff, and delivered to him two days at least previous to the trial. These privileges were further extended by 7 Ann. c. 21. s. 11, which enacts, that after the decease of the pretender, when any person is indicted for high treason or misprision of treason, a list of the witnesses who shall be produced on the trial in support of the charge, and of the jury, mentioning their names, professions, and places of abode, shall also be given at the same time that a copy of the indictment is delivered to the party indicted. And these copies and lists are to be delivered, at least ten days before the trial, in the presence of two credible witnesses. But this last act of parliament has since been repealed, as far as it affects treasons relating to the coin, which were expressly excepted from the statute of William; and are now, therefore, to be tried in the same way with common felonies (*a*). It will suffice if the list, in describing the place of abode of the witnesses, state it was *lately* of such a place; but the place mentioned must be the last place of the witness's abode (*b*).

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Although these acts mention only "the whole indictment," the prisoner ought to have a copy of the caption also delivered to him,

(*a*) 6 Geo. 3. c. 53.

(*b*) 2 Stark. 116, 127.

OF OBTAINING
COPY OF
INDICTMENT.

for this is as necessary to enable him to conduct himself in pleading as the other ; and such is now the constant practice (*a*). But if he plead without having claimed these advantages, or when they have been imperfectly granted, he cannot afterwards take advantage of the defect, for his pleading has cured the objection (*b*).

Time and mode
of granting it.

By necessary construction, the ten days mentioned in the statute 7 Ann. c. 21. s. 11. must be reckoned after the bill is found, and before the arraignment of the prisoner ; for, until the finding of the bill, there is no indictment, and, upon the arraignment, the prisoner must plead *instanter* (*c*). The ten days must, in the instance of the copy of the indictment, be reckoned exclusive of the days of delivery and arraignment, and with regard to the copy of the panel, exclusive of the days of delivery and of trial (*d*). By general practice too the time, at least with respect to the copy of the indictment, is reckoned exclusive of Sunday, as that is a day on which, it will not be presumed that the prisoner is preparing for his defence, though this indulgence is not given by the statute (*e*). When the indictment is to be read to him, in cases to which the act does not apply, in order to enable the defendant to plead *autrefois acquit*, the proper time is to grant *oyer*, before he is called upon to plead (*f*).

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Although the statute of William requires that the defendant shall have a copy of the panel “duly returned by the sheriff,” if the copy be delivered before the return of the precept, it will be sufficient within the words and intent of the act, because he will have the advantage of it, in the interval allowed to inquire into the character of the jurors, and to prepare his challenges (*g*). The

(*a*) Fost. 229, 230. 1 East P. C. 113.

(*b*) 4 Harg. St. Tr. 746, 7. Fost. 230. 2 Salk. 634. Comb. 5. And see 2 Stark. C. N. P. 158.

(*c*) Fost. 230. 1 Burr. 643. Hawk. b. 2. c. 39. s. 15. 1 East P. C. 112.

(*d*) Fost. 230. 1 Burr. 643. Hawk. b. 2. c. 39. s. 15. 1 East P. C. 112.

(*e*) Fost. 2. 230. 1 East

P. C. 112. 4 Bla. Com. 352, n. 6.

It is said in Lord Erskine's speech, on the trial of Hadfield, that a defendant has fifteen days between arraignment and trial. Erskine's Speeches, 5, v. 7.

(*f*) Hawk. b. 2. c. 39. s. 13. 2 Leach, 711.

(*g*) 4 St. Tr. 636. Fost. 230. Hawk. b. 2. c. 41. s. 23. 1 East P. C. 113.

TIME AND MODE
OF
GRANTING IT.

mode in which the prosecutor is enabled to comply with the requisitions of the statute, is by moving for a rule upon the sheriff, to deliver to him a list of the jurors whom it is intended to return on the panel, in order to deliver them to the prisoner (*a*). If so many of the jurors are challenged, that a sufficient number are not left in the panel, the court will, in case of a special commission, award a new panel *ore tenus*, and in other cases will award a *decem tales*, and adjourn to another day to give the defendant time to examine the new lists according to the statutes (*b*). Trivial objections to the mode of stating the jurors returned, will not be material, as where the name is mis-spelled, but the sound is not altered, and where, in the addition, the name of the street in which the defendant resides, is stated without any circumstance to distinguish it from other streets, the names of which are similar (*c*). But if, previous to the trial, the lists are discovered to be materially incorrect, a motion may be made on the part of the crown, to allow the sheriff to amend the panel, and then the corrected lists must be delivered to the parties indicted (*d*).

It seems to be universally agreed, that at common law, a prisoner was not entitled to defend by *counsel*, upon the general issue not guilty, on any indictment for treason or felony (*e*). This rule may appear somewhat strict and severe, as the crown has always the benefit of counsel to marshal its evidence, and state the case to the jury; but it is, in some degree, attempted to be explained by the maxim, that the judge is to be counsel for the prisoner (*f*); whose duty it is to see that all the proceedings are regular; to examine witnesses for the defendant; to advise him for his benefit;

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Of assigning
counsel.

(*a*) 2 Dougl. 590. 1 East P. C. 113. See form of rule Dougl. 591. Post, last vol.

(*b*) Fost. 63, 4. 1 East P. C. 113.

(*c*) 6 T. R. 531. 1 East P. C. 114.

(*d*) 1 East P. C. 113, 14.

(*e*) 3 Inst. 29, 137. 2 Bulst.

147. Cro. Car. 147. Fost. 228. 231. Rep. temp. Hardw. 250, 1. Hawk. b. 2. c. 39. s. 1. 4 Bla. Com. 355, 6. 1 East, P. C. 112. Dick. Sess. 193. Doc. & Stu. 259 to 262.

(*f*) See 4 Bla. Com. 354, 5, 6, and the note 4. Doc. & Stu. 259.

OF ASSIGNING
COUNSEL.

to hear his defence with patience ; and, in general, to take care that he is neither irregularly nor unjustly convicted (*a*). Whereas, when counsel are allowed a prisoner, it is their business to see that he lose no advantage ; and it is then the duty of the judge to be equal and indifferent between the king and the prisoner (*b*). In prosecutions in which counsel may be and are allowed, the court will not be of counsel for the defendant also (*c*). The rule by which counsel are refused to the defendant, applies only to *matters of fact* ; for whenever a point of *law* arises proper to be debated, he will have counsel to discuss it (*d*) ; as whether the facts proved constitute any offence, or the offence charged ; whether the witnesses offered are competent ; whether the jury are sufficient, and whether the indictment is properly framed (*e*). In these cases, it is said, the prisoner must propose the point, and the court will assign him counsel if they think it will bear discussion (*f*). But if any doubt arises on the trial of a nobleman by his peers, it is said, they will not allow counsel, but decide the matter among themselves (*g*).

The refusal of counsel also applies only to the general issue, and has never been extended to any *collateral issue* ; for upon these, the prisoner is entitled to their full assistance (*h*). Thus he may have counsel to plead a pardon (*i*), to assign error to reverse outlawry (*k*) ; but the court cannot assign the defendant counsel on an outlawry for treason till he has pleaded to the outlawry, and then he may have counsel on the collateral matter (*l*), or to plead a former acquittal ; even though by rudeness and contumacy he should forfeit all claim to a mere discretionary indulgence (*m*). And it is said, that in such cases, any one may be counsel for him

(*a*) 3 Inst. 29. 2 Bulst. 147.
4 Bla. Com. 355, 6. Dalt. J.
c. 185. Dick. Sess. 194.

(*b*) 4 Harg. St. Tr. 705.

(*c*) Ibid.

(*d*) Cro. Car. 147. 3 Inst. 29.
137. 2 Hale, 236. Fost. 131, 2.
Hawk. b. 2. c. 39. s. 4. 4 Bla.
Com. 356.

(*e*) Hawk. b. 2. c. 39. s. 4.

(*f*) Hawk. b. 2. c. 39. s. 4.
Cro. C. C. 147.

(*g*) Hawk. b. 2. c. 39. s. 6.

(*h*) Fost. 42. 46. 56. 232.
3 Inst. 137. Cro. Car. 365.
1 Burr. 638. 2 Stra. 825, 6.
2 Hale, 241. Hawk. b. 2. c. 39.
s. 5. 4 Bla. Com. 356, n. 9.

(*i*) 3 Inst. 29. 137. Hawk.
b. 2. c. 39. s. 5.

(*k*) Fost. 46. 2 Stra. 825, 6.
Hawk. b. 2. c. 39. s. 5. Burr.
638. Cro. Car. 365.

(*l*) 1 Burr. 638.

(*m*) 2 Hale, 241.

without assignment (*a*), though it is certainly better that both the counsel and solicitor should be assigned by the court on the nomination of the defendant (*b*). However, it is certain, that any one may, as *amicus curiæ*, inform the court of any error in the proceedings, of which they are bound to take cognizance (*c*).

OF ASSIGNING
COUNSEL.

Even, upon the general issue, the strict rule of law against defending by counsel, has been considerably modified by modern practice. For, at the present day, a prisoner is allowed counsel to instruct him what questions to ask, or even to ask questions for him with respect to matters of fact, and to cross examine the witnesses for the crown, and to examine those produced on the part of the defendant, though not to address the jury (*d*). And in case of mere misdemeanors, or any offences less than felony, it does not appear that the right of the party indicted to a full defence by advocates, has ever been disputed (*e*). But the defendant, on the trial of a misdemeanor, cannot have the assistance of counsel to examine the witnesses, and reserve to *himself* the right of addressing the jury; though indeed, even in such case, counsel may argue for him a point of law, or suggest what questions to put to the witness (*f*).

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The rule by which counsel were denied upon the general issue, on charges of felony and treason, has been entirely abolished, as it respects the latter, though it still remains in force with reference to the former. In prosecutions for treason, it was feared that the very weight of the charge would tend to depress the prisoner, while from its political nature, it was too likely to be imputed, in bad times, to the innocent who might be obnoxious. It was, therefore, enacted by the 7 W. 3. c. 3. s. 1. which, we have seen, gives a copy of the indictment and jurors, that all persons accused of any such treason, as works corruption of the blood, shall be admitted to make their full defence by counsel; and, upon their

(*a*) Sir T. Jones, 180. Hawk. Dick. Sess. 194.
 b. 2. c. 39. s. 5. (e) Cro. Car. 482, 3. 4 Bla.
 (b) Hawk. b. 2. c. 39. s. 7. Com. 355, n. 8.
 (c) 3 Inst. 29. 137. Hawk. (f) 1 Ry. & Mo. N. P. C. 166:
 b. 2. c. 39. s. 7. Dalt. J. c. 165. 3 Campb. 98.
 (d) 4 Bla. Com. 354, 5, 6.

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COUNSEL.

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request, the court before whom they are to be tried, are authorized and required to assign them such counsel, not exceeding two, as they shall themselves desire, and the counsel so assigned, shall at all reasonable times have free access to the prisoner. And by the third section of the same act, its provisions are extended to persons outlawed for treason, who may afterwards, by any other law, put themselves upon their trial. But, by particular provisions of this act (*a*), it does not affect parliamentary impeachments, or persons indicted for treasons relating to the coin, signet, or sign manual. By a modern statute (*b*), however, the same indulgence is allowed to persons impeached by the high court of parliament, though the latter description of treasons are still left as at common law, and no counsel can be allowed to defend them (*c*). The indulgences thus granted, have, on several occasions, been exercised, and found highly beneficial to the liberties of the subject (*d*). And under these acts, every prisoner is separately entitled to two counsel, though jointly indicted with others for the same offence (*e*). But other felonies have not, by any statute, been made subject to the same regulations; but, on any appeal, full counsel have always been admitted; because, although the object of the prosecution is the death of the defendant, it is in form, in the nature of a civil proceeding (*f*).

Time and mode
of assigning coun-
sel.

It seems, that upon the true construction of the stat. of William, the prisoners are entitled to have counsel assigned ten days before arraignment, exclusive of Sundays, in order that they may have full opportunity of preparing for their defence by professional assistance (*g*). The application need not be made by the prisoners themselves, but may be by one of their intended counsel, or their agents and attornies (*h*). And the latest practice seems to be (*i*), upon the finding of the indictment by the grand jury, for one of

(*a*) Sections 12, 13.(*b*) 20 Geo. 2. c. 30.(*c*) 2 Stra. 825, 6.(*d*) Fost. 42. 46, 47. 228.

1 Burr. 643. Dougl. 592.

2 Stra. 825. 4 Bla. Com. 356.

(*e*) 1 East, P. C. 111.(*f*) 3 Dyer, 296, a. Hawk.

b. 2. c. 39. s. 3. See form of Assignment, 1 Burr. 643.

(*g*) 1 East, P. C. 114.(*h*) Dougl. 591. Hawk. b. 2.

c. 39. s. 10. 1 East, P. C. 114.

Fost. 230, n. *.

(*i*) Upon Hardy's trial, 1 East, P. C. 114.

the judges in court to give notice, that on application by the agent or attorney for the prisoner to the courts of oyer and terminer or Old Bailey, or either of the judges, counsel will be assigned them, in order to prevent harassing them by bringing them up merely to be remanded. Though formerly it seems to have been the mode to bring them up, to hear the indictment read, and before reading it, to assign them counsel, then to call upon them to plead, and remand for a convenient interval (*a*). But when a prisoner is allowed counsel upon a collateral fact, he is not entitled to have them until after he has pleaded, to defend in court, though they may advise him in private (*b*). And the court will not grant a rule for this purpose, when they understand the secretaries of state have admitted the counsel to visit him in prison (*c*). After counsel are once assigned, the court will not discharge them, though they desire it, but will sometimes add others to them (*d*). But if the prisoner desire either a serjeant or king's counsel, he must pray it in a distinct petition, when it will probably be granted (*e*).

TIME AND MODE
OF ASSIGNING
COUNSEL.

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Although we have seen that no one can be convicted of a felony in his absence, and at the assizes and sessions, the defendant must appear in person, before plea, it is otherwise in the King's Bench in the case of misdemeanors; for the defendant may in that court, when the crime is inferior to felony, appear by attorney (*f*). And in case of mayhem, even though it is stated to be done *feloniously* in the indictment, the defendant need not personally attend, but may cause his plea to be delivered in the office (*g*). So, where infants are prosecuted for misdemeanors, it is the constant practice for them to appear by attorney in the

Of appearance
and defending
by attorney.

(*a*) 1 Burr. 643. 1 Bla. Rep. 4.

(*b*) 7 W. 3. c. 3. s. 1. 1 East, P. C. 111. 1 Burr. 638. Dougl. 591, n. 2. 1 Bla. Rep. 3. Fost. 41. 228, 229.

(*c*) 1 Bla. Rep. 3. Fost. 41. 229.

(*d*) Hawk. b. 2. c. 39. s. 3.

(*e*) See forms, Hand's Prac.

246. 417. Post, last volume.

(*f*) Ante, 337, 8. 1 Lev. 146. Kelw. 165. Dyer, 346, b. 1 Rol. Abr. 289, l. 10. 2 Hale, 216. Cro. Jac. 362. Com. Dig. Attorney, B. 5. Bac. Abr. Attorney, B.

(*g*) 2 Stra. 1101. 816.

OF APPEARANCE
AND DEFENDING
BY ATTORNEY.

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crown office, though in civil cases they must defend by guardian (*a*). And it is usual at the sessions for the party to appear, traverse, or deny the indictment, and enter into a recognizance with sureties to appear and try at a subsequent sessions (*b*). So also a clerk in court may confess an indictment for his client in his absence (*c*). And we have seen, that in order to reverse an outlawry before conviction on an indictment for a misdemeanor, the defendant may appear by attorney, though he cannot do so on a prosecution, for a felony (*d*), or when he is taken for a contempt, or on a *cepi corpus* upon an exigent (*e*).

Analogous to the practice of the plaintiff's entering an appearance for the defendant in a civil action (*f*), it was enacted by the 48 Geo. 3. c. 58. s. 1., that if a person in custody under a warrant or writ of *capias*, founded on an indictment in the court of King's Bench, (which we may recollect can only be for a misdemeanor) shall not cause an appearance, and plea or demurrer, to be entered for himself within eight days after copy of the indictment delivered, with notice to plead in eight days, it shall be lawful for *the prosecutor to cause an appearance*, and plea of not guilty to be entered for him, and to proceed to trial as if he were actually present. And there is a similar provision with respect to prosecutions for obstructing revenue officers (*g*).

Of defending in
formâ pauperis.

Although a defendant in a civil action is never entitled to defend in formâ pauperis, this rule does not apply to criminal proceedings; for the reasons why, in the former case, this indulgence is not allowed, is, that the statute 11 Hen. 7. c. 12. contains no provision relative to defendants, and that the court, if they had this discretionary power, would be enabled to dispense with the

(*a*) 2 Ld. Raym. 1284. Tidd, 92.

(*b*) Dick. Sess. 151, 2.

(*c*) 6 Mod. 16. Bac. Abr. Attorney, B.

(*d*) Ante, 369. Com. Dig. Attorney, B. 6. Bac. Abr. At-

torney, B. 4 & 5 W. & M. c. 18.

(*e*) Id. *ibid*.

(*f*) See 12 Geo. 1. c. 29.

5 Geo. 2. c. 27. Tidd's Prac. 241.

(*g*) 26 Geo. 3. c. 77. s. 18.

35 Geo. 3. c. 96. 6 T. R. 400.

statutes relative to costs to the prejudice of the party suing (*a*). But, as in criminal cases, the prosecutor receives no costs, unless the indictment be removed by certiorari, and, therefore, he cannot be prejudiced by such an admission; the courts have a discretionary power at common law, of allowing the party indicted to defend as a pauper (*b*). And, in the exercise of this discretion, they will admit a defendant to plead a pardon in formâ pauperis (*c*) and even to defend an indictment for conspiracy (*d*). By the 2 Geo. 3. c. 28. s. 8. a person arrested on a *capias* or information, relating to the customs, upon making affidavit that he is not worth £5, exclusive of his wearing apparel, may, at the discretion of such judge, be admitted to defend as a pauper, with the same privileges as those who may sue in this manner for the recovery of civil rights.

OF DEFENDING
IN FORMA
PAUPERIS.

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The mode for the party defending to obtain this benefit, is by making an affidavit before the *judge* or a commissioner of the court, under the last-mentioned act, that he is not worth £5, and then to petition to have a particular counsel and clerk assigned him (*e*). In civil cases, where the *plaintiff* applies, he must, at the foot of his petition, add a certificate under the hands of two counsel, that they believe him to have good grounds of action; but it does not seem essential for a defendant to procure such an attestation, that he has probable grounds of defence (*f*). When he has prepared the affidavit and petition, he presents them, and in civil cases, if the court see fit, they will issue an order according to the prayer of the plaintiff (*g*). But, where the defendant applies, he must move the court, and then the order will issue (*h*). An order cannot be made at the judge's chambers in vacation, for leave to prosecute in formâ pauperis, the order must be obtained in court (*i*).

(*a*) 2 Keb. 378. Hullock, 228, 9.

(*b*) Rep. temp. Hardw. 211, 212. 253. 2 Stra. 1041. 1214. 3 Burr. 1308. 6 Mod. 88. Com. Dig. Formâ Pauperis, A. Hullock, 228.

(*c*) 2 Stra. 1214. Com. Dig. Formâ Pauperis, A. Hullock, 229, n. 1.

(*d*) Vin. Abr. Paupers, A.

(*e*) Vin. Abr. Paupers, B.

(*f*) Id. ibid.

(*g*) Id. ibid.

(*h*) Comb. 77. Vin. Abr. Paupers, B.

(*i*) Admitted by the court, in Rex v. Cresswell, at Guildhall, London, 22d July, 1816.

OF DEFENDING
IN FORMA
PAUPERIS.

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The effect of this admission, when granted, is to prevent the officers of the court from taking fees, as well as those who are assigned to conduct the cause on the motion of the defendant (*a*).

Under the statute of 11 Hen. 7. the court admitting the plaintiff to prosecute as a pauper, might punish him if non-suited (*b*); but in criminal cases, there is no instance, at least in modern practice, of a prisoner so indulged, having on conviction, received an aggravated punishment.

Of arraignment
and its incidents.

We have seen, that although a defendant accused only of a misdemeanor, may be found guilty in his absence, this can never be done in capital felonies, but it is necessary that he should personally attend, and it should so appear on the record (*c*). When, therefore, he either voluntarily appears to the indictment, or was before in custody, or is brought in upon process to answer it, he is immediately to be *arraigned* thereon, which is the next stage of criminal prosecution (*d*). Different derivations have been assigned to the term *arraignment* (*e*); it signifies the calling of the defendant to the bar of the court, to answer the accusation contained in the indictment (*f*). It consists of three parts, 1st, calling the prisoner to the bar by his name, and commanding him to hold up his hand; 2dly, reading the indictment to him distinctly in English, that he may understand the charge; and, 3dly, demanding of him whether he is guilty or not guilty, and asking him how he will be tried (*g*).

(*a*) Hullock, 228, n. 1.

(*b*) Vin. Abr. Paupers, C. Com. Dig. Formâ Pauperis, A. Hullock, 223.

(*c*) Ante, 358. 2 Hale, 216. 1 Show. 131.

(*d*) 2 Hale, 216. 4 Bla. Com. 322. Burn, J. Arraignment. Williams, J. Arraignment.

(*e*) Johnson's Dic. Arraignment. Jac. Dic. Arraignment. Dalt. c. 135. 2 Hale, 216, 17.

4 Bla. Com. 322.

(*f*) 2 Hale, 216. 4 Bla. Com. 322. Burn, J. Arraignment. Williams, J. Arraignment. 4 Harg. St. Tr. 777, 8.

(*g*) 2 Hale, 219. Williams, J. Arraignment. Dick. Sess. 160. See forms, Harg. St. Tr. vol. 4. 777. 661. 2 Hale, 219. Dick. Sess. 153. 160. and post, last vol.

The first of these ceremonies is intended the more completely to identify the prisoner as the person named in the indictment, because by holding up his hand when his name is called, he acknowledges himself to be properly described under that appellation (*a*). But this ceremony is not absolutely necessary, for if the prisoner obstinately refuse to hold up his hand, the same purpose is answered by any admission that he is the person intended (*b*). And it seems not to be usual at all to require it of a peer (*c*).

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The intention of reading the indictment to the prisoner, is, that he may fully understand the charge to be produced against him (*d*). This is to be done in English by a very ancient statute, long before the proceedings in general were in our own language, and when all the written parts of the accusation were scrupulously framed in Latin (*e*). And it seems that the indictment is to be read, although the defendant has had a copy delivered to him (*f*). The mode in which it is read is, after saying "A. B. hold up your hand," to proceed, "you stand indicted by the name of A. B., late of, &c. for that you, on, &c." and then to go through the whole of the indictment (*g*). If the defendant wish to plead *autrefois acquit*, the indictment is to be so slowly read, that the defendant may take it down, so as to state it correctly in his plea (*h*).

After this is concluded, the clerk of the arraigns proceeds to the third part of this branch of the proceedings, by adding, "how

(*a*) 2 Hale, 219. Dalt. c. 185. Hawk. b. 2. c. 28. s. 2. 4 Bla. Com. 323. Burn, J. Arraignment. Williams, J. Arraignment. Dick. Sess. 158.

(*b*) Sir T. Raym. 408. 1 Bla. Rep. 3. 2 Hale, 219. Hawk. b. 2. c. 28. s. 2. 4 Bla. Com. 323. Burn, J. Arraignment. Williams, J. Arraignment. Dick. Sess. 159.

(*c*) 2 Hale, 219, n. a. Hawk. b. 2. c. 28. s. 2. n. 3.

(*d*) 2 Hale, 219. Dalt. c. 185. 4 Bla. Com. 323. Williams, J. Arraignment. Dick. Sess. 160.

(*e*) 37 Ed. 3. c. 15. Hawk. b. 2. c. 28. s. 3. 4 Bla. Com. 323.

(*f*) 1 Burr. 643.

(*g*) Dalt. J. c. 185. Burn, J. Sessions. Cro. C. C. 7. Dick. Sess. 160. As to the form of reading indictment, see Dick. Sess. 160, and post, last vol.

(*h*) Ante, 403, 4.

FORM OF.

say you A. B., are you guilty or not guilty?" (a) Upon this, if the prisoner confesses the charge, the confession is recorded, and nothing is done till judgment (b). But if he denies it, he answers "*not guilty*," which was abbreviated upon the minutes "*non cul.*" or "*nient cul.*" for *non culpabilis* or *nient culpable*; upon which the clerk of assize, or clerk of arraigns, on behalf of the crown, replies that the prisoner is guilty, and that he is ready to prove the accusation (c). This is done, in the same abbreviated method by two monosyllables *cul. prit*; *cul.* which means *culpabilis* or *culpable*, and signifies that the prisoner is guilty; and *prit*, which is put for *presto sum* or *paratus verificare*, and imports that he is ready to prove his assertions (d). This is, therefore, a *vivâ voce* replication on the part of the crown, and not, as some from the corruption of language have been led to suppose, an epithet of reproach applied to the defendant. Dalton indeed supposes it to mean "*guilty already*," (e) but there does not seem to be any meaning in the addition of the latter word, and this interpretation does not appear to be supported by any other authorities; but in capital cases, the omission of the statement of this replication or similiter on the record, or a mistake therein is immaterial (f). After issue is thus joined, the clerk proceeds to ask the prisoner "*how will you be tried?*" which anciently referred to the alternative of trial by battle or by jury (g). But, at the present day, as since the abolition of ordeal, there can be no mode of trial but by the country, the prisoner replies, "*by God and my country;*" [417] to which the clerk, in the humane presumption of the party's innocence, rejoins "*God send you a good deliverance.*" (h) This

(a) 2 Hale, 119. Dalt. J. c. 185.
1 Burr. 643. Williams, J. Arraignment. Burn, J. Sessions. Cro. C. C. 7. Dick. Sess. 160.

(b) 4 Harg. St. Tr. 779. Dalt. J. c. 185. Burn, J. Sessions. Dick. Sess. 160.

(c) Dalt. J. c. 185. 4 Bla. Com. 339. See form of entry, 4 Bla. Com. App. and post, last vol.

(d) 4 Bla. Com. 339. 2 Hale, 219. Dalt. J. c. 185. See form, 4 Harg. St. Tr. 778, post, last vol.

(e) Dalt. J. c. 185.

(f) 5 T. R. 513, 14, 519. 2 Stra. 775. 4 Burr. 2804, 5. 6 Mod. 281. Leach, 276, 7. But see 4 Bla. Com. 339, & id. Appendix, s. 1.

(g) 4 Bla. Com. 340. Dick. Sess. 166. See form, 4 Harg. St. Tr. 778. Post, last vol.

(h) 2 Hale, 219. 4 Bla. Com. 341. Cro. C. C. 7. Burn, J. Sessions. Williams, J. Arraignment. Dick. Sess. 160. 4 Harg. St. Tr. 778.

being done, he writes on the indictment "*po. se*," for *ponit se*, meaning that the defendant puts himself upon the country, and thus the form of the arraignment concludes (*a*). In prosecutions for treason, as the defendant cannot be tried immediately after arraignment, he is remanded by rule to be brought up again at some fixed period to take his trial (*b*).

FORM OF.

It has been laid down, that the prisoner ought to stand at the bar, during his arraignment, without irons, shackles, or any other restraint, unless there is danger of an escape (*c*). But a distinction has been taken between the time of arraignment and trial, and it seems to be the better opinion, that he is not entitled to have his fetters taken off until after he has pleaded (*d*). When the party indicted is deaf and dumb, he may, if he understand the use of signs, be arraigned, and the meaning of the clerk who addresses him, conveyed to him by signs, and his signs in reply explained to the court, so as to justify his trial and the infliction of legal penalties (*e*). In addition to the usual forms of arraignment, it seems to be the practice for a peeress, when about to be tried by her peers, to be arraigned kneeling, and to rise after the joining of the issue (*f*).

In the case of murder at common law, it was usual to postpone the arraignment of the prisoner on the indictment, until a year and a day had elapsed, unless the evidence were very clear against him, and no appeal depending (*g*). But now, by 3 Hen. 7. c. 1., the justices shall proceed to try him upon an indictment for murder or manslaughter, though within the year, and, if acquitted, he may, at their discretion, be detained to answer an appeal; for *autrefois acquit* upon an indictment is no bar to that vindictive proceeding. Other offences, however, remain as at common law, though it is

[418]

(*a*) 2 Hale, 119. Cro. C. C. 7. Burn, J. Sessions. Williams, J. Arraignment. Dick. Sess. 160.

(*b*) 4 Harg. St. Tr. 773.

(*c*) 2 Inst. 315. 3 Inst. 34. 2 Hale, 119. Hawk. b. 2. c. 28. s. 1. Kel. 10.

(*d*) 6 St. Tr. 230. 1 Leach, 36. 2 Hale, 219, n. b. 4 Bla.

Com. 322, n. 2. Hawk. b. 2. c. 28. s. 1. n. 2. Cro. C. C. 8, 9. Williams, J. Arraignment. 4 Harg. St. Tr. 697.

(*e*) 1 Leach, 102.

(*f*) 1 Leach, 146.

(*g*) 2 Hale, 220. Hawk. b. 2. c. 28. s. 1.

FORM OF.

the constant practice not to wait until the termination of the year, without regard to the appeal. And as by the 21 Hen. 8. c. 11., the prosecutor may have restitution of his goods in the ordinary mode of criminal proceedings, the appeal of robbery fell into disuse (*a*), and is now abolished by the 59 Geo. 3. c. 46. If there be an inquisition before the coroner for murder, and also an indictment for murder found by the grand inquest, the practice is to arraign and try the prisoner at the same time upon both of them, and to indorse the acquittal or attainder upon both presentments (*b*). But if he be arraigned upon the latter only, there ought to be an entry of *cesset processus* upon the former, as to the prisoner, or otherwise he may be prosecuted to outlawry (*c*). It seems that if, after arraignment, the prisoner by consent withdraw his plea of the general issue, and plead to the jurisdiction, he may afterwards be again arraigned upon the same indictment, and the former arraignment is no answer (*d*). Where several defendants are to be charged upon the same indictment, they should be all arraigned together on the first day before any of them are brought to trial, and, on the next day, proceed to trial with one or more of them together, as shall be found most convenient for the purposes of justice (*e*).

[419]

It seems to be agreed, that the total want or omission of the arraignment would be sufficient ground for reversing judgment or attainder, after they have been pronounced against the defendant, even on his own confession (*f*). But it is doubtful, whether it is absolutely necessary, in case of an appeal at least, to state it on the record (*g*). And it is said, that if it be stated in the record, that the defendant had oyer of the indictment, it shall be intended that he was arraigned formally upon it (*h*).

The proper mode of stating the arraignment on the record is in this form, “and being brought to the bar here in his own proper person, he is committed to the marshal, &c.” And being asked

(a) 2 Hale, 221, 2.

(b) 2 Hale, 221. 1 East P. C.

371.

(c) 2 Hale, 221.

(d) Post. 16, 23. 1 Wils. 157.

Cro. Car. 147.

(e) Kel. 8.

(f) 2 Hale, 218. 3 Mod. 265.

1 Show. 131. Hawk. b. 2. c. 28.

s. 6. Com. Dig. Indictment, M.

(g) Hawk. b. 2. c. 28. s. 6.

(h) 1 Show. 132. Com. Dig. Indictment, M.

how he will acquit himself of the premises, (in case of felony, and “of the high treasons,” in case of treason,) above laid to his charge, saith, &c. (*a*). If this statement be omitted, it seems the record will be erroneous (*b*). This does not appear to have been thought so necessary in an appeal, though why the distinction should arise appears uncertain (*c*).

FORM OF.

At common law, the accessory could never be arraigned before the actual attainder of the principal; and, therefore, where the attainder of the former was prevented by his death, standing obstinately mute, challenging peremptorily above the number allowed by law, being pardoned, or admitted to the benefit of clergy, the latter altogether escaped from justice (*d*). And it was necessary that the attainder of the principal should be upon the very same charge, in which the accessory was included (*e*). But it was no objection to the arraignment of the accessory, that the attainder of the principal was erroneous, as none can take advantage of that circumstance but the individual against whom it was pronounced (*f*); though, if both are attainted, the renewal of the attainder of the latter reverses also that of the former (*g*). And it was considered, that if the principal were once attainted, whether, after conviction by verdict or outlawry, his subsequent death or pardon would not in the least prevent the arraignment of the accessory (*h*).

Of the arraignment of principals and accessories.

[420]

Notwithstanding these exceptions, which, in some degree, modified the rule requiring the attainder of its accessory, its consequences became so injurious to public justice, that it was found necessary for the legislature to remedy the mischiefs it produced. And, therefore, the 1 Ann. sess. 2. c. 9. s. 1, enacted, that if any principal offender were convicted of felony, stood mute,

(*a*) Hawk. b. 2. c. 28. s. 6.
4 Bla. Com. Append. III. Post,
last vol.

(*b*) 3 Mod. 365. 1 Show. 132.
Hawk. b. 2. c. 28. s. 6.

(*c*) Hawk. b. 2. c. 28. s. 6.

(*d*) 2 Inst. 183, 4. Cro. Eliz.
541. 2 Hale, 222. Fost. 362, 3.
Hawk. b. 2. c. 29. s. 41. 4 Bla.
Com. 323.

(*e*) 2 Inst. 184. Plowd. 98, 9.
Hawk. b. 2. c. 29. s. 39.

(*f*) 9 Co. Rep. 119. 2 Inst.
184. Hawk. b. 2. c. 29. s. 40.

(*g*) 1 Rol. Abr. 777. 9 Co.
Rep. 119. Hawk. b. 2. c. 29.
s. 40.

(*h*) Cro. Eliz. 541. 2 Dyer,
120. Hawk. b. 2. c. 29. s. 42.

OF PRINCIPALS
AND
ACCESSARIES. challenged peremptorily more than the proper number of jurors, was pardoned, received the benefit of clergy, or was otherwise delivered *between* conviction and attainder, the accessory shall be arraigned, tried, and punished, as if the principal had been actually attainted. By the second section of the same statute, receivers of stolen goods may be punished as for a misdemeanor, though the actual thief be not convicted, and by the 5 Ann. c. 31. s. 6, the same proceedings may be had in this case, though the principal be not even taken. The same provisions were also, by two recent acts (*a*) extended to other things, not supposed to be included in the descriptions of former statutes. Still if the supposed principal be so acquitted that he may effectually plead *autrefois acquit*, in bar to any subsequent prosecution for the same charge, it is clear that the accessory cannot be arraigned; for the maxim is *ubi factum nullum ibi fortia nulla*, and there can be no derivative guilt where there is nothing from whence it could have its origin (*b*).

[421] Formerly, it seems that the accessory could never be arraigned before the appearance of the principal; but now it is the better opinion that he may be called upon to answer and plead, though the trial cannot proceed further, except in those cases which we have already noticed (*c*). But where there are several principals, and the defendant is indicted as accessory to one only, the non-appearance of the rest will be no bar to his conviction, if his own principal have appeared to the charge (*d*). It has however been doubted whether, if he be indicted as accessory to several, and one of them only has appeared, whether he can be tried before the rest are convicted; but it now seems agreed that he may be so arraigned, and that he shall be considered as accessory to him who has been convicted, though the evidence prove him to have stood in that relation of guilt to several (*e*).

(*a*) 22 Geo. 3. c. 58. 29 Geo. 2. c. 30.

(*b*) 4 Co. Rep. 43. Hawk. b. 2. c. 29. s. 36.

(*c*) 2 Hale, 223. Hawk. b. 2. c. 29. s. 45.

(*d*) Hawk. b. 2. c. 29. s. 46.

(*e*) 9 Co. Rep. 119. 1 Hale, 624. Fost. 361. Hawk. b. 2. c. 29. s. 46.

OF PRINCIPALS
AND
ACCESSARIES.

When the principal and accessory appear together, they may both be arraigned together, plead together, and, if both rely upon the general issue, be tried by the same jurors (*a*). In this case, the jury will be charged to inquire, first, respecting the guilt of the principal, and afterwards that of the accessory; and that if they think the former innocent, the latter must, of course, be acquitted (*b*). If, however, the principal plead in abatement or bar, instead of answering to the felony, the arraignment of the accessory will be delayed, until after the determination of the collateral objection (*c*). And, upon the trial, the accessory is fully at liberty to dispute the guilt of the principal, even though he has been previously convicted, and by establishing his innocence, proves his own (*d*). Where, upon the same trial, the principal and accessory are severally convicted, judgment should be first pronounced on the former, and afterwards on the latter (*e*).

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If there be two indictments against the same person for the same offence, as for murder and manslaughter, in respect of the same death, or an inquisition of the coroner, and an indictment found by the grand jury, the proper course is to arraign him upon both at the same time, and to indorse the acquittal or attainder on them, that he may not again be disturbed by another proceeding (*f*). For if he be arraigned upon one only, and acquitted, he must be tried upon the other, and plead his former acquittal (*g*). But if the prisoner be arraigned upon the indictment only, there ought to be an entry of cesset processus on the coroner's inquest, for otherwise the prisoner might be outlawed upon it (*h*). If, however, the same man be indicted for various robberies, committed upon several persons, he may be severally arraigned and tried upon each indictment, in order that the parties

Of arraignment
upon several in-
dictments.

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- (*a*) 2 Inst. 134. 1 Hale, 624. 283. Hawk. b. 2. c. 29. s. 47.
2 Hale, 223, 4. Hawk. b. 2. n. 4. 4 Bla. Com. 324.
c. 29. s. 47. 4 Bla. Com. 323. (*e*) 1 Hale, 625.
(*b*) 2 Inst. 134. 9 Co. Rep. (*f*) 1 East, P. C. 371. 1 Salk.
119. 1 Hale, 624, 5. 2 Hale, 382. 2 Hale, 221. Com. Dig.
222, 3. Hawk. b. 2. c. 29. s. 47. Indictment, M. Ante, 164.
Fost. 360. (*g*) 1 Salk. 382. Com. Dig.
(*c*) 2 Inst. 134. Hawk. b. 2. Indictment, M.
c. 29. s. 47. (*h*) 2 Hale, 221.
(*d*) Fost. 365, 121. 1 Leach,

UPON SEVERAL
INDICTMENTS.

injured may obtain the restitution of their goods they are entitled to under the statute (a).

Of the incidents
of arraignment.

Such is the most usual course of proceeding upon the arraignment of the prisoner. But there are several incidents which sometimes arise in this stage, which give a different direction to the prosecution, and which we must here consider. Instead of pleading not guilty, and putting himself upon his country, as he usually does, he may deny that he is the person intended—plead in abatement—stand mute—or confess that he is guilty.

[423]
Denial of identity.*

When the prisoner denies that he is the same person, being brought in upon a former attainder, or otherwise, he must state that objection ore tenus to the court; to which the attorney-general will reply, verbally, that he is ready to prove him so, and a venire will be ordered to try that issue, returnable *instantur* (b). Where this plea is expected, the sheriff ought to have a jury ready, in order to try the issue (c). And the court will not put off the trial of this point on the application of the defendant, unless it be uncertain what he ought to plead, or very strong ground be shown them (d). Nor is it proper, in this case, for the crier to make proclamation (e). It seems, that if a defendant be brought in, upon an allegation that he has been attainted, and stands mute, this trial of identity shall be taken, unless he has been either actually, or by bail, in the custody of the court from the time of his former arraignment, and he will not be concluded by the return of the sheriff upon a *cepi corpus* (f). Where he is arraigned for the original offence, and pleads thus, if the issue be found against him, he must answer over to the felony; but if he has been formerly attainted, then nothing remains but to award execution against him (g).

(a) 21 Hen. 8. c. 11. Hawk.
b. 2. c. 28. s. 7.
(b) Fost. 41. 1 Bla. Rep. 4.
2 Burr. 1810. 1 Burr. 638, 9.
(c) 1 Burr. 638, 9.

(d) 3 Burr. 1811. 1 Bla.
Rep. 4. Fost. 41.
(e) 3 Burr. 1811.
(f) 2 Hale, 402.
(g) Fost. 43.

* See form of entry of trial, 4 Bla. Com. Appendix, V. post, last vol.

When the defendant has any matter to plead in abatement, as *misnomer*, *autrefois acquit*, a pardon, &c. this is the proper time for him to introduce it, before he pleads to the felony (*a*). But there are instances of his being permitted, as a matter of favor, after the plea of *not guilty* has been recorded, to withdraw it, and plead to the jurisdiction (*b*). The nature and mode of this description of pleading will be considered hereafter, when we take a general view of the pleadings upon the indictment (*c*). [424]

Pleading in
abatement.

When the prisoner, upon his arraignment, totally refuses to answer, insists upon mere frivolous pretences, or refuses to put himself upon the country, after pleading not guilty, he is said to *stand mute* (*d*). But if he demurs, or challenges peremptorily more than the number of jurors allowed by law, he will not be regarded as having stood mute by reason of his obstinacy, in the one case, or his subsequent silence in the other (*e*). If he is wholly silent, an inquest must be impanelled, to inquire whether he is obstinately mute, or dumb, *ex visitatione Dei*, which may be by the oath of any twelve persons who may happen to be present (*f*). But after an issue has been joined, if the prisoner stand mute, while the jury are in court, the investigation may be taken before them, if circumstances render it requisite (*g*). If they return that he is dumb, *ex visitatione Dei* (*h*), the court will use every means to convey to him information of the nature of the arraignment; and if he be incapable, in any way, of expressing his desires, the clerk of arraigns will enter for him a plea of *not guilty*, and the trial will proceed as if he had pleaded (*i*). In this case, it is the duty of the court to examine all the proceed-

Of standing
mute.

(*a*) 2 Hale, 219. Cro. C. C. 9. Williams, J. Arraignment. Dick. Sess. 161.

(*b*) 1 Wils. 157.

(*c*) See chapter XI. post, 433 to 478.

(*d*) 2 Dyer, 241, b. Keilw. 70. 2 Inst. 178. 2 Hale, 316, 17. 4 Bla. Com. 324. Hawk. b. 2. c. 38. s. 1. Burn, J. Mute. Williams, J. Mute.

(*e*) Hawk. b. 2. c. 30. s. 2, 3. 3 Inst. 327. Williams, J. Mute.

(*f*) 1 Ry. & Mo. C. N. P. 78.

1 Leach, 452. 2 Hale, 217.

2 Inst. 177, 8. Rast. Ent. 385.

Hawk. b. 2. c. 30. s. 5. Williams, J. Mute. See form of swearing the jury, 4 Bla. Com. 328, 9. 1 Leach, 183. 451, 2, 3. Cro. C. C. 484. Williams, J. Mute. Post, last vol. See form of oath, Cro. Circ. Comp. 542, 7th edit.

(*g*) Hawk. b. 2. c. 30. s. 5.

(*h*) See form of finding, 1 Leach, 184. 452, 3. Post, last vol.

(*i*) 1 Leach, 452.

STANDING
MUTE.

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ings with a critical eye, to take every fair advantage on behalf of the prisoner, and to render him every possible service, consistent with the rules of the law (*a*). It has been said that a doubt exists, whether supposing him, under these circumstances, to be found guilty of a capital offence, judgment of death can be pronounced against him (*b*); but it is clear, that sentence of inferior penalties, as transportation, may be passed and carried into execution (*c*); and it would be absurd to require the formalities of a trial, and to demand the utmost caution in the proceedings, if the whole were a mere idle ceremony, by which no end was to be effected.

If the prisoner answer, but merely foreign to the purpose, and refuse regularly to plead, so as to warrant his trial, it is evident there can be no occasion for any inquest of office, for his obstinacy and his ability to speak are sufficiently apparent (*d*). And where a man is found to have cut out his own tongue, to prevent his answering, he will be regarded as obstinately silent (*e*). When the defendant is found to be obstinately mute in case of high treason, he will be regarded as convicted, and receive the same judgment as if he had confessed the accusation (*f*). And this has also always been the case in petit larceny, and all other offences below the degree of capital (*g*). So that in the highest and lowest description of crimes, the rule has always been similar; and in both, an obstinate silence has always been regarded as a conviction. And the same principle was by statute applied to murder and other bloodshed, within the verge of his majesty's palaces (*h*).

In all other felonies, however, the punishment of *peine forte et dure* was, until lately, denounced as the consequence of an obsti-

(*a*) 1 Leach, 452. 2 Inst. 177, 178. Hawk. b. 2. c. 30. s. 7. 4 Bla. Com. 324. Williams, J. Mute.

(*b*) 2 Hale, 317. 4 Bla. Com. 324, 5. 1 Leach, 153, n. a. Williams, J. Mute.

(*c*) 1 Leach, 451, 2.

(*d*) Hawk. b. 2. c. 30. s. 6.

(*e*) 2 Inst. 178. 4 Bla. Com. 325. Williams, J. Mute.

(*f*) Dyer, 205, n. a. Skin. 14, 15. Sav. 56. Kel. 57. 3 Inst. 14. 2 Inst. 177. 2 Hale, 317. Hawk. b. 2. c. 30. s. 9. 4 Bla. Com. 325. Williams, J. Mute.

(*g*) 2 Inst. 177. Hawk. b. 2. s. 30. s. 10. 4 Bla. Com. 325. Williams, J. Mute.

(*h*) 33 Hen. 8. c. 12. 2 Hale, 318. Hawk. b. 2. c. 30, s. 11.

STANDING
MUTE.

nate silence. The greatest caution and deliberation were indeed to be exercised before it was resorted to; and the prisoner was not only to have "*trina admonitio*," but a respite of a few hours, and the sentence was to be distinctly read to him, that he might be fully aware of the penalty he was incurring (*a*). And if the felony were one for which the benefit of clergy might be allowed him on his prayer, the court would allow it though it were not prayed, and that after as well as before judgment (*b*). And it is even said, that the court ought to examine witnesses, to show a probability of his guilt, before they proceed to this extremity (*c*); though this does not appear to be of absolute necessity, and no entry of the investigation need appear on the record (*d*). If, on such an inquiry, the evidence against him appeared very slight, it seems that he could only be fined and imprisoned for a contempt of the process of justice (*e*).

The sentence of penance which was pronounced against those who thus added contumacy to guilt, was indeed exceedingly dreadful. They were to be remanded to prison, and there placed in some low and dark room, laid on the back with scarcely any covering, and iron weights more heavy than they could bear placed upon them. In this situation, they were to receive no sustenance the first day but three morsels of the worst bread, and on the second day, three draughts of standing water which should be nearest to the prison door, and thus remain till they died; or, as the ancient judgments ran, till they answered (*f*). There are slight variations in some of the precedents, but they agree in all the important particulars of this infliction, which was intended that the criminal should die by famine, cold, and pressure (*g*). It seems to be matter of dispute, in what manner and at what period it was first introduced, and whether it existed at common law, or was created by legislative provision (*h*). The statute of West-

[427]

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- (*a*) 2 Hale, 320, 1. 4 Bla. Rast. Ent. 385. 2 Hale, 319.
Com. 325. Hawk. b. 2. c. 30. s. 16. 4 Bla.
(*b*) 2 Hale, 321. Com. 327. Burn, J. Mute. Wil-
(*c*) 2 Inst. 177. 2 Hale, 321. liams, J. Mute.
Hawk. b. 2. c. 30. s. 14. (*g*) 2 Inst. 178.
(*d*) Hawk. b. 2. c. 30. s. 14. (*h*) 2 Inst. 178, 9. 2 Hale,
(*e*) Hawk. b. 2. c. 30. s. 15. 321, 2. 4 Bla. Com. 327, 8.
(*f*) 2 Inst. 178. Keilw. 70.

STANDING
MUTE.

minster the First (a) directs notorious felons, who will not put themselves upon the inquest, "shall have *strong and hard confinement*, as they which refuse to stand to the common law of the land;" but these words seem very imperfectly to express the sentence which is set forth with so horrible a minuteness. Lord Coke and Hale therefore contend, with great force, that the punishment must have existed before that act was passed, and that it merely directed the persons who were to become the objects of its severity (b). But Blackstone, on the contrary, regards it as altogether of statutable origin, and thinks that it was gradually introduced between the reign of Edward 3. and that of Hen. 4. when the last instance occurs of its infliction (c). How a cruelty so elaborate could have been introduced, without any express statute to sanction it, seems exceedingly obscure, and will perhaps warrant us in differing from the learned commentator, and assigning it to the earlier and darker periods of our history. The only cause which delayed its abolition until a recent date seems to be, that by the refusal to plead, the criminal escaped conviction, and consequently his blood was not corrupted, nor his lands forfeited by attainder (d). This penalty was therefore preserved, in order to compel the defendant to plead, that the lord might not lose his forfeiture; and instances have occurred, in which the desire of preserving the estate to the family has overcome the fear of torture, and induced him to remain obdurate. At length, however, by the 12 Geo. 3. c. 20, this punishment was entirely abrogated, and the inconveniences arising from the refusal to answer avoided; for, by that act it is enacted, that if any person, being arraigned on any indictment, or appeal of felony, or on any indictment for piracy, shall stand mute, or will not answer directly to the felony or piracy, he shall be convicted of the offence, and the court shall thereupon award judgment and execution, as if such person had been convicted by verdict or confession, and the judgment shall have the same consequences. So that by these provisions, in the case of felony and piracy, an obstinate silence amounts to a conviction, and all the same conse-

(a) 3 Edw. 1. c. 12.

(b) 2 Inst. 178, 9. 2 Hale, 321, 2.

(c) 4 Bla. Com. 327, 8.

(d) 2 Hale, 319. Bro. Abr. Forfeiture, 64. Id. Appeal, 64. Hawk. b. 2. c. 30. s. 19.

quences arise, as if the defendant had regularly pleaded. Since this act two instances have arisen in which the prisoner has remained obstinately silent and has received sentence and execution, as if the jury had found him guilty (*a*). It has been observed, that it might have been a greater improvement of the law, if the prisoner's silence had been considered as equivalent to a plea of not guilty, rather than as a confession, and as if a trial had taken place (*b*); and we have seen, that the legislature have, in prosecutions for misdemeanors in the King's Bench, authorized the prosecutor to plead for the defendant, and proceed to trial where the defendant neglects to plead (*c*).

STANDING
MUTE.

The last incident of the arraignment is confession. This may be either express or implied. An express confession of the indictment is, where the party pleads *guilty*, and thus directly, in the face of the court, confesses the accusation (*d*). This is the highest kind of conviction of which the case admits (*e*). It may be received after the plea of not guilty is recorded, even in case of high treason, and the entry will be made "*relictâ verificatione cognovit indictamentum*" (*f*), and when this is done, nothing remains for the court but to pronounce judgment (*g*). But in the King's Bench, the court do not on a confession in a capital case give judgment immediately, and four days are allowed in term, if there be so many, for a motion in arrest of judgment (*h*). And the courts are very reluctant to receive and record such confessions, especially where the punishment is capital, and will frequently, out of tenderness to the life of the subject, advise the prisoner to retract it, and plead not guilty (*i*). And where he freely in court discloses the facts of his case, and demands the

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(*a*) 4 Bla. Com. 328, n. 4.
1 Leach, 185, n. a. Id. 453, n. a.

(*b*) 4 Bla. Com. 329, 15th edit.
n. 4; and see Hawk. b. 2. c. 30.
s. 9, 10, 11, 12, 13, 14.

(*c*) Ante, 412. 48 Geo. 3.
c. 58. s. 1.

(*d*) Hawk. b. 2. c. 31. s. 1.
Burn, J. Confession. Williams,
J. Confession.

(*e*) 2 Hale, 225. Hawk. b. 2.
c. 31. s. 1. Burn, J. Confession.
Williams, J. Confession.

(*f*) 4 Harg. St. Tr. 778, 9.

Hawk. b. 2. c. 31. s. 1.

(*g*) Comb. 364. Com. Dig. In-
dictment, K. 4 Bla. Com. 329.
Cro. C. C. 7. Form of confes-
sion, 4 Harg. St. Tr. 778, 9.
Post, last vol.

(*h*) 4 Harg. St. Tr. 779. See
form of proceeding to judgment,
4 Harg. St. Tr. 779. Post, last
vol.

(*i*) 2 Hale, 225. Hawk. b. 2.
c. 31. s. 2. 4 Bla. Com. 329.
Burn, J. Confession. Williams,
J. Confession.

CONFESSION OF
INDICTMENT.

opinion of the judges whether they amount to felony, upon which they reply in the affirmative, they will refuse to record the disclosure, and admit him to the full advantage of a trial upon the evidence of the witnesses (*a*). In a smaller offence, however, as a case of assault, it may be advisable to confess the indictment, as the defendant may afterwards produce affidavits to show that the prosecutor made the first assault, which he cannot do after conviction (*b*). And it is usual for the party indicted to give notice (*c*) to the prosecutor that he intends to plead guilty to the indictment, upon which the latter attends the court with his witnesses and gives evidence of the nature of the offence, and the latter will also be allowed to produce his affidavit in mitigation of the punishment; which affidavit is to be stamped in the court of King's Bench, but not at the sessions; and if the prosecutor does not appear, the court will set a small fine on the defendant, and discharge him (*d*). And in case of a trifling misdemeanor, the defendant may confess by the clerk in court, who will submit in his absence to a fine; but where corporal punishment is to be inflicted, he must be present at the time the judgment is given (*e*). Sometimes, in case of mere personal and trifling injuries, the prosecutor and defendant agree in private, the latter comes into court and pleads guilty to the indictment, and upon proving a general release given by the former, submits to a small fine, for the breach of the peace which his conduct has occasioned (*f*). Thus also the defendant may, after traversing the indictment, come in and withdraw his plea of not guilty, and confess, without entering his traverse, either on an agreement with the prosecutor, or on giving him proper notice of his intention (*g*). And in cases of common assault, where the parties agree before the indictment is tried, it is said to be the usual course, at the Middlesex Sessions, for the prosecutor to give a written acknowledgment that he is satisfied; and upon the affidavit of any person who saw him sign such acknowledgment, the court will, on motion of the defendant, discharge his recognizance (*h*). And on an indictment for neglecting

(*a*) 2 Hale, 225. Hawk. b. 2. c. 31. s. 2. Com. Dig. Indictment, K.

(*b*) 1 Salk. 55. 6. Com. Dig. Indictment, K.

(*c*) 1 Leach, 111, 2. See form, Toone, 393. Post, last vol.

(*d*) Cro. C. C. 22.

(*e*) 1 Salk. 55. 400. 6 Mod. 16. Com. Dig. Indictment, K.

(*f*) Dick. Sess. 156. Cro. C. C. 21. 1 Leach, 111.

(*g*) 1 Leach, 111, 2.

(*h*) Cro. C. C. 21.

to repair a highway, the defendant may confess; and upon affidavit that the way is repaired, may submit to a small fine (*a*): but a party indicted for not repairing a road, which he was bound to repair *ratione tenuræ*, cannot do this without paying costs, though a parish need not pay them (*b*). In the higher description of offences, when the defendant pleads guilty, the clerk writes on the indictment the word “*confesses*,” and he is set aside until the time of passing the sentence (*c*).

CONFESSION OF
INDICTMENT.

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An *implied confession* is where, in a case not capital, a defendant does not directly own himself to be guilty, but tacitly admits it by throwing himself on the king’s mercy, and desiring to submit to a small fine, which the court may either accept or decline, as they think proper (*d*). If they grant the request, an entry is made to this effect, that the defendant “*non vult contendere cum domina regina et posuit se in gratiam curiæ*,” without compelling him to a more direct confession (*e*). The difference in effect between an implied, and an express confession is, that after the latter, not guilty cannot be pleaded to an action of trespass for the same injury (*f*); whereas it may at any time be done after the former (*g*). But no confession, however large and explicit, will prevent the defendant from taking exceptions in arrest of judgment to faults apparent in the record; for the judges must *ex officio* take notice of them, and any one, as *amicus curiæ*, may point out the exceptions (*h*).

We shall hereafter consider the effect of a confession in evidence.

(*a*) 3 Salk. 393. 1 Bla. Rep. 602. Dick. Sess. 140, 141. He cannot get the indictment quashed, on an affidavit that the road is in repair, he must plead guilty, and pay a nominal fine, 2 Chit. Rep. 214.

(*b*) 1 Bla. Rep. 291. 602. 3 Salk. 393. 6 T. R. 619.

(*c*) Cro. C. C. 7.

(*d*) Hawk. b. 2. c. 31. s. 3. Com. Dig. Indictment, K. Burn, J. Confession. Williams, J. Confession.

(*e*) Hawk. b. 2. c. 31. s. 3. Comb. 19. 1 Salk. 55. Williams, J. Confession. Form of confession, *posuit*, &c. 1 Salk. 55. Post, last vol.

(*f*) 1 Salk. 55. Hawk. b. 2. c. 31. s. 1. Com. Dig. Indictment, K. Williams, J. Confession.

(*g*) 1 Salk. 55. Hawk. b. 2. c. 31. s. 3. Com. Dig. Indictment, K.

(*h*) Hawk. b. 2. c. 31. s. 4. Williams, J. Confession.

CHAPTER XI.

OF THE RULES TO PLEAD, AND PLEADINGS
UPON INDICTMENTS.

Of the rules to
plead *.

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AS in capital cases the prisoner is compelled to answer immediately, there is no rule given either to plead or join in demurrer (*a*). But in prosecutions for misdemeanors in the King's Bench, either originally commenced there, or removed into that court by certiorari, two four-day rules to plead are given, and then a peremptory rule is applied for, after which, if there be a demurrer, one four-day rule is given to join in the demurrer, and then a peremptory rule is granted (*b*). And upon a respondeas ouster, the defendant usually has four days' time to plead, though this is in the discretion of the court (*c*). And it is the practice of the Crown Office, after the two four-day rules have expired, to move for a peremptory rule, giving in town causes till the next day (*d*), and in the country ten days to plead. In subsequent stages of pleading, only one four-day rule is given, after which the peremptory rule is moved for, which, in general, allows four days in addition (*e*). If this motion be not made by the prosecutor in term time, the defendant will not be compellable to plead before the term ensuing (*f*). But it is said that in vacation the peremptory rule is not requisite (*g*). When the motion must be made it is merely a matter of course, and the rule is drawn up and served by the prosecutor's clerk in court upon the defendant's, who gives notice thereof to the solicitor by whom the defence is

(*a*) 6 Harg. St. Tr. 238, 241.
6 East, 587.

(*b*) 6 East, 587. 6 T. R. 595.
n. b. Com. 19. Skin. 217. See
form of peremptory rule to join
in demurrer, 6 East, 588. Post,
last vol.

(*c*) Comb. 19. Tidd, 5th edit.
647.

(*d*) *Quære*, two days, *ex relatione*, Mr. Nicholls.

(*e*) 6 East, 586, n. c.

(*f*) 6 T. R. 594.

(*g*) 6 East, 586, n. c.

* See form, post, last vol.

conducted (*a*). During this interval, the defendant's clerk in court usually enters the plea, as, on its expiration, if none be put in, the prosecutor is entitled to sign judgment by default, which the defendant is sometimes inclined to suffer, in order to save the expence of a trial, and mitigate the punishment (*b*). If a judgment by default has been regularly signed, the court have refused to set it aside, at the instance of the defendant, even upon payment of costs, pleading the general issue, and taking short notice of trial, as is often done in civil suits (*c*). It is said, that where a great number are jointly indicted as for a riot, that in order to save the expence of all of the defendants pleading, the prosecutor may, in the King's Bench, be required by rule, to fix upon two or three of the defendants, and to proceed to trial against them, the others entering into a rule, that if the defendants who plead are found guilty, they will also plead guilty (*d*).

OF THE RULES
TO PLEAD.

We come now to consider the various modes by which a defendant may place on the record his objection, or answer to the charge alleged against him. The following is a general outline of these matters in the order in which they naturally arise (*e*).

Modes of
pleading.

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- 1 Pleas to the jurisdiction.
- 2 Demurrers.
- 3 Dilatory pleas.
 - 1 Declinatory of trial.
 - 2 In abatement.
- 4 Pleas in bar of the indictment.
 - 1st Mixed of record and fact.
 - 1 Autrefois acquit.
 - 2 Autrefois attain.
 - 3 Autrefois convict.
 - 4 Convict of another felony, and had his clergy.
 - 5 Matter of record, pardons, &c.
- 5 Pleas to the matter of the indictment.
 - 1 Not guilty.
 - 2 Special pleas.

(*a*) Hand's Prac. 9.

(*b*) Id. *ibid*.

(*c*) 1 Wils. 163. Com. Dig. Indictment, N.

(*d*) 6 Mod. 212.

(*e*) 4 Bla. Com. 332. 2 Hale, 236. Hawk. b. 2. c. 32. Burn, J. Indictment, XI.

General qualities and requisites of criminal pleading.

Before we proceed to consider each of these descriptions of answers or objections to the indictment, with the proceedings subsequent to them, it will be proper to notice some of those general qualities which apply to criminal pleading; such as the number of pleas admitted, the time of putting them in, the amendments allowed, of the withdrawing one plea in order to put in another, and of the entries to be made on the record.

Of the number of pleas, and pleading successive pleas.

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At common law there was but one rule which applied alike to civil and criminal proceedings, that the defendant must rely upon one ground of defence, and that pleading double was never to be admitted (*a*). This strictness having been found very inconvenient, was relaxed, as far as it relates to civil actions, by 4 Ann. c. 16. s. 4, 5, which enables the defendant, by leave of the court, to plead as many matters as he may think fit, but which contains a proviso (*b*), that nothing contained therein shall extend to any indictment or presentment of treason, felony, or murder, or any other matter, or to any action upon a penal statute; criminal proceedings, therefore, remain under the same restriction which existed as to all matters at common law, and no more than one plea can be put in, to answer any indictment or criminal information. In case of felony, however, if the prisoner plead in bar or abatement, and it be adjudged against him, he will have liberty at the same time, or even afterwards, to plead over to the matter of the indictment, as if he had never relied upon any other ground of defence; for though a man may lose his property by mispleading, he cannot forfeit his life by any technical nicety or legal error (*c*). And this exception to the general maxim extends to cases where, though the judgment is capital, the delinquent is admitted to his clergy (*d*). But it does not include misdemeanors of any description as a matter of *right*; and, therefore, in these cases, if a defendant plead in abatement or bar, and an issue in fact thereon be determined against him, he will have totally lost the benefit of a trial on the offence itself, and sentence may be pronounced, as

(*a*) 2 Eunomus, 141. Tidd, 8th ed. 766. 1 Chitty on Plead. 4th edit. 477, 8.

(*b*) S. 7.

(*c*) 8 East, 110. 237, 8, 9. 2 Hale, 255, 6. Fost. 21. 4 Bla.

Com. 338. Cro. Eliz. 495. 2 Ld. Raym. 922. Hawk. b. 2. c. 23. s. 128, and c. 31. s. 6. See form, 2 Hale, 237. 2 Leach, 712, 13.

(*d*) 8 East, 110.

though he had been regularly convicted (*a*). It seems, however, to be in the discretion of the court, to allow him still to plead not guilty, and this they will probably exercise, when the penalty incurred on conviction is very severe (*b*).

OF THE NUMBER
OF PLEAS, AND
PLEADING
SUCCESSIVE
PLEAS.

We have already seen, that when the defendant has any special matter to plead in abatement or bar as misnomer, a former acquittal or conviction, a pardon, &c. he should plead it at the time of arraignment, before the plea of not guilty (*c*). Time of pleading.

In order to prevent the delay which might be effected by the defendant's pleading, in the case of misdemeanors, by the 60 Geo. 3, and 1 Geo. 4. c. 4. s. 1, it is enacted, that where any person prosecuted in the King's Bench at Westminster, or in the King's Bench in Dublin, respectively, for any misdemeanor, either by information or by indictment there found, or removed into the same respective courts, shall appear in term time, in person, to answer to such indictment or information. Such defendant, upon being charged therewith, shall not imparl to a following term, but shall be required to plead or demur thereto within four days from the time of appearance, and in default thereof, judgment may be entered against him for want of a plea; and in case such defendant shall appear by his or her clerk, or attorney in court, he shall not imparl to a following term; but a rule, requiring such defendant to plead, may forthwith be given, and a plea or demurrer to such indictment or information enforced, or judgment by default entered thereupon, in the same manner as might have been done before the passing of that act, in cases where the defendant had appeared to such indictment or information by his or her clerk in court or attorney, in a previous term. The second section provides, that the court, or judge of the same, upon sufficient cause shewn for that purpose, may allow further time to plead or demur. And by section 3, where prosecuted for any misdemeanor, by indictment, at any session of the peace, session of oyer and terminer, great session, or session of gaol

(*a*) 8 East, 110, 11, 12. 2 Ld. Raym. 922. Cro. Eliz. 495. Hawk. b. 2, c. 31. s. 7.

(*b*) 8 East, 110. 6 East, 602. (*c*) Ante, p. 422, 3. 2 Hale, 219. Cro. C. C. 9.

TIME OF
PLEADING.

delivery, within England or Ireland, having been committed to custody, or held to bail, to appear to answer for such offence, twenty days at least before the session at which such indictment shall be found, he shall plead to such indictment, and trial shall proceed thereupon at such same session of the peace, &c. respectively, unless a writ of certiorari for removing such indictment into the King's Bench at Westminster, or in Dublin, respectively, shall be delivered at such session before the jury shall be sworn for such trial. By section 4. such writ of certiorari may be applied for and issued before indictment found, in the like cases, in the same manner, and upon the same terms and conditions, as if such writ of certiorari had been applied for after such indictment had been found. By section 5, it is further enacted, that where any person, prosecuted of any misdemeanor, by indictment, at any session of the peace, session of oyer and terminer, great session, or session of gaol delivery, within England or Ireland, not having been committed to custody, or held to bail to appear to answer for such offence, twenty days before the session at which such indictment shall be found, but who shall have been committed to custody, or held to bail to appear to answer for such offence at some subsequent session, or shall have received notice of such indictment having been found, twenty days before such subsequent session, he or she shall plead at such subsequent session, and trial shall proceed thereupon at such same session of the peace, &c. respectively, unless a writ of certiorari, for removing such indictment into the King's Bench at Westminster, or in Dublin, respectively, shall be delivered at such last-mentioned session before the jury shall be sworn for such trial. The 6th section provides, that the act shall extend to prevent any indictment, found by a grand jury of any city or town corporate, from being removed, at the prayer of any defendant, for trial by a jury of the county next adjoining to the county of such city or town corporate, pursuant to the provisions of the 38 Geo. 3. c. 52; and upon such removal, the defendant shall plead, and the trial shall be had according to the provisions of this act, in like manner as if such indictment had been originally found by a grand jury of such next adjoining county. By the 7th section, and upon sufficient cause shewn for that purpose, further time may be allowed for pleading to any such indictment, or for trial of the same. By

section 10, the act is not to extend to any information in the nature of quo warranto, or for the non-repair of any highway, bridge, &c.

TIME OF
PLEADING.

In prosecutions for felonies, the plea will be insufficient, if pleaded by attorney (*a*); but we have seen that a defendant, charged with a mere misdemeanor, may, in the King's Bench, plead by attorney, and is not obliged to be personally before the court (*b*). In this case, also, where he has a pardon to plead, he is not compelled to claim advantage of it kneeling, as when accused of higher offences (*c*). If the defendant pleads a *dilatory* plea, as misnomer of the place where he resides, he must annex an affidavit that it is true, or the court will set it aside (*d*), as wanting the sanction which is required by the statute (*e*).

Manner of pleading.

Though indictments and appeals are excepted from the statutes of amendments (*f*), yet it seems, that pleas to them are amendable at common law, before they are filed upon the record (*g*). The reason of this distinction is, that the pleading is not perfected while it is only on paper, and during the time in which the proceedings are only in agitation, the court have a power over them; but when once they are entered on the roll, they can only be altered by virtue of some legislative provision (*h*). But pleas in abatement to an indictment for a misdemeanor, are not amendable (*i*).

Amending plea.

When once the defendant has pleaded, he is bound to abide by the defence which he has chosen, and cannot, as a matter of right, withdraw it, in order to rely on another (*k*). But a plea of not guilty may be withdrawn in order to confess the indictment; and, as we have seen already, the entry will be *relictâ verificatione indictamentum cognovit* (*l*). And the court may allow the de-

Of withdrawing plea, and pleading another.

(*a*) Carth. 55, 6.

(*b*) Ante, p. 337, 411. 10 East, 83.

(*c*) 2 Stra. 816.

(*d*) 3 Burr. 1617. 2 Stra. 1161. Com. Dig. Indictment, L. Hawk. b. 2. c. 34. s. 5 & 6. But see s. 7, of 4 & 5 Ann. c. 16.

(*e*) 4 & 5 Ann. c. 16. s. 11.

(*f*) Ante, 297.

(*g*) 1 Salk. 47. Com. Dig. Amendment, 2. C. 1.

(*h*) Salk. 47. 2 Burr. 1099.

(*i*) 2 B. & C. 871. 4 D. & R. 592, S. C.

(*k*) 1 Sess. Cas. 382.

(*l*) Ante, 429. Kel. 11. Com. Dig. Indictment, K.

OF
WITHDRAWING
PLEA, AND
PLEADING
ANOTHER.

fendant, as a matter of favour, with the consent of the attorney-general, to withdraw a plea of the general issue, and object to the jurisdiction before which the trial is to proceed (*a*). In this case, if the jury be sworn, a juror will be withdrawn before evidence given, the inquest discharged, and an entry made upon the record, of the permission to alter the plea, and the formal proceedings by which it was effected (*b*). So leave will, in some cases, be granted to the defendant to withdraw a plea, and enter a demurrer in its room (*c*); and by leave a demurrer may be withdrawn (*d*).}

Of entering the
plea.

When the defendant is in custody upon an indictment or information in the King's Bench, for any offence not amounting to treason or felony, either by virtue of a *capias* or Bench warrant, the prosecutor may, by 48 Geo. 3. c. 58. s. 1, when eight days have elapsed, after due notice, and a copy of the indictment or information have been delivered to the defendant, enter an appearance for him, and a plea of not guilty, and proceed to trial as if he were actually present. In order to prevent oppression, by reason of exorbitant fees, the 2 Hen. 4. c. 10, provides, that the clerk shall take no more than two shillings for entering the plea and the *venire facias*, though any number of defendants be jointly indicted.

I. Of pleas to
the jurisdiction,
and proceedings
thereon*.

In considering the nature of the several pleas on which the defendant is able to rely, we come, first, to examine those which he may offer *to the jurisdiction* of the court before which the indictment is preferred, because these are preliminary to any objection to the proceedings themselves, and aim at invalidating the whole, and at shewing that there is no necessity for any defence on the part of the persons indicted. They may be successfully relied on, when the court has no cognizance of the crime alleged on the record, as where a party was accused of a rape at the sheriff's tourn, or of treason at the quarter sessions (*e*). In general, any objection to the jurisdiction must be pleaded, and

(*a*) 1 Wils. 157. Fost. 16. 31. Prac. 40. Cro. Eliz. 196.

(*b*) Fost. 17. See form of entry, Fost. 17. Post, last vol.

(*d*) Cas. K. B. 31.

(*c*) 2 Smith, 620. Hand's

(*e*) 4 Bla. Com. 333. 2 Hale,

256.

* As to this plea in general, see 4 Bla. Com. 333.

cannot be taken advantage of under the general issue (*a*). But where a statute directs that particular matter shall be determined only within a certain boundary, or by certain magistrates, this may be shewn under the plea of not guilty (*b*). So also where the objection proves that no court in England can try the indictment, it may be given in evidence, without being specially pleaded (*c*). And it has been holden, that objections to the jurisdiction, apparent on the face of the indictment by the caption, when returned on a certiorari or otherwise, may be well taken on demurrer (*d*); but if a party be indicted before justices at sessions, it should seem that he may plead specially, that the offence did not arise within their jurisdiction, though the matter might be given in evidence under the general issue (*e*). From the nature of this plea, it must evidently be pleaded before the general issue, because by pleading not guilty, the defendant admits the power of the court to try him, and refers his cause to their decision (*f*). But we have seen that, by permission, the latter may be withdrawn, and the former substituted in its place (*g*).

OF PLEAS TO
THE
JURISDICTION,
AND
PROCEEDINGS
THEREON.

This plea must not only object, that the court before which the proceedings are taken has no jurisdiction over them, but must shew what court has authority to proceed to try them (*h*); for, if there be no other mode of trial, that circumstance will, of itself, give the King's Court jurisdiction. It is not necessary that it should conclude by answering over to the felony, or put in issue the facts of guilt or innocence, though it may do so (*i*). As this is a dilatory plea, it seems necessary to add an affidavit of its truth, according to the principle we have already stated (*k*).

Form of the
plea.

[439]

(*a*) Fost. 16. Hawk. b. 2. c. 33. s. 5.

(*b*) 1 East, 352.

(*c*) 6 East, 583.

(*d*) 1 T. R. 316. 1 Leach, 425.

(*e*) Trem. P. C. 271. 1 Chit. on Pleading, 4th edit. 381. acc. Trem. P. C. 271, n.; and Stark. 292, semb. contra.

(*f*) Fost. 16. Hawk. b. 2. c. 34. s. 4.

(*g*) Ante, 437. 1 Wils. 157. Fost. 16. 31.

(*h*) 6 East, 583. See form of this plea, Fost. 18. 1 Wentw. 10. 18. 6 East, 584. Trem. P. C. 298. 189. 1 Chitty on Pleading, 4th edit. 384. Post, last vol.

(*i*) 2 Hale, 256.

(*k*) Ante, p. 436. 3 Burr. 1617. Hawk. b. 2. c. 34. s. 5, 6, 7. Burn, J. Indictment, XI.

FORM OF THE
PLEA.

To this plea the crown may demur, or reply *instant* (*a*). And if the court determine against the plea, the defendant will have judgment to answer over to the felony (*b*). But in case of misdemeanors, no judgment of *respondeas ouster* is of right demandable, when an issue in fact is found against the defendant (*c*), for the decision operates as a conviction, though, as a matter of favour, the defendant may still be admitted to plead not guilty (*d*).

II. Of demur-
rers *.

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The next mode by which the defendant may object to the indictment, is by *demurrer*, a term derived from *demorare* or *demurer*, and signifies that the party will go no further, because the indictment or proceeding is defective in substance, or informal in statement (*e*). Thus if a man be indicted for feloniously stealing a greyhound, which is an animal in respect whereof no theft can be committed, the defendant may demur; for while he admits the taking, he may deny the felony (*f*). But it seems to be unsettled, whether he can demur on account of the omission or bad statement of the defendant's name or addition, or must plead it in abatement (*g*). The demurrer puts the legality of the whole proceedings in issue, and compels the court to examine the validity of the whole record; and, therefore, in an indictment removed from an inferior court, if it appear from the caption that the court before which it was taken had no jurisdiction over it, it will be adjudged to be invalid (*h*). We have already seen what time is allowed for a party to demur (*i*). When once a demurrer is filed,

(*a*) Fost. 17. See form of demurrer and joinder, Fost. 19. Trem. P. C. 189. Post, last vol. Of replication, 4 Wentw. 69. Post, last vol. Of rejoinder and issue, 4 Wentw. 70. Post, last vol. 1 Wentw. 24.

(*b*) Trem. P. C. 302.

(*c*) 8 East, 110, 11.

(*d*) 6 East, 602.

(*e*) Co. Lit. 71. b. 4 Bla. Com. 333, 4. Jac. Dic. De-

murrer. Burn, J. Demurrer. Williams, J. Demurrer. Burn, J. Indictment, IX.

(*f*) 4 Bla. Com. 334. Williams, J. Demurrer.

(*g*) Andrew, 148. 150. 2 Sess. Cases, 315. 148. 150. 2 Hale, 175. Ante, 204. Post, 447.

(*h*) 1 T. R. 316. 1 Leach, 425. Andr. 137, 8.

(*i*) Ante, 435. 432, 3.

* As to demurrers in general, see Hawk. b. 2. c. 31. s. 5. 4 Bla. Com. 333, 4. Burn, J. Demurrer. Williams, J. Demurrer. Burn, J. Indictment, XI.

the defendant cannot withdraw it without the consent of the parties on whose prosecution he is indicted, or at least without the permission of the court (*a*). But it is certain, that he may demur at any time before trial, in cases of misdemeanors, even after pleading, on his solicitor's obtaining a common side-bar rule, from the clerk of the rules, for leave to enter a retraxit (*b*). On the trial of a capital offence, as treason, though in strictness, if the defendant has on his arraignment pleaded not guilty, he ought not to object to the indictment till after his trial, yet it is not unusual to hear his exceptions before the witnesses are called (*c*); and where the parts of an indictment are severable, as the overt acts of treason, if one or more be imperfectly stated, evidence under the defective statement may be resisted (*d*).

As to the form of the demurrer (*e*), it seems that, in capital cases, it may be *ore tenus*, on which ever side the objection arises (*f*). It seems that the defendant, when indicted for felony, may either demur, and, at the same time, plead over to the felony, or that he may take the latter course after the demurrer is found against him (*g*). If he resolves to demur, his solicitor procures and engrosses the demurrer, and the clerk in court in the King's Bench, files and gives a four-day rule for the prosecutor to join in demurrer (*h*). If he does not join at the expiration of the time thus allowed him, the defendant is entitled to have judgment entered up for want of joinder (*i*). But, in general, the prosecutor joins in demurrer immediately, and *ore tenus* if the case be important (*k*). Upon this the demurrer book is made up, and in case of misdemeanors, the issue of law is set down for argument. The defendant, we have seen, is entitled to the benefit of counsel

Form of
demurrer.

[441]

(*a*) Cas. K. B. 31. Ante, 437.

(*b*) Cro. Eliz. 196. Hand's Prac. 40.

(*c*) 4 Harg. St. Tr. 697, 8. 717 to 723.

(*d*) 4 Harg. St. Tr. 723.

(*e*) See form and joinder, Hand's Prac. 382. 10 Wentw. 475. Post, last vol. Stark. 786.

(*f*) Fost. 105. See 4 Harg.

St. Tr. 697, 8. 6 Id. 237, 8.

(*g*) 8 East, 112. 2 Hale, 257. 4 Bla. Com. 334.

(*h*) Hand's Prac. 40. 6 East, 583.

(*i*) Hand's Prac. 40, 41.

(*k*) Fost. 105. See form of joinder, Fost. 20. Hand's Prac. 383. 476. Post, last vol. Of the Demurrer Book, 3 Lord Raym. 39, and post, last vol.

FORM OF
DEMURRER.

to argue the demurrer (*a*). And any counsel or serjeant may, as *amicus curiæ*, state his opinion to the court upon the insufficiency of the indictment (*b*). It seems, however, that where a felony is in question, the proceedings are more expeditious, and the court proceed immediately to hear the arguments, and examine the objections (*c*); unless there be difficulty in the case when time for argument may be given (*d*).

Judgment on
demurrer.

It seems to have been formerly doubted, whether, if the defendant demur generally in case of felony, and the indictment be held to be valid, final judgment shall not be immediately given, and execution awarded against him (*e*). But this doubt existed only in the case of a general demurrer concluding in bar; for it is clear, that if the demurrer prayed judgment of the indictment, and that it might be quashed, the prisoner could never be concluded from pleading over to the felony, either at the same time, or after the determination of the legal exceptions (*f*). And, at the present day, it seems that the defendant shall have judgment of *respondeas onster*, in every case of felony where his demurrer is adjudged against him; for we have already seen, that where he unwarily discloses to the court the facts of his case, and demands their advice whether they amount to felony, they will not record or notice the confession (*g*); and a demurrer seems to rest upon the same analogy (*h*). So if the attorney-general demur to the defendant's plea, and it be adjudged against him, he shall not be concluded from a trial, but be ordered to plead over to the felony (*i*). But in mere misdemeanors, if the defendant demur to the indictment, whether in abatement or otherwise, and fail on the argument, he shall not have judgment to answer over, but the

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- (*a*) Ante, 407. 2 Hale, 236. 196. Dyer, 38, 39. Hawk. b. 2. c. 31. s. 6.
 (*b*) Dalt. J. c. 165. Staundf. 141, b. 4 Co. 39.
 (*c*) Fost. 20. 105. 6 Harg. St. Tr. 241.
 (*d*) 6 Harg. St. Tr. 241, 2.
 (*e*) 2 Hale, 315. 257. 2 Inst. 178. acc. Hawk. b. 2. c. 31. s. 5. 2 Hale, 225. 257. 4 Bla. Com. 334. cont. and see Stark. 315. 2 Leach, 603.
 (*f*) 1 Salk. 59. Cro. Eliz. 196. Dyer, 38, 39. Hawk. b. 2. c. 31. s. 6.
 (*g*) Ante, p. 429. 2 Hale, 225. 257. 4 Bla. Com. 334.
 (*h*) Fost. 21. 4 Bla. Com. 334. 8 East, 112. 2 Leach. 603. 2 Hale, 225. 257. 1 M. & S. 184. Burn, J. Demurrer. Williams, J. Demurrer; but see Stark. 315.
 (*i*) 2 Hale, 257. Burn, J. Indictment, XI.

decision will operate as a conviction (*a*). The reason of this distinction seems to be, that there can be no demurrer in abatement in cases not capital, except to a plea in abatement of the same description; and, therefore, every objection to the indictment itself is in bar of the accusation (*b*). In case however of judgment against the defendant on a demurrer, to a plea in abatement, or to a replication to such plea, the judgment is respondeat ouster (*c*).

JUDGMENT ON
DEMURRER.

These doubts, relative to the final judgment upon an unsuccessful demurrer to an indictment, have caused this mode of exception to be seldom resorted to in practice, in case of indictment for felony (*d*). Besides, the prisoner will have all the advantage he could possibly obtain in this way, by motion in arrest of judgment, after taking the chance of a complete acquittal (*e*). And if the defendant succeed in his demurrer on any mere formal exception, he only obtains a little delay, for the judgment is, that the indictment be quashed, and the defendant will be detained in custody until another accusation has been preferred against him (*f*). But where the legal exception goes to show that the facts stated on the record do not amount to a felony, the defendant will be altogether discharged out of custody (*g*); and in prosecutions for supposed misdemeanors, especially when it is clear that no offence has been committed, and the indictment discloses the objection, it is then, with a view to get rid of the prosecution in the earlier stage, and to save the trouble and expense of a trial, more usual to demur than in case of indictments for felonies (*h*).

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If the indictment contain two distinct and independent charges for two separate offences, and the defendant demurs generally, though one of the offences be not indictable, or be insufficiently

(*a*) 8 East, 112. Hawk. b. 2. c. 31. s. 7. Williams, J. Demurrer. Burn, J. Demurrer, acc. 4 T. R. 459, semb. contra.
 (*b*) 1 Salk. 218. 220. Hawk. b. 2. c. 31. s. 7.
 (*c*) Post, 451. Trem. P. C. 189, 190. 6 East, 602.
 (*d*) 2 Leach, 603. 4 Bla. Com. 334. Burn, J. Indictment, XI. Williams, J. Demurrer.
 (*e*) 4 Bla. Com. 324. Burn, J. Indictment, XI. Williams, J. Demurrer.
 (*f*) Andr. 147.
 (*g*) 2 Leach, 600.
 (*h*) Andr. 137. 1 T. R. 316.
 4 T. R. 778.

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DEMURRER.

alleged, there will be judgment for the crown upon the count which is valid, for the indictment may be good in part, though in other places defective (*a*). And upon demurrer to an information, the record may be amended, if found to be defective, and this may be done even on an application at a judge's chambers (*b*); but we have seen that an indictment itself cannot be amended, though the caption may (*c*). If an objection be taken in a late stage of the proceedings, when it appears that a fatal defect occurred in the earlier part of them, the court will revert back to the first error, and give judgment against the party by whom it was committed (*d*). And therefore, if a replication to a plea of *autrefois acquit* be demurred to, and it appear that the plea is insufficient, judgment will be given against the defendant, notwithstanding the insufficiency of the replication (*e*).

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III. Of dilatory
pleas.
Pleas declinatory
of trial *.
Sanctuary, and
abjuration.

All the Pleas which were formerly used as declinatory of trial, have either been altogether abolished, or have fallen into disuse. Of this description was the old plea of sanctuary, which seems to have arisen, and been supported wholly by a superstitious veneration for places regarded as sacred (*f*). All churches, churchyards, and places consecrated by the pope's bull, seem to have been able to afford this protection for the fugitive (*g*). These places, for forty days after the commission of the offence, afforded a refuge for the criminal, unless accused of treason or sacrilege (*h*). The mode of claiming this privilege was by flying to the consecrated precincts, and within forty days going in sackcloth, and confessing himself to the coroner as guilty, with all the particulars of his crime, and taking an oath, by which he abjured the realm, and swore to depart immediately at the port assigned him, and never to return without leave of his majesty. By these means he ensured his personal safety, if he went with a crucifix in his

(*a*) 2 Sess. Cas. 32.(*b*) 4 T. R. 458.(*c*) Ante, 297. 335.(*d*) 1 M. & S. 190. 1 Chit.
on Pleading, 4th edit. 580.(*e*) Id. *ibid*.(*f*) 4 Bla. Com. 322.(*g*) Keilw. 188, 9. Hawk.
b. 2. c. 32. s. 3.(*h*) Keilw. 191. Hawk. b. 2.
c. 32. s. 4. 4 Bla. Com. 332.

* As to these pleas in general, see Hawk. b. 2. c. 32, per totum. 4 Bla. Com. 332, 3. Keilw. 138 to 192.

hand immediately to the place of embarkation (*a*); but his blood was corrupted, and all his goods and chattels forfeited to the crown (*b*). The plea of sanctuary arose, therefore, when, during the interval of forty days, the offender was taken and arraigned for the felony. This absurd immunity was greatly narrowed by 27 Hen. 8. c. 19, and 32 Hen. 8. c. 12. And by the 21 Jac. 1. c. 28, was altogether destroyed; so that it would, at the present day, be merely superfluous to enter into any further discussion relative to its nature and requisites.

OF DILATORY
PLEAS.
PLEAS
DECLINATORY
OF TRIAL.
SANCTUARY AND
ABJURATION.

The other species of declinatory plea—the benefit of clergy—has fallen into disuse. For, as the defendant is equally entitled to receive it after conviction, it is preferable to wait till that time, and so take the chance of an acquittal (*c*). It is now always prayed immediately before sentence; and, therefore, we shall postpone the consideration it demands until we examine that stage of the proceedings.

Benefit of
clergy.

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Pleas in abatement are founded either on some defect apparent on the face of the indictment, without reference to any extrinsic fact, or are founded upon some matter of fact, extrinsic of the record, which renders the indictment insufficient.

2. Of pleas in
abatement*.

Any defect apparent on the face of the indictment may be made the ground of a plea in abatement, and if found for the defendant, will abate the indictment (*d*). Thus, if the indictment do not describe the defendant by any addition of place or degree, it is defective on the face of it, and the defendant may plead in abatement (*e*). So if the defendant be misnamed, or his addition of degree be mis-stated, which is an extrinsic objection not apparent on the face of the indictment, the defendant may plead this also in abatement (*f*). So if in an indictment for the non-repair, &c. of

What may be
so pleaded.

(*a*) 4 Bla. Com. 332, 333. Com. 333.

3 P. W. 38, note B.

(*d*) 2 Hale, 236, 238.

(*b*) 4 Bla. Com. 333. 3 P. W. 38, note B.

(*e*) Andr. 145, &c.

(*f*) Hawk. b. 2. c. 25. s. 70.

(*c*) 2 Hale, 236. 4 Bla.

* As to these pleas in general, see 2 Hale, 236 to 239. Hawk. b. 2. c. 34. Com. Dig. Abatement. Bac. Abr. Abatement. Ante, 203 to 211, as to the statement of the name and addition.

WHAT MAY BE
SO PLEADED.

a highway, the way be described too general, the defendant may take advantage of it, by plea in abatement (*a*). But for objections apparent on the face of the indictment itself, without reference to any extrinsic fact, it is more usual to move to quash it (*b*), or to demur (*c*).

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At common law, it seems to have been considered, that no advantage could be taken of any error in the indictment, as to the name or addition of the defendant, in case of felony; for it was considered that the accusation was directed against the prisoner at the bar, by whatever name he might be distinguished; though this rule could not apply in minor offences, where the defendant might appear by attorney (*d*). But by 1 Hen. 5. cap. 5, it is necessary to state correctly the names, estates, degrees, mysteries, and places of residence, of the defendants in all criminal proceedings. Since this statute, therefore, a misnomer has, in all cases, been thus pleadable (*e*). Formerly there was a distinction taken between the christian and the surname, that the former *might*, but the latter *could not* be pleaded in abatement (*f*); but this is now settled to be groundless, and an error in the latter is equally fatal with a mistake in the former (*g*). A mistake in the addition too, may be thus objected to on the part of the defendant, where quality or profession is mistaken (*h*). So the total want of addition will be a sufficient ground, upon this plea, to vitiate the proceedings (*i*). And if a peer be indicted of a crime for which process of outlawry lies against him, without stating his title, he may plead the omission in abatement (*k*). But if a defendant be indicted with an alias dictus, he cannot plead in abatement that

(*a*) 1 Stark. 357, 8.

(*b*) Ante, 299.

(*c*) Ante, 439.

(*d*) 1 Sid. 40. Cro. Car. 104.
Bac. Abr. Abatement, D. Bac.
Abr. Indictment, G. 2.

(*e*) 1 Leach, 476. 2 Hale,
176. 238. Hawk. b. 2. c. 34.
s. 2. 4 Bla. Com. 334. Bac.
Abr. Indictment, G. 2. Burn,
J. Indictment, XI.

(*f*) 2 Hale, 175. Bac. Abr.
Indictment, G. 2. Hawk. b. 2.

c. 25. s. 68.

(*g*) Ante, 202. 10 East, 83.
Rep. temp. Hardw. 303. Burn,
J. Indictment, XI.

(*h*) Ante, 203, 4. 2 Hale,
175, 176. Hawk. b. 2. c. 23.
s. 102 to 123. c. 25. s. 68 to 71.

(*i*) Andr. 146. 2 Sess. Cases,
315. 2 Leon. 248, 9. Hawk.
b. 2. c. 25. s. 69.

(*k*) 6 Co. Rep. 53. 2 Hale,
240. 2 B. & C. 371. 4 D. & R.
592, S. C.

he was not known by such name; but if he do, the prosecutor must demur, and not move to quash the plea (*a*). We have already considered the various instances which have arisen under these general rules, when we examined the degree of accuracy with which the name and addition should be stated (*b*), that it will be unnecessary here to repeat them. All mistakes in the name or addition must be thus pleaded, or the defendant must move to quash the indictment, on a proper affidavit, if any advantage is to be taken of them, for they will not form any ground of error, or in arrest of judgment (*c*).

WHAT MAY BE
SO PLEADED.

It has been holden to be no good plea in abatement of an indictment, that another prosecution for the same offence is depending, though it will be a ground for the court to quash one of them on motion, if it should appear to be defective (*d*). It is expressly provided by 7 W. 3. c. 3, that mere formal or technical exceptions to indictments for high treason, must be taken before any evidence is given in support of the charge, and will be of no avail in any subsequent stage of the proceedings. [447]

This plea, like the other proceedings in misdemeanor, may, in the King's Bench, be put in by attorney, as well as if the party indicted had appeared in person (*e*); for if he be not the person intended, the attorney-general may reject it, and sign judgment against the real defendant on default of an answer. But if he accepts the plea, he thereby admits the party by whom it is made to be the person intended, and cannot afterwards object that it is made by a stranger (*f*). It is always necessary to plead it before any plea in bar, as the defendant will be estopped by an issue (*g*). And the proper time to take advantage of it is upon the arraignment. Manner and time of pleading.

(*a*) 1 Dowl. & Ry. 43.

(*b*) Ante, p. 203 to 217.

(*c*) Ante, 202. 139. 2 Bla. Rep. 1120. Bac. Abr. Abatement, D.

(*d*) See ante, 299. Cro. Car. 147. Ld. Raym. 922. Fost. 104, 5, 6. Dougl. 240. Hawk. b. 2. c. 34. s. 1. Com. Dig. Indictment, L.

(*e*) Ante, 411. 10 East, 83. Hawk. b. 2. c. 34. s. 3.

(*f*) Hawk. b. 2. c. 34. s. 3. Williams, J. Misnomer and Addition, II.

(*g*) 2 Hale, 175. Fost. 16. Bac. Abr. Indictment, G. 2. Hawk. b. 2. c. 34. s. 4. Williams, J. Misnomer and Addition, II.

MANNER AND
TIME OF
PLEADING.

ment, when the prisoner is called upon to answer (*a*). In prosecutions for treason, the plea is in writing, signed by counsel; and if demurred to, the defendant must immediately join in demur (*b*).

Form and requisites of pleas in abatement*.

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In cases of felony or treason, a plea in abatement may be admitted *ore tenus*, and the issue may be joined without delay (*c*). But the regular practice is to engross it upon parchment, procure it to be signed by counsel, and for the defendant to deliver it in open court, upon being charged with the indictment (*d*). It is always necessary to disclose the real name, and by that statement the defendant is concluded (*e*). And where a peer pleads his right to be tried before the House of Lords, he must state that he is a peer of the United Kingdom, and the mode in which he derives his title, because the plea is to be determined by the record (*f*). In all cases of felony, the defendant should answer over to the matter of the charge, and if this be omitted, the court will order it to be done, and insert it at the bottom of the parchment (*g*); but if this be omitted, the plea will not be demurrable on that account, because he might plead over to the felony, after the plea has been determined against him (*h*). But in a prosecution for misdemeanor, the defendant, as we have seen, cannot plead over to the offence, together with a plea in abatement (*i*). The plea ought to have a proper conclusion, "praying judgment of (or "on") the indictment, and that it may be quashed;" for the court will not give such judgment as appears proper on the whole record, as they will on a plea in bar, unless it be regularly demanded (*k*). To this plea it is, by the 4 & 5 Ann. c. 16. s. 11,

(*a*) 2 Hale, 175. Williams, J. Misnomer and Addition, II.

(*b*) 6 Harg. St. Tr. 237, 8. 241, 2.

(*c*) 1 Leach, 476. Fost. 105.

(*d*) Cro. C. C. 21. 6 St. Tr. 237.

(*e*) 2 Hale, 238. 4 Bla. Com. 335.

(*f*) 2 B. & C. 871. 4 Dow.

& Ry. 592. S. C. 6 Co. Rep. 53, b. 2 Hale, 240.

(*g*) 1 Leach, 478. 2 Leach, 712, n. a. 2 Hale, 238. Dyer, 88. 3 Salk. 171. Carth. 56.

Burn, J. Indictment, XI.

(*h*) Carth. 55, 6.

(*i*) Ante, 485. 8 East, 107. Cro. Eliz. 495.

(*k*) 10 East, 83.

* See forms, 10 East, 83. 6 Harg. St. Tr. 237. 3 Burr. 1617. 1 Wentw. 36. Cro. C. C. 46. 393. 2 Hale, 237. 175. Post, last vol.

necessary, at least when filed in the crown-office, to add an affidavit, entitled in the prosecution, averring that it is true (*a*). But this seems not to be necessary on a trial at bar of an indictment for high treason (*b*); though it does not appear upon what reason this distinction is founded. The entry of the plea of misnomer upon the roll must be special, "that A. B. who is indicted by the name of C. D. comes and says, that whereas in the indictment it is supposed that one C. D. with force and arms, &c. his name is A. B. and not C. D.;" for if he should style himself *the said* C. D. he concludes himself, and cannot plead a misnomer (*c*).

FORM AND
REQUISITES OF
PLEAS IN
ABATEMENT.

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If this plea be insufficient in point of form, or bad in point of substance, the prosecutor may demur (*d*). The court will not, on motion, quash the plea (*e*), nor will they allow it to be amended (*f*). In indictments for treason or felony, the defendant must join in demurrer immediately (*g*). And if the replication of the prosecutor be insufficient, the defendant may resort to the same means, and if he establish the insufficiency will obtain judgment. Thus if a prisoner plead in abatement that he is a peer, and the attorney-general reply, that he formerly petitioned the Lords to be tried by them, and was refused, the defendant will have judgment on demurrer, because the decision of the House of Lords is no judgment, and therefore the replication is invalid (*h*).

Demurrer,
replication,
and issue.

If a plea of misnomer be put in, it is the best course to allow it, as the defendant is concluded by the name he discloses in his

(*a*) 3 Burr. 1617. 2 Stra. 1161. Hawk. b. 2. c. 34. s. 5, 6. Com. Dig. Indictment, I. *sed quære*. See 4 Ann. c. 16. s. 4.

(*b*) Fost. 16. 3 Burr. 1617. Hawk. b. 2. c. 34. s. 7.

(*c*) 2 Hale, 175. Williams, J. Misnomer and Addition. See 5 T. R. 487. 8 T. R. 515. 3 Wils. 413. See form of entry of plea, and in felony and replication, known as well by one name as the other, 1 Hale, 174, 5.

2 Hale, 237. 3 Williams, J. 462. Trem. P. C. 189.

(*d*) 8 East, 83. See form of demurrer and joinder, 1 Wentw. 24. Post, last vol. 6 Harg. St. Tr. 238.

(*e*) 2 B. & C. 618. 1 Dow. & Ry. 43.

(*f*) 2 B. & C. 871. 4 Dow. & Ry. 592, S. C.

(*g*) 6 Harg. St. Tr. 241, 2.

(*h*) 2 Salk. 509. Holt, 530.

DEMURRER,
REPLICATION,
AND ISSUE.

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plea, and he may be immediately re-indicted (*a*). The prosecutor may, however, if he thinks fit, deny the plea, or reply that the defendant is known as well by one christian name or surname as another, and, if he succeeds, judgment will be given for the crown (*b*), or the prosecutor may demur to the plea; and in cases of felony, the demurrer and joinder may be *ore tenus* (*c*). When the issue is joined upon a plea in abatement or replication thereto, the venire may be returned, and the trial of the point by a jury of the same county proceed instanter (*d*). But, at the sessions, where a misdemeanor only is in question, it is the usual practice, after plea for the defendant, to enter into a recognizance to prosecute the same with effect at the ensuing sessions, and then he must give four days notice of his intention to try to the prosecutor, and that if he does not reply, judgment will be entered for the defendant (*e*). When a plea is put in that the defendant is a peer, the issue is to be tried, not by the country but by the record; but whether a woman be a peeress by marriage, is a fact for the decision of a jury (*f*).

Judgment on
plea in abate-
ment, and con-
sequences.

When a plea in abatement is found in favor of the defendant, the judgment, in case of misdemeanor, is, that he be not compelled to answer the indictment, but depart the court without day (*g*). But, on an accusation for a capital crime, after the indictment has been abated for misnomer, the court will not dismiss the prisoner, but cause him to be indicted *de novo*, by the name disclosed in his plea, to which, we have seen, he can make no second objection (*h*). And if the grand jury be not discharged, another bill may be immediately preferred, whatever may be the description of the offence (*i*). If it be pleaded by one of se-

(*a*) 2 Hale, 176. 238. Burn, Indictment, IX. Williams, J. Misnomer and Addition, II. Dick. Sess. 167.

(*b*) 2 Leach, 476. 2 Hale, 237, 238. Cro. C. C. 21. See form, 2 Hale, 237. Post, last vol.

(*c*) Fost. 105. 1 Leach, 476.

(*d*) 2 Leach, 478. 2 Hale, 238. 22 Hen. 8. c. 14. 23 Hen. 3. c. 1. 32 Hen. 3. c. 3. 3 Inst. 27. Stark. 311.

(*e*) Cro. C. C. 31.

(*f*) 6 Co. Rep. 53, a. 2 Hale, 240. Burn, J. Indictment, XI.

(*g*) 2 Hale, 238. 10 East, 88, where see form.

(*h*) Cro. Car. 371. 2 Hale, 176. 238. Hawk. b. 2. c. 34. s. 2. Williams, J. Misnomer and Addition, II.

(*i*) 2 Hale, 176, 238. Cro. C. C. 21. Hawk. b. 2. c. 34. s. 2. Dick. Sess. 167.

veral defendants, and allowed, it will only quash the indictment as to him, without affecting it as to those who are correctly indicted (*a*).

JUDGMENT ON
PLEA IN
ABATEMENT,
AND
CONSEQUENCES.

If a plea in abatement be found against the defendant, in case of felony, he shall have judgment of respondeas ouster (*b*). But, on such a finding by a jury, in case of misdemeanors, the judgment will be final against the defendant (*c*). If, however, judgment be given against the defendant, either on demurrer to his plea in abatement, or on demurrer to the prosecutor's replication to such plea, the judgment is respondeas ouster, and not final (*d*). This distinction between the result of a verdict against the defendant on his plea in abatement, and a judgment against him on a demurrer thereon, is founded on this principle, that wherever a man pleads a fact which he knows to be false, and a verdict be against him, the judgment ought to be final, for every man must be presumed to know whether his plea be true or false in matter of fact; but upon demurrer to a plea in abatement, there shall be a respondeas ouster, because every man shall not be presumed to know the matter of law, which he leaves to the judgment of the court (*e*).

We come now to the consideration of special pleas in bar, which, without entering into the facts of the offence, shew that the defendant ought not at all to be called upon to answer the indictment. The principal of these are a previous acquittal, conviction, attainder, and pardon, which we shall now proceed to examine.

Pleas in bar of
the indictment.

(*a*) Rep. temp. Hardw. 303. 2 Hale, 177. Bac. Abr. Indictment, G. 2. Williams, J. Misnomer and Addition, II.

(*b*) 8 East, 110. 1 Leach, 478. 2 Hale, 239. 255, 6. Fost. 21. 2 Ld. Raym. 922. Hawk. b. 2. c. 31. s. 6. 4 Bla. Com. 338.

(*c*) 3 East, 107. Hawk. b. 2. c. 31. s. 7. Cro. Cir. Com. 22.

2 Wils. 367.

(*d*) Trem. P. C. 189, 190. 6 East, 583. 602. This accords with the judgment in civil actions, 1 East, 542. 2 Wils. 368. See the form of judgment of respondeat ouster, Trem. P. C. 189.

(*e*) 2 Wils. 368. 1 East, 542.

I. Antrefois acquit*.

The plea of *autrefois acquit*, which is a plea in bar, is founded upon the principle, that no man shall be placed in peril of legal penalties more than once upon the same accusation (*a*). It has, therefore, been generally agreed, that where a man has once been pronounced "not guilty," on a valid indictment or appeal, he cannot afterwards be indicted again upon a charge of having committed the same supposed offence (*b*). To this rule, indeed, the proceedings in case of appeal of death formed a solitary exception; but this being now abolished (*c*), there is no exception.

When this plea may be pleaded.

In order, however, to entitle the defendant to this plea, it is necessary, that the crime charged be precisely the same, and that the former indictment, as well as the acquittal was sufficient (*d*). As to the first of these requisites, the identity of the offence, if the crimes charged in the former and present prosecution are so distinct, that evidence of the one will not support the other, it is inconsistent with reason, as it is repugnant to the rules of law to say, that the offences are so far the same, that an acquittal of the one will be a bar to the prosecution for the other (*e*). But, on the other hand, it is clear, that if the charge be in truth the same, though the indictments differ in immaterial circumstances, the defendant may plead his previous acquittal, with proper averments; for it would be absurd to suppose, that by varying the day, parish, or any other allegation, the precise accuracy of which is not material, the prosecutor could change the rights of the defendant, and subject him to a second trial (*f*). Thus, as to the point of time, if he be indicted for a murder, as committed on a certain day, and acquitted, and afterwards be charged with killing the same person, on a different day, he may plead the former acquittal in bar, notwithstanding this difference,

(*a*) 4 Co. Rep. 40. 4 Bla. 522. 9 East, 437.
 Com. 335. Hawk. b. 2. c. 35. (*e*) 2 Leach, 717.
 s. 1. 2 B. & C. 502. (*f*) Keilw. 58. 1 Leach, 448.
 (*b*) Hawk. b. 2. c. 35. s. 1. 9 East, 437. 2 Hale, 224, 5, 6.
 4 Bla. Com. 335. 247. 2 Inst. 318. Hawk. b. 2.
 (*c*) 59 Geo. 3. c. 46. c. 35. s. 3. Burn, J. Indictment,
 (*d*) 2 Leach, 717. 1 East, P. C. XI.

* As to this plea in general, see 2 Hale, 240 to 250. Hawk. b. 2. c. 35, per tot. Com. Dig. Indictment, L. 4 Bla. Com. 335, 6. Burn, J. Indictment, XI. 4 Co. 45.

WHEN THIS
PLEA MAY BE
PLEADED.

for the day is not material; and this is a fact which could not be twice committed (*a*). And the same rule applies to accusations of other felonies; for though it is possible for several acts of the same kind to be committed at different times by the same person, it lies in averment, and the party indicted may shew that the same charge is intended (*b*). But where an indictment charged that defendant, on, &c. in the 2d year of the reign of the present king, kept a gaming-house, and the defendant pleaded, that on, &c. in the 4th year of the reign of the present king, defendant was arraigned upon an indictment, which charged, that defendant, on the 18th of January, in the 57th year of the reign of the late king, and on divers other days and times, between that day, &c. kept a gaming-house, &c. to the nuisance of the subjects of our said lord the king, and against the peace of our said lord the king, &c.; and the plea then averred the indentity of the offences described in the two indictments, and the acquittal of the defendant upon demurrer to this plea, concluding with a prayer of judgment of respondeas ouster, it was held that the plea was bad, because the indictment upon which the acquittal was alleged to have taken place, on the face of it, charged an offence committed in the reign of the late king, and it was not competent to the defendant to shew by averment, that it was for the same offence as that charged in the indictment before the court, because that would be in effect to contradict the record (*c*). Where a defendant pleaded an acquittal on an indictment for murdering a child, by *administering a certain deadly poison, to wit, oil of vitriol*, and by forcing the child to *take drink*, and *swallow down* a large quantity of the said oil of vitriol, knowing it to be a deadly poison, whereby the child became sick and distempered in his body, and by that sickness languished and died, it was held a good bar to an indictment (1st count) for murdering the same child, by *administering a large quantity of oil of vitriol*, and forcing the child *to take into his mouth and throat* a large quantity of the said oil of vitriol, knowing that the said *oil of vitriol* would occasion the death of the child, whereby he *became disordered in his mouth*

(*a*) 2 Hale, 179. 244. Hawk. Indictment, XI.
b. 2. c. 35. s. 3. Ante, 224. (*c*) 3 B. & C. 502.
(*b*) 2 Hale, 179. 244. Burn, J.

WHEN THIS
PLEA MAY BE
PLEADED.

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and throat, and by the *disorder choaking, suffocating, and strangling occasioned* thereby, languished and died; (2d count) for murdering the child, by *administering a certain acid*, called oil of vitriol, and forcing the child to take a large quantity of the said acid into his mouth and throat, by means whereof he became disordered *in his mouth and throat*, and incapable of swallowing his food, and died of the *inflammation, injury, and disorder* occasioned thereby (*a*). If a party be indicted for the murder or assault of a certain person unknown, and afterwards charged on an indictment for the same offence, he may rely upon the previous acquittal (*b*). So if the person killed be differently, though sufficiently described in two distinct indictments, the defendant may shew that the same individual is intended (*c*). But then it is necessary to aver, that the party slain was known by both names, so as to maintain the sufficiency of the first proceedings, for if they were merely nugatory, they will form no ground of defence to any subsequent prosecution (*d*). And hence we may observe, that the great general rule upon this part of the subject is, that the previous indictment must have been one upon which the defendant could legally have been convicted, upon which his life or liberty was not merely in imaginary, but in actual danger, and consequently, in which there was no material error (*e*). So that all variations not inconsistent with the validity of both proceedings, such as differences in the day, the ville, or the quantity, may be shown to be merely technical. But if the variances are in those things which are material, *autrefois acquit* must not be pleaded; for either the first indictment was ineffectual, and, therefore, the acquittal is of no avail, or the second will prove not applicable to the evidence, and, therefore, the objection is needless. Thus if a person be indicted for a crime laid to be done at a certain parish in a particular county, and found not guilty, and afterwards accused of the same fact at another place within the same county, he may plead his former acquittal, for the ville is altogether immaterial, and either indictment might be supported (*f*); but if the difference be in the

- (*a*) 1 Brod. & Bing. 473.

(*b*) Dyer, 285, a. Keilw. 25.
Hawk. b. 2. c. 35. s. 3.

(*c*) 2 Hale, 244.

(*d*) 2 Hale, 244, 5. Hawk.

b. 2. c. 35. s. 3.

(*e*) 4 Co. Rep. 39, 40. 1 Leach,
448. 2 Hale, 248. Hawk. b. 2.
c. 35. s. 8.

(*f*) 2 Hale, 245. Ante, 200.

county, he cannot do this, because one indictment must be bad, since the offence will be proved to be beyond the jurisdiction of the grand jury (*a*). And where the reason fails, the rule fails with it; for an indictment removed from the proper county, though tried in another, is thus pleadable, because the same offence may still be intended (*b*). Upon the same principle, where the defendant was acquitted merely on some error of the indictment, or variance in the recitals, he may be indicted again upon the same charge, for the first proceedings were merely nugatory (*c*). Thus, if an indictment for larceny lay the property in the goods in the wrong person, the party may be acquitted, and afterwards tried on another, stating it to be the property of the legal owner (*d*). But where, in the first indictment, the prosecutor mis-stated a mere superfluous averment, he cannot afterwards rectify that error in a second, to place the life and liberty of the defendant again in jeopardy (*e*). And, in such cases, the point in discussion always is whether, in fact, the defendant could have taken a fatal exception to the former indictment; for, if he could, no acquittal will avail him, but if he could not, it is always competent for him to shew the offences to be really the same though they are variously stated in the proceedings.

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It is not, in all cases, necessary that the two charges should be precisely the same in point of degree, for it is sufficient if an acquittal of the one will shew that the defendant could not have been guilty of the other. Thus a general acquittal of murder is a discharge upon an indictment of manslaughter upon the same person, because the latter charge was included in the former, and, if it had so appeared on the trial, the defendant might have been convicted of the inferior offence; and, on the other hand, an acquittal of manslaughter will preclude a future prosecution for murder, for if he were innocent of the modified crime, he could not be guilty of the same fact, with the addition of malice and design (*f*). So an acquittal of petit treason will bar an indict-

(*a*) 2 Hale, 245. Com. Dig.
Indictment, L. Ante, 177.

(*b*) 2 Hale, 245.

(*c*) Ante, 304. 2 Leach, 708.
2 East, P. C. 519.

(*d*) 1 Leach, 464.

(*e*) 9 East, 437.

(*f*) 4 Co. Rep. 45, 6. 2 Hale,
246. Fost. 329.

WHEN THIS
PLEA MAY BE
PLEADED.

ment for the murder of the same person, and an acquittal of murder an indictment for petit treason (*a*). But if the former charge were such an one, as the defendant could not have been convicted of the latter upon it, the acquittal cannot be pleaded. Thus, if the first charge were for a felony or stealing, and the second for a mere misdemeanor, the previous acquittal will be no bar, for a felony or larceny cannot be modified on the trial into a trespass or misdemeanor (*b*). And it often happens, that after an acquittal of the felony, the defendant is indicted and tried for the misdemeanor upon the same evidence, and it would be no objection, though the judge might still think that there was evidence of the felony to have gone to the jury (*c*). Thus also if a defendant be indicted for a burglarious entry and a stealing, and acquitted, he may still be tried for a burglarious entry with intent to steal; for although the burglary be the same, it is evident the prisoner could not have been found guilty on the first, upon proof of a mere intention, and therefore may well be indicted for that offence in the second (*d*). It is, indeed, generally laid down, that an acquittal of burglary will not prejudice an indictment for larceny, or vice versâ (*e*); but this must be understood of those cases, in which, like that we have just stated, the former charge did not necessarily include the latter. On the same ground, if a robbery be committed in one county, and the goods be carried into another, so as to make it larceny there, an acquittal of the larceny in the last county will not prejudice an indictment for robbery in the first, because the verdict of not guilty can proceed on the ground only, that the goods were not brought within the jurisdiction of the grand jury, and will not affect the original taking, into which they had no authority to inquire (*f*). And thus also it is clear, that if a man be indicted as accessory after the fact, and acquitted, he may afterwards be tried as a principal, for proof of one will not at all support the other (*g*). But it was

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(*a*) Fost. 325. 328, 9. Hawk. b. 2. c. 35. s. 5.

(*b*) Hawk. b. 2. c. 35. s. 5. Bro. App. 121. 1 Leach, 12. 12 East, 415. Ante, 251.

(*c*) 12 East, 415.

(*d*) 2 Leach, 716. Hawk. b. 2. c. 35. s. 5.

(*e*) 2 Hale, 245, 6. Hawk. b. 2. c. 35. s. 5.

(*f*) 2 Hale, 245, acc.; but see Hawk. b. 2. c. 35. s. 4. cont.

(*g*) 1 Hale, 625, 6. 2 Hale, 244. Kel. 25, 6. Hawk. b. 2. c. 35. s. 11. Staundf. 105.

formerly holden, that the offences of principal and accessory before the fact, were in substance the same, and, therefore, that after an acquittal as to the former, no one could be indicted as to the latter, though it was admitted that an acquittal as procurer would not hinder him from being indicted as a principal (*a*). But as it seems now to be the better opinion, that the charges, however nearly allied in moral guilt, are specifically different in their legal aspect, and that evidence of procuring will not suffice to show an actual commission, it follows that a previous verdict in his favor, when charged with being principal, cannot be pleaded on a subsequent prosecution, for inciting others to the felony (*b*). And if two offences are supposed to have been committed at the same time, as if a horse and a saddle are stolen together, an acquittal of one will be no bar to an indictment for the other, for the crimes are essentially different (*c*). So if a road be out of repair, the parties bound to amend it may be indicted, though they have, at a former period, been acquitted on a similar proceeding (*d*).

WHEN IT MAY
BE PLEADED.

As to the sufficiency of the discharge, which may be thus pleaded, it must be a legal acquittal by judgment upon trial, by verdict of a petty jury (*e*). And, therefore, if a man be committed for a crime, and no bill be preferred against him, or, if it be thrown out by the grand jury, so that he is discharged by proclamation, he is still liable to be indicted (*f*). So if the facts be found specially by the coroner's inquest or grand jury, and he be thereupon discharged, he cannot plead it in bar to any subsequent prosecution; but if the special verdict be found by the petit jury, and judgment be given by the court "that he go thereof without day," this will amount to a sufficient acquittal (*g*).

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(*a*) 1 Hale, 625. 2 Hale, 244.
Hawk. b. 2. c. 35. s. 11.

(*b*) Fost. 361, 2. 2 St. Tr.
798. Hawk. b. 2. c. 35. s. 11.
2 Hale, 244.

(*c*) 2 Hale, 246.

(*d*) 6 East, 316.

(*e*) 2 Hale, 243. 246. Hawk.
b. 2. c. 35. s. 6. Burn, J. In-
dictment, XI.

(*f*) 2 Hale, 243. 246. Burn,
J. Indictment, XI.

(*g*) 2 Hale, 246. Burn, J.
Indictment, XI.

WHEN IT MAY
BE PLEADED.

Although it was formerly thought, that no acquittal in any other court could be effectually pleaded in bar to a prosecution in the court of King's Bench, it is now settled that a legal acquittal in any court whatsoever, having competent jurisdiction to try the charge, will be sufficient to preclude any subsequent proceedings before every other tribunal (*a*). And even an erroneous acquittal is conclusive until the judgment be reversed; so that if a judge direct a jury to acquit the prisoner on any ground, however fallacious, he is entitled to the benefit of the verdict (*b*). But, in this case, the indictment itself must not be materially defective, for, if it be so, the former prosecution is no bar, because the life of the defendant was never legally in jeopardy (*c*). And it should seem, that a substantial defect in the former indictment would prevent an acquittal thereon from being effectually pleaded, although the jury found a special verdict, and the judgment of acquittal was founded on facts not amounting to a crime (*d*); and, [459] if a judgment in favor of a prisoner be reversed, he may be arraigned and tried *de novo* (*e*). A mere error in the former process, however, will not render that prosecution nugatory, because the reason which relates to errors in the indictment will not apply, and the defendant might legally have been convicted (*f*).

Of the form and
requisites of the
plea of *autrefois*
acquit *.

The plea of *autrefois acquit* is of a mixed nature, and consists partly of matter of record, and partly of matter of fact. The matter of record is the former indictment and acquittal; the matter of

(*a*) 1 Leach, 135, n. a. 1 Lev. 118. 1 Sid. 179. Hawk. b. 2. c. 35. s. 10. Bul. N. P. 245.

(*b*) 2 Inst. 318, 19. 2 Hale, 247.

(*c*) 2 Hale, 393, 4, 5. 4 Co. Rep. 44, 5. 3 Inst. 314. See the two indictments for the same offence against Astlett, 2 Leach, 954, 958. In 2 Hale, 394, 5, a distinction is taken as to the effect of a judgment on a former

indictment, *quod eat sine die*, and *quod eat inde quictus*; and in the latter case it is said, there can be no further indictment, notwithstanding the insufficiency of the former indictment.

(*d*) 3 Inst. 314. 4 Co. 44, 5. 2 Hale, 248, 395. Stark. 320, *sed quere*.

(*e*) 2 Hale, 247.

(*f*) 2 Hale, 248. Hawk. b. 2. c. 35. s. 8.

* See forms, 2 Leach, 712. 9 East, 438. 1 M. & S. 183. 2 Hale, 391, 2. Burn, J. Indictment, XI. Post, last vol.

fact is the averment of the identity of the offence, and of the person, as having been formerly indicted (*a*). As to the matter of record, it is now settled to be absolutely requisite to set forth in the plea, the record of the former acquittal (*b*); but it is not necessary to produce the record immediately, because it is pleaded in bar, and he who pleads it hath neither the custody nor property in the record (*c*). In order to enable the defendant to do this, if the indictment be before justices, or at the assizes, he may remove the tenor of the record into chancery, and have it sent to the court, where it is to be tried by mittimus sub pede sigilli (*d*). Or if he be arraigned in the King's Bench, and the former trial were before justices of the peace, or of oyer and terminer, the court will give him a writ of certiorari to remove the proceedings, and respite the plea until he has, by the return, been enabled to frame it (*e*). If the second indictment be in the same court with the first, the prisoner is not entitled to a copy of the record of acquittal, but may have it read over to him very slowly and distinctly, in order to shape his pleading (*f*). And the defendant is bound to produce and vouch, or refer to the record on which he relies; because, although in civil actions, it is not brought forward until after a replication of nul tiel record, it is otherwise in criminal proceedings, where the danger of delay is greater, and the temptation to temporize more powerful (*g*). The plea concludes with a verification and prayer, that the defendant may be dismissed the court without further day (*h*).

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After the record of acquittal is accurately set forth, the matter of fact of the plea must be stated, viz. that the charges and persons are the same which were included in the former prosecution (*i*). We have already seen, that where the variance between

(*a*) 2 Hale, 241. 255. Hawk. b. 2. c. 35. s. 3. Burn, J. Indictment, XI.

(*b*) 1 M. & S. 188. 9 East, 438. 2 Leach, 712. 4 Co. Rep. 44. 2 Hale, 241, 243. 255. Burn, J. Indictment, XI. Hawk. b. 2. c. 35. s. 2.

(*c*) Hawk. b. 2. c. 37. s. 65.

(*d*) 2 Hale, 242. 255. Burn, J.

Indictment, XI.

(*e*) 2 Hale, 242. 255. Hawk. b. 2. c. 35. s. 2.

(*f*) Ante, 403, 4. 2 Leach, 711, 12.

(*g*) 2 Hale, 241, 2, 3. 255.

(*h*) 2 Hale, 392. 2 Leach, 715.

(*i*) 1 Hale, 255. 392. Burn, J. Indictment, XI.

FORM AND
REQUISITES OF
PLEA.

the indictments is not material, the identity may be maintained by averments; and the same observation applies to an immaterial difference in the addition of the party indicted (*a*). It is certainly proper, and seems absolutely necessary to plead over to the felony "not guilty" (*b*); though the jury cannot be charged at the same time with both issues, but must first determine the plea of previous acquittal (*c*). The defendant is entitled to have counsel assigned him to frame his plea properly, it being special (*d*).

Of the pleadings,
&c. subsequent
to the plea.

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To this plea of *autrefois acquit*, the attorney-general, on the part of the crown, may either reply, taking issue upon the averments of identity, or nul tiel record (*e*), if he intends to dispute the fact of an acquittal, or may demur, if he relies upon its insufficiency in point of law to bar the proceedings (*f*). Where the plea has been taken *ore tenus*, the replication of the crown may be immediately put in in the same way, and issue will be joined, and an immediate venire awarded (*g*). But if the plea be put in in writing, the replication cannot be *ore tenus*, but must be on parchment; for otherwise the parties would not have equal justice, as, by its being pleaded *ore tenus*, the prisoner would be deprived of the opportunity of taking advantage of any defect there might happen to be in the form of the replication (*h*).

In case of felony, if the plea be held bad on the trial, the judgment is *respondeat ouster*; or rather, as the defendant generally pleads over to the felony, the jury are charged again, and that at the same time with the issue on the plea of *autrefois acquit* (*i*), to inquire of the second issue, and the trial proceeds as if no plea in bar had been pleaded (*k*). But, in case of misdemeanors, as the defendant cannot also plead over, the judgment

(*a*) Keilw. 58. Hawk. b. 2. 2 Leach, 715. Post, last vol.;
c. 35. s. 3. 2 Hale, 242. and Joinder, 2 Leach, 716.

(*b*) 2 Leach, 712, n. a. 2 Hale, 255.

(*c*) 1 Leach, 135.

(*d*) 2 Hale, 241. Ante, 408.

(*e*) 2 Hale, 255. See form
of Replication, 1 M. & S. 184.
Post, last vol.

(*f*) See form of Demurrer,

(*g*) 2 Hale, 255. 1 Leach, 443, 4th edit. 2 Leach, 504, 3d edit. where this point is differently stated.

(*h*) 2 Leach, 715, n. a.

(*i*) 1 Leach, 134.

(*k*) 1 M. & S. 184. 1 Leach,

448. 2 Leach, 721.

upon a plea of *autrefois acquit*, which is in bar, whether it be on demurrer to the same, or on issue joined, is final, and sentence will be pronounced against the defendant (*a*); and this, though the prayer of judgment in the replication to the plea in abatement conclude improperly (*b*). When, on the other hand, the plea is allowed, the judgment is, that "he shall go without day," and he is altogether discharged from the prosecution (*c*).

PLEADINGS, &c.
SUBSEQUENT
TO PLEA.

The plea of *autrefois convict* depends, like that we have just considered, on the principle that no man shall be more than once in peril for the same offence (*d*). In order to plead this plea with effect, the crime must be the same for which the defendant was before convicted, and the conviction must have been lawful, on a sufficient indictment (*e*); for a conviction of one felony is no bar to a trial of another (*f*). And if he has neither received sentence, nor prayed the benefit of clergy, this plea is said not to be pleadable if the former indictment were invalid (*g*); so the plea of a former arraignment is of no avail (*h*). But if he has prayed the benefit of clergy, but not actually received it, from any doubt whether it ought not to be allowed him, or any delay on the part of the court, he is still to be admitted to plead his former conviction (*i*). It seems that, at common law, a conviction of one crime, and the admission of the defendant to clergy, was a bar to a prosecution for any preceding felony, however atrocious (*k*). By 8 Eliz. c. 4, this evil was, in some degree, lessened by a provision, that the admission to clergy should only

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Of the plea
of *autrefois*
convict *.

When plead-
able.

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- (*a*) Ante, 451. 2 Ld. Raym. 922. 3 B. & C. 502. (*g*) Ld. Raym. 922. 4 Co. 45, n. a. 2 Hale, 251. 4 Co. 40, a.
(*b*) 2 B. & C. 512.
(*c*) 2 Hale, 391, 2, where see form.
(*d*) 4 Co. Rep. 40. Hawk. b. 2. c. 36. s. 1. 4 Bla. Com. 336.
(*e*) 9 East, 441.
(*f*) 2 Hale, 253. Hawk. b. 2. c. 36. s. 10. Burn, J. Indict-
ment, XI.
(*h*) Fost. 104, 5.
(*i*) 1 Salk. 63. Kel. 103, 4. 2 Hale, 251. 4 Co. 46, a. 3 Inst. 131. Hawk. b. 2. c. 36, s. 12. 14.
(*k*) 2 Dyer, 214, 15. 3 Inst. 131. 2 Hale, 253. Kel. 93. 103. Hawk. b. 2. c. 36. s. 11.

* As to this plea in general, see 2 Hale, 251 to 255. Hawk. b. 2. c. 36. s. 10 to 17. 4 Bla. Com. 336. Burn, J. Indictment, XI.

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PLEADABLE.

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excuse him from answering such charges, upon which he might, if originally indicted, have received this benefit. But it seems that, as to clergyable felonies, no alteration has been made, and therefore they are altogether remitted by conviction, and the allowance of clergy (*a*). In cases of murder, a conviction of an inferior offence, as manslaughter, and the allowance of clergy, is, in one respect, more beneficial than a total acquittal, because it is a bar to any subsequent appeal (*b*). The reason of this apparent anomaly is, that the statute of 3 Hen. 7. c. 1, which enacts, that a former acquittal or attainder shall be no bar to an appeal of homicide, does not take any notice of conviction, and that as the act is derogatory to the maxim of common law in favor of life, that it shall not twice be placed in danger, it cannot be extended beyond its literal construction.

At what time.

This plea must always be pleaded after a conviction, and cannot be taken advantage of as a plea in abatement, that there is another indictment for the same cause depending (*c*). Its form, requisites, and consequences, are very nearly the same as in a plea of former acquittal. Thus, like that plea, it will be of no avail when the first indictment was invalid, and when, on that account, no judgment could be given, because the life of the defendant was never before in jeopardy (*d*). So also, like that plea, it must set forth the former record, and plead over to the felony (*e*). As in that the identity must be shewn by averments, both of the offence and the person, so the same forms are here requisite (*f*). The replication is also in the same way, taking issue upon the material averments (*g*); and the judgment, if in favor of the prisoner, is, "that he go thereof without day." And if the issue be found against the defendant, the consequence is, as in the

(*a*) 2 Hale, 254. Hawk. b. 2. c. 36. s. 11.

(*b*) 2 Leon. 160, 161. 3 Inst. 131. 1 And. 68. 4 Co. 45, 6. Hawk. b. 2. c. 36. s. 17. See form of plea, post, last vol.

(*c*) 2 Id. Raym. 920. Dougl. 240. Cro. Car. 147.

(*d*) 4 Co. Rep. 45. Hawk. b. 2. c. 36. s. 15.

(*e*) 2 Hale, 255. 2 Hale, 392. Burn, J. Indictment, XI. See form, Cro. C. C. 388. Post, last vol.

(*f*) 2 Hale, 255. Burn, J. Indictment, XI.

(*g*) 2 Hale, 255. 391, 2. See form of replication and judgment, 2 Hale, 392.

former pleas, that he answers over in case of felony, and that he receives judgment for all inferior offences.

WHEN
PLEADABLE.

The plea of *autrefois attain* is founded upon principles entirely [464] different from those which we have just considered. The reason Of the plea of *autrefois attain**. for allowing it to prevail at all is, that when once a felon is attainted he is dead in law, his whole possessions are forfeited, his blood is corrupted, and nothing remains but to put in execution the sentence of death under which he continues, so that any second attainder would be superfluous (*a*). It may, therefore be pleaded as well when the attainder arose from a different charge, as from the same offence of which he is indicted (*b*). And it may, in general, be pleaded by whatever means it was obtained, whether by verdict, abjuration, or outlawry (*c*). And even though the indictment on which it was founded was erroneous, it is still pleadable, as long as the party remains actually attainted (*d*). But this plea is never admissable, except where a second trial would be wholly superfluous (*e*). Where, therefore, any advantage either to public justice or private individuals would arise from a second prosecution, the plea will not prevent it; as where the criminal is indicted for treason after an attainder of felony, in which case the punishment will be more severe, and the forfeiture more extensive (*f*). So where the party attainted is concerned in another felony, as principal, he may be indicted for it, in order to prevent his accessaries from escaping (*g*). Thus also he may be again indicted for former robberies, in order that the parties injured may procure the restitution of their goods under the statute (*h*), though they might have an inquest of office to answer the same purpose, without again arraiguing the prisoner (*i*). And when an attainder

(*a*) Co. Lit. 390, b. note 2. Com. 336.
 Hawk. b. 2. c. 36. s. 1. 4 Bla. (*f*) 3 Inst. 213. Poph. 107.
 Com. 336. 2 Hale, 250, 1, 2, 3. 2 Hale, 252. Hawk. b. 2. c. 36.
 (*b*) Hawk. b. 2. c. 36. s. 1. s. 4.
 4 Bla. Com. 336. (*g*) Poph. 107. 4 Bla. Com.
 (*c*) Hawk. b. 2. c. 36. s. 1. 337. Hawk. b. 2. c. 36. s. 6.
 2 Hale, 252, 3. (*h*) 21 Hen. 8. c. 11. 2 Hale,
 (*d*) 4 Co. 45, a. 2 Hale, 251. 252.
 (*e*) Co. Lit. 390, b. n. 2. 4 Bla. (*i*) 2 Hale, 252.

* 2 Hale, 251, 2, 3. Hawk. b. 2. c. 36. s. 1 to 10. 4 Bla. Com. 336, 7.

PLEA
OF AUTREFOIS
ATTAINT.

is reversed, so that it no longer endangers the life of the party, he may be prosecuted for any other felony, as though he had never been attainted (*a*). If the attainder be consequent upon outlawry, and it is reversed for technical error, the prisoner may be compelled to answer the crime for which he was attainted; but if it be avoided on the ground of a former acquittal, it will operate as a plea, and he cannot be further prosecuted for the same felony (*b*). And though a pardon is a bar to any other prosecution for the same offence, it will be of no avail upon an indictment of any subsequent felony (*c*). So if he commit a second crime, after an attainder for the first, and be pardoned for the first, he becomes liable to be indicted for the second (*d*). In this case, if autrefois attaint be pleaded, the pardon may be replied, as restoring to the prisoner the legal capacity of defending (*e*).

The forms of pleading, replication, and judgment, are so similar in case of this plea, to those which belong to the pleas of a former conviction and acquittal, that it will not be necessary here to discuss them (*f*). It will, therefore, be only proper here to observe, that besides these pleas of a former trial of the individual *himself*, when his guilt depends upon the proof of that of another, he may plead and give in evidence that party's acquittal; thus if a gaoler suffers a prisoner to escape, and he is afterwards retaken, tried, and acquitted, he may plead the acquittal of the party committed to his charge, because if that party be innocent he cannot be guilty (*g*). And the party escaping might give the first discharge in evidence, to bar an indictment for the subsequent felony (*h*). It is also a general rule, that an accessory may plead in bar that his principal has been acquitted (*i*).

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(*a*) Hawk. b. 2. c. 36. s. 2.
4 Bla. Com. 336, 7.

(*b*) 2 Hale, 252, 3.

(*c*) 2 Hale, 253, acc. 3 Inst. 611, 12.
213, contra.

(*d*) 2 Hale, 253.

(*e*) 2 Hale, 253.

(*f*) 2 Hale, 255. 392.

(*g*) 2 Hale, 254. 1 Hale,

(*h*) 2 Hale, 254.

(*i*) 2 Hale, 254.

PLEA
OF PARDON *.

When the prisoner has either personally obtained a *pardon* for himself, or is included in a general act of grace, he must plead that privilege specially, as otherwise the court will not be bound to allow it, and indeed has no discretionary power to notice it (*a*). But there seems to be an exception to this rule, where a general act of parliament pardons all persons, without any kind of proviso of the particular offence for which the defendant is indicted; for then the court are required to attend to it *ex officio*, as they are to every other public statute (*b*). A pardon may always be pleaded when the offender is evidently included within its intention; as where all felonies and lower offences committed before a certain day are remitted, a murderer is pardoned who has given the fatal stroke before the time specified, though the death which completes the crime does not happen till a subsequent period (*c*). But if murders be expressly excepted, or the act extends only to misdemeanors, he will not be entitled to the benefit of the act, because, though at the time it was passed his crime was only a misdemeanor, it subsequently became a higher crime than those included in the pardon (*d*).

If a party has a right to plead a pardon, it is certainly better to plead it in bar in this stage of the proceedings, for though he may take advantage of it at any time, even after conviction (*e*); yet if once judgment be pronounced, though the life of the party may be saved by reversal of judgment, the production of a pardon will not reverse the attainder, so that the blood will be corrupted (*f*). It must be pleaded before the general issue, if at all previous to verdict, unless its date be subsequent to the pleadings, because the former estops the latter (*g*).

At what time
it should be
pleaded.

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(*a*) Cro. Car. 32. 449. 3 Inst. 233, 4. Cro. Eliz. 768. Moor. 770. 619. Sir Tho. Raym. 23. Fost. 67. Cro. Eliz. 4. 153. Hawk. b. 2. c. 37. s. 60. 64. Bac. Abr. Pardon, G. 2.

(*b*) 3 Inst. 234. 1 Dyer, 28. b. Plowd. 83. Hawk. b. 2. c. 37. s. 61.

(*c*) Plowd. 401. 1 Hale, 426. 1 Dyer, 99. Hawk. b. 2. c. 37.

s. 21. Bac. Abr. Pardon, D.

(*d*) Fost. 64. Bac. Abr. Pardon, D.

(*e*) 4 Bla. Com. 337. Trem. P. C. 271. 273. 6 Co. 14. Hawk. b. 2. c. 37. s. 59.

(*f*) 4 Bla. Com. 337.

(*g*) Fost. 43. Hawk. b. 2. c. 37. s. 57. Bac. Abr. Pardon, G. 2.

* As to this plea in general, see Hawk. b. 2. c. 37. s. 60 to 72. 4 Bla. Com. 337. 396 to 402. Bac. Abr. Pardon, G.

HOW TO
BE PLEADED*.

A pardon, whether general or particular, must be specially pleaded, and cannot be given in evidence under the general issue (*a*), unless where the statute pardoning enables (as is now usual) the party to plead the general issue (*b*). In pleading a general act of pardon, if the act contain exceptions of particular persons, by name, or of a general description of individuals, it is, in general, necessary for the defendant to shew specially that he is not one of the parties named in the statute, as without its benefit in the first case, or included in the proscribed description in the second (*c*). But where the pardon is in its body general as to all, and some are afterwards excepted in a distinct proviso, it seems that such averments are not absolutely requisite, and that if the defendant be thus excepted, it must be shown by the crown in its reply (*d*). And where a particular offence only is excepted, he will not be compelled to negative its commission, for the court will judicially take notice of the colour of the charge against him, and compare it with that excepted in the pardon (*e*). So where a single individual is excluded from the operation of the royal clemency, it has been holden not to be necessary to aver that the defendant is not the person referred to, for that is a circumstance of which the judges are bound to take cognizance (*f*).

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A particular pardon cannot be pleaded, unless it be under the great seal; and, therefore, a mere promise, articles of surrender, or the sign manual, will not avail, unless confirmed by this sanction (*g*). And, when it is thus authenticated, it must not only be specially pleaded, but brought into court *sub pede sigilli*, because it is supposed to be in the defendant's possession, and in whose

(*a*) Hawk. b. 2. c. 37. s. 59. Fortes. 43. 67.

(*b*) Fortes. 67.

(*c*) Cro. Eliz. 125. Cro. Car. 449. Plowd. 103. Bro. Abr. Pleadings, 124. Id. Charter de Pardonne, 66. 1 Dyer, 27. b. Hawk. b. 2. c. 37. s. 60. Bac. Abr. Pardon, G. 1. 3 East, 87. 88, 9.

(*d*) 1 Lev. 26. Hawk. b. 2.

c. 37. s. 60. Bac. Abr. Pardon, G. 1.

(*e*) Noy, 99. Cro. Car. 449. Moor, 620. Hawk. b. 2. c. 37. s. 62. Bac. Abr. Pardon, G. 1.

(*f*) Cro. Eliz. 125. Hawk. b. 2. c. 37. s. 63. Bac. Abr. Pardon, G. 1.

(*g*) 1 St. Tr. 578. 1 Bla. Rep. 479, 480. Post. 62. Hawk. b. 2.

c. 37. s. 63.

* See form of plea, 3 Inst. 234. Rast. Ent. 455, a. b. 2 Hale, 391, 392. Trem. P. C. 312. Post, last vol.

favor it has been granted, who is so beneficially interested in its purport (*a*). But if he pleads the pardon, and is unable immediately to produce it, the court will, in their discretion, indulge him with further time, in order to procure it (*b*). If a party, having the king's pardon for manslaughter, be indicted for murder, it is said that he ought not to plead not guilty to the whole, for he would thereby waive his pardon, but he should confess the indictment as to the manslaughter, and plead the king's pardon thereto; and as to the killing with malice prepense, he should plead not guilty (*c*).

If there be any variance between the denomination of the party in the indictment and in the pardon, or in his addition, he may show, by proper averments of identity, that the same person is intended (*d*). And, therefore, if a man be indicted as "yeoman," and pardoned as "gentleman," or the addition of place is different, he may show his identity by averment (*e*). So also, if in an indictment for homicide the time of the death is stated differently, the variance may be thus explained, and rendered harmless (*f*). And if these explanatory averments be omitted, the court will, in their discretion, defer the proceedings, in order to give time for the defendant to perfect his plea, or to obtain a more effectual pardon (*g*).

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The court will always allow the defendant counsel to plead a pardon (*h*); and if sufficient cause be shown, he may be admitted to plead it *in-formâ pauperis* (*i*). Unlike the other pleas in bar which we have noticed, this plea does not conclude over to the felony, because that would be inconsistent with its substance (*k*).

(*a*) Hawk. b. 2. c. 37. s. 65. Bac. Abr. Pardon, G. 2. Trem. P. C. 312.

(*b*) Hawk. b. 2. c. 37. s. 65.

(*c*) 2 Hale, 258.

(*d*) 1 Dyer, 34. a. Keilw. 58. Hawk. b. 2. c. 37. s. 66. Bac. Abr. Pardon, G. 2.

(*e*) Keilw. 58. 1 Rol. Rep. 368. Hawk. b. 2. c. 37. s. 66. Bac. Abr. Pardon, G. 2.

(*f*) Bro. Abr. Charter de Par-

donne, 15. Hawk. b. 2. c. 37. s. 66. Bac. Abr. Pardon, G. 2.

(*g*) 3 Inst. 240. 1 Sid. 41. Sir Tho. Raym. 13. Hawk. b. 2. c. 37. s. 66. Bac. Abr. Pardon, G. 2.

(*h*) 3 Inst. 29. 137. Hawk. b. 2. c. 39. s. 5. Ante, 408.

(*i*) 2 Stra. 1214.

(*k*) Fost. 42, 3. Hawk. b. 2. c. 37. 59. 67. Bac. Abr. Pardon, G. 2. 2 Hale, 256.

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BE PLEADED.

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It concludes by praying, that the defendant may be dismissed of the premises by the court (*a*). In case of felony, it is generally pleaded kneeling (*b*), though this formality is clearly unnecessary when the party is indicted for any offence of inferior degree, for then he may plead it by attorney (*c*). There was also an ancient custom of giving gloves to the judges and the officers, which is compounded for by a fee of four guineas to each of the judges, and upon which it seems they may insist, before they allow a pardon (*d*). But now fees for pardons are to be paid by the Treasury (*e*). When these forms have been complied with, the judgment is entered, "that the prisoner be discharged of the premises, and go without day," upon which he is to be set at liberty (*f*). But the judges are empowered by statute to compel the defendant to enter into a recognizance, with two sufficient sureties, for his good behaviour for any time not exceeding seven years, and if he refuse, they may remand him until he comply (*g*). But this practice, if it has ever yet been exercised, is very unusual; and if the party be of good fame, it is always the course to discharge him (*h*). On the other hand, if the plea be found against him, in case of felony, he will have judgment of "respondeas ouster;" and in case of misdemeanor, the court may proceed to pass sentence, as upon a conviction (*i*).

If a pardon be granted to a defendant in prison, it is said that the proper mode of obtaining its benefit upon the circuits, and at the Old Bailey, is to procure the sign manual or privy seal, signifying his majesty's intention to pardon the offender, and directing the justices of gaol delivery to bail him, on his entering into a recognizance to appear and plead the next general pardon (*k*).

(*a*) 2 Hale, 391.

(*b*) Gilb. Rep. 48. 2 Stra. 1208.

(*c*) 2 Stra. 816.

(*d*) Gilb. Rep. 48. Sir Tho. Jones, 56. 1 Sid. 452. Kel. 25. Pulton de pac. Reg. 88. Hawk. b. 2. c. 37. s. 71. Bac. Abr. Pardon, G. 2.

(*e*) 58 Geo. 3. c. 29.

(*f*) 2 Hale, 391.

(*g*) 5 & 6 Wm. & M. c. 13.

Hawk. b. 2. c. 37. s. 70. Bac. Abr. Pardon, G. 2.

(*h*) 2 Stra. 1203. Bac. Abr. Pardon, G. 2.

(*i*) 2 Hale, 256.

(*k*) 1 Bla. Rep. 479. 2 Bla. Rep. 797. 15 East, 463. Hawk. b. 2. c. 37. s. 72. Bac. Abr. Pardon, G. 2. See form of such a mandate, 15 East, 463. See forms relative to pardons, post, vol. iv.

This mandate is obeyed by the justices, who, if the pardon is conditional, take security also for the performance of the stipulations upon which it is granted, and then issue their warrant to the gaoler for the prisoner's discharge (*a*).

Pleas to the matter of the indictment are either the *general issue*, or *special pleas* to the *merits* of the transaction. The first of these, is the only plea on which the defendant can receive sentence of death (*b*), for we have seen, that he may resort to it on all capital charges, when other modes of defence have failed him (*c*). Upon all *capital* accusations, the plea of not guilty puts in issue the whole of the charge, not merely whether the defendant actually did the facts stated on the record, but the criminal intention with which it is alleged he was actuated, and the legal quality of the guilt to be deduced from the whole (*d*). In this respect there is a very important distinction between civil and criminal proceedings; in the former, if the facts are admitted, and the defence is, that they were rendered legal by circumstances, a special justification must be pleaded; but, in the latter, no justification can be admitted, to limit the defendant's means of defence; nor is it at all necessary, for if it appear that the facts, though true, were legal, the defendant will, of course, be acquitted (*e*). Thus on an indictment for murder, a man cannot plead that he killed the deceased in the fury of passion, and therefore it is only manslaughter; nor that he slew him in self defence, and so is altogether guiltless; but he must plead generally "not guilty," and give the special matter in evidence (*f*). So also in indictments for felony and treason, if the facts stated amount to neither of them, the prisoners will be discharged under the general issue;

V. Pleas to matter of indictment.
I. The general issue*.

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|---|---|
| (<i>a</i>) 1 Bla. Rep. 479. Hawk. b. 2. c. 37. s. 72. Bac. Abr. Pardon, G. 2. | (<i>e</i>) 2 Hale, 258. 4 Bla. Com. 338, 9. 1 Ersk. Spee. 278. |
| (<i>b</i>) 4 Bla. Com. 338. | (<i>f</i>) 2 Hale, 258. 304. Bro. Abr. Appeal, 122. 4 Bla. Com. 338. 6 Mod. 172. Trem. P. C. 270. Bac. Abr. Assault and Battery, C. |
| (<i>c</i>) Ante, 485. 2 Hale, 257, 8. | |
| (<i>d</i>) 4 Bla. Com. 338. 1 Erskine's Speeches, 278. | |

* As to this plea, see Hawk. b. 2. c. 38. 4 Bla. Com. 338. 341. Ante, 415, 416. 422. 432, as to the incidents of arraignment, and the authorities there cited.

THE GENERAL
ISSUE.

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for the terms "feloniously" and "traitorously," by which those crimes are designated, are the gist of the charge; and unless they are shewn to be properly applied, the indictment cannot be supported (*a*). On pleading this plea, the prisoner, if in irons, is entitled to have them removed, in order that he may suffer no unnecessary pain or restraint on his trial (*b*). The mode of pleading this plea in capital cases, on the arraignment, the replication, the circumstances, and the issue, have been already considered as incidents to the arraignment, and, therefore, need not be repeated (*c*). In prosecutions for misdemeanors, the defendants (or if a parish be indicted, two of the inhabitants,) plead, by attorney, the general issue, not guilty (*d*), to which a replication, called the similiter, is added (*e*), and the issue delivered, as we shall hereafter consider.

II. Special pleas
in bar.

In cases of indictments or informations for *misdemeanors*, the rule we have just considered does not apply with the same degree of strictness, for there are some cases where a special plea is not only allowable, but even requisite. Thus, if the defendant fall within any exception or proviso, which is not contained in the purview of the statute creating the offence, he may, by pleading, show that he is entitled to the benefit of that exception, or proviso, and there are many pleas of this description, in the ancient entries (*f*). Son assault demesne cannot, it is said, be pleaded to an indictment for an assault, but must be given in evidence under the general issue, to which a special plea would amount (*g*). And where a special plea to the merits is put in, the general issue cannot be pleaded with it, because duplicity is not allowed in pleadings, or even in actions upon a penal statute (*h*). But he

(*a*) 4 Bla. Com. 338, 9.

(*b*) 1 Leach, 36. 3 Inst. 34.
2 Inst. 315. Kel. 10. 2 Hale,
219. Hawk. b. 2. c. 23. s. 1.
4 Bla. Com. 322. Ante, 417.

(*c*) Ante, 416.

(*d*) See forms of Pleas, post,
last vol.

(*e*) See forms of Replications,
post, last vol.

(*f*) 2 Leach, 606. Rex v.
Baxter, Trem. P. C.

(*g*) 6 Mod. 172. Trem. P. C.
270. Bac. Abr. Assault and
Battery, C. *sed quere*.

(*h*) 9 Ann. c. 14. 4 T. R. 701.
2 Stra. 1044. 4 Bla. Com. 333,
n. 1. 8 East, 107. Hawk. b. 2.
c. 26. s. 62. 2 Hale, 255, 6.

may plead the former as to part, and the latter as to the residue (a). And thus, where a man has obtained the king's pardon for manslaughter, and is afterwards indicted for murder, he may plead "not guilty" as to the malice aforethought, and a pardon to the felonious homicide (b). So the defendant may confess the indictment in part, and plead not guilty to the residue.

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IN BAR.

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Formerly it was the practice to plead particular exemptions specially to any indictment for misdemeanors, as for not going to church, or exercising a trade (c); but now it is the usual practice to plead only the general issue, and give the special matter of exemption in evidence under it (d). The principal, and indeed almost the only cases, in which special pleas to the merits are necessary, are in the case of indictments for neglecting to repair highways and bridges. With respect to these, it is a general rule, that where the defendants are charged with the repair of the road or bridge in question of common right, and are *prima facie* liable to amend it, as in an indictment against a parish for not repairing an highway, they must, in order to shew that the burthen is thrown upon some other quarter, set forth that ground of discharge in a special plea (e). So the inhabitants of a county, if indicted for the non-repair of a bridge, or of the highway within 300 feet of the extremity of the bridge, must, to exonerate themselves, plead specially that some other is bound, by prescription or tenure, to repair the same (f). But this does not seem to apply where the obligation is altered by a public act of parliament, of which all are supposed to take cognizance (g). And, under a plea of not guilty, the inhabitants of a parish or county may dispute the fact of the highway or bridge being public, and may give in evidence, that private individuals have been accustomed to repair, or any other facts, in order to show that the way or

(a) Hawk. b. 2. c. 26. s. 62.

(b) 2 Hale, 258.

(c) See forms, Trem. P. C. 1 Saund. 309. a.

(d) 1 Saund. 310, n. 8. Dougl. 531.

(e) 1 Mod. 112. 1 Vent. 256. 12 East, 192. 13 East, 95.

Hawk. b. 1. c. 76. s. 9. 2 Saund.

159, n. 10. 1 Ld. Raym. 725.

2 T. R. 111. See post, vol. iii. 572, 3, 4.

(f) 7 East, 588. 12 East, 192.

(g) 3 Campb. 222. 2 B. & A.

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SPECIAL PLEAS
IN BAR.

bridge was not public (*a*). On the other hand, it is settled that where defendants are not *prima facie* or of common right liable to repair, as a particular division of a parish, or an individual, are charged by prescription, or *ratione tenuræ*, they may exonerate themselves, and throw the burthen upon others, either the parish at large, or an individual, under the general issue (*b*). In general all parishes come under the first of these rules, and must plead specially that others are bound to repair the roads and bridges within their boundaries (*c*). But when an Act of Parliament has authorized a public company to make alterations, and they cut or widen trenches across the roads, and then build bridges over them, or otherwise first create the necessity, and then remedy it by building bridges, they will be always liable to keep them in repair, when necessary (*d*). And, as where a particular body or individual is bound by some charter, or other means, to repair, that fact may be specially pleaded by a parish or county; so if the parties on whom the duty lies have been convicted for the same offence, the defendants may plead the conviction, setting out the record, and averring the identity of the place in question (*e*).

It is a good general rule, that whatever the prosecutor is bound to prove upon the general issue, the defendant may contradict under the same plea, without specially setting forth the ground of his defence upon the record (*f*). And this is the reason why a man is not bound to plead that he is not by tenure or prescription compelled to repair, for the affirmative of those points must be shewn by the prosecutor, or they can make out no ground of conviction (*g*). And, therefore, a parish may, under the plea of not guilty, shew that the place in question is in sufficient repair, or that it is not a public way, or that it does not lie within the district, for all these must be alleged in the indictment, and given in evidence on the trial (*h*). And if there be any variance in the

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(*a*) 2 M. & S. 262. 1 Stra. 180, 183, 4.

(*b*) 1 Stra. 180, 183, 4. 3 Salk. 183. 2 Saund. 159, note 10. Comb. 396.

(*c*) 1 Vent. 189. 2 T. R. 111. 1 Ld. Raym. 725. 2 Saund. 159, n. 10.

(*d*) 14 East, 317.

(*e*) Sir T. Raym. 385. Trem. P. C. 206.

(*f*) 1 Stra. 181, 2, 3. 2 Saund. 158, b. n. 3. Id. 159, b. n. 10. 2 M. & S. 265. 3 Campb. 223.

(*g*) 2 Saund. 159, b. n. 10.

(*h*) 2 Saund. 158, b. note 3. 1 Stra. 181, 2, 3.

description of the highway, it may be taken advantage of under the general issue; but if the description be too indefinite, being equally applicable to several highways, advantage should be taken it by plea in abatement (*a*). SPECIAL PLEAS
IN BAR.

Where different townships or divisions of a parish have, from time immemorial, repaired the roads respectively belonging to each of them, and the parish at large is indicted, this prescription must be properly pleaded to the indictment; for if judgment be given generally against the parish, that will afterwards afford evidence that the whole parish is liable to repair (*b*). But if the districts can shew that they had no notice of the indictment, or that the defence was wholly conducted by the district in which the nuisance was permitted, the court will give such other districts leave to plead the prescription to any subsequent indictment, on the ground of a similar negligence (*c*). The mode of pleading such a prescription seems to be, for each district claiming an exemption from liability, to state in a separate plea "that the parish has immemorially been divided into a certain number of districts or townships, called A. B. C. &c. and that the inhabitants of the several districts of A. and C. (in which the highway lies) have immemorially been used and accustomed to repair and amend the several and respective highways, situate and lying in their said respective districts, independent of each other; and that the said part of the said highway, in the said indictment mentioned, lies in that part of the said parish called the district of C.; and by reason of the premises, the inhabitants of the said district ought to have repaired the same, independent of the inhabitants of the said district of A. in the said parish" (*d*). But if, in such case, there are two townships thus liable to repair, and the highway indicted lies partly in one, and partly in the other, the plea by the parish must

Forms and requisites of the special pleas, replications, &c.*

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(*a*) 1 Stark. Rep. 357.

(*c*) Dougl. 421. 2 Saund.

(*b*) Peake, Rep. 219. 2 Saund. 259, a. n. 10.

159, a. n. 10.

(*d*) 2 Saund. 159, b. n. 10.

* See forms, post, last vol. 14 East, 513. 11 East, 304, a bad form. 13 East, 95. 220, 21. 12 East, 192. 2 Saund. 159. Cro. C. A. 402. 401. 5 Burr. 2594. West, 158. See plea to a presentment, 2 Saund. 159; and a plea, cravingoyer, 1 Saund. 309, a.

REQUISITES OF SPECIAL PLEAS, REPLICATIONS, &c. show how much lies in each of them, or the plea will be deemed invalid (a).

Every special plea to an indictment for an offence respecting the highways, must not only shew that the defendant is not bound to repair, but must show specially who ought to do so, and from whence their duty arises (b). And even where a special plea is unnecessary, and the whole matter might be given in evidence under the general issue, if it is pleaded at all, the defendant must show in whom the duty exists, and traverse his own liability (c). In a late case, where an indictment was brought against a parish for the non-repair of a highway lying within it, a plea, that the inhabitants of *another parish have repaired, and been used and accustomed to repair, and of right ought to have repaired*, was held ill, for the plea ought to have shewn a consideration (d); but where the inhabitants of a parish pleaded, that the inhabitants of a particular district within the parish, were bound by prescription to repair all common ways situate within that district, save and except one common highway within the said district, it was holden that the plea might be supported, though it appeared that the excepted highway was of recent date; and it was also holden, that in such a plea it was not necessary to state by whom the excepted highway was repairable, and such a plea will be held good, although it does not state any consideration for the liability of the inhabitants of that district (e). But this would be otherwise, if the road is not within the parish (f). When the plea charges an individual with the liability of repairing *ratione tenuræ*, it has been considered proper to add the word *suæ* (g), but it has been holden to be unnecessary; for *ratione tenuræ* alone will be construed to imply such a tenure as makes him chargeable (h). And where the obligation arises from tenure, it is not necessary to

(a) 11 East, 304.

(b) 1 Sid. 140. Carth. 213.
2 Saund. 159, n. 10.

(c) 2 Saund. 159, a. n. 10.

(d) 5 M. & S. 260.

(e) 1 B. & A. 343. 1 Stark.
Rep. 393. See also 5 Co. Rep.
60. 4 B. & A. 623.

(f) Rex v. Saint Giles, Cambridge, Stark. on Evidence, Appendix, to p. 669. 5 M. & S. 260.

(g) Hawk. b. 1. c. 76. s. 90.

(h) 1 Vent. 331. 1 Stra. 187.
2 Saund. 153, n. 9.

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SPECIAL PLEAS,
REPLICATIONS,
&c.

state that the party on whom it is thrown ought to repair, "as he and all those who held the said lands for the time being, from time whereof the memory of man is not to the contrary, have been used to do," though many precedents contain these words, because a prescription is implied in the estate of inheritance which he possesses (a). But where the duty proceeds merely from inhabitancy, the custom, prescription, and reason on which it is founded, ought to be clearly set forth in the proceedings (b). An individual, however, cannot be bound by a prescription without either tenure or profit, as the right of toll, in respect of which he must take care that the road is duly amended, though it is otherwise in the case of a corporation (c). And, in conformity to these principles, it has been resolved that if a parish lies partly in one county and partly in another, and a highway lying in one part is ruinous, an averment that the inhabitants of that part only are bound to repair is bad, for the prescription must embrace the whole parish (d). If the person or township indicted unnecessarily plead specially, and show in their pleas who are bound to repair, it is necessary to traverse the statement of their own liability (e); but if a parish be indicted for the dangerous state of a highway, or a county for the dilapidation of a bridge, and they throw the charge upon another, the plea ought not to conclude with a traverse of the defendant's liability, because that is a traverse of matter of law which cannot be referred to a jury (f); it being an intendment of law that the parish in the one case, and the county in the other, is liable to repair, and therefore the matter of fact to be put in issue and referred to a jury, is merely the liability of the particular district or individual, which, if established in evidence, will negative the presumption of law against the parish or county. Many of the precedents in the books, however, improperly negative the liability of the parish or county (g).

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(a) Keilw. 52, pl. 4. Co. Ent. 358. a. Styles, 400. Hawk. b. 2. c. 76. s. 8. 2 Saund. 158. n. 9.

(b) 2 T. R. 111. 5 Barr. 2700. 3 Keb. 301.

(c) 13 Co. Rep. 33. Hawk. b. 1. c. 76. s. 8.

(d) 5 T. R. 498.

(e) Ante, 476, n. (c). 2 Saund. 159, a. note 10.

(f) 2 Lev. 112. 1 Saund. 23. n. 5. 2 Saund. 159, a. n. 10. 161, n. 11. 2 Hen. Bla. 182. *Sed vide* 1 B. & A. 348. 355. Ante, 476.

(g) 13 East, 96. 222.

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SPECIAL PLEAS,
REPLICATIONS,
&c.

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With respect to the *replications*, a variety will be found among the forms relative to this chapter, but which do not afford matter for any particular consideration. If the plea of the county or parish improperly conclude with a traverse of their liability, the replication should not take issue on the traverse (*a*), though that is not unusual (*b*); but should take issue on the liability of the particular individual. If the plea of the defendant in any case conclude to the country, the similiter may be added, thus: "and A. B. who prosecutes for the king, doth the like," and at the sessions the clerk of the peace is to join issue for the king, and the entry of the similiter in his name, without stating his office and authority, is sufficient, it being intended that he was known to the court to be the proper officer (*c*); and, at the assizes, the similiter is added in the name of the clerk of assize (*d*); and if by mistake the similiter is omitted in a prosecution for a misdemeanor, the court will order it to be interlined (*e*); but we have seen that, in felonies, no similiter is necessary (*f*). If the plea of the defendant be insufficient, the prosecutor may *demur*, upon which there may be a joinder in demurrer (*g*).

Of a nolle
prosequi.

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In any of these various stages of the proceeding, a *nolle prosequi* may be entered by the attorney-general (*h*). The usual occasion of granting this stay of the prosecution is, either when, in cases of misdemeanor, a civil action is depending for the same cause (*i*), or any improper and vexatious attempts are made to oppress and injure the defendant; as by repeatedly preferring defective indictments for the same supposed offence (*k*); or, if it be clear that the indictment for a misdemeanor is not sustainable against the defendant, as if a surgeon be indicted for refusing to be a constable (*l*). In the former case, it compels the party indicting, to

(a) Ante, 477, n. (f). 2 Hen. Bla. 182.

(b) 13 East, 22. 2 M. & S. 614.

(c) Cro. Car. 315. Hawk. b. 2. c. 38. s. 2.

(d) Cro. Jac. 502.

(e) Id. ibid.

(f) Ante, 416. 472.

(g) 1 Saund. 273, 4. Form of

Demurrer by Coroner, to plea to an information and joinder, 1 Saund. 273. See forms, post, last vol.

(h) See form, post, last vol.

(i) 2 Burr. 720. Cro. C. C. 22; but see 1 Bos. & Pul. 191.

(k) 1 Bla. Rep. 545.

(l) 1 Com. Rep. 312. 1 Bla. Rep. 545.

make his election in which mode he will seek his remedy (*a*). In order to obtain it, the defendant must procure a certificate from the clerk of the peace, of the whole substance of the indictment, and of the time when it was preferred ; and an affidavit must be added to it by the applicant, that he saw the clerk of the peace sign the certificate, and that he has been served with process, and received notice of declaration from the prosecutor for the same identical injury, in respect of which he is indicted (*b*). On these requisites being complied with, the attorney-general will, if he think the double proceeding is vexatious, grant a summons, directed to the prosecutor, to attend him on a certain day, and show cause why a nolle prosequi should not issue ; if he attend, he must make his election, and drop the civil or the criminal proceeding ; but if he be absent, a second and third summons issue, to give him an opportunity of appearing ; and, on his default, the attorney-general will grant his warrant, directing the clerk of the peace to enter a cessat processus (*c*). If the cause of the application be the vexatious conduct of the prosecutor, the attorney-general may direct the removal of the proceedings by certiorari into the King's Bench, and desire to hear counsel on the grounds of the motion, on which, if he think fit, it will be granted (*d*). But, even though the prosecutor desire it, it cannot be entered by the clerk of the crown without the concurrence of the attorney-general (*e*). A nolle prosequi may also be entered as to one of several defendants, at any time before the trial (*f*). The effect of a nolle prosequi, when obtained, is to put the defendant " without day ;" but it does not at all operate as an acquittal, for he may be afterwards re-indicted, and even upon the same indictment fresh process may be awarded (*g*). [480]

(*a*) 2 Barr. 720.

(*b*) Williams, J. Sessions. Cro. C. C. 22. See form, *id.* *ibid.* Post, last vol.

(*c*) Cro. C. C. 22.

(*d*) 1 Bla. Rep. 545.

(*e*) 1 Ld. Raym. 721.

(*f*) 11 East, 307.

(*g*) 6 Mod. 261. 1 Salk. 59. Com. Dig. Indictment, K.

CHAPTER XII.

*OF PROCEEDINGS BEFORE TRIAL, AND RELATING
TO IT: VIZ. THE ISSUE—RECORD—TIME OF
TRIAL—NOTICE OF TRIAL—PUTTING OFF TRIAL
—PLACE OF TRIAL—TRIAL AT BAR—REMANETS
—COMPROMISES—AND WITHDRAWING THE RE-
CORD.*

Of the issue*.

WE come now to consider some formal proceedings which arise preparatory to the trial, with its time, and the notices by which it is preceded. The first of these particulars which calls for our attention, is the *Issue*.

In capital cases the issue is altogether immaterial; and, though the plea of not guilty and the similitur are ultimately stated on the record, it is not usual, in practice, to make up any formal issue preparatory to the trial; for the plea and similitur are ore tenus, and the trial itself is in the nature of an inquisition, in which the jury are charged to inquire of the truth of the charge against the prisoner (*a*). A mistake, therefore, in the joinder of issue, will not be material, though the court have, in some cases, reprehended the clerk for his negligence (*b*). And even the total omission of the similitur will not be sufficient to vitiate the proceedings (*c*). In misdemeanors, on the other hand, the issue should be made up, and an analogy prevails to civil proceedings (*d*). If, however, the similitur be omitted, the court will

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(<i>a</i>) 4 Burr. 2084, 5. 2 Stra.	(<i>b</i>) 1 Leach, 276, 7.
775. 5 T. R. 313. 314. 319.	(<i>c</i>) 4 Burr. 2084.
6 Mod. 231. Ante, 416. Com.	(<i>d</i>) 6 Mod. 231.
Dig. Indictment, L.	

* See forms of issue, 4 Wentw. 198. Hand's Prac. 391. 6 Wentw. 1. 440. Post, last vol. 4 Bla. Com. Appendix, s. 1.

order it to be interlined (*a*). In these cases, the clerk of the peace, or clerk of assize, joins issue on behalf of the prosecution, but it is not necessary that his official character should appear upon the record (*b*). When the defendant appears at the sessions, and engages by a recognizance to enter and try his traverse at a subsequent period, the proceedings and issue are entered in a form called the *issue* or *traverse book*, the costs of which he is bound to defray (*c*). And if the original indictment were right, and the clerk enters it wrong on the plea-roll, it may be amended; though we have seen that the original indictment itself is not amendable (*d*). In the King's Bench, when the prosecution has been commenced there, or removed into that court by certiorari, there is no delivery of an issue, but the pleadings are entered in a book in the office, and each party's clerk in court makes a copy (*e*). If the indictment has been removed by certiorari on the part of the defendant, he having entered into a recognizance to appear and plead, &c. his clerk in court makes up the record, and gives notice of trial.

When an indictment has been originally instituted in the King's Bench, or removed there by certiorari, there is, besides the issue, a record of nisi prius (*f*).

It is usual, at this stage of the prosecution for a misdemeanor, depending in the King's Bench, that a *view* is applied for.

In cases of indictments for nuisances, it may be necessary, either on behalf of the prosecutor, or of the defendant, for the jury to have a view of the premises indicted. This, it seems, cannot be granted by the judges at the assizes (*g*); but, if necessary, may be the ground of removal by certiorari into the King's Bench (*h*). The power of granting a view, in criminal and civil

Record of nisi prius.

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Of obtaining a view.

(*a*) Cro. Jac. 502. 1 Leach, 276, 7.

(*b*) Cro. Car. 315. Cro. Jac. 502. Com. Dig. Indictment, L.

(*c*) 1 Leach, 111. See form, post, last vol. 4 East, 175. 8 East, 209. 4 Burr. 2085.

(*d*) 6 Mod. 281. Cro. Car. 141.

(*e*) But see Hand, 9, 43.

(*f*) 4 East, 175. 8 East, 269. 4 Burr. 2085. 11 East, 509, 510. See forms, post, last vol.

(*g*) 1 Sess. Cas. 180. 2 Barnard, 214. Ante, 378.

(*h*) 1 Sess. Cas. 180. Ante, 378.

OF OBTAINING
A VIEW.

cases, is now given, by the 6 Geo. 4. c. 50. s. 23, to the court in which the issue is depending, or to a judge in vacation (*a*). The court will grant it on an indictment for not repairing a highway, or for a nuisance (*b*), but not on a prosecution for perjury (*c*), unless under particular circumstances (*d*). And a view will not be granted, if there is any risk of its misleading the jury (*e*). When it is allowed, the same rules will, in general, prevail, as are observable in civil proceedings (*f*).

Of the time
of trial.

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With respect to the *time of trial*, there is a material distinction between prosecutions for felony, and for inferior offences. When the defendant is indicted for a crime of the higher description, it is always the practice to try him at the same assizes; generally on the same day the bill is found against him, and on which he is arraigned upon the indictment (*g*). In order to this immediate trial, the sheriff, by virtue of a writ previously directed to him, returns a panel of forty-eight jurors to try all felons that may, at that session, be called upon to answer (*h*). And this seems to be the case wherever the defendant is in actual custody, whether his crime be capital, or of an inferior degree (*i*). But then it is usual to try the felonies first, and afterwards to proceed to the examination of the minor accusations (*k*). In case of high treason, however, it is said that fifteen days must elapse between the arraignment and the trial, though the authority for this delay seems to be uncertain (*l*). The causes are to be tried in the order in which they are entered; and in indictments for misdemeanors, at the instance of private prosecutors, when both the defendant and prosecutor have brought down their records, and entered them

(*a*) See this provision, and the mode in which the viewers are to be sworn, &c. post, Chap. XIII.

(*b*) 1 Sess. Cas. 180. 1 Barnard, 144. 2 Barnard, 214, *acc.* 1 Sess. Cas. 87. *semb. contra.*

(*c*) K. B. A. D. 1815.

(*d*) 2 Chit. Rep. 422.

(*e*) *Id.*

(*f*) See Bac. Aor. Juries, H. Tidd, 8th edit. 847, 8. 516.

(*g*) Cro. Car. 315. 340. 583.

Fost. 2. 1 Sid. 235. 2 Inst. 568. 4 Inst. 164. 2 Hale, 28, 29. Com. Dig. Justices of the Peace, D. 14. Bac. Ab. Trial, I. 4 Bla. Com. 351. Dick. Sess. 152.

(*h*) 4 Bla. Com. 351.

(*i*) 2 Hale, 28, 29. 4 Bla. Com. 351. Cro. Car. 315. 340. 448.

(*k*) Cro. C. C. 9.

(*l*) 5 Ersk. Speeches, 7.

with the marshal, the defendant's first, the prosecutor's lower in the list, the trial must take place in the order of entry (a).

OF THE TIME
OF TRIAL.

At the quarter sessions, however, in prosecutions for misdemeanor, when the defendant was not in actual custody, the justices had no power to compel him to take his trial at the same court at which he pleaded, or traversed the indictment, though if he consented the trial might be had (b); and though it should seem to have been considered, that justices of gaol delivery and oyer and terminer, might proceed to trial immediately after the finding of the bill for a misdemeanor, yet it was not the practice to do so without the defendant's consent, but the defendant traversed over to the next assizes (c). But now, by the 60 Geo. 3, and 1 Geo. 4. c. 4. s. 3, if the defendant has been committed to custody, or held to bail for a misdemeanor, twenty days before the session of the peace, session of oyer and terminer, great session, or session of gaol delivery, at which the indictment was found, the defendant shall plead, and the trial shall take place at such session, unless a writ of certiorari be awarded. And by section 5, where a defendant, indicted for a misdemeanor at any session of the peace, session of oyer and terminer, great session, or session of gaol delivery, not having been committed to custody, or held to bail to appear to answer for such offence twenty days before the session at which the indictment was found, but who shall have been committed to custody, or held to bail to appear to answer for such offence at some subsequent session, or shall have received notice of such indictment having been found, twenty days before such subsequent session, he shall plead at such subsequent session, and trial shall take place at such session, unless a certiorari be awarded before the jury be sworn for such trial. But on sufficient cause shewn, the court may allow further time for trial (d). In cases of indictments for obtaining

(a) 1 Ry. & Mo. C. N. P. 20; and see 1 Stark. C. N. P. 63. Post, 488. & 40 Geo. 3. c. 87. s. 22. *acc.* Cro. Car. 340. Cro. Jac. 404, *contra.*

(b) 2 Rol. Abr. 96. Cro. Car. 438, 9. 448. 1 Sid. 99. 334. 2 Hale, 23. 48. Com. Dig. Justices, D. 13. 4 Bla. Com. 351. Cro. C. C. 9. Dick. Sess. 104; and see recital of the law in 39

(c) Id. *ibid.* 2 Hale, 23, 9. Dick. Sess. 104. 1 Leach, 111; and see recital of law in 39 & 40 Geo. 3. c. 87. s. 22.

(d) 60 Geo. 3; and 1 Geo. 4. c. 4. s. 7.

OF THE TIME
OF TRIAL.

goods, &c. by false pretences, and sending threatening letters, with intent to extort money, &c. and other misdemeanors punishable under the 30 Geo. 2. c. 24, it is enacted by that act (*a*), that every such offender, bound over to the general quarter sessions of the peace, or sessions of oyer and terminer, and gaol delivery, of the county where the offence was committed, shall be tried at such general quarter sessions of the peace, or sessions of oyer and terminer, and gaol delivery, which shall be held next after his apprehension, unless the court shall think fit to put off the trial, on just cause made out to them. So also by the 39 & 40 Geo. 3. c. 87. s. 22, persons indicted for a misdemeanor, in receiving stolen goods, under the 2 Geo. 3. c. 28, are to be tried immediately, without being allowed the delay of a traverse (*b*).

When the defendant is not in custody, he cannot compel the prosecutor to try till the next assizes; though by his consent, and giving notice of it to the clerk of assize, the trial may be had at the same assizes (*c*); and, where two defendants are in custody for a misdemeanor, and upon their arraignment one of them chooses to take his trial at the time, and the other to put it off until the ensuing assizes, the court will put off the trial till that time (*d*). And on the midland circuit, it was held, that when an indictment has been found against a defendant at one assizes, and

[485] he gives notice that he will plead and try at the next, the prosecutor is nevertheless not bound to try at the such next assizes, but it will suffice if he tries at the third assizes; for it may not be certain that the defendant will plead according to his notice, in which case the prosecutor would incur a useless expence in witnesses, &c. (*e*). By the 60 Geo. 3, and 1 Geo. 4. c. 4. s. 9, it is provided, that in case any prosecution for a misdemeanor, instituted by the attorney or solicitor-general, in any of the courts of King's Bench at Westminster or in Dublin, or at any session of the peace, session of oyer and terminer, great session, or session of gaol delivery, in England or Ireland, shall not be brought to

(*a*) Sect. 17. On a prosecution for a misdemeanor in receiving stolen goods, defendant is entitled to traverse, unless he be in custody.

(*b*) 2 East, P. C. 754.

(*c*) Cro. C. C. 9.

(*d*) Cro. C. C. 9.

(*e*) Midland Circuit, Summer Ass. A. D. 1815, before Mr. Justice Heath, *ex relatione*. Mr. Nicholls.

trial within twelve calendar months next after the plea of not guilty shall have been pleaded therein, the court may, upon application by the defendant, of which application twenty days previous notice shall have been given to the attorney or solicitor-general, to make an order, authorising such defendant to bring on the trial in such prosecution; and the defendant may bring on such trial accordingly, unless a nolle prosequi shall have been entered in such prosecution; but this provision does not extend to prosecutions by quo warranto, or for not repairing bridges or highways (a).

OF THE TIME
OF TRIAL.

The reason of this distinction between felonies and misdemeanors, as to the time of trial, is said to be, that the parties to be tried at the assizes before justices of gaol delivery, for felony, are well aware of the time when their trials will proceed from the time they are committed, and their commitment apprizes them of the nature of the charge, and, therefore they have full opportunity to prepare for their defence (b); and also, that it is a mere question of fact, which is to be determined in case of felony, whereas in many inferior misdemeanors, as for not repairing, intricate questions of civil right, and ancient liability, may come before the court for their decision (c).

It is said that the technical term *traverse*, from *transverto*, to [486] turn over, is applied to an issue taken upon an indictment for a Of traverses. misdemeanor, and means nothing more than turning over or putting off the trial to a following sessions or assize (d); and that thus it is that the officer of the court asks the party whether he is ready to try then, or will *traverse* to the next sessions; though some have referred its meaning originally to the denying or taking issue upon an indictment, without reference to the delay of trial, and which seems more correct (e). We have already seen the provisions of the 60 Geo. 3, and 1 Geo. 4. c. 4, and the other

(a) 60 Geo. 3; and 1 Geo. 4. c. 4. s. 10.

(b) Cro. Car. 448. Fost. 2; but see 2 Hale, 28. 1 Bla. Rep. 515.

(c) Id. *ibid.* Dick. Sess. 152 & 104.

(d) Dick. Sess. 151. Burn, J. Traverse.

(e) Lamb, 540. 4 Bla. Com. 351. Jac. Dic. Traverse. Williams, J. Traverse. See form, Burn, J. Traverse.

OF TRAVERSES. acts, which prevent traverses in particular cases (*a*). The mode of traversing is, for the defendant to come into court, and bring with him two sufficient sureties, and then to deliver them, with their proper additions, to the clerk of the peace, who reads the indictment, to which the defendant pleads not guilty. The clerk of the peace, or clerk of assize, on the circuit, then calls upon the party indicted by name, to enter into a recognizance before the court to appear, enter and try his traverse at the next sessions, and not depart without leave on that occasion (*b*). The principal and his bail then signify "that they are content" (*c*). After the defendant has thus traversed the indictment, and entered into a recognizance to appear, enter, and try, he cannot, by rendering himself to prison in discharge of his bail, procure himself to be tried at the next assizes, under the commission of gaol delivery, in order to save the fees which otherwise he would be liable to pay, because the condition of his recognizance is not fulfilled without entering his traverse (*d*). But he might have been tried at the sessions of gaol delivery, if he had given ten days notice to the prosecutor, before he pleaded, of his intention so to try (*e*). In capital cases, the court will not appoint the time of trial, unless the defendant be brought to the bar, and be personally in court when the rule is made for the purpose (*f*).

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Time of trial,
when proceed-
ings are in the
King's Bench.

If the proceedings have been removed by certiorari into the court of King's Bench, there is time allowed between the arraignment, or appearance, and the trial, for a jury to be impanelled by the sheriff upon a writ of venire facias, having fifteen days between the teste and return, as in civil proceedings (*g*). When the case is very important, the defendant may be tried at bar; but otherwise the judges will, by writ of nisi prius, transmit the record into the county where the offence is charged to have been committed (*h*). If they pursue the latter course, the justices of assize have full power to try, and may proceed to sentence and

(*a*) Ante, 484.

(*b*) 4 Bla. Com. 351. Dick. Sess. 152.

(*c*) Dick. Sess. 152. See form, Williams, J. Sessions. Post, last vol.

(*d*) 1 Leach, 111.

(*e*) 1 Leach, 112.

(*f*) 2 Stra. 326.

(*g*) 9 Co. 118, b. 4 Bla. Com. 350. Cro. Car. 448. Cro. C. C. 9. Bac. Abr. Trial, 1.

(*h*) 4 Bla. Com. 309, note 3. Id. 350.

execution (*a*). But if the defendant be thus convicted of a misdemeanor, he is brought up to the bar of the King's Bench to receive judgment (*b*). By the 60 Geo. 3, and 1 Geo. 4. c. 4. s. 1, defendants appearing in term time to a prosecution in the King's Bench, or removed there, for a misdemeanor, cannot imparl to the following term, except informations in nature of quo warranto, or prosecutions for not repairing bridges or highways (*c*).

Where an information is to be tried in this court, the notice of trial is the same as on a prosecution by indictment (*d*). And if the prosecutor give notice of trial in this court, after a removal by certiorari, and be afterwards desirous of avoiding it, he must countermand it, in order to prevent the expense of withdrawing the record; for if this notice be not given in time, he must pay the costs to the defendant (*e*). Till the 60 Geo. 3. c. 4, there appears to have been no mode of compelling a trial on the part of a defendant, when the proceedings were by the attorney-general in the King's Bench; for there can be no trial, by proviso in that case, and when the king is the prosecutor, the attorney-general's warrant is necessary for a trial at nisi prius (*f*). But on indictments of treason or felony, if the attorney-general will delay, the court of King's Bench may give the defendant leave to bring on the trial, as they see fit (*g*). And now, by 60 Geo. 3, and 1 Geo. 4. c. 4. s. 8, as we have before seen, this is remedied in the case of misdemeanors (*h*). And on indictments for misdemeanors, the defendant may in the first instance, by consent of the prosecutor, and leave of the attorney-general, carry down the cause for trial; but it must not be by surprise on the attorney-general, nor without the consent of the prosecutor, or some default in him (*i*). And it is a rule, that when an indictment is removed into the King's Bench by the prosecutor, the defendant shall not carry it down to

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(*a*) 2 Hale, 41. 6 Hen. 8. Comb. 225. Tidd, 8th edit. 817.
 c. 6. 4 Bla. Com. 309, n. 3. (*f*) 2 East, 202, 207, note a.
 (*b*) 4 Bla. Com. 309, n. 3. 2 Lord Raym. 1082. Post.
 (*c*) 60 Geo. 3. c. 4. s. 10. Tidd, 8th edit. 821.
 (*d*) Post, 488. See Fortes. (*g*) 2 Salk. 652.
 357. (*h*) See the section at length,
 ante, 485.
 (*e*) 8 East, 269. 1 Stra. 33. 2 Stra. 937. 946. 1 Salk. 193. (*i*) 2 Salk. 653.

TIME OF TRIAL
IN THE
KING'S BENCH.

trial without leave of the court, on motion (a). If an indictment be found in a county wherein the court of King's Bench sits, a venire, facias returnable immediately, may be awarded for the trial of the indictment (b). The causes are to be tried in the order in which they are entered in the marshal's list (c). And where there was one indictment against A. and another against A. and B. entered for trial in that order, special juries having been struck in both, and both having been entered as common jury causes, it was held the prosecutor could not, by withdrawing the first record, reverse the order of trial (d).

Notice of trial *. When the defendant has, in this manner, traversed the indictment, he must, if desirous to proceed to trial, or get rid of the prosecution, give due notice to the prosecutor of his intention to proceed to trial. The time required at the assizes is *eight* days exclusive; at the sessions at least *two*, and generally *four* days reckoned exclusively; and at all the Middlesex sessions four days, exclusive, before the commencement of the session at which the trial is intended to proceed (e). Where the traverse is sent down from the crown-office, the same notice is in general requisite as in civil proceedings (f); that is, at the sittings in London and Middlesex, eight days, if defendant resides within forty miles of London; and fourteen days, if he reside beyond that distance; and at the assizes ten days (g). The justices at the sessions may fix, as a general rule, what notice they will consider as sufficient (h). The notice of trial, when the defendant is indicted before the justices of oyer and terminer, should specify the nature of the offence for which he is to be tried before them (i). And

(a) 2 Salk. 653; and see 5 B. Cro. C. C. 9. 20, 21. Dick. & A. 728. Sess. 152, 3. Burn, J. Traverse.

(b) 9 Co. 118, b. Bac. Abr. 1 Leach, 111. Trial, I.

(c) 1 Ry. & Mo. C. N. P. 20. Ante, 484.

(d) 1 Stark. C. N. P. 63.

(e) 4 Bla. Com. 351, n. 5.

(f) Cro. C. C. 9.

(g) Tidd, 8th edit. 814, 15.

(h) 4 Bla. Com. 351, n. 5.

(i) Cro. C. C. 21.

* See forms, 3 Williams, J. Sessions. Dick. Sess. 153. Toone, 394. Cro. C. C. 298. Post, last vol.

it has been held at sessions, that such notice should be signed by the defendant himself, and not by his solicitor (*a*).

NOTICE OF
TRIAL.

It is necessary that the notice thus framed should be served personally on the prosecutor to whom it is directed (*b*). Upon this being effected, the party who served it should make an affidavit of the fact (*c*), which the defendant should be ready to produce at the time appointed for trial (*d*). For if, after due service, the party indicting does not appear, upon being three times called in open court, the defendant will be entitled to an acquittal (*e*). And on the trial of a misdemeanor, the prosecutor cannot appear for the purpose only of questioning the proof of notice of trial; and when he does appear, he cannot call for proof of notice (*f*). If the prosecutor cannot be found, on the attempt to serve the notice of trial upon him, the person who made such attempt must make an affidavit that he has ineffectually endeavoured to serve the prosecutor (*g*). Upon this the defendant, by his counsel, may move the court at sessions, that service of notice at the office of the clerk of the peace may be deemed good service; and when an order has been obtained, the defendant sticks up a copy of it, and of notice of trial, in the office of the clerk of the peace. The court may also be moved to respite the recognizance, and for a rule or order that service of a new notice, at the prosecutor's last or usual place of abode, shall be deemed good for the sessions ensuing (*h*). Upon this motion, the court will make an order, in which such second notice will be declared to be valid. When this is obtained, the defendant should serve a copy of the order, together with another notice, at the place of residence which it mentions; he should also take out a venire, enter his traverse, and be prepared with a second affidavit, stating the order, the notice, and the service, to produce at the ensuing sessions; when, if the prosecutor still neglects to appear, the court will direct the defendant to be acquitted (*i*).

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(*a*) At the sessions, Middlesex, *ex relat.* Mr. Nicholls.

(*b*) Cro. C. C. 21.

(*c*) Cro. C. C. 21. See forms, Cro. C. C. 298. Post, last vol.

(*d*) Cro. C. C. 21.

(*e*) Id. *ibid.* Williams, J. Sessions. See form of calling,

Dick. Sess. 154. 3 Williams, J. 1032.

(*f*) 1 Ry. & Mo. C. N. P. 241.

(*g*) Cro. C. C. 21. See form, post, last vol.

(*h*) See form, post, last vol.

(*i*) Cro. C. C. 21.

NOTICE OF
TRIAL.

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Besides the respiting of the recognizance, which is in this case allowed, after the attempt to serve the first notice, the same indulgence will frequently be granted, on motion, upon indictments for nuisances, or suffering highways to continue in bad repair, in order to give the defendants an opportunity of removing the causes for which they are indicted; and to obtain the certificate of magistrates that they have done so, upon which the defendants will, in general, merely be subject to a nominal fine (*a*). The reason for this practice is, that such prosecutions are carried on rather for the suppression of public grievances, than for the punishment and example of offenders; and all the ends of justice are sufficiently answered by a removal of the ground of the proceedings.

But to return to the usual course of proceeding after a traverse, when the prosecutor receives the notice, and his appearance on the trial is expected. At the assizes, the defendant intending to try, must go before the clerk of assize, and take out a copy of the proceedings drawn out of record, for which he is to pay after the rate established by custom. At the same time, he must also sue out a venire, for the sheriff to return a jury, which the clerk is empowered to award. He may also obtain his subpœnas for witnesses from the same officer. After the venire is procured, it must be delivered to the under sheriff, who will return a jury (*b*). When all these requisites have been obtained, the traverse must be duly entered with the judge's marshal; for unless this form has been complied with, the defendant has no right to insist on his trial (*c*). The proceedings at the sessions are similar, except that the descriptions of the officers differ, the clerk of the peace being substituted for the clerk of assize; and, formerly, the subpœnas of the latter running only in the same county, if the witnesses resided beyond it, application must have been made to the crown office (*d*); but this has been altered by a late statute (*e*).

(*a*) Dick. Sess. 140. As to the certificate, ante, 430.

(*b*) Cro. C. C. 9.

(*c*) 1 Leach, 111. Cro. C. C. 9.

(*d*) Cro. C. C. 21.

(*e*) 45 Geo. 3. c. 92. s. 3, 4.

There are several cases in which, upon a proper application, the court will put off the trial. And it has been laid down that no crime is so great, and no proceedings so instantaneous, but the trial may be put off, if sufficient reasons are adduced to support the application (*a*); and it should seem that the trial of a collateral issue, as the identity of the prisoner, may be put off on a positive affidavit, but not otherwise; because, as the prisoner's life is not in jeopardy on that issue, there is no occasion to allow indulgence, unless the defendant will swear to the fact himself (*b*). In general, the trial may be postponed, on the ground of the publication of a libel, tending to influence the minds of the jurors in forming their decision (*c*). And the illness of the defendant's attorney has been allowed to operate in a similar occasion (*d*). And where an accomplice fully and fairly discloses the joint guilt of himself and his companions, and is admitted by justices of the peace to bear testimony against his fellows, by which he acquires an equitable claim, though no absolute right, to the mercy of the crown, the court will put off the trial, in order to enable him to apply for a pardon (*e*). And where a material witness, upon being examined, appears to have no sense of the obligation of an oath, or of a future state of retribution, so that he cannot legally be sworn, the court may put off the trial, even in a capital case, and order him to be, in the mean time, instructed by a clergyman in the principles of moral obligation (*f*). And a trial in civil cases may be put off for want of documentary evidence (*g*). But the most usual ground for the delay is the absence of a material witness, which, if properly verified, will be sufficient, on an indictment for treason, felony, or misdemeanor, at the instance of a defendant, though the prosecution is carried on at the public expense (*h*). If, however, a witness was not absent at the time

(*a*) Per Lord Mansfield, 1 Bla. Rep. 514. 3 Burr. 1514. Fost. 2. As to the grounds for putting off a trial, in civil cases, which seem analogous, see Tidd's Prac. 8th edit. 831 to 834.

(*b*) 1 Bla. Rep. 4, 5, 6; but see Lord Kenyon's observations on this case, Peake's Rep. 97, 8.

(*c*) 4 T. R. 285. 1 Burr.

510, 511. Bac. Abr. Trial, H. 3 Brod. & Bing. 272.

(*d*) Say. Rep. 63. Bac. Abr. Trial, H.

(*e*) Cowp. 339, 340. 1 Leach, 125.

(*f*) 1 Leach, 430, n. a.

(*g*) 1 Dow. & Ry. 159.

(*h*) Bac. Abr. Trial, H. Fost. 2.

PUTTING OFF
TRIAL.

notice of trial was given, it seems the court will not grant the application on account of any subsequent absence (*a*). And where the witnesses are in a foreign country, and not likely shortly to come hither, the court have refused to allow it (*b*); though as the witnesses may be examined on interrogatories sent out abroad, it should seem that when the evidence is very material, the trial may be delayed till such examination has been obtained (*c*). And in prosecutions for a misdemeanor, committed in the East or West Indies, in a public capacity, the defendant, under the 31 Geo. 3. c. 63. and 42 Geo. 3. c. 85, is, on a special affidavit of the absence of material evidence, entitled, in the discretion of the court of King's Bench, to put off the trial, and obtain a mandamus for the examination of the witness abroad, and the prosecutor may obtain such mandamus, and delay as a matter of course (*d*). But when the defendant has been guilty of laches or delay, the court will refuse to put off the trial (*e*), or at least will impose terms upon him, as that he shall consent to examine upon interrogatories a material witness for the crown (*f*). In *civil* cases, where the defendant has pleaded in abatement, a strong case must be made out, to induce the court to put off the trial (*g*). And it is the constant practice of the Old Bailey, not to put off trials on account of the absence of witnesses to character, lest there should be a failure in that prompt execution of justice, so necessary to the intimidation of offenders (*h*).

Before any application can be made to postpone the trial, notice must be given to the opposite party, in order that he may attend and oppose it; and in the King's Bench, a rule nisi must be obtained (*i*). Upon this an affidavit must be made, stating the names and places of abode of the absent witnesses, and that they

(*a*) Barnes, 442. Bac. Abr. Trial, H.

(*b*) 3 Burr. 1514, 15. 1 Bla. Rep. 510. 8 East, 37.

(*c*) 2 M. & S. 602. 1 Bla. Rep. 512. *Sed quere*, if the court will put off the trial *until* the witnesses are examined, but only to a definite period, 1 Chit. Rep. 685.

(*d*) 8 East, 31.

(*e*) 1 Bla. Rep. 514. Tidd's Prac. 8th edit. 831.

(*f*) 2 M. & S. 602.

(*g*) 2 Chit. Rep. 5.

(*h*) 8 East, 34.

(*i*) Cro. C. C. 22. See form, Cro. C. C. 299. Tidd's App. 312. Post, last vol.

are material to the prosecution or defence (*a*). Affidavits in corroboration may be filed (*b*). It is, in general, necessary in the affidavit of the absence of a material witness, to state at what time his return may be expected (*c*); but this may be, in some cases, dispensed with; as if he is on board a ship in his majesty's service, in which case the party making the affidavit cannot swear this, because he is ignorant of the instructions given to the commander (*d*). And it seems, that an affidavit, stating the witness is not expected to return till a particular day, is sufficient, it being an implied assertion, that he is expected at that time (*e*). And in civil cases, it is not necessary to mention in the affidavit the *name* of the witness (*f*). It is also said to be necessary for the oath to be positive, that the witness absent is material, and not merely that the deponent believes him to be so; for nothing is more easy than generally to swear to a belief of this description (*g*). In some cases, the sources of the proposed required evidence should be stated with punctuality (*h*). When there is no cause for suspicion of mere desire to delay, it will be sufficient generally to swear that the absent party is a material witness, without whose evidence the party cannot safely proceed to trial; that he has endeavoured, without effect, to serve him with a subpoena; and that there is a reasonable ground to expect his future attendance (*i*). And the affidavit should also state the notice to the opposite party, and the service of it upon him. But if there is any cause of suspicion, the court will require the circumstances to be specifically stated, on which the application is grounded; that the party absent is a material witness; that the applicant has used all his exertions to procure his attendance; and that there is a reasonable expectation of his being able to attend at the time to which the trial is proposed to be deferred (*k*). It must, in

(*a*) See form, post, last vol. 8 East, 35, 6. 33. Fost. 2.

(*b*) 1 Kenyon's Rep. 356.

(*c*) 1 Bla. Rep. 514. Bac. Abr. Trial, H.

(*d*) 1 Barnard, 39. Bac. Abr. Trial, H.

(*e*) 1 Chit. Rep. 730, n. 2 Chit. Rep. 411, S. C.

(*f*) 2 Dow. & Ry. 420. 4 D. & Ry. 332, notes.

(*g*) 1 Bla. Rep. 514. Bac. Abr. Trial, H.; but see Peake's Rep. 97, 8.

(*h*) 4 Dow. & Ry. 830.

(*i*) 3 Burr. 1513. 8 East, 37. Bac. Abr. Trial, H. Tidd's Prac. 834.

(*k*) 1 Bla. Rep. 436. 514. 8 East, 31. 37. 3 Burr. 1514. Bac. Abr. Trial, H. Tidd, 783, 784.

PUTTING OFF
TRIAL.

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general, be made by the party applying (*a*); though, in some cases, his attorney (*b*), or a third person, have been allowed to do it in his stead, as if he be abroad, or unable to appear (*c*). It should regularly be made two days at least before the intended trial (*d*); but when the necessity of the witness was not known until afterwards, it may be applied for at a nearer period (*e*). When the motion is granted, it is seldom for more than the next term or the ensuing assizes (*f*). But, upon the particular circumstances of the case, the court will make a rule for putting off the trial of an issue to a more distant time of decision (*g*). When the application is thus delayed till the trial is called on, a motion must be made by counsel, and the prosecutor will be entitled to the costs of the day upon the delay being conceded (*h*).

Where a party bound to appear is so ill that his life would be endangered by his removal, an affidavit should be made, by his medical attendant, to prevent his recognizance from being estreated (*i*).

PLACE OF
TRIAL.

We have already sufficiently considered the *county* in which the defendant is to be tried, in our observations on the venue (*k*). When an indictment or presentment has been removed into the King's Bench or was instituted there, that court has a general jurisdiction to direct the trial to take place in a county different from that where the offence was committed, when it shall be made appear to them that an impartial trial cannot be had in the latter county (*l*); and where the offence was committed in a city or town, which is a county of itself, the court before whom the

(*a*) Barnes, 437. Bac. Abr. Trial, H.

(*b*) Peake, N. P. 97. Tidd, 834, 8th edit.

(*c*) Barnes, 448. Bac. Abr. Trial, H. Tidd, 834.

(*d*) Barnes, 437. 442. 444.

(*e*) Barnes, 452. Peake, N. P. 97. 1 Esp. Rep. 125. Bac. Abr. Trial, H.

(*f*) Bac. Abr. Trial, H.

(*g*) Bac. Abr. Trial, H.

(*h*) 1 Esp. Rep. 125. Tidd, 8th edit. 818, &c.

(*i*) Toone, 7. See form, *id.* *ibid.* Post, last vol.

(*k*) Ante, 177, &c.

(*l*) Ante, 201. 371 to 373. 4 East, 210, 11. 7 T. R. 735. 6 T. R. 195. 1 Bla. Rep. 378.

indictment is depending is empowered by statute to direct the removal of the prisoner, and to order the issue to be tried in the county at large, for a more free and impartial decision (*a*). From this regulation, however, London and Westminster, Bristol, Chester, Exeter, and the borough of Southwark, are expressly exempted. Yet upon a suggestion that an impartial trial cannot be had in the county of the city of Chester, the court will award a trial to be had in the adjoining county palatine (*b*). In this case, the same venue remains in the indictment, and the place where the inquiry is actually instituted is the only deviation from the ordinary course of proceedings (*c*); and it is necessary for the prosecutor to prove that the offence was committed in the district from which the indictment and proceedings were removed (*d*). Very strong evidence of partiality will be required, in order to induce the court to listen to the application for the removal (*e*); and we have already seen when and on what grounds the application for a certiorari will be granted (*f*).

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The practical mode of obtaining this change in the place of trial, when it is absolutely necessary, independently of the statute before mentioned (*g*), is to procure an affidavit of the circumstances and grounds on which it is insisted that the place of trial should be changed; and then for counsel to move the court for a rule to show cause why the suggestion of partiality should not be entered on the roll with a *nient dedire*, in order to have the trial in the adjoining county (*h*). If the court make the rule absolute (*i*), a suggestion is entered on the roll (*k*), which need not state the facts upon which the inference is made that a fair trial cannot be had (*l*), which is not traversable; and, therefore, cause

(*a*) 38 Geo. 3. c. 52. 51 Geo. 3. c. 100.

(*b*) 7 T. R. 735. 6 T. R. 195. 1 Bla. Rep. 378; and see 3 B. & A. 448.

(*c*) 1 Bla. Rep. 379. 3 Burr. 1333.

(*d*) 9 East, 296.

(*e*) 3 Burr. 1333. 1 Bla. Rep. 379.

(*f*) Ante, 378 to 380.

(*g*) Supra, note (*a*).

(*h*) 7 T. R. 735. 1 T. R. 363. 1 Bla. Rep. 379. 3 Burr. 1333. Tidd, 8th edit. 780. See form of rule to show cause, 3 Burr. 1330. Post, last vol.

(*i*) See form of rule, post, last vol.

(*k*) Form of suggestion, Tidd, Appendix, 286. Post, last vol. 1 T. R. 363.

(*l*) 3 B. & A. 448.

PLACE OF
TRIAL.

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must be shown that it is necessary, before the court will permit it to be entered (*a*). And it is necessary to give a copy of it to the adverse party, and allow him a reasonable time to consider and oppose it, before the entry is made of the *nient dedire* (*b*); and if the removal be from the city of Chester, the record will be sent down by mittimus, to be tried in the county palatine of Chester (*c*). But when the offence was committed in Wales, it seems, by several statutes, to be a matter of right to have the issue tried in the next adjoining county of England, to which the proceedings may be removed by certiorari (*d*); and these provisions relate also to felonies subsequently created (*e*).

When either the prosecutor or the defendant applies to the court of oyer and terminer and gaol delivery, to change the place of trial, under the before-mentioned statute, 38 Geo. 3. c. 52, he must enter into a recognizance, in the sum of £40, to pay all the extra costs arising from the removal, in case the court should so award (*f*). But this regulation does not apply to indictments removed into the King's Bench by certiorari, and sent down from thence to be tried in the county adjoining to that in which the offence was committed; or to cases where a trial is directed to take place in a different county, by the common-law jurisdiction of the court of King's Bench (*g*). When that is the case, as well as when the issue is on an indictment removed by certiorari, and on a criminal information, the place of trial is on the civil side of the hall, by virtue of the writ of *nisi prius* (*h*).

The statute of 19 Geo. 3. c. 74. s. 70 (*i*), reciting, that the courts of assize, *nisi prius*, oyer and terminer, and gaol delivery, for several counties at large, were often held in or near cities or

(*a*) 3 Burr. 1333. 1 Bla. Rep. 379.

(*b*) 1 Stra. 235. 10 Mod. 199. Tidd, 8th edit. 782.

(*c*) 7 T. R. 736. Tidd, 8th edit. 780. Form of mittimus, post, last vol.

(*d*) 26 Hen. 8. c. 4. 26 Hen. 8. c. 6. 34 & 35 Hen. 8. c. 25. 8 Mod. 136. 1 Stra. 533.

(*e*) 3 Campb. 78.

(*f*) 38 Geo. 3. c. 52. s. 12. See form of recognizance, post, last vol.

(*g*) 4 East, 208. 1 Smith, 31. Tidd, 8th edit. 781, n. a.

(*h*) 5 T. R. 623. 4 Bla. Com. 365, n. b.

(*i*) Made perpetual by the 39 Geo. 3. c. 45. Burn, J. Assizes.

towns that are counties of themselves, and at the same time with the courts of those cities and towns, and that inconveniences frequently arose in transacting the business of the several courts, because the lodgings of the judges were situated either only in the county at large, or only in the county of the city or town, enacts, that whenever the courts for any county at large are held in or near any city or town, which is also a county of itself, with the like courts for the city or town, the lodgings of the judges shall be construed and taken to be situated both within the county at large, and also within the county of the city or town for transacting the business of the assizes for the county at large, and for the county of the city or town, during the time that the judges continue therein, for the execution of their several commissions.

PLACE OF
TRIAL.

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In a case of an information for a misdemeanor, the court granted a *trial at bar*, at the request of the defendant, because the consequences of conviction would be serious, as the loss of a valuable office (*a*); so if there be vexatious delay on the part of the prosecutor (*b*); and where a person of good character was apprehended by a hundred for a robbery, and there was reason to suspect that the prosecution would be carried on with great rigour, in order to discharge the place by convicting him, the court were disposed to grant a trial at bar (*c*). But it will not, in general, be allowed on the application of the attorney-general, unless the prosecution be really carried on at the instance of the crown (*d*); though it has been said, that the attorney-general has the power of so doing, when he files an information *ex officio* (*e*). And, in a capital case, the court will not appoint a trial at bar, unless the defendant be present (*f*); and the court, the same as in civil cases, is extremely unwilling to grant a trial at bar, except in cases where it appears to be absolutely necessary (*g*). In all

OF A TRIAL
AT BAR *.

(*a*) 1 Stra. 52. Bac. Abr. Bac. Abr. E. Trial.
Trial, E.

(*b*) 2 East, 209.

(*c*) 12 Mod. 331. Bac. Abr.
Trial, E.

(*d*) 2 Stra. 816. 1 Vent. 74.

(*e*) 1 Stra. 644.

(*f*) 2 Stra. 824.

(*g*) Tidd's Prac. 8th edit.
306, 7.

* See Bac. Abr. Trial, E. Tidd's Prac. 306, 8th edit. 4 Bla. Com. 350.

OF A TRIAL
AT BAR.

cases of trials at bar, where a certain time is limited for the trial, if at the day there is a defectus juratorum, on which the trial is adjourned, there is no fresh application for a trial at bar, but a decem tales is awarded, and the trial is had upon the old rule (a).

Of remanets.

When on the trial of an indictment for a misdemeanor, the prosecutor obtains a special jury, and only a part of them appear, and both parties refuse to pray a tales, though a warrant for a tales has been delivered to them, the prosecution is made a *remanet pro defectu juratorum* (b). On this occasion, the defendant is not liable to pay costs for not proceeding to trial, because he did every thing to enable the prosecutor to try the issue (c).

Of compromise *.

It is not unusual at the quarter sessions, before the trial, where the offence more immediately affects some individual, and partakes of the nature of a civil injury, for the parties to agree, and the prosecutor to give a written acknowledgment that he is satisfied, upon proof of which the court will discharge the recognizance of the defendant (d); but all this should be done under the eye of the court (e). This practice, as well as the suffering the defendant to talk with the prosecutor after verdict, has been censured, as inconvenient and dangerous (f); because public justice is thus turned into a process for private remuneration, and the rules of evidence are subverted; and, in general, a court of sessions cannot refer matter, to be determined by another, or delegate their authority (g). It is, however, said to be the practice of the Middlesex sessions (h); and may possibly be, in some cases, equitable (i). And the court, upon motion for a criminal infor-

(a) 5 T. R. 457, 8.

(b) 2 Stra. 937. 3 Burr. 1694.

(c) 2 Stra. 937. 3 Burr. 1694.

(d) Cro. C. C. 21.

(e) Rex v. Rant, reported in Kyd, on Awards, p. 64.

(f) 4 Bla. Com. 363. Ante, 8.

(g) Bac. Abr. Arbitrament,

A.

(h) Cro. C. C. 20.

(i) Dick. Sess. 156. 11 East, 46.

* See ante, 7, 8, 430, as to compromises.

mation, will, if they regard it as a sufficient punishment, discharge the rule on payment of the costs, and decline any further proceedings (a). And, after conviction on an indictment for an assault, it is sometimes referred to the coroner and attorney, if the parties consent, and he generally awards costs and satisfaction (b). Where a court of sessions referred an indictment for an assault to an arbitrator, and empowered him to settle all costs incident to the indictment, and subsequent proceedings thereon, it was said the arbitrator did not exceed his authority by awarding the previous, as well as subsequent, costs (c).

When the party who has given notice of trial is not ready to proceed to trial of an indictment or information for a misdemeanor, at the time appointed, in the notice of trial, he may withdraw the record, but then he must pay the costs to the other party, unless he countermand his notice of trial in time, to prevent any extra expenses (d). In the King's Bench, when the *defendant* has brought the prosecutor to trial, the record cannot be withdrawn on the part of the prosecutor; but if the prosecutor be not prepared to produce evidence, the defendant must be acquitted (e). And we have seen, that where there are two indictments entered for trial, to be tried by special juries, they must be tried in the order they stand in the list; and the prosecutor cannot, by withdrawing the first record, reverse the order of trial (f).

Of withdrawing
the record, and
not proceeding
to trial.

(a) Dougl. 314.

(b) See post.

(c) 1 J. B. Moore, 120.

(d) 1 Salk. 193. 1 Stra. 33.
2 Stra. 874. Comb. 225. 8 East,

270. Tidd, 8th edit. 817, 8.

(e) Per Ld. Ellenborough, in
Rex v. Smith, Sittings at West-
minster, 10th July, 1816.

(f) 1 Stark. C. N. P. 63.

CHAPTER XIII.

OF THE JURY—JURY PROCESS—PROCEEDINGS
ON TRIAL—CHALLENGES—AND SWEARING
JURY.*

THE trial by jury, to the consideration of which we are now arrived, is to be traced, in its ruder elements, to the earliest periods, though probably modified and improved by the Saxon princes (*a*). It is not, however, necessary here, either to inquire into its history, or to enlarge upon its benefits; but to consider its actual nature, and the modes by which it is administered. For this purpose, we will examine from what county the jury must be chosen, into what court returned, what qualifications they must possess, what number must be sworn, by what process they are to be convened, what liabilities they incur, and what indemnities they enjoy, as well as special juries, how they are to be impanelled, when they may be challenged, and in what way they must be sworn to try the issue between the crown and the prisoner.

[501]

From what place
the jury must
come.

We have already considered the locality of trial required at common law, and the various modifications that rule has received by statutable provisions (*b*). We have seen the necessity which originally existed for summoning the jury from the very ville or place where the offence was committed, and the right of challenging for want of hundredors (*c*); but now, by the 6 Geo. 4.

(*a*) 3 Bla. Com. 349, 350. 2 T. R. 240. 2 Hale, 163, 272, 273. Doc. & Stud. 24. 3 Campb.

(*b*) Ante, 177 to 202, as to the venue. 77. See an instance of such a challenge, A. D. 1724. 8 Mod.

(*c*) Ante, 177. Co. Lit. 125. 246. 1 Stra. 593.
a. & b. n. 1. 6 Co. Rep. 14, b.

* As to this subject in general, see Erskine's Speeches, vol. i. 264 to 364. Tr. per Pais, c. 3 to 9. Co. Lit. 156 to 159. 3 Bla. Com. 349 to 366. 4 Bla. Com. 349 to 355. 2 Hale, 259 to 267. Hawk. b. 2. c. 40, 41, 42. Bac. Abr. Juries. Dalt. J. c. 186. Burn, J. Jurors. Williams, J. Jurors.

c. 50. s. 13, the jury are to come from the body of the county, and not from any hundred, or particular venue in the county, and the want of hundredors is no longer a cause of challenge. As we have already considered the material points relating to the place from which the jury are to come, in our observations on the venue, it will be sufficient to refer the reader to that part of the chapter on indictments (*a*).

FROM WHAT
PLACE THE JURY
MUST COME.

At common law, the jurors are returnable only into the court in which the prosecution is depending (*b*). But since the statute Westminster the Second (*c*), an issue joined in the King's Bench, whether for treason or felony, or any other crime of inferior degree, committed in a different county from that in which the court sits, may be tried in the proper county by writ of nisi prius, in pursuance of the statute (*d*). As, however, the king is not expressly named in this provision, he cannot be bound by it without his own consent, and therefore a trial at nisi prius cannot, when the prosecution is actually on the part of the crown, regularly be awarded without special warrant, or the consent of his majesty's attorney-general (*e*). When it is duly granted, the jury are, of course, returned to the assizes, to which the proceedings are remitted:

Into what court
jurors to be re-
turned.

[502]

The qualifications of petty jurors on the trial, are now clearly pointed out by the 6 Geo. 4. c. 50. s. 1. and all the difficult questions that have arisen on the subject are therefore set at rest. The 2d and 3d sections shew who are exempted from the office. As these provisions have been already recited at length, it will suffice merely to refer to them (*f*).

The qualifica-
tions of jurors,
and exemptions
from serving.

The jurors returned must be from the jurors'-book for the current year, if indeed there be such book; if there be not, then from the book for the preceding year (*g*).

(*a*) Ante, 177 to 202.
(*b*) Hawk. b. 2. c. 42. s. 1.
(*c*) 13 Edw. 1. c. 30.
(*d*) 2 Inst. 423, 4. Cro. Car.
343, 9. 4 Inst. 160. 4 Co.
Rep. 43, b. Hawk. b. 2. c. 42.
s. 2. The 6 Geo. 4. c. 50, does

not, it seems, affect this practice.
See the 20th section of the act.
(*e*) Hawk. b. 2. c. 42. s. 3.
Ante, 437, 8.
(*f*) Ante, 308. 308, a. 308, b.
(*g*) 6 Geo. 4. c. 50. s. 14.

QUALIFICATIONS
OF JURORS,
AND
EXEMPTIONS.

By the 42d section of the act, no man shall be returned as a juror, to serve at any session of nisi prius, or of gaol delivery, in the county of Middlesex, who has served as a juror at either of such sessions, in the said county, in either of the two terms, or vacations, next immediately preceding, and has the sheriff's certificate of having so served; and no man shall be returned as a juror, to serve on trials before any court of assize, nisi prius, oyer and terminer, or gaol delivery, or any of the said courts of the three counties palatine, or the said great sessions, who has served as a juror at any of such courts, within one year before, in Wales, or in the counties of Hereford, Cambridge, Huntingdon, or Rutland, or four years before in the county of York, or two years before in any other county, and has the sheriff's certificate of having so served; and no man shall be returned to serve upon any grand jury, or petty jury, at any sessions of the peace to be holden for any county, riding, or division, in England or Wales, who has served as a juror at any such session within one year before, in Wales, or in the counties of Hereford, Cambridge, Huntingdon, or Rutland, or two years before in any other county, and has the certificate of the clerk of the peace of having so served; and if any sheriff, or other minister, shall wilfully transgress in any of the cases aforesaid, the court may, and is hereby required, on examination and proof of every such offence, in a summary way, to set such fine upon every such offender as the court shall think meet. Provided that nothing herein contained shall extend to grand jurors at the assizes, or great sessions, or to special jurors.

By the 48th section, every justice of the peace is exempt from serving at any sessions of the peace, for the jurisdiction of which he is justice; and by the 49th section, the inhabitants of the city and liberty of Westminster are exempt from serving at the sessions for the county.

By the 43d section, no money shall be taken to excuse persons from serving; and none are to be summoned but those named in the warrant to summon.

Juries for liberties, cities, &c. and city of London.

By the 50th section of the act it is enacted, that the qualification thereinbefore required for jurors, and the regulations for

procuring lists of persons liable to serve on juries, shall not extend to the jurors or juries in any liberty, franchises, cities, boroughs, or towns corporate, not being counties, or in any cities, boroughs, or towns, being counties of themselves, which shall respectively possess any jurisdiction, civil or criminal; but that in all such places the sheriffs, bailiffs, or other ministers, having the return of juries, shall prepare their panels in the manner heretofore accustomed: Provided always, that no man shall be impanelled or returned by the sheriffs of the city of London, as a juror, to try any issue joined in his majesty's courts of record at Westminster, or to serve on any jury at the sessions of oyer and terminer, gaol delivery, or sessions of the peace, to be held for the said city, who shall not be a householder, or the occupier of a shop, warehouse, counting-house, chambers, or office, for the purpose of trade or commerce, within the said city, and have lands, tenements, or personal estate, of the value of one hundred pounds; and that the lists of men, resident in each ward of the city of London, who shall be so qualified as herein mentioned, shall be made out, with the proper quality or addition, and the place of abode of each man, by the parties who have heretofore been used and accustomed in each ward to make out the same respectively; and that such shop, warehouse, counting-house, chambers, or office as aforesaid, shall, for the purposes of this act, be respectively deemed and taken to be the place of abode of every occupier thereof: Provided also, that no man shall be impanelled, or returned to serve on any jury, for the trial of any capital offence in any county, city, or place, who shall not be qualified to serve as a juror in civil causes, within the same county, city, or place; and the same matter and cause being alleged, by way of challenge, and so found, shall be admitted and taken as a principal challenge: and the person so challenged shall and may be examined on oath, of the truth of the said matter.

JURIES
FOR LIBERTIES,
CITIES, &c.
AND CITY OF
LONDON.

The petit jury, when sworn, must consist precisely of twelve, and is never to be either more or less on the trial of the general issue (*a*), and this fact it is necessary to insert upon the record (*b*). [505]
Of the number of the jurors.

(*a*) 2 Hale, 161. Bac. Abr. Williams, J. Juries, IV.
Juries, A. Burn, J. Jurors, III. (*b*) 2 Bla. Rep. 719.

NUMBER OF THE
JURORS.

If, therefore, the number returned be less than twelve, any verdict must be ineffectual, and the judgment will be reversed for error (*a*). But if more than twelve be accidentally sworn, it will not vitiate the proceedings, though it is an irregularity to be avoided (*b*).

The *venire facias*, therefore, to the sheriff, at common law, was to return only twelve to serve on the petit jury (*c*). And now, by 6 Geo. 4. c. 50. s. 13, the writ is to direct the sheriff to return twelve. Previously to this act, as it was considered there would have been great inconvenience from merely summoning the number to be actually employed, and the full jury would very seldom be assembled, it was the practice for the sheriff to return twenty-four on the panel (*d*). And he might, at any time, have returned more than that number; for the statute of Westminster the Second, which limits the panel, in civil cases, to twenty-four, does not extend to criminal proceedings (*e*). And if he return less than twenty-four, and twelve appear, and are sworn, the subsequent proceedings will not be invalid (*f*). But now, by the 6 Geo. 4. c. 50, s. 15, upon the trial of issues before justices of assize or nisi prius, the sheriff is always to return, in counties in general, a number not less than forty-eight, nor more than seventy-two, unless the judge or judges direct a greater or lesser number to be returned (*g*).

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For the expediting of trials, by the 6 Geo. 4. c. 50. s. 22, it is provided, that judges of assize, or of the counties palatine, or of great sessions, in Wales, may direct the same panel for the

(*a*) 2 Hale, 161.

(*b*) 2 Hale, 296, *semble*.

(*c*) 2 Hale, 263. Co. Lit. 155, a. Bac. Abr. Juries, B. 6.

(*d*) Co. Lit. 155, a. 2 Hale, 263. Bac. Abr. Juries, B. 6. Burn, J. Jurors, III.

(*e*) Kel. 16. Bac. Abr. Juries, B. 6.

(*f*) Cro. Car. 223. Bac. Abr. Juries, B. 6.

(*g*) See more of the enactment, and mode of returning

writ, post, 516. That it extends to criminal proceedings, Hawk. b. 2. c. 41. s. 21. Bac. Abr. Juries, b. 8. *Quære*, if the 17th and 18th sections of the act relating to the return of jurors for trials of causes in counties palatine and in Wales, affect criminal causes; if so, the same number as above, required by s. 15, are necessary to be returned.

criminal and civil sides, and may direct two sets of jurors to be summoned, one to attend at the beginning of each assizes, and the other to attend the residue thereof, to serve indiscriminately on the criminal and civil side.

NUMBER OF THE
JURORS.

The kind of process to be issued, in order to summon a jury, differs according to the court from whence it is awarded. In some courts there must be a particular precept to the sheriff, or writ of *venire facias*; in others a general precept will suffice, or the whole may be merely a command to the sheriff, to return a jury *ore tenus*.

Of the process by which the jury is convened, and what kind of process must, in the first instance, be awarded.

The justices of gaol delivery are of the latter description, and may have a panel returned by the sheriff, without any writ to warrant the process (*a*). The course of proceeding by these judges was thus clearly stated by Lord Chief Justice Treby (*b*): “There is, antecedent to the coming of the justices, a general commandment or precept (*c*), made in writing, to the sheriff, by the said justices, to return juries against their coming, for the trying of all and singular prisoners in their gaol, whether they have pleaded before, or shall after. And for that purpose it requires the sheriff to summon out of all parts of his county, whence the prisoners come, a great number of freeholders, not akin to the prisoners, to be at the time and place appointed for holding the court. The sheriff, by virtue of this general previous precept, summoneth many for jurors, and prepares divers several panels of their names, either at first or afterwards, as appears necessary, and returneth and delivereth in one or more of these panels from time to time, as the court does need and call for any. This we know, in fact, is frequently done, where the sessions of gaol delivery lasts several days, and there is occasion. Though, in supposition of law, all these panels are returned, and the trials thereupon had the first day of the sessions, and in law it is

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(*a*) 4 Harg. St. Tr. 742, 3, 4. 4 Inst. 164. 2 Inst. 568. Fost. 63, 4. Cro. Car. 315. 2 Hale, 28, 261, 266. Hawk. b. 2. c. 41. s. 4. Bac. Abr. Juries, b. 1. Bac. Abr. Trial, I.
(*b*) 4 Harg. St. Trial, 744, 745. See also Fost. 63, 4. Cro. C. C. 4. Hawk. b. 2. c. 41. s. 1. Bac. Abr. Juries, b. 1. Rast. Entr. 384, 5. 2 Hale, 410.
(*c*) See form of general precept, Rast. Entr. 384, 5. Post, last vol.

JURY PROCESS. intended to be but that one day only. The return of this precept is thus, viz. *executio istius præcepti patet in quibusdam pannellis huic præcepto annexis*, and the panels are annexed; and there are often filed here divers panels upon the same general precepts; though sometimes but one. These panels are thus delivered into court, and a jury taken out of them as there is occasion, only upon a *parol award*; that is, barely the court's calling for the same, without writ or precept in writing, or giving any day for the doing it. For this proceeding is immediate, for the speedy delivery of the prisoners; and the entry, after setting forth that the prisoner, being arraigned, pleads not guilty, is *ideo immediate veniat inde jurata or fiat inde jurata (a)*. And this court's being instituted for the speedy delivery of prisoners, and warnings being given long before of their coming, are the causes why it has been always held, without doubt, that justices of gaol delivery might inquire and try the same day. If it fall out, that by reason of defaults, deaths, or challenges, there cannot be a full jury had out of a panel, which is an accident that the court cannot know, till they have gone through the panel, I think in this case that the panel goes for nothing, is utterly lost and void, and to be cast away, or cancelled; for it does not answer the award of the court, which was to have a jury to try the prisoner presently. It is meant an effectual panel, that should afford a full jury of twelve unexceptionable men, and every panel that comes short in this, is to be laid aside, as a void thing; and then the court takes and makes use of another immediately, which may not be deficient, whereby the award is observed, and the present service dispatched." Hence, if all the persons returned upon the general precept should be challenged by any prisoner, the justices of gaol delivery award a new panel, *ore tenus*, without any further process, returnable instant; and it is not the course to pray a tales (b).

The same power seems also to be vested in the justices of the King's Bench, as to indictments actually found in the county where it is holden, since they may issue a precept, returnable

(a) See also 2 Hale, 410.

(b) Post. 25. 64. 4 Harg. St. Tr. 744.

immediately before them (*a*). But in prosecutions in this court for misdemeanors, and when the proceedings were originally taken before another tribunal, and not in the county where the court sits, it is said that a writ of venire, or a particular precept, and then a non omittas distringas must be awarded (*b*). And all the process issued must be made out in the name of his majesty, under the seal of the court, and teste of the chief justice, and ought to bear date after the issue is joined between the king and the prisoner (*c*).

JURY PROCESS,
FORM OF,
IN GENERAL.

According to some opinions, justices of oyer and terminer have no power to award a panel by general precept, or before issue is joined between the crown and the defendant, but must issue a particular precept, in the nature of a writ of venire, after the defendant has pleaded (*d*). And it seems that justices of the peace must proceed by a similar process (*e*), though the contrary has been sometimes asserted (*f*). Under special commissions, the same forms of proceedings are used as before justices of gaol delivery (*g*). In all collateral issues, as of identity of person, a panel of jurors may be awarded ore tenus, returnable instant (*h*).

[509]

Where it is required that the jury should have a view of any place, the court, or any judge thereof in vacation, may order a rule to be drawn up, containing the usual terms, and also requiring, if thought fit, the party applying for the view to deposit, in the hands of the under sheriff, a sum of money, to be named in the rule, for payment of the expenses of the view; and com-

In case of
a view.

(*a*) 9 Co. Rep. 118, b. 2 Inst. 568. Co. Lit. 134, b. 2 Rol. Abr. 626. 2 Hale, 260. Hawk. b. 2. c. 41. s. 3. Bac. Abr. Juries, b. 4. Bac. Abr. Trial, I.

(*b*) Id. *ibid.* 4 Harg. St. Tr. 744, 5. Hawk. b. 2. c. 41. s. 3. See form of venire, *post*, last vol. 4 & 5 W. 3. c. 24. s. 15. 11 East, 509, 10. Burn, J. Jurors, III.

(*c*) 2 Hale, 260. Hawk. b. 2. c. 41. s. 2.

(*d*) 4 Harg. State Tr. 744. 2 Hale, 28. 260, 61. 410. Fost. 64. 4 Inst. 164. 2 Inst. 568. Cro. Car. 583. Hawk. b. 2. c. 41. s. 1. Bac. Abr. Trial, I. Bac. Abr. Juries, b. 1.

(*e*) Hawk. b. 2. c. 41. s. 1.
(*f*) Id. *ibid.* See form of precept, Burn, J. Riot, Rout, &c. *Post*, last vol.

(*g*) Cro. Car. 583. Fost. 64.

(*h*) Fost. 41. 1 Bla. Rep. 4.

JURY PROCESS,
FORM OF,
IN GENERAL.

manding special writs of *venire facias*, *distringas*, or *habeas cor-pora*, to issue, by which the sheriff, or other minister to whom the writs are directed, is to be commanded to have six or more of the jurors named in such writs, or in the panels thereto annexed (who must be mutually consented to by the parties; or, if they cannot agree, must be nominated by the sheriff, or such other minister as aforesaid), at the place in question, some convenient time before the trial, who is to have the place in question shewn to them by two persons named in the writs, to be appointed by the court or judge; and the said sheriff, or other minister, who is to execute any such writ, must, by a special return upon the same, certify, that the view has been had according to the command of the same; and must specify the names of the viewers (*a*).

When the pro-
cess may be joint
or several.

It seems to be generally agreed, that if several persons be indicted together for one crime, before any court whatever, the justices before whom the proceedings are taken, may either issue one *venire facias* for them all, or one for each respective individual, at their discretion (*b*). If they order a joint *venire*, and jurors be challenged by any one of the defendants, they must be withdrawn as to all of them, because, as there is but one panel, the same person cannot both be withdrawn and continue (*c*). But it seems that justices of gaol delivery may afterwards sever the panel, if the prisoners challenge more than are returned upon the *venire*, and there are not sufficient persons to be procured who are qualified to serve on the jury (*d*). But it does not appear that any other justices are invested with the same authority (*e*); and it seems that, in case of an appeal, after the appellor has once issued joint process, he cannot procure several writs to be awarded, even though the first was never returned, because such an alteration would amount to a discontinuance, and totally retard the proceedings (*f*). It is, therefore, in general, better to

(*a*) 6 Geo. 4. c. 50. s. 23.

(*b*) Sir W. Jones, 425. Cro.
Car. 531. 2 Hale, 263. Hawk.
b. 2. c. 41. s. 3.

(*c*) Dyer, 246, b. Plowd.
100. Moor, 13. Co. Lit. 156, b.
Kel. 9. 2 Hale, 263. Hawk.

b. 2. c. 41. s. 9.

(*d*) Plowd. 100. 2 Hale, 264.
Kel. 9. Hawk. b. 2. c. 41. s. 9.

(*e*) Plowd. 100. 2 Hale, 263,
264. Hawk. b. 2. c. 41. s. 9.

(*f*) 3 Co. Rep. 66. Hawk.
b. 2. c. 41. s. 9.

make several writs of *venire facias*, by which any possible delay may be effectually prevented (*a*).

In civil actions and appeals, when the plaintiff neglects to try an issue at the next assizes, after it is joined in the county, or in the ensuing term in London, the defendant, in order to bring it on, may obtain process by *proviso*; that is, a writ of *venire*, with a clause, that if two writs come to the sheriff, he shall execute only that one which is returned by the plaintiff (*b*). But, wherever the crown is substantially the prosecutor, this mode of suing out process can never be adopted, because no laches is ever imputable to the crown; and, therefore, none of the rules which may be found on this subject apply to indictments, or any other description of criminal proceedings, when actually prosecuted by the crown, though they do apply to all other indictments and informations at the instance of a private prosecutor (*c*). But in indictments for treason or felony, if the attorney-general delays the trial, the court of King's Bench may give the defendant leave to bring it on, as they see fit. So in indictments for misdemeanors, the defendant may, in the first instance, by the consent of the prosecutor, and leave of the attorney-general, carry down the cause to trial; but it will not be allowed by surprise on the attorney-general, nor without the consent of the prosecutor, or some default on his part. And it is a rule, that when an indictment is removed into the King's Bench by the prosecutor, the defendant shall not carry it down to trial until the prosecutor has made default, or by leave of the court on motion (*d*).

When process may be awarded with a proviso.

When the sheriff receives the precept or writ from the justices of gaol delivery, previous to the assizes, he issues his warrants, directed to the bailiffs, six (*e*) days before the judges arrive, and

Of the mode in which the process is to be executed, and the attendance of jurors compelled.

(*a*) 2 Hale, 263.

(*b*) Keilw. 176. Cro. Car. 484. 2 Dyer, 215, b. 2 Rol. Abr. 666. Hawk. b. 2. c. 41. s. 10. Bac. Abr. Juries, b. 7.

(*c*) 2 East, 202. 207. 7 T. R. 661. 2 Ld. Raym. 1082. 2 Salk. 652. 6 Mod. 246. 1 Keb. 195. 2 Leon. 110. Willes, 535. 1 T. R. 696. Hawk. b. 2. c. 41. s. 10. Bac. Ab. Juries, b. 7. Tidd, 8th

edit. 820, 821.

(*d*) Id. *ibid*. Tidd, 821. 2 Salk. 652, 53. 2 East, 209, n. b.

(*e*) *Quære*, if not *ten* days, except in London and Middlesex. There is no express provision to this effect in the 6 Geo. 4; but as, by section 25, the jurors must be summoned ten days before the required day of attendance, this would be implied.

MODE
OF EXECUTING
PROCESS.

petit constables within his county, commanding them to summon the jurors, and reciting the precept of the justices, or writ of venire (*a*). In the first week in July, the clerk of the peace is to issue a warrant, directed to the high constable, commanding him to issue precepts to all the churchwardens and overseers, requiring them to make out, before the 1st of September then next, a list of the men qualified to act as jurors, annexing printed forms of the precepts and returns (*b*), in order the better to enable the sheriff to make his return to the venire (*c*). The high constable is then to issue his precepts to the churchwardens and overseers to make out the jury lists (*d*). Upon this the churchwardens and overseers are to make out the lists in a particular mode (*e*); and having made them out, are to fix the same, on the three first Sundays in September, on the principal church doors, having first subjoined thereto a notice, stating, that all objections to the list will be heard by justices at the place therein named; and they are to keep the list, or a copy of it, for inspection (*f*). But these regulations for procuring lists do not extend to liberties, cities, and boroughs, which are to remain as before (*g*).

By the 25th section of the 6 Geo. 4. c. 50, the summons of every juror, not being a special juror, must be made by the proper officer ten days at the least before the day on which the juror is to attend, by shewing to the man to be summoned, or in case he shall be absent from the usual place of his abode, by leaving with some person there inhabiting a note in writing, under the hand of the sheriff, or other proper officer, containing the substance of such summons; and the summons of every man to serve on *special juries*, in any of the courts aforesaid, shall be made by the like persons, and in the like manner as aforesaid, three days at the least before the day on which the special juror is to attend; but no longer time is required for summoning jurors in London or Middlesex (*h*), than before the passing the act; and no longer

(*a*) 42 Ed. 3. c. 11. 6 Hen. 6. c. 2, repealed by 6 Geo. 4. c. 50. Cro. C. C. 4. See forms of warrants, post, last vol.

(*b*) See form on 3 & 4 Ann. c. 18. s. 5. Burn, J. Jurors, VI. Post, last vol.

(*c*) 6 Geo. 4. c. 50, s. 4, 5.

(*d*) 6 Geo. 4. c. 50. s. 6.

(*e*) Id. s. 8.

(*f*) Id. s. 9.

(*g*) 6 Geo. 4. c. 50. s. 50.

(*h*) *Quære*, if not six days.

time is given for the return of any writ of *venire facias*, *habeas corpora*, or *distringas*, than was before the passing of the act required. This summons need not be signed by the sheriff by whom it is issued (*a*).

The time for the return of the process differs according to the various courts from which it is awarded. In the King's Bench, the process may be returnable immediately, upon an indictment found in the county where the court sits, whether the crime were actually committed there, or having taken place without the realm, is made triable there by some particular legislative provision (*b*). But where the proceedings are removed by *certiorari* from some inferior tribunal, the space of fifteen days must be suffered to elapse before the return, from the time of which the process is dated (*c*). The justices of gaol delivery may also issue process at common law, returnable on the day in which it is awarded (*d*). And the commissioners of oyer and terminer, it seems, might do so, though some contend, that if invested with power under that commission only, they must allow fifteen days between the date and the return (*e*). But justices of the peace, except in case of felony, or where the party is in prison, or consents to waive the formality, cannot, it seems, issue the *venire returnable* in a shorter time (*f*); though, in those excepted cases, they may, and commonly do try, within a more limited period (*g*). When indictments removed by *certiorari* are sent down into the proper county to be tried, they are determined on the *nisi prius* side, and the process upon them is the same as if they were, in all respects,

When the process must be returnable.

[513]

(*a*) 2 East, 366, 7.

(*b*) 9 Co. Rep. 118, b. 2 Inst. 568. Co. Lit. 134, b. 2 Rol. Abr. 626. 2 Hale, 260. Hawk. b. 2. c. 41. s. 3. Bac. Abr. Juries, b. 4. Bac. Abr. Trial, I.

(*c*) Id. *ibid*.

(*d*) 4 Inst. 164. 2 Inst. 568. Cro. Car. 315. Fost. 63, 64. 2 Hale, 28, 261. Hawk. b. 2. c. 41. s. 4. Bac. Abr. Juries, b. 1. Bac. Abr. Trial, I.

(*e*) 2 Keb. 212. 292. 1 Keb. 433. 2 Inst. 568. 2 Rol. Abr. 96. 1 Sid. 334. Cro. Car. 340.

583. 1 Hale, 28. Hawk. b. 2. c. 41. s. 4, acc.; but see 2 Rol. Abr. 625. Keilw. 159. Bac. Abr. Trial, I.

(*f*) Keilw. 159. 2 Roll. Abr. 625. Sir W. Jones, 379. 1 Keb. 433. 2 Keb. 212. Cro. Car. 438. 448. 340. 1 Sid. 99. 335. Hawk. b. 2. c. 41. s. 4, acc.; but see 2 Inst. 568. 4 Inst. 164. Cro. Jac. 404. Hawk. b. 2. c. 41. s. 1, *contra*.

(*g*) 1 Sid. 335. Cro. Car. 340. 2 Roll. Abr. 96. 1 Keb. 443. Hawk. b. 2. c. 41. s. 1.

RETURN
OF PROCESS.

mere civil proceedings (*a*). Upon special commissions, the return of the process is equally speedy with that which the justices of gaol delivery are empowered to allow (*b*).

The law on this subject has been, however, in some degree modified by the 6 Geo. 4. c. 50. s. 25, which, as we have just before seen, requires the petty jurors to be summoned ten days before the day of attendance, except in London and Middlesex (*c*).

[514] If, therefore, justices of oyer and terminer, and the peace, have any strict legal right at common law, in any case, to award process returnable instant, it seems that they are restrained by this act to the period of ten days, which it specifies (*d*). Before the former description of justices, if the venire be made returnable on a future day, they must not only adjourn to that day, but enter the adjournment on the record, for the whole sessions are only, in contemplation of law, one day, and therefore, when that is past, their authority to try will determine (*e*). But it is agreed, that they may make it returnable at the next assizes (*f*), and then, it should seem, try it by virtue of the statute (*g*).

If there be an intervening day between the return of the venire and the date of the distringas, it will be a discontinuance, and erroneous (*h*); but fresh process may be issued (*i*).

To whom the
process should
be directed,
and by whom
returned.

The process should, in general, be directed to the sheriff, and executed and returned by the same officer (*k*). But where the sheriff is either an actual party, or is so nearly related to the prosecutor or defendant as that he cannot be presumed impartial, the process is to be directed to the coroners, or to such of them as

(*a*) 4 Bla. Com. 309, n. 3.

(*b*) Cro. Car. 583. Fost. 64.

(*c*) Ante, 511. — *Quere*, in London and Middlesex six days only.

(*d*) Hawk. b. 2. c. 41. s. 5. Bac. Abr. Juries, b. 4.

(*e*) 2 Keb. 284. 292. 718. 354. 1 Sid. 348. 2 Hale, 261. Hawk. b. 2. c. 41. s. 6. Bac. Abr. Juries, b. 4.

(*f*) Cro. Car. 340. 2 Keb.

284. 718. 354. Hawk. b. 2. c. 41. s. 6. Bac. Abr. Juries, b. 4.

(*g*) 1 Edw. 6. c. 7. Hawk. b. 2. c. 41. s. 6. Bac. Abr. Juries, b. 4.

(*h*) 1 Salk. 51. 2 Ld. Raym. 1061.

(*i*) Hawk. b. 2. c. 27. s. 104. Stark. 278.

(*k*) Co. Lit. 153, a. Bac. Abr. Juries, b. 3. Bro. Abr. Challenge, 153.

may be presumed free from bias; and if none of them can be regarded as proper, then to two elisors, named by the court, and to whom, for that reason, no objection can be admitted to prevail (*a*). And in a case where the panel of tales was granted in a special jury case, on the ground of interest in the sheriff, it was held that a venire facias was properly awarded to the coroner, although two of the special jurymen appeared, and were sworn on the former occasion (*b*). But if there be two sheriffs for one county, and one of them be partial, the writ must be directed to the other, and not remitted to the coroners, who are only employed when there is a total inability in the superior officers, which cannot be the case when there is one impartial sheriff (*c*). So if the under sheriff be a party concerned, the writ may be directed to the high sheriff, with a proviso, that the former shall not interfere in its execution (*d*).

When once process is awarded to the coroners, on the ground of the sheriff's actual partiality, it cannot afterwards be awarded to his successor, because the entry is "vice comes se non intro-mittat;" but when it is sent to the inferior officers, on any other ground, as that he was tenant to one of the parties, it may be transferred to the new sheriff, because no such entry appears on the proceedings (*e*). If the defendant object to the sheriff on any ground whatever, he must do so by challenge before the trial, for he can take no advantage of any objection of that kind in arrest of judgment (*f*).

To the general precept issued to summon jurors on a commission of gaol delivery, the sheriff makes no formal return, but the return to it is by a panel or panels, the title of which does not name any particular prisoner (*g*). The sheriff must personally make a return to the process, and show that he complied with its

Of the form of
the return to
the process.

(*a*) *Id. ibid.* 1 Leach, 101. Hawk. b. 2. c. 9. s. 45. See form, post, last vol.; and Tidd's Appendix.

(*b*) 2 B. & C. 105.

(*c*) 1 Salk. 152. Carth. 214. 4 Mod. 65. 1 Show. P. C. 327. 12 Mod. 22. Holt, 166. Comb.

191. Bac. Abr. Juries, b. 3.

(*d*) Bac. Abr. Juries, b. 3.

(*e*) Co. Lit. 153, a. 2 Roll. Abr. 670. Bac. Abr. Juries, b. 3, 4.

(*f*) 1 Leach, 101.

(*g*) 4 Harg. St. Tr. 745.

FORM OF
RETURN TO
PROCESS.

[516]

requisitions, for he cannot return *mandavi ballivo*, as he may in some cases of appeal, because the writ is always “*non omittas propter aliquam libertatem*,” and in the name and behalf of his majesty (*a*). But if the sheriff make a due return, it will be no material error if his name should not appear indorsed on the back of the *venire*, but, if an objection be taken on that account, it may be amended (*b*).

Of the necessity
of returning a
panel into court.

[517]

By the 6 Geo 4. c. 50. s. 15, it is enacted, that every sheriff, or other minister, to whom the return of juries for the *trial of issues* before any court of assize, at *nisi prius*, in any court of England, except the counties palatine, may belong, shall upon his return of every writ of *venire facias* (unless in causes intended to be tried at bar, or in cases where a special jury shall be struck, by order or rule of court,) annex a panel to the said writ, containing the names, alphabetically arranged, together with the places of abode, and additions, of a competent number of jurors, named in the jurors'-book; and that the names of the same jurors shall be inserted in the panel annexed to every *venire facias*, for the trial of all issues at the same assizes or sessions of *nisi prius*, in each respective county. In this provision, criminal, as well as civil issues, and jurors returned on a *tales*, as well as on the original panel, it should seem, are included (*c*). A general description of the street in which a jurymen resides, although there are several of the same denomination, will, it should seem, be regarded as sufficiently explicit (*d*). An affidavit to ground a motion to set aside the panel, on the ground of misdescriptions of the additions of the jury, should expressly negative the additions stated (*e*). When the sheriff, by virtue of the general precept, before a trial on a commission of *gaol delivery*, returns a general panel or panels, the same is entitled generally “names of jurors to try for our Lord the King,” or “names of jurors to try between our Lord the King and the prisoners at the bar,” without naming any of the prisoners; and when for the trial of a particular prisoner, or several prisoners, with whom it is thought fit to charge the same

(*a*) 2 Hale, 264. See form of return, post, last vol. Bac. Abr. Juries, b. 3.

(*d*) 6 T. R. 531.

(*b*) Cro. Jac. 527, 8.

(*e*) 1 Chit. Rep. 85.

(*c*) Hawk. b. 2. c. 41. s. 21.

jury, a jury is about to be taken out of any panel, the clerk, as he goes along, may take a note upon paper of the name of every one that is sworn; or he may, and usually does write, "sworn," on the panel against the name of every one that is sworn; but this is no part of the record, and the clerk may trust to his memory, and not write the names of the jurors until they are all sworn, when he is to enter them on the record of the indictment (*a*). A copy of the panel is to be kept in the sheriff's office, for the inspection of parties, and their attornies (*b*).

RETURNING
PANEL INTO
COURT.

Where a jury have had a view, those who appear on the jury to try the issue, are to be first sworn on the jury (*c*).

On trials before other justices than those of *nisi prius*, the prisoner has no right to demand a copy of the panel, unless he be entitled to it by some express legislative provision (*d*). Thus by the 6 Geo. 4. c. 50. s. 21, when any person is indicted for high treason, or misprision of treason, in any court other than the court of King's Bench, a list of the petit jury, mentioning the names, profession, and place of abode of the jurors, shall be given at the same time, that the copy of the indictment is delivered to the party indicted, which shall be ten days before the arraignment, and in the presence of two or more credible witnesses; and when any person is indicted for high treason, or misprision of treason, in the court of King's Bench, a copy of the indictment shall be delivered within the time, and in the manner aforesaid; but the list of the petit jury, made out as aforesaid, may be delivered to the party indicted at any time after the arraignment, so as the same be delivered ten days before the day of trial: Provided always, that nothing herein contained shall anyways extend to any indictment for high treason, in compassing and imagining the death of the king, or for misprision of such treason, where the overt act, or overt acts of such treason alleged in the indictment, shall be assassination or killing of the king, or any direct attempt

When defendant
may have a copy
of panel.

(*a*) 4 Harg. St. Tr. 745.

(*b*) 6 Geo. 4. c. 50. s. 19.

(*c*) 6 Geo. 4. c. 50. s. 24.

(*d*) 2 St. Tr. 762. 3 St. Tr.

366, 7. 4 St. Tr. 6. Hawk. b. 2.

c. 41. s. 22. Bac. Abr. Juries,

b. 8.

WHEN
DEFENDANT
MAY HAVE A
COPY OF PANEL.

against his life, or any direct attempt against his person, whereby his life may be endangered, or his person may suffer bodily harm; or to any indictment of high treason for counterfeiting his majesty's coin, the great seal or privy seal, his sign manual or privy signet; or to any indictment of high treason, or to any proceedings thereupon, against any offender or offenders, who by any act or acts now in force, is and are to be indicted, arraigned, tried and convicted by such like evidence, and in such manner as is used and allowed against offenders for counterfeiting his majesty's coin." We have just seen, that a general description of the street in which a juryman resides, although there are several of the same denomination, will be regarded as sufficiently explicit (*a*). It will be sufficient, within the intent of the statute, to deliver to the defendant a copy of the panel arrayed by the sheriff, before it is returned into court, if the same be afterwards returned without alteration (*b*); and in order to enable the prosecutor to do this, he may move for a rule upon the sheriff, to give him a list of the persons whom he intends to return upon the panel, which will be sufficient if duly delivered to the prisoner (*c*).

What is to be
done when suf-
ficient jurors do
not appear.

If on the return of the venire, a sufficient number of jurors do not appear to be sworn, the first consideration which arises, is how the deficiency is to be supplied; the next, to what penalties the parties are subject for not appearing.

On the trial of an indictment under the commission of gaol delivery, we have seen that there is no tales, but if the panel is exhausted by non-appearance or challenge of the jurors, there must be a new panel, and the jurors, before sworn, are not reckoned in the number (*d*); and on the trial of an indictment under a commission of oyer and terminer, it should seem that a fresh panel should also be chosen (*e*). But it is said, that where the trial is under a particular writ of venire facias, in order to procure a jury, if some of those impaneled appear, but not a

(*a*) 6 T. R. 531.

(*b*) 4 St. Tr. 166. Hawk. b. 2.
c. 41. s. 23. Bac. Abr. Juries,
b. 8.

(*c*) 1 Dougl. 591. Hawk. b. 2.

c. 39. s. 16.

(*d*) 4 Harg. St. Tr. 744, 5.

(*e*) Id. *ibid*.

sufficient number, a *distringas juratores* issues, accompanied by a writ of tales, but if all of them make default, the former alone is awarded without the latter (a).

WHAT TO BE
DONE WHEN
SUFFICIENT
JURORS DO NOT
APPEAR.

The tales is the mode by which, if a full jury do not appear, or be reduced below the number by challenge, death, or otherwise, the judges may, on the application of either party, command the sheriff to appoint *so many* sufficient persons present as will complete the number, and whose names are to be annexed to the panel (b). Thus, by the 6 Geo. 4. c. 50. s. 37, it is enacted, that where a full jury shall not appear before any court of assize or nisi prius, or before any of the superior civil courts of the three counties Palatine, or before any court of great sessions, or where, after appearance of a full jury, by challenge of any of the parties, the jury is likely to remain untaken, for default of jurors, every such court, upon request made for the king, by any one thereto authorized or assigned by the court, or on request made by the parties, plaintiff or demandant, defendant or tenant, or their respective attornies, in any action or suit, whether popular or private, shall command the sheriff, or other minister to whom the making of the return shall belong, to name and appoint, as often as need shall require, so many of such other able men of the county there present, as shall make up a full jury; and the sheriff, or other minister aforesaid, shall, at such command of the court, return such men, duly qualified, as shall be present, or can be found to serve on such jury, and shall add and annex their names to the former panel: Provided, that where a special jury shall have been struck for the trial of any issue, the talesmen shall be such as shall be impaneled upon the common jury panel, to serve at the same court, if a sufficient number of men can be found; and the king, by any one so authorized or assigned as aforesaid, and all and every the parties aforesaid, shall and may, in each of the cases aforesaid, have their respective challenges to the jurors so added and annexed; and the court shall proceed to the trial of every such issue, with those jurors who were before impaneled, together with the talesmen so newly added and

(a) 2 Hale, 265. 4 Harg. St. Tr. 745. See forms, 3 Ld. Raym. 20, 21, 23, *sed quere*. (b) 5 T. R. 458. Williams, J. Juries, IV. 3 Bla. Com. 364.

WHAT TO BE
DONE WHEN
SUFFICIENT
JURORS DO NOT
APPEAR.

annexed, as if all the said jurors had been returned upon the writ or precept awarded to try the issue. A tales alone cannot, it should seem, under this statute, be granted on the return of the venire, but only after a habeas corpora or distringas (*a*). This writ, by its very name, signifies a returning *so many* as will make up the full complement; and, therefore, it is not granted where there is a total default, but only where the number is deficient (*b*). And if the juror was not present when his name was called, but appear before his default is recorded, and a tales sworn, he will be sworn (*c*). But if one juror only appear, and he be challenged, a tales may yet be granted, and twelve new jurors may thus ultimately be returned to try the defendant (*d*). Upon an award of tales at nisi prius, it is not necessary that the tales should be selected out of persons accidentally present; they may be selected out of persons, whose presence the sheriff or coroner has taken previous means to obtain (*e*).

This mode of filling up the jury may be resorted to, as will be seen from the above enactment, either by the prosecutor, or the party indicted (*f*); but it seems that the latter cannot pray it until after the default of the former (*g*); and neither party can demand it without the consent of the attorney-general; though it is otherwise in actions upon penal statutes, because of the individual interest that the plaintiff possesses in the event of the proceedings (*h*). It is usual, therefore, when an indictment removed into the King's Bench is carried down to trial, to obtain a warrant for a tales.

In capital cases, the tales may be granted for a larger number than the original process, in order to prevent the delays which

(*a*) 2 *Ld. Raym.* 1170. *Cro. Eliz.* 502. 2 *Rol. Abr.* 671. *Hawk. b. 2. c. 41. s. 15.* 4 *Harg. St. Tr.* 743.

(*b*) 10 *Co. Rep.* 104. 2 *Hale*, 265, 6. *Finch*, 414. *Hawk. b. 2. c. 41. s. 14.*

(*c*) 4 *Harg. St. Tr.* 740.

(*d*) 10 *Co. Rep.* 104. *Bac. Abr. Juries, C. setl quere.*

(*e*) 2 *B. & C.* 105.

(*f*) 3 *Bla. Com.* 364.

(*g*) 10 *Co. Rep.* 104. *Cro. Car.* 484. 2 *Rol. Abr.* 671. *Bac. Abr. Juries, C.*

(*h*) 3 *Salk.* 339. 1 *Lev.* 223. 6 *Mod.* 246. *Hawk. b. 2. c. 41. s. 18.* *Williams, J. Juries, IV.* See form of warrant of attorney-general for a tales, *Hand's Prac.* 418. *Post*, last vol.

may arise from peremptory challenges (*a*); but, in all other cases of decem tales or octo tales at common law, the number must be less than that which was originally awarded (*b*), though this does not apply to the case of a tales de circumstantibus under the statute, which allows "so many to be chosen as shall make up a full jury (*c*)."¹ In all cases, however, after the issuing of the first tales, every subsequent order of the same kind to complete the jury must be for a less number than that by which it was preceded (*d*), except where the former tales was quashed, and then the next may be for the same number (*e*).

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Those who are returned to serve upon the tales must have the same qualifications as in other cases. The prisoner has the same power of objecting to them as he has to the original panel, if he has any ground of so doing, or without alleging any, until his number of challenges is exhausted (*f*). But if the principal array be quashed upon a challenge for favor, this will not affect the tales, but the trial will proceed before those returned, if there be a sufficient number; and, if not, then a new tales will be awarded, to complete them (*g*). The same person, however, who has been challenged on the original panel, cannot afterwards be sworn on the tales; and if that should be done, a new trial will be granted (*h*).

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The writ of tales is grantable not only when a sufficient number of jurors do not appear, but when so many are challenged by either party, that a sufficient number is not left to try the issue (*i*). It may be granted by the court of King's Bench, on an indict-

(*a*) 2 Dyer, 213, b. 10 Co. Rep. 104. b. 1 Bulst. 121. 2 Hale, 266. Bac. Abr. Juries, C. Hawk. b. 2. c. 41. s. 12.

(*b*) 2 Hale, 266. Finch, 414. 10 Co. Rep. 105. Hawk. b. 2. c. 41. s. 12. Bac. Abr. Juries, C.

(*c*) 6 Geo. 4. c. 50. s. 37. 10 Co. Rep. 105. Cro. Jac. 316. Hawk. b. 2. c. 41. s. 12.

(*d*) 10 Co. Rep. 410. 2 Hale, 266. Hawk. b. 2. c. 41. s. 13. Bac. Abr. Juries, C.

(*e*) 2 Hale, 266. Keilw. 176. Hawk. b. 2. c. 41. s. 13. Bac. Abr. Juries, C.

(*f*) 6 Geo. 4. c. 50. s. 37. Burn, J. Jurors, III. Williams, J. Jurors, IV.

(*g*) 10 Co. Rep. 104. 2 Dyer, 245. Hawk. b. 2. c. 41. s. 14. Bac. Abr. Juries, C.

(*h*) 2 Ld. Raym. 1410. 1 Stra. 640. Bac. Abr. Juries, C.

(*i*) 2 Hale, 266. 3 Bla. Com. 364.

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ment brought up by certiorari from some inferior jurisdiction, as well as on one taken originally before the tribunal; but, in the latter case, the writ may be made returnable immediately, or on the day following; but, in the former case, fifteen days must intervene between the teste and the return, as in the original *venire facias* (a). So also justices of oyer and terminer have power to grant it returnable before them on the day upon which it was granted (b). But the tales is seldom used before justices of gaol delivery; and doubts have existed as to their power to award it, because they may always order a larger panel without any writ but that general precept, by which they command the sheriff to have a sufficient number of jurymen ready, for the purposes of justice, at the assizes (c).

Distringas, and
habeas corpora.

If, on the return of the tales, the persons summoned do not appear, a *distringas* and a *habeas corpora*, with command to add so many more to those summoned on the *venire*, is the first process against them (d). In these writs it is not requisite to insert the names of all the jurors contained in the panel, but it is sufficient to insert in the mandatory part of such writs respectively, "the bodies of the several persons in the panel to this writ annexed named," or words of the like import, and to annex to such writs respectively panels, containing the same names as were returned in the panel to the *venire facias*, with their places of abode, and additions.

With respect to the *qualifications*, and exemptions, and the mode of returning *lists* of special jurymen, by the 31st section of the 6 Geo. 4. c. 50, it is enacted, that every man who shall be described in the jurors'-book for any county in England or Wales, or for the county of the city of London, as an esquire, or person of higher degree, or as a banker or merchant, shall be qualified and liable to serve on special juries in every such county in England and Wales, and in London respectively; and the sheriff of every county in England and Wales, or his under sheriff, and

(a) 2 Hale, 266.

(b) 2 Hale, 266.

(c) 3 Salk. 338, 9. 2 Hale, 266. acc.; sed vide Plowd. 100,

contra. Bac. Abr. Juries, C.

(d) 2 Rol. Abr. 793. Bac. Abr. Juries, C.

DISTRINGAS,
AND HABEAS
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the sheriffs of London, or their secondary, shall, within ten days after the delivery of the jurors'-book for the current year to either of them, take from such book the names of all men who shall be described therein as esquires, or persons of higher degree, or as bankers or merchants, and shall respectively cause the names of all such men to be fairly and truly copied out, in alphabetical order, together with their respective places of abode and additions in a separate list, to be subjoined to the jurors'-book, which list shall be called "The Special Jurors List," and shall prefix to every name in such list its proper number, beginning the numbers from the first name, and continuing them, in a regular arithmetical series, down to the last name; and shall cause the said several numbers to be written upon distinct pieces of parchment or card, being all as nearly as may be of equal size, and after all the said numbers shall have been so written, shall put the same together in a separate drawer or box, and shall there safely keep the same, to be used for the purpose hereinafter mentioned.

By the 33d section, the court may discharge any man, who has served as a special juror once during the same assizes.

When the special jury is granted by the court, the officer is to appoint a time and place for the nomination of such special jury; and a copy of the rule of court (*a*), and of such officer's appointment, is to be served on the under sheriff, of the county in England or Wales, in which the trial is to be had, or on the secondary of the city of London, if the trial is to be had there, and also on all the parties who have usually been served with the same respectively, in the accustomed manner; and the said officer, at the time and place appointed, being attended by such under sheriff or secondary, or his agent, who is required to bring with them the jurors'-book, and such special jurors' list, and all the numbers so written on distinct pieces of parchment or card as aforesaid, is, shall, in the presence of all the parties, in any of the cases aforesaid, and of their attornies (if they respectively choose to attend, or if the said parties, or their attornies, all or any of them, do not attend, then, in their absence) to put all the said numbers

(*a*) See form, post, last vol.

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in a box, to be provided by him for that purpose, and after having shaken them together, he is to draw out of the said box forty-eight of the said numbers, one after another, and is, as each number is drawn, to refer to the corresponding number in the special jurors' list, and read aloud the name designated by such number; and if, at the time of so reading any name, either party, or his attorney, objects that the man whose name has been so referred to is in any manner incapacitated from serving on the said jury, and also then and there proves the same, to the satisfaction of the said officer, such name is to be set aside, and the said officer is, instead thereof, to draw out of the said box another number, and is, in like manner to refer to the corresponding number in the said list, and read aloud the name designated thereby; which name may be, in like manner, set aside, and other numbers and names is, in every such case, to be resorted to, according to the mode of proceeding as before described, for the purpose of supplying names in the places of those set aside, until the whole number of forty-eight names, not liable to be set aside, is completed; and if, in any case, it happens that the whole number of forty-eight names cannot be obtained from the special jurors list, in such case the said officer is fairly and indifferently to take, according to the mode of nomination heretofore pursued in nominating special juries, such a number of names from the general jurors' book, in addition to those already taken from the special jurors' list, as is required to make up the full number of forty-eight names; all and every of which forty-eight names is, in such case, to be equally deemed and taken to be those of special jurors; and the said officer is afterwards to make out for each party a list of the forty-eight names, together with their respective places of abode and additions, and after having made out such list, shall return all the numbers so drawn out, together with all the numbers remaining undrawn, to such under sheriff or secondary, or his agent, to be, by such under sheriff or secondary, safely and securely kept for future use; and all the subsequent proceedings for reducing the said list, and all other matters whatsoever relating to special juries, are to remain and continue in force as heretofore, except where the same, or any part thereof, is expressly altered by the act; and all the fees, heretofore payable on the striking of special juries, are to continue to be paid in the accustomed manner.

The other consideration on the default of jurors, is the penalty Punishment for default of jurors. with which their neglect is to be visited. By the common law, jurors returned, and not appearing, are to forfeit the issues returned upon them; and those who attend, may be ordered to inquire the yearly value of the defaulters' lands; upon which the court may fine them to the amount returned, or any less sum, in discretion, if the party pray it. But if the juror appear, and afterwards make default, he will lose the annual profits of his estate, or be fined by the court, without any prayer from the party indicting. He is said, however, not to be amerceable at all on the return to the first venire, unless before justices at the assizes (a). And by the 6 Geo. 4. c. 50. s. 38, if any man, having been duly summoned to attend on any kind of jury in any of the courts in England or Wales, thereinbefore mentioned, shall not attend in pursuance of such summons, or being thrice called shall not answer to his name; or if any such man, or any talesman, after having been called, shall be present, but not appear, or after his appearance shall wilfully withdraw himself from the presence of the court, the court shall set such fine upon every such man or talesman so making default (unless some reasonable excuse shall be proved by oath or affidavit), as the court shall think meet: Provided always, that where any viewer, having been duly summoned to attend on any jury, shall make default as aforesaid, the court is hereby authorized and required to set upon such viewer (unless some reasonable excuse shall be proved as aforesaid) a fine to the amount of £10, at the least, and as much more as the court, under the circumstances of the particular case, shall think proper. By the 54th section, persons summoned to serve on juries in the inferior courts of the city of London, or in any liberty, franchise, city, borough, or town, not attending after being called, &c. as therein mentioned, may be fined not more than 40s., nor less than 20s., unless the court be satisfied with the cause of his absence; and the fine may be levied by distress and sale.

Such is the mode of obtaining, compelling, and selecting a Of special juries*. common jury. But it frequently happens, in important cases of

(a) Rast. Ent. 267. 2 Hale, Bac. Abr. Juries, b. 2. Burn, J. 309. Hawk. b. 2. c. 22. s. 14. Jurors, III.

* Hand's Prac. 9, 10; and see Tidd, as to the practice in civil cases.

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misdeameanor, that one of the parties is desirous of having the issue determined by a special jury: This can never be done in cases of felony or treason, but only upon the trial of less serious offences (*a*); and it can only be obtained when the prosecution is depending in the court of King's Bench, or either of the three counties palatine, or the great sessions in Wales, which we have seen may be one of the reasons for removing a prosecution for a misdeameanor from an inferior tribunal (*b*). It is said, that it may be granted upon a trial at bar without the consent of the parties; but this can never be done at nisi prius, unless some good cause can be shown, as the notorious partiality of the sheriff (*c*). But the 6 Geo. 4. c. 50. s. 30, seems to have finally determined upon whose motion it may be granted. By that statute, the courts at Westminster, or the judges of the courts of the three counties palatine, or the courts of great sessions in Wales, are authorized, in any case whatsoever, except in indictments for treason or felony, upon the motion of either party, to order the issue actually joined before them to be tried by a special jury.

[523] Before the passing of this statute, the mode of chusing special jurymen was as follows:—The sheriff attended the coroner and attorney of the court with the freeholders' book of the county, and the said coroner and attorney, in the presence of both parties, nominated forty-eight free and lawful men out of the said book, on which the agent for the prosecutor struck out twelve, and the agent for the defendant struck out another twelve, and the remaining twenty-four were returned for the trial of the issue (*d*). The coroner, in striking a special jury, was not bound to take the jurors as they occurred in the sheriff's books, but was to make a selection; and where he had made such selection impartially, the court refused to cancel a list of the persons selected (*e*). A time for the attendance was appointed by the proper officer, and notice

(*a*) 6 Geo. 4. c. 50. s. 30.
Sir Tho. Jones, 222. Vin. Abr.
Trial, D. c. 2. Bac. Abr. Juries,
D. Burn, J. Jurors, III. Wil-
liams, J. Juries, IV.

(*b*) Ante, 372. 5 T. R. 626.

(*c*) 8 Mod. 248. Bac. Abr.
Juries, C.

(*d*) 3 Geo. 2. c. 25. s. 15.
1 Chit. Rep. 35, n. 1 B. & A.
193. Bac. Abr. Juries, D. Bul.
Ni. Pri. 304. See observations
on this practice, 11 Harg. St.
Tr. 272.

(*e*) 1 B. & A. 193.

was given to the respective agents to attend ; and if either party neglected to be present, the course was, for the master to strike twelve, for the person who had no one there on his behalf to comply with the regulations of the practice (*a*). This rested altogether with the proper officers, and the court would not interfere for their direction (*b*). It was not, indeed, usual for the motion to come at all into court ; but the usual practice was, for the solicitor of the applicant to draw up a motion paper for the rule, signed by counsel, procure the master's appointment for the time of naming the jury, and serve copies of both on the adverse party's clerk in court, and at the sheriff's office, so that the one might send the books, and the other attend to strike for his client at the day appointed by the master (*c*). By the 6 Geo. 4. c. 50. s. 33, the parties may, by consent, have a special jury struck according to this ancient mode ; and by the 36th section, the mode of striking special juries in any county of a city or town, except in London, is to remain as theretofore.

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By the 33d section of the same act, the same special jury may, by consent of the parties, or their attornies, in writing, try any number of causes.

We have already seen the time requisite to summon special jurors (*d*).

If, after a special jury has been struck, the trial goes off for want of jurors, no new jury can be struck, but the issue must be ultimately tried by the jury who were first appointed, or as many of them as may appear, with the addition of talesmen (*e*) ; no new venire issues, but an alias distringas, and upon that the continuance is entered (*f*). Where upon the trial of an information for a libel only ten special jurymen appeared, and two talesmen were sworn on the jury, it was held no ground for a new trial that

(*a*) Rep. temp. Hardw. 158.
1 Salk. 405. Bul. N. P. 304, 5.
1 Cowp. 412. Bac. Abr. Juries,
E. Burn, J. Jurors, III. Wil-
liams, J. Juries, IV. Hand's
Prac. 10.

(*b*) 1 Cowp. 412.

(*c*) Hand's Prac. 10. See the
practice in civil cases, Tidd, 797
to 801.

(*d*) Ante, 511, 12.

(*e*) 5 T. R. 453.

(*f*) 5 T. R. 457.

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the two of the non-attending special jurymen named in the panel had not been summoned, though this fact was not known to the defendant until after he had been tried (*a*). Before the passing of the 6 Geo. 4, which takes away the right of challenge for want of hundredors, after a rule for a special jury by consent, no such challenge could be allowed, if the defendant, on striking the special jury, excluded any who were of that description, but an attachment might have issued against him (*b*). But where the sheriff was a party interested in the event, and there appeared to have been no unfairness on the part of the defendant, the right to challenge was not taken away, because the jury returned was special (*c*). If a rule be made for a special jury, and the parties proceed to trial before a common jury, the verdict cannot afterwards be impeached, for the defendant must either make challenge to the array, or let judgment go by default (*d*).

The 34th section of the 6 Geo. 4. c. 50, enacts, that the whole additional expenses of a special jury are to be discharged by the party upon whose application it is granted, unless the judge certify that it was a cause in which such an order was requisite; which it seems he will not do in a criminal proceeding (*e*). By the 35th section, one guinea only is allowed to a special jurymen, except where there has been a view. It seems that it need not appear upon the record that there was a rule for a special jury, or that a special jury was returned by virtue of such rule (*f*).

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Of a jury de
medietate
linguæ.

Besides the ordinary special jury, there is another description of jury which aliens and denizens are, by the singular humanity of the law, entitled to demand. This is denominated a jury de medietate linguæ. It takes its origin from the 28 Edw. 3. c. 13. s. 2. This act is, however, now repealed, though a similar provision is to be found in the 6 Geo. 4. c. 50. s. 47, by which it is enacted, that in all inquests that are taken against aliens, half the

(*a*) 4 B. & A. 430.

(*b*) 1 Stra. 593. 8 Mod. 245.
2 Ld. Raym. 1364. Bac. Abr.
Juries, D.

(*c*) 2 Stra. 1000. Cas. K. B.
110. Bac. Abr. Juries, D. *sed*

quare.

(*d*) 5 T. R. 456.

(*e*) See 1 Esp. Rep. 229. Tidd,
844, 5, 8th edit.

(*f*) 5 T. R. 464.

jury shall be aliens, if so many are to be found within the town or place where the trial is had; and if not, so many as the sheriff is able to procure; and the alien juror need not possess any freehold, or other qualification, required by the act in other cases (*a*). If an alien neglect to claim this advantage before the jury are sworn, he can take no exception in any subsequent stage of the proceedings (*b*). But if he allege he is an alien, he may on that ground challenge the array for that cause, and then move for a new precept, or *venire facias*, or for a *jure de medietate linguæ* (*c*). But in order to do this more effectually, it is proper to enter a suggestion on the record at the time of the application, that the defendant is an alien, and praying that the proper *venire* may be awarded (*d*).

Some of the precedents of awards of *venire*, in pursuance of the statute of the 28 Edw. 3. ordered, that the aliens should be natives of the country to which the defendant alleged himself to belong (*e*). Others, on the contrary, contained merely a general direction, without regard to any particular territory (*f*). It should seem to be the better opinion, that the latter will now suffice; the 6 Geo. 4. c. 50. s. 47, only mentions aliens in general, and does not seem to allude to this additional qualification of the jurors (*g*).

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Upon the return to the *venire facias* thus awarded, if the sheriff insert twelve, all of them as aliens, to some of whom this description will not apply, it seems that the defendant will not be concluded by such a return from objecting, but may still challenge the array, for want of a sufficient number of foreigners (*h*). And

(*a*) And see Cro. Eliz. 272. 841. Hawk. b. 2. c. 43. s. 35. Bac. Abr. Juries, E. 8.

(*b*) 1 Dyer, 28, a. 1 Bla. Rep. 517. 2 Dyer, 144, 5, a. 3 Dyer, 357, b. 2 Rol. Ab. 643. 2 Hale, 271, 2. Hawk. b. 2. c. 43. s. 40. Bac. Abr. Juries, E. 8.

(*c*) 2 Hale, 272. Bac. Abr. Juries, E. 8. See post, 538.

(*d*) 1 Bla. Rep. 517. See form of suggestion and *venire*, 2 Dyer, 144, b. Rast. Ent. 264, 265. Post, last vol.

(*e*) Rast. Ent. 7. 159. 264. 2 Dyer, 144, b. Hawk. b. 2. c. 43. s. 42. Bac. Abr. Juries, E. 8.

(*f*) Rast. Ent. 265. Hawk. b. 2. c. 43. s. 42. Bac. Abr. Juries, E. 8.

(*g*) See Bro. Abr. Denizen, 4. Bro. Abr. Panel, 3. Hawk. b. 2. c. 43. s. 42. Bac. Abr. Juries, E. 8.

(*h*) 2 Rol. Abr. 643. Hawk. b. 2. c. 43. s. 43. Bac. Abr. Juries, E. 8.

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it ought to show which are aliens, and which are not, in order that there may appear to be a proper number of the former (*a*). And if there be one or more wanting to make up the number of aliens, the court may grant a tales for so many of that kind which is defective (*b*). The statute of the 28 Edw. 3. c. 13, on which this right of aliens was originally founded, was, however, repealed, as to the people called Egyptians, by the 1 & 2 Ph. & M. c. 4. s. 3, and 5 Eliz. c. 20, which enacted, that they should be tried by the inhabitants of the county where they were arrested, and not per medietatem linguæ (*c*); but this harsh provision was repealed by the 23 Geo. 3. c. 51. The privilege is also taken away from persons indicted of high treason by the statute, which directs that all trials for that offence shall take place as at common law (*d*).

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Indemnities
of jurors.

Regarding with peculiar estimation the duties which jurors have to fulfil, the law has afforded to them that protection which is necessary for the exercise of their important functions. If, therefore, any man assault, or even threaten a juror for any thing done by him in that capacity, he is highly punishable by fine and imprisonment (*e*). And if any one strike a jurymen in the presence of the courts at Westminster, or the justices of assize, or of oyer and terminer, he will lose his hand, forfeit his goods, and the profits of his lands during his life, and suffer a perpetual restraint of liberty (*f*). And so careful are the courts to protect the rights of jurors, that where a town-clerk published an order of the King's Bench, in which a jury was declared to be suspected of bribery in giving a verdict, that court granted an information against him (*g*); nor can any action be supported against a jurymen for his verdict, however wrongful and vexatious his conduct may have been (*h*).

(*a*) Cro. Eliz. 818, 841. Hawk. b. 2. c. 43. s. 44. Bac. Abr. Juries, E. 8.

(*b*) Cro. Eliz. 305. 10 Co. Rep. 104. Hawk. b. 2. c. 43. s. 45. Bac. Abr. Juries, E. 8.

(*c*) Bac. Abr. Juries, E. 8.

(*d*) 2 Dyer, 145, a. 3 Inst. 27. Hawk. b. 2. c. 43. s. 37. Bac. Abr. Juries, E. 8.

(*e*) 2 Rol. Abr. 76. Tr. per

Pais, 269. Hawk. b. 1. c. 21. s. 14. Burn, J. Jurors, VI. Williams, J. Juries, VIII.

(*f*) 2 Rol. Abr. 76. Tr. per Pais, 269. Hawk. b. 1. c. 21. s. 3. Burn, J. Jurors, VI. Williams, J. Juries, III.

(*g*) Tr. per Pais, 277. Hawk. b. 2. c. 22. s. 20.

(*h*) 1 T. R. 513, 14, 535.

Though the jurymen are thus protected in the exercise of their legitimate functions, they are liable to be punished for the abuse of their authority, or for any illegality in their conduct during the time they are charged with the trial of the prisoner. With regard to these liabilities, they are to be considered in two relations: first, in their ministerial capacity, as persons bound to attend the court, and to perform the duty for which they are returned until they are legally discharged; and, secondly, in their judicial capacity, as judges of the facts to be brought before them in evidence, and of the guilt or innocence of the party indicted (*a*).

Liability of
jurors to punishment.

In the first of these capacities, jurors, like all other officers, are punishable by attachment, or by fine, at the discretion of the court, for any contempts of which they may be guilty (*b*). Thus they may be punished by fine, for not appearing at the return to the venire, in the manner we have already shown (*c*). And, if after appearing, they refuse to be sworn, or withdraw themselves, though challenged for cause, before the challenge is decided, any court of record may set such fine upon them, as in their discretion they shall regard as adequate (*d*). So if one of the indictors be returned upon the petit jury, and do not challenge himself, he may be fined (*e*). So, if, when the jury are sworn, they refuse to give any verdict, they are subject to a discretionary penalty (*f*). And where they attempt to impose upon the court, as by offering a verdict as unanimous from which some of them dissent (*g*); or where they cast lots, in order to determine what verdict they shall deliver (*h*); or where they agree upon two verdicts, one to be

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(*a*) Hawk. b. 2. c. 22. s. 13. Bac. Abr. Juries, M. 2. Williams, J. Juries, VIII.

(*b*) Tri. per Pais, 263, 264. Hawk. b. 2. c. 22. s. 14, &c. Bac. Abr. Juries, M. 2. Williams, J. Juries, VIII.

(*c*) Ante, 521.

(*d*) 2 Hale, 309. 8 Co. Rep. 38. Tri. per Pais, 268. Hawk. b. 2. c. 22. s. 15. Bac. Abr. Juries, M. 2. Williams, J. Juries, VIII.

(*e*) 2 Hale, 309.

(*f*) Vaugh. 152. Noy, 49. 3 Bulst. 173. Hawk. b. 2. c. 22. s. 16. Bac. Abr. Juries, M. 2. Williams, J. Juries, VIII.

(*g*) 1 Rol. Abr. 219. Bro. Abr. Jurors, 28. Hawk. b. 2. c. 22. s. 17. Bac. Abr. Juries, M. 2. Williams, J. Juries, VIII.

(*h*) 3 Keb. 805. 2 Leon. 205. 140. 1 Stra. 642. Sir T. Jones, 83. Bac. Abr. Juries, M. 2. Hawk. b. 2. c. 22. s. 17. Williams, J. Juries, VIII.

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given in the first instance, and the other, in case the court should refuse to receive the first (*a*), they will incur the same liability. To receive a bribe, in order to influence the verdict, is very highly criminal (*b*), and not only subjects the party to fine and imprisonment, but to the forfeiture of ten times the sum taken, one half to the king, and the other to the informer (*c*). And even the sending for or receiving instructions from the prosecutor, or the defendant, respecting the guilt or innocence of the latter, renders the jurymen liable to such fine as the court shall think proper to inflict (*d*).

The misbehaviour of the jurors, after they have left the bar, is also, in many cases, a ground to punish them. Thus, if they separate before they have given in their verdict (*e*), or take any thing with them to eat or drink (*f*), or actually eat or drink, or otherwise refresh themselves without leave of the court, even though they have agreed among themselves (*g*), they will be liable to be fined by the judges. But, if the eating or drinking were at their own cost, it will not annul the verdict; which it will do, if it were at the expence of the prosecutor or the defendant, when a new trial will be ordered (*h*). It will also be regarded as a misbehaviour, if a jurymen has a piece of evidence in his pocket, and reads it to his companions after they have retired to consider, though it will not render the verdict invalid (*i*). But if the jurymen separate, without consulting on the evidence, though they afterwards give in a verdict agreeable to the directions of the

(*a*) Cro. Eliz. 779. 2 Hale, 311. Hawk. b. 2. c. 22. s. 17. Bac. Abr. Juries, M. 2. Williams, J. Juries, VIII.

(*b*) Hawk. b. 2. c. 22. s. 19. Bac. Abr. Juries, M. 2. Williams, J. Juries, VIII.

(*c*) 5 Edw. 3. c. 10. 34 Edw. 3. c. 3. 38 Edw. 3. st. 1. c. 12. Triper Pais, 264, 5. Burn, J. Jurors, VI. Williams, J. Juries, VIII.

(*d*) Rast. Ent. 329. 1 Lord Raym. 148. Hawk. b. 2. c. 22. s. 19. Bac. Abr. Juries, M. 2. Williams, J. Juries, VIII.

(*e*) Vaugh. 152. Hawk. b. 2. c. 22. s. 18. Bac. Abr. Juries, M. 2. Williams, J. Juries, VIII.

(*f*) 1 Dyer, 78. Hawk. b. 2. c. 22. s. 18. Bac. Abr. Juries, M. 2. Williams, J. Juries, VIII.

(*g*) 2 Dyer, 218. Vaugh. 152. Cro. Jac. 22. 2 Hale, 306. Hawk. b. 2. c. 22. s. 18. Bac. Abr. Juries, M. 2. Williams, J. Juries, VIII.

(*h*) 2 Hale, 306. Cro. Jac. 22. Bac. Abr. Juries, M. 2.

(*i*) 2 Hale, 306, 7. Cro. Eliz. 616. Bac. Abr. Juries, M. 2. Williams, J. Juries, VIII.

court, they will not only be liable to fine, but a new trial will be granted (*a*). LIABILITY OF
JURORS TO
PUNISHMENT.

In their judicial character, however, jurors stand upon much higher ground, and are much less liable to question. In civil cases, they were till recently liable to the old penalty of an attain; but this mode of punishment had long fallen into disuse (*b*), and is entirely abolished by 6 Geo. 4. c. 50. s. 60. There are several instances, in the older authorities, of juries being fined and bound to their good behaviour, for verdicts palpably against evidence, and the direction of the judges (*c*); but it was solemnly resolved, after much discussion, that all such sentences are illegal, and that a juror is not, in any way, punishable for a verdict, though it may seem contrary to evidence, as well as the direction of the judges (*d*). For the jury are as much judges of the fact, as the court are of the law, and have an absolute power to acquit or convict; and it would be a great responsibility for the mind of a judge, if he were to decide on the guilt or innocence of the prisoner (*e*). But, it is said, that if it plainly appear that the jury are convinced of the truth of the facts which constitute guilt, and they declare this to the court, who inform them, that to give legal effect to the verdict they must find it in a particular way, and they obstinately insist on finding contrary to such direction, they may be fined for so manifest a piece of injustice (*f*). And it is also laid down, that if a judge, in order the better to enable him to direct the jury, ask their opinions respecting a particular fact, and they contemptuously refuse to give it him, and afterwards insist on a verdict contrary to his direction, that they may be fined for their

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(*a*) Bac. Abr. Juries, M. 2.

(*b*) 1 T. R. 535. Vaugh. 146. Tr. per Pais, 274. Bac. Abr. Juries, M. 1. 1 Ld. Raym. 469. 1 Ersk. Speeches, 280, per Ld. Mansfield, acc. 2 Hale, 310, contra.

(*c*) Yelv. 23. Noy, 48. Palm. 363. 1 Sid. 272, 3. 1 Keb. 769. 938. Sir Tho. Raym. 138. 2 Hale, 311, 312. Hawk. b. 2. c. 22. s. 20. Burn, J. Jurors, VI. Williams, J. Juries, VIII.

(*d*) Vaugh. 135. Sir T. Jones, 16, 17. Tr. per Pais, 274, 5. 1 T. R. 535. 2 Keb. 180, 81. 2 Hale, 313. Hawk. b. 2. c. 22. s. 20. Bac. Abr. Juries, M. 2. Burn, J. Jurors, VI. Williams, J. Juries, VIII.

(*e*) 2 Hale, 309, 310. 313. Tr. per Pais, 276, 7. Hawk. b. 2. c. 22. s. 20.

(*f*) Hawk. b. 2. c. 22. s. 21. Bac. Abr. Juries, M. 2. Williams, J. Juries, VIII.

wilful misconduct (*a*). In case of libel, however, it is expressly enacted, that the judge shall not direct the jury to find the defendant guilty, merely on proof of the publication of the paper in question, and the truth of the innuendoes inserted, though the judge may give his opinion on the merits of the case, as in all other criminal proceedings (*b*).

Of placing defendant at the bar, and his treatment there.

In prosecutions for felonies, we have seen that the defendant is frequently arraigned and tried on the same day, and he continues in court from the time of his arraignment to that of his conviction or acquittal. But on trials of indictments for treason, and for misdemeanors, as a time intervenes between the arraignment and the trial, the defendant is brought up to take his trial, and the clerk of the arraigns calls to the gaoler to set him to the bar, as in the following words: "Keeper of Newgate, set Robert Lowick to the bar (*c*)."
If the trial be in the King's Bench, the defendant may be brought into court by habeas corpus, or side-bar rule (*d*). When the defendant has been brought to the bar, he is entitled to have his irons removed, in order that he may not labour under any kind of difficulty or disgrace whilst he takes his trial (*e*). And, in pursuance of the same spirit of indulgence, the court will allow him to sit, if he seems incapable of bearing the fatigue, or the trial be considerably protracted (*f*); and he is entitled to the use of pen, ink, and paper, during his trial (*g*). But there is no foundation for the right of a peer, which was once insisted on, of sitting covered, and having a place assigned him, when appearing to defend himself on an information for a libel (*h*). In cases of

(*a*) Vaugh. 144. Sir T. Jones, 15, 16. Hawk. b. 2. c. 22. s. 22. Bac. Abr. Juries, M. 2. Williams, J. Juries, VIII.

(*b*) 32 Geo. 3. c. 60. 1 Ersk. Speeches, 137, to the end. Williams, J. Juries, VIII. See post, vol. iii. for this statute, &c.

(*c*) See form, 4 Harg. St. Tr. 717. 737.

(*d*) 4 Harg. St. Tr. 1 & 777.

See form of side-bar rule, post, last vol.

(*e*) 1 Leach, 36. 2 Inst. 315. Kel. 10. 3 Inst. 34. 2 Hale, 219. 4 Harg. St. Tr. 697. 6 Id. 230. Hawk. b. 2. c. 28. s. 1. 4 Bla. Com. 322. Cro. C. C. 9.

(*f*) 6 T. R. 531.

(*g*) 4 Harg. St. Tr. 704.

(*h*) 1 Esp. Rep. 227, 228.

mere misdemeanors, however, where the defendant has not been in previous custody, he is not necessarily nor generally present (*a*).

The sheriff having returned the panel of the jury into court (*b*), Calling jury. and the time for the trial having arrived, the clerk calls the petit jury on their panel, by saying, "you good men, that are impanelled to try the issue joined between our sovereign lord the king and the prisoner (or "prisoners") at the bar, answer to your names upon pain and peril that shall fall thereon (*c*)."
When this is done, and a full jury appears, the clerk of arraigns calls to the prisoner at the bar, and says to him, "These good men, that you shall now hear called, are those which are to pass between our sovereign lord the king and you ("upon your several lives and deaths" if it be a capital offence); if therefore you, or any of you, will challenge them, or any of them, you must challenge them as they come to the book to be sworn, before they are sworn, and you shall be heard (*d*)."
The clerk then proceeds to call each juror by name, and to swear him. On the trial of an indictment for high treason, when a panel of the jury has previously been delivered to the prisoner, it is the course to call the jurors in the order on the panel (*e*); but when the trial is by a special jury, and a tales is prayed, or by a common jury, the box, containing the papers with the names of the common jury, is to be shut and shaken, and then opened in the presence of the prisoner, and such papers taken out successively (*f*). [533]

The proceedings on the trial of a misdemeanor traversed at the assizes (*g*), and also the proceedings at sessions (*h*), are nearly the

(*a*) Ante, 411, as to appearance by attorney. 4 Bla. Com. 375.

(*b*) 2 Hale, 293. Bac. Abr. Juries, F. Cro. C. C. 7. Williams, J. Juries, VI.

(*c*) 2 Hale, 293. Bac. Abr. Juries, F. Cro. C. C. 7. 482, 3. Williams, J. Juries, VI. Dick. Sess. 182. See form, Cro. C. C. 7. 482, 3. At Assizes, Dick. Sess. 182. At Sessions, post, last vol.

(*d*) Cro. C. C. 7. 4 Harg. St.

Tr. 723. 747. See form, at Assizes, Cro. C. C. 7. 4 Harg. St. Tr. 723. 747. At Sessions, Dick. Sess. 182, 3. Post, last vol.

(*e*) 4 Harg. St. Tr. 750.

(*f*) 11 Harg. St. Tr. 266; and see 6 Geo. 4. c. 50. s. 32, as to special juries.

(*g*) Cro. C. C. 483. See forms, Cro. C. C. 483. Post, last vol.

(*h*) Dick. Sess. 182, 3. See forms, Dick. Sess. 182, 3. Post, last vol.

same as those we have just considered; the clerk of the peace, in the latter court, calling the jury, and informing the prisoner when he is to challenge such jury.

Of challenges*. From the words of the clerk's address to the prisoner, it is evident, that this is the proper time to exercise the right of challenging; and therefore, before we proceed to the swearing of the jury, and the subsequent proceedings, we will consider the law relative to challenges, and the mode in which the right is to be claimed.

The term *challenge* is used, in law, for an exception to jurors who are returned to pass on a trial, and it is either to the array, or to the polls. To the array, is when exception is taken to the whole number impanelled; and to the polls is, when some one or more are excepted against, as not indifferent. Challenge to jurors is also divided into challenge principal or peremptory, and challenge per cause; *i. e.* upon cause or reason (*a*).

Challenge on
behalf of the
king.

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The challenges to the array, or the polls, may be made either by the crown or the defendant. On the part of the former, it seems, that at common law any number of jurors might have been peremptorily challenged, without alleging any other reason for the objection than "*quod non boni sunt pro rege (b)*." This power, however, being found very liable to abuse, was taken away by the 33 Edw. 1. stat. 4, commonly called *ordinatio de inquisitionibus*, which has been construed to extend to criminal as well as civil proceedings (*c*); and the same provision is to be found in the 6 Geo. 4. c. 50 (*d*). But, under a similar provision in a prior statute, it was agreed that the crown is not compelled to show any

(a) Jac. Dic. Challenge.	(c) Moor, 595. Hawk. b. 2.
(b) Co. Lit. 156, b. 2 Rol. Abr. 645. Hawk. b. 2. c. 43. s. 2. Bac. Abr. Juries, E. 10. Com. Dig. Challenge, C. 1.	c. 43. s. 3. Com. Dig. Challenge, C. 1. Bac. Abr. Juries, E 10. 4 Bla. Com. 353. (d) Sect. 29.

* As to challenges in general, see 2 Hale, 267 to 276. Hawk. b. 2. c. 43, per totum. Bac. Abr. Juries, E. Com. Dig. Challenge. 4 Bla. Com. 352 to 355. Burn, J. Jurors, IV. Williams, J. Juries, V. Dick. Sess. 183 to 191.

cause of challenge until the panel is gone through, so that it may appear that there will not be sufficient to try the prisoner, if the peremptory objection is admitted to prevail (*a*). And it has been also holden, that if the defendant, in order to oblige the king to show cause, challenge the touts paravaile, he must first show all his causes of objection, before the king can be called upon to show the grounds of his challenges (*b*). And it is quite clear, that the prosecutor may challenge the array or the polls, for cause shown, in the same way as the defendant (*c*).

Challenges on behalf of the *defendant* are either peremptory or with cause. Peremptory challenges are those which are made to the juror, without assigning any reason, and which the courts are compelled to allow. The number, which in all cases of felony, the prisoner was allowed by the common law thus peremptorily to challenge, amount to thirty-five, or one under the number of three full juries (*d*). This number has, however, been altered by several legislative provisions. Thus, by the 22 Hen. 8. c. 14. s. 7, made perpetual by the 32 Hen. 8. c. 3, no person arraigned for petit treason, high treason, murder, or felony, shall be admitted peremptorily to challenge more than twenty of the jurors. And by the 33 Hen. 8. c. 23. s. 3, the same restriction is extended to cases of high treason. But as far as these statutes respect either high or petit treason, it is agreed that they were repealed by the 1 & 2 Ph. & M. c. 10, which, by enacting that all trials for treason shall be carried on as at common law, has revived the original number, as far as it respects those offences (*e*);

Challenges on behalf of the defendant.

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(*a*) 1 Vent. 309, 310. Sir T. Raym. 473, 4. Skin. 82. 2 St. Tr. 744. 3 St. Tr. 52. 869. 2 Hale, 271. Hawk. b. 2. c. 43. s. 3. Bac. Abr. Juries, E. 10. 4 Bla. Com. 353. Id. *ibid.* n. 8. Challenge, 70. 74, 75. 217. 2 Hale. 268. Hawk. b. 2. c. 43. s. 7. Com. Dig. Challenge, C. 1. Bac. Abr. E. 9. 4 Bla. Com. 354. 2 Woodes. 498. Burn, J. Juries, IV. Williams, J. Juries, V. Dick. Sess. 185.

(*b*) 3 St. Tr. 52. Sir T. Raym. 473, 4. Skin. 82. 3 St. Tr. 4. 4 St. Tr. 177. 407. Hawk. b. 2. c. 43. s. 3. Bac. Abr. Juries, E. 10.

(*c*) Co. Lit. 156. 2 Inst. 431. 2 Hale, 271. Bac. Abr. Juries, E. 10.

(*d*) Co. Lit. 156. Bro. Abr.

(*e*) Co. Lit. 156. Bro. Abr. Challenge, 217. 3 Inst. 227. Fost. 106, 7. 2 Hale, 269. Hawk. b. 2. c. 43. s. 8. Bac. Abr. Juries, E. 9. Burn, J. Juries, IV. Williams, J. Juries, V. Dick. Sess. 185.

CHALLENGES ON
BEHALF OF THE
DEFENDANT.

So that, at the present day, in cases of high and petit treason, the prisoner has thirty-five *peremptory* challenges; in murders, and all other felonies, by the 6 Geo. 4. c. 50. s. 29, twenty (*a*); and in misprision of treason, the point seems to be unsettled (*b*).

The right of peremptorily challenging is admitted only in favor of life; and though it may be demanded even in clergyable felonies, it can never be allowed to a defendant accused of a mere misdemeanor (*c*). Nor can they be allowed in any case, except upon the plea of not guilty, for no peremptory challenges are ever admitted on the trial of collateral issues (*d*). But when the right of challenging exists, though several defendants are tried by the same inquest, each individual has a right to the full number of his challenges; but if they refuse to join in their challenges, they must be tried separately, in order to prevent the delay which might arise from the whole panel being exhausted (*e*).

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There seems to have been some difference of opinion as to what was to be done when a prisoner challenged peremptorily more than thirty-five jurors at common law, whether it was to be regarded as a standing mute, or as amounting to a conviction (*f*). The latter seems to be the better opinion; but the question cannot, at the present day, be material, since the effects of standing mute, and conviction, are precisely similar (*g*). But it seems, that if in cases of felony, the prisoner challenges more than twenty, and less than thirty-five, which, by the common law, he might properly have done, the challenge will merely be over-ruled and disregarded, and the trial will proceed upon the plea of not guilty,

(*a*) Fost. 106, 7. 4 Bla. Com. 354. Hawk. b. 2. c. 43. s. 3. Bac. Abr. Juries, E. 10. Williams, J. Juries, V. Dick. Sess. 185.

(*b*) See 3 Inst. 27, a. Hawk. b. 2. c. 43. s. 5. Williams, J. Juries, V.

(*c*) Co. Lit. 156. 2 Harg. St. Tr. 808. 4 Harg. St. Tr. 1. 4 Bla. Com. 352, n. 7. Burn, J. Jurors, IV.

(*d*) 1 Bla. Rep. 6. 2 Hale, 267. Fost. 42. Bac. Abr. Ju-

ries, E. 9. 4 Bla. Com. 353, n. 7. acc. Sed vide Co. Lit. 156, b. Hawk. b. 2. c. 43. s. 6, contra.

(*e*) 3 Salk. 81. Fost. 106, 7. Plowd. 100. Co. Lit. 156, b. 2 Hale, 268. Bac. Abr. Juries, E. 10.

(*f*) Plowd. 262. 3 Inst. 227, 228. 2 Hale, 268. Hawk. b. 2: c. 43. s. 9. Bac. Abr. Juries, E. 9. 4 Bla. Com. 354.

(*g*) Ante, 428. 12 Geo. 3. c. 20.

because the words of the 6 Geo. 4. c. 50. s. 29, are, "that he be not admitted to challenge more than twenty;" which merely implies, that the challenge above that number shall be void, without affixing any other penalty (*a*).

Challenges for cause are of two kinds: 1st, to the whole array; 2d, to individual jurymen. To challenge the array, is to except at once to all the jurors in the panel, on account of some original defect in making the return to the venire (*b*). It is either a principal challenge, or for favor; the former of which is founded on some manifest partiality, and is therefore decisive; while the grounds of the latter are less certain, and left to the determination of triers, in the manner we shall state hereafter (*c*). The legitimate causes of a principal challenge are not very numerous. Thus, if the sheriff be the actual prosecutor, or the party aggrieved, the array may be challenged, though no objection can be taken in arrest of judgment (*d*). So if the sheriff be of actual affinity to either of the parties, and the relationship be existing at the time of the return (*e*),—if he return any individual at the request of the prosecutor or the defendant (*f*),—or any person whom he believes to be more favorable to one side than the other (*g*),—if an action of battery be depending between the sheriff and the defendant, or if the latter have an action of debt against the former (*h*),—the array may be quashed, on the presumption of partiality in the officer. So also if the sheriff, or his bailiff, who makes the return, is under the distress of the party indicting or indicted, or has any pecuniary interest in the event, or is counsel, attorney, servant, or arbitrator in the same cause, a

Of challenges
for cause.

1. To the array.

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(*a*) 3 Inst. 227. 2 Hale, 270. Hawk. b. 2. c. 43. s. 9. 4 Bla. Com. 354. Bac. Abr. Juries, E. 9.

(*b*) Co. Lit. 156, a. Bac. Abr. Juries, E. 1. Williams, J. Juries, V. Dick. Sess. 183. Tidd, 5th edit. 845.

(*c*) Co. Lit. 156, a. Bac. Abr. Juries, E. 1. Williams, J. Juries, V. Dick. Sess. 183.

(*d*) 1 Leach, 101. Williams, J. Juries, V. 4 B. & A. 471.

(*e*) Co. Lit. 156, a. Wil-

liams, J. Juries, V. Burn, J. Jurors, IV. 1. Dick. Sess. 183, 184.

(*f*) Co. Lit. 156, a. Bac. Abr. Juries, E. 1. Burn, J. Jurors, IV. 1. Williams, J. Juries, V. Dick. Sess. 184.

(*g*) Co. Lit. 156, a. Bac. Abr. Juries, E. 1.

(*h*) Co. Lit. 156, a. Bac. Abr. Juries, E. 1. Burn, J. Jurors, IV. 1. Williams, J. Juries, V. Dick. Sess. 184.

TO THE ARRAY. principal challenge will be admitted (*a*). And, in general, the same reasons which we have already seen (*b*), would cause it to be directed to the coroners or elisors, will also be sufficient to quash the array, when partiality may reasonably be suspected (*c*). For all these causes of suspicion, the king may challenge as well as the defendant (*d*).

[538] But, besides these, the default of the sheriff will be sometimes a ground of principal challenge to the array. Thus, if the array be returned by the bailiff of a franchise, and the sheriff return it as from himself, the return will be bad, because the party will lose his challenges; though, if the sheriff return one from the liberty, it will suffice, and the lord of the franchise will be compelled to resort to his action against him (*e*). And, at common law, it was a good cause of challenge to the array, upon a prosecution against a peer, that a knight was not returned upon the panel (*f*); but by the 24 Geo. 2. c. 18. s. 4, and the 6 Geo. 4. c. 50. s. 28, the necessity for such a return is done away. So anciently the defendant had always a right of challenging, if four persons were not returned from the hundred where the offence was alleged to have been committed (*g*); but now the jury are always summoned from the body of the county, and the right to challenge, for want of hundredors, is taken away by the 6 Geo. 4. c. 50. s. 13 (*h*). It is no ground of challenge for unindifference on the part of the sheriff, that the sheriff's officer had neglected to summon one of the twenty-four special jurymen returned on the panel (*i*). The right of aliens to challenge *de medietate linguæ*, seems to be disputed, and it is said that they must demand the privilege at the time of awarding the venire (*k*). There can be no challenge to the array, on the ground of unindifferency in the master of the

(*a*) Co. Lit. 156, a. 3 Burr. 185, 6. Bac. Abr. Juries, E. 1. Burn, J. Jurors, IV. 1. Williams, J. Juries, V. Dick. Sess. 184.

(*b*) Ante, 514, 15.

(*c*) Tidd, 5th edit. 345.

(*d*) Co. Lit. 156, a.

(*e*) Co. Lit. 156, a. Bac. Abr. Juries, E. 1.

(*f*) Co. Lit. 156, a. Wil-

liams, J. Juries, V.

(*g*) 2 Hale, 272.

(*h*) Co. Lit. 125, b. n. Ante, 177. And see instances of challenges in last century, 8 Mod. 245. 1 Stra. 593.

(*i*) 4 B. & A. 471.

(*k*) 1 Bla. Rep. 517. Cro. Eliz. 869. 2 Dyer, 144. 3 Dyer, 357, b. 1 Keb. 547, acc. 2 Hale, 272, contra. See ante, 525.

crown-office, he being the officer of the court, expressly appointed to nominate the jury : the only remedy in such case is, to apply to the court, by motion, to appoint some other officer to nominate the jury (a). TO THE ARRAY.

Causes of challenge for *favor*, are, when one of the parties is tenant to the sheriff, if the sheriff has an action of debt against him, or where a relationship does not subsist between the party and the officer immediately, but between their children ; for as these circumstances do not necessarily imply partiality, they are no ground of a principal challenge (b). So, if the sheriff and one of the parties are united in the same office, this is only a ground of challenge to the favor (c). And if the sheriff were discharged before he returned the panel, the court would not allow a principal challenge for that reason, because the averment would be directly contrary to the record, which purports to be returned by the sheriff, and, as such accepted ; but the defendant may challenge the array on the ground of favor, and the court will direct the triers to find it invalid, because it is without warrant (d). But where the sheriff has neglected to take the oaths, made necessary by the 25 Car. 2. c. 2. on his entrance into his office, the challenge will be altogether disallowed, because he must, for the purposes of convenience, be taken to be sheriff de facto until his removal (e).

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It has been said, that no challenge to the favor can be allowed against the king, and the reason assigned is, that the duty of allegiance must be supposed to induce a preference for him, which might defeat every panel (f) ; but this seems to be very subtle, and, in capital cases, at least, unfounded (g).

If either the prosecutor or the defendant are apprehensive that the other party will challenge the array, on the ground of any

(a) 4 B. & A. 471.

(d) Cro. Eliz. 369. Bac. Abr.

(b) Co. Lit. 156, a. Bac. Abr. Juries, E. 1. Burn, J. Jurors, IV. 1. Williams, J. Juries, V. Dick. Sess. 184.

Juries, E. 1.

(e) 2 Vent. 58. Bac. Abr.

Juries, E. 1.

(f) Co. Lit. 156, a.

(c) Dyer, 367, a. Bac. Abr. Juries, E. 1.

(g) 2 Hale, 271. Co. Lit. 156, a. n. 4.

TO THE ARRAY, relationship subsisting between himself and the returning officer, and is desirous to prevent the delay which such a circumstance would occasion, he may suggest the matter, of his own accord, to the court, and pray that the venire may be awarded to the coroners; or, if they are interested, to such elisors as the court may think proper to select (*a*). This application removes all future difficulty; for if the other party admits the partiality, and consents to the arrangement, the venire is awarded to the unexceptionable officer; and, if he refuses, and maintains that there is no ground of alteration, he cannot afterwards take advantage of the objection, which he has himself alleged to be futile (*b*).

Challenges for
cause to the
polls.

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If the challenge to the array be determined against the party by whom it was made, he may afterwards have his challenge to the polls (*c*); that is, he may separately object to each jurymen, as he is about to be sworn. And challenges to the polls, like those to the array, are either principal, or to the favor (*d*); and, after challenging thirty-five jurors in treason, and twenty in felony, peremptorily, the defendant may, for cause shown, challenge as many jurors as may be called, so as to exhaust one or more panels, if his causes of objection be well founded (*e*). The most important causes of the first of these descriptions of challenges are, *propter honoris respectum*, *propter defectum*, *propter affectum*, and *propter delictum* (*f*), which we shall now proceed to consider.

A challenge, *propter honoris respectum*, is allowed where a peer, or lord of parliament, is sworn upon a jury for the trial of a commoner (*g*). It is clearly settled that he may challenge him-

(*a*) Co. Lit. 157, b. 3 Dyer, 367, a. 5 Co. Rep. 36, b. Bul. N. P. 306. Williams, J. Juries, V.

(*b*) 5 Co. Rep. 36, b. 3 Dyer, 367, a. Co. Lit. 157, b. Bul. N. P. 306. Williams, J. Juries, V.

(*c*) Co. Lit. 156. Bul. N. P. 307.

(*d*) Com. Dig. Challenge, C. 2. Williams, J. Juries, V. Dick. Sess. 185.

(*e*) Com. Dig. Indictment, M.

(*f*) Co. Lit. 156, b. Com.

Dig. Challenge, C. 2. 4 Bla. Com. 353. Williams, J. Juries, V. Dick. Sess. 185. Tidd, 5th edit. 845.

(*g*) Co. Lit. 156, b. 2 Rol. Abr. 646. 6 Co. Rep. 53. 9 Cō. Rep. 49. Bro. Abr. Challenge, 209. Sir W. Jones, 153. Hawk. b. 2. c. 43. s. 11. 3 Bla. Com. 361. Com. Dig. Challenge, C. 2. Bac. Abr. Juries, E. 6. Burn, J. Jurors, IV. Williams, J. Juries, V. Dick. Sess. 186. Tidd, 5th edit. 845.

self, or have a writ of privilege, in order to discharge him (*a*); To THE POLLS. and it seems to be the better opinion, that either party may challenge him, on the ground of his dignity (*b*): because he is not within the description of *pares patriæ*, but belongs to a higher order of the state (*c*). But members of the House of Commons do not appear strictly to have any title to claim such an exemption on account of that circumstance, and, of course, it cannot operate as a ground of challenge; though the court will discharge them on their request, especially if parliament be actually sitting (*d*).

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A challenge, *propter defectum*, may be either on account of some personal objection, as alienage, infancy, old age, or a deficiency in the requisite property. But, as we have fully considered the necessary qualifications which all jurors must possess, both in relation to their character (*e*) and estate (*f*), it will be sufficient to observe, that wherever any of those requisites are wanting, the juryman may be challenged either by the crown or the prisoner. But now, by the 6 Geo. 4. c. 50. s. 27, the want of freehold is not a cause of challenge (*g*).

The third description of challenges, are those which arise *propter affectum*, or on the ground of some presumed or actual partiality in the juryman, who is made the subject of objection; for the writ, requiring that the jury should be free from all exception, and of no affinity to either party, must evidently include both these grounds of challenge (*h*). If, therefore, the juror is related to either party, within the ninth degree, though it is only by mar-

(*a*) 3 Dyer, 314. Co. Lit. 156, b. Bro. Abr. Challenge, 209. Hawk. b. 2. c. 43. s. 11. Com. Dig. Challenge, C. 2. Bac. Abr. Juries, E. 6. 3 Bla. Com. 361. Burn, J. Jurors, IV. 1. Williams, J. Juries, V. Dick. Sess. 186. 2 Tidd, 845.

(*c*) Co. Lit. 156, b. Bac. Abr. Juries, E. 6.

(*d*) Bac. Abr. Juries, E. 6. Lamb, 396. Dick. Sess. 84, 5.

(*e*) Ante, 307. 502. 3 Bla. Com. 361. Dick. Sess. 106.

(*f*) Ante, 502.
(*g*) See, before the passing this act, 4 Harg. St. Tr. 750.

(*h*) Bac. Abr. Juries, E. 5. Williams, J. Jurors, IV. 1.

TO THE POLLS. riage, a principal challenge will be admitted (*a*). So also if he has acted as godfather to a child of the prosecutor or defendant, he may be challenged for that reason (*b*). And it will be no answer to such a challenge, that he is also related to the other party, because, by the terms of the writ, he ought to be akin to neither (*c*). Thus also if the juryman be under the power of either party, or in his employment, or if he is to receive part of a fine upon conviction, or if he has been chosen arbitrator, in case of a personal injury, for one of the parties, or has eaten and drank at his expense, he may be challenged by the other (*d*). So if there are actions depending between the juryman and one of the parties, which imply hostility, that will be a ground of principal challenge, though other actions only warrant challenges to the favor (*e*). And, in general, the causes of this nature, which would justify a challenge to the array, on the ground of the presumed partiality of the sheriff, will be sufficient exceptions to an individual juror (*f*).

An actual partiality may also be shown, as well as a supposed bias. Thus, if a juryman has expressed his wishes as to the result of the trial, or his opinion of the guilt or innocence of the defendant, with a malicious intention, on evidence of those facts, he will be set aside (*g*). And if either party has exhorted him as to the nature of his verdict, he may be challenged, but not if the entreaty merely were to attend and act according to his conscience (*h*). If it be proved that the juror has, in contempt, called his dogs by the names of the king's witnesses, that will be a sufficient ground of challenge on the behalf of his majesty (*i*).

(*a*) Co. Lit. 157, a. Finch, 401. Bac. Abr. Juries, E. 5. 3 Bla. Com. 363. Burn, J. Jurors, IV. 1. Williams, J. Juries, V. Dick. Sess. 186.

(*b*) Co. Lit. 157, a. Burn, J. Jurors, IV. 1.

(*c*) Co. Lit. 157, a. Bac. Abr. Juries, E. 5.

(*d*) Co. Lit. 157. Bac. Abr. Juries, E. 5. Burn, J. Jurors, IV. 1. Williams, J. Juries, V. Dick. Sess. 186, 7. Tidd, 5th edit. 846.

(*e*) Co. Lit. 157. Dick. Sess. 187.

(*f*) See ante, 536, 7, 8.

(*g*) 4 Harg. St. Tr. 748. Hawk. b. 2. c. 43. s. 28. Bac. Abr. Juries, E. 5. Burn, J. Jurors, IV. 1. Williams, J. Juries, V. 2 Tidd, 846. Dick. Sess. 186.

(*h*) Co. Lit. 157. Bac. Abr. Juries, E. 5. Burn, J. Jurors, IV. 1. Williams, J. Juries, V. Dick. Sess. 187.

(*i*) 3 St. Tr. 317. Hawk. b. 2. c. 43. s. 20. Bac. Abr. Juries, E. 5.

By the statute of the 25 Edw. 3. c. 3. a man who has acted TO THE POLLS.
as a grand jurymen on the finding of a bill of indictment, may be
objected to, if returned to serve on the petit jury (*a*). And the
provisions of this statute have been construed to extend not only
to the same indictment, but also to any other indictment for the [543]
same offence, or where the matter which there came in question
happens here to be material (*b*). But it will be no ground of
challenge, that one of the panel has been on a former jury, which
convicted others upon the same indictment; because every man
must be tried upon the evidence of his own guilt, without refer-
ence to that of his associates (*c*).

The last ground for a principal challenge to the polls is *propter delictum*, or the legal incompetence of the juror on the ground of infamy. Thus, if he has been convicted or attainted of treason, felony, or of any crime that is infamous, unless he has obtained a free pardon, or if he is under outlawry or excommunication, he may be challenged, and the exception must prevail (*d*). All the grounds of challenge, it is said, are only to the favor, unless the party relying upon them is ready to produce the record of the former conviction (*e*). It has also been holden, that if a jurymen be sworn by a wrong name, this is merely a ground of challenge, and will form no objection in arrest of judgment (*f*).

(*a*) 4 Harg. St. Tr. 750. See 13 How. St. Tr. 339.

(*b*) 1 Sid. 244. Hawk. b. 2. c. 43. s. 27. Bac. Abr. Juries, E. 5. 13 How. St. Tr. 339.

(*c*) 4 St. Tr. 738. Kel. 9.

(*d*) See the act 6 Geo. 4. c. 50. s. 3. Ante, 307. Co. Lit. 158. 2 Rol. Abr. 469. 3 Bla. Com. 363, 4. Bac. Abr. Juries, E. 2. Burn, J. Jurors, IV. Williams, J. Juries, V. Tidd, 8th edit. 905. Dick. Sess. 186, 7. Before this act, even the king's pardon would not take away defect, 2 Bulst. 154. 2 Hale, 277. Bac. Abr. Juries, E. 2. It is doubted how far outlawry, in a mere personal action, is a ground

of challenge, Cro. Car. 134. Sir W. Jones, 193.

(*e*) Bac. Abr. Juries, E. 5. Dick. Sess. 187.

(*f*) 12 East, 231, n. a. Burn, J. Jurors, E. 5. 4 Harg. St. Tr. 739, 40. But where a person, not summoned to serve on a jury at nisi prius, answered to the name of a person for whom a summons was delivered, and to whose house he had succeeded, the objection having been taken before the verdict was taken, the court of Common Pleas awarded a *venire de novo*, 6 Taunt. 460. 2 Marsh. 154, S. C.

Challenges to the
polls for favor.

Challenge to the polls *for favor*, are when, though the juror is not so evidently partial as to amount to a principal challenge, yet there are reasonable grounds to suspect that he will act under some undue influence or prejudice (*a*). The causes of such a challenge are manifestly numerous, and dependent on a variety of circumstances; for the question to be tried is, whether the jurymen is altogether indifferent as he stands unsworn (*b*); because he may be, even unconsciously to himself, swayed to one side, and indulge his own feelings, when he thinks he is influenced entirely by the weight of evidence (*c*). And as the writ of venire directs those to be returned by whom the truth may be best known, it excludes all who are apparently partial without any trial, as not falling within its qualifications; but where there is a doubt or suspicion, it implies that it shall be investigated by a trial (*d*). Of this latter description is the case, where the party and the jurymen are fellow servants, where the latter has been entertained in the former's house, or where he has been appointed arbitrator by both the parties, to terminate their differences (*e*). And, in general, the same circumstances will operate as a ground of objection to the favor of a single jurymen, as we have seen, may be urged on a challenge to the array, for the partiality of the returning officer (*f*).

Of the time of
the challenge.

No challenge can ever be made either to the array or the polls, until a full jury have made their appearance; because, if that should not be the case, the issue will remain *pro defectu juratorum* (*g*); and, on this account, the party who intends to challenge the array, may pray a tales to complete the number, and then object to the panel (*h*). Neither can the party challenge the array, or any particular jurymen, after they have been sworn, on the same, or, according to the better opinion, on any following

(*a*) Co. Lit. 157, b. Bac. Abr. Juries, E. 5. Williams, J. Juries, V. Dick. Sess. 138.

(*b*) Co. Lit. 157, b. Bac. Abr. Juries, E. 5. Williams, J. Juries, V. Dick. Sess. 138.

(*c*) Id. *ibid*.

(*d*) Id. *ibid*.

(*e*) Co. Lit. 157. Bac. Abr.

Juries, E. 5. Burn, J. Jurors, IV. 1. Williams, J. Juries, V.

(*f*) Ante, 536. 8.

(*g*) 4 B. & A. 471.

(*h*) Hob. 235. Hawk. b. 2. c. 43. s. 1. Bul. N. P. 307. Bac. Abr. Juries, E. 11. Burn, J. Jurors, IV. 2. Williams, J. Juries, V. Dick. Sess. 138.

day, unless for some cause which arose after the administering of the oath, or by the consent of the attorney-general (*a*). And where R. C. answered to the name of J. L. on the sheriff's panel, at the trial of a prisoner for a capital felony, it was held a mere matter of challenge, and no ground of objection after verdict (*b*). It follows, therefore, that the proper time for challenging is between the appearance and the swearing of the jurors. After a challenge to the array, the party may challenge the polls; but, after he has excepted to any of the individual jurymen, he cannot object to the whole panel (*c*). If there be several objections to the same juror, they must all be suggested at the same time (*d*); and when the right to challenge for hundredors, or knights, was in force, it was necessary to exert it before so many were sworn as would serve for that purpose, or the party would lose the benefit (*e*). But if a juror be challenged on one side, and found to be indifferent, he may still be challenged by the other (*f*). And if a jurymen be challenged for cause, and pronounced impartial, he may afterwards be challenged peremptorily, for otherwise the very challenge might create in his mind a prejudice against the individual who made the objection (*g*). Where a jurymen is taken ill during the trial, so that the first jury is discharged, and the same eleven, with another, returned a second time instant, the prisoner has a right to challenge any of them, as if they had never been previously inserted in the panel (*h*). The prisoner may, therefore, in prosecutions for treason, challenge thirty-five, and for felony twenty, peremptorily; and also challenge an indefinite number, on showing a sufficient reason (*i*).

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(*a*) Co. Lit. 158, a. Cro. Car. 291, 92. Heb. 235. Yelv. 23. 2 Rol. Abr. 658. 2 Hale, 274. Bro. Abr. Challenge. 50. 73. 3 St. Tr. 379. Hawk. b. 2. c. 43. s. 1. Bul. N. P. 307. Bac. Abr. Juries, 11. Burn, J. Jurors, IV. 2. Williams, J. Juries, V. Dick. Sess. 188.

(*b*) 12 East, 231. Ante, 543.

(*c*) Co. Lit. 158, a. Bac. Abr. Juries, E. 11. Burn, J. Jurors, IV. 2. Williams, J. Juries, V. Dick. Sess. 189.

(*d*) Co. Lit. 158, a. Bac. Abr. Juries, B. 11. Burn, J. Jurors,

IV. 2. Williams, J. Juries, V. Dick. Sess. 189.

(*e*) Co. Lit. 158, a. Bac. Abr. Juries, E. 11.

(*f*) Co. Lit. 158, a. Bac. Abr. Juries, E. 11. Burn, J. Jurors, IV. 2. Williams, J. Juries, V.

(*g*) 6 T. R. 531. Co. Lit. 158, a. 4 Bla. Com. 363. Hawk. b. 2. c. 43. s. 10. Bac. Abr. Juries, E. 11. Burn, J. Jurors, IV. 2. Williams, J. Juries, V. Dick. Sess. 189. See form, 4 Harg. St. Tr. 738, 9, 40. 750.

(*h*) 4 Taunt. 309.

(*i*) 4 Harg. St. Tr. 740.

Mode of challenging.

A challenge to the array must be made in writing ; but where it is only to a single individual, the words, " I challenge him," are sufficient on the part of the defendant ; and " We challenge him for the king," if the objection arise on the part of the counsel for the prosecution (*a*). In order to enable the defendant to make his challenges, he is entitled to have the whole panel read over in his hearing, that he may see who they are that appear (*b*). And on a prosecution for treason, the jurors are to be called in the order in the panel delivered to the defendant (*c*) ; and if one or more of them be omitted, his absence should be accounted for ; and if, when a juror is called and asked as to his qualification, he says he has it not, he is sworn to the fact (*d*). In a prosecution for felony, or where there is not a special jury, the jurors are drawn from the box, and the prisoner must make all his challenges in person, and not by counsel, even in cases where the assistance of an advocate is admitted for other purposes (*e*) ; but in prosecutions for treason, the prisoner's counsel may take an account of the challenges (*f*) ; and when cause of challenge is shown, and objected to as insufficient, the prisoner is allowed counsel to argue the matter (*g*). When the challenge is peremptory, the above words will suffice ; but when it is necessary for the prisoner to assign a ground for the challenge, the prisoner must immediately show the cause upon which his objection is founded, which he does verbally, and the matter is immediately argued and determined (*h*) ; but as we have seen, the king need not show the cause until the whole panel is exhausted (*i*) ; and if one of the jurors

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(*a*) 4 Harg. St. Tr. 470. Tr. per Pais, 172. Burn, J. Jurors, IV. 2. Williams, J. Jurors, V. Dick. Sess. 189. See forms of challenges to the array, Cro. C. C. 105. 2 Lil. Ent. 472. 10 Wentw. 474. Burn, J. Jurors, VI. c. Williams, J. Juries, V. Post, last vol.

(*b*) Fost. 7. 6 St. Tr. 245. Hawk. b. 2. c. 43. s. 4.

(*c*) 4 Harg. St. Tr. 750.

(*d*) Id. *ibid*. See form of oath, 4 Harg. St. Tr. 750. Post, last vol. The right to challenge for want of freehold, is now taken

away by 6 Geo. 4. c. 50. s. 27.

(*e*) 4 St. Tr. 105. 2 Id. 743, 744. Hawk. b. 2. c. 43. s. 4. Burn, J. Jurors, IV. 2. See forms, 4 Harg. St. Tr. 724. 750, 751. Post, last vol.

(*f*) 4 Harg. St. Tr. 705:

(*g*) 4 Harg. St. Tr. 738.

(*h*) 4 Harg. St. Tr. 738. Burn, J. Jurors, IV. 2. Williams, J. Juries, V. See forms, 4 Harg. St. Tr. 738. 740. Post, last vol.

(*i*) Ante, 534. 3 Harg. St. Tr. 519. 4 Id. 740. 2 Hale, 271.

MODE OF
CHALLENGING.

was not present, but appear before his default is recorded, the king's counsel, if he has previously challenged another juror, need not assign his cause of challenge till after such defaulter has been sworn (*a*). The usual course is for the clerk of the arraigns, or clerk of the peace (after he has addressed the prisoner as to his right of challenge, and that he is to object to the jury as they come to the book, and before they are sworn), to call the name of the first juror, and then, if he be not objected to, the prisoner so signifies; and then that juror is sworn, and then the next is called and he is accepted or challenged (*b*); and if the juror challenge himself, he may do so by stating that he is not a freeholder; and on being interrogated, and disclosing that he is not otherwise qualified, to which facts he may be sworn (*c*). But the juryman cannot be asked, if he has not, previous to the trial, expressed opinions hostile to the defendant and his cause. Such expressions must be proved by extrinsic evidence (*d*); and every challenge must be propounded in such a way, as that it may be put at the time upon the *nisi prius* record, so that the adverse party may either demur, or counterplead or deny matter of challenge. And where the challenges were not put on the record, the defendants were held not to be in a condition to ask the opinion of the court of King's Bench, as a matter of right, upon their sufficiency (*e*).

When a challenge has been made to the *array*, it lies in the discretion of the court to direct the mode in which it shall be tried (*f*). Sometimes it is referred to two attornies, sometimes by the two coroners, and sometimes by two of the jury (*g*). But it is said, that when the challenge is on the ground of affinity in the sheriff, it is best to leave it to two of the jurymen returned; but if for favor and partiality, then by two indifferent persons, taken from the by-standers (*h*).

How the challenge is to be tried.

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(*a*) 4 Harg. St. Tr. 740.

(*b*) 4 Harg. St. Tr. 723. See form, 4 Harg. St. Tr. 737. Post, last vol.

(*c*) 4 Harg. St. Tr. 740.

(*d*) 4 B. & A. 471.

(*e*) 4 B. & A. 471.

(*f*) 2 Hale, 275. Burn, J. Jurors, IV. 3. Williams, J. Ju-

ries, V. Dick. Sess. 189.

(*g*) 2 Hale, 275. Burn, J. Jurors, IV. 3. Williams, J. Juries, V. Dick. Sess. 189, 190.

(*h*) 2 Rol. Rep. 363. 2 Hale, 275. 4 Bla. Com. 353, n. 8. Burn, J. Jurors, IV. 3. Williams, J. Juries, V. Dick. Sess. 190.

HOW THE
CHALLENGE IS
TO BE TRIED.

When the array is thus challenged for favor, the opposite party may either plead to it, or demur to its sufficiency in law (*a*). If the former course be taken, then the triers are sworn, and charged to inquire "whether it be an impartial array or a favorable one;" if they affirm it, the clerk enters under it "affirmatur;" but if they find it to be partial, the words, "calumnia vera" are written on the record (*b*). If a demurrer be resolved on, either to the array or the polls, it is said that there is no occasion for those circumstances which must attend a demurrer to a plea, such as the counsel's signature; but it is good, as soon as agreed on at the bar, and the prothonotaries ought of right to enter it on the record (*c*). The court may either decide the demurrer immediately, or adjourn its consideration to a future period (*d*). Should the judges, upon hearing the arguments, over-rule the challenge, the decision is entered on the original record, and at nisi prius it appears on the postea; but if it is over-ruled without demurrer, on being debated, the objection may afterwards be made the subject of a bill of exceptions (*e*). If the challenge be admitted, and the array be quashed, a new *venire* is awarded to the coroners or elisors, in the same manner as if it had been prayed by one of the parties to be so directed, to prevent the delay at an earlier stage of the proceedings (*f*). The disallowing the challenge, is not a ground for a new trial (*g*).

[549] When a challenge is made to the *polls*, if it be a principal challenge, for some apparent partiality, it is sufficient, if the ground be made out to the satisfaction of the court, without any further investigation (*h*). But a challenge to the favor, where the defendant simply denies, the matter of challenge is left to the discretion of triers (*i*). These do not exceed two, unless by the

(*a*) See form of demurrer and joinder, 10 Wentw. 474, 475. Post, last vol.

(*b*) Tr. per Pais, 165. 4 Bla. Com. 353, n. 8. Bac. Abr. Juries, E. 12. Williams, J. Juries, V. Dick. Sess. 190.

(*c*) 3 Leon. 222. Bac. Abr. Juries, E. 12.

(*d*) Style, 464. Tr. per Pais, 199.

(*e*) Skin. 101. Hut. 24. Bac. Abr. Juries, E. 12.

(*f*) Ante, 539. Co. Lit. 158, a.

(*g*) 4 B. & A. 471.

(*h*) Co. Lit. 157, b. Bac. Abr. Juries, E. 12. Williams, J. Juries, V.

(*i*) Co. Lit. 157, b. Bac. Abr. Juries, E. 12. Williams, J. Juries, V. 4 B. & A. 471.

consent of the prosecutor and the defendant, or some special cause is alleged by one of them; or where one juror is sworn, and two triers appointed with him (*a*). If this challenge be made to the first juror, and, of course, before any one has been sworn, then the court will direct two indifferent persons to try the question; and if they find the party challenged indifferent, he will be sworn, and join with the triers in determining the next challenge. But when two jurors have been found impartial, and have been sworn, then the office of the triers will cease, and every subsequent challenge will be referred to the decision of the jury-men (*b*). If the prisoner challenge ten, and the crown one, and a twelfth be sworn, one trier shall be chosen by each party, and added to the jurymen sworn, and the challenges be referred to their decision. But if several be sworn, and the rest challenged, the court may assign any two of the persons sworn to determine the challenges (*c*). To the triers thus chosen, no challenge can be admitted (*d*).

HOW THE
CHALLENGE IS
TO BE TRIED.

The triers being thus chosen, the following oath is administered to them:—"You shall well and truly try whether A. B. (the jurymen challenged) stand indifferent between the parties to this issue, so help you God (*e*).” The trial then proceeds by witnesses before them (*f*). They may also examine the jurymen challenged upon his *voire dire*, *veritatem dicere*, as to the leaning of his own affections, or the sufficiency of his own estate (*g*); but he cannot be interrogated as to the circumstances which may tend to his own disgrace, discredit, or the injury of his character: as, whether he has stood in the pillory, been convicted of an infamous crime, outlawed, or even whether he has previously declared

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(*a*) Co Lit. 158, a. Bac. Abr. Juries, E. 12. 4 Bla. Com. 353, n. 8.

(*b*) Co. Lit. 158, a. 2 Hale, 275. Bac. Abr. Juries, E. 12. Burn, J. Jurors, IV. 3. Williams, J. Juries, V. Dick. Sess. 190.

(*c*) 2 Hale, 275. Finch, 112. Bac. Abr. Juries, E. 12. 4 Bla. Com. 353, n. 8. Burn, J. Jurors,

IV. 3. Williams, J. Juries, V. Dick. Sess. 189, 90.

(*d*) Tr. per Pais, 200.

(*e*) 1 Salk. 152. Burn, J. Jurors, IV. 3. Tr. per Pais, 205.

(*f*) Co. Lit. 158, a. Bac. Abr. Juries, E. 12.

(*g*) 4 Harg. St. Tr. 740. 750. See form of oath, 4 Harg. St. Tr. 750.

HOW THE
CHALLENGE IS
TO BE TRIED.

his opinion, that the prisoner is guilty, and would be executed (*a*). The triers, as far as they are concerned, are officers of the court, and liable to be punished for any misbehaviour or improper conduct in the execution of their duty (*b*). The disallowing of a challenge is not a ground for a new trial, but for a venire de novo (*c*).

If either by reason of peremptory challenges, or for cause, there are not sufficient jurors left in the panel, there must, if the trial be under a commission of gaol delivery, be a fresh panel, and a tales cannot be awarded (*d*); but if the trial were under a particular writ of venire facias, then a tales may be awarded, in the same way as where a sufficient number did not appear on the return to the venire (*e*). To this the sheriff may return entirely new men, who were not in the former panel (*f*); and no jurymen, who has been challenged on the original panel, ought to be sworn on the tales (*g*). Upon this return, the prisoner may challenge any of those who were sworn before peremptorily, if they are now returned; but he cannot challenge them for cause, without showing that the objection arose after the original swearing (*h*). And he can only challenge peremptorily from the tales, so many as will complete his number of twenty, in case of felony, and thirty-five in treason, together with the challenges he made to the original jury (*i*).

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Of reforming
the panel.

Besides these challenges by the parties themselves, the justices of gaol delivery, and of the peace, are empowered by statute to reform the panels of jurors, by taking out the names of individuals, and inserting others, at their discretion; and the sheriff is bound to return the panel so altered, under penalty of £20, one

(*a*) 4 Harg. St. Tr. 748. Co. Lit. 158, b. Kel. 9. Tr. per Pais, 205. 1 Salk. 153. 3 Bla. Com. 364. Bac. Abr. Juries, E. 12. Burn, J. Jurors, IV. 3. Williams, J. Juries, V. Dick. Sess. 191.

(*b*) Palm. 363. Bac. Abr. Juries, E. 12.

(*c*) 4 B. & A. 471.

(*d*) 4 Harg. St. Tr. 744, 5.

(*e*) 4 Bla. Com. 354. 4 Harg. St. Tr. 745.

(*f*) Fost. 64.

(*g*) 2 Ld. Raym. 1410. 1 Stra. 640. Bac. Abr. Juries, E. 12.

(*h*) 2 Hale, 270.

(*i*) 2 Hale, 270.

half to the king, and the other to the informer (*a*). And this provision extends alike to grand inquests and petit juries (*b*). So that, at the assizes, it sometimes happens, if a prisoner be arraigned on the crown side, that the judge, before whom he is to be tried, sends to the judge at nisi prius, for a fresh jury, which the sheriff is obliged to return, immediately between the king and the prisoner (*c*). And, by this means, the danger of juries being improperly selected by the returning officer, is, in a great degree, prevented.

OF REFORMING
THE PANEL.

The challenges being thus completed, and a full jury of unexceptionable persons, by some of the means we have examined, being ready, the clerk of the arraigns on the circuit proceeds to administer to each of them the following oath:—"You shall well and truly try, and true deliverance make between our sovereign lord the king and the prisoners at the bar, whom you shall have in charge, and a true verdict give, according to the evidence, so help you God (*d*)."

The form of swearing the petit jury for the trial of a traverse, differs in a slight degree from that which is used when the defendant is actually present (*e*). The forms at the sessions are the same (*f*). But it does not seem that the precise form of the oath is material, if the party conscientiously objects to use it, for a Scotch covenantor may be sworn as a jurymen, by holding up his hand, without kissing the book (*g*); and other variations have been allowed on several occasions (*h*).

Of the swearing
the jury.

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(*a*) 3 Hen. 8. c. 12. 2 Hale, 265. Burn, J. Jurors, IV. 4. Williams, J. Juries, V. Dick. Sess. 191. And this practice does not seem taken away by the 6 Geo. 4. c. 50. See the 20th section of that act.

(*b*) 2 Hale, 265. Burn, J. Jurors, IV. 4. Williams, J. Juries, V. Dick. Sess. 191.

(*c*) 2 Hale, 265. Burn, J. Jurors, IV. 4. Williams, J. Juries, V.

(*d*) 2 Hale, 293. 5 T. R. 313. Cro. C. C. 8. 4 Bla. Com. 354,

355. Dick. Sess. 192. According to 4 Harg. St. Tr. 723, 724. 737, each juror is sworn when called, and not challenged. See form of oaths, Cro. C. C. 483, 484. Post, last vol. 2 Hale, 293. 4 Harg. St. Tr. 723, 724. 737.

(*e*) See form, Cro. C. C. 483. Post, last vol.

(*f*) Dick. Sess. 192.

(*g*) 1 Leach, 498. 2 T. R. 733.

(*h*) See post, as to swearing witnesses.

OF SWEARING
THE JURY.

In describing, on the record, the swearing of the jury, it should be shown when and where they were sworn (*a*). Care should be taken that the parties sworn answer to the proper names by which they are returned, though a mistake in this respect will not, after verdict, be material. Thus, where the party actually summoned answers to a wrong name, and is sworn, it is merely a ground of challenge, which may be instantly removed by correcting the panel, and will afford no objection in arrest of judgment (*b*). So if the son of a jurymen be summoned, and answer to the name of his father, the court will not arrest the judgment, unless it be shown that some actual injustice has been done to the prisoner (*c*). Viewers, in the case of appearance, are to be sworn upon the jury first (*d*). As soon as each juror is sworn, he is set apart on the jury-box (*e*); and when a full jury of twelve are thus sworn, the clerk of the arraigns or clerk of the peace at the sessions, directs the crier ("*countez*," or "count these") (*f*), to count the jury, who does so, and then says to the jury, "twelve good men and true, stand together and hear your evidence;" and then the judge declares that the rest of the jury who have appeared are discharged; and the clerk of the arraigns directs the crier to make proclamation, which is made accordingly in the following form (*g*):

[553] "If any one can inform our lords the king's justices, the king's
 "serjeant, or the king's attorney, on this inquest to be taken be-
 "tween our sovereign lord the king and the prisoners at the bar,
 "of any treason, murder, felony, or other misdemeanor committed
 "or done by them, or any of them, let them come forth, and they
 "shall be heard; the prisoners stand at the bar upon their de-
 "liverance, and all others that are bound by recognizance to give
 "evidence against the prisoners at the bar, let them come forth
 "and give their evidence, or else they forfeit their recogni-

(*a*) 2 Stra. 901.

(*b*) 12 East, 231, n. a. Burn, J. Jurors, IV. 1. See 2 Marsh. 154. 6 Taunt. 460, S. C. Ante, 543, n. (*f*).

(*c*) 12 East, 229.

(*d*) 6 Geo. 4. c. 50. s. 24.

(*e*) 4 Harg. St. Tr. 750.

(*f*) 4 Harg. St. Tr. 1. 753.

(*g*) 2 Hale, 293, 294. Cro.

C. C. 8. Dick. Sess. 183. 192. 4 Harg. St. Tr. 723, 724. 753. Dalt. J. c. 185. In Cro. C. C. 8. Dick. Sess. 183, it is said, that the proclamation precedes the swearing of the jury. See also 3 Harg. St. Tr. 519. But see 4 Harg. St. Tr. 724. 753, which states the practice to be otherwise.

“zance” (a). The forms on the trial of a misdemeanor or traverse, or at the sessions, or on a special commission, are nearly the same (b). But it is not necessary that this proclamation, which is only for the benefit of the king, should appear upon the record, at least the defendant cannot take advantage of the omission (c). When this proclamation has been read, the trial commences in the manner we shall presently consider. The demeanor of the jury, in considering and declaring their verdict, the way in which they are to be discharged, and the penalties to which they are subject, will be considered with those stages of the proceedings in which they naturally arise.

(a) See observations on the latter part of this form, 5 T. R. 313.

(b) See form of proclamation on trial of a felony at the Assizes, Cro. C. C. 7. 482. Post. On a special commission, 4 Harg.

St. Tr. 724, 5. 753. On trial of a misdemeanor, Cro. C. C. 483. Post. At the Sessions, Dick. Sess. 183. Post.

(c) 2 Ld. Raym. 1469. Co. Ent. 353, b.

CHAPTER XIV.

OF THE TRIAL, AND ITS INCIDENTS, WITH THE
EVIDENCE AND VERDICT.

WHEN the jury have been thus assembled in the jury-box, and sworn, the clerk, in case of felony, calls to the prisoner at the bar, and bids him hold up his hand, by saying, "C. D. hold up thy hand" (*a*), and then addresses the jury in these words:—

"Look upon the prisoner, you that are sworn, and hearken to his cause.—A. B. stands indicted by the name of A. B. &c." (*reading the indictment as was done upon the arraignment, and then proceeding*), "Upon this indictment he hath been arraigned; upon this arraignment he pleaded not guilty; and for his trial hath put himself upon God and the country, which country you are; so that your charge is to inquire whether he be guilty of the high treason (or 'felony'), whereof he stands indicted, or not guilty; if you find him guilty, you shall inquire

[555] "what lands, tenements, goods, and chattels he had at the time of the high treason (or 'felony') committed, or at any time since; if you find him not guilty, then you shall inquire if he did fly for it or not; if you find he did fly for it, then you shall inquire what goods and chattels he had at the time when he did fly for it, or at any time since; if you find him not guilty, and that he did not fly for it, say so, and no more. Hear your evidence" (*b*). But on the trial of an indictment for a misdemeanor, where we have seen that it is not necessary for the defendant to appear (*c*), the indictment is not thus formally read

(*a*) 2 Hale, 293. Cro. C. C. 8.
Dick. Sess. 192. 4 Harg. St.
Tr. 724. 753. 778. To several
defendants, 6 Harg. St. Tr. 797.

(*b*) Id. *ibid.* See observations
on this form of proceeding.
5 T. R. 313, 14.

(*c*) Ante, 358, 414.

over in court; and, indeed, there is no necessity for such a proceeding, as he is entitled to a copy. OF THE TRIAL, &c.

When the indictment has thus been read, and the jury addressed, if it is a cause of more than ordinary importance, the indictment is usually opened, and the evidence arranged, examined, and enforced by the counsel for the prosecution (*a*). The junior barrister usually states the outline of the indictment, and pleadings thereon, but he cannot speak to more than is upon the record, for it is the province of the leading counsel to state the circumstances of the offence (*b*); and it is not usual for the leading counsel to endeavour to aggravate the case, but to confine himself to the facts which he thinks will be proved in evidence (*c*). We have already considered the cases in which the prisoner is allowed the advantage of counsel (*d*). After the speech of the leading counsel, the witnesses are called and examined (*e*); which brings us to the important subject of *evidence*, which we must now consider.

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The doctrine of *evidence* upon criminal prosecutions is, in most respects, the same as that in civil actions (*f*). The rules of credibility are evidently, in common reason, the same in both cases; and the chief distinction arises from that caution which always prevails when life is in question, and the anxiety of judges to look on every circumstance with the most favorable eye for the

Of Evidence in general*.

(*a*) 4 Bla. Com. 354.

(*b*) 1 St. Tr. 234. 9 Harg. St. Tr. 208.

(*c*) 6 St. Tr. 829.

(*d*) Ante, 407.

(*e*) 4 Harg. St. Tr. 705.—
Speech of the leading Counsel,
St. Tr. 829. Opening speech,
6 St. Tr. 829. It seems advisable to adduce some evidence

in support of the prosecution, in order the better to avoid an action for malicious prosecution, in case of an acquittal, 3 Esp. Rep. 7 & 8.

(*f*) 4 Esp. Rep. 136. 139. 144.
2 East, P. C. 993. 4 Bla. Com. 356. 1 Leach, 300. 392, n. a.
2 T. R. 201, n. a. 3 Camp. 401.

* As to evidence in general, see 2 Hale, 274 to 292. Hawk. b. 2. c. 46, per tot. Bac. Abr. Evidence. 4 Bla. Com. 356 to 360. Vin. Abr. Evidence. Burn, J. Evidence. Williams, J. Evidence. Peake's Law of Evidence. Phillips on Evidence. Gilb. Law of Evidence. Tr. per Pais, ch. 15; and the late very excellent work of Mr. Starkie on Evidence, which comprises the whole law on the subject.

OF EVIDENCE. defendant (*a*). In one respect, indeed, the superior interest which the public have in the punishment of offenders produces a more striking difference; for the party aggrieved is allowed to give evidence against the prisoner, though he is frequently permitted, by restoration of stolen goods, by rewards, by reimbursement of costs, or other means, to derive a benefit from his conviction (*b*). No injustice need, however, arise from this exception, which has been found essentially necessary for the purposes of public justice; because the credibility of the witness is still left to the jury, and they are able to estimate the probable influence of interest, or of revenge, on the testimony which he delivers.

What Parts of
the Charge must
be proved in
Evidence*.

[557]

In this stage of the investigation, it may be material for the prosecutor to know what parts of his indictment, it will be necessary for him to substantiate with evidence. It is now settled, that he must prove every statement which enters into the substance of the charge, but he will not be compelled to maintain any averments which, without being repugnant, are merely formal or superfluous (*c*). The distinction between material and immaterial averments, is perfectly well settled in criminal, as well as civil cases; and, if the averment be material, that is, if it be connected with the charge, it must be proved; but if it be wholly superfluous, it may be thrown out of the question (*d*). The prosecutor must, in general, be prepared to show that the offence was committed in the county where the venue is laid, and it will not lie upon the defendant to disprove that circumstance (*e*); but we have seen, that the particular ville, time, number, quantity, and value, need never be accurately proved, except where they enter into the colour and essence of the offence (*f*). Thus, although the day is not, in general, material, yet if the defendant be indicted for a burglary, and a subsequent stealing, the prosecutor, on failing to prove the burglary on the day laid in the indictment, cannot be admitted to give evidence of a larceny, as having taken place on any day pre-

(*a*) 4 Esp. Rep. 136. 139. 144.
2 East, P. C. 993.

(*b*) 2 East, P. C. 993. 1 Leach,
131, 2, 3.

(*c*) 2 Leach, 594.

(*d*) 2 Leach, 594.

(*e*) 2 Leach, 987. 2 New
Rep. 91, 2. 2 East, P. C. 992.

7 East, 65.

(*f*) Ante, 200. 224. 294.
Hawk. b. 2. c. 46. s. 178 to 190.

2 Hale, 291, 2.

* As to what averments are divisible, and what part of a charge it will suffice to prove, see ante, 250 to 252.

vious to that on which he attempted to prove the burglary to have happened (*a*). But on an indictment for a misdemeanor, containing several counts, alleging several misdemeanors of the same kind on the same day, the prosecutor may give evidence of such misdemeanors on different days (*b*). On an indictment against a county for not repairing a bridge, or a parish for not repairing a highway, the prosecutor must prove that the bridge and the way were public (*c*). So, on an indictment for perjury, he must be prepared to prove the whole of the defendant's evidence, as one part of it may be so explained by another, as to remove the imputation against him (*d*). And, though the indictment contains several distinct assignments of perjury, and professes only to state the false depositions in substance and effect, the whole must be proved to have been spoken, and essentially to bear the same construction with that set forth upon the record; and, if stated in the indictment continuously, it must be proved in the same order (*e*). But, it is a general rule, which runs through the whole criminal law, that it is sufficient to prove so much of the indictment as shows the defendant to have been guilty of a substantive crime therein stated, though not to the full extent charged against him (*f*). And, therefore, if an indictment charges that the defendant did, and caused to be done, a particular act, it is enough to prove either (*g*); and the defendant may be found guilty upon a count in an information, which charges him with having composed, printed, and published a libel, if he is proved to have published, without any evidence that he was implicated in the composition (*h*). And if negative averments be introduced, to show that the case is not within any of the exceptions recognized by a legislative provision, which it would be his duty to produce, as matters of defence, if he could avail himself of their benefit, there will be no necessity to support those allegations in evidence (*i*). But, when the law presumes the affirmative of any fact, the negative

WHAT PARTS
OF THE CHARGE
MUST BE
PROVED IN
EVIDENCE.

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(*a*) 2 Leach, 708. 2 East, P. C. 519.

(*b*) 2 Stark. 458.

(*c*) 1 Stra. 183. 2 Saund. 153. b. n. 3.

(*d*) Peake, N. P. 38. 171, *sed quære*. For the discussion of this point, see Indictment for Perjury, post, vol. ii. 312 b.

(*e*) 2 Campb. 134.

(*f*) 2 Campb. 583.

(*g*) 2 Campb. 584.

(*h*) 2 Campb. 583. See other instances of finding a verdict, as to a part only of an indictment, post.

(*i*) 2 East, P. C. 782.

WHAT PARTS
OF THE CHARGE
MUST BE
PROVED IN
EVIDENCE.

of such fact must be proved by the party averring it in pleading ; and, when any act is required to be done by one, the omission of which would make him guilty of a criminal neglect of duty, the law presumes the affirmative, and throws the burthen of proving the negative on the party who insists on it (*a*).

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There are also some cases, in which it is not necessary that the proof should precisely correspond with the allegations in the indictment. Thus, an indictment for murder, by poisoning with one kind of poison, may be supported by proof of another kind of poison ; and an indictment for killing with a sword, will be supported by proof of killing with a staff or gun ; though an indictment for killing with poison, will not be supported by proof of killing by stabbing (*b*). So, if A. B. and C. be indicted for the murder of D., and it is laid in the indictment that A. gave the stroke, and that B. and C. were present, aiding and abetting, though upon the evidence it appears that B. alone gave the stroke, and that A. and C. were present, this will maintain the indictment, for they are all principals (*c*). It is also a general rule, that whatever is merely superfluous need not be proved, although it be stated on the face of the proceedings (*d*). So that, as we have already considered what must be stated, and what degree of accuracy is requisite, it is only necessary here to observe, that, in general, what need not have been stated need not be proved, and that where we have shown an accurate statement to be unnecessary, the reason why it is so, is because there is no occasion for the evidence, in those respects, exactly to correspond with the indictment (*e*).

It is necessary to adduce evidence to identify the defendant. The question of identity is for the consideration of the jury (*f*). In order to identify a person in court, with one whom the witness has described, the attention of the witness may be directed to the person in court, and he may be asked whether that is the person of whom he has spoken (*g*).

(*a*) 3 East, 192. 3 Campb. 10 & 12.

(*b*) 2 Hale, 291.

(*c*) 2 Hale, 292.

(*d*) 2 Leach, 594. And as to surplusage in general, see ante, 294.

(*e*) See ante, 294.

(*f*) *Benson v. Olive*, Mich. Term, 5 Geo. 2. And as to proof of identity, see Stark. on Evidence, Index, tit. Identity. Post, vol. ii. 312, b. in cases of perjury.

(*g*) 2 Stark. C. N. P. 123.

Having thus shown that the prosecutor will be required to prove all the material, though none of the superfluous, parts in the indictment, we must next inquire what *degree* of proof will suffice to sustain the former.

What is sufficient proof.

The common law did not, according to the stronger opinions, require any particular *number of witnesses*, or weight of other proofs, to convict a man, of a particular offence, but left it altogether to the force of the evidence, as depending upon a variety of circumstances, far too diversified and subtle to be reduced within any precise boundaries (a). Lord Coke, indeed, contends, rather from scriptural analogies than legal authorities, that one witness was never sufficient to convict a person of high treason (b), but the later writers seem to hold a contrary opinion. At an early period, however, it was necessary to make some alteration in this respect, in order to secure the subject from the oppression of state prosecutions. For this purpose, the 1 Edw. 6. c. 12. s. 22, and the 5 & 6 Edw. 6. c. 11. s. 12, enacted, that no person should be convicted of *high treason*, or *petit treason*, except by the testimony of two lawful accusers, or his own voluntary and free confession. But these salutary provisions were generally supposed to be repealed by the 1 & 2 Ph. & M. c. 10, which directed all prosecutions for high treason to be carried on according to the course of the common law; although the intention of that statute was doubtless rather to extend, than to diminish the privileges of the party indicted. And although these statutes, and indeed every rule of evidence, were repeatedly disregarded in the succeeding reigns, it seems to be the stronger opinion that they remained unrepealed, and that it was rather an exercise of arbitrary discretion than of legal authority, to refuse their benefit to the prisoner (c). This question is, however, at the present day, rather one of historical curiosity than of practical importance, for the 7 W. 3. c. 3. s. 2. enacts, that no person shall be convicted of any species of high treason, which works corruption of blood,

Number of witnesses.

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(a) Carth. 144. Fost. 233. Hawk. b. 2. c. 25. s. 129. Bac. Abr. Evidence, C. Burn, J. Evidence, 1.

(b) 3 Inst. 26.

(c) 1 Leach, 461, 2. 3 Inst. 24. 1 Hale, 300. Kel. 9. Fost. 234, 5, 6, 7, 8. 3 St. Tr. 204. Sir T. Raym. 407.

NUMBER
OF WITNESSES.

[561]

or of misprision of such treason, unless upon the oaths of two lawful witnesses, either both of them to the same overt act, or one of them to one, and the other to another overt act of the same treason, unless the party indicted shall confess his guilt, stand mute, refuse to plead, or object peremptorily to more than the law allows him to challenge. And by the 4th section of the same act it is provided, that if two distinct treasons, of different kinds, are included in one indictment, a single witness to each of them will not be regarded as two witnesses to the same treason, and the defendant cannot be convicted on their testimony alone.

In the construction of this statute it has been holden, that one witness is sufficient to convict in any treason which does not produce corruption of blood (such as coining), as such offences are evidently excepted from its provisions (*a*). For these subordinate treasons are, by the express provisions of 1 & 2 Ph. & M. c. 11, to be tried according to the course of the common law, without regard to the statutes of Edward; and, therefore, this circumstance does not at all militate against the doctrine, that those acts were never repealed, as far as they respect treasons in general, by the sweeping effect of any subsequent provision. And, indeed, petit treason, respecting which there has been no such particular exception, stands upon the *very same* footing, on which the statutes of Edward placed it (*b*). It has, however, been decided, that a prisoner indicted for murder and petit treason, if there are not two lawful witnesses to the guilt, may be found guilty of the former upon mere circumstantial evidence, though acquitted of the latter (*c*).

The statute of William has been construed to extend to the proof of overt acts only, and not to any collateral circumstances which may arise on the trial (*d*). So that if the prisoner, in his defence, contend that he is not a subject of this realm, and con-

(*a*) 1 Leach, 42. Fost. 222.
Sir T. Jones, 233. 1 East, P. C.
129. Hawk. b. 2. c. 46. s. 9.
Dick. Sess. 197.

(*b*) 1 Leach, 461, 2. Fost. 232.
Hawk. b. 2. c. 46. s. 6.

(*c*) 1 Leach, 462. 10 St. Tr.
36. Fost. 106. 328. 2 Hale,
292. Hawk. b. 2. c. 46. s. 7.

(*d*) Fost. 240. 2. 2 Salk. 634.
5 St. Tr. 17. Hawk. b. 2. c. 46.
s. 4, note f.

sequently cannot be bound by the duty of allegiance, proof by one witness will suffice to show that he is a native of some part of his majesty's dominions (*a*). Under this act, the confession, which will take away the necessity for two witnesses, must be in open court, on the arraignment of the defendant, and which, as in all other criminal cases, is equivalent to a conviction (*b*). But an extra judicial confession, if made under such circumstances as would render it admissible in any other criminal case, may be given in evidence to corroborate other proof, though not to take the case out of the requisitions of the statute (*c*). It has, however, been resolved, that the information of a witness taken upon oath before a magistrate, joined to the *vivâ voce* testimony of another, do not amount to sufficient evidence to go to a jury, who are to decide on the guilt of a prisoner accused of the higher description of treasons (*d*).

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To these rules, established by the statute of William, and which have since been thus applied, an exception has been introduced in the past reign, in consequence of the attack on the person of his late majesty. It was provided by the 40 Geo. 3. c. 93, that where, on an indictment for high treason, the overt act laid should be the assassination of the king, or any direct attempt, endangering his person, the defendant should be tried in the same manner as if he were charged with a common murder, and none of the exceptions in his favor, which the statutes of William, and Anne, would otherwise have authorized him to claim, will be allowed to protect him. At the present day, therefore, the peculiar rules of evidence, which affect cases of high treason, are rather limited in their operation, since its lowest and its highest degrees are both placed on a footing, in this respect, with ordinary felonies.

There is one other description of offence, to prove which, for a very different reason, two witnesses are considered requisite.

(*a*) 2 Salk. 634. Fost. 240. 4 Harg. St. Tr. 778.

1 East, P. C. 130.

(*b*) Fost. 10, 11. 240. 244.

1 East, P. C. 133, acc. 4 Bla. Com. 357, contra. See form,

(*c*) 8 St. Tr. 254, 5. 262, 3.

Fost. 241. 1 East, P. C. 132, 3.

(*d*) 4 St. Tr. 237. 5 St. Tr. 17.

Hawk. b. 2. c. 46. s. 8.

NUMBER
OF WITNESSES.

This is the case with the crime of *perjury*, where the oath of the defendant is to be disputed, and cannot justly be regarded as false on the testimony of a single witness (*a*). Here, therefore, our law properly adopts the maxim of the civil jurists, though, in general, very perilous to the interests of public justice, which is, that one witness of a fact is neutralized by the denial of the party indicted, and therefore a third person must be obtained, in order to turn the balance. But, some hold that it would be more reasonable, in all cases, to leave the evidence, which the prosecutor can bring forward, to the jury, who, under the direction of the judge, would always be competent to decide on the degree of credibility which it deserves.

Of presumptive
evidence*.

From the secrecy with which some kinds of crime are frequently committed, the jury must often be compelled to receive evidence which is merely circumstantial and *presumptive*. It would be to little purpose to detail the curious distinctions which some of the older writers have taken, and the multifarious instances with which they have endeavoured to explain them. It seems, however, to be a good general rule, that no one ought to be convicted, before a felony is known to have been actually committed; so that no man should be found guilty of murder, before the death of the party is actually ascertained; nor of stealing goods, unless the owner is known, merely because he cannot give an account in what way they came into his possession (*b*). But the circumstance, that individuals have occasionally suffered on presumptive testimony, whose innocence has been afterwards ascertained, ought not to prevent juries from receiving (though with caution and deliberation) this species of evidence; for the evil is comparatively small which can result from its admission, compared with that general impunity, which the worst offenders might obtain, if this kind of proof were never to be regarded.

(*a*) Rep. temp. Hardw. 265. Peake on Evid. 9, 10.
 2 Stra. 1230. 10 Mod. 194, 5. (*b*) 2 Hale, 289, 90. 4 Bla.
 Hawk. b. 2. c. 46. s. 10. 4 Bla. Com. 358, 9. Barl. J. 189.
 Com. 357. Dick. Sess. 198.

* As to this kind of evidence in general, see Stark. on Evidence, Index, tit. Presumptions.

PRESUMPTIVE
EVIDENCE.

In general, however, it lies upon the prosecutor to prove the affirmative of the issue, and not on the prisoner to establish his innocence (*a*). But to this rule there was, until lately, a statutable exception, by which a mother of an illegitimate child, concealing its death, must have proved by one witness that it was born dead, or she would be presumed to have murdered it (*b*). This provision was, however, lately repealed, and the same rules of evidence prevail on such an indictment, as on the ordinary course of criminal proceedings (*c*). And where the prosecutor alleges some crime against the prisoner, which consists in the omission of a duty, it will rest upon the latter to prove the negative (*d*).

With regard to the presumptive evidence which may be admitted against the prisoner, it may be observed, that it must arise, in general, from the facts in issue, and cannot be deduced from any other part of the defendant's conduct, in order to prove him guilty. Thus, the admission of the prisoner, that he formerly committed an offence of a similar nature to that of which he is indicted, and that he has a tendency to such practices, cannot be admitted in evidence (*e*). But where the knowledge of the defendant of the nature of his conduct is the point in issue, as where he is charged with uttering a forged note, knowing it to be forged, evidence of his having committed a series of acts of the same description, may be received as presumptive of knowledge (*f*). So also, on an indictment for knowingly passing base money, it may be shown that the prisoner had other coin of the same kind in his possession, and had transferred it to other persons, in order to enable the jury to draw the conclusion, that he knew the money in question to be counterfeit (*g*). Thus, upon the same principle, on an information for a libel, in order to corroborate the fact that the defendant is the author, other publica-

(*a*) Phil. on Evid. 72.

(*b*) 21 Jac. 1. c. 27.

(*c*) 43 Geo. 3. c. 58.

(*d*) 3 East, 193. 199. 1 Phil. on Evid. 6th edit. 193.

(*e*) 1 Phil. on Evid. 6th edit. 193.

(*f*) 1 Campb. 324. 2 Leach, 983. 987. 1 New. Rep. 92. Russ. & Ry. C. C. 120. 132. 245.

(*g*) 1 New. Rep. 95. Russ. & Ry. C. C. 132; and post, vol. ii. 112, n.

PRESUMPTIVE
EVIDENCE.

tions may be adduced on the trial, which are, in themselves, libellous (*a*), and this, though the latter (a newspaper) be defective in the stamp (*b*). And on a charge against several defendants, for a conspiracy to cause themselves to be regarded as persons of large fortune, in order to defraud an individual, evidence of several instances of false representation may be adduced, to show the combination which actually existed between them (*c*). So upon an indictment for maliciously shooting, if it be questionable whether the shooting was by design or accident, proof may be given that the prisoner at another time intentionally shot at the same person (*d*). But it seems that, in such cases, the court ought not to take into their consideration, in pronouncing judgment, any criminal acts not charged in the indictment, which may thus come incidentally under their cognizance (*e*).

With respect to the *degree* of the *presumption* which will be admitted to prevail, some important rules may be collected. In an indictment for a libel, in which a publication in the county where the defendant is indicted must be proved, the post-mark of the letter, containing the matter charged, is not sufficient to prove a publication in the county where the venue is laid, because of the possibility of forgery (*f*). But, in order to prove that a defendant caused to be published in Middlesex, libellous letters written by him elsewhere, it will suffice to show that the letters are in his hand-writing, and that the publisher of a public register in Middlesex, to whom the letters were sent, before they were forwarded to him, received an anonymous letter, in the same hand-writing, desiring the publication (*g*). And when a person is indicted for perjury, in an answer in Chancery, it will be sufficient to prove his signature, and that of the master before whom it purports to be sworn, in order to fix him as the deponent; for the attestation of the master affords a sufficient presumption of the defendant having been sworn before him (*h*).

(*a*) Peake, N. P. 75. Ersk.
Speech for Paine.

(*b*) Peake, N. P. 75. 1 Taunt.
101.

(*c*) 1 Campb. 399; and see
post, vol. iii. 1143 *a*.

(*d*) Russ. & Ry. C. C. 531.

(*e*) 1 New. Rep. 95.

(*f*) 1 Campb. 215. Russ. &
Ry. C. C. 264; and see post,
vol. iii. 876.

(*g*) 7 East, 65.

(*h*) 2 Campb. 508. 2 Burr.
1189; and see post, vol. iii. 876.

In general, what one defendant says is evidence only against himself; but in the case of conspiracy, when a joint purpose has been proved, the expressions of one party indicted, respecting the object of the conspiracy, may be given in evidence against the others (*a*). It is sufficient to prove the commencement of an office named in the indictment, and it will be presumed to continue, unless the defendant can show its termination (*b*). So, where a party acts ostensibly as a public officer, as in administering an oath, the presumption is that he has competent authority to support him, though the contrary may be shown by the defendant's witnesses (*c*). And, therefore, even in an indictment for murder, in resisting an officer in the execution of his duty, it is sufficient to prove that he acted as such officer, and to produce the process or warrant, under the sanction of which he acted, at the time when the offence was committed (*d*).

PRESUMPTIVE
EVIDENCE.

It is a general rule, which runs alike through civil and criminal proceedings, that the best evidence must be given, of which the nature of the case will allow (*e*). By this it is intended that no proof can be admitted, which supposes, from its very nature, that the party bringing it forward has it in his power to adduce better evidence, if he thought proper to procure it (*f*). For the suppression of that which would be the strongest testimony, induces a vehement presumption, that if it were brought forward, it would be against the party who is desirous of evading its production (*g*). And, therefore, if a copy of any deed or writing be offered in evidence, when it is in the power of the defendant to produce the original, it will not be received, for a suspicion is evidently thrown upon its correctness (*h*). So no parol evidence will be admitted

The best evidence must be given.

(*a*) 5 Esp. Rep. 125. 6 T. R. 527. 529. 11 East, 585. See post, vol. iii. 1143 *a. b.* for more fully as to this.

(*b*) 5 Esp. Rep. 230.

(*c*) 1 Campb. 131. 3 Campb. 432. 4 T. R. 366.

(*d*) 4 T. R. 366. 1 Campb. 131. 3 Camp. 432. Fost. C. L. 311, 12. Holt, C. N. P. 593.

(*e*) Gilb. on Evid. 13. Bul. N. P. 293. Stark. on Evid.

part i. 102, 103; part iii. 389.

(*f*) 3 Wils. 275. 2 Stra. 1261. Bul. N. P. 293, 4. Hawk. b. 2. c. 46. s. 66. Dick. Sess. 195. 1 Phil. on Evid. 6th ed. 207, (*a*). Peake, on Evid. 8.

(*g*) Hawk. b. 2. c. 46. s. 66. Bul. N. P. 293, 4. Dick. Sess. 195.

(*h*) Bul. N. P. 294. 1 Phil. Evid. 6th edit. 207.

BEST EVIDENCE. of the contents of any writing, which it is in the power of the party offering it to produce (*a*). But if it be proved that the original has been lost or destroyed, or that it is in the hands of the defendant, the prosecutor may give an attested copy of it, as the next best evidence that he can obtain; and if no copy were taken, parol evidence of its contents may be admitted (*b*). And, therefore, parol evidence may be given of the contents of a forged bill of exchange, upon proof that it is in the prisoner's possession (*c*). And upon the same principle, where the defendant has swallowed the instrument, for the forgery of which he is indicted, parol evidence may be given of its contents, without any notice to produce it (*d*). If a witness to a bond, after his attestation, becomes interested, it may be read, upon proof of his hand-writing; so it may, if he be dead, or beyond the seas (*e*). So where the originals of any papers are public documents, as the journals of parliament, the records of courts of justice, and other public memorials, attested copies may, for public convenience, be always received in evidence (*f*). But in general, no declaration or entry by any person can be given in evidence, where the party who made such declaration or entry can be produced and examined as a witness (*g*).

But though the best kind of evidence is thus requisite, the greatest quantity of existing proof is not requisite, because the same reason will not apply. Thus, for example, no one can prove the execution of a deed but a subscribing witness, if there were one, and he be still living; but though there were twenty witnesses to the instrument, all of whom might be subpoenaed, the testimony of one will suffice (*h*). If there be several eye-

(*a*) Hawk. b. 2. c. 46. s. 66. When parol evidence is admissible, see Stark. on Ev. part iii. 394; part iv. 1042.

(*b*) 2 T. R. 201. 1 Leach, 300. 3 T. R. 306. Hawk. b. 2. c. 46. s. 67. But parol evidence of a lost agreement cannot be received, if the agreement was on unstamped paper, and this though it has been wrongfully destroyed by one of the parties, 2 B. & A. 478. 2 Stark. N. P. 478.

(*c*) 1 Leach, 294. Hawk. b. 2. c. 46. s. 67. Dick. Sess. 196.

(*d*) 14 East, 276.

(*e*) Stra. 34. 3 Ves. 112. 5 T. R. 341.

(*f*) 3 Salk. 155. 2 Stra. 954. 1073. Hawk. b. 2. c. 46. s. 78.

(*g*) 3 Esp. Ca. 244. 2 Brod. & B. 311.

(*h*) Stark. on Evid. part iii. 391. 1 Phil. on Evid. 6th edit. 209.

witnesses to a particular fact, it may be proved by the testimony of BEST EVIDENCE. one only (*a*). Nor does the rule, as to the best evidence, in any case apply, unless the evidence proposed be, in its general nature, of an inferior degree to that for which it is sought to be substituted. It is not sufficient, that it may probably be less satisfactory in the particular instance; and upon this principle it will not be necessary to call the supposed writer of an instrument, for the purpose of proving or disproving his hand-writing; but the evidence of others acquainted with his mode of writing will be held sufficient, because this kind of proof differs rather in degree than in species (*b*). So that even upon an indictment for forging a bank note, it has been holden that proof, that the signature to the fictitious instrument is not the writing of the cashier of the bank, may be given by any one who is acquainted with his writing, though he would himself be, in such case, a competent witness (*c*). The rule also does not apply where the party has admitted the fact which is to be proved, for he is in general barred by his admission or representation, particularly if the other party acted on the faith of it, and no competition arises as to the comparative efficacy of two modes of proof. But it has been held, that an admission by an obligor of his execution of a bond, does not supersede the necessity of proving it, by calling the attesting witness (*d*).

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There is no general rule better established in the law of evidence, than that mere statements of what was uttered by a stranger, cannot be admitted to prove any circumstance on the trial (*e*). For the law admits of no evidence but such as is delivered upon oath, and the original expressions were not only uttered when the speaker was not under that obligation, but are liable to be forgotten, misunderstood, and unconsciously altered,

Of hearsay evidence, and dying declarations.

(*a*) Stark. on Evid. part iii. 391.

(*b*) 1 Stark. C. N. P. 167. Russ. & Ry. C. C. 378. Stark. on Evid. part iii. 391, 2.

(*c*) 2 East, P. C. 1002. acc. *sed quære*; and see 2 East, P. C. 1000, *contra*. Post.

(*d*) Dougl. 205. See Stark. on Evid. part iii. 393; part iv.

tit. Admission.

(*e*) 2 St. Tr. 332. 414, 15. 761. 802, 3. 3 St. Tr. 145. 210. 252. 4 St. Tr. 33. Hawk. b. 2. c. 46. s. 46. Bac. Abr. Evidence, K. Bul. N. P. 294. Burn, J. Evidence, III. Williams, J. Evidence, V. 1 Phil. on Evid. 6th edit. 218. Stark. on Evid. part i. 40 to 47.

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EVIDENCE.

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by the party who repeats them (*a*). Besides, if the original speaker be living, this statement of his words is not the best evidence, which, we have seen, the courts will require (*b*); and the prisoner loses the benefit of cross-examination, which is of such eminent service in discovering the real aspect of the circumstances related (*c*). And therefore, though the declarations of a prisoner respecting the charge may, as we shall see hereafter, be produced against him when they amount to confession, they cannot be brought forward in his defence, though he is at liberty to cross-examine any of the witnesses for the crown, as to his language and demeanor (*d*). But hearsay may be used as inducement and in illustration of more substantial testimony (*e*); and in Lord George Gordon's case (*f*), the cry of the mob was held admissible in evidence. And the declarations of a witness, at another time, may be adduced to invalidate or to confirm his evidence, by showing that he varies in his statement, or has maintained a uniform consistency in his narration (*g*).

Dying declarations.

There is also one great and important exception to this rule, respecting the rejection of hearsay evidence, which, though it stands alone, rests upon the principles of substantial justice. This is the case of the *dying declaration* of a party murdered, respecting the causes which led to his situation, and which is constantly admitted in prosecutions for felony (*h*). For it is considered, that when an

(*a*) Hawk. b. 2. c. 46. s. 46. Bul. N. P. 294. Bac. Abr. Evidence, K. Burn, J. Evidence, III. Williams, J. Evidence, V. 1 Phil. on Evid. 6th edit. 218. Stark. on Evid. part i. 40.

(*b*) Bul. N. P. 294. Williams, J. Evidence, V. Ante, 566.

(*c*) Hawk. b. 2. c. 46. s. 46. Bac. Abr. Evidence, K. Burn, J. Evidence, III. Williams, J. Evidence, V.

(*d*) Hawk. b. 2. c. 46. s. 47. n. 2. Bac. Abr. Evidence, K. Williams, J. Evidence, V.

(*e*) 2 St. Tr. 325, 28, 332, 3, 414, 15. 3 St. Tr. 144, 5, 209, 210. Hawk. b. 2. c. 46. s. 46.

Bul. N. P. 294. Bac. Abr. Evidence, K. Williams, J. Evidence, V.

(*f*) 21 How. St. Tr. 542.

(*g*) 1 Mod. 283. Skin. 402. Holt, 236. Hawk. b. 2. c. 46. s. 48. Bul. N. P. 294. Bac. Abr. Evidence, K. Burn, J. Evidence, III. Williams, J. Evidence, V.

(*h*) 1 Stra. 499. 9 St. Tr. 161. 3 Burr. 1253. 1 Leach, 460. 500. 4. 2 Leach, 561. Hawk. b. 2. c. 46. s. 49. Vin. Abr. Evidence, A. b. 38. Burn, J. Evidence, III. Williams, J. Evidence, V. 1 Phil. on Evid. 6th edit. 223. Stark. on Evid. part i. 101.

DYING
DECLARATIONS.

individual is in certain expectation of immediate death, all temptations to falsehood, either of interest, hope, or fear, will be removed, and the awful nature of his situation may be presumed to impress him as strongly with the necessity of a strict adherence to truth, as the most solemn obligation of an oath administered in a court of justice (*a*). But dying declarations are admissible only where the death is the subject of the charge, and the circumstances of the death are the subject of the declaration (*b*). In trials for robbery, the dying declarations of the party robbed are inadmissible (*c*). To enable these testimonies to be given in evidence, they must be made when the party is not only in actual danger of death, but when he is aware of the circumstances in which he is placed, and impressed with a sense of speedy dissolution (*d*). But it is not necessary that the deceased should express that opinion in words; it will be sufficient, if it can be collected from the general circumstances of his condition (*e*). If the narrative of the deceased be then reduced into writing, the document must be given in evidence, and no parol testimony respecting its contents can be admitted (*f*). It has been holden, that the dying declaration of a criminal at the scaffold will not be thus admissible; because his oath could no longer have been received in a court of justice, after his blood is corrupted, and therefore it would be absurd to admit his evidence, under circumstances which merely operate as a substitute for an obligation, which he was no longer capable of incurring (*g*). And, though the contrary was formerly decided, it is now settled that the court, and not the jury, are to decide, whether, under the circumstances of the case, the declaration ought to be admitted (*h*).

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The *confession* of the defendant, voluntarily made, without either threat or solicitation, may be given in evidence against him, Of the defendant's confession.

(*a*) 1 Leach, 502. 1 Gilb. Evid. 210. Williams, J. Evidence, V. 1 Phil. on Ev. 6th ed. 223. Stark. on Evid. part i. 101.

(*b*) 2 B. & C. 605. 608. 4 D. & Ry. 120.

(*c*) Per Bayl. & Best, Js. 1822. 1 Phil. on Evid. 6th edit. 225.

(*d*) 1 Leach, 503, 4. 1 East,

P. C. 353, 4.

(*e*) Id. *ibid*.

(*f*) Vin. Abr. Evidence, A. b. 38. Burn, J. Evidence, III. Williams, J. Evidence, V.

(*g*) 1 Leach, 337. Hawk. b. 2.

c. 46. s. 51. 1 East, P. C. 353. n. a.

(*h*) 1 Leach, 504.

CONFESSION. whether it was taken as an examination before justices of the peace, upon the statutes of Philip and Mary (*a*), or upon an examination taken at common law, before a secretary of state, or other magistrate, for treason, or other crimes not within those statutes (*b*), or made to private individuals, in the ordinary course of conversation (*c*). And this, when fully proved, will be sufficient to convict him, even when uncorroborated by any other testimony (*d*). And a confession is sufficient ground for a conviction, though there is no other proof of his having committed the offence, or of the offence having been at all committed, if such confession was in consequence of a charge against the prisoner, especially if there is evidence that he had been desirous to keep out of the way of the person upon whom the offence is supposed to have been committed, or if any of his companions, under the same charge, have attempted to do so (*e*). Where persons having nothing to do with the apprehension, prosecution, or examination of the prisoner, advised him to tell the truth, and consider his family, it was held that such admonition was no ground for excluding a confession made an hour afterwards to the constable in prison (*f*). And where a prisoner was charged with stealing a guinea, and two promissory notes, the prosecutor told him that it would be better for him to confess, it was held, that after this admonition, the prosecutor might prove that the prisoner brought him a guinea and a £5. note, which he gave up to the prosecutor as the guinea, and one of the notes that had been stolen from him (*g*). But where the prosecutor asked the prisoner, on finding him, for the money he, the prisoner, had taken

(*a*) Ante, 83, 4, 5. 1 Leach, 311. 2 Leach, 552. 637. 2 Hale, 284, 285. 3 St. Tr. 13. 131. 4 St. Tr. 33. 6 St. Tr. 831. 1 St. Tr. 68. Hawk. b. 2. c. 46. s. 31, 33. 4 Bla. Com. 357. Bac. Abr. Evidence, L. Burn, J. Evidence, III. Williams, J. Evidence, V. Dick. Sess. 211. Toone, 137. 1 Phil. on Evid. 6th edit. 104. Stark. on Evid. part i. 104, 5; part iv. 48, 49.

(*b*) Id. *ibid.* Hawk. b. 2. c. 46. s. 32; but the examination must not be of prisoner, as

a witness, Holt, C. N. P. 597.

(*c*) Id. *ibid.* Hawk. b. 2. c. 46. s. 33. A bond given by defendant, acknowledging a nuisance, is evidence against him on an indictment for such nuisance, Peake, 91.

(*d*) 1 Leach, 311, in note. Hawk. b. 2. c. 46. s. 39. Russ. & Ry. C. C. 309.

(*e*) Russ. & Ry. C. C. 481; and see *id.* 440.

(*f*) Russ. & Ry. C. C. 153.

(*g*) Russ. & Ry. C. C. 151.

CONFESSION.

out of the prosecutor's pocket, but before the money was produced said, "He only wanted his money, and if the prisoner gave him that he might go to the devil if he pleased," after which the prisoner took 11s. 6½*d.* out of his pocket, and said it was all he had left of it, held, that the confession ought not to have been received (*a*). Where the wife of a constable had told the prisoner, some days before the commitment, that it would be better for him to confess, the confession was admitted (*b*). Where hopes had been held out to a prisoner to confess, and when brought before a magistrate he refused to confess, except upon conditions, the judge admitted the general rule, with some qualifications, observing, that there must be very strong evidence of an explicit warning by the magistrate, not to rely on any expected favor on that account, and that it ought most clearly to appear, that the prisoner understood such warning, before his subsequent confession could be given in evidence (*c*). And, in a similar case, where the prisoner had been told by the constable's assistant, that it would be better for him to confess, but the magistrate cautioned him frequently to say nothing against himself the confession was held to be admissible (*d*). Where a prisoner had been admitted king's evidence, and confessed, and upon the trial of his accomplices refused to give evidence, he was convicted upon his own confession, even although it had been previously *falsely* represented to him by a constable, that his accomplices were in custody (*e*). Where a witness answers questions upon examination on trial, tending to criminate himself, and to which he might have demurred, his answers may be used for all purposes (*f*).

But confessions are, from their very nature, so liable to suspicion, especially when others are implicated, so likely to be influenced by hope or fear, and the terror of a sudden accusation, and so liable, like all hearsay evidence, to be misreported and changed in the narration, that the law does not suffer them to be received,

(*a*) Russ. & Ry. C. C. 152.

(*e*) Stark. on Evid. part iv.

(*b*) 1 Phil. on Evid. 6th edit. 23. 50.

104. (*f*) 4 Campb. 10. 2 Stark.

(*c*) East, P. C. 658.

C. N. P. 366; and see further,

(*d*) 1 Phil. on Evid. 6th edit. Stark. on Evid. part iv. 49, 50.

104.

CONFESION. except under peculiar conditions (*a*). Thus, they are only suffered to operate against the party confessing, and cannot affect his accomplices in guilt (*b*), except where they indicate a common purpose, in which all of them share (*c*). The confession must also be taken altogether, in order that the part which is in his favor may be weighed by the jury, and perhaps may explain the residue (*d*). The identity of the confession must also be proved, if it is in writing, before it can be read to the jury, for, in order to give it effect, the highest authenticity is requisite; and it is usual to prove, by the magistrate's clerk, the hand-writing of the prisoner and of the justice (*e*). But, above all, it must be cleared from the slightest suspicion that it was obtained by any threat of severity, or promise of favor; for if even the least degree of influence appear to have been exercised over the prisoner's mind, in order to induce him to disclose his guilt, the whole will be entirely rejected (*f*). And if a confession is improperly obtained, it is ground for excluding evidence of the confession, and of any act done by the prisoner in consequence of such confession (*g*). In this respect, the law of England acts upon a principle directly the reverse of those nations who employ torture, in order to extort a confession; for not only is that absurd and cruel process unknown to the English courts (*h*), but a peculiar delicacy is observed in the reception of the prisoner's acknowledgment, that he is guilty. It has, however, been ruled, that the confession shall be presumed to have been freely made until the contrary appear, and that the magistrate's clerk cannot, unless the prisoner alleges that the confession was unduly obtained, be asked by the

(*a*) 4 Bla. Com. 357. Williams, J. Evidence, V. Dick. Sess. 212.

(*b*) 1 St. Tr. 265. Hawk. b. 2. c. 46. s. 34. Bac. Abr. Evidence, L. Burn, J. Evidence, III. Williams, J. Evidence, V. Dick. Sess. 211. 3 Stark. C. N. P. 33.

(*c*) 5 Esp. Rep. 125. 6 T. R. 527. 9. 11 East, 585. Post, vol. iii. 1143.

(*d*) 5 Mod. 165. Hawk. b. 2. c. 46. s. 42. Bac. Abr. Evidence, L. Williams, J. Evi-

dence, V. Dick. Sess. 211.

(*e*) 2 Hale, 235. 6 St. Tr. 831. Hawk. b. 2. c. 46. s. 35. Williams, J. Evidence, V. Dick. Sess. 211, 12.

(*f*) 1 Leach, 263. 265, n. a. 387. 2 Leach, 559, n. a. 337. Hawk. b. 2. c. 46. s. 36. Bac. Abr. Evidence, L. Williams, J. Evidence, V. Dick. Sess. 212. 1 Phil. on Evid. 6th edit. 104. Ante, 84, 85, 86.

(*g*) Russ. & Ry. C. C. 492.

(*h*) Fost. 244.

prisoner's counsel whether the confession was voluntarily made (*a*). The practice, however, at present, is for the prosecutor's counsel, on his examination of his own evidence in chief, to inquire of the witnesses all the facts, so as to satisfy the jury that the confession was voluntarily made, and duly taken (*b*). But any facts disclosed by an extorted confession, and afterwards ascertained to be true, may be given in evidence, though they were obtained by means which render the confession itself inadmissible; because they rest upon their own foundation; they are unaltered in their complexion by the hopes or fears of the prisoner; and justice, which cannot suffer by their being proved, would frequently be defeated by their rejection (*c*). But, even then, the facts must be, of themselves, sufficient to warrant the conviction, and cannot, for that purpose, be connected with any other part of the confession, than that by means of which they were discovered (*d*). So that if a prisoner be improperly induced to acknowledge that he has stolen certain property, and, at the same time, discloses the place in which he has concealed it, the circumstance that the goods were found may be given in evidence, and that the defendant pointed out the place in which they were hidden, but his acknowledgment that he had previously stolen them must be altogether rejected (*e*).

CONFESSION.

We have seen that the statutes 1 & 2 Ph. & M. c. 13, and 2 & 3 Ph. & M. c. 10, require justices of the peace, before they bail or commit the prisoner, to take his examination, and that of those that bring him (*f*). If, on this occasion, he freely confess, the writing may be given in evidence against him (*g*). We have seen, that in this case it ought to be reduced into writing, and that it is advisable to have it signed by the prisoner (*h*). And where a

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(*a*) 6 St. Tr. 831.

(*b*) Ex Relat. Mr. Stafford.

(*c*) 1 Leach, 386. 263. 265. 2 East, P. C. 658. Hawk. b. 2. c. 46. s. 33. 40. Dick. Sess. 212. 1 Phil. on Evid. 6th edit. 104.

(*d*) 1 Leach, 265. 2 East, P. C. 653.

(*e*) 1 Leach, 265, n. a. 2 East, P. C. 658. 1 Phil. on Evid. 6th

ed. 108. Russ. & Ry. C. C. 492.

(*f*) Ante, 74, 5, to 89, as to Examination.

(*g*) 3 St. Tr. 13. 151. 1 St. Tr. 89. 186. 964. 1 Hale, 304. Hawk. b. 2. c. 46. s. 31. Bac. Abr. Evidence, L. Williams, J. Evidence, V.

(*h*) Ante, 86. 4 Esp. N. P. C. 172.

CONFESSION. prisoner, after his examination had been taken down in writing, refused to sign it, and did not say it was true, the evidence was rejected (*a*). And, as it is always presumed that the magistrate has performed his duty, until the contrary appears, no parol evidence can be admitted of the confession, until it is proved not to have been reduced into writing; because the best evidence must, in all cases, be given, which it is possible to procure (*b*). But, after it has been shown never to have been thus authenticated, it may be given in evidence, or if, though taken down, it wants the signature of the prisoner and the magistrate; for it would be absurd to suppose that a confession is rendered less authentic, than if it had been made before a private individual, by being made in the presence of a magistrate, and upon a regular and formal examination (*c*). And it has been holden, that the minutes of the solicitor for the prosecution, taken down during the examination, may be read in evidence against him (*d*). It is certainly improper to take the declarations of the party accused upon oath (*e*); and it has been considered, that if it be so taken it cannot be received on the trial (*f*); for though the admission of guilt is more solemn, yet it is considered not to be so freely made, as when the party is unsworn (*g*).

When evidence
as to character
is admissible for
the crown.

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As we have seen that the evidence is to be confined to the points in issue, it is clear that the prosecutor can adduce no proof of the defendant's general character, unless that it is the very scope of the charge against him (*h*). But where general character is put in issue, facts relating to it may be admitted (*i*). To this rule there is an exception, in the case of an indictment against an

(*a*) 2 Stark. 483. But this would not apply to a voluntary confession by a prisoner on his examination, 2 Leach, 554; 4th edit. 559.

(*b*) 1 Leach, 202. 309, 10, 11. Hawk. b. 2. c. 46. s. 43. Bul. N. P. 293. Williams, J. Evidence, V.

(*c*) 2 Leach, 555. 637. Hawk. b. 2. c. 46. s. 44.

(*d*) 2 Leach, 639.

(*e*) Ante, 86. Hawk. b. 2.

c. 46. s. 37. Bul. N. P. 242. Williams, J. Evidence, V. 1 Phil. on Evid. 6th edit. 106.

(*f*) By the Editor of Hawkins. Hawk. b. 2. c. 46. s. 17. Ante, 86.

(*g*) Ante, 86.

(*h*) Bul. N. P. 296. Hawk. b. 2. c. 46. s. 206.

(*i*) Hawk. b. 2. c. 46. s. 205. Bul. N. P. 296. Peake on Evid. 7.

individual as a common barretor, where it is necessary to give him notice of the particular facts which the prosecutor intends to establish (*a*). And the reason of this rule is said to be, that this kind of proceeding is usually instituted against attornies, who are constantly engaged in the lawful management of suits; and it might be very difficult to show the distinction between that conduct, and the encouragement of legal disputation: so that it is necessary for the defendant to know what circumstances in particular it is intended to object against him, that he may be prepared to show they arose in the honorable and legitimate exercise of his profession (*b*). And though the veracity of a witness may be impeached by examination into his general character, no investigation can be allowed into any particular fact, because he cannot be supposed to be ready to explain the one, though he ought always to be prepared to defend the other (*c*). And it is a general rule, that no one can be allowed to discredit his own witness, if on his examination his testimony makes against him (*d*); but he may call other evidence, to disprove the facts which are thus adverse to the side it is his aim to establish (*e*). CHARACTER.

But evidence to character is more frequently called on the behalf of the defendant (*f*), and, in doubtful cases, will often influence the jury to an acquittal (*g*). And even where the defendant thus opens the discussion, the prosecutor can ask no questions as to particular facts, but must confine himself simply to general reputation and character (*h*). [575]

Having thus considered the *degree* of evidence which the prosecutor must adduce, and the *kind* he is at liberty to bring forward, we come to examine the two descriptions, or *modes* of

Descriptions
of proof.

(*a*) Hawk. b. 2. c. 46. s. 205. Bul. N. P. 296. Peake on Evid. 7.

(*b*) Bul. N. P. 296. Peake on Evid. 7.

(*c*) Bul. N. P. 296. Hawk. b. 2. c. 46. s. 207. 1 Phil. on Evid. 6th edit. 276.

(*d*) Hawk. b. 2. c. 46. s. 208.

Hastings' Case in the House of Lords.

(*e*) Hawk. b. 2. c. 46. s. 209.

(*f*) 6 St. Tr. 832.

(*g*) Peake on Evid. 7, 8. 1 Phil. on Evid. 6th edit. 165.

(*h*) Hawk. b. 2. c. 46. s. 206. Bul. N. P. 296.

proof, into which all legitimate evidence is divided. These consist either of *written* documents or papers, or of the *verbal* evidence of witnesses, given in open court, in the presence of the prisoner (*a*).

1. Written evidence.

The descriptions of documentary evidence are so extremely numerous, that it will be possible only to notice the most important. These are, public documents or records—private papers in the hand-writing of the party, or others—and depositions duly taken before a magistrate.

1. Public documents.

Public acts of parliament will always sufficiently prove themselves, and the production of the printed book of statutes will suffice; but private acts must be examined with the roll before they can be given in evidence (*b*). And by the 41 Geo. 3. U. K. c. 90. s. 9, the statutes of England and of Great Britain, printed and published by the king's printer, are to be received as conclusive evidence of the several statutes, in the courts of either kingdom. The preamble of an act of parliament is evidence of all it recites (*c*). Proclamations, addresses, and articles of war, as printed by the king's printer, are considered as sufficiently authenticated by their mere production (*d*); and a recital in a proclamation is evidence of the fact recited (*e*). And the gazette, if produced, is sufficient to prove any acts of state which it contains (*f*), but not any thing which merely respects an individual (*g*). The journals of the House of Lords have always been admitted as evidence of their proceedings, even in criminal cases (*h*), and the journals of the House of Commons are also admissible for the same purpose; but this was once doubted, because they are not records (*i*). An unstamped copy of the mi-

(*a*) As to the species of evidence, see 1 Leach, 501.

(*b*) Bul. N. P. 225. Burn, J. Evidence, II. Dick. Sess. 213.

(*c*) 4 M. & S. 532.

(*d*) 2 Leach, 593. 1 Lord Raym. 282. 5 T. R. 446. 4 M. & S. 532. Stark. on Evid. part ii. 162 to 166. Burn, J. Evidence, II. Dick. Sess. 213; but see 2 Campb. 41.

(*e*) 4 M. & S. 546.

(*f*) 2 Leach, 593. 5 T. R. 436. Burn, J. Evidence, II. Dick. Sess. 213. 3 Price, 89.

(*g*) Id. ibid. 1 Phil. on Evid. 387, 388. 5 Esp. 233. Vide 1 Stark. N. P. 186. Peake's Rep. 155. 1 Esp. 371. S. C.

(*h*) Cowp. 17.

(*i*) Id.

minutes of the reversal of a judgment in the House of Lords, without more of the proceedings, is evidence of the reversal (*a*); but, upon an indictment for perjury, a resolution of the House of Commons, of the existence of a popish plot, was rejected as evidence (*b*). Upon the same principle, the returns and muster books of the navy office are evidence of the death of a party who is so returned (*c*), though his identity must be established by other testimony (*d*). Corporation books, proved to have been regularly kept, are evidence, though not kept by the proper officer (*e*). So are heralds' books, and the minutes of a visitation (*f*). So the daily book of a public prison is sufficient to show the time of a prisoner's discharge, though not the cause of his commitment (*g*); or the log-book of a man of war, to prove when another ship became part of her convoy (*h*).

Records of his majesty's courts are, in all cases, sufficient evidence; and the rolls of courts, which are not of record, when they respect the interests of the public (*i*). But as these are the property of all who may have occasion to refer to them, and therefore cannot be removed, examined copies of them may be produced, and proved by witnesses (*k*). If the perjury was on a former trial, the record of the prior proceedings must be made up,

(*a*) Cowp. 17.

(*b*) 4 St. Tr. 39; and see 9 id. 259. 5 T. R. 465.

(*c*) 1 Leach, 20. Bul. N. P. 249. Burn, J. Evidence, II. Peake on Evid. 79. Dick. Sess. 213. 5 Esp. 117.

(*d*) 3 Esp. Rep. 190. Burn, J. Evidence, II. Dick. Sess. 213, 214. Peake on Evid. 79.

(*e*) 1 Stra. 93. 1 Leach, 393, n. a. See 3 B. & A. 142. Stark. on Evid. part i. 298, 9.

(*f*) 1 Stra. 192. 401. 1 Leach, 393, n. a. Stark. on Evid. part ii. 179.

(*g*) 1 Leach, 392. 3 Bos. & Pul. 183. Burn, J. Evidence, II. Peake on Evid. 79.

(*h*) 1 Esp. Rep. 427. Peake on Evid. 79. And for evidence

as to *ancient surveys*, see Stark. on Evid. part i. 167 to 172; as to *public licences, grants, and certificates*, id. 172 to 174; *public registers* of a parish, id. 174 to 176; *parish books*, id. 176; *books of public offices*, id. 177, 8; *ships' registers*, id. 179; *public histories and chronicles*, id. 180, 181; *court-rolls*, id. 296, 7; *books of public companies*, id. 299; *corporation books*, id. 298, 9.

(*i*) 10 Co. Rep. 92. Burn, J. Evidence, II. Dick. Sess. 214. Russ. & Ry. C. C. 526. As to evidence of records and judicial authorities in general, see Stark. on Evid. part ii. 181 to 296.

(*k*) 10 Co. Rep. 92. Cowp. 17. Burn, J. Evidence, II. 1 Phil. on Evid. 6th edit. 366.

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and an office copy proved; and the minutes of the former trial will not be admissible in evidence (*a*). And on a prosecution for perjury in an affidavit, or in forgery, the original must be produced, and not an office copy (*b*), and the hand-writing proved; from which evidence, and proof that the jurat was properly attested, identity will be inferred (*c*). The books of sessions are considered as public books, which every one has a right to inspect, and the defendant may have a rule to inspect the books and records of the court where the indictment was preferred, and from which it was removed by certiorari into the King's Bench (*d*). And it should seem that a justice of the peace may, by rule of court, be compelled to produce on the trial, and give a copy of the original information and proceedings before him (*e*). But a court of equity will not make an order in support of an indictment against a bankrupt for not surrendering in due time, that the clerk of the commission attend at the Old Bailey with the proceedings, the creditors not concurring in the prosecution (*f*). The records, thus authenticated, are conclusive against those who are parties to them; and therefore a conviction of a parish for not repairing, is for ever after evidence of their liability to repair (*g*). But they will not be conclusive against any other persons; and, therefore, an accessory may dispute the guilt of his principal, notwithstanding the record of his conviction (*h*).

2. Private documents and papers, and subpœna, and notice to produce same.

When deeds or papers, which it is material to obtain on the trial, are in the hands of a third person, the proper course to obtain them is by serving him with a subpœna duces tecum, requiring him to appear and produce them (*i*). A witness thus

(*a*) 6 Mod. 168.

(*b*) 3 Campb. 401. 1 Sch. & Lef. 232. 1 Stra. 126. 1 Ry. & Mo. C. N. P. 169.

(*c*) 1 Leach, 50. As to evidence in perjury, see post, vol. ii. 312, *et seq.*

(*d*) 1 Wils. 240. 1 Bla. Rep. 39. Tidd, 8th edit. 646, 7. 852. But it seems a minute book, in which an entry of the proceedings at sessions is made, and from which book the roll, containing the record of such pro-

ceedings, is subsequently made up, is not itself a record, so as to be admissible in evidence, as a proof of the fact there stated, 1 Ry. & Mo. Rep. 171.

(*e*) 1 Stra. 126. Barnes, 468. Tidd, 8th edit. 647.

(*f*) 1 Atk. 221.

(*g*) Peake, N. P. 219.

(*h*) 1 Leach, 288. Dick. Sess. 214, 15.

(*i*) 1 Phil. on Evid. 6th edit. 421. See form, post, last vol.

subpœnaed is bound to attend, though it may be a question for the consideration of the judge whether he ought to produce the documents to which the process refers; and, in case of disobedience, he will be liable to an attachment, or an action for damages (*a*). But if the paper would subject him, or, in case of an attorney, his client, who entrusted him with the document, to any criminal prosecution, the court will not compel him to produce it (*b*).

When the papers are in the hands of the *defendant* himself, or his attorney, he cannot be compelled to bring them forward, or furnish evidence against himself, even though he should hold it in his hands in court; for *nemo tenetur seipsum accusare* (*c*). Therefore, in a criminal information or indictment, or action for penalties, a rule cannot be obtained to inspect corporation books, or the statutes and archives of the university of Oxford, in order to afford evidence against a member (*d*); and it is an established rule, that a bill for discovery is not sustainable in equity, if it call upon a party to disclose facts tending to criminate him, or in case of a married woman, her husband (*e*); and, therefore, where a bureau was delivered for the purpose of repairs, to a person who discovered money in a secret drawer, which he converted to his own use, as this amounted to a felony, a bill against the party for a discovery of the facts was held demurrable (*f*); and the defendant's adoption of this demurrer affords no legal inference of the truth of the fact charged in the bill (*g*). In case the defendant is thus in possession of evidence, which it is supposed will

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(*a*) 9 East, 473. 1 Phil. on Ev. 6th ed. 8. 3 Burr. 1687, post.

(*b*) 1 Phil. on Ev. 6th ed. 418. 3 Burr. 1687. 9 East, 485.

(*c*) Id. *ibid.* 4 Burr. 2489. 1 Leach, 299, 300, n. a. 2 T. R. 201. Loft, 321. 1 Wils. 239. 1 Bla. Rep. 37. 39. 351. 2 Ld. Raym. 927. 9 East, 485.

(*d*) 1 Wils. 239. 1 Bla. Rep. 37. 45. 351. 2 Stra. 1005. 1 T. R. 689, n. c. 3 T. R. 142. Tidd, 8th edit. 648. 852; and in 5 B. & A. 202, where a lord of

a manor was indicted for a nuisance, in not repairing the bank of a river, the court would not compel him to allow the prosecutor, *even though he was tenant of the manor*, to inspect the court-rolls, for the purpose of obtaining evidence in support of the prosecution.

(*e*) 8 Ves. 405. 11 Ves. 525, 16 Ves. 59.

(*f*) 8 Ves. 405.

(*g*) 16 Ves. 59. 64.

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be favorable to the prosecution, he should be served with a notice to produce them, in order to enable the prosecutor to give parol notice of their contents (*a*). For, in this respect, there is no difference between civil and criminal proceedings; for, as the same reason exists in both, the same course may be adopted (*b*). And, according to the same analogy, it is sufficient that the notice should be served on the agent or attorney of the prisoner (*c*). Therefore, on an information for composing and publishing a libel in a newspaper, notice must be given to the defendant to produce the original manuscript, the printer having returned it to him (*d*). The object of this proceeding is not to raise any presumption of criminality against the defendant, in case he does not produce the document (*e*). But in order to entitle the prosecutor, if the defendant declines to produce the paper, to give the next best evidence of its contents of which the case will allow; and, therefore, on proof of regular service of the notice, he may either read an examined copy, or supply the defect by the testimony of witnesses (*f*). It is not, however, necessary to give this notice in cases where, from the very nature of the prosecution, the defendant is charged with the possession of the particular instrument; as in an indictment for stealing a bill of exchange, parol evidence may be given of its contents, without any notice to produce the original (*g*); so we have seen, that is not necessary where the defendant has swallowed the note alleged to be a forgery (*h*); and where a prisoner, accused of high treason, had shown to a witness the paper containing the treasonable matter charged in the indictment, his evidence respecting its contents was admitted (*i*).

When a deed is brought forward in evidence, unless it is upwards of thirty years old, its execution must be proved by one of

(*a*) 2 T. R. 201, 2. Peake's Rep. 75.

(*b*) 2 T. R. 202. 14 East, 276. 1 Leach, 297. 300.

(*c*) 2 T. R. 203. 3 T. R. 306. 1 Phil. on Evid. 6th edit. 3.

(*d*) Peake's Rep. 75.

(*e*) 16 Ves. 59. 64.

(*f*) 2 T. R. 201, 2, 3. 1 Leach,

300. 1 Phil. on Evid. 6th edit. 441, 2.

(*g*) 1 Leach, 294. 2 East, P. C. 675. 1 Phil. on Evid. 6th edit. 441, 2.

(*h*) 14 East, 276. Ante, 567.

(*i*) 6 St. Tr. 229. 1 Leach, 300, in notis.

the subscribing witnesses (*a*); but where there was no subscribing witness, or he cannot be found, or denies any knowledge of the transaction (*b*), or at the time was under some legal disability to give evidence (*c*), or has since become so (*d*), or where the name of a fictitious person was inserted (*e*), the execution may be proved by other evidence. This may be either by a party actually present (*f*); by the admission of the party indicted; or by proof that the signature is in the hand-writing of the party by whom it professes to have been written (*g*).

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The last species of evidence is applicable to so many cases, especially those of forgery, that it is important to notice the kind of proof by which hand-writing is either to be disproved or established (*h*). Undoubtedly, in such a case, the best evidence which can be given is that of a person who actually saw the papers written; and, therefore, this ought to be procured, whenever it is actually in existence. But when this is not the case, evidence of a person acquainted with the hand-writing of the party may be received, to establish or to overthrow the identity of that produced in evidence (*i*). The belief of those persons, however, who are sworn on such an occasion, must rest on some intelligible foundation; as either having actually seen the party write, or having received letters from him, which bear his signature (*k*). And the latter may, indeed, frequently be more powerful than the former; for the mere circumstance of having seen the party write, perhaps at a considerable distance of time, cannot bring so strong a conviction to the mind, as the habit of receiving and answering letters, which may amount to a moral certainty of the identity

(*a*) 1 Leach, 175. As to proof by subscribing witness in general, see Stark. on Evid. part ii. 327 to 343.

(*b*) Peake, N. P. 146. 3 Esp. Rep. 173. 2 Campb. 635.

(*c*) Phil. on Evid. 238.

(*d*) 5 T. R. 371.

(*e*) Peake, N. P. 23.

(*f*) Com. Dig. Evidence, B.

(*g*) Peake, N. P. 146. Phil. on Evid. 238.

(*h*) As to proof of hand-writing in general, see Stark. on

Evid. part iv. 651 to 658. 1 Phil. on Evid. 6th edit. 465 to 472.

(*i*) 4 St. Tr. 453. 6 St. Tr. 69, 279. 1 Burr. 642. 4 Bla. Com. 358. Bul. N. P. 236. Williams, J. Evidence, V. Stark. on Evid. part iv. 651. Peake, on Evid. 102, 3.

(*k*) 1 Bla. Rep. 384. 4 Esp. 37. Peake, on Evid. 102, App. XXI. Fitzg. 195. Williams, J. Evidence, V. Stark. on Evid. part iv. 651.

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both of the person and the signature. But it may be collected, from the reversal of the attainder in the case of Algernon Sydney, that the evidence of a person who has merely occasionally seen the supposed writing of the party, in indorsements upon bills, will not now be admitted in evidence (*a*). And it is to be observed, that the witness, in giving his opinion as to the identity of the hand-writing, ought to speak solely from the impression which the similarity makes upon his mind; and, therefore, where a witness on such an occasion, states as a ground of his belief that the defendant has forged other deeds, that evidence cannot be admitted (*b*); and where, on the other hand, he thinks the writing like the prisoner's but declines a positive opinion, because he does not believe him capable of the crime intended to be proved against him, the former impression will be received in evidence, and is not to be rejected on account of the latter (*c*).

Considerable doubt seems to have existed respecting the admissibility of a mere *comparison of hand-writing*, where no witness has seen the party write, or has received letters authenticated with his signature (*d*). From the reversal of the attainder of Algernon Sydney, this kind of proof seems to be altogether illegal (*e*). But it is difficult to conceive why papers, the authenticity of which is questionable, should not be compared with others that are admitted to be genuine; unless it be urged, that the inference must be deduced from a general character, and not from particular instances, which may be artfully selected, or viewed through the medium of other circumstances which may produce a fanciful resemblance. The courts have, therefore, suffered the introduction of evidence, arising from long acquaintance with the writing of the party, though not from actual correspondence, when the witness forms his judgment from authentic documents, and when from the antiquity of the writing, it is impossible to procure any more certain testimony. Thus where,

(*a*) 3 St. Tr. 802. Phil. on Evid. 240. 8 Harg. St. Tr. 471.

(*b*) Peake on Evid. 103, n. c. Peake, N. P. 142.

(*c*) Peake on Evid. Appendix, XXII.

(*d*) See Stark. on Ev. part iv. 654 to 658.

(*e*) 8 Harg. St. Tr. 471. 6 Harg. St. Tr. 277. 279. 4 Bla. Com. 358. Hawk. b. 2. c. 46. s. 52.

in order to establish a *modus*, it is necessary to prove the writing of a parson who is deceased, in his book, the evidence of one who has examined the parish registers, in which his name is frequently written, has been allowed to prove the identity of the signature (*a*); and there is no difference in this respect between civil and criminal proceedings (*b*). It is now, however, clear, that the evidence of a third person to prove, merely from his own skill and practice, that the same individual wrote two distinct papers, ought to be rejected (*c*). Nor will such witness be rendered competent, by having seen the party write since the commencement of the prosecution, if called to give evidence in his favor (*d*). But it has been holden, that a person employed to detect forgeries may be called to state, whether in his opinion, the hand produced in court is a natural or a disguised mode of writing, though not to draw any inference respecting the identity of the party by whom it was written (*e*).

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With respect to the cases in which particular documents, when produced, will be evidence, we may observe, that whenever an instrument is the very subject of the prosecution, it cannot, except in the instance of forgery, be given in evidence, unless it be properly *stamped*, according to the provisions of the legislature; because the paper is not valid to the end which it purposes, and the stamp acts prohibit the offering it in evidence (*f*). Thus, to support an indictment on 43 Geo. 3. c. 58. s. 1, for feloniously setting fire to a house, with intent to defraud the insurers, an unstamped memorandum, indorsed on a stamped policy, effected by deed, is not admissible in evidence (*g*). And it has been holden, that on a prosecution founded on the 7 Geo. 3. c. 50. s. 1, which

(*a*) Bul. N. P. 236. Peake on Evid. 104. 4 T. R. 497; and 1 Ry. & Mo. C. N. P. 141.

(*b*) 4 Esp. Rep. 144. 117.

(*c*) 1 Esp. Rep. 14. 4 Esp. Rep. 144. 117. Peake on Evid. App. XL. 1 Phil. on Evid. 6th edit. 471. Peake, N. P. 40. Hawk. b. 2. c. 46. s. 53, acc. 4 T. R. 497. Bul. N. P. 236. Williams, J. Evidence, V. contra.

(*d*) Peake, N. P. 15.

(*e*) 4 Esp. Rep. 117, 145. 4 T. R. 497, *sed quære*. See

5 B. & A. 330. 1 Dow. & Ry. 165. S. C. At all events, such evidence would be entitled to little weight.

(*f*) 1 Taunt. 95. Peake, N. P. 167. 2 Leach, 1007.

(*g*) 1 Taunt. 95. 2 Leach, 1007. Russ. & Ry. C. C. 138. S. C.

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makes it a capital offence for any person employed in receiving letters, to secrete any letter containing a bank note, or any warrant or draft for the payment of money, it is not competent to the prosecutor to give in evidence an instrument on unstamped paper, where the stamping was necessary to render it valid (*a*). And where a clerk, on receiving money on his master's account, gave to the debtor a receipt on plain paper, a stamp being necessary, it was held that this receipt was not evidence against the prisoner, on an indictment for embezzling the money so received (*b*). But such a writing may be produced for collateral purposes (*c*). Or where the act, requiring the stamp, does not expressly prohibit the reading the instrument in evidence; and therefore, if the prisoner be indicted for stealing a letter in which it was folded, it may be brought forward to fix him with having purloined the letter (*d*); and, in an information for a libel in one newspaper, a copy of another newspaper, though unstamped, may be read in evidence, to show the intent and malice of the defendant (*e*). And this rule, respecting the necessity of a proper stamp, seems to have been denied in cases of forgery; for it has been repeatedly decided, that a fictitious instrument may be given in evidence, which the prisoner intended to pass for a valid one, though no stamp has been affixed, of a legal denomination or value (*f*). But, on the other hand, it has been solemnly resolved, that a defendant cannot be convicted of stealing exchequer bills, as such, when the instruments taken, though apparently good, were invalid from an informality in issuing them (*g*). The reason of this distinction seems probably to be, that, in case of stealing, the instrument is averred to be that which it professes, and, if it turn out to be something different, the indictment will not be supported; but, where forgery is imputed, the writing is treated as fictitious on the face of

(*a*) 3 B. & P. 311. 2 Leach, 900. 904. 1 East, P. C. Add. XVII. Russ. & Ry. C. C. 31. S. C.

(*b*) 3 Stark. 67.

(*c*) 3 B. & P. 316. Phil. on Evid. 272. 274. 3 Campb. 454. 15 East, 449. 455. Peake's Rep. 75. 1 Taunt. 101.

(*d*) 3 B. & P. 316. 1 East,

P. C. Add. XVII. 2 Leach, 900. 1013, n. a. Phil. on Evid. 274.

(*e*) Peake, N. P. 75.

(*f*) 1 Leach, 257, 258, notis. 2 Leach, 703. 1010. 2 East, P. C. 955, 6. 1 Taunt. 99. 100. 1 Phil. on Evid. 6th edit. 500. 1 New. Rep. 5.

(*g*) 2 Leach, 954.

the proceedings, and the averments are sustained, if, on the face of it, it purports to be a valuable instrument (*a*). In the former case, but little mischief can arise to public justice, while a protection is afforded to the revenue; but, in the latter, where the prisoner has to frame the paper on which he may be convicted, nothing could be more dangerous than to allow him to escape from the punishment of defrauding individuals, merely because, at the same time, he had contrived to defraud the public. It must be observed, however, that, in the before-mentioned case of the *King v. Gillson* (*b*), five of the eleven judges were of opinion, that the unstamped policy was admissible in evidence in support of the indictment, for feloniously burning the house, with intent to defraud the insurers; and that, according to the judgment of the court in *Reculist's case* (*c*), the regulations in the stamp acts were meant only to prevent the instrument from being admissible in evidence for any civil purpose, and not to affect the administration of the criminal law; and, therefore, it may still be questionable whether, in any criminal case, the want of a proper stamp should be allowed as an objection.

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Letters and papers found in the custody of a person indicted for high treason, may be read on his trial, to prove any overt act of rebellion, though not laid themselves as any part of the overt acts, on which the crown intends to rely (*d*). And letters forwarded to the king's enemies, to communicate treasonable information and intercepted, may also be read in evidence (*e*). But some evidence must first be given, according to the rules we have already stated, that the papers brought forward in court are in the hand-writing of the prisoner (*f*). And letters which, though directed to the defendant, have never been in his possession, cannot be admitted in evidence against him (*g*). Where perjury is

(*a*) 1 New. Rep. 5.

(*b*) 1 Taunt. 102. Ante, 582.

(*c*) 2 Leach, 705, 6, 7. See also 1 Phil. on Evid. 6th ed. 500.

(*d*) 4 St. Tr. 440. 7. 6 St. Tr. 63. 1 Burr. 642. Hawk. b. 2. c. 46. s. 55.

(*e*) 1 Burr. 642. Hawk. b. 2.

c. 46. s. 56. And see 2 Stark. C. N. P. 6th edit. 500.

(*f*) 1 Burr. 642. Hawk. b. 2.

c. 46. s. 55.

(*g*) 1 Leach, 235. 2 Leach, 820.

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assigned upon an answer in Chancery, the original must be produced, and a copy will not be sufficient (*a*); but it will suffice to prove the hand-writing of the defendant and of the master, without any further evidence of the oath or the signature (*b*). And in an indictment for perjury committed upon a trial, the *postea* is good evidence that the investigation took place, in order to introduce the assignment of the false deposition (*c*).

3. Depositions
taken before a
Magistrate.

The third description of written evidence, consists of depositions regularly taken before a magistrate. We have already seen in what way these examinations ought to be taken and certified, by virtue of the statutes of Philip & Mary (*d*), before the prisoner is bailed or committed (*e*): we have now, therefore, only to inquire in what cases they can be given in evidence. It seems that the statutes which authorize the justices to take them, extend only to cases of manslaughter and felony; and therefore they are not admissible in case of a mere misdemeanor, or for publishing a libel, or in any civil action, information, or appeal (*f*). So in cases of high and petit treason, the examination cannot be given in evidence, because the offence is not within the jurisdiction of the justices, and is not named in the acts of Philip & Mary (*g*); and by the common law, no one could be convicted upon such documentary evidence (*h*). But, on an indictment for the latter offence, they may be admitted to prove the defendant guilty of murder, of which, we have seen, he may be convicted (*i*).

In order to make the depositions admissible evidence, in cases where the magistrate is duly authorized to take them, it must be

(*a*) 1 Stra. 126. 3 Campb. 401. 1 Scho. & Lef. 232. Bul. N. P. 293. Hawk. b. 2. c. 46.

(*b*) 1 Leach, 50. 2 Burr. 1189. 3 Mod. 116. Hawk. b. 2. c. 46. s. 58. See post, vol. ii. 312 *a*.

(*c*) 1 Stra. 163. Hawk. b. 2. c. 46. s. 57. See post, vol. iii.

(*d*) 1 & 2 Ph. & M. c. 13. s. 4. 2 & 3 Ph. & M. c. 10.

(*e*) Ante, 74 to 88. See observations on this species of

evidence, 1 Leach, 501.

(*f*) 5 Mod. 163. 1 Salk. 281. Comb. 358. 1 Ld. Raym. 729. 3 T. R. 710. 722, 3. Hawk. b. 2. c. 46. s. 19.

(*g*) 2 Hale, 285, 6. Fost. 337. Hawk. b. 2. c. 46. s. 16. acc. 1 Ld. Raym. 407, contra.

(*h*) Kel. 55. 1 Hale, 305. 2 Hale, 52.

(*i*) 1 Leach, 457. Fost. 104. 337.

clearly shown that the witness is either dead (*a*), unable to travel (*b*), or kept away by the defendant's contrivance (*c*), or that he cannot be found (*d*), so that there is no possibility of obtaining his attendance. They must also have been duly taken, according to the requisitions of the statute: in the presence of the defendant (*e*), on the oath of the accuser and witnesses (*f*), and reduced into writing (*g*); in which case they will be admissible, although the witness was not at the time apprehensive of approaching dissolution (*h*). And where the testimony of a person, under apprehension of immediate dissolution, has been taken by a magistrate in the absence of the party indicted, though it cannot be read as an examination under the statute, it may be received as a dying declaration, with the same degree of authority as if made to a private individual (*i*). And a deposition of the deceased was held admissible in a case of murder, although taken when the prisoner was charged with another offence, and although the greater part of it had been reduced into writing during his absence: it appearing that the deceased was afterwards resworn in the prisoner's presence, the deposition then read over, and stated by the deceased to be correct, and the prisoner asked, whether he had any questions to put (*k*). And the information of an accomplice, duly taken, may, in case of his death, be read in evidence against the prisoner (*l*), though it will not be conclusive, unless corroborated by other testimony (*m*). And it is not necessary

(*a*) Ante, 81. 1 Kel. 55. 1 Lev. 180. Salk. 281. 1 Hale, 335. 586. 2 Hale, 52. 120. 284. 1 Leach, 12. 2 Leach, 854. Hawk. b. 2. c. 46. s. 15. Bul. N. P. 242. Williams, J. Evidence, V.

(*b*) Ante, 81. Kel. 55. 2 Hale, 52. 284. 1 Hale, 305. 586. Hawk. b. 2. c. 46. s. 15. Williams, J. Evidence, V.

(*c*) Ante, 81. Kel. 55. Fost. 337. Hawk. b. 2. c. 46. s. 15. Williams, J. Evidence, V.

(*d*) Ante, 81. Bul. N. P. 239. Hawk. b. 2. c. 46. s. 18.

(*e*) 1 Leach, 502, 503, n. a. 2 Leach, 561. 5 Mod. 163.

(*f*) 1 Hale, 586. Dalt. J.

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(*g*) 1 Leach, 309. But see 1 Leach, 202, if evidence to the contrary be given. A written examination before a magistrate will not exclude a previous parol declaration made to a third person, and not reduced into writing, Stark. on Evid. part iv. 51; and see 2 Leach, 559. 4 Esp. 172.

(*h*) 1 Leach, 458.

(*i*) 1 Leach, 361. 503. 3 T. R. 713.

(*k*) Russ. & Ry. C. C. 339.

(*l*) Ante, 82, 3. 1 Leach, 12. Hawk. b. 2. c. 46. s. 25.

(*m*) 1 Leach, 12.

DEPOSITIONS. that the depositions should be signed by the witness (*a*). Parol evidence is admissible to prove matters deposed by a party on his examination before commissioners of bankrupt, material to the inquiry, such matter not being contained in the written examination taken by the commissioners (*b*).

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By the 1 & 2 Ph. & M. c. 13. s. 15, the coroner is required to take the depositions of witnesses on an inquisition of death, and certify it, together with the proceedings, to the judges at the assizes. Under this provision the coroner ought to take evidence in favor of the party accused, as well as against him, for the inquiry is not so much like the deliberation of a grand jury on a bill of indictment, as an inquest of office to ascertain how the deceased came to receive those injuries which proved mortal (*c*). The examinations thus taken will be sufficient evidence in case the witnesses are dead, unable to travel, beyond sea, or kept out of the way by the contrivance of the party to whom their testimony is adverse (*d*). And it seems that they differ from those taken before justices in this respect, that they are admissible, though taken in the absence of the prisoner; because the coroner is an officer appointed on the behalf of the public, and will be presumed to have acted properly in all matters within his jurisdiction (*e*). But they cannot be received, though the witnesses are dead, unless it is proved that they were signed by the coroner (*f*).

Before either of these species of deposition can be received, evidence must be given that they are the identical papers taken before the justices or coroner, without alteration (*g*). And they may be used as well on the part of the defendant as against him, to destroy the credit of any witness for the prosecution, by show-

(*a*) 1 Leach, 458. 2 Leach, 854. 1 Phil. on Ev. 6th ed. 352.

(*b*) 1 Ry. & Mo. C. N. P. 231; and see 4 Esp. 172.

(*c*) 1 Leach, 43. 1 Hale, 415. 2 Hale, 60. 1 Phil. on Evid. 6th edit. 353.

(*d*) 1 Kel. 55. Sir T. Jones, 53. 1 Lev. 180. 1 Phil. on Evid. 6th edit. 354. Dick. Sess. 217.

(*e*) 3 T. R. 713. 722. Bul. N. P. 242. 1 Phil. on Evid. 6th edit. 354. 379.

(*f*) 2 Leach, 770, 1.

(*g*) Kel. 55. Post. 337. Hawk. b. 2. c. 46. s. 15. 1 Phil. on Evid. 6th edit. 379.

ing that he varies from the statement he made before the magistrate (*a*). For one of the principal objects of the legislature in passing the statutes of Philip & Mary was, to enable the judge and jury on the trial to estimate the veracity of a witness by the consistency of the evidence he delivers, and we have therefore seen that the defendant has a power of compelling the production of the examination (*b*).

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We come now to consider the second, and by far the most usual and important, description of evidence in criminal proceedings. In the consideration of this subject we shall examine—who may be called as witnesses—how their attendance may be compelled, and expences defrayed—what questions they may be required to answer—and how their examination by both parties is to be conducted.

II. Of parol evidence.

It is a general rule, that all persons may be witnesses who are capable of understanding, and may be presumed to feel the obligations incurred by a solemn appeal to the Almighty. We have, therefore, here only to inquire who are inadmissible witnesses, either from their inability to comprehend the former, or from their supposed liability to slight and disregard the latter.

1. Who may be witnesses.

But here we must premise, that there are two kinds of exceptions to witnesses, to their *competency* and their *credibility*: the first of which only comes at present under our consideration. Exceptions to the *credit* of a witness are such as do not at all disable him from being sworn, but merely affect the degree of belief which the jury will give to his evidence (*c*). Objections to the *competency* of a witness go, on the other hand, to prove that he cannot be sworn at all, on account of some inherent incapacity or defect (*d*). Thus, in the case of kindred, no relationship, ex-

(*a*) Ante, 81, 2. 2 St. Tr. 622 to 627. 644. 647. 651. Hawk. b. 2. c. 46. s. 22. 1 Phil. on Evid. 6th edit. 351. Russ. & Ry. C. C. 88.

(*b*) Ante, 88, 9.

(*c*) 2 Hale, 276. 1 Burr. 414. 11 East, 209. Burn, J. Evidence, 111. Williams, J. Evidence, I. Peake on Evid. 124, n. h. 4th edit. 138, n. h.

(*d*) Id. ibid.

WHO MAY BE
WITNESSES
IN GENERAL.

cept that of husband and wife, can disqualify a man from being examined, though it may induce such a suspicion of partiality, as greatly to lessen the value of the evidence he may deliver (*a*). So where a person admits himself to have sworn falsely on the same affair, and attributes it to the persuasion of the defendant, such an admission does not render the witness incompetent, though it may evince him to be wholly unworthy of credit (*b*). In many cases a person may be credible where he is not competent, and competent where he is not credible (*c*). And, therefore, where in acts of Parliament, directing convictions before justices, this word “credible” is introduced, it bears no precise or legal signification; but the magistrate is to judge, like the jury on a trial, how far the witness is sufficiently to be believed, to warrant the conviction (*d*). We shall hereafter have occasion to notice some other cases, where interest affects the credit without destroying the competency; but the nice shades of distinction in the degree of belief, are mere matters of fact to be left to the jury, and are infinitely too subtle and numerous to become the object of general inquiry (*e*).

Inability to understand the meaning of an oath by infancy, or defect of intellects.

Inability to understand the obligations of an oath, is the first objection we shall notice, to the competency of a witness. For this reason a person insane cannot be admitted to be sworn, while he is in that condition (*f*); but he may, if he sufficiently recover the use of his understanding in a lucid interval (*g*), though it may be rather difficult to decide what degree of intellect will be requisite on such an occasion (*h*). However, it is certain, that a person *deaf* and *dumb* from his birth, and who understands the meaning of signs, and has a due sense of moral obligation, may be examined; and a person, accustomed to converse with him, may be sworn to interpret the tokens he uses in his replies (*i*).

(*a*) 2 Hale, 276.

(*b*) 11 East, 309.

(*c*) 1 Burr. 417.

(*d*) 1 Burr. 418. Peake on Evid. 124, n. h. 4th edit. 138, n. h.

(*e*) 2 Hale, 277.

(*f*) Co. Litt. 6 b. 2 Hale, 273. Hawk. b. 2. c. 46. s. 160. Com. Dig. Testmoigne, A. 1. 1 Phil.

on Evid. 6th edit. 18. 20.

(*g*) 2 Hale, 273. Com. Dig. Testmoigne, A. 1. 1 Phil. on Evid. 6th edit. 18. 20.

(*h*) 2 Hale, 278.

(*i*) 1 Leach, 408. Hawk. b. 2. c. 46. s. 163. Williams, J. Evidence, I. 1 Phil. on Evid. 6th edit. 18. See form of oath, 1 Leach, 408. Post, last vol.

This want of discretion is the true reason why the evidence of very young children has been rejected (*a*). Formerly, indeed, the age of nine or ten years was fixed on, as determining the age when children may be witnesses (*b*). But it now seems to be settled, upon better principles, that the ability of the child to feel the obligation of an oath, is the criterion by which his competency to take it is to be decided (*c*). And, therefore, a child under seven years of age has been examined upon oath, when he appeared to understand its nature (*d*); while, on the other hand, the evidence of a person of full years, who has no sense of future retribution, will be rejected (*e*). It was once thought, that where the party immediately injured was an infant of tender years, the parents of the child might be admitted to state the account he had given of the transaction immediately after it had taken place, and that the infant might be examined, though not sworn (*f*); but both these ideas are now rejected, and it is fully established, that if the infant is of competent discretion, he may be sworn, however young; and, if not, no evidence whatever can be given respecting his assertions (*g*). But, in the latter case, rather than there should be a failure in public justice, the judge may put off the trial, and order the child to be properly instructed in the interval (*h*).

INABILITY
TO UNDERSTAND
THE MEANING
OF AN OATH.

The obligation of an oath, upon which all evidence must be [591] thus given, arises from the sanctity of an appeal to God, and the dread of future punishment; and, therefore, depends on a belief of their existence. Those persons, therefore, who, either from the weakness of their capacities, or their ignorance, have no idea of these awful sanctions, or from erroneous speculations

Incompetence
on the ground
of infidelity.

(*a*) Hawk. b. 2. c. 46. s. 160. Com. Dig. Testmoigne, A. 1. Phil. on Evid. 6th edit. 19.

(*b*) 2 Stra. 700. 1 East, P. C. 442. 1 Hale, 302. 1 Phil. on Evid. 6th edit. 19.

(*c*) 2 Hale, 278. 1 Leach, 110. 199. 1 East, P. C. 443. Bul. N. P. 293. Hawk. b. 2. c. 46. s. 161. Williams, J. Evidence, I. 1 Phil. on Evid. 6th edit. 19.

(*d*) 1 Leach, 199. 1 East, P. C. 441 to 444. Peake on Evid. 137, n. g. 4th edit.

(*e*) 1 Leach, 430.

(*f*) 2 Hale, 278, 9. Bul. N. P. 298.

(*g*) 1 Leach, 110. 199. 1 Phil. on Evid. 6th edit. 19.

(*h*) 1 Leach, 430. The jury must not be discharged, 1 Ry. & Mo. C. C. 86.

INFIDELITY. deny them, cannot be admitted to bear testimony in a court of justice (*a*). In very ancient times, however, Jews seem to have been sworn upon the Old Testament alone (*b*), though Lord Coke, who was singularly severe to all who professed a different religion, maintains the contrary (*c*). It was, however, formerly considered, that one who believed neither the Old nor the New Testament was incapable of being admitted to give evidence, because he could not be properly sworn upon either (*d*). After the Revolution, a more liberal mode of thinking began to prevail; and, at length, after solemn arguments, it has been completely settled, that where a person believes in a Supreme Being, and in the dispensation of rewards and punishments, in a future state of existence, he may be sworn according to the ceremonies of his own religion, however widely they may differ from those established in England (*e*). A Mahometan, therefore, may be sworn on the Alcoran (*f*); a Gentoo, according to the modes of his country (*g*); and a Scotch covenantor, after the mode of that description of sectaries (*h*). And, hence it follows, that when a person about to be sworn is examined on his *voire dire*, as to his competency, he is not to be interrogated as to his particular opinions, but only whether he believes in a God, and a state of future retribution (*i*).

(*a*) Co. Litt. 6 b. 2 Hale, 279. 11 East, 311. 1 Leach, 430. Hawk. b. 2. c. 46. s. 148. Bul. N. P. 292. Burn, J. Evidence, III. Williams, J. Evidence, I.

(*b*) 2 Hale, 279. Gilb. on Evid. 145. 1 Ld. Raym. 282, per Ld. Mansfield. 1 Cowp. 389. Hawk. b. 2. c. 46. s. 153. And a witness who declines swearing on the New Testament, though he professes christianity, may be allowed to swear on the Old Testament, if he considers that more binding on his conscience, 1 Ry. & Mo. Rep. 77.

(*c*) 2 Inst. 479. 4 Inst. 279. 3 Inst. 165; and see 7 Co. 17, a.

(*d*) Hawk. b. 2. c. 46. s. 148.

(*e*) 1 Atk. 21. 1 Wils. 84. Willes, 538. 1 Cowp. 388.

1 Leach, 54. Hawk. b. 2. c. 46. s. 149, 50, 51. Bul. N. P. 292. 2 Hale, 279. Burn, J. Evidence, III. Williams, J. Evidence, I. Com. Dig. Testimoigne, A. 2. Dick. Sess. 193. Peake on Ev. 141. 1 Phil. on Evid. 6th edit. 23.

(*f*) 2 Stra. 1104. 1 Leach, 54.

(*g*) 1 Atk. 21. 1 Wils. 84. Willes, 538. At the Old Bailey, December Sessions, 1804, a Chinese was sworn according to the form of the courts at China, by holding a saucer in his hand, which he dashed to pieces at the conclusion of the oath, Peake on Evid. 138, n. 5th edit.

(*h*) 1 Leach, 412. 498.

(*i*) Peake N. P. 11. 1 Phil. on Evid. 6th edit. 23.

INFIDELITY.

To this rule there is an exception in the case of the people called *Quakers*, which, at first sight, may appear rather to deviate from this charitable principle. Their affirmation, though admitted in all civil cases, is uniformly rejected in proceedings substantially criminal (*a*). And, in the construction of this principle, it has been decided, that an affirmation is not admissible in an appeal of murder (*b*), a motion for an information on a misdemeanor (*c*), or exhibiting articles of the peace (*d*). But if a motion be made to the court against a Quaker, his affirmation may be read in his own exculpation, though not to prove the innocence of others (*e*). And where the object of the proceeding is of a civil nature, it may be received, though the forms are technically criminal, as in a motion for an attachment (*f*), and an action on a penal statute (*g*). Still, however, he is subject to considerable hardship, in consequence of his conscientious scruples; for, if he is indicted for treason or felony, he can call no witness in his defence of the same religious persuasion, because the statutes which require witness to be sworn for the defendant (*h*), contain no exception in his favor (*i*). It has, indeed, been regarded as a kind of anomaly, by Lord Mansfield, that while we admit the testimonies of savages and heathens, we refuse that of those who so nearly approach ourselves in religious opinions (*k*). But the true solution of the difficulty appears to be, that the latter acknowledge themselves to *swear*, and only differ in the mode of binding themselves

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(*a*) 7 & 8 W. 3. c. 34. s. 6. 22 Geo. 2. c. 46. s. 37. 1 Cowp. 291. 2 Burr. 1117. Willes, 292, n. b. Hawk. b. 2. c. 46. s. 158, 159. Burn, J. Oaths, III. Williams, J. Quakers, I. Peake on Evid. 158. 1 Phil. on Evid. 6th edit. 24, 5.

(*b*) 2 Stra. 856. 1 Cowp. 392. Hawk. b. 2. c. 46. s. 159. Com. Dig. Testmoigne, A. 3. Burn, J. Oaths, III. Williams, J. Quakers, I. 2 Stra. 872.

(*c*) 2 Burr. 1117. Hawk. b. 2. c. 46. s. 159. Com. Dig. Testmoigne, A. 3. Burn, J. Oaths, III. Williams, J. Quakers, I.

(*d*) 1 Stra. 527. Hawk. b. 2. c. 46. s. 159. Com. Dig. Test-

moigne, A. 3. Burn, J. Oaths, III. Williams, J. Quakers, I. 1 Phil. on Evid. 6th edit. 24.

(*e*) Andr. 201, n. 1 Cowp. 392. 2 Burr. 1117. Willes, 292, n. b.

(*f*) 2 Stra. 1219. Andr. 200. 1 Cowp. 394. Willes, 292, n. b. 1 T. R. 266. 4 T. R. 317, acc. 2 Stra. 946. Com. Dig. Testmoigne, A. 3.

(*g*) Cowp. 332. Com. Dig. Testmoigne, A. 3. Phil on Ev. 13.

(*h*) 7 & 8 W. & M. c. 3. s. 1, 1 Ann. st. 2. c. 9. s. 3.

(*i*) Cowp. 391.

(*k*) Cowp. 383.

INFIDELITY. by the same solemnities; and, on the other hand, though the affirmation of a Quaker is, in truth, a solemn appeal to heaven, he himself refuses to consider it as an oath; for, if he thought it so, the principles of his faith would compel him to refuse it, as much as the ordinary form: and it is the impression on the mind of the witness, which is to be regarded. The difference is, that the heathen considers himself as sworn, the Quaker regards all swearing as unlawful (*a*).

Excommunicated persons. It has been said, that persons *excommunicated* by the ecclesiastical courts are not competent witnesses, because they are supposed to be excluded from the influence of religion (*b*); but, even before the 53 Geo. 3. c. 127, this matter would probably have been otherwise determined, because excommunication is only analogous to outlawry in a personal action, which has no power to disqualify a man from giving evidence (*c*).

[594] The larger class of disqualifying circumstances, however, arise not from inability to understand the nature of an oath, but from a supposed liability to swerve from the truth, which the law so violently presumes, as altogether to reject the witness. This may arise, either from connection and interest in the event, which will involuntarily sway the mind to give a different colouring to facts which it views through a peculiar medium, or from the consequences of legal infamy.

Relationship. The only natural relation, however, which the law regards as destroying competency, is that of husband and wife; for no other tie, however intimate, can render testimony inadmissible (*d*).

(*a*) Quakers consider all swearing illegal, in consequence of our Saviour's exhortation in 7th chap. Matthew, v. 37: "I say unto you, swear not at all." Paley, vol. i. 194.

(*b*) 2 Bulst. 255. Bul. N. P. 292. 3 Bla. Com. 102. 2 Atk. 70.

(*c*) 1 Hale, 303. Co. Lit. 6, b. 2 Hale, 227. Hawk. b. 2. c. 46. s. 107. 1 Phil. on Evid. 6th edit. 25. By 53 Geo. 3. c. 127,

excommunication was discontinued, except in certain cases; and in those cases the 3d section enacts, that parties excommunicated shall incur no civil disabilities.

(*d*) 2 Hale, 276. Sayer, 45. Co. Lit. 6, b. 1 Hale, 303. Bul. N. P. 287. Hawk. b. 2. c. 46. s. 77. Williams, J. Evidence, I. Dick. Sess. 203. 1 Phil. on Evid. 6th edit. 71.

This relation, from its peculiar nature, as absorbing the legal RELATIONSHIP. existence of the woman, is an absolute bar to the admission of any evidence, either for or against each other; for the allowance of the first would induce partiality, and that of the latter provoke dissention (*a*). And parties, thus connected, are not allowed to give any evidence, which may even tend to criminate the other; and, therefore, on an indictment for bigamy, the first wife cannot be admitted to prove her marriage with the defendant, because he is her legal husband (*b*); but the second may, after the first marriage has been proved, for her marriage was never valid (*c*). So a feme covert cannot be asked a question on a trial to contradict what her husband has sworn, which may subject him to a prosecution for perjury (*d*). And where several persons are jointly indicted, the wife of one of them cannot be produced as a witness, either for or against the others (*e*). And this rule will not be relaxed, even though the other party should consent to the admission (*f*). And it has been considered, that a woman who has passed as the wife of a man, but is not so, cannot be examined as a witness (*g*).

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To this rule, however, there are some exceptions, which either do not fall within its principle, or are justified by necessities which supersede it. Thus, where a woman has been forcibly married, she may be admitted as a witness against the delinquent, in a prosecution on the statute, because there is no validity in a contract obtained by violence; but if she were forcibly taken away, and afterwards consented to the marriage, she will not be a competent witness (*h*); and a lawful wife is a good witness

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- (*a*) Co. Lit. 6, b. Rep. temp. Hardw. 264. 2 Stra. 1095. 2 Rol. Abr. 686. 1 Hale, 301. 2 Hale, 279. 2 T. R. 265. 4 T. R. 678. 5 Esp. Rep. 107. Hawk. b. 2. c. 46. s. 70. Bul. N. P. 286. Com. Dig. Testmoigne, B. 2. Burn, J. Evidence, III. Williams, J. Evidence, I. Dick. Sess. 202. Peake on Evid. 173. 1 Phil. on Evid. 6th edit. 71.
- (*b*) Sir T. Raym. 1. 4 St. Tr. 754. 1 Phil. on Evid. 6th ed. 72.
- (*c*) Bul. N. P. 287. 1 Hale, 693. 1 East, P. C. 469. Hawk. b. 2. c. 46. s. 72. 1 Phil. on Evid. 6th edit. 71. 78. Burn, J. Evidence, III. Williams, J. Evidence, I. (d) 2 T. R. 268. (e) 5 Esp. Rep. 107. 2 Stra. 1095. (f) Rep. temp. Hardw. 264. (g) 1 Price, 81. 1 Phil. on Evid. 6th edit. 82. (h) Rep. temp. Hardw. 83. 5 St. Tr. 456. 1 Hale, 301, 661. Bul. N. P. 286. Hawk. b. 2. c. 46. s. 78. Co. Lit. 6, b. n. 6. 1 Phil. on Evid. 6th edit. 79.

RELATIONSHIP. against her husband, in case of violent injuries to her person (*a*). So she is allowed, in common practice, to exhibit articles of peace against him; and may file an affidavit for an information, on his endeavour to take her away by force, after a deed of separation between them (*b*). And her dying declarations, where he is suspected of having murdered her, may be read in evidence on his trial (*c*). It has also been said, that she may be admitted as a witness against him on an indictment for high treason, because the duty of allegiance due to the crown, supersedes every private obligation (*d*), but the contrary seems to be the stronger opinion (*e*).

Interest in the event.

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There is no rule, respecting which more contrariety of opinion has arisen, than as to the degree of *interest* which destroys the competency, and that which goes only to affect the credit of a witness. But it seems now to be settled, that except where the interest appears on the very face of the proceedings, and a conviction or acquittal must necessarily be advantageous or prejudicial to the witness, no interest can, in cases substantially criminal, destroy his competence, however it may affect his credit (*f*). Thus, even where a woman was called to give evidence, whose husband lay under sentence of death, and she expressed her belief that the conviction of the prisoner would be the means of her husband's pardon, she was regarded as competent (*g*). A witness is competent, upon an indictment for tearing a promissory note, payable to him (*h*); or for extorting a bond, &c. from him (*i*); or for usury, although he was the

(*a*) Rep. tem. Hardw. 83. Hut. 115. 1 St. Tr. 388. 265. 209. 366. 1 Hale, 301. 1 Stra. 633. Hawk. b. 2. c. 46. s. 77. 1 East, P. C. 454. Bul. N. P. 287. Com. Dig. Testmoigne, B. 2. 1 Bla. Com. 443. Burn, J. Evidence, III. Williams, J. Evidence, I. Dick. Sess. 202, 3. Peake on Evid. 173. 1 Phil. on Evid. 6th edit. 79.

(*b*) 1 Burr. 543. 13 East, 171 (*a*). Bul. N. P. 287. Hawk. b. 2. c. 46. s. 80. Burn, J. Evidence, III. Williams, J. Evidence, I. 1 Phil. on Evid. 79.

(*c*) 1 Leach, 500. 1 East, P. C.

357. 1 Phil. on Evid. 6th edit. 223, 4.

(*d*) Brownl. 47. Bul. N. P. 286. Peake on Evid. 173.

(*e*) 1 Hale, 301. Hawk. b. 2. c. 46. s. 82. 1 Phil. on Evid. 6th edit. 79. Brownl. 47.

(*f*) 1 Leach, 132. 314; and id. n. a. 4 East, 572. 580. 582. 2 New. Rep. 90.

(*g*) 1 Leach, 132, 3.

(*h*) Stra. 595. 1 Sid. 431. 1 Vent. 49. Stark. on Evid. part iv. 772.

(*i*) Stark. on Evid. part iv. 772. 7 Mod. 118.

borrower of the money, and has not repaid it (*a*); or for cheating him, by false pretences (*b*); or upon an information, for fraudulently procuring the witness to execute a cognovit (*c*). So a man, who has laid a wager, on the event of a prosecution, may still be examined as a witness, the objection only affecting his credibility (*d*). And the testimony of the party injured, unlike that of the plaintiff in civil actions, is constantly admitted in evidence; because he cannot, in any future suit, derive any advantage from the record of conviction (*e*); nor will the right of the prosecutor to costs, in case of a removal by certiorari, disqualify him from being sworn as a witness (*f*). And persons who are entitled to a reward, or the restoration of goods, on the conviction of the offender, are constantly sworn to prove him guilty; for otherwise scarcely any delinquent could be brought to justice, and the object of the legislature would be defeated, instead of the reward advancing the end they intended to promote (*g*). So, if an indictment be preferred against a county for not repairing a bridge, and the only question be, whether it is in repair, men of the county are good witnesses, not only on the general principle, but because it is equally desirable to every man, that the bridge, for convenience of passage, should be repaired when it is necessary, as that the county should not be put to an unnecessary charge; so that they are indifferent, being equally concerned on both sides of the question (*h*). And by statute 1 Ann. st. 1. c. 18. s. 13, inhabitants of the county, &c. are made good witnesses, when the question is, whether the persons, &c. are obliged to repair (*i*).

INTEREST
IN THE EVENT.

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On the other hand, informers, who are entitled to a part of the penalty, are incompetent witnesses to support a conviction (*k*).

(*a*) 7 Mod. 118.

(*b*) Salk. 286.

(*c*) 1 Sid. 431. 1 Vent. 49.

(*d*) 1 Stra. 652. 1 M. & S. 11.

(*e*) 4 East, 581. 577, n. b. 1 Campb. 9. 151. Peake on Evid. 146. 1 Phil. on Evid. 6th edit. 117.

(*f*) 10 Mod. 193. Burn, J. Evidence, 111. Dick. Sess. 203.

(*g*) 3 Esp. Rep. 68. Peake, N. P. 217. 1 Esp. Rep. 169. 1 Leach, 132. 314, n. a. 2 Esp.

N. P. C. 712. Peake on Evid. 167, 8, in notis. Hawk. b. 2. c. 46. s. 122. Burn, J. Evidence, 111. Dick. Sess. 203, 4. See Stark. on Evid. part iv. 722, 773.

(*h*) 1 Vent. 351. 6 Mod. 307. Gilb. L. Evid. 129. Peake on Evid. 169.

(*i*) See post, vol. iii.

(*k*) Stra. 316. 2 Ld. Raym. 1543. Andr. 18. Gilb. 111.

INTEREST
IN THE EVENT.

And, in a late case, on an indictment for a forcible entry and detainer, the party grieved was held an incompetent witness (*a*). With respect to the offence of perjury, it was formerly thought that the party aggrieved by the deposition, alleged to be false, could not be sworn on the trial, even though the record of conviction could not be given in evidence in his favor on any future occasion (*b*). But it seems now to be fully settled, that the party in question is competent (*c*), even without showing that he has satisfied the judgment obtained against him, in the cause in which the perjury was committed; for the conviction of the defendant, founded on his evidence, is no ground of subsequent relief even in equity (*d*).

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In the case of *forgery*, however, it is still certain, that the party by whom the instrument purports to be made, cannot be called to prove it fictitious, if he would be liable to be sued on it if genuine, or if he would be deprived of any claim upon another, by its being established to be valid (*e*). This rule, from its very principle, does not apply where the party, whose signature is forged, has no individual interest in the paper; and, therefore, the cashier of the Bank of England may be called to prove a note, purporting to be signed by him, as such agent, to be a forgery (*f*); and the drawer of a bill is a competent witness to prove, that the name of the payer indorsed thereon is a forgery (*g*). And, in a late case, upon an indictment for forging or uttering a power of

113. Esp. N. P. C. 96. Stark. on Evid. part iv. 776. But informers, by the particular provisions or policy of several acts of parliament, may be admitted, 1 Phil. on Evid. 6th edit. 117. And see Sayer, 289. Willes, 425. 3 Esp. 68. 1 Esp. 217. Peake's Rep. 217.

(*a*) 1 Ry. & Mo. Rep. 242.

(*b*) 2 Stra. 1043. 1104. 1 Salk. 283. Peake, N. P. 12. Rep. temp. Hardw. 265. 360. 1 Esp. Rep. 97. Hawk. b. 2. c. 46. s. 113.

(*c*) 2 Stra. 1230. 4 Burr. 2255. 4 East, 581. 1 Stra. 595. Peake on Evid. 146, note i. 1 Phil. on Evid. 6th edit. 111.

Williams, J. Evidence, I.

(*d*) 4 East, 572. 577, in notis. 4 Burr. 2255. 1 Phil. on Evid. 6th edit. 111.

(*e*) 4 East, 582. 1 Leach, 8. 2 Leach, 634. 987. Hardw. 331. 3 Salk. 172. 2 East, P. C. 993, 994, 5, 6. 2 New. Rep. 87. Russ. & Ry. C. C. 97, S. C. Burn, J. Evidence, I. Williams, J. Evidence, III. Peake on Evid. 163, 9. 1 Phil. on Evid. 6th edit. 111. Stark. on Evid. part iv. 582, 3.

(*f*) 1 Leach, 311. 2 East, P. C. 1001.

(*g*) 1 Leach, 332. 2 East, P. C. 996.

attorney, to sell and transfer stock in the funds, the person whose name is forged is a competent witness for the crown, if the stock has not been transferred, and he has given notice to the bank, disavowing the power; especially if it be previously proved, that though there is an attestation, importing that he executed, in the presence of two witnesses, he did not so execute in their presence, the bank act not authorizing any transfer, under a power of attorney, unless it is attested by two witnesses; and it was held, it would make no difference, whether the stock was the property of him whose name was forged, or whether he was a mere trustee (*a*). In an indictment against the payee of a bill, for uttering a forged acceptance, the first indorsee is a competent witness, though he has only advanced part of the amount of the bill, and though he releases, at the time of the trial, the person in whose name the acceptance is forged (*b*). So where the bankers of a witness have paid a check forged in his name, and afterwards discovering the fraud, have omitted to debit him with the payment, he may be sworn to disprove his signature (*c*). And, where a receipt is forged, in order to defraud a debtor, who had actually paid the money to his creditor, the latter may be called to prove the document fictitious (*d*). So also one, whose voucher is forged by alterations, for the purpose of imposing on a third person, with whom he had no dealings, and to whom he could on no ground be responsible, is the proper witness to prove that it is not authentic (*e*). So the supposed testator of a forged will, if living, will be a good witness against the party indicted of the forgery (*f*). But it has been somewhat strangely decided, that the executor of a will, posterior in date to the alleged forgery, is not a sufficient witness, for it is difficult to conceive what interest he can have in the event of the trial; as the will, in which he is named executor, is, at all events, the only one which is available (*g*). It seems, however, that

(*a*) Russ. & Ry. C. C. 505. 338. Bul. N. P. 289.
 1 Bing. 121, S. C.; and see
 2 Bing. 413. 1 Burn, J. 24th
 edit. 978.
 (*b*) Russ. & Ry. C. C. 435.
 (*c*) 1 Leach, 48. 2 East, P. C.
 999.
 (*d*) 2 East, P. C. 1000. 12 Mod.
 338. Bul. N. P. 289.
 (*e*) 2 East, P. C. 1000. 1 Leach,
 333, n. (*a*).
 (*f*) 1 Leach, 99. 450. 2 East,
 P. C. 1001.
 (*g*) 1 Leach, 26. 2 East, P. C.
 995.

INTEREST
IN THE EVENT.

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on an indictment for personating the holder of stock, the real owner may be admitted to give evidence (*a*). And the maker of a note, purporting to be payable on demand at a particular banker's, may be examined to prove the place where it was originally made payable, on an indictment against a subsequent holder for altering the place, in order to give it currency (*b*). And, in all cases, the individual interested may become a competent witness, by producing a release from the party to whom he would be liable, in case the instrument were valid (*c*). And a release from the holder of a bill of exchange to the supposed acceptor, will make him a competent witness to prove the forgery in an indictment against the drawer, the drawer having received value for the bill from such holder (*d*). And it is said, that if the party who wishes to call a witness, tender a release to him, and he refuse to accept it; or if a witness, having an apparent claim do so, and it is accepted, he may afterwards be examined on the trial (*e*).

Infamy.

The inability of a witness to give evidence, on the ground of *infamy*, formerly arose from two sources: a conviction of certain offences, and the infliction of certain penalties (*f*). Some crimes there were, of which a mere conviction of any description, properly evidenced, was always sufficient, as it is at present, to render the criminal infamous; such as attain of false verdict (*g*); conspiracy, at suit of the king (*h*); perjury, and subornation of

(*a*) 1 Leach, 434, 438. 2 East, P. C. 897.

(*b*) 2 Taunt. 328.

(*c*) 1 Leach, 150. 155. 214. 2 East, 1002, 3. Williams, J. Evidence, I. 1 Phil. on Evid. 6th edit. 114.

(*d*) Russ. & Ry. C. C. 278; and see *id.* 435.

(*e*) 1 Dougl. 139, 40. 3 T. R. 27. Peake on Evid. 174, 5. App. xlv. 1 Phil. on Evid. 6th edit. 114.

(*f*) See in general Stark. on Evid. part iv. 714.

(*g*) Co. Lit. 6, a. 2 Hale, 277. Com. Dig. Testmoigne, A. 5. Bac Abr. Evidence, A. 6.

Bul. N. P. 291. Burn, J. Evidence, III. Williams, J. Evidence, I. Dick. Sess. 199.

(*h*) Co. Lit. 6, a. b. 2 Hale, 277. 1 Leach, 442. Peake on Evid. 140. Com. Dig. Testmoigne, A. 5. Bac. Abr. Evidence, A. 6. Bul. N. P. 291. Burn, J. Evidence, III. Williams, J. Evidence, I. Dick. Sess. 199. In 2 Dods. Rep. 174, it was determined, that a conviction for a conspiracy to commit a fraud, would not render an affidavit of the convict inadmissible; and see 3 Stark. C. N. P. 21, S. P.

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perjury (*a*); præmunire (*b*); forgery, under the statute 5 Eliz. c. 14 (*c*); piracy (*d*); and every description of felony and treason (*e*). So also conviction of fraud in gaming (*f*), barratry (*g*), piracy (*h*), and bribing a witness to absent himself, when summoned to attend (*i*). It was also held, that the punishments of mutilation, tumbrell, whipping, branding, and pillory, had the same effect, for whatever crimes they might be inflicted (*k*). But it is now determined, on better principles, that it is the crime, and not the punishment, which destroys the competency of a witness (*l*). If, therefore, a man be actually set on the pillory for a crime not infamous, as for a riot or a libel, his competency will not be affected (*m*); while, on the other hand, if he be found guilty of any of the offences regarded in that light, it will be entirely destroyed, though he were not sentenced to any ignominious penalty (*n*). At the present day, therefore, a conviction of any description of treason and felony, or of any species of the *crimen falsi*, whether barratry, conspiracy, at suit of the king, perjury, forgery, or other crime, will incapacitate the party convicted from giving evidence, while it continues in force, without

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(*a*) Sir T. Raym. 32. Co. Lit. 6. b. 2 Hale, 277. Peake on Evid. 140. 1 Phil. on Evid. 27, 8. Com. Dig. Testmoigne, A. 5. Bul. N. P. 291. Bac. Abr. Evidence, A. 6. Burn, J. Evidence, III. Williams, J. Evidence, I. Dick. Sess. 199.

(*b*) Co. Lit. 6, b. 2 Hale, 277. Com. Dig. Testmoigne, A. 5. Bul. N. P. 291. Bac. Abr. Evidence, A. 6. Burn, J. Evidence, III. Williams, J. Evidence, I. Dick. Sess. 199.

(*c*) 2 East, P. C. 1003. Co. Lit. 6, b. 2 Hale, 277. Com. Dig. Testmoigne, A. 5. Bul. N. P. 291. Bac. Abr. Evidence, A. 5. Burn, J. Evidence, III. Williams, J. Evidence, I. Dick. Sess. 199.

(*d*) Id. *ibid*.

(*e*) Id. *ibid*. Willes, 666, 7.

(*f*) 9 Ann. c. 14. s. 5.

(*g*) 2 Hale, 277. Phil. on Evid. 15.

(*h*) 2 Roll. Abr. 886.

(*i*) Fortes. 208. Phil. on Evid. 15.

(*k*) Co. Lit. 6, b. 2 Hale, 277. Com. Dig. Testmoigne, A. 5. Bac. Abr. Evidence, A. 6. Dick. Sess. 199.

(*l*) Willes, 666. Co. Lit. 6. b. n. 1. 2 Wils. 18. 2 Salk. 690. 5 Mod. 75. Fortes. 209. 1 Leach, 442, 3. 1 Phil. on Evid. 6th edit. 28. Bul. N. P. 292. Com. Dig. Testmoigne, A. 5. Bac. Abr. Evidence, A. 6. Williams, J. Evidence, I. Dick. Sess. 199.

(*m*) 3 Lev. 426. 5 Mod. 75. Com. Dig. Testmoigne, A. 5. Fortes. 209. Hawk. b. 2. c. 46. s. 102. Peake on Evid. 141. Phil. on Evid. 16.

(*n*) 2 Salk. 690. 1 Leach, 442. 10 St. Tr. 42. Peake on Evid. 141. Bul. N. P. 292. 1 Phil. on Evid. 6th edit. 28. Hawk. b. 2. c. 46. s. 102. Com. Dig. Testmoigne, A. 5. Williams, J. Evidence, I.

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regard to the punishment inflicted (*a*). So also will fraud in gaming (*b*), and bribing a witness not to give evidence (*c*). Anciently, a person found guilty of petty larceny, was disabled from becoming a witness (*d*); but this is now altered by an express legislative provision (*e*). So it was formerly doubted whether persons excommunicated were competent witnesses; but the 53 Geo. 3. c. 127, declares that they shall be admissible (*f*). So persons outlawed in a personal action, are competent witnesses (*g*). [601] But though persons, under these disabilities, are rendered incapable of making oath against or in favor of others, their affidavits may be received in their own exculpation (*h*). On principle it should seem, that in general the objections to a witness, on account of his having committed a crime, particularly if not perjury, ought rather to affect his credibility than his competency; for though a person may be proved, on his own showing, or by other evidence, to have committed a crime, it does not follow that he can never afterwards feel the obligation of an oath (*i*).

In order to urge the disability against the witness with effect, it is necessary to *prove* the record of the judgment, as well as conviction (*k*). For the sentence must be produced, as well as the conviction, lest any objection should have defeated it in arrest of judgment (*l*); and the admission of the witness himself will not suffice, without a copy both of the judgment and conviction (*m*). The record must have a caption (*n*). It is not material to show that the judgment has been executed (*o*).

(*a*) Vide ante, 599, note (n).

(*b*) 9 Ann. c. 14. s. 5.

(*c*) Fortes. 208. Phil. on Evid. 15.

(*d*) 2 Wils. 18. Willes, 665. 1 Leach, 443, n. a.

(*e*) 31 Geo. 3. c. 35.

(*f*) 53 Geo. 3. c. 127. s. 3. 1 Phil. on Evid. 6th ed. 26. Id. Pref. VII. Peake on Evid. 155. 2 Hale, 277.

(*g*) 1 Phil. on Evid. 6th edit. 26. Co. Lit. 6, b. Com. Dig. Testmoigne, A. 5. Sir T. Raym. 369.

(*h*) 2 Stra. 1148. 2 Salk. 461.

(*i*) 11 East, 311.

(*k*) 8 East, 78. 11 East, 309. 6 Esp. Rep. 124. Bul. N. P. 292. Com. Dig. Testmoigne, A. 5. Bac. Abr. Evidence, A. 6. Dick. Sess. 200.

(*l*) 1 Cowp. 8. 4 Burr. 2283. Com. Dig. Testmoigne, A. 5. Bac. Ab. Evidence, A. 6. 1 Phil. on Evid. 6th edit. 27.

(*m*) 8 East, 77. 11 East, 309. 6 Esp. Rep. 124. See form of proof, 4 Harg. St. Tr. 759, 760. Post, last vol.

(*n*) 2 Stark. C. N. P. 183.

(*o*) 2 Salk. 689. 3 Inst. 219. 3 Lev. 426. But see Co. Lit. 8. Kel. 37. 3 Mod. 75, 6.

But it is agreed that, in general, every description of legal infamy, resulting from a conviction, may be so entirely removed by his majesty's pardon, as to render the party, who was before disabled, a competent witness (*a*). This rule, however, does not extend to a case where the incompetence is made part of the judgment by a particular statute; and, therefore, after a conviction of perjury, or subornation of perjury, on 5 Eliz. c. 9, the defendant, though pardoned, cannot be examined as a witness (*b*); though, if the indictment had been founded merely on the common law, the remission of the penalty would have included that of the disqualifications imposed by the sentence (*c*). And it is necessary that the pardon should appear to the court under the great seal, for the warrant under the king's sign manual will not be of any avail (*d*).

How incompetency by infamy is restored.

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The incompetence may be avoided, by reversing the sentence, as on a judgment of perjury, in the statute (*e*).

Competence may also be restored by the admission of a defendant to clergy, and his performing the conditions, or undergoing the penalties, on which he is entitled to receive it (*f*). Thus, formerly the old method of purgation was used, to take away all stain of the conviction from those who were admitted to clergy (*g*). By the statute 18 Eliz. c. 7. s. 3, that process was rendered unnecessary, and burning in the hand was allowed, by

(*a*) 2 Salk. 513, 14. 689. 1 Ld. Raym. 39. Sir T. Raym. 379. Hob. 67. 81, 82. Holt, 685. 1 Leach, 454. 2 Hale, 278. 5 Esp. Rep. 94. 1 Phil. on Evid. 6th ed. 31, 3. Hawk. b. 2. c. 46. s. 110. Com. Dig. Testmoigne, A. 4. Williams, J. Evidence, I. Dick. Sess. 200. Stark. on Evid. part iv. 717 to 723.

(*b*) 5 Esp. Rep. 94. 2 Salk. 514. 689. 690. Holt, 135. Bul. N. P. 292. 1 Ld. Raym. 256. 3 Salk. 155. Hawk. b. 2. c. 46. s. 112. Dick. Sess. 200. 3 Harg. St. Tr. 44, 47. 1 Phil. on Evid. 6th edit. 34. Peake on Evid. 141.

(*c*) 5 Esp. Rep. 94. Bul. N. P. 192. Dick. Sess. 200. 11 East, 311. 3 Harg. St. Tr. 44. 47. One who returns from transportation before the expiration of his term, is not restored to his civil rights, see 2 B. & A. 258.

(*d*) 1 Leach, 98. Hawk. b. 2. c. 37. s. 50. 1 Bla. Rep. 479.

(*e*) Peake on Evid. 141. 9 St. Tr. 625. 665.

(*f*) Sir T. Raym. 369. 380. Kel. 37. Hob. 292. 2 Hale, 278. 5 St. Tr. 172. See Stark. on Evid. part iv. 718 to 723.

(*g*) 5 St. Tr. 172. Kel. 37, 8.

INFAMY. way of substitution (*a*). And where this stigma has been changed by act of parliament for some other penalty, as transportation (*b*), fine, and whipping (*c*), those new punishments have the same effect with the old, by the particular provisions of those statutes (*d*). And, upon the same principle, clergymen and peers of the realm, who are entitled to their clergy, without either [603] penalty or condition, are restored to their competence by the mere reception of the benefit (*e*). In a late case it was held, that a person who had been convicted of grand larceny, and sentenced to transportation for seven years, his being confined in the hulks for seven years, in execution of his sentence of seven years transportation, made him a competent witness, such confinement operating as a statute pardon. And it was also held, that his having twice escaped during such confinement, for a few hours each time, did not destroy the effect of it (*f*).

Of the evidence
of Accomplices.

We have seen, that the mere confession of guilt, without a conviction, will not be sufficient to render a man legally infamous; and, therefore, *the testimony of an avowed accomplice may*, in all cases, be taken (*g*), even though an indictment has been found against him for the offence, respecting which his evidence is admitted (*h*). And if he die before the trial, his depositions, taken before the magistrate, in the presence of the prisoner, in pursuance of the statutes of Philip & Mary, may be read in evidence against the prisoner (*i*). The practice of allowing the partakers in the crime to convict their companions in guilt, was introduced in the room of the old custom, by which they were allowed to become approvers (*k*). This latter mode of procuring testimony was,

(*a*) 5 St. Tr. 172.

(*b*) 4 Geo. 1. c. 11.

(*c*) 19 Geo. 3. c. 74. s. 3.

(*d*) 1 Phil. on Evid. 6th edit. 32. See form of entry of satisfaction, 4 Harg. St. Tr. 760.

(*e*) Id. ibid. How to prove clergy, &c. see 1 Phil. on Evid. 6th edit. 32.

(*f*) Russ. & Ry. C. C. 248.

(*g*) Ante, 601. 1 Leach, 12. 155. 464. 466. 1 St. Tr. 96. 696, 697. 723. 2 St. Tr. 334. 501. 3 St. Tr. 161. 217. 595. 698.

669. 4 St. Tr. 724. Kel. 17, 18. Hawk. b. 2. c. 46. s. 94. Bul. N. P. 286. Com. Dig. Testmoigne, A. 4. Bac. Abr. Evidence, A. 5. Burn, J. Evidence, III. 1 Phil. on Evid. 6th ed. 35 to 41. Dick. Sess. 205, 6.

(*h*) 1 St. Tr. 96. 2 St. Tr. 501. Hawk. b. 2. c. 46. s. 95. Bac. Abr. Evidence, A. 5. Burn, J. Evidence, II. Dick. Sess. 205, 206.

(*i*) 1 Leach, 12. Ante, 81.

(*k*) Cowp. 335.

by suffering a criminal to confess, as well the particular crime charged upon him, as all other treasons or felonies in which he was either an agent or contriver. On the court's admitting his offer, which it was always in their discretion to refuse, the party accused was immediately put on his trial, whereon, if he was acquitted, the approver was sentenced to death; but if convicted, the latter obtained his pardon. Instead of this singular method of bringing offenders, and frequently the innocent, to punishment, the testimony of accomplices is admitted, in the way we have already noticed in an early stage of the proceedings (*a*). We have now, therefore, only to consider the effect of their testimony, when sworn on the trial.

ACCOMPLICE.

An accomplice will be a competent witness on the trial, even though he has received a promise of pardon, or is entitled by some statute to claim a reward on the prisoner's conviction (*b*). But, in general, there is no promise of pardon to a man who thus becomes a witness (*c*); though, if he makes a full and complete disclosure, he will have an equitable claim to the mercy of the crown, and the court will put off his trial, to enable him to apply for a pardon (*d*). Some interest, therefore, he must always have in the conviction of the defendant; but though it may affect his credit, it will not divest him of his capacity to become a witness (*e*). And even though he has never been admitted as an evidence for the crown, but has been surreptitiously taken before the grand jury, to enable them to find the bill, it will not invalidate the proceedings, and he may be examined on the trial (*f*). A person suspected of being an accomplice may chuse whether he will rely on the general assurance of the court to recommend him to mercy, and may, if he pleases, refuse to be sworn; but,

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(*a*) 4 Bla. Com. 329, 30. Ante, 82, 3.

(*b*) Kel. 17. 10 St. Tr. 259. 1 Hale, 303. Hawk. b. 2. c. 46. s. 135. Com. Dig. Testmoigne, A. 4. Willes, 425. 1 Phil. on Evid. 6th edit. 37. 4 Bla. Com. 330.

(*c*) Kel. 18.

(*d*) Cowp. 339. 1 Leach, 115,

S. C. He is not entitled, as a matter of right, to be exempt from being prosecuted for other offences, at the same assizes at which he has been a witness for the crown, Russ. & Ry. C. C. 361. 454.

(*e*) Ante, 319.

(*f*) 1 Leach, 155. Hawk. b. 2. c. 46. s. 97.

ACCOMPLICE. if sworn, he must disclose the whole transaction (*a*). As the statute 2 Geo. 2. c. 24. s. 8, against bribery at elections, exempts those participators in the guilt, who turn informers, from the penalties it inflicts, by a necessary construction it constitutes them legal witnesses (*b*). So on the trial of an accessory for a misdemeanor, under the 22 Geo. 3. c. 58, in receiving stolen goods the original felon may be examined as a witness; for the conviction of the former does not depend upon that of the latter (*c*). And in a prosecution on the 4 Geo. 1. c. 11, for taking a reward to recover stolen goods for the owner, the party who stole them may be admitted to give evidence (*d*). But if these principles seem oppressive to the defendant, in some cases they operate in his favor; for any of those who are separately indicted for the same offence, may be called as witnesses on his part, to prove his innocence (*e*).

It was formerly thought, that though an accomplice may be admitted as an evidence, his testimony could only be left to the jury, when corroborated by more unexceptionable witnesses. But it is now settled, that such evidence may be left to the jury; and, if they regard it as sufficient, the prisoner may be convicted (*f*). An accomplice does not require confirmation as to the person charged, provided he is confirmed in the particulars of his story (*g*). And if the testimony of an accomplice be confirmed, so far as his testimony relates to one prisoner, but he be not confirmed with respect to another prisoner, still the latter may be convicted on the testimony of the accomplice (*h*). It is, however,

(*a*) 2 Leach, 767. The course on the circuit is, before the bill goes before the grand jury, for a brief to be given to counsel to move that the prisoner, C. D., may be admitted evidence for the crown; and then counsel reads depositions, and if he is satisfied that the evidence of the accomplice is material, he makes the motion.

(*b*) Willes, 423. 425, note c. Say. Rep. 291. 239. 4 East, 180.

(*c*) 1 Leach, 418, 19, n. (*a*). 2 East, P. C. 782.

(*d*) 1 Leach, 17, note (*a*). 419, n. (*a*). 2 East, P. C. 782.

(*e*) 2 Rol. Abr. 685. Rep. temp. Hardw. 303. 2 Hale, 280. 1 Hale, 305. Fortes. 247. 2 Campb. 333, in notis. Hawk. b. 2. c. 46. s. 99. Williams, J. Evidence, I. Dick. Sess. 206, 207.

(*f*) 1 Leach, 464, 6, n. a. 478. 2 Campb. 132. 7 T. R. 609. 1 Hale, 303, 4, 5. Hawk. b. 2. c. 46. s. 96. Dick. Sess. 206.

(*g*) Russ. & Ry. C. C. 251.

(*h*) 3 Stark. C. N. P. 34.

the practice to direct the jury only to give weight to the evidence of an accomplice, when, in some point, it is confirmed by other evidence; which establishes, in some degree, his character for veracity, and enables them to judge of the consistency of his narrative (*a*). And if the jury find the prisoner guilty, on the single testimony even of a credible accomplice, the court will sometimes recommend him to mercy (*b*).

ACCOMPLICE.

There is one species of disability to give evidence, which arises merely from a temporary relation, and is confined in its effects to the circumstances disclosed under its sanction. It arises from the situation in which a counsel or attorney stands to his client, and the *confidence* which it is necessary for every one to repose in his legal advisers. To this confidence the law has attached so sacred an inviolability, that it will not compel, nor even suffer those who are thus employed to disclose any facts stated to them confidentially, in the way of their profession, even after the cause, in the course of which they were communicated, is entirely concluded (*c*). Thus an attorney is not bound to obey a subpœna duces tecum, to produce papers against his client on an indictment for perjury (*d*), though it would certainly be prudent for him to attend on such an occasion, and state to the court the grounds on which he is bound to secrecy (*e*). The retainer of a counsel for a cause is in the nature of a privileged communication, and cannot be disclosed (*f*). And this rule extends also to an interpreter, who may be employed on the part of an alien, ignorant of the language, to communicate his instructions to his attorney (*g*). And the rule is not confined to communications made in the course of a cause, or with a view to a cause (*h*), but extends to all cases where the party applies for professional

Professional confidence.

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(*a*) Dick. Sess. 206. 3 Stark. C. N. P. 34, and notes.

(*b*) 1 Leach, 466. Hawk. b. 2. c. 46. s. 96.

(*c*) 3 Burr. 1687. 9 East, 485. 4 T. R. 758. 761. Bul. N. P. 284. Hawk. b. 2. c. 46. s. 84. Dick. Sess. 207. 1 Phil. on Evid. 6th edit. 132. Peake on Evid. 193. Stark. on Evid. part i. 104; part iv. 395, &c.

(*d*) 3 Burr. 1687. 9 East, 485.

(*e*) 9 East, 485.

(*f*) 1 Ry. & Mo. C. N. P. 165.

(*g*) Peake, N. P. C. 77; but not to a communication made to an interpreter in the absence of the attorney.

(*h*) 2 Brod. & B. 4. 2 Camph. page 9.

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advice (*a*). And the rule extends to facts which the attorney becomes acquainted with in the character of an attorney, although the communication was not made by his client (*b*). Such as communications made by third persons, who accompanied the client when he came to consult the attorney (*c*); and to the contents of a written instrument, which he has by delivery from his client (*d*).

But this indulgence does not apply to cases where the witness, though a professional man, was consulted merely as a friend, without being engaged to conduct the proceedings (*e*). As where an attorney is employed in matters which are not professional, as in a treaty for the purchase of an estate (*f*). And it is reported to have been decided, that a person who has been consulted on the supposition that he was a solicitor, may, if not so, be compelled to disclose the communication (*g*). And a counsel or solicitor may be required to give evidence of any thing which he knew before his retainer, for the circumstance of his being subsequently employed, cannot affect the knowledge of facts which had previously come under his observation (*h*). So also he may be examined as to any facts which he might have known without being retained, and which, therefore, form no part of his professional confidence, as the execution of a deed to which he was a witness (*i*), or whether his client was sworn to an answer in chancery; or whether an instrument, on which there appears to be an erasure, was ever in a different condition (*k*). But he cannot state any disclosures or confessions made by his client in reliance on professional honor (*l*). The attorney-general, if asked as to the motives of a prosecution instituted by him, may demur to the questions, and refuse to reply (*m*). A person retained to conduct

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(*a*) 2 Brod. & Bing. 4. 6 Mad. 47. 4 T. R. 752. Bul. N. P. 284. Hawk. b. 2. c. 46. s. 85.

(*b*) 5 Esp. Ca. 52.

(*c*) 2 Campb. 579.

(*d*) 5 Esp. Ca. 120.

(*e*) 4 T. R. 753. Hawk. b. 2. c. 46. s. 91.

(*f*) 2 B. & B. 4. 2 Campb. 9. 6 Mad. 47. 19 Ves. 263. 272.

(*g*) 6 Esp. Rep. 67.

(*h*) 1 Vent. 197. 10 Mod. 40.

(*i*) Cowp. 845. Peake, N. P. 108. 4 Esp. Rep. 185. 5 Id. 53. Hawk. b. 2. c. 46. s. 87. Bul. N. P. 284.

(*k*) 1 Vent. 197. Bul. N. P. 284.

(*l*) Id. *ibid*.

(*m*) 11 Harg. St. Tr. 283.

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a cause, may be examined as to any mere collateral fact, which cannot, from its nature, have been private : as to prove the handwriting of his client (*a*), or to state the contents of a notice to produce papers, which he received in his official capacity (*b*). And the rule does not extend to a letter written by the attorney to his client, and indorsed by the client (*c*). Nor to what took place at the execution of a deed (*d*). Nor to an admission of a debt made by the attorney to the adverse party, by order of his client (*e*). Nor to proof of identity (*f*). Nor to proof that the consideration of a bond was usurious (*g*). And it seems to be the better opinion, that on an indictment for perjury in an answer in chancery, he may be sworn to prove that the oath was taken by his client ; because that is a matter, the knowledge of which he may only share with the public (*h*). And he will not be protected from liability to be sworn, if he has become a party to the transaction (*i*). Nor does the rule extend to a communication made to an attorney, which has been accidentally overheard by another witness, for this is owing to the negligence of the client himself (*k*). Nor does this protection extend to any other species of confidence than that which is placed in a legal adviser ; for, as the law stands at present, though it has been regretted by the courts, physicians, surgeons, catholic priests who receive confessions, and others, whose situation entrusts them with concerns as delicate as these, are compelled to the fullest disclosures (*l*). So a steward, or private friend, is bound to disclose communications, however confidential they may be in their nature (*m*). So is a trustee (*n*). And a peer has no greater privilege in this respect than a commoner (*o*).

(*a*) Hawk. b. 2. c. 46. s. 89.

(*b*) 7 East, 357.

(*c*) 2 Stark. C. N. P. 274.

(*d*) 5 Esp. 52. 1 New. Rep. 21.

(*e*) 2 Esp. Ca. 474.

(*f*) 2 Dow. & Ry. 347. 2 Stra. 1122. Bul. N. P. 284.

(*g*) Peake, 108.

(*h*) 2 Cowp. 348. Bul. N. P. 284, 5. Hawk. b. 2. c. 46. s. 88, acc. 2 Stra. 1122. Com. Dig. Testmoigne, C. 2, semb. contra.

(*i*) Peake, 108. 4 T. R. 759.

(*k*) 4 T. R. 753. 2 Campb. 10.

(*l*) 3 St. Tr. 715. 4 T. R. 759, 760. 11 St. Tr. 243, 246. 9 St. Tr. 582. Hawk. b. 2. c. 46. s. 92. But see Ld. Kenyon's observations in Peake's Rep. 78, 9; and Hints to Witnesses, 23, 4.

(*m*) 2 Atk. 524.

(*n*) Ld. Raym. 783. Stark. on Evid. part iv. 397.

(*o*) 11 St. Tr. 246.

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It is said to be no sufficient exception to a witness, that he is one of the judges or jurors who are to try the issue (*a*). But in such a case the juryman would, for the sake of convenience, be probably passed over in the panel, or challenged by the party against whom he is to be examined as a witness. And when one of the judges is to be sworn, he will not afterwards, it seems, return to the bench until that trial is concluded (*b*). A clerk attending upon a grand jury, shall not be allowed to reveal that which is given in evidence before the inquest (*c*).

It may be as well here to observe, that the court itself will refuse to hear professional communications, though the witness be desirous of communicating them (*d*); but, of course, the client may waive this privilege (*e*). And if a counsel or attorney be called as a witness by his client, he is not protected from cross-examination as to the point upon which he has been examined in chief, although it was matter of confidential communication. But such cross-examination must be confined to the same matter, and must not be extended to other points in the same cause (*f*).

When objection
must be made to
a witness.

If any of these objections which we have considered, exist as to the competence of a person called as a witness, the objection should properly be made before he is sworn in chief at the trial; though now it may be made at any time before conviction (*g*). Where, upon a trial for high treason, it appeared, that after a witness had been examined without objection on the part of the prisoner, that he had been misdescribed in the list of witnesses, which is required by the statute to be given to the prisoner previous to his trial, the court would not permit the evidence of that witness to be struck out (*h*). If the objection, on the score of interest, be not taken previous to the examination in chief, the witness cannot be cross-examined as to the contents of a written

(*a*) Kel. 12. 1 Sid. 133. 2 St. 599. Bul. N. P. 284. 4 T. R. Tr. 257. 632. 674. Hawk. b. 2. 756. 759. 2 Ves. jun. 189.

c. 46. s. 83. (*e*) 1 Phil. on Evid. 6th edit. 132.

(*b*) Kel. 12. Hawk. b. 2. c. 46. s. 83.

(*f*) 2 Atk. 524.

(*c*) Tr. per Pais, 387. Hawk. b. 2. c. 46. s. 93. Ante, 317.

(*g*) 1 T. R. 717. 2 Burr. 2251. Com. Dig. Testmoigne, C. 1.

(*d*) See Stark. on Ev. part iv.

(*h*) 2 Stark. C. N. P. 158.

document not produced, which might have been done had the objection been taken in the first instance (*a*). It seems to be no ground for arresting the judgment, that an exception might have been taken to one of the witnesses; for the evidence has been left to the jury, and they have found it worthy of credit (*b*). But it may be allowed to weigh with the court on an application for a new trial, when the merits of the case seem to be with the party applying (*c*).

OBJECTION
TO A WITNESS.

The most usual mode of compelling the attendance of witnesses for the prosecution, is by binding them over in a recognizance to appear, and give evidence at the time of the examination before a magistrate (*d*). We have already shown the power with which justices are for this purpose invested, and the mode in which the recognizance is to be taken; and it is scarcely necessary to observe here, that if the party does not perform its condition, by appearing on the trial, he will forfeit the sum which it specifies (*e*).

2. Mode of compelling the attendance of witnesses.

But where the prosecutor discovers that a person, who is not thus already bound to appear, will be necessary to prove the indictment, he must have recourse to other process. This is, by suing out a writ of *subpœna ad testificandum* (*f*), which will be made out by the clerk of the peace at the sessions (*g*), the clerk of assize at the assizes (*h*), or the crown-office, when its aid becomes requisite (*i*). The writs issued by the two former authorities were, until lately, compulsory only within the county where they are granted; and, therefore, if the witness lived beyond its limits, application must have been made to the crown-office, from whence it might issue to any part of England (*k*). But now, by

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(*a*) 2 Campb. 14.

(*b*) Id. *ibid*.

(*c*) 1 T. R. 717. Com. Dig. Testmoigne, C. 1.

(*d*) 2 Hale, 282. Hawk. b. 2. c. 46. s. 172, n. c. Bac. Abr. Evidence, D. Burn, J. Evidence, IV. Williams, J. Evidence, III. Dick. Sess. 208, 9.

(*e*) Ante, 90 to 92. Dick. Sess. 209. Bac. Abr. Evidence, D.

(*f*) See form, 10 Wentw. 358. Burn, J. Evidence, IV. Williams, J. Evidence, III. Dick. Sess. 93, 4.

(*g*) Cro. C. C. 21. Dick. Sess. 208. 94.

(*h*) Cro. C. C. 9.

(*i*) 3 T. R. 585.

(*k*) Cro. C. C. 9. 21. 2 Nolan, 309, n. 3.

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OF WITNESSES.

the 45 Geo. 3. c. 92. s. 3, a writ of subpoena, issued from any court of competent jurisdiction to compel the attendance of the witness, will be equally valid if served in any part of the United Kingdom, and the disobedience of it is punishable in the King's Bench. The 38 Geo. 3. c. 52. s. 4, provides, that the courts of oyer and terminer, and general gaol delivery, may issue process to compel the attendance of witnesses on the trial of an indictment, found by the grand jury of the county, for offences committed in the county of a city, or town corporate.

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The prosecutor should not include more than four persons in the subpoena (*a*). And, as the writ itself should be retained, the prosecutor must deliver to each of the defendants *tickets*, containing its substance (*b*); or, as is now the most usual mode, copies of the writ itself (*c*). This must be done a reasonable time before the trial, in order to enable the witness to attend with as little inconvenience as possible (*d*). And if there are any papers in his hands, which it is desirable to the party to obtain, a special clause should be inserted in the writ, called a *duces tecum*, by which he will be commanded to attend with the documents in question (*e*); which he ought to obey, even where, from any confidential relation, the court will not, on his appearance, compel him to produce them (*f*). But no man can be forced to bring forward evidence against himself, even though he hold the paper in his hand at the time of trial (*g*). Nor can any rule be obtained to inspect the books of a corporation, or the archives of an university, on the part of the prosecutor, in case any indictment or criminal prosecution is instituted against the former, or the officers of the latter (*h*). But every one has a right to demand an inspection of the books of sessions, for they are the property of

(*a*) Cowp. 846. Bac. Abr. Evidence, D. in notes. Burn, J. Evidence, A.

(*b*) 5 Mod. 355. Cro. Car. 540. Bac. Abr. Evidence, D. See form, Burn, J. Evidence, IV. Williams, J. Evidence, III. Dick. Sess. 94. Post, last vol.

(*c*) Bac. Abr. Evidence, D. Burn, J. Evidence, IV. Williams, J. Evidence, III. Dick. Sess. 94.

(*d*) 1 Stra. 510. Bac. Abr. Evidence, D. Dick. Sess. 210.

(*e*) See form, post, last vol.

(*f*) 9 East, 435. Ante, 577. 6 Esp. Rep. 116. 2 Tidd, 806.

(*g*) 1 Leach, 299. 4 Burr. 2489. 1 T. R. 689, in notes. Loft, 321. Ante, 577, 8.

(*h*) Ante, 578. 2 Stra. 1210. 1 Bla. Rep. 37. 351. 2 Lord Raym. 927. 1 Wils. 239. 1 T. R. 689, in notes.

the public (*a*). Where, however, the writings are in the custody of the defendant, a notice must be served on him to produce them (*b*), in order to enable the prosecutor to give parol evidence of their contents, as we have sufficiently shown, in the consideration of documentary evidence (*c*).

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Where the party, whose testimony is desired, is detained in prison, on board a ship, or in any description of confinement, a writ of *habeas corpus ad testificandum* may be obtained, to procure his attendance (*d*). This, any one of the judges or barons of the courts of King's Bench, Common Pleas, and Exchequer, in England or Ireland, have discretionary power to grant to any part of the United Kingdom, to bring a witness before any court of record, to be examined before such courts, or any grand, petit, or other jury, in any cause or matter, civil or criminal (*e*). And the justices of the great sessions of Wales, and the county palatine of Chester, have the same authority within the limits of their jurisdiction (*f*). In order to obtain this writ, an *affidavit* (*g*) must be made by the party applying (*h*), stating, that the party is confined, and that he is a material witness, and that the trial is about to take place (*i*); and if he be at a great distance, the court will expect it to be specially shown how he is material (*k*); and in case of his being on board a ship, that he is willing to attend (*l*). On this an application must be made to the court, if sitting, or to a judge in vacation, when the former will, in its

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(*a*) 1 Wils. 240. 1 Bla. Rep. 39. Tidd, 8th edit. 646, 7. 852. Ante, 576, 7.

(*b*) Ante, 578. See form, post, last vol.

(*c*) Ante, 578, 9.

(*d*) 3 Burr. 1440. Hawk. b. 2. c. 46. s. 172. 4 Harg. St. Tr. 599. See form, post, last vol. Ante, 321.

(*e*) 43 Geo. 3. c. 140. 44 Geo. 3. c. 102. Tidd, 8th edit. 359, 60. Dick. Sess. 203. The application for a *habeas corpus*, under the 44 Geo. 3, ought to be made to a judge out of court, 2 M. & S. 582.

(*f*) 44 Geo. 3. c. 102. s. 2. Tidd, 8th edit. 859, 60.

(*g*) See form, post, last vol.

(*h*) Fortes. 396. Tidd, 8th edit. 858.

(*i*) Tidd, 8th edit. 858. Peake on Evid. 210. 1 Phil. on Evid. 6th edit. 5.

(*k*) Tidd, 8th edit. 858.

(*l*) Cowp. 672. 1 Phil. on Ev. 6th edit. 5. 1 Stark. C. N. P. 470. In Peake, 210, 11, and Tidd's Prac. 8th edit. 858, it seems to be supposed that an affidavit of the readiness of the witness to attend, must, in all cases, be made; but this requisite only applies when the party is on board ship, Cowp. 672. 1 Phil. on Evid. 6th ed. 5; and, in the latter case, it is not in all cases necessary to swear to the witness's readiness to attend.

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discretion, grant a *rule*, or the latter will issue his *fiat* for the writ, whereon it will immediately issue from the crown-office (*a*). This writ should then be served on the party detaining the witness (*b*), and notice should, it is said, be given, in case of imprisonment for debt, to all those at whose suit he is in custody (*c*). But this process will not be awarded to bring up a prisoner, in custody on a charge of high treason, or a prisoner of war; who, though he may be examined on interrogatories, by consent, cannot be brought up, unless the secretary of state agree to his removal (*d*). And where it appears that the evidence of the witness cannot be material, or that his imprisonment will soon determine, or that the application is a mere excuse to remove a prisoner in execution, the court will refuse to grant it (*e*); and the party applying must, it is said, defray all reasonable expences (*f*). And a question has been made, whether the party applying for the writ, ought not to indemnify the gaoler against the chance of the witness escaping (*g*). An habeas corpus to bring up a witness on behalf of a prisoner, was formerly refused (*h*); but is now to be issued on behalf of the defendant, as well as of the prosecutor (*i*).

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When a witness resides abroad, or is about to leave the country before trial, he may, by the consent of both parties, be examined on *interrogatories*; in the former case, before commissioners approved by both of them; and, in the latter, before a judge in chambers (*k*). But this cannot be done if the defendant refuses, because the evidence is not the best of which the case will admit (*l*), except in proceedings for offences alleged to have been committed in the East or West Indies, by persons holding official

(*a*) 3 Burr. 1440. Tidd, 8th edit. 858. 1 Phil. on Evid. 6th edit. 5. 2 M. & S. 582. See forms of rule, post, last vol.

(*b*) 1 Cowp. 248, 9. Tidd, 8th edit. 860. 1 Phil. on Evid. 6th edit. 5.

(*c*) 1 Smith, 284, *sed quere*.

(*d*) Dougl. 419. Bac. Abr. Evidence, D. Peake on Evid. 211. 1 Phil. on Evid. 6th edit. 5. Tidd, 8th edit. 860.

(*e*) 3 Burr. 1440. Tidd, 8th edit. 860.

(*f*) 1 Smith, 285. Tidd, 8th edit. 860. Peake on Evid. 211. 1 Phil. on Evid. 6th edit. 5.

(*g*) Bac. Abr. Evidence, D. Tidd, 8th edit. 860.

(*h*) 4 Harg. St. Tr. 2, 599.

(*i*) Hawk. b. 2. c. 46. s. 172; and post, 624, 5.

(*k*) 1 Cowp. 174. 2 M. & S. 604. 2 Salk. 691. Comb. 53. Ante, 492. Bac. Abr. Evidence, E. 2 Chit. Rep. 199.

(*l*) Barnes, 447. Tidd, 8th edit. 860.

situations there, where witnesses may be examined before the magistrates there on writs of mandamus (*a*). And the court will put off the trial until the return of those writs, in case of informations for misconduct in officers employed in India (*b*). So where a party, in a case where consent is requisite, refuses to grant it, the court will put off the trial, to give time for the attendance of the witnesses (*c*).

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It is certain that, in civil cases, a witness is not bound to attend, unless he is paid his reasonable expences (*d*). And, though formerly there was no law to reimburse those who attended on behalf of the crown, it was regretted by some of the most eminent authorities in the profession (*e*). To remedy this evil, it is provided by several recent statutes, that the prosecutor and witnesses, in case of felonies, may, on *petitioning* the judge, obtain their reasonable expences out of the county stock, with an allowance, if poor, for their loss of time, whether the defendant be found guilty or be acquitted (*f*). But it is said that the witness is compellable to attend, and must not, as in civil cases, refuse to obey the subpœna, on the ground that his expences have not been duly tendered (*g*). This position, however, seems, at the present time, very questionable, as far as relates to attendance in pursuance of a subpœna, as the statute, which directs that subpœnas may be served in any part of the kingdom, provides that no attachment shall issue on the ground of disobedience, unless reasonable

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(*a*) 13 Geo. 3. c. 63. 42 Geo. 3. c. 85. s. 2, 3. 8 East, 31. Tidd, 8th edit. 864. Ante, 492.

(*b*) Ante, 492. 8 East, 31. Cowp. 174.

(*c*) 1 Cowp. 174. 2 Dougl. 219. Tidd, 8th edit. 861. As to the practical mode of examination by interrogatories, see Tidd, 8th edit. 861, 2.

(*d*) 2 Stra. 1150. 13 East, 15, 16, 17, n. a. 1 Bla. Rep. 36. 1 Hen. Bla. 49.

(*e*) 2 Hale, 282.

(*f*) 25 Geo. 2. c. 36. 27 Geo. 2. c. 3. 18 Geo. 3. c. 19. 4 Bla. Com. 361, 362. Burn, J. Evi-

dence, III. Williams, J. Evidence, VI. Dick. Sess. 209; and see also the 58 Geo. 3. c. 70. s. 4, allowing costs, &c. in cases of larceny, or other felony. It seems this act does not extend to any costs incurred previous to the apprehension, 1 Dow. & Ry. 24. By the 7th section, no person shall be entitled to costs and expences who has not been bound by recognizance, or previously received a written notice to attend, from the prosecutor, his attorney, or agent.

(*g*) 1 Phil. on Evid. 6th edit. 3, 9. Hawk. b. 2. c. 46. s. 173.

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charges of going to, and returning from, the place of trial, have been tendered to the witness (*a*). But none of the acts of Parliament, allowing compensation in criminal cases, extend to prosecutions for misdemeanors; and, in these cases, therefore the judge has no power to grant the witness's petition (*b*); and the parties desiring the attendance of the witnesses must take care, and tender sufficient to cover their reasonable expences, or the court will not punish the witness for his non-attendance.

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In civil cases, if the party served with a subpoena refuse to appear, he is liable not only to the forfeiture of the sum of £100, mentioned in the writ, to his majesty, but to an additional penalty of £10, at the suit of the party injured by his absence (*c*). But this enactment does not seem to extend to criminal proceedings; in which the only effectual punishment, and mode of securing the future attendance of the witness, is by attachment for the contempt of the court, from which the process was originally awarded (*d*). And when the subpoena was not issued out of the crown-office, the court issuing the same may, upon proof to their satisfaction of the due service of the subpoena, transmit a *certificate* of the default of the witness, under the seal of the court, or under the hand of one of the justices thereof, to the court of King's Bench; which court is empowered to punish the witness the same as if he had disobeyed a subpoena issued out of that court, provided the expences have been tendered (*e*). The witness, if taken upon an attachment for his contempt, may be detained till he has given evidence on the trial of the offender, and then he may be set at liberty (*f*). And to this proceeding all are subject; for a peer of the realm is equally bound to obey a subpoena, and equally punishable for neglecting it, with the meanest of his fellow-subjects (*g*). But the court will not grant an at-

(*a*) 45 Geo. 3. c. 92.

(*b*) 7 T. R. 377. 4 Bla. Com. 362, n. 12.

(*c*) By 5 Eliz. c. 9. s. 12. Dick. Sess. 209.

(*d*) 8 T. R. 585. 1 Stra. 510. 2 Stra. 810. 1054. 1150. 2 Dougl. 560, 1. 1 Bla. Rep. 36. 1 Cowp. 386. 2 Ld. Raym.

1529. Burn, J. Evidence, III. Williams, J. Evidence, IV. Dick. Sess. 209.

(*e*) 45 Geo. 3. c. 92. s. 3. 8 T. R. 585.

(*f*) 8 T. R. 585, note a.

(*g*) 1 Salk. 278. Williams, J. Evidence, IV.

tachment, unless the subpoena was personally served, and sufficient expences tendered (*a*). And an indictment may be sustained, for a conspiracy to prevent a witness from attending (*b*).

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If witnesses are thus punishable for disregarding the process of the court, they are, on the other hand, protected while they obey it. They are privileged from arrests *euendo, morando, et redeundo* (*c*); and, in allowing them sufficient time for these purposes, the courts are always disposed to be liberal (*d*). And, in general, they will be equally safe, if after being asked to give evidence, they attend without a subpoena (*e*). We have already seen how far approvers are protected and privileged (*f*).

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When the witnesses for the prosecution are thus brought into court, they are called by their names to be sworn; for it is now settled, that no one can be examined as a witness in any criminal proceeding except upon oath (*g*). Anciently, indeed, in capital cases, the witnesses for the prisoner were not allowed to give their evidence under this sanction (*h*), by which means they could not obtain the same degree of credit as the evidence in support of the prosecution. This unjust custom, which rested rather upon practice than law (*i*), and which had not even a particle of reason to support it (*k*), was at length entirely done away by 1 Ann. c. 9. s. 3. That statute requires, that all witnesses produced on the behalf of the prisoner shall be sworn in the same way as those who are called on the part of the crown, and shall be equally liable with them to the consequences of wilful perjury. Now, therefore, the witnesses on both sides are sworn, before they can be admitted to give evidence. And this rule is so universal in its operation, that a peer cannot be examined upon his honor, but

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Trial.

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- (*a*) 2 Stra. 1054. 45 Geo. 3. 146. 3 Keb. 631.
c. 92. s. 4. (*h*) Cro. Car. 292. 2 P. Wms. 247. 2 Hale, 283. Hawk. b. 2. c. 46. s. 164. Bac. Abr. Evidence, E. Williams, J. Evidence, IV. 5 T. R. 313.
(*b*) 2 East, 364. (*i*) 2 Hale, 283, in notis. Hawk. b. 2. c. 46. s. 164.
(*c*) 2 Bla. Rep. 1113. (*k*) 3 Inst. 79. Hawk. b. 2. c. 46. s. 164.
(*d*) Id. *ibid*. 2 Stra. 986.— Witness protected attending an arbitration, 7 Price, 699.
(*e*) 3 T. R. 536.
(*f*) Ante, 603, 4.
(*g*) 1 Leach, 110. Peake, 11.
n. (*a*). 1 Salk. 278. 1 P. Wms.

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must take the same oath, with any other individual (*a*). The oath which is usually administered, is called a corporal oath, because the person who takes it lays his hand on some part of the Scriptures, usually the New Testament (*b*), "*tactis sacrosanctis Dei evangelis*," which supposes the person to be a Christian (*c*), and the oath is thus described in indictments for perjury, "was duly sworn, and did take his corporal oath, and was sworn upon the holy gospel of God, before, &c. to speak the truth, the whole truth, and nothing but the truth, touching and concerning, &c." The form used at the assizes or sessions is, for the clerk of arraigns, or of the peace, to desire the witness to take the book in his hand, and, when that is done, to say to him, "The evidence you shall give between our sovereign lord the king and the prisoner at the bar shall be the truth, the whole truth, and nothing but the truth. So help you God;" upon which the witness kisses the book, and thereby appeals to heaven for the truth of what he is about to disclose (*d*). But it is not absolutely necessary to use this form, if the witness has a conscientious objection to the mode, or professes a religion which binds him by a different obligation. As we have already seen, that persons of any opinions may be sworn, provided they believe in God, and a future state of retribution, so it would be absurd to force upon them a ceremony they do not regard as binding, and expect them to feel obligations which they do not believe to exist. The ties of the most barbarous superstition may strike as awful an impression into the heart which has been nursed in its terrors, as the usual appeal to heaven conveys to the feelings of a Christian. By this principle, the courts have been guided in their uniform practice. Jews, from the earliest times, have been sworn on the writings of

(*a*) 1 Salk. 278. 3 Keb. 631. 1 P. Wms. 146. Burn, J. Peers. Williams, J. Peers. Williams, J. Evidence, VI. Peake on Evid. 11, n. (*a*).

(*b*) 3 Inst. 165. Burn, J. Oaths, I. Williams, J. Oaths. If the oath be taken on the common prayer-book, which hath the Epistles and Gospels, it is good enough, and perjury upon the statute may be assigned upon

his oath, 2 Keb. 314. Burn, J. Oaths, I.

(*c*) 2 Hale, 279.

(*d*) 2 Hale, 279. See form, Cro. C. C. 484. Dick. Sess. 193. Post, last vol. Form to interpreter of deaf and dumb witness, 1 Leach, 409. Post, last vol. Form to interpreter in general, Cro. C. C. 484. Post, last vol. Of a Jew, 2 Hale, 279. 3 Burr. 450. Post, last vol.

Moses (*a*). When they take the oath of abjuration, they are to omit the words, "on the true faith of a Christian (*b*)."¹ The followers of Mahomet may be sworn to speak truth on the Alcoran (*c*). And Gentoos may give evidence, after performing the fantastic ceremonies which their wild superstitions require (*d*). Upon the same principle, we find sectaries in our country sworn in the way they regard as most sacred. Thus, a Scotch covenanter may be sworn after his peculiar manner, which is perhaps more solemn and impressive than our own (*e*). And any one objecting to kiss the book, may lay himself under the same obligations by holding up his hand, and repeating the oath while the book lies open before him (*f*). If a witness, without objecting to it, takes the oath in the usual form, he may be afterwards asked whether he thinks the oath binding on his conscience; but it is unnecessary and irrelevant to ask him if he considers any other form of oath more binding, and such question cannot legally be put to him (*g*).

When the witness is thus duly sworn, he must, in all cases of accusations affecting the prisoner's life, deliver his testimony in his presence (*h*); for the law regards the *vivâ voce* examination of witnesses in open court, where the manner may be observed, as well as the substance scrutinized, and where apt and sudden questions may be asked, for which the witness could not be prepared, and where he may be confronted with other witnesses, and where the defendant may have the benefit of cross-examination and of instant inquiry, to be the most satisfactory mode of ascertaining

(*a*) 2 Keb. 314. 2 Stra. 821. 1 Cowp. 389. 1 Atk. 40, 42. Willes, 543. 1 Ld. Raym. 282. Burn, J. Oath, IV. It is no objection, after trial, that a Jew was sworn upon the holy gospel, 3 B. & B. 232.

(*b*) 10 Geo. 1. c. 4. s. 18. Burn, J. Oath, IV.

(*c*) 2 Stra. 1104. 1 Leach, 54. 1 Atk. 21. 1 Cowp. 390. Burn, J. Oaths, IV. See form, 1 Leach, 54.

(*d*) 1 Atk. 21. 1 Cowp. 390. See the form, in which this oath

was administered, set forth, in 1 Atk. 21.

(*e*) 1 Leach, 412. 498, note b. Peake, N. P. 23. 1 Phil. on Evid. 6th edit. 22. Cowp. 390. Burn, J. Oaths, IV. See form, 1 Leach, 412. 498, n. b. Peake, N. P. 23. Post, last vol.

(*f*) 2 Sid. 6. 1 Cowp. 390. Burn, J. Oaths, IV.

(*g*) 2 Brod. & Bing. 234.

(*h*) Hawk. b. 2. c. 46. s. 1. Bac. Abr. Evidence, E. Williams, J. Evidence, IV.

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the credit which they deserve (*a*). And, in analogy to cases technically criminal, it is an invariable rule, that in all summary proceedings before justices under penal statutes, the evidence must be given in the presence of the defendant; and this circumstance must appear on the record of the conviction, or it will be quashed by the court of King's Bench, after a removal thither by certiorari (*b*). But where a material witness is ill, or beyond seas, and unable to come hither, he may, in *a case of misdemeanor*, as we have already seen, be examined on interrogatories of the party indicted (*c*). But so much is *vivâ voce* testimony preferred, that if the deponent afterwards arrive in England, his examination will not be suffered to be read, but his personal attendance will be absolutely requisite (*d*).

Before the examination commences, the crown may demand that the witnesses should retire, in order to each being questioned in the absence of the others (*e*). And the same order will be made on the request of the defendant, but as a matter of indulgence, and not of right (*f*).

When the witness is thus sworn and present, he is examined by the counsel for the prosecution; or, if none be retained, by the judge, or presiding magistrate. Formerly, if any objection were to be made to his competency, he was first sworn on the *voire dire*; but now, if his interest or infamy be subsequently discovered, it is the practice to reject him (*g*). It is usual for only one counsel to examine the same witness; but where the junior counsel is embarrassed in his examination, his leader may step in to his assistance, and proceed in questioning the witness (*h*). On

(*a*) Hob. 325. Vaugh. 143, 4. Fortes. Pref. III. Bac. Abr. Evidence, E. Williams, J. Evidence, IV.

(*b*) 1 T. R. 125. 2 T. R. 18. 3 Burr. 1785. 2 Burr. 1163. 2 Stra. 1240. 1 Cowp. 241. Williams, J. Evidence, IV.

(*c*) 1 Cowp. 174. 2 M. & S. 602. 2 Salk. 691. Ante, 612. 492. Comb. 53.

(*d*) 2 Salk. 691. Bac. Abr. Evidence, E.

(*e*) Fost. 47. Bac. Abr. Evidence, D. Williams, J. Evidence, IV. 4 Harg. St. Tr. 754. 6 Id. 800. Peake on Evid. 206, n. f.

(*f*) Id. *ibid*. 4 Harg. St. Tr. 754. 6 Harg. St. Tr. 800.

(*g*) 1 Phil. on Evid. 6th edit. 123. Peake on Evid. 204, 5.

(*h*) 20 St. Tr. 664. Cobbett's edition, Horne Tooke's case. 2 Campb. 280.

the examination in chief, the counsel will not be allowed to ask leading questions; that is, such as from their nature, instruct the witness what he is to say in reply (*a*). But, at the same time, he must state his question in so forcible a way, that it may be perfectly understood, and no material circumstance omitted. And if the witness appears desirous of concealing the truth, in order to favor the defendant, the court will allow a latitude, bordering on cross-examination, to the prosecutor's counsel (*b*). So in the examination of a witness, to contradict the testimony of another, leading questions may be allowed, as whether a written instrument contained certain matter; because otherwise it would be difficult to bring them to any direct contradiction (*c*).

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A witness cannot be permitted to read his evidence (*d*), but may refresh his memory from any book or paper, provided he can afterwards swear to the fact from his own recollection; though if he can only maintain its truth by finding it entered there, the papers must be themselves given in evidence (*e*). And he may be allowed to look at papers, in order to refresh his memory, which were not written by himself, but which he has repeatedly inspected (*f*). Two or three lines of a letter may be exhibited to a witness, without exhibiting to him the whole; and the witness may be asked, whether he wrote the part exhibited. But if the witness deny that he wrote such part, he cannot be examined as to the contents of the letter (*g*). It has been said, that it is necessary he should swear absolutely to the fact which he is called to prove, and that a mere persuasion and belief will not be sufficient proof for the consideration of a jury (*h*). But it is now settled, that there are cases in which a belief will be available in evidence. Thus a subscribing witness to a deed may swear that

(*a*) Peake on Ev. 206. 1 Phil. on Evid. 2d edit. 255, 6. As to what are leading questions, see 1 Stark. C. N. P. 83. 2 Stark. C. N. P. 123. 1 Campb. 43. Stark. on Evid. part ii. 123, 124.

(*b*) 1 Phil. on Ev. 6th ed. 255.

(*c*) 1 Campb. 44.

(*d*) 5 St. Tr. 445. Hawk. b. 2. c. 46. s. 168.

(*e*) 3 T. R. 749. 11 Harg. St. Tr. 255. 3 T. R. 754. 2 Campb. 112. 8 East, 284, 289. Hawk. b. 2. c. 46. s. 168. Bac. Abr. Evidence, E.

(*f*) 2 Campb. 112. 8 East, 284, 289.

(*g*) 2 Brod. & Bing. 236.

(*h*) 1 Dyer, 53, b. n. 15. Hawk. b. 2. c. 46. s. 167. Williams, J. Evidence, IV.

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he has totally forgotten that he signed it ; but, on being shown his signature, he may depose that he believes he saw the execution, and the court will be satisfied with his answer (*a*). And though, in general, the opinion of an individual is no evidence, on questions of science, persons skilled in the art may be called to state what their sentiments are, respecting any point within the scope of their particular inquiries. Thus, a physician, in case of murder ; a person skilled in detecting feigned hands, in case of forged writings ; and a seal engraver, where a seal is suspected to be a forgery, may respectively give their opinions respecting the cause of the death, or the authenticity of the suspected instrument (*b*). On a trial, where the defence is insanity, a witness of medical skill may be asked whether such and such appearances, proved by witnesses, are in his judgment symptoms of insanity ; but it is questionable whether he can be asked, whether, from the other testimony given, the act with which the prisoner is charged, is, in his opinion, an act of insanity, for that is the very point to be decided by the jury (*c*).

During the examination of a witness, he cannot be compelled to answer any question tending to render him the subject of a criminal accusation (*d*) ; and, on the same principle, a witness is not compellable to answer interrogatories, having a direct tendency to subject him to penalties, or having such a connection with them, as to form a step towards it (*e*). Formerly, when a question was put to a witness, the answer to which would have a tendency to criminate him, it was the practice for the judge to tell the witness that he was not bound to answer the question ; but now, as the witness may waive the objection, it is said, that he may be left to his own discretion, and the conclusion, therefore, is, that the question may be put, and then the witness may object (*f*). It has also at length, after much discussion, been established, that a witness is not obliged to admit or answer to

(*a*) 3 Wils. 427.(*b*) 4 T. R. 498. 4 Esp. Rep. 117. 145.(*c*) Russ. & Ry. C. C. 456.(*d*) 3 Camp. 210. 8 Ves. 405.
11 Ves. 525. 16 Ves. 59 64. 239.
4 Harg. St. Tr. 9. 7 Mod. 119.2 Dougl. 593. Hawk. b. 2. c. 46.
s. 169. Bac. Abr. Evidence, E.
Preamble to 46 Geo. 3. c. 37.
Dick. Sess. 201.(*e*) 16 Ves. 239.(*f*) 16 Ves. 64. 242.

any matter which tends to throw a shade over his moral character, although it involves no offence for which he could be indicted (*a*). And therefore, on an indictment for a rape, the prosecutrix is not bound to answer whether she is a woman of dissolute character, nor can any other be called to prove it (*b*). And, upon the same principle, no man is bound to answer whether he has stood in the pillory, or been convicted of an offence for which he has received a pardon, or taken up on suspicion of felony, or even whether he has given an opinion respecting the event of the trial (*c*). But it seems that there is no objection to questions of this nature being put (*d*); and a refusal to answer them must obviously, in most cases, make an unfavourable impression on the jury (*e*). And it is always open to the other side to impeach his credit, by evidence of his general want of veracity, though they cannot descend to particular transactions (*f*). And the deposition he made before the magistrate, and which was certified to the judges, may be produced, in order to show that he has varied in his narration (*g*). And yet it has been recently holden, that the record of a conviction before a justice, cannot be given in evidence for the same purpose on a subsequent trial (*h*). It is, however, provided by statute, that it shall be no objection to a question put to a witness, that the answer to it may prove him liable to a debt, or subject him to a civil action (*i*).

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When the examination in chief of the witness is concluded, the prisoner, or his counsel, has power to cross-examine him as to every part of his testimony (*k*). And if he is not assisted by an advocate, it is the duty of the court to ask any questions which

Cross-examination.

(*a*) 3 Campb. 519. 1 Phil. on Evid. 6th edit. 265. Id. Preface, VI. Hodgson's case, 4 Harg. St. Tr. 748. Peake on Evid. 142 to 154. 4 Esp. Rep. 225. Stark. on Evid. part ii. 137, acc.; but see 4 T. R. 440. Hawk. b. 2. c. 46. s. 169. 3 Esp. Rep. 94. 2 Campb. 637, 8, contra.

(*b*) 1 Phil. on Evid. 6th edit. 262. Id. Pref. VI. 3 Campb. 519. Russ. & Ry. C. C. 211. 2 Stark. C. N. P. 241.

(*c*) 4 Harg. St. Tr. 748.

(*d*) 2 Campb. 638. 2 Stark. 116.

(*e*) 2 Stark. 116. Sed vide 16 Ves. 59. 64.

(*f*) 4 Harg. St. Tr. 478. Ante, 588. 599. Bul. N. P. 296. Peake's Rep. 11.

(*g*) 3 Harg. St. Tr. 131, 132. 1 Campb. 463, in notes. Hawk. b. 2. c. 46. s. 22. Ante, 81, 2.

(*h*) 1 Campb. 462.

(*i*) 46 Geo. 3. c. 37.

(*k*) 4 Bla. Com. 355, 6.

CROSS-
EXAMINATION.

they think may tend to his benefit (*a*). And in civil cases it has been decided, that a witness, when once called, sworn, and examined, although merely as to the formal proof of a document, may be cross-examined, though he be the real party in a cause (*b*). And if a witness has once been called into the box and sworn, he may be cross-examined by the opposite side, though he has not been examined in chief (*c*). But where in an action by the assignees of a bankrupt, the petitioning creditor was called, for the purpose of producing the bill of exchange on which the debt was founded, the court would not permit him to be cross-examined by the defendant, since he could not have been examined by the plaintiffs (*d*).

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In this cross-examination the party is allowed great latitude. He may ask any questions even respecting matters communicated in professional confidence; for if the opposite side have brought forward their solicitor or counsel, they have broken the ties which bound him to silence (*e*). Leading questions are here admitted with safety, because the witness is supposed to be more favorable to the party calling him, than to that against which he is brought forward to swear (*f*). But it is obvious, that evidence so obtained is very unsatisfactory, and open to much observation (*g*). And although upon cross-examination, leading questions may be put, those questions must not assume facts to have been proved, or that particular answers have been given, contrary to the fact (*h*). It is not allowable, on cross-examination, in the statement of a question to a witness, to represent the contents of a letter, and to ask the witness whether he wrote a letter to any person with such contents, or contents to the like effect, without having first shewn the witness the letter, and having asked him whether he wrote that letter (*i*). If, on cross-examination, a witness admits

(*a*) Ante, 407. Dick. Sess. 194.

(*b*) 2 Stark. C. N. P. 314.

(*c*) 1 Esp. 357.

(*d*) 1 Stark. C. N. P. 132; and see Stark. on Evid. part ii. 130, 1.

(*e*) Bac. Abr. Evidence, E. Williams, J. Evidence, IV.

(*f*) Peake on Evid. 206.

(*g*) Stark. on Evid. part ii. 132. 24 How. St. Tr. 1 Phil. on Evid. 6th edit. 255. 259.

(*h*) Stark. on Evid. part ii. 133. 4 Esp. 74. 2 Brod. & Bing. 286.

(*i*) 2 Brod. & Bing. 286.

a letter to be of his hand-writing, he cannot be questioned by counsel whether statements, such as the counsel may suggest, are contained in it, but the whole letter must be read in evidence (*a*). In the ordinary course of proceeding, such letter must be read as part of the cross-examining counsel's case. The court, however, may permit it to be read at an earlier period, if the counsel suggest that he wishes to have the letter immediately read, in order to found certain questions upon it; considering it, however, as part of the evidence of the counsel proposing such a course, and subject to the consequences thereof (*b*). If, on cross-examination, it is proposed to ascertain of a witness whether he has made representations of any particular nature, immediately after being asked, whether he made any representation, he must be asked, whether he made the representation by parol, or in writing (*c*). In order to try a witness's credit, facts may be supposed, apparently connected with the cause, which have no real existence, except in the imagination of the counsel (*d*). But how far questions may be asked for the same purpose, which have no seeming tendency to bear on the point in issue, appears still to be dubious. It is, perhaps, better left to the discretion of the courts, in each particular case, to prevent the counsel from too great a digression from the matter in issue. At all events, a witness cannot be cross-examined as to any distinct collateral fact, for the purpose of afterwards impeaching his testimony by contradicting him (*e*). And should such questions be answered, evidence cannot afterwards be adduced, for the purpose of contradiction (*f*). The following rule, as to the cross-examination of witnesses, was amongst others laid down in the Queen's case:—If, on the trial of an action or indictment, a witness examined on the part of the plaintiff or prosecutor, upon cross-examination by defendant's counsel states, that at a time specified he told A. that he was one of the witnesses against the defendant, and being re-examined by the plaintiff's or prosecutor's counsel, states what induced him to mention this to A., the

(*a*) 2 Brod. & Bing. 288.

(*b*) Id. ib.

(*c*) 2 Brod. & Bing. 292.

(*d*) Peake on Ev. 206. 1 Phil. on Evid. 6th ed. 276, &c. Stark.

on Evid. part ii. 135.

(*e*) Stark. on Evid. part ii. 134. 7 East, 103. 2 Stark. 156.

2 Campb. 638.

(*f*) 2 Campb. 638. 2 Stark. 156.

plaintiff's or prosecutor's counsel cannot further re-examine the witness as to such conversation, even as far only as it related to his being one of the witnesses (*a*).

Of bill of exceptions to evidence.

When an exception is made by any party to a witness, or evidence, which is over-ruled by the court, the opposite side have, at least in civil proceedings, the power of appealing from the decision, by tendering a *bill of exceptions*. This document the judge must, in civil cases, seal, by virtue of the 13 Edw. 1. c. 31, and it will operate like a writ of error. But it seems to be the better opinion, that this provision does not extend to any criminal case; and is certainly inadmissible on indictments for treason and felony (*b*). It has indeed been allowed on an indictment for a misdemeanor, but the propriety of this allowance is disputed (*c*); for it is said, that if every prisoner were allowed this privilege, a great delay must arise, and the ends of justice would frequently be defeated; for bills of exceptions would be tendered on almost every capital conviction (*d*). It will not, therefore, be necessary to expatiate on the form or mode of obtaining it, but merely to refer to the books which treat of it, with reference to civil cases, where it frequently occurs (*e*).

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Demurrers to evidence.

A *demurrer to evidence* is a proceeding by which the judges are called upon to determine what the law is upon certain facts which are brought forward in evidence; and is, therefore, analogous to a demurrer upon facts alleged in pleading (*f*). It admits the truth of all the facts, which are attempted to be shown, whatever may be the nature of the evidence, whether of record, or in writing (*g*), or by parol (*h*). The court may, if they think fit, over-rule it at once, without suffering it at all to be made the

(*a*) 2 Brod. & Bing. 294. Best, J. diss.

(*b*) Kel. 15. 1 Lev. 68. 1 Sid. 85. Rep. temp. Hardw. 250, 1. 2 Harg. St. Tr. 447. Hawk. b. 2. c. 46. s. 220. Willes, 535. Bul. N. P. 316. Tidd, 8th edit. 911, 912. 1 Phil. on Evid. 6th edit. 295. Stark. on Evid. part iii. 430 to 434.

(*c*) 1 Leon. 5. Rep. temp. Hardw. 250, 1.

(*d*) 2 Harg. St. Tr. 447.

(*e*) Tidd, 8th edit. 911, 12.

(*f*) 2 Hen. Bla. 205, 6. Tidd, 8th edit. 914. 910. See form, Bul. N. P. 314.

(*g*) 5 Co. 104, a.

(*h*) Alleyn, 18.

subject of discussion (*a*). It can, however, be of very little use in criminal proceedings, since the crown is never compellable to join in demurrer; but the judge directs the jury to find a special verdict, the legal effect of which the court will afterwards determine (*b*).

DEMURRERS
TO EVIDENCE.

When the case and evidence of the prosecution is concluded, the judge calls on the defendant for his defence, usually saying, "Well, prisoner, what have you to offer in your defence" (*c*)? The prisoner is then, and before the examination of his own witnesses, entitled to address the jury, whose duty, as well as that of the court, it is, to attend with patience to what he may think fit to offer (*d*). We have seen that he is not allowed counsel to do this for him, except in prosecutions for high treason, and of misdemeanors inferior to felony; or the highest and the most trifling offences (*e*). Where, however, in treason, he is entitled to this assistance, he may have one of his counsel to open his case, and arrange his defence, and the other to reserve himself till its conclusion, when he may sum up its principal features, and impress it on the minds of the jury (*f*). In felonies also, as well as misdemeanors, by the modern practice, we have seen that it is usual to allow counsel to examine and cross-examine witnesses, and otherwise to assist the prisoner, though in felonies the counsel is not allowed to address the jury (*g*). If, in felonies, the prisoner has no counsel, it is, as we have seen, the duty of the court to examine witnesses for him, to advise him for his benefit, and to assist him in defending himself; taking advantage also of every obvious defect or irregularity in the proceedings of the prosecutor (*h*). If the defendant be guilty of any contempt in addressing the jury, he may be fined (*i*). It may be as well here to

Of the address
of the defendant,
and evidence on
his behalf.

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(*a*) 2 Rol. Rep. 119. Bul. N. P. 314.

(*b*) 5 Co. Rep. 104. 2 Hen. Bla. 137. Co. Lit. 72. Tidd, 8th edit. 914. 1 Phil. on Evid. 6th edit. 298.

(*c*) 6 St. Tr. 832.

(*d*) Dick. Sess. 222.

(*e*) Ante, 407, 8, 9.

(*f*) Dougl. 591, n. 2. 2 Stra. 825, 6.

(*g*) Ante, 407, 8. 4 Bla. Com. 356. Dick. Sess. 194.

(*h*) Dick. Sess. 194. Dalt. J. c. 135. Ante, 407.

(*i*) 4 B. & A. 329.

observe, that though the counsel for the prosecution has closed his case, and the prisoner's counsel points out a defect, the judge is at liberty to put what questions he thinks fit, to answer the objection (*a*).

Evidence for the prisoner.

The rules of evidence, on the part of the defendant, are, in general, the same with those we have considered at large, as applying to the case of the prosecution. In prosecutions for misdemeanors, the defendant has been, from the earliest times, allowed the writ of subpoena (*b*). But prisoners had no right, by the common law, to this compulsory process in capital cases, without a special order of the court for that purpose (*c*); and the courts refused a habeas corpus to bring up a prisoner, whose evidence was material for the defendant (*d*); and it is said, that the prisoner was not even permitted to call witnesses, though present; but the jury were to decide on his guilt or innocence, according to their judgment, upon the evidence offered in support of the prosecution (*e*). And though, as we have seen, this latter practice of rejecting evidence for the prisoner was abolished about the time of Queen Mary, yet the witnesses could not be sworn on behalf of the prisoner, but were merely examined without any particular obligation, and therefore obtained but little credit with the jury (*f*). It is remarkable, that Queen Mary, when she appointed Sir Richard Morgan chief justice of the Common Pleas, enjoined him, "that notwithstanding the old error, which did not admit any witness to speak, or any other matter to be heard, in favor of the adversary, her majesty being party: her highness's pleasure was, that whosoever could be brought in favor of the subject, should be heard; and, moreover, that the justices should not persuade themselves to sit in judgment otherwise for her highness than the subject" (*g*). And the greatest legal authorities were decidedly of opinion, that there was no foundation in

(*a*) Russ. & Ry. C. C. 136.

(*b*) 1 Phil. on Evid. 6th edit.
2. Hawk. b. 2. c. 46. s. 170.
4 Harg. St. Tr. 599.

(*c*) Id. *ibid*. Hawk. b. 2.
c. 46. s. 171. 2 Harg. St. Tr.
505.

(*d*) 4 Harg. St. Tr. 2599.

(*e*) 5 T. R. 313. 4 Bla. Com.
359.

(*f*) Ante, 615. 5 T. R. 313.
4 Bla. Com. 359. Dalt. J. c. 165.

(*g*) 1 St. Tr. 72. Harg. edit.
Throckmorton's case. 4 Bla.
Com. 359.

reason or in justice for these tyrannical practices (*a*). By the 31 Eliz. c. 4, any person impeached for the felony of embezzling military stores, thereby created, was at liberty to establish his defence by lawful witnesses. At length, by 7 W. 3. c. 3. s. 7, in all cases of treason within that act, it is enacted, that defendants "shall have the like process of the court to compel their witnesses to appear for them, as is usually granted to compel witnesses to appear against them," so that the defendant may have a subpœna, or a habeas corpus, to bring up a witness who is a prisoner (*b*). And by 1 Ann. st. 2. c. 9. s. 3, the witnesses of a prisoner, on indictments for treason and felony, are to be examined on oath (*c*). So that, as the right always existed with regard to inferior crimes (*d*), there is now no distinction in these respects between the evidence for the crown and the prisoner.

EVIDENCE
FOR PRISONER.

We have already seen, in considering the effect of the general issue, what special matter of defence the prisoner may give in evidence; that plea refers the whole matter of his guilt or innocence to the jury; the intention, as well as the facts, and the legal complexion of the transaction, as well as the transaction itself (*e*). It follows, therefore, that he may show the innocence of his intention, as well as negative the facts of the charge. And it is laid down as a general rule, that wherever he could not have pleaded specially, he may justify, under the general issue; as, on an indictment for murder, he may show that the killing was justifiable by the circumstances of the occasion (*f*). So he may give in evidence, facts which bring his case within the terms of a proviso in the statute, by which the offence charged upon him is created, if his case comes within its exception (*g*). And he may even bring witnesses to prove son assault demesne,

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(*a*) 3 Inst. 79. 2 Hale, 283. Ante, 615.

(*b*) 4 Harg. St. Tr. 599. 44 Geo. 3. c. 102.

(*c*) 1 Phil. on Evid. 6th edit. 2. Hawk. b. 2. c. 46. s. 170. 4 Harg. St. Tr. 599. Ante, 615.

(*d*) There seems no express provision, that the defendant, in felony, shall have process to

bring in his witnesses. Hawk. b. 2. c. 46. s. 172.

(*e*) Ante, 470, 1.

(*f*) Co. Lit. 283, a. 2 Rol. Abr. 682. Bul. N. P. 288, Hawk. b. 2. c. 46. s. 203. Williams, J. Evidence, V.

(*g*) 2 Rol. Abr. 683. Hawk. b. 2. c. 46. s. 204. Williams, J. Evidence, V.

EVIDENCE
FOR PRISONER.

though it must have been specially pleaded to an action for battery (*a*).

The following rules, as to the examination of witnesses on the part of the defendant, were laid down in the Queen's case:—

✓ When a witness, in support of a prosecution, has been examined in chief, and has not been asked in cross-examination as to any declarations made by him, or acts done by him, to procure persons corruptly to give evidence in support of the prosecution, it is not competent to the party accused to examine witnesses in his defence, to prove such declarations or acts, without first calling back such witness, examined in chief, to be examined or cross-examined as to the fact, whether he ever made such declarations, or did such acts (*b*). If a witness is called on the part of a plaintiff or prosecutor, and gives evidence against the defendant or accused, and if after the cross-examination of such witness, the defendant's or accused's counsel discover that the witness so examined has corrupted, or endeavoured to corrupt another person to give false testimony in such cause, the counsel for the defendant or accused are not permitted to give evidence of such corrupt act of such witness, without calling back such witness (*c*). If on the trial of an indictment for any crime, evidence has been given, upon the cross examination of witnesses examined in chief in support of the indictment, from which it appears that A. B. (not examined as a witness) has been employed by the prosecutor as an agent, to procure and examine evidence and witnesses in support of the indictment, the party indicted is not permitted to examine C. D. as a witness, to prove that A. B. has offered a bribe to E. F., in order to induce him to give testimony touching the matter in the indictment (E. F. not being a witness examined in support of the indictment, nor examined before it was so proposed to examine C. D.) (*d*). If in the trial of an indictment for any crime, evidence has been given, upon the cross-examination of witnesses examined in chief in support of the indictment, from which it appears that A. B. (not examined as a witness) has been employed

(*a*) Hawk. b. 2. c. 46. s. 203.
Williams, J. Evidence.
(*b*) 2 Brod. & Bing. 311.

(*c*) 2 Brod. & Bing. 311.
(*d*) 2 Brod. & Bing. 302.

by the prosecutor as an agent, to procure and examine evidence and witnesses in support of the indictment, the party indicted is not permitted to examine G. H. as a witness, to prove that A. B. has offered him a bribe, to induce him to bring to A. B. papers belonging to the party indicted (G. H. not having been examined as a witness in support of the indictment) (*a*). If a witness, examined in chief on the part of the plaintiff, being asked, whether he remembers a quarrel taking place between A. & B. and answers that he has heard of a quarrel between them, but does not know the cause of it; and such witness is not asked, upon his cross-examination, whether he has or has not made a declaration stated, in the question, touching the cause of the quarrel, the counsel for the defendant cannot, in order to prove such witness's knowledge of the cause of the quarrel, afterwards examine a witness, to prove that the other witness has made such a declaration to him, touching the cause of such quarrel (*b*). If a witness, examined in chief on the part of the plaintiff, being asked, whether he remembers a quarrel taking place between A. & B. answers that he does not remember it, and such witness is not asked on his cross-examination whether he has or has not made a declaration, stated in the question, respecting such quarrel, the counsel for the defendant cannot, in order to prove that such witness must remember the quarrel, afterwards examine a witness to prove that the other witness has made such a declaration (*c*).

When several defendants are indicted together, one of them cannot regularly become a witness for the others; but if no evidence whatever be given against him, he is entitled to his discharge as soon as the case of the prosecutor is closed, and may then be examined on behalf of the other defendants (*d*). So if one person be joined for a trespass by a simul cum, and no attempt was ever made to serve process upon him, or any thing proved against him, he will be admitted as a witness (*e*). And where one of the defendants, on an indictment for an assault, submits to a small fine, and is discharged, he may be called on the part of

(*a*) 2 Brod. & Bing. 302.

(*b*) 2 Brod. & Bing. 299.

(*c*) Id. ib.

(*d*) 1 East, 312, 13. 6 T. R.

627. 1 Sid. 237. Sav. 34. Bul. N. P. 285. 1 Hale, 303.

(*e*) Rep. temp. Hardw. 123.

264. 1 Atk. 452. Style, 482.

EVIDENCE
FOR PRISONER.

others, with whom he was jointly indicted (*a*). And where one defendant has effectually pleaded misnomer, he may be received as a witness, because the indictment as against him is abated (*b*). But if he suffers judgment by default, he cannot afterwards become a witness against, or in favor of his associates (*c*). And if any, even the least, evidence be given against him, he cannot be sworn, but the whole must be submitted together to the jury (*d*).

The only other important circumstance in the defendant's evidence, which the prosecutor's does not include, is the permission to call witnesses to support his character, which has always been allowed him (*e*). Where the parties called are respectable, and their testimony strong in his favor, it greatly fortifies the presumption of his innocence; and, in a case depending on doubtful circumstances, produces considerable effect on the minds of a jury (*f*). But it is only admitted in cases strictly criminal, and, therefore cannot be received in any actions for penalties, though the conduct attributed by them to the defendant is dishonest and immoral (*g*).

Of the reply on
the trial.

Where the defendant calls any witnesses on his defence, the counsel for the prosecution has always a right to address the jury in reply, the same as in civil cases (*h*). But, where the prisoner adduces no evidence, in the case of an ordinary prosecution, not conducted by the attorney or solicitor-general, it is not the practice, and it has been holden that no such right exists (*i*). And so, if the defendant produce evidence, merely collateral to the subject-matter of the indictment, as to establish the incompetency,

(*a*) 1 Stra. 633. Peake on Evid. 168. 1 Phil. on Evid. 6th edit. 38.

(*b*) Rep. temp. Hardw. 303.

(*c*) 5 Esp. Rep. 154. 2 Campb. 333, 334, note. Bul. N. P. 285. 1 Phil. on Evid. 6th edit. 38.

(*d*) Bul. N. P. 285. Peake on Evid. 168. 1 Phil. on Evid. 6th edit. 39.

(*e*) Ante, 573, 4, 5. Peake

on Evid. 8.

(*f*) Ante, 574, 5. Peake on Evid. 8.

(*g*) 2 Bos. & Pul. 532, n. a.

(*h*) 11 Harg. St. Tr. 288, where see Reply.

(*i*) 1 Esp. Rep. 227. Peake, N. P. 4. note (*), 236, 237. 11 Harg. St. Tr. 267 and 288, acc. 20 St. Tr. 664. Cob. edit. contra.

or affect the credibility of the prosecutor's witness, or merely as to the good character of the defendant (*a*), this will not entitle the prosecutor's counsel to the general reply (*b*). And it should seem, that if the affirmative be on the defendant, and he begins on the trial, then his counsel has, as in civil cases, the general reply (*c*). The attorney and solicitor-general, however, have, in all cases of a crown prosecution, the right of replying, whether witnesses be examined, or evidence adduced or not, on the behalf of the defendant (*d*). And this has been allowed, even on collateral issues, though said to be contrary to all practice (*e*). And the solicitor-general, in case of high treason, may, if he prefer it, instead of summing up the evidence for the crown, reserve himself for the reply, to that adduced by the prisoner (*f*).

Before we come to the conclusion of the trial, there are some incidental circumstances to be mentioned, which may arise during its continuance. If it should be impossible for the trial to be concluded in one day, the court may adjourn from day to day, until the whole of the investigation has been completed (*g*). This, although sometimes done as a matter of consent, with the concurrence of the defendant, the courts have a right to do without any such consent, when they think the occasion requires it (*h*). When this is the case the jury all retire together, to some adjoining tavern, where accommodations are prepared for them, and the bailiffs are sworn "well and truly to keep the jury, and neither to speak to them themselves, nor suffer any other person to speak to them, touching any matter relative to this trial (*i*). And if the jury separate, and one of them converse respecting the verdict with a stranger, the verdict will be bad, and a venire de novo awarded (*k*). Where the jury, without the knowledge or consent of the defendants, separate at night, it was held that the verdict

Of adjournment
from day to day.

(*a*) Per Bosanquet, Serjt. vice Thomson, B. at Kingston Surrey Assizes, 1818.

(*b*) 5 Esp. Rep. 96. 11 Harg. St. Tr. 288.

(*c*) Peake on Evid. 5, note (*). 3 Campb. 366, 368.

(*d*) 11 Harg. St. Tr. 267. 273. 288. 20 St. Tr. 664. Cob. edit. Peake, N.P. 236. 1 Bla.

Rep. 6.

(*e*) 1 Bla. Rep. 6.

(*f*) 1 Burr. 644.

(*g*) 6 T. R. 530, 1. 4 Taunt. 311.

(*h*) 4 Taunt. 311. 6 T. R. 311. Hawk. b. 2. c. 5. s. 14.

4 Bla. Com. 360, n. 11.

(*i*) 6 T. R. 530, 1.

(*k*) 4 B. & A. 273.

ADJOURNMENT
FROM
DAY TO DAY.

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was not therefore void ; and that it formed no ground for granting a new trial, it not appearing that there was any suspicion of improper communications having taken place (*a*). The entry of the adjournment must also, at least in prosecutions for misdemeanors, appear upon the record, for otherwise the adjournment cannot afterwards be intended (*b*). And it is most proper to enter it in the present tense, though the numerous precedents which are framed in the past, seem to sanction that course of proceeding (*c*). A court of general gaol delivery has power to make an order to prohibit the publication of the proceedings of a trial thus continued, and to punish disobedience to such order by fine (*d*).

Of illness, &c.
during the trial.

If one of the jurymen be taken ill during the trial, though of a capital offence, so as to be incapable of agreeing in the verdict, or die, the jury must be discharged, though the evidence of the crown is nearly gone through, and the prisoner may be tried afresh by another jury (*e*). If a jurymen be taken ill, another jurymen may be permitted by the court to attend him, accompanied by a bailiff, sworn to remain constantly with him ; and, on his return, he may himself be questioned on his oath, “ to make true answer to such questions as the court shall demand of him,” as to the state of the individual whom he has left ; and if it appear, from his evidence, that there is a probability of the juror’s speedily recovering, he may be allowed proper refreshment (*f*) ; but if there be no probability that he will be able to return to pursue his duties, a new panel may be ordered, returnable instant, upon which all the other eleven are competent to serve (*g*). To these, however, the prisoner has the same right of

(*a*) 2 B. & A. 462. 1 Chit. Rep. 401, S. C. ; where see Abbott’s, C. J.’s admonition to the jury, on separating before trial ended.

(*b*) 2 Keb. 284. 292. 1 Sid. 348. Hawk. b. 2. c. 5. s. 15. Bac. Abr. Court of Justices of Oyer, Terminer, and Gaol Delivery, C.

(*c*) Sir T. Raym. 115. Hawk. b. 2. c. 5. s. 15. Bac. Abr. Court of Justices of Oyer, Terminer, and Gaol Delivery, C.

See form of Entry, 6 T. R. 531. Cro. C. C. 480. Post, last vol.

(*d*) 4 B. & A. 218.

(*e*) 2 Leach, 620. 4 Taunt. 309. 3 Campb. 207. Dick. Sess. 324.

(*f*) Doc. & Stud. 271, 272. 1 Vent. 125. Bac. Abr. Verdict, H.

(*g*) 2 Leach, 620. 3 Campb. 207. 4 Taunt. 309. Russ. & Ry. C. C. 224, S. C. Doct. & Stud. 271, 2.

challenge as if they had been returned upon the original venire (*a*). And if the prisoner himself be taken so ill during the trial, that he is incapable of remaining at the bar, the investigation must be suspended; and, when he afterwards recovers, another jury must be returned, to decide on the merits of the accusation (*b*). In some cases, indeed, where a jurymen has been taken ill, the judge, instead of discharging the jury, has asked the prisoner's consent to swear another juror in the room of him who was removed by indisposition (*c*); but the better practice seems to be that of discharging the jury altogether, and returning another, competent to determine the issue (*d*).

ILLNESS, &c.
DURING TRIAL.

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The delivery of any papers to the jury, either during or previous to the trial, is a great crime in those who are guilty of it; but it is not sufficient to avoid the verdict, which the jury will be presumed to have given without regard to any such illegal interference (*e*).

Besides these cases, in which the jury will be discharged from the casual circumstances of illness, there are some others in which the crown, at least by the consent of the prisoner, is at liberty to withdraw a juror, in order either to indict him again, or to put off the trial (*f*). Thus, it has been laid down, that in order to let the prisoner into a ground of defence, which he could not otherwise have taken, before evidence given, the court may, by consent, discharge the jury, and that circumstance cannot bar any subsequent proceedings (*g*). But it does not seem that, without such consent, the prosecutor has any right to bring the defendant twice into peril of his life (*h*), though the contrary has been formerly holden (*i*). Nor ought the court to admit the prisoner to consent to his own prejudice, but rather to give him

Of withdrawing
a juror.

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- | | |
|---------------------------------------|--|
| (<i>a</i>) 3 Campb. 208. Ante, 550. | 3 Ld. Raym. 21. |
| (<i>b</i>) 2 Leach, 546. Fost. 76. | (<i>g</i>) Fost. 31. |
| 3 Campb. 209. Dick. Sess. 324. | (<i>h</i>) Fost. 31. 2 Stra. 984, 5. |
| (<i>c</i>) 2 Leach, 621, n. b. | Hawk. b. 2. c. 47. s. 1. Com. |
| (<i>d</i>) Fost. 31. | Dig. Indictment, M. Dick. Sess. |
| (<i>e</i>) 1 Ld. Raym. 148. | 225. |
| (<i>f</i>) 3 Ld. Raym. 21. 11 Harg. | (<i>i</i>) Sir T. Raym. 84. |
| St. Tr. 273. See form of Entry, | |

WITHDRAWING
A JUROR.

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the full benefit of every circumstance in his favor (*a*). And it would be absurd to suppose that, after evidence given, the prosecutor might be allowed to withdraw a juror, merely because the proof would not amount to conviction (*b*); though it might have been done, on account of the sudden illness of a witness (*c*). So, though in former times the contrary has been allowed (*d*), it seems to have been doubted whether, in cases in which life is affected, or even where the punishment on conviction is infamous, this mode can be resorted to, even where the indictment is manifestly defective, or where material witnesses have been kept away by accident or collusion (*e*). This doubt, however, seems to be scarcely well founded; and the general rule, deducible from this contrariety of opinions, appears to be, that this course may be taken, whenever it is either favorable or indifferent to the party indicted; or where he has purposely kept back evidence for the crown, or where a material witness is suddenly incapacitated to attend by illness (*f*).

Contempts of
court.

During the whole of the trial, and indeed while the court are sitting, the judges have a power incident to their commission, to punish any contempts of their authority, or obstruction of the course of justice (*g*). They may fine a person offending, and command the fine to be immediately levied (*h*); as for contempt in addressing the jury (*i*). And if the defendants are guilty of any contemptuous behaviour, they may be committed, or obliged to find sureties for the outrage on public justice, though acquitted of the original accusation (*k*). The commitment should be for a time certain (*l*).

Summing up of
evidence.

When the evidence and the speeches on both sides are thus

(*a*) Fost. 31, acc. 1 And. 103, contra.

(*b*) Fost. 30. 2 Stra. 984, n. 1, acc. 2 Harg. St. Tr. 832, 833. 2 Hale, 294, 5, contra.

(*c*) 2 Harg. St. Tr. 832.

(*d*) Kel. 26. 52. Comb. 401. 1 Vent. 69. 2 Hale, 295, 6.

(*e*) Fost. 28. 30, 31. 2 Stra. 984. Com. Dig. Indictment, M.

(*f*) Fost. 30, 31. 33. Hawk. b. 2. c. 47. s. 1.

(*g*) 6 T. R. 530. 3 Harg. St. Tr. 408.

(*h*) Id. ibid.

(*i*) 4 B. & A. 329.

(*k*) Cro. Car. 507. Comb. 40. Hawk. b. 2. c. 46. s. 11, n. f.

(*l*) 5 B. & A. 894.

concluded, it becomes the duty of the judge, or presiding magistrate, to sum up the evidence to the jury (*a*). In order to enable him to do this with accuracy, he ought to take notes of the proofs adduced in every part of the proceedings. And this is the more necessary, as these minutes frequently become important documents in a remoter stage of the prosecution: as where the cause is removed by certiorari before sentence; where a special case is carried up to the court above; or where an application is made for a pardon. In these, and many other cases, these notes are examined, to show the circumstances of the prisoner's guilt, and how far the aggravations or excuses of the case ought to operate in the dispensation of justice, or the extension of mercy (*b*). Where the evidence affects several defendants differently, the judge will, as we have seen, select the evidence applicable to each, and leave their cases separately to the jury (*c*).

SUMMING UP OF EVIDENCE.

When the judge has thus summed up the evidence, he leaves it to the jury to consider of their verdict. If they cannot agree in a short time, by consulting in their box, they retire to a convenient place appointed for the purpose, and the bailiff is sworn to keep them as follows:—"You shall swear that you shall keep this jury without meat, drink, fire, or candle; you shall suffer none to speak to them, neither shall you speak to them yourself, but only to ask them, whether they are agreed: So help you God" (*d*). This oath of the bailiff comprizes, in a great degree the duties of the jury when they are withdrawn (*e*). During the whole of their absence, they are not to eat or drink without the permission of the justices, or to speak with any one except the bailiff, and merely to inform him whether they are agreed (*f*). And they are not only prohibited from taking refreshment, but are fineable if they have taken any thing eatable with them, when

Of the conduct of jurors in considering their verdict.

(*a*) 6 Harg. St. Tr. 832, 833. Dick. Sess. 223. See form of Charge, 6 Harg. St. Tr. 832.

(*b*) Dick Sess. 223, note. See form, 11 Harg. St. Tr. 290, 1.

(*c*) Ante, 271. 3 T. R. 106.

(*d*) Dalt. c. 185. 2 Hale, 296. Dick. Sess. 223. Bac. Abr. Juries, G.

(*e*) And see 4 B. & A. 273. 2 B. & A. 462. 1 Chit. Rep. 401, S. C.

(*f*) Co. Lit. 227, b. Dalt. c. 185. 2 Hale, 296, 7. 306. Trials, per Pais, 247. Doct. & Stud. 271. Burn, J. Jurors, V. Williams, J. Juries, VII. Dick. Sess. 223.

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they retire, though they have not actually eaten (*a*). But unless they eat at the charge of one of the parties, their misdemeanor will not avoid their verdict, but only subject them to punishment (*b*). Indeed, it seems that even the eating at the expense of one of the parties will only avoid the verdict, when the decision is in favor of the party who provided the refreshment, because the influence must otherwise have operated in a contrary direction (*c*). And the justices may give the jury leave to refresh themselves, so that it is not at the cost of either party, whenever they think it expedient (*d*).

The jury must not hear any evidence in private before them, either to refresh their memory as to what passed at the trial, or as to any new matter which may arise during their deliberations; for if they do, their verdict will be invalid (*e*), and a venire de novo must be awarded (*f*); but they may hear a witness again in open court, or ask questions to the judges for their direction, so that it be done in the presence of all the parties concerned, and in the face of the public (*g*). Nor can they carry with them any writing, paper, or deed, which was not given in evidence in open court; for if they do so, and find for the party by whom the documents were handed to them, it will avoid the verdict, though not if they decide against him (*h*). But the court may permit the jury to take with them any writings under seal, whether the defendant and the crown consent or not, and any writings whatever, with the consent of both parties to the permission (*i*). And if they take with them other documents, which were given in evi-

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(*a*) 1 Leon. 133. Godb. 353. Plowd. 519. Tr. per Pais, 252. Williams, J. VIII. Bac. Abr. Juries, G.

(*b*) 1 Leon. 133. Tr. per Pais, 248. Co. Lit. 227, b. 1 Lord Raym. 148. Bul. N. P. 308. Burn, J. Jurors, V. Williams, J. Juries, VII.

(*c*) Co. Lit. 227, b. Tr. per Pais, 248.

(*d*) Doct. & Stud. 271. Trials, per Pais, 248. Williams, J. Juries, VII. Burn, J. Jurors, V. Dick. Sess. 224.

(*e*) Cro. Eliz. 189. Bul. N. P. 308. Bac. Abr. Juries, G. Williams, J. Juries, VII.

(*f*) 4 B. & A. 273.

(*g*) 2 Hale, 296. 307. 308. Tr. per Pais, 252, 3. Williams, J. Juries, VII.

(*h*) 1 Ld. Raym. 148. Co. Lit. 227, b. Bul. N. P. 308. Tr. per Pais, 249.

(*i*) Cro. Eliz. 411. 2 Rol. Abr. 687. Tr. per Pais, 256, 7. Bul. N. P. 380. Williams, J. Juries, VII.

dence, though without leave of the court, or if one juryman show a piece of evidence to his companions, this will only render them subject to a fine, and will not avoid their verdict, though given in favor of the party from whom they received them (*a*). CONSIDERATION
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The jury must not, until they are agreed, separate or leave the place appointed for their deliberations, without the special permission of the court (*b*); but the judges may adjourn while the jury are withdrawn to confer, and return to receive the verdict (*c*). And if they do not agree before the judges at the assizes depart, they may be carried with them from place to place, until they become unanimous (*d*). And it is laid down to be an uncontroverted rule, that a jury sworn and charged in a capital case, cannot be discharged until they have given a verdict (*e*). But it has been held, that if eleven of the jury be agreed, and one of them dissent, who says he would rather die in prison, the opinion of the eleven cannot be received; but a new venire must be awarded, as if one of them had died previous to a verdict (*f*). In civil cases, indeed, the jury may resolve on a privy verdict and separate, and may afterwards refresh themselves; but in no accusation, which affects life or member, can any such proceeding be admitted (*g*). And if the jury say they are agreed, the court, if they suspect them not to be really unanimous, may examine them separately, and if they find that any of them dissent from the opinion of their fellows, may fine the jury, and may compel them to reconsider their opinion, till they are really agreed (*h*).

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(*a*) Cro. Eliz. 616. 2 Rol. Abr. 714. Cro. Eliz. 411. Bnl. N. P. 380. Williams, J. Juries, VII.

(*b*) Co. Lit. 227, b. Tr. per Pais, 249. 1 Harg. St. Tr. Pref. to 2d edit. vi. & vii. 4 Bla. Com. 360. Hawk. b. 2. c. 47. s. 1.

(*c*) 3 Harg. St. Tr. 731. 4 Id. 231. 455. 485. 4 Bla. Com. 360.

(*d*) 1 Vent. 97. Tr. per Pais, 252. 2 Hale, 297. Williams, J. Juries, VII. Bac. Ab. Juries, G.

(*e*) Bac. Abr. Juries, G.

(*f*) 2 Hale, 297; and id. 294, 295. 309. Doct. & Stud. 271, 2. Tr. per Pais, 248. Williams, J. Juries, VII.; but see 1 Harg. St. Tr. Pref. 2d edit. vi. & vii.

(*g*) Co. Lit. 227, b. 3 Inst. 110. Sir T. Raym. 193. 2 Hale, 300. 4 Bla. Com. 360. Tr. per Pais, 249. Hawk. b. 2. c. 47. s. 2. Burn, J. Jurors, V. Williams, J. Juries, VII.

(*h*) 2 Hale, 299. 309. Williams, J. Juries, VII.

Of asking the jury as to their verdict.

When the jury have come to a unanimous determination with respect to their verdict, they return to the box to deliver it. The clerk then calls them over by their names, and asks them whether they are agreed on their verdict (*a*), to which they reply in the affirmative. He then demands who shall say for them, to which they answer, their foreman. This being done, he desires the prisoner to hold up his hand, and addresses them, "look upon the prisoner you that are sworn: how say you, is he guilty of the felony [or treason, &c.] whereof he stands indicted, or not guilty" (*b*)? If they say *guilty*, then he asks them "what lands or tenements, goods or chattels, the prisoner had at the time of the felony committed, or at any time since?" To which they commonly reply, "none, to our knowledge" (*c*). If they say "not guilty," then the clerk asks them, "whether he did fly for it or not?" They commonly answer, "not to our knowledge;" but, if they find a flight, it is recorded (*d*). The officer then writes the word "guilty," or "not guilty," as the verdict is, after the words "po. se." on the record; and again addresses the jury: "Hearken to your verdict, as the court hath recorded it; you say that A. B. is guilty [or "not guilty"] of the felony whereof he stands indicted, and that he hath no goods or chattels, and so you say all (*e*)."
The formal proceedings of the trial being thus closed, the verdict itself comes next under our consideration.

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Of the verdict.

It must be given openly*.

The verdict (*f*), whatever may be its effect, must, in all cases of felony and treason, be delivered in the presence of the de-

(*a*) 6 Harg. St. Tr. 828. Cro. C. C. 8. See form, Cro. C. C. 8. Dick. Sess. 227. 6 St. Tr. 833. Post, last vol.

(*b*) 6 Harg. St. Tr. 828, 29. 3 Harg. St. Tr. 408. Cro. C. C. 8. Dick. Sess. 227.

(*c*) 6 Harg. St. Tr. 829. 833. Dick. Sess. 228. See form, Cro. C. C. 8. Dick. Sess. 227. 6 St. Tr. 829. 833. Post, last vol.

(*d*) Dick. Sess. 193. 228. 387. 1 Hale, 362. 2 Hale, 301.

(*e*) 6 Harg. St. Tr. 830. Cro. C. C. 8. Dick. Sess. 228. See forms, Dick. Sess. 228. 6 St. Tr. 833. Post, last vol.

(*f*) When a person is found guilty, it is said he is convicted; but that term properly means judgment passed upon him for an offence, 4 M. & S. 72, 3.

* As to the verdict in general, see Co. Lit. 226 to 228. Hawk. b. 2. c. 47, per totum. 4 Bla. Com. 360, 1, 2. Bac. Abr. Verdict. Burn, J. Jurors, V. Williams, J. Juries, VII.

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fendant, in open court, and cannot be either privily given, or promulgated while he is absent (*a*). And in all cases where the jury are commanded "to look on him," as in larceny, and all accusations subjecting him to any species of mutilation, or loss of limb, the same rule applies, without exception (*b*). In all trials for inferior misdemeanors, however, a privy verdict may be given, and there is no occasion for the presence of the defendant (*c*). And, by consent of the parties, it may be delivered at the house of the judge, even where it is situate beyond the limits of the county in which the trial proceeded (*d*).

The verdict thus given is either general to the whole of the charge—partial, as to a part of it—or special, where the facts of the case alone are found, and the legal inference is referred to the judges (*e*).

Kind of verdicts which may be given.

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The jury are at liberty to find a general verdict whenever they think fit to do so, including both the law and the fact of the case submitted to their decision (*f*). To this rule there seems, indeed, to have been an exception in the case of libel until lately, where the jury were directed to find the defendant guilty, on proof of the mere fact of authorship or publication, and were excluded from entering into any discussion as to the libellous quality of the paper charged as seditious; and, of course, from taking at all into consideration the defendant's motive for the publication, or its tendency (*g*). But after this anomalous principle had undergone much and very able discussion by Lord Erskine, in the various stages of the prosecution against the Dean of Saint

General verdict.

(*a*) Co. Lit. 227, b. 3 Inst. 110. Sir T. Raym. 193. 2 Hale, 300. Hawk. b. 2. c. 47. s. 2. 4 Bla. Com. 360. Bac. Abr. Verdict, B. Burn, J. Jurors, V. Williams, J. Juries, VII.

(*b*) Co. Lit. 227, b. 3 Inst. 110. Sir T. Raym. 193. 4 Bla. Com. 360. Hawk. b. 2. c. 47. s. 2. Bac. Abr. Verdict, B. Burn, J. Jurors, V. Williams, J. Juries, VII.

(*c*) Sir T. Raym. 193. 5 Burr. 2667. 1 Vent. 97. Bac. Abr.

Verdict, B. Burn, J. Jurors, V. Williams, J. Juries, VII.

(*d*) 5 Burr. 2667; and see 19 Geo. 3. c. 74. s. 70. 39 Geo. 3. c. 45.

(*e*) 4 Bla. Com. 361.

(*f*) Co. Lit. 228. 4 Bla. Com. 361. Burn, J. Jurors, V.

(*g*) 1 Ersk. Speeches, 213 to 331. Stark. 337, 8. See post, vol. iii. 877, 877 *a*, 877 *b*, for more, as to this verdict in libels.

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Asaph (*a*), it was entirely destroyed by legislative provision. The 32 Geo. 3. c. 60, refers the whole of the case to the jury—the nature of the work, as well as the fact that it is published—and enables them to give a general verdict to the merits, as in any other case, where malicious intention is necessary to constitute guilt. But there are many cases, where the law is doubtful, in which it may be prudent in them to find the facts specially, and leave the inference to the court, in the manner we shall presently examine (*b*).

Partial verdict.

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The jury may acquit the defendant of a part, and find him guilty of the residue. Thus, they may convict him upon one count of the indictment, and acquit him of the charge contained in another (*c*); or upon one part of a count capable of division, and not guilty of the other part, as on a count for composing and publishing a libel, the defendant may be found guilty of publishing only (*d*). And, in general, where from the evidence it appears that the defendant has not been guilty to the extent of the charge specified, he may be found guilty as far as the evidence warrants, and be acquitted as to the residue; as where he is charged with engrossing 1000 quarters of wheat, and the evidence amounts to but 700 (*e*); but, if a contract be described, it must be proved as laid, and the jury cannot find a variant contract (*f*). And where the accusation includes an offence of inferior degree, the jury may discharge the defendant of the higher crime, and convict him of the less atrocious (*g*). Thus, upon an indictment for burglariously stealing, the prisoner may be convicted of the theft, and acquitted of the nocturnal entry (*h*); upon an indictment of murder, he may be convicted of manslaughter (*i*); on an indict-

(*a*) See 1 Ersk. Speeches, 165, to the end. 3 T. R. 430. 5 Burr. 2661. 2686.
(*b*) Co. Lit. 228.
(*c*) See ante, 248 to 252, as to several counts in the indictment. As to what part of a count may be found, ante, 250 to 252.
(*d*) 2 Campb. 583, 4, 5.
(*e*) Hawk. b. 2. c. 26. s. 75.
(*f*) Hawk. b. 2. c. 26. s. 75. Lane, 19. 59, 60.

(*g*) 2 Campb. 583, 84, 85. 1 Leach, 36, 88. 2 East, P. C. 516, 7, 8. 2 Hale, 302. Hawk. b. 2. c. 47. s. 4, 5, 6.
(*h*) 1 Leach, 36, 88. 2 East, P. C. 516. 8. 1 Hale, 559, 60. Hawk. b. 2. c. 47. s. 6. 1 Hale, 560. Com. 478. 2 Hale, 302.
(*i*) Co. Lit. 282, a. 2 Rol. Rep. 460. Cro. Eliz. 296. 3 Dyer, 261, a. 2 Hale, 302. 292, 93. Hawk. b. 2. c. 47. s. 4.

ment on the statute of stabbing (*a*), he may be acquitted of the statutable offence, and found guilty of felonious homicide (*b*); on an indictment for stealing privately from the person, he may be found guilty of larceny only (*c*); on an indictment for grand, the offence may be reduced to petit, larceny (*d*); robbery may be softened into felonious theft (*e*); and petit treason lessened to murder, or any description of less atrocious homicide (*f*); and, on an indictment founded on a statute, the defendant may be found guilty at common law (*g*). And other instances of this rule will be found already pointed out.

The only exception to this rule seems to be, where the prisoner, by being originally indicted for a different offence, would be deprived of any advantage which he would otherwise be entitled to claim; in which case the prosecutor is not permitted to oppress the defendant, by altering the mode of the proceedings. A defendant, therefore, cannot be found guilty of a misdemeanor on an indictment for felony, because he would by that means lose the benefit of having a copy of the indictment, a special jury, and of making his full defence by counsel (*h*). And though it was formerly thought, that if, after a conviction of felony, the fact appeared to be a mere trespass, judgment might be given for the latter (*i*); the contrary is now established, and the prisoner is entitled to have the judgment altogether arrested (*k*). Upon the same principle, no one can be convicted of petit treason on an indictment for a common murder, because he would thereby lose the benefit of the larger number of peremptory challenges (*l*); but, in an indictment for the former, he may be properly convicted of the latter, because he thereby enjoys a higher benefit,

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(*a*) 1 Jac. 1. c. 8.

(*b*) Style, 86. 2 Hale, 302. Hawk. b. 2. c. 47. s. 6.

(*c*) 1 Leach, 240. 2 Hale, 302. Hawk. b. 2. c. 47. s. 6.

(*d*) 2 Hale, 302. 2 Stra. 1134. Hawk. b. 2. c. 47. s. 6.

(*e*) 2 Hale, 302. Hawk. b. 2. c. 47. s. 6.

(*f*) 1 Leach, 457. 2 Hale, 302. 292. 1 East, P. C. 339. 356. Fost. 104. Hawk. b. 2.

c. 47. s. 6.

(*g*) Hawk. b. 2. c. 46. s. 173.

(*h*) Ante, 251, 2. Stra. 1137. Kel. 29, 30. 12 Mod. 520, n. b. Cro. Car. 332. Hawk. b. 2. c. 47. s. 6; but see Cald. 399, 400, 1.

(*i*) Hawk. b. 2. c. 47. s. 12. Cro. Jac. 497, 3. 2 Stra. 1137.

(*k*) 1 Leach, 12. 2 Stra. 1137.

(*l*) Fost. 304, 323.

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instead of losing any privilege to which he may be entitled (*a*). Where the offence appears, from the evidence, to be of a higher degree than is alleged in the indictment, it is in the discretion of the court to discharge the jury, and to direct another indictment to be preferred (*b*). Thus, where a prisoner is accused of murder, and the crime amounts to petit treason, the court will not direct an acquittal, but discharge the jury of that indictment, and direct a fresh bill to be preferred, lest he should avail himself of the previous acquittal (*c*).

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Where the defendant is found guilty of the charge in general, though all the counts are bad but one, the verdict will be sufficient, and an entire judgment may be given (*d*); and, in this respect, there is an essential difference between a general verdict in civil and in criminal proceedings; for, in the former case, if some of the counts are bad, when entire damages are given, judgment must be arrested, because the court cannot apportion the damages (*e*); while, in the latter case, the judges are fully competent to decide on the sentence (*f*). But, if a general verdict be given on a count, stating an act which, if it stood by itself, would be punishable criminally, but shows that it was committed under circumstances which rendered it justifiable or excusable, no judgment can be given on any part of the count (*g*).

Although several are frequently included in the same indictment, yet, as the charge is distinct against each of them, the jury may, on the evidence, acquit some of them and find the others guilty (*h*). Even where they are all charged with doing the same offence, some of them may be convicted, and others acquitted (*i*). So where two defendants are charged, one as principal in the first,

(*a*) 1 Leach, 457. 2 Hale, 302. 1 East, P. C. 339. 356. Fost. 104. Hawk. b. 2. c. 47. s. 6.
(*b*) Fost. 327, 8. 104.
(*c*) Id. *ibid*.
(*d*) Ante, 249. 2 Stra. 845. 1 Salk. 384. 1 Cowp. 276.
(*e*) 1 T. R. 152. 3 T. R. 433. 2 Burr. 985.

(*f*) 1 Salk. 384. 2 Burr. 985. Ante, 249.
(*g*) 5 East, 304. 308. 2 Burr. 985. Hawk. b. 2. c. 47. s. 8.
(*h*) 2 St. Tr. 526. Harg. edit. Turner's case, 1 Sid. 171. Hawk. b. 2. c. 47. s. 8. 3 T. R. 105, 6.
(*i*) 3 T. R. 105. 1 Leach, 360.

and the other in the second degree, as being present, aiding and abetting, the latter may be found guilty, though the former is acquitted (*a*). And they may be convicted in different degrees of crime, arising out of the same circumstances: as one of them of murder, and the other of petit treason, on any indictment against both for the latter (*b*); but it has been considered, that one of several defendants cannot be found guilty of burglary, and the others of larceny, when all are accused of the former (*c*). And where the charge is of such a nature, that one, as in case of conspiracy, or two, in that of riot, cannot be guilty without the union of others, if all the rest are acquitted, and the indictment does not charge the offence to have been perpetrated in company with any persons unknown, the verdict of guilty must be altogether repugnant and invalid (*d*). But where one is indicted for a conspiracy, or two for a riot, with others, the conviction will be valid, though they never come in to be tried, or die before the time of trial (*e*). If an accessory be indicted at the same time with the principal, if the latter be acquitted, the former must also be acquitted, since his guilt is entirely inconsistent with the innocence of him who is charged as principal (*f*).

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With respect to the *form* in which a verdict should be given, which thus *partially* convicts and acquits, it has been holden, that it ought to find specifically not guilty of the higher, and guilty of the inferior charge; and that if it merely find the defendant guilty of the inferior offence, it will be of no avail (*g*). But there are so many instances in which a verdict, taking no notice of the aggravation, has been regarded as sufficient, that it does not seem to be necessary at the present day (*h*). It has also been said to be wrong, to enter positively guilty of the inferior, and not guilty of the higher offence; as, in cases of an indictment for burgla-

(*a*) 1 Leach, 360.

(*b*) Fost. 104.

(*c*) 2 Harg. St. Tr. 526. 1 Sid. 171. Hawk. b. 2. c. 47. s. 8. See 2 East, P. C. 521.

(*d*) Poph. 202. 3 Burr. 1262. 12 Mod. 262. 2 Salk. 593. Hawk. b. 2. c. 47. s. 8. Stra. 193. 1227.

(*e*) 1 Stra. 193. 12 Mod. 262.

2 Stra. 1227. 3 Burr. 1262. Hawk. b. 2. c. 47. s. 8. n. (1).

(*f*) Stark. 332, 3.

(*g*) 1 And. 103, 4. Hawk. b. 2. c. 47. s. 5.

(*h*) 9 Co. 67. 4 Co. 46. 2 Hale, 302. Ld. Raym. 1518. Stra. 343.

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rious stealing, to state that "the jury say guilty of felony only, in stealing to the value of £150. from the dwelling-house. Not guilty of the burglary;" because an acquittal of the latter includes that of the former (*a*); but that the entry, in such case, ought to be, "not guilty of breaking and entering the house in the night, time: guilty of the rest of the indictment" (*b*). However, this nicety seems no longer to prevail, and such an entry as the first, recently seems to have been holden sufficient to warrant judgment of death being pronounced upon the prisoner (*c*). The proper entry in such a case is, "not guilty of breaking and entering in the night, but guilty of the stealing, &c." (*d*). But it is the common practice on every circuit in England, in case of a conviction of manslaughter, on a charge of murder, to say, "not guilty of murder, but guilty of manslaughter," though the latter is included in the former (*e*). And the minute on the record is a mere memorandum for the future guidance of the officer, and must be taken altogether, to ascertain the meaning of the jury (*f*).

Special verdict.

The jury have a right, in all cases whatsoever, whether capital or otherwise, to find a *special* verdict, by which the facts of the case are put on the record, and the law is submitted to the judges (*g*). There is, indeed, one case in which, formerly, they were obliged by its particular circumstances to find a special verdict. This was, where it appeared that, through the carelessness or negligence of a person indicted for murder, another had been killed, which was a kind of clergyable felony at common law; and though it did not subject the unfortunate defendant to any corporal punishment, compelled the forfeiture of his goods and chattels (*h*). In this case the law could not be satisfied by a general verdict of not guilty, the effect of which would have been to negative the fact of the killing, and which could work no kind of penalty (*i*). The ancient practice, therefore, was in these cases, to find the facts specially, and state in the conclusion the

(*a*) 1 Leach, 36. East, P. C. 517.

(*b*) 1 Leach, 37. East, P. C. 517.

(*c*) 2 East, P. C. 518.

(*d*) Id. *ibid*.

(*e*) Id. *ibid*. Stark. 332.

(*f*) 2 East, P. C. 518.

(*g*) 1 Bulst. 87. 9 Co. 12, b. 63. Hawk. b. 2. c. 47. s. 3. Bac. Abr. Verdict, D. 2 Hale, 302. 4 Bla. Com. 361.

(*h*) 2 Hale, 302, 3.

(*i*) 2 Hale, 302.

inference drawn by the jury, on which it is said the court might give judgment, as for manslaughter, if they thought that the crime appeared to be really apparent on the face of the proceedings (*a*). But where the defendant was proved to be a lunatic, or the death occurred in the defence of his property or life, from a robber or assassin, so that no kind even of remissness could be imputed to him, the jury were fully warranted in finding a general verdict, pronouncing him altogether innocent (*b*). But now, from the humane suggestion of Mr. Justice Foster, that judges ought not to seek after forfeitures, where the mind is free from guilt, and that the affliction of the innocent survivor is at all times a severe punishment for his remissness, it is the practice to direct the jury to acquit the prisoner (*c*).

With respect to the *form* of the *special verdict*, some few requisites demand our notice (*d*). No particular form of words is, however, necessary to be followed with technical exactness (*e*). It must positively state the facts themselves, and not merely the evidence adduced to prove them (*f*). And all the circumstances constituting the offence, must be found, in order to enable the court to give judgment (*g*). For the court cannot supply a defect in the statement made by the jury on the record, by any intendment or implication whatsoever (*h*); and, therefore, where the indictment set forth that the defendant discharged a gun against the deceased, and thereby gave him a mortal wound, and the jury

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(*a*) 2 Hale, 302. Hawk. b. 2. c. 47. s. 4.

(*b*) 2 Hale, 303. Fost. 265. 24 Hen. 8. c. 5. Cro. Car. 544.

(*c*) Fost. 264.

(*d*) See forms of Special Verdicts, post, last vol.; and for printed forms in Treason, see Kel. 72, 73, 74. In Murder, 1 Leach, 368. 5 Burr. 2794. 2 Ld. Raym. 1485. 1575. Manslaughter, Cowp. 830. Arson, Cald. 220. 1 Leach, 243. Robbery, 2 Stra. 1015. Com. Rep. 478. Larceny, 1 Leach, 498, 9. On Riot Act, 4 Burr. 2073. Assisting prisoner sentenced to

escape, 3 P. Wms. 441. For false imprisonment, 3 T. Rep. 735. 26 Mr. J. Ashurst's Paper Books, 1. Not repairing a way, 7 East, 588. 5 Taunt. 285. 3 Ld. Raym. 24. Not executing the office of constable, 5 Burr. 2788. Against overseer's disobedience of order of justice, 5 T. R. 159.

(*e*) 1 Dougl. 211.

(*f*) 1 Wils. 56. 4 Burr. 2077. Kel. 78, 9. Hawk. b. 2. c. 47. s. 9.

(*g*) 2 Stra. 1015.

(*h*) Com. Rep. 480. 2 East, P. C. 708. 784.

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only stated that he discharged a gun, and thereby killed him, omitting that it was *against* him, although from the other circumstances stated that averment was amply supplied to common reason, it was adjudged that the court could not give any judgment against the prisoner (*a*). So where the defendants were indicted for a robbery from the person, and the special verdict stated facts that amounted to a simple larceny, and referred it to the court, whether the prisoners were guilty of the crime stated in the indictment, the judges thought they could not pass sentence for the real offence upon such a proceeding (*b*). And in an information on the statute of usury, if the jury find the corrupt agreement, but take no notice of the loan, the finding will be altogether ineffectual (*c*).

It is, however, sufficient, if the jury find all the substantial requisites of the charge, without following the technical language used in the indictment; as where a defendant is charged with forging and counterfeiting a bank note, and the jury state that he erased and altered it, by changing the word "two" into "five," this was holden to be a sufficient description of the offence (*d*). So where, on a charge of homicide, the indictment mentioned three wounds, and the special verdict found but one, the variance was not considered as fatal (*e*). And, as we have seen that, in various circumstances, there is no occasion for the evidence exactly to correspond with the indictment, it follows, that the special verdict, which is a statement of facts proved on the trial, will be good, though, in these points, an accurate correspondence should be wanting (*f*). Thus, where a fact is of a transitory nature, the jury may find it to have occurred in another place within the county, than that named in the proceedings (*g*). But they cannot find any thing essential to the charge, to have occurred beyond the jurisdiction of the grand jury (*h*). Neither can they vary from

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(*a*) Kel. 111. 2 Com. Rep. 480. 4 Burr. 2073. 2 Stra. 1015. Cowp. 830. Hawk. b. 2. c. 47. s. 9.

(*b*) 1 Stra. 1015. 2 Com. Rep. 479. Rep. temp. Hardw. 115. East, P. C. 784.

(*c*) Cro. Jac. 210.

(*d*) 1 Stra. 19.

(*e*) 1 Bulst. 87, 88. Hawk. b. 2. c. 47. s. 4.

(*f*) See ante, 238. 293 to 297.

(*g*) 6 Co. 47. 2 Rol. Abr. 689.

(*h*) 6 Co. 47.

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the time and place laid, when it was material to have proved them in evidence (*a*). And it has been said, that they ought expressly to find all the material facts to have occurred within the county, to which the province of the court is limited (*b*); but if the verdict do not state the time when the circumstances occurred, the court will intend them to have happened in the order in which the jury have stated them (*c*).

It does not seem to be necessary that the jury, after stating the facts should draw any legal conclusion. Thus, in case of murder, they need not find any malice aforethought, or show that the killing was felonious; for it is the province of the court to judge of the legal complexion of the offence, from the facts stated in the verdict (*d*). And if they exceed their duty, and in so doing draw an erroneous inference, the court will pronounce that judgment which they think warranted by the facts, and reject the conclusion as superfluous (*e*).

It seems to have been laid down, that, in a capital case, a special verdict cannot be *amended* (*f*). But it seems to be the better opinion, that though a verdict cannot be amended in matters of *fact*, yet the court may amend a mere error in form, even in capital cases, when there are any notes or minutes by which it can be amended (*g*). At all events, this may be done where the mistake was occasioned by the negligence of the defendant's clerk in court (*h*). And from the whole, we may perhaps infer, that where the alteration is merely to fulfil the evident intention of the jury, the court will, in all cases, allow it to be effected.

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When the special verdict comes on to be argued, it will not be necessary for the defendant to be present, as on a motion in arrest

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| (<i>a</i>) Com. Dig. Pleader, S. 15. | 382. Salk. 53. 1 Ld. Raym. |
| (<i>b</i>) 1 Leach, 382. 6 Coke, 47. | 141. Hawk. b. 2. c. 47. s. 4, |
| (<i>c</i>) 1 Ld. Raym. 142. | in notes. 1 Salk. 47, 53. |
| (<i>d</i>) 2 Ld. Raym. 1493, 94. | (<i>g</i>) 5 Burr. 2663. 1 Leach, |
| Stra. 773. Palm. 545. 12 Co. | 383. 1 Stra. 515. 2 Stra. 844. |
| 87. 9 Co. 69. | 1 Dougl. 375, in notes. Hawk. |
| (<i>e</i>) 4 Co. 42. b. 2 Hale, 302. | b. 2. c. 47. s. 9. |
| (<i>f</i>) Per Buller, J. 1 Leach, | (<i>h</i>) 2 Stra. 344. |

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of judgment; because, in that case, he is considered as guilty, but in this he is still presumed to be innocent (*a*). If three offences are charged in the indictment, and the special verdict state evidence which only applies to two of them, the court may adjudge the defendant guilty of the two offences noticed, and enter an acquittal as to the residue (*b*). But they cannot find a defendant guilty of a mere misdemeanor, who is originally charged with felony; on the same principle which prevents them from pronouncing sentence upon him, as for the former, when he has been improperly found guilty of the latter (*c*). When, however, it clearly appears from the facts stated, that he has been guilty of a crime, though not of the degree charged upon him by the indictment, the court will not discharge him, but direct him to be re-indicted (*d*). Where the verdict is so imperfect, that no judgment can be given on it, it is certain, that in case of misdemeanors, a *venire facias de novo* may be awarded (*e*). But it seems doubtful, whether this ought to be done in capital cases (*f*); and, at all events, the court may enter a judgment of acquittal (*g*). Such a discharge, however, by reason of an imperfect verdict, will be no bar to another prosecution for the same felony (*h*).

General Verdict,
with a Special
Case reserved.

There is another mode by which, when the law is doubtful, the jury may refer it to the court, instead of taking the decision upon themselves. This is, by finding a general verdict of guilty, and reserving a *special case* for the opinion of the judges; a course which is not unfrequently adopted (*i*). It has the advantage over a special verdict, of being less expensive, and coming to a more speedy decision (*k*). But, as the facts do not appear on the record, the party loses the benefit of a writ of error. It also refers not only the facts, but the evidence to the court for their

(*a*) 2 Stra. 844. 1227. 2 Burr. 931. 1 Salk. 55, 6. Com. Dig. Indictment, N. 2 Barnard, 412.

(*b*) 2 Stra. 842.

(*c*) 2 Stra. 1133. 1 Leach, 12. Cro. C. C. 33. Ante, 251, 2.

(*d*) 2 Stra. 1019.

(*e*) 5 Burr. 2663. Skin. 667. 2 Ld. Raym. 1521. Hawk. b. 2. c. 47. s. 9.

(*f*) 1 Ld. Raym. 141. 2 Ld. Raym. 1585.

(*g*) 2 Ld. Raym. 1586.

(*h*) 3 P. Wms. 439. Com. Dig. Indictment, N.

(*i*) 3 East, 164. 2 Leach, 837. Stark. 334.

(*k*) Tidd's Prac. 8th edit. 930.

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VERDICT.

revision (*a*); though the former, and not the latter, must be stated on the record (*b*). In substance it does not differ from a special verdict; and, indeed, the matter drawn up for the latter has been sometimes applied to constitute the former (*c*). The court of King's Bench will not take cognizance of a special case, reserved upon the trial of an indictment at the sessions (*d*), though they will on the removal of a conviction (*e*).

If the jury, through mistake, or evident partiality, deliver an improper verdict, the court may, before it is recorded, desire them to reconsider it, and recommend an alteration (*f*). Thus, where the decision is repugnant, as if they find one guilty alone of a conspiracy, and acquit the other, they will, on explanation that they cannot find that one person alone was guilty of a conspiracy, withdraw, and may, on reconsideration, find both the defendants guilty (*g*). But it is considered as bearing too hard on the prisoner, and has been seldom done in modern times, when the decision is in his favor (*h*). The jury may also themselves rectify their verdict in the same stage of the proceedings, and it will stand as ultimately amended (*i*). Though they can neither be directed nor allowed to make any alteration, after the verdict is recorded (*k*); unless, indeed, the mistake appear and be corrected promptly (*l*). But a general, like a special verdict, may be amended in matter of form, though not in any substantial degree (*m*). And the same rules seem to apply, which we have already stated, respecting the case in which the facts are found specially by the jury (*n*). Of sending the jury to reconsider their verdict.

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(*a*) 2 Leach, 843.

(*b*) 2 Wils. 163. Tidd, 8th edit. 930.

(*c*) 2 Leach, 780. 498. See forms, Leach, 498. 780. 837.

(*d*) 13 East, 95. Tidd, 8th edit. 930.

(*e*) 15 East, 333.

(*f*) 1 And. 104. Alleyn, 12. Plowd. 211, b. 2 Hale, 299, 300. 310. Hawk. b. 2. c. 47. s. 11. Bac. Abr. Verdict, G.

(*g*) Bro. Abr. Jurors, 7. Bac. Abr. Verdict, G.

(*h*) Hawk. b. 2. c. 47. s. 11, 12; but see 2 Hale, 310. And. 104. Alleyn, 12. 2 Harg. St. Tr. 26. Cromp. 114.

(*i*) Co. Lit. 227, b. 2 Hale, 299, 300. Bac. Abr. Verdict, G. Plowd. 211.

(*k*) Co. Lit. 227, b. 2 Hale, 300. Hawk. b. 2. c. 47. s. 11. Bac. Abr. Verdict, G.

(*l*) 1 Ry. & Mo. C. C. 45.

(*m*) 5 Burr. 2663. Dougl. 375.

(*n*) Ante, 643, 4.

Proceedings on conviction.

When the prisoner is convicted by the jury, he is put aside from the bar, to await the delivery of his sentence (*a*). If there is then reason to apprehend that the indictment is defective, and that a motion to arrest the judgment may succeed, another indictment may be preferred to the grand jury, for the crime of which he has been convicted (*b*).

Proceedings when the Prisoner is acquitted.

When the prisoner is acquitted upon the merits, upon a sufficient indictment, he is for ever free and discharged from that accusation, unless an appeal be prosecuted within the time limited for that purpose (*c*), though the party aggrieved may still seek redress by action, if the acquittal were not collusive (*d*). In this respect, our law differs from the civil jurisprudence, which only discharged him from that accuser, and allowed a prosecution to be instituted by another, at a future period (*e*). He is immediately to be set at liberty, unless there are some legal grounds for his detention (*f*). Formerly, if the judge considered the verdict of acquittal as against evidence, in case of indictments for atrocious crimes, he might bind the persons over for their good behaviour, in some degree to restrain a violence, which impunity might render more daring (*g*). But this seems to have been objected to by some of the judges (*h*); and is contrary to the general principle, that an acquittal is to be taken as a complete establishment of innocence. Where, however, the acquittal has arisen from a defect in the proceedings, and cannot be pleaded in bar to a subsequent prosecution, the prisoners may be detained, in order to be indicted in such a way as to answer the purposes of justice (*i*). And in an indictment against an individual for not repairing a highway, or other supposed nuisance, an acquittal on the merits, and upon a sufficient indictment, does not preclude the prosecutor from instituting another indictment for the continuance of the same, or for a fresh nuisance (*k*). And where the prisoner is ac-

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| (<i>a</i>) Dick. Sess. 223. | Cases, 282. |
| (<i>b</i>) 2 Ld. Raym. 920. | (<i>g</i>) Cro. Car. 292. 507. Comb. |
| (<i>c</i>) 4 Bla. Com. 361. Hawk. | 40. Hawk. b. 2. c. 47. s. 11, |
| b. 2. c. 47. s. 12. | n. f. |
| (<i>d</i>) 12 East, 409. | (<i>h</i>) Cro. Car. 292. |
| (<i>e</i>) 4 Bla. Com. 361, n. a. | (<i>i</i>) 2 Leach, 662, 752. |
| (<i>f</i>) 3 P. Wms. 499. 2 Sess. | (<i>k</i>) 6 East, 316. |

quitted, on the ground of insanity, of treason, murder, or felony, it has been recently provided, that the jury must be required to find specially the grounds of their verdict, and thereupon the court must order him to be confined in such manner as they think expedient, till his majesty shall give further orders respecting his disposal (*a*). It frequently happened in former times, that defendants were detained in prison on account of fees alleged to be due to the gaoler on their acquittal; but, to remedy this evil, the statute 14 Geo. 3. c. 20 (*b*), enacts, that every prisoner against whom no bill of indictment shall be found, or who on trial shall be acquitted, or who shall be discharged by proclamation for want of prosecution, shall be immediately set at large in open court, without payment of any fee, either to the sheriff or the keeper of the prison; but the treasurer of the county, on receiving a judge's certificate, is to pay to the gaoler a sum, not exceeding 13s. 4*d.*, on the discharge of every prisoner in his custody. In prosecutions for misdemeanors, depending in the King's Bench, judgment of acquittal is not given at nisi prius, or the assizes, but afterwards on the postea, by the court of King's Bench (*c*).

ACQUITTAL OF PRISONER.

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The jury were formerly charged, on a coroner's inquisition for murder, if they acquitted the defendant, to inquire who was the actual criminal (*d*); but this practice has long become a mere matter of form (*e*), and at length has sunk into disuse. And they were also charged, on the statute of Winchester, to take a similar inquiry, in case of the acquittal of an alleged robber; for the hundred was answerable to the party injured, and the jury were returned from the hundred which was thus liable. But since they have been selected from the county at large, this also has been laid aside (*f*). Here, therefore, in modern practice, the functions of the jury are concluded.

Where a prosecution has been instituted in the King's Bench by information, if the defendant is acquitted on the trial, or the

(*a*) 39 & 40 Geo. 3. c. 94.

(*d*) 2 Hale, 300.

(*b*) 4 Bla. Com. 361, 2. Hawk.

(*e*) 2 Hale, 301.

b. 2. c. 47. s. 13. Id. c. 48. s. 13.

(*f*) Id. *ibid.*

(*c*) Post, 652, 3. 11 East, 514.

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prosecutor does not proceed to trial within a year after the issue is joined, or enters a nolle prosequi, the court will award the defendant his costs, unless the judge, before whom the proceedings were held, certify in court, on the record, that there was reasonable cause for instituting them; and if the costs are not paid within three months after taxation and demand, the defendant may put in force the recognizance of the prosecutor to pay them, though he can only obtain the £20 there mentioned, and must himself defray all the extra expences (a).

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(a) 4 & 5 W. & M. c. 18. s. 2. 2 T. R. 145. Hand's Prac. 18.

CHAPTER XV.

OF THE PROCEEDINGS BETWEEN VERDICT AND JUDGMENT.

WHEN a special verdict has been found at the Old Bailey or assizes, involving any points of considerable difficulty and importance, it may be removed by certiorari into the court of King's Bench, to be there argued and decided (*a*). Of removing the verdict into the King's Bench.

At the assizes, when the offence is capital, the defendant is immediately asked what he has to say why judgment of death should not be pronounced against him (*b*). In the case of murder, this must be done immediately after conviction (*c*); but, in other cases, judgment of death need not be formally pronounced in open court, but merely entered of record (*d*). As the practice in the King's Bench is otherwise, in cases of misdemeanors, and other proceedings may intervene, we will consider them before we examine the judgment. Immediate judgment at Assizes.

When the defendant has been found guilty in the court of King's Bench, whether on an indictment originally taken there, or removed thither by certiorari, in all cases, whether capital or otherwise, it is incumbent on the prosecutor to enter a rule for judgment nisi causâ on the postea, with the clerk of the rules (*e*). For it is necessary that four days should elapse between the conviction and the judgment, if there are so many in the term remaining (*f*). And the prosecutor must in that time bring the postea into court, in order to enable the judges to pass sentence (*g*). If the prosecutor neglect to give the rule, or bring Of the rule for judgment.

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(*a*) 2 *Ld. Raym.* 1577. 1 *Leach*, 370.

(*b*) 4 *Bla. Com.* 375. 4 *Burr.* 2086.

(*c*) 25 *Geo. 2.* c. 37. s. 3.

(*d*) 4 *Geo. 4.* c. 48.

(*e*) *Hand's Prac.* 12. 2 *Bar-*

nard, 88. *Tidd's Prac.* 8th edit. 934.

(*f*) 4 *St. Tr.* 779. *Harg.* edit. *Knightley's case.* *Hawk.* b. 2. c. 48. s. 1.

(*g*) 2 *Barnard*, 88.

RULE
FOR JUDGMENT.

in the *postea*, the defendant may, by motion to the court, compel him so to do; because otherwise he might linger in prison to an indefinite period, with the conviction suspended over him (*a*). And a *feme covert*, convicted with her husband for keeping a disorderly house, may move for judgment, though her husband has absconded (*b*). The practice in the King's Bench, respecting this proceeding, is stated to be as follows:—The prosecutor's solicitor, after the defendant has been convicted, procures the record, &c. from the associate in a country cause, or the clerk of *nisi prius* in a town cause, and takes it to the clerk in court, who thereupon gives the rule for judgment on the return of the *disringas*, and enters up the conviction, and the clerks in court make office copies of it for the solicitors (*c*). The defendant, in prosecutions in the King's Bench for misdemeanors, has a right to the inspection of the *venire*, and other process, and if it be refused, he may move the court that the officer allow such inspection (*d*). It is in this stage of the proceedings, and before the expiration of the rule for judgment, that the defendant must move for a new trial, though he may after the expiration of such rule, move in stay, or arrest of judgment (*e*).

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Of a new trial.

In case of felony or treason it seems to be completely settled, that no *new trial* can, in any case, be granted, where the proceedings have been regular (*f*); but if the conviction appear to the judge to be improper, he may respite the execution, to enable the defendant to apply for a pardon (*g*). And where there has been a mis-trial, as where one of the jurors, after retiring, talked with a stranger respecting his verdict, a *venire de novo* may be awarded, and a fresh trial had, even at the quarter sessions (*h*). However, in all cases of misdemeanor, after a conviction there is no doubt that the superior courts may grant a new trial, in order to fulfil the purposes of substantial justice (*i*). But inferior courts

(*a*) 5 T. R. 455. 2 Barnard, 38.

(*b*) Rep. temp. Hardw. 278, 279.

(*c*) Hand's Prac. 12.

(*d*) 1 Barnard, 147, 8.

(*e*) Hand's Prac. 12.

(*f*) 6 T. R. 625. 638. 13 East, 416, n. b. 4 B. & A. 275.

(*g*) 13 East, 416, n. b. 4 Bla. Com. 375, 6.

(*h*) 4 B. & A. 273.

(*i*) 6 T. R. 638. 13 East, 416. Imp. K. B. 7th edit. 433.

have no power to do so upon the merits, but only for an irregularity in the proceedings (*a*); which we have seen is one of the reasons for removing an indictment from the inferior court by certiorari (*b*). And we have seen that the court of King's Bench will not allow a certiorari to remove an indictment for a misdemeanor and proceedings thereon, at the assizes after verdict, and before judgment, in order to found an application to the superior court for a new trial, on the judge's report of the evidence, upon the ground of the verdict being against evidence, and the judge's direction (*c*). The allowance of a new trial is after a general verdict; and, after special verdict, a *venire facias de novo* is the proper mode of bringing the merits a second time under consideration (*d*). The latter, indeed, was the ancient proceeding in all cases; and the former is, comparatively speaking, of modern invention (*e*). The first instance of a new trial on the merits, which we find reported, arose in the year 1655 (*f*), though it seems most probable that it was allowed in earlier periods (*g*). The material difference between a new trial and a *venire facias de novo* is, that the latter is only grantable where some mistake is apparent on the record; but the former may be granted on the ground of improper direction, false evidence, misconduct of jurors, and a variety of other causes, which never appear on the face of the proceedings (*h*). A new *venire* can, indeed, be obtained only in two cases: first, where it appears upon the face of the verdict that it is in itself imperfect, and that no judgment can be given upon it; and, secondly, where the jury ought to have found other facts differently; and it cannot be granted on any other occasion (*i*).

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(*a*) 13 East, 416, n. b. 4 B. & A. 273. 2 Clit. Rep. 250.

(*b*) Ante, 373.

(*c*) 13 East, 411.

(*d*) 1 Imp. K. B. 7th edit. 430, See Index. Reference as to a *Venire de novo*.

(*e*) Id. ibid.

(*f*) Style, 462.

(*g*) 6 T. R. 622, 3. 2 Salk. 648. Tidd, 8th edit. 942. Imp. K. B. 7th edit. 430, n. (*a*).

(*h*) Imp. K. B. 7th edit. 430. 4 B. & A. 273.

(*i*) Per Willes, C. J. 1 Wils. 56. In the case in 4 B. & A. 273, a *venire de novo* was awarded, where there was a mis-trial, through the misbehaviour of some of the jury. Upon a *venire de novo*, in case of felony, a new arraignment and plea is not necessary, 4 B. & A. 275.

NEW TRIAL.

But a new trial may be granted by the superior courts for a variety of reasons, in order to further the purposes of justice. Thus, in cases where a notice of trial ought to have been given, and the prosecutor has omitted to do so, and by that means precluded the defendant from exculpating himself, a new trial will be granted (*a*). But if, notwithstanding the want of form, the defendant appears and makes defence, the defect will be of no importance (*b*). A new trial may be granted for want of a proper jury, as where they are not duly returned (*c*). A new trial may be granted for the misbehaviour of the jury, as if they cast lots for their verdict, or refresh themselves at the cost of the prosecutor (*d*), though such misdemeanor must be proved by extrinsic evidence; and the courts will not receive an affidavit of partiality and prejudice in one of the jurymen, from the unsuccessful party (*e*); neither can the affidavit of the jurors themselves be received on the occasion (*f*). Nor can a juror be allowed to make oath as to what he thought or intended, in opposition to what he found (*g*); but where there is a doubt upon the judge's report, as to what actually passed at the time of delivering the verdict, information may be received either from a jurymen or a by-stander (*h*). An admission, by jurymen, that the verdict was entered by mistake, made after they had separated, though on the day of trial, is not a sufficient ground for a new trial (*i*). And, in general, the assent of all the jury to the verdict pronounced by the foreman in their presence and hearing, is to be conclusively

(*a*) Bul. N. P. 327. Bac. Abr. Trial, L. 3 Price, 72.

(*b*) 2 Salk. 646. Bul. N. P. 327. Bac. Abr. Trial, L. 1.

(*c*) 4 T. R. 473. 1 Smith, 304. 4 B. & A. 430.

(*d*) 1 Stra. 642. 2 Salk. 645. 1 Id. Raym. 148. Bul. N. P. 326. Ante, 632, 3. Tidd, 8th edit. 940. The dispersion of a jury, with the permission of the judge, during the interval of an adjournment, in case of a misdemeanor, does not vitiate their verdict, where there is no suggestion of their having been im-

properly practiced upon in the interim, 2 B. & A. 462. 1 Chit. Rep. 401, S. C.

(*e*) 7 Price, 203.

(*f*) 1 T. R. 11. 2 Bla. Rep. 1299. Say. Rep. 100. 1 New. Rep. 326. Tidd, 8th edit. 940. 8 Taunt. 26. 1 J. B. Moore, 455, S. C. 3 Brod. & Bing. 272.

(*g*) 3 Burr. 1696. 5 Burr. 2667. Com. Dig. Indictment, N.

(*h*) 5 Burr. 2667. Tidd, 8th edit. 940; but see Cas. Pr. C. P. 66. 1 Burr. 383. 9 Price, 134. semb. contra.

(*i*) 2 Chit. Rep. 268.

inferred, and no affidavit can, in any case, be admitted to the contrary. But, in civil cases, if all the jury were not present when a verdict of guilty was delivered, and it is therefore uncertain whether they all heard the verdict pronounced by the foreman, the court will, with the consent of the defendant, grant a new trial (*a*). And neither the mere circulation of papers, tending to prejudice the minds of the jury, nor their misconduct in taking with them documents which might be evidence for either party, will be sufficient to procure a revisal of the verdict (*b*). And where, in a civil case, it was sworn that hand-bills, reflecting on the plaintiff's character, had been distributed in court, and shewn to the jury on the day of trial, the court granted a new trial, and could not receive from the jury affidavits in contradiction, though the defendant denied all knowledge of the hand-bills (*c*); but merely desiring a juror to appear, is no cause for a new trial (*d*). Nor will it be allowed, merely on the ground that the defendant came unprepared, even when the circumstance which arose was one which it was impossible for him to foresee (*e*), or because one of the witnesses has made a mistake in giving his evidence (*f*), or has been discovered to be incompetent since the finding of the jury (*g*). But where material witnesses have been prevented by illness from attending (*h*), or gained credit on the trial by circumstances since falsified by affidavit (*i*), or are afterwards convicted of perjury, or shown to be evidently foresworn (*k*), the court will, in some cases, allow a second investigation of the proceedings. The mere finding a bill for perjury, however, will not suffice, because it is grounded on *ex parte* evidence; nor is it of course to receive affidavits, impeaching the credit of witnesses (*l*).

(*a*) 2 Stark. N. P. C. 111.

(*b*) 1 Ld. Raym. 148. 2 Salk. 645. Ante, 633, 4.

(*c*) 3 Brod. & Bing. 272.

(*d*) 1 Stra. 643.

(*e*) 2 Salk. 653. Bul. N. P. 327. 2 Atk. 319. 2 Wils. 98. 1 Stra. 691. 2 T. R. 113. 1 T. R. 84. 1 Bla. Rep. 298. 2 Bla. Rep. 802, 3. 6 Mod. 22. 2 Salk. 647. 2 Chit. Rep. 278. And see cases in Tidd's Prac. 8th edit. 938.

(*f*) Say. Rep. 27.

(*g*) 1 T. R. 717. 1 Bos. & Pul. 429, n. (a).

(*h*) 6 Mod. 22. 1 Salk. 645. Affidavits of the death of a person may be received, to account for his not being examined, see 2 Chit. Rep. 278.

(*i*) 1 Bos. & Pul. 427.

(*k*) Tidd, 8th ed. 938. 2 Chit. Rep. 269.

(*l*) Id. *ibid*.

NEW TRIAL.

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Another reason for granting a new trial, may be the misdirection of the judge, or the refusal of legal, or the admission of improper evidence (*a*). And it may be obtained on the ground, that the verdict is without, or contrary to, evidence, if the judge himself expresses his dissatisfaction of the issue (*b*). But the circumstance, that the verdict was obtained because the pleadings were defective, will not be allowed to operate. Thus, in the case of a prosecution for not repairing a highway, the court will not grant a new trial where a verdict was obtained against the county in consequence of a defect in pleading, that individuals were bound to repair by reason of their tenure; but they will stay judgment, on payment of costs, until another indictment is preferred, to try more effectually the point really contested (*c*). And it is a general rule, that even where grounds are laid, which in general are sufficient, a new trial will not be granted, to encourage a disposition to litigate; or unless it is necessary, in order to obtain substantial justice (*d*). And although it appears, upon a case reserved, that evidence has been admitted at the trial which ought not to have been received, yet, if the judges are of opinion that there is ample evidence to support the indictment, after rejecting such improper evidence, they will not set aside the conviction (*e*).

A new trial cannot, in general, be granted in favor of the prosecutor, after the defendant has been acquitted, whether on an indictment for a misdemeanor or a felony (*f*), even though the verdict appears to be against evidence (*g*), or was upon the misdirection of the judge (*h*). But it seems to be the better opinion, that where the verdict was obtained by the fraud of the defendant, or in consequence of irregularity in his proceedings, as

(*a*) 2 Salk. 649. 2 Wils. 273.
Bul. N. P. 327. Tidd, 8th edit.
938.

(*b*) 1 Burr. 12. 2 Burr. 665.
936.

(*c*) 16 East, 223.

(*d*) 1 Burr. 54. 2 Salk. 644.
646. 8. 653.

(*e*) Russ. & Ry. C. C. 132.

(*f*) 4 M. & S. 337.

(*g*) 6 East, 315. 2 Smith, 407.
4 Bla. Com. 361. 2 Salk. 646.
1 Wils. 298. 12 Mod. 9. 1 Lev.
124. 1 Sid. 149. 153. 1 Ld.
Raym. 63. Bac. Abr. Trial, L. 9.
Hawk. b. 2. c. 47. s. 12. Tidd,
8th edit. 942. Same in penal
actions, 10 East, 268.

(*h*) 1 Stark. N. P. C. 516.

by keeping back the prosecutor's witnesses, or neglecting to give due notice of trial, a new trial may be granted (*a*). And when the defendant has been acquitted on an indictment for not repairing a road, &c. the court will, under very special circumstances, suspend the entry of judgment, so as to prevent a plea of autrefois acquit, and enable the parties to have the question reconsidered upon another indictment, without the prejudice of a former judgment (*b*).

NEW TRIAL.

It has been laid down, that the court cannot grant a new trial at the instance of the defendant, without the consent of the king's counsel (*c*); but this doctrine has subsequently been holden to be unfounded (*d*). An inferior court cannot, as we have seen, grant a new trial on the merits, but only on account of some irregularity on the face of the record; which is one reason for removing, by certiorari, into a court of superior jurisdiction, and which must be done before conviction (*e*).

No application of this nature can, in general, be heard, after a motion in arrest of judgment (*f*). But there are cases in which, if it appears that manifest injustice will ensue from a strict observance of the rule, the court will waive the formality, and admit the defendant to a rehearing (*g*). And this indulgence will sometimes be granted, especially if it appear that he was not acquainted with the cause that induces him thus to apply, until after he has moved in arrest of judgment (*h*). And the court, if they grant a rule nisi for a new trial, will, at the instance of the party applying, make it a part of the rule, that the defendant shall have a certain time, *e. g.* three days to move in arrest of judgment, after they shall have given their opinion upon the motion

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(*a*) 2 Salk. 646. 12 Mod. 9. Sayer, 90. Hawk. b. 2. c. 47. s. 12. Bac. Abr. Trial, L. 9, acc. 1 Sid. 153. 1 Lev. 9, contra.

(*b*) 1 B. & A. 63. 2 Chit. Rep. 282, S. C. 1 B. & A. 64 (*d*). 67 (*a*). But see 5 M. & S. 392.

(*c*) 1 Sid. 49, 50. Bac. Abr. Trial, L. 9.

(*d*) 1 Ld. Raym. 63. Bac. Abr. Trial, L. 9.

(*e*) Ante, 654. 373. 2 Salk. 650. 1 Stra. 113. 392. 499. Fortes. 198. 1 Douglas, 380. Holt, 184. 7 Mod. 84. 13 East, 416, n. (*b*).

(*f*) 2 Salk. 647. 1 Burr. 434. Bac. Abr. Trial, L. 1. Hand's Prac. 13.

(*g*) 2 Dougl. 797. 2 Com. Rep. 525. Bac. Abr. Trial, L. 1.

(*h*) Bac. Abr. Trial, L. 1.

NEW TRIAL. for a new trial, or the defendant may obtain a rule in the alternative; though, as the motion in arrest of judgment may be made at any time before judgment is pronounced, it should seem that such special rule is not necessary (*a*). It is also to be observed, that where the motion for a new trial has been duly made first, and afterwards an attempt has been made to arrest the judgment, the court will desire the latter to be first argued, because all the delay and vexation of a second trial will be saved, if the judgment be first arrested (*b*). The application must be made, in general, within four days exclusive, after the entry of a rule for judgment, as is uniformly the case in civil proceedings (*c*). But the courts will not suffer justice to be injured by a strict adherence to this rule, any more than to that which we have just stated, but will interpose, after the regular time, whenever their interference is clearly shown to be requisite (*d*).

[659] The motion for a new trial, when founded on the facts of the case, is made upon an affidavit of the circumstances (*e*); and, in the King's Bench, such affidavit must be made before the expiration of the first four days of the term following the trial, if the cause was tried in vacation, and before the expiration of the first four days after the return of the *distringas*, if the cause was tried in term, without the special permission of the court to act otherwise (*f*). When the application is made, all the defendants who have been convicted must be actually present, unless a special ground be laid for dispensing with the general rule (*g*); because the conviction fixes so strong an imputation of guilt upon them, that the court will be sure they have them in their power, before they entertain the motion for a revision of the proceedings (*h*).

(*a*) Hand's Prac. 13. 1 Burr. 334. 4 T. R. 126. See forms, 1 Burr. 334. 4 T. R. 126. Post, 663.

(*b*) 6 T. R. 627. Bac. Abr. Trial, L. 1.

(*c*) 5 T. R. 436. 11 East, 308. Tidd, 8th edit. 934.

(*d*) 5 T. R. 437, n. a. 438. Dougl. 170. 797. 1 East, 146. 11 East, 308. 2 Stra. 845. 995. 2 Burr. 1189. Tidd, 8th ed. 943.

(*e*) Tidd, 8th edit. 945.

(*f*) Reg. Gen. 3 B. & C. 176. 4 Dow. & Ry. 836; and see 1 Chit. Rep. 383, in notes.

(*g*) 11 East, 307. 2 Stra. 968. 1227. Cas. K. B. 29. 2 Barnard, 412. 1 Sess. Cas. 428. Bac. Abr. Trial, L. 9. Tidd, 8th edit. 945. Com. Dig. Indictment, N.

(*h*) *Id.* *ibid.*

And, it seems, the consent of the counsel for the prosecution cannot dispense with this practice (*a*). And it may also be urged, in support of this practice, that otherwise the party most criminal might keep away, and take the opinion of the court, by putting forward one of the defendants, whose guilt was less apparent or less atrocious; or those not present might abscond, on hearing that their application had not been attended with success (*b*). But it should seem, with reference to the proceedings at the time when judgment is given, that where a pecuniary penalty, or fine only, and not corporal punishment can be awarded, a new trial might be moved for in the absence of the defendant, at least on the clerk in court undertaking for his paying the fine, in case judgment should be given against him (*c*). The court, if they see justice has not been done, may order the matter for a rehearing, though not in the form which they use when a regular motion is granted (*d*). And where some of the defendants have been convicted, and others acquitted, a new trial may be granted as to the former, without impeaching the verdict so far as it relates to the latter (*e*). Where the defendant is in custody, he must apply to the court for a habeas corpus to bring him up, in order to apply for a revision of the proceedings (*f*).

When the application is regularly made in court, upon grounds *primâ facie* sufficient, they will award a rule to show cause why a new trial should not be granted (*g*). On this the puisne judge of the court applies to the judge who tried the cause, unless he were one of the judges of the court, for a report of the trial, and a statement of his opinion respecting its merits (*h*). If he signify his dissatisfaction, the remedy prayed for is usually allowed; if he declare his concurrence with the verdict it is commonly refused; but if he merely report the evidence, without giving any decided and satisfactory opinion, the court will admit the question

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(*a*) 2 Dow. & Ry. 46.(*f*) 2 Burr. 931.(*b*) 11 East, 307.(*g*) Bul. N. P. 327. Tidd,(*c*) Post. 1 Salk. 55, 6. 400.

8th edit. 945. Hand's Prac.

(*d*) 11 East, 309. 3 Burr.

12.

1901.

(*h*) Bul. N. P. 327. Tidd,(*e*) 6 T. R. 638, 640. Tidd,

8th edit. 945.

8th edit. 945.

NEW TRIAL. to be argued before them (*a*). If they find there is no ground for the application, they will discharge the rule; but, if solid ground be shown, they make it absolute (*b*).

When a new trial is granted in favor of two defendants who have been convicted, while others have been acquitted, in order to prevent the revival of proceedings against the latter, there are two methods which may be adopted; the first of these is, to alter the original venire, so as to make it embrace those only who have been convicted; and the other is, to make an entry on the record, that the verdict was improperly taken against those who were convicted, and then to award a new trial, as far as they are concerned (*c*). A new trial will, in general, be granted, without compelling the defendant to pay the costs of the former proceedings (*d*).

Motion for stay
of judgment.

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Before the expiration of the rule for judgment, the defendant may, in some cases, move to stay the sentence. Thus we have seen, that where the county has pleaded a wrong plea to an indictment, for not repairing an highway, the court will, after verdict against them, stay the judgment upon payment of the costs, until another indictment has been preferred, which may enable them to throw the burthen of repairing on the parties presumed to be liable; the county repairing, if necessary, while the matter is depending (*e*). But the courts are reluctant to stay judgment on an indictment for not repairing a bridge; they will not stay it generally, but only till further order; and if the trial of another indictment be not proceeded in with all possible dispatch, judgment will be given (*f*). But the judgment will not be stayed, on the ground that the witnesses are indicted for perjury, until that trial has been decided (*g*). Nor where the husband and wife are indicted together, is it any ground of staying judgment against

(*a*) Rep. temp. Hardw. 23. Barnes, 439. Bul. N. P. 327. Tidd, 8th edit. 945.

(*b*) Hand's Prac. 12.

(*c*) 6 T. R. 626, 7. 640. See form of entry on the record, 6 T. R. 626, 7. 640. Post, last vol.

(*d*) 3 T. R. 378. See Tidd, 8th edit. 945, 6.

(*e*) 16 East, 223. And see also ante, 657, in notis.

(*f*) 2 Chit. Rep. 215; and see 1 B. & A. 63. 2 Chit. Rep. 282.

(*g*) 1 Bla. Rep. 404. 2 Chit. Rep. 269.

the latter, that the former has not appeared; but a distinct sentence will be given (*a*).

In the King's Bench, at any time between the conviction and the sentence, or immediately at the assizes, the defendant may move the court in arrest of judgment (*b*). The causes on which this motion may be grounded, although numerous, are confined to objections which arise upon the face of the record itself, and which make the proceedings apparently erroneous; and, therefore, no defect in evidence, or improper conduct on the trial, can be urged in this stage of the proceedings (*c*). Thus, it is no ground of arrest of judgment, that the sheriff, by whom the panel was returned, is the prosecutor, however strong a reason it would have been of challenge (*d*). But any want of sufficient certainty in the indictment, respecting the time, place, or offence, which is material to support the charge, as well as the circumstance of no offence being charged, will cause the judgment to be arrested (*e*). And it is to be observed, that none of the statutes of jeofails, or amendments, extend to criminal proceedings; and, therefore, essential defects in the indictment are not, as in civil cases, aided by verdict (*f*). So that though it was formerly thought that this motion would not be regarded in case of conspiracy, but the party would be left to his writ of error (*g*), it is now settled, that this idea is entirely destitute of foundation (*h*). Nor is the ground of arresting the judgment confined to the indictment alone, it may be found in any part of the record, which imports that the proceedings were inconsistent or repugnant, and would make the sentence appear irregular to future ages. Thus, the omission in the caption of the indictment, of the words "*then*"

Motion in arrest
of judgment.

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(*a*) Rep. temp. Hardw. 278, 279. Com. Dig. Indictment, N.

(*b*) 5 T. R. 445. 4 Harg. St. Tr. 779. 11 Harg. St. Tr. 289. Comb. 364. Hawk. b. 2. c. 48. s. 1. 4 Bla. Com. 375. See proceedings, 11 Harg. St. Tr. 289. See Tidd, 8th edit. 949 to 961.

(*c*) 4 Burr. 2287. 1 Lord Raym. 231. 1 Salk. 77, 315. 1 Sid. 65. Com. Dig. Indict-

ment, N.

(*d*) 1 Leach, 101.

(*e*) 4 Bla. Com. 375. 3 Burr. 1901. 1 East, 146. See ante, 200. 217. 219. 225. 227, as to the construction of indictments.

(*f*) 4 Bla. Com. 375. Ante, 298, acc. Stark. 252, 3, 4, 5. cont.

(*g*) 1 Saund. 301, 2.

(*h*) Hawk. b. 2. c. 48. s. 1, n. e. 1 Saund. 301, 2, n. (1).

MOTION
IN ARREST OF
JUDGMENT.

and *there*," in the statement of the swearing of the jury, was formerly held fatal; because, without them, it did not appear that the oath was taken in the county where the offence is alleged to have been committed, but the law is now otherwise (*a*); and it will be no ground for arresting the judgment, after special verdict removed by certiorari, that the judge who tried the prisoner is not stated to have been of the quorum, that no issue appears on the record, or that the authority of the justices of gaol delivery is not stated; for there is no occasion to set forth the commission at all, by virtue of which the trial proceeded, there is no necessity for an issue on a capital indictment, and the judges can be assigned by no one but his majesty (*b*). Nor, where the original indictment was against three, and the proceedings are removed as to one of them only, is it any defect that no notice is taken of the other defendants (*c*). It seems, however, to be a general rule, that as criminal proceedings are not aided after verdict by any of the statutes of jeofails, or amendments, any objection which would have been fatal on demurrer, will be equally so on arrest of judgment, and it is therefore usually reserved till this time, in order to obtain the chance of an acquittal (*d*).

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The defendant may move at any time in arrest of judgment, before the sentence is actually pronounced upon him (*e*); and even when the defendant waives the motion, yet if the court, upon a review of the whole case, are satisfied that he has not been found guilty of any offence in law, they will of themselves arrest the judgment (*f*). But if the sentence is once pronounced, though before the actual entry of the judgment, the court are not bound to attend at all to a motion of this nature, even though a formal error should be discovered, sufficient to reverse the proceedings (*g*), but the defendant is left to his writ of error; though, as we have seen, the court may, without any motion, arrest the judgment (*h*), and may alter their sentence any time during the

(*a*) 2 Stra. 901. Com. Dig. Judgment, N.; but see ante, 334, as to caption.

(*b*) 4 Burr. 2084, 5.

(*c*) 4 Burr. 2086.

(*d*) Ante, 442, 3.

(*e*) 5 T. R. 445. 2 Burr. 801.

2 Stra. 845.

(*f*) 1 East, 146. 11 Harg. St. Tr. 290.

(*g*) 3 Burr. 1901, 2, 3. Com. Dig. Indictment, N.

(*h*) 1 East, 146.

same term (*a*). It should seem that the court may, if they think fit, arrest the judgment, notwithstanding it has been given. A motion in arrest of judgment, however, cannot ever be entertained, after judgment against the defendant on demurrer (*b*). In this motion, as in that for a new trial, the defendant must be personally before the court, in order to procure it a hearing; because there is the strongest presumption possible that he is guilty (*c*). But where the jury find a verdict, in which they submit a question to the court, though not professedly special, his presence will be dispensed with on the argument, because he will be presumed to be innocent (*d*). Nor is there any occasion for his presence, to move for an inspection of the venire, and other process (*e*). And it should seem, that where the judgment against the defendant could only be the payment of a fine, the court might dispense with his personal appearance (*f*). If the defendant is in actual custody, he must apply for a habeas corpus, to enable him, on being brought up, to make the motion (*g*). When an application of this kind is made at the assizes, and the judge thinks it is open for discussion, the sentence is respited, in order to take the opinion of the twelve judges (*h*). If the judge thinks that the objections are not well founded, he then passes sentence; but he may, nevertheless, respite execution, in order to take the opinion of the judges upon the objections (*i*). If the judgment is ultimately arrested, all the proceedings will be set aside, and judgment of acquittal will be given; but it will be no bar to a subsequent indictment, which the prosecutor may immediately prefer (*k*).

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If the defendant be in custody, or the crime be capital, he will, of course, be remanded to prison in the interval between conviction

Process after verdict to bring in defendant to receive judgment.

(*a*) 6 East, 323. 1 M. & S. 442.

(*b*) 2 Ld. Raym. 1221.

(*c*) 2 Burr. 930, 1. 2 Stra. 844, 1227. 1 Bla. Rep. 209. 2 Barnard, 412. Com. Dig. tit. Indictment, N. In indictment against several for a misdemeanor, a new trial cannot be moved for, unless all be present, 4 B. & C. 329.

(*d*) 2 Stra. 1227. 2 Burr. 931.

(*e*) 1 Barnard, 147.

(*f*) Post.—1 Salk. 55, 6. 400.

(*g*) 2 Burr. 931.

(*h*) 1 Leach, 360. 25 Geo. 2. c. 37. s. 3 & 4. 1 Leach, 101. 2 Leach, 1104.

(*i*) 2 Leach, 1026, 7.

(*k*) Ante, 304, 443. 3 P. Wms. 439. 4 Co. 45. Com. Dig. Indictment, N. 4 Bla. Com. 375.

BRINGING
DEFENDANT TO
RECEIVE
JUDGMENT.

tion and sentence, if any be allowed to transpire (*a*). But, if the cause of prosecution be a mere misdemeanor, and he be found guilty in his absence, as we have seen frequently occurs, a *capias* is awarded and issued, to bring him in to receive his judgment; and, if he absconds, he may be prosecuted even to outlawry (*b*). As this *process*, however, corresponds with that on indictment found, and the object of both is the same, to compel the appearance of the defendant, and enforce his submission to the laws, it will not be necessary here to enter into the subject of the process, which we have already attempted to detail (*c*).

In case of a conviction for a misdemeanor, if the defendant be present, he will, of course, be committed during the interval, unless the prosecutor will consent to his liberation, on his recognizance to appear and receive judgment (*d*). But the length of his imprisonment will be considered by the court, in deciding on the sentence (*e*).

Of compromises
with the Prose-
cutor between
Verdict and
Judgment.

In this, as well as in earlier stages of the prosecution, in cases of trifling misdemeanors, the courts have power to allow a compromise, in order to render some satisfaction to the party immediately injured (*f*). This may be done by suffering the defendant to confer, or, as it is commonly called, to *speak with* the prosecutor; after which, if the latter declares that he is satisfied, the court will only impose a trifling fine for the injury to the public welfare (*g*). But this mode of compromise has been censured, when entrusted to inferior magistrates, as allowing the prosecutor to become a witness in the cause from which he is to derive benefit, and encouraging the commencement of criminal prosecutions rather for the sake of private advantage, than the great purposes of public justice (*h*). But this reasoning scarcely appears conclusive, for there are many instances where the legislature have themselves offered rewards to persons, who are the

(*a*) 4 Harg. St. Tr. 779.

(*b*) 4 Bla. Com. 375.

(*c*) See ante, 337 to 370.

(*d*) 1 East, 159. 4 Burr. 2539.
Hand's Prac. 15, 16.

(*e*) 1 East, 160.

(*f*) 2 Bla. Com. 363, 4. Ante,
7. 8. 430.

(*g*) 4 Bla. Com. 363, 4. Dick.
Sess. 155, 6. Ante, 7, 8.

(*h*) 4 Bla. Com. 364.

means of convicting the guilty, and who are to derive a most evident advantage from conviction, and one far more certain than the mere chance of recompence from the defendant, and who are still competent witnesses (*a*). It is not, therefore, true, “that the rules of evidence are entirely subverted” (*b*). And it has been urged, with apparent force, that the justices, whom Mr. Justice Blackstone considers as the most improper to be entrusted with such a power, are, in fact, the best fitted to exercise it with judgment; because they are, from their local knowledge, much better acquainted with the character and circumstances of the parties, than the judges, who are acquainted only with the facts produced in evidence (*c*).

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It is also not unusual for the court, in order to defray the costs of the prosecution, to intimate an inclination to mitigate the punishment, on the ground of the defendant's paying them, or advancing a sum for that purpose (*d*). And, in conformity to this principle, it has been holden, that where, on an indictment against a master for ill-treating his parish apprentice, the defendant gave a security for the expences of the proceedings, on an intimation from the court that his imprisonment would, on that account, be reduced from twelve months to six, the note was founded on a good consideration, and consequently the transaction was legal (*e*). And where, by leave of the magistrates, the party referred it to the master to ascertain the costs the prosecutor had incurred, as well as the damages he had sustained by the original injury, and he had accordingly fixed them at sums for which the defendant was attached, it was holden that he could not be discharged at the end of twelve calendar months, though the damages were less than £20, under the 48 Geo. 3. c. 123, because the ground of the imprisonment was regarded as criminal (*f*). Since, then, a compromise is thus enforced, its legality can scarcely be disputed.

(a) Ante, 7, 8.

East, 46. 48.

(b) 4 Bla. Com. 364.

(e) 11 East, 46. 48. Bac. Abr.

(c) Dick. Sess. 156, in notes; and see 11 East, 46. 48.

Indictment, A. 16 East, 301. 4 Campb. 46.

(d) Hawk. b. 2. c. 25. s. 3. Bac. Abr. Indictment, A. 11

(f) 2 M. & S. 201; but see 13 East, 190.

Death of Defendant between Trial and Judgment.

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If the defendant, after removing an indictment for a misdemeanor into the King's Bench by certiorari, and conviction there, but before judgment is pronounced, die, his bail will not be discharged from their recognizance until the costs of the prosecution are paid (*a*).

Benefit of Clergy*.

But by far the most important circumstance intervening between conviction and judgment, is the claim and allowance of the *benefit of clergy*, in those cases where it is by law to be granted. It is, of course, claimed immediately before judgment at the assizes. This is one of the most singular relics of ancient superstition, and certainly the most important. That, by a mere form, without the shadow of existing reason to support it, the severity of the common law should be tempered, may seem strange to those who have been accustomed to regard our criminal law as a regular fabric, not only attaining great practical benefit, but built upon solid and consistent principles. The benefit of clergy is, no doubt, of great practical advantage, compared to the dreadful list of offences which would otherwise be punished as capital; but it would be well worthy of an enlightened age to forsake such a subterfuge, and at once, without resorting to it, to apportion the degree of suffering to the atrocity and the danger of the crimes (*b*).

History of Benefit of Clergy.

The history of this singular mode of pardon, if so it can be termed, is both curious and instructive. In the early periods of European civilization, after the final destruction of the Roman empire, the church obtained an influence in the political affairs of nations, which threw a peculiar colouring over their original institutions. Monarchs, who were desirous of atoning for atrocious offences, or of obtaining the sanction of heaven to their projects of ambition, were easily persuaded to confer immunities on the clergy, whom they regarded as the vice-gerents of heaven. Presuming on these favors, that aspiring body soon began to claim as

(*a*) 8 T. R. 409. 5 W. & M. c. 11.

(*b*) See also observations, Fost. C. L. 305, 6.

* As to Benefit of Clergy in general, see 4 Bla. Com. 365. 2 Hale, 323 to 391, Index, Clergy. Fost. C. L. Index, Clergy. Williams, J. Felony, V. Burn, J. Clergy, II. Com. Dig. Justices, Y. Bac. Abr. Felony, G.

a right what had been originally conferred as a boon, and to found their demand to civil exemptions on a divine and indefeasible charter, derived from the text of Scripture, "touch not mine anointed, and do my prophets no harm" (*a*). It need excite no surprise that they were anxious to take advantage of their dominion over the conscience, to exempt themselves from the usual consequences of crime. To the priests impunity was a privilege of no inconsiderable value. And so successful was the pious zeal to shield those who were dedicated to religion, from the consequences of any breach of temporal enactments, that in several countries they obtained a complete exemption from all civil liabilities, and declared themselves responsible only to the pope and his ecclesiastical ministers (*b*). They erected themselves into an independent community, and even laid the temporal authorities under subjection (*c*). Nobles were intimidated into vast pecuniary benefactions, and princes trembled at the terrors of spiritual denunciation. In England, however, this authority was always comparatively feeble. The complete exemption of the clergy from secular punishments, though often claimed, was never universally admitted (*d*); for repeated objections were made to the demand of the bishop and ordinary, to have the clerks remitted to them as soon as they were indicted (*e*). At length, however, it was finally settled, in the reign of Henry 6, that the prisoner should first be arraigned, and might then claim the benefit of clergy as an excuse for pleading, or might demand it after conviction; and the latter of these courses has been almost invariably adopted, to allow the prisoner the chance of a verdict of acquittal.

But if the privileges of the church were less dangerous in England than on the continent, they soon became more extensive; they not only embraced every order of clergymen, but were claimed for every subordinate officer of religious houses, with the numerous classes of their retainers. And so liberal was the ap-

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(*a*) Keil. 181. P. S. 105, 15.

(*b*) 2 Hale, 324. 4 Bla. Com. 366. Burn, J. Clergy, II. Williams, J. Felony, V.

(*c*) 2 Hale, 324.

(*d*) Keilw. 180. 2 Hale, 372.

377. 4 Bla. Com. 366.

(*e*) 2 Hale, 377. 4 Bla. Com. 366.

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plication of these dangerous benefits, that, at length, every one who, in those days of ignorance, was able to read, though not even initiated in holy orders, became entitled to demand them, such reading being deemed evidence of his clerical profession (*a*). The privileges of the clergy were recognized and confirmed by statute in the reign of Edward the Third (*b*). It was then enacted, that all manner of clerks, secular as well as religious, should enjoy the privileges of holy church for all treasons or felonies, except those immediately affecting his majesty. To the advantage of this provision all who could read were admitted (*c*). But as learning became more common, this extensive interpretation was found so injurious to the security of social life, that the legislature, notwithstanding the opposition of the church, were compelled to afford a partial remedy. In the reign of Henry the Seventh (*d*), a distinction was drawn between persons actually in holy orders, and those who, in other respects secular, were able to read, by which the latter were only allowed the benefit of their learning once, and on receiving it to be branded in the left thumb with a hot iron, in order to afford evidence against them on any future occasion. The church seems to have lost ground in the succeeding reign, probably in consequence of the separation of England from the sway of the Roman Pontiff; for all persons, though actually in orders, were rendered liable to be branded, in the same way as the learned class of laymen (*e*). But, in the time of Edward the Sixth, the clergy were restored to all the rights of which they were deprived by his predecessor, except as to certain atrocious crimes, which it became necessary more uniformly to punish (*f*). At the same time, some of the more enormous evils attendant on this general impunity were done away. Murder, poisoning, burglary, highway robbery, and sacrilege, were all excepted from that privilege, which was confirmed

(*a*) 2 Hale, 372.

(*b*) 25 Edw. 3. c. 4.

(*c*) 2 Hale, 272, 3. Kel. 100, 101, 2. Hawk. b. 2. c. 33. s. 5. Williams, J. Felony; V. See Mode of Admission of Defendant convicted of Manslaughter, 1 Salk. 61.

(*d*) 4 Hen. 7. c. 13. The

distinction is now abolished by 6 Geo. 4. c. 25. s. 3.

(*e*) 28 Hen. 8. c. 1. s. 7. 32 Hen. 8. c. 3. s. 8; and the provision of the 28 Hen. 8, is revived by the 6 Geo. 4. c. 25. s. 3.

(*f*) 1 Edw. 6. c. 12. s. 10.

as to inferior offences (*a*). But peers of the realm, for the first offence, were to be discharged in every case, except murder and poisoning, even though unable to read (*b*).

But here we must pause, before we proceed to follow the gradual improvement of this privilege, to inquire what was originally done with an offender to whom it was allowed, by those ecclesiastical authorities who claimed the right of judging him, and in what manner the power of the church, in this respect, was ultimately destroyed. It appears that after a layman was burnt in the hand, a clerk discharged on reading, or a peer without either burning or penalty, he was delivered to the ordinary, to be dealt with according to the ecclesiastical canons (*c*). Upon this, the clerical authorities instituted a kind of purgation, the real object of which was to make him appear innocent, who had been already shown to be guilty, and to restore him to all those capacities, of which his conviction had deprived him (*d*). To effect this, the party himself was required to make oath of his innocence, though before he might have confessed himself guilty. Then twelve compurgators were called, to testify their belief in the falsehood of the charges. Afterwards he brought forward witnesses, completely to establish that innocence, of which he had induced so weighty a presumption. Finally, it was the office of the jury to acquit him; and they seldom failed in their duty (*e*). If, however, from any singular circumstance, they agreed in the justice of the conviction, the culprit was degraded, and compelled to do penance (*f*). As this seldom occurred, and the most daring perjuries were thus perpetually committed, the courts of common law were soon aroused, to abridge the power of these clerical tribunals. They, therefore, sometimes delivered over the privileged of clergy, when his guilt was very atrocious, without allowing him to make purgation; the effect of which proceedings was his perpetual imprisonment, and incapacity to acquire personal, or to enjoy real estate, unless released by his majesty's pardon (*g*).

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(*a*) 1 Edw. 6. c. 12. s. 10.

(*b*) 1 Edw. 6. c. 12. s. 14.

(*c*) Hob. 291. 4 Bla. Com. 368.

(*d*) Hob. 291. 3 P. Wms. 447, 8. 4 Bla. Com. 368.

(*e*) Hob. 291. 3 P. Wms. 447, 8. 4 Bla. Com. 364.

(*f*) Hob. 289. 4 Bla. Com. 364.

(*g*) 3 P. Wms. 448, 9. 4 Bla. Com. 368.

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But the severity of this proceeding almost rendered it useless; and it became absolutely necessary for the legislature to interfere, in order to prevent the contemptible perjuries which this absurd ceremony produced, under the sanction and pretence of religion. This desirable object was effected in the reign of Elizabeth; and the party, after being allowed his clergy, and burnt in the hand, was to be discharged, without any interference of the church to annul his conviction (*a*).

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The clerical process being thus abolished, it was thought proper, at the same time, to empower the temporal judges to inflict a further punishment, where they should regard it as proper. The 18 Eliz. c. 7, empowered them, therefore, to direct the convict to be imprisoned for a year, or any shorter period. But the law on this subject was still in many respects imperfect. Females were still liable to the punishment of death, without any exemption, in all cases of simple felony; because being never eligible to the clerical office, they were not included in any of the extensions of the benefit of clergy. No other proof need be adduced, to show the absurdity of the very foundations of the system (*b*). At length it was enacted, that women convicted of simple larcenies, under the value of 10s. should be punished with burning in the hand and whipping (*c*), exposure in the stocks, or imprisonment for any period less than a year (*d*). And in the reign of William and Mary they were admitted to all the privileges of men, in clergyable felonies, on praying the benefit of the statute (*e*); though they can only once be allowed this means of escaping (*f*). In the same reign, the punishment of burning in the hand was changed for a more visible stigma on the cheek (*g*), but was soon afterwards brought back to the original practice (*h*).

(*a*) 18 Eliz. c. 7. 2 Sess. Cas. 265 to 282. 3 P. Wms. 444, 445, 6.

(*b*) Fost. C. L. 305, 6. 2 Hale, 371, 2.

(*c*) The whipping of women is now abolished by the 1 Geo. 4. c. 57.

(*d*) 21 Jac. 1. c. 6. Fost. 305, 6.

(*e*) 3 & 4 W. & M. c. 9. s. 5. Fost. 306.

(*f*) 4 & 5 W. & M. c. 24. s. 13.

(*g*) 10 & 11 W. 3. c. 23. 3 P. Wms. 451.

(*h*) 5 Ann. c. 6. 3 P. Wms. 451.

Hitherto all laymen, except peers, who, on their conviction, were found unable to read, were liable to suffer death for every clergyable felony. But it was at length discovered, that ignorance, instead of an aggravation, was an excuse for guilt, and that the ability to read was no extenuation of crime (*a*); and, therefore, by 5 Ann, c. 6. the idle ceremony of reading was abolished (*b*), and all those who were before entitled to clergy on reading, were now to be admitted, without any such form to its benefits. At the same time it was sensibly felt, that the branding, which had dwindled into a mere form, and the year's imprisonment, which the judges were empowered to inflict, were very inadequate punishments for many clergyable offences; and, therefore, the court were authorized to commit the offenders to the house of correction, for any time not less than six months, nor exceeding two years, and to double it in case of escaping (*c*). Further alterations have since been made in the penalties consequent upon clergy. The 4 Geo. 1. c. 11. (*d*), and 6 Geo. 1. c. 23, provide, that the court, on the allowance of this benefit, for any larceny, whether grand or petit, or other felonious theft not excluded from the statutable indulgence, may, instead of judgment of burning, in case of men, and whipping, in that of females, direct the offender to be transported for seven years to America, which has been since altered to, any part of his majesty's colonies (*e*). To return within the period was, at the same time, made felony, without benefit of clergy. And by several subsequent provisions, many wise alterations have been made respecting transportation, and the mode of treating offenders while under its sentence (*f*). At length the burning in the hand was entirely done away, and the judges are empowered to sentence the criminal, in its room, and in addition to the former penalties, to a pecuniary fine; or, except in the case of manslaughter, to private whipping, not more than thrice to be inflicted, in the presence of three witnesses (*g*). And this provision has, by the 6 Geo. 4. c. 25.

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(*a*) Fost. 305, 6.

(*b*) Fost. 305, 6. 3 P. Wms. 443, 4.

(*c*) 5 Ann. c. 6. s. 2.

(*d*) See observations on this statute, 3 P. Wms. 490.

(*e*) 19 Geo. 3. c. 74.

(*f*) 16 Geo. 2. c. 15. 8 Geo. 3. c. 15. 19 Geo. 3. c. 74. 31 Geo. 3. c. 46. 24 Geo. 3. sess. 2. c. 56.

(*g*) 19 Geo. 3. c. 74. s. 3.

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s. 2, been applied to all cases of punishment inflicted on persons convicted of clergyable felonies. Provisions have also been made by a recent act (*a*), regulating the punishment of the hulks, and that of transportation of convicts. Regulations have also been made, for the imprisonment and employment of convicts in a penitentiary (*b*). It appears from these several modern regulations, that, as observed by Mr. Justice Foster, we now consider benefit of clergy, or rather the benefit of the statutes, as a relaxation of the rigour of the law, a condescension to the infirmities of the human frame, exempting offending individuals in some cases from the punishment of death, and subjecting them to milder punishment; and, therefore, in the case of clergyable felonies, we now profess to measure the degree of punishment by the real enormity of the offence, and not, as the ignorance and superstition of former times, suggested by a blind respect for sacred persons or sacred functions, nor by an absurd distinction between subject and subject, originally owing to impudent pretension on the one hand, and to mere fanaticism on the other (*c*).

Having thus sketched out the progress of benefit of clergy to our own times, we have now to inquire more particularly, who are, at the present day, entitled to receive it—for what crimes it must be granted—at what time and in what manner it is to be demanded—how it is to be allowed—and what consequences will follow its reception.

What persons are
entitled to the
benefit of clergy.

It may be collected from the preceding statement, that all persons, whether they are able to read or not (*d*), and women as well as men (*e*), are, at the present day, entitled, once, to receive the benefit of clergy, in all crimes where it is allowed; and, instead of being condemned to die, they may be sentenced to any of

(*a*) 5 Geo. 4. c. 84, repealing 16 Geo. 2. c. 15, and 8 Geo. 3. c. 15.

(*b*) 56 Geo. 3. c. 63. 59 Geo. 3. c. 136. See 4 Bla. Com. 371. Montague's Collection of Opinions on the Punishment of Death, vol. ii. where the system

of penitentiary houses is applauded. The provisions of 19 Geo. 3. c. 74, in this respect, expired on the 25th of March, 1802.

(*c*) Fost. 305, 6.

(*d*) Ante, 672.

(*e*) Ante, 673.

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those discretionary penalties to which we have already alluded (*a*). It has, indeed, been supposed that Jews, and other infidels, and heretics who could not by possibility become priests, were not admitted to clergy until the ceremony of reading was abolished (*b*); but it has been urged, that in this case they could not now receive it, as the 5 Ann. c. 6, only dispenses with the necessity of reading in the case of those persons who would, on that proof of their learning, have before been entitled to claim it (*c*). And now, by 6 Geo. 4. c. 25. s. 3, persons in orders have no preference over laymen (*d*). Peers of the realm also, having a voice and a seat in parliament, are still entitled to their discharge, by virtue of 1 Edw. 6. c. 12, without any corporal punishment or indignity whatever, though only for the first time they are convicted (*e*). And this provision has been holden to extend to peeresses (*f*). But when a statute takes away clergy generally, and contains no exceptions or provision in favor of peers or clergy, they are not entitled to the privilege (*g*). And, in strictness of law, the goods both of clergymen and peers are liable to forfeiture, in cases where they are entitled to the benefit of clergy (*h*).

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The benefit of clergy seems never to have extended in this country to high treason, or to have embraced misdemeanors inferior to felony (*i*). For the state, at all times, so far resisted the encroachments of the church as to preserve the guard which the law had thrown round the person of the sovereign; and it seems that there were also some peculiar acts of violence, which were regarded as declarations of open hostility, and, therefore, included within the meaning of treason: as lying in wait on the highway, burning houses, and ravaging and destroying a country (*k*). It

For what crimes
it may be claimed.

(*a*) Ante, 673.

(*b*) 11 Co. 29, b. 2 Hale, 273.

(*c*) 4 Bla. Com. 374.

(*d*) See 2 Hale, 374, 5. 4 Bla. Com. 373.

(*e*) 2 Hale, 276, 7. 4 Bla. Com. 373. 1 Leach, 147, 8.

(*f*) 11 Harg. St. Tr. 262, 3, 4. 1 Leach, 146.

(*g*) 2 Hale, 374.

(*h*) Co. Lit. 391, a. Post, 689.

(*i*) 2 Hale, 326, 7. Hawk.

b. 2. c. 33. s. 20. Staund. P. C.

124, a. 11 Co. 29, b. 2 Inst.

150. 629. 634. 4 Bla. Com.

574. Com. Dig. Justices, Y. 3.

Burn, J. Clergy, II. 3. Wil-

liams, J. Felony, V.

(*k*) 2 Hale, 333. 346. 327.

Fost. 192, 3. Hawk. b. 2. c. 33.

s. 22. 4 Bla. Com. 374.

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was also doubted, whether petit treason was not excluded from clergy (*a*); but the contrary was clearly shown by the statute 25 Edw. 3. st. 3. c. 4, which allows the privilege of clergy in all treasons and felonies, except those affecting his majesty. It is therefore a general rule, that clergy is to be admitted in every description of felony, except where it is taken away by some subsequent legislative provision (*b*). And it is also laid down, that where any later act of parliament takes away clergy in a case, where by the statute of Edward it would have been admitted, it only applies to such parties as are expressly named in the act, and is to be taken strictly (*c*). And, therefore, where clergy is taken away from the principal, it is not necessarily taken from the accessory, either before or after the fact, unless he be particularly included in the words of the statute (*d*). So if it be taken from the accessory alone, it will not exclude the principal (*e*). Nor, if the accessory before the offence be excluded, will it affect the accessory after (*f*). And where a statute creates a new felony generally, without mentioning clergy, it will be allowed to the offender (*g*). So if it only exclude it in certain circumstances, it will be allowed in every other circumstance; as if it denies it after conviction by verdict, it will not be refused on standing mute, though this now amounts to a conviction (*h*). But where the act takes it away from the offence generally, there it can in no case be admitted (*i*).

[677] We come now to consider what offences have been ousted of clergy by particular statutes. The crime of *petit treason* was first excluded from the benefit of clergy by the 23 Hen. 8. c. 1, which denied it to those who were convicted of it by verdict or confession; but made no provision for standing mute, challenging

(*a*) Hawk. b. 2. c. 33. s. 21.
(*b*) 2 Hale, 330. 335. Hawk.
b. 2. c. 33. s. 23. 4 Bla. Com.
373. Williams, J. Felony, V.
(*c*) 2 Hale, 335. Hawk. b. 2.
c. 33. s. 26. Williams, J. Fe-
lony, V.
(*d*) 11 Co. 37. 2 Hale, 335. 6.
Fost. 355. 4 Bla. Com. 373.
Burn, J. Clergy, II. 3.
(*e*) 11 Co. 29 to 36. Sav. 46.

Hawk. b. 2. c. 33. s. 26.
(*f*) 2 Hale, 335.
(*g*) 2 Hale, 335. Bac. Abr.
Felony, G. Burn, J. Clergy,
II. 3.
(*h*) 2 Hale, 335. Hawk. b. 2.
c. 33. s. 23. Fost. 358. Burn, J.
Clergy, II. 3.
(*i*) Fost. 358. Com. Dig. Jus-
tices, Y. 2.

peremptorily, or refusing to answer. Those cases were, therefore, included in the 25 Hen. 8. c. 3, and both acts were, by the 32 Hen. 8. c. 3, made perpetual. These provisions were, in effect, repealed by the 1 Edw. 6. c. 12, which restored clergy in all cases, except those therein mentioned, in which it was grantable before the beginning of the reign of Henry the Eighth; but, according to some opinions, were revived by the 5 & 6 Edw. 6. (*a*). It is, however, strongly contended, that no such revival ever really was in contemplation; and that the true ground on which clergy is denied to persons convicted of this crime is, that it is included in the terms "wilful murder," as excluded from clergy by the 1 Edw. 6.; and of which indeed it is only an atrocious species (*b*). At all events, it seems that the only mode by which clergymen can be excluded from this benefit, in case of petit treason, is by including it in the terms "wilful murder;" for the privileges of persons actually in orders are excepted in all the statutes of Henry the Eighth, and are only set aside in the 1 Edw. 6, to which we have already alluded (*c*). It is certain, however, that accessaries were not ousted of clergy by any of these conflicting statutes. But, by the 4 & 5 Ph. & M. c. 4, the accessaries before the fact, in this and many other felonies previously excluded from clergy, were placed on the same footing with principals. And all the difficulties that arose from the principle which we have already stated, that where the statutes only spoke of conviction, they did not oust those of clergy who stood mute, challenged more than the number allowed them, or refused to answer, were obviated by the 3 & 4 W. & M. c. 9, which, in all cases, makes those circumstances, in this respect, equivalent to a conviction.

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Murder, with malice prepense, is also excluded from clergy by the statutes of Henry the Eighth (*d*); and, whether those statutes were revived, or entirely repealed, it is specifically named in the 1 Edw. 6. c. 12, and has ever since been the object of capital sentence. In this case also, accessaries before the fact are de-

(*a*) 11 Co. 29.

(*b*) 1 Hale, 340. Fost. 330.
Hawk. b. 2. c. 33. s. 52.

(*c*) Fost. 330. Com. Dig. Jus-

tices, Y. 4.

(*d*) 23 Hen. 8. c. 1. 25 Hen. 8.
c. 3. 2 Hale, 374.

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prived of clergy by the statutes of Philip and Mary. And the 1 Jac. 1. c. 8, makes it felony, without benefit of clergy, to stab another having no weapon previously drawn, but does not extend to abettors.

The principal offender attainted or convicted of *breaking any house* by day or by night, any person being therein, and thereby put in fear, was deprived of the benefit of clergy by 1 Edw. 6. c. 12. s. 10, in all cases, except the challenging peremptorily more than twenty, which *casus omissus* is provided for in this, as in other cases, by the act of William and Mary (*a*). And a nocturnal breaking into a booth or tent, in a fair or market, any person being therein, though not put in fear, was reduced to the same condition (*b*). And, at length, every description of *burglary*, whether any one were within the house or not, was made liable to the same penalties (*c*); and accessories before the fact were deprived of the benefit which had before been taken away from the principal (*d*). But by 4 Geo. 4. c. 46. s. 2, the offence of breaking into any place to destroy woollen, silk, linen, or cotton goods, &c. in the loom or frame-work, &c. is clergyable.

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Arson, or the wilful burning of the house of another, is not one of the crimes ousted of clergy by the 1 Edw. 6.; and, therefore, it has been contended that this can only be done by virtue of the statutes of Henry the Eighth, which we have regarded as effectually repealed (*e*). The statute of Philip and Mary (*f*), however, expressly takes away this benefit from accessories before the fact; and on this provision some very able authorities rest the ground, by which it was supposed to be taken away from principals (*g*). To this conclusion Mr. Justice Foster comes, after a long and learned discussion of the principles and meaning of the statutes. But this position appears to be decidedly at variance with the doctrine laid down, that all statutes ousting clergy must

(*a*) 3 & 4 W. & M. c. 9. s. 2. 521. See post, vol. iii.
2 East, P. C. 523.

(*b*) 5 & 6 Edw. 6. c. 9.

(*c*) 18 Eliz. c. 7.

(*d*) 3 & 4 W. & M. c. 9. 2 East,
P. C. 523. Russ. & Ry. C. C.

(*e*) 11 Co. 30.

(*f*) 4 & 5 P. & M. c. 4.

(*g*) Fost. 333, 4, 5. 2 Hale,

347. Com. Dig. Justices, Y. 5.

be taken strictly, so that the exclusion of one party shall not affect another, even were he more deeply guilty (*a*). Perhaps it may be put upon another ground than those stated by the learned judge, viz. that this crime was not clergyable at common law, because it was regarded as an act of open hostility, and as partaking of the nature of treason (*b*). But all doubts upon this point have been removed by a modern statute (*c*).

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Robbery, or the forcible taking of property from the person, by putting in fear, was, when committed in or near an highway, excluded from clergy by the 1 Edw. 6. c. 12. s. 10, except when the culprit challenged more than twenty of the jurymen. The cases which were thus left unaffected, the 3 & 4 W. & M. c. 9. brought under the same penalty; for, by that statute, robbery is to be punished with death, wherever committed, and in whatever way the offender is substantially convicted (*d*). In order to oust him of clergy, there must be an actual taking, the party injured must be put in fear, and the theft must be committed in his presence (*e*). Where these are combined, accessaries before the fact, as well as principals, are, in all cases, excluded from clergy (*f*).

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Robbery, by breaking into a dwelling-house, any person being therein, and put in fear, is excluded from clergy by the 1 Edw. 6. c. 22. s. 10. By the 4 & 5 Ph. & M. c. 4, accessaries before the fact to such a breaking, accompanied with larceny, are also excluded. Under this act, however, there was still a necessity, not only for some one to be in the house, but to be put in fear. But the 5 & 6 Edw. 6. c. 9, excludes from clergy the person who robs in a house, booth, or tent, the inhabitant or any part of his family being there, whether they are waking or sleeping. And the 39 Eliz. c. 15, makes it felony, without benefit of clergy, to take property to the value of 5s. in any dwelling-house, although

(*a*) Ante, 260. 676.

(*b*) Ante, 675, 6. 4 Bla. Com. 374. 2 Hale, 333.

(*c*) 9 Geo. 1. c. 22. 2 East, P. C. 1017. 1031. 1032. See post, vol. iii. 1123, for further as to Arson.

(*d*) 2 East, P. C. 785. Ante,

678, n. (*d*). Russ. & Ry. C. C. 9, 10.

(*e*) 1 Hale, 532, 3. 4 Bla. Com. 243. See post, vol. iii. 806.

(*f*) 4 & 5 Ph. & M. c. 4. 3 & 4 W. & M. c. 9. s. 1. 1 Hale, 537. See post, vol. iii. 941 *a*.

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no person is within at the time the felony is committed. And the 9 & 10 W. & M. c. 9. s. 1, takes clergy from any person taking goods in a dwelling-house, where any one is at the time, of whatever value; and if no one is there at the time, then if the property amounts to the value of 5s. as well from accessories before the fact, as from those actually engaged in the felony.

Grand larceny is also, in several instances of peculiar aggravation, excluded from clergy. Thus, stealing privately from the person, without the knowledge of the party on whom the theft is committed, was, by the 8 Eliz. c. 4, rendered thus highly penal. But this statute makes no mention of accessories either before or after the fact, and they might therefore be admitted to the benefit of the statute (*a*). Nor could any principals in the first degree, upon such an occasion, be ousted of the privilege, for the hand that stole was alone to be affected by this provision (*b*). Several decisions have very nicely marked out the situations to which the act applies (*c*); but it is unnecessary to state them, as it has been holden to be repealed by the 48 Geo. 3. c. 129, which provides for the crime a lighter and more suitable penalty (*d*).

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Horse-stealing is one of the crimes excluded from clergy by the 1 Edw. 6. as to principals; and by the 31 Eliz. c. 12. s. 5, all accessories both before and after the fact, are placed in the same condition. But this last provision has been holden to extend only to those who were regarded as accessories at the time the act was framed, and not to those who have been subsequently declared thus to be partakers in the guilt; so that though persons knowingly receiving stolen property have been made accessories, yet this has no antecedent reference, and a party receiving a stolen horse is not ousted of clergy (*e*). *Stealing sheep, or other cattle*, has also been made felony, without benefit of clergy (*f*); which term, "other cattle," has been subsequently explained, as intending bulls, cows, oxen, steers, bullocks, heifers, calves and lambs,

(*a*) 1 Leach, 8. 1 Hale, 529.
Fost. 356. Hawk. b. 2. c. 33.
s. 59. Com. Dig. Justices, Y. 9.
(*b*) 1 Leach, 8.
(*c*) 1 Leach, 240. 241. 443.

495. 2 Leach, 783.

(*d*) 1 Leach, 444, n. a.

(*e*) Fost. 372, 3. Com. Dig.
Y. 11. See post, vol. iii. 934 a.

(*f*) 14 Geo. 2. c. 6.

and no other animals (*a*). Aiders and assisters are also specifically named in these provisions.

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Stealing cloth from the tenter in the night time, and embezzling naval stores to the value of 20s., were placed beyond the benefit of clergy in the reign of Charles the Second (*b*). But by the 4 Geo. 4. c. 53, the benefit of clergy is restored (*c*). Taking away manufactures from *bleaching-grounds*, was visited with a similar penalty, both as to agents and procurers (*d*); but, by 51 Geo. 3. c. 41. s. 2, clergy is restored (*e*). The same provision was soon applied to *stealing* to the value of more than 40s. upon any *navigable river* (*f*); but, by 4 Geo. 4. c. 53, clergy is restored (*g*). And stealing from vessels in distress, and plundering them when wrecked, were, from the cruelty they exhibited, and the frequency with which they were practised on the coast, excluded from all clergyable benefits (*h*). Stealing letters from the mail, or any carriage employed by the post-office or out of the post-office, &c. is felony without benefit of clergy (*i*).

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By the 10 & 11 W. 3. c. 23, any person who, in any *shop, warehouse, coach-house, or stable*, privately steals goods, wares, or merchandizes, to the value of 40s. was excluded from the benefit of clergy. But, by 4 Geo. 4. c. 53, the benefit of clergy is restored (*k*).

Commerce being thus protected, a law almost equally severe was enacted, to preserve the *habitation* from the depredations of the desperate. By the 12 Ann. c. 9, stealing to the value of 40s. in a dwelling-house or out-house adjoining, though without either breaking or concealment, and whether any person be within or not, is felony, without clergy, in all the agents and assisters.

(*a*) 15 Geo. 2. c. 24. See post, vol. iii. 935.

(*b*) 22 Car. 2. c. 5. s. 3. 39 & 40 Geo. 3. c. 89.

(*c*) See post, vol. iii. 936 *a*.

(*d*) 18 Geo. 2. c. 27.

(*e*) See post, vol. iii. 936 *a*.

(*f*) 24 Geo. 2. c. 45.

(*g*) See post, vol. iii. 939.

(*h*) 12 Ann. st. 2. c. 18. 26 Geo. 2. c. 19. Post, vol. iii. 936.

(*i*) 7 Geo. 3. c. 50. 52 Geo. 3. c. 143. Post, vol. iii. 935. 935 *a*.

(*k*) See post, vol. iii. 941. The act repeals 1 Geo. 4. c. 117, as to clergy.

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From this provision, however, apprentices under the age of fifteen years, who rob their masters, are expressly excepted.

Sacrilege was one of those crimes which, at common law, were not admitted to clergy, at least it was in the discretion of the ordinary to refuse it to the party convicted (*a*). At all events, it was precluded from this advantage by 1 Edw. 6. c. 12. s. 10, in all cases except challenging more than twenty, which was supplied by the statute of William and Mary (*b*). But it does not seem that the accessories to this crime are excluded from clergy, except the offence amount to burglary, or the rule of common law be still regarded as prevailing.

Rapes (*c*), and *unnatural offences* (*d*), are severally excluded from clergy. The benefit of clergy is restored in cases of forcible marriages (*e*).

The increase of the national debt and the national commerce, and the consequent multiplication of all paper securities, by which greater temptations are held out to the commission of forgery, have induced the legislature to declare this crime, felony without benefit of clergy, by a variety of statutes (*f*).

[685] Besides these offences, there are many others which have been created by statute, and at the same time ousted of clergy. To enumerate all these, with the constructions that have been put upon them, would be entering too minutely into the law of crimes and punishments itself, for our present design (*g*). We will, therefore, only observe, in general, that where clergy is taken away from the *offence* itself, as in case of murder, robbery, burglary, rape, and unnatural offences, a principal in the second degree being present, aiding and abetting, is also excluded; but where

(*a*) 2 Hale, 333. Hawk. b. 2. c. 33. s. 77.

(*b*) 3 & 4 W. & M. c. 9.

(*c*) 18 Eliz. c. 7.

(*d*) 25 Hen. 8. c. 6. 5 Eliz. c. 17.

(*e*) 1 Geo. 4. c. 115, repealing 39 Eliz. c. 9.

(*f*) As to the subject of for-

gery in general, and the cases in which the benefit of clergy is taken away, see post, vol. iii. 1023 to 1035.

(*g*) See Cro. C. C. 8th edit. 538 to 556, alphabetical Table of Felonies, with and without Clergy. Russell, on Crimes, tit. Benefit of Clergy.

the *person* committing the crime is specifically named, as in the case of stabbing, aiders and abettors are not included (*a*).

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BE CLAIMED.

As the marine law did not allow of clergy in any case, under the 28th Hen. 8. c. 15, the practice of the admiralty courts leaning to mercy rather than extreme rigour, was, till very lately, to direct the entire acquittal and discharge of an offender convicted before them, of an offence which, if it had been committed on shore, would have been clergyable (*b*). So that if a defendant were indicted of murder, and on the trial it appeared to be only manslaughter, he was altogether acquitted (*c*). But now, by the 39 Geo. 3. c. 37, all marine felonies are to be tried and adjudged by the same rules as if they had occurred on shore; and if any person be indicted for murder, he may be convicted of manslaughter, admitted to clergy in like manner, and be sentenced to the same punishment, as in any court of ordinary criminal jurisdiction.

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By the ancient common law, when the mode of allowing the benefit of clergy was by the ordinary demanding the party accused to be delivered over to the spiritual authorities, this was frequently done soon after the arrest, or before any plea to the indictment (*d*). But after the statute of Westminster the First, c. 2, it became the practice to hold an inquisition respecting the right of the prisoner to clergy, and his guilt or innocence, before the demand was complied with (*e*). At length it was considered, that it would be more beneficial to the prisoner not to allow clergy until after his conviction, by which means he obtained the benefit of a trial, and the chance of an entire acquittal (*f*). And it is now, therefore, the constant practice to allow it after verdict, and before the delivery of the sentence (*g*). But if, through any mistake, judgment of death were pronounced, it would be allowed

At what time
clergy may be
applied for.

(*a*) 1 Hale, 529. 537. 2 Hale, 359. Fost. 356, 7, 8, id. Preface, V. 4 Bla. Com. 373. Ante, 260. 679.

(*b*) Fost. 288, 9. Moor, 746. 4 Bla. Com. 374, 5.

(*c*) Fost. 288, 9.

(*d*) 2 Inst. 164. 2 Hale, 277.

Burn, J. Clergy, II. 4. Williams, J. Felony, V.

(*e*) 2 Inst. 164. 2 Hale, 378.

(*f*) 2 Inst. 164. 2 Hale, 239.

Burn, J. Clergy, II. 4. Williams, J. Felony, V.

(*g*) Id. *ibid*.

AT WHAT TIME after attainder, and even at the very scaffold (*a*). And if the PRAYED FOR. offender stand obstinately mute, it is also to be allowed after sentence, anciently of penance, and now of death, at the discretion of the judges (*b*). And if a prisoner does not pray his clergy in a clergyable felony, and sentence of death is passed upon him, he may be brought up at a subsequent assizes, and have his clergy (*c*).

How benefit of clergy is to be prayed, and proceedings thereon.

[687] The usual form of granting the benefit of clergy is, for the clerk to ask the prisoner what he has to say why judgment of death should not be pronounced upon him, and then to desire him to fall on his knees, and pray the benefit of the statute; which he does, and the court grants it to him without delay (*d*). This form seems to arise from the terms of the 5 Ann. c. 6, which abolished the necessity of reading, and allowed clergy to all who should pray the benefit of that act. But it cannot be doubted, that if the prisoner should obstinately refuse to pray it, the court would *ex debito justitiæ* allow it (*e*). When a peer prays his clergy, so as to be discharged without any further punishment, to which we have seen he is entitled, he specifically avers that he is a peer of the kingdom, having a place and voice in parliament, and prays the benefit of the 1 Edw. 6. c. 12 (*f*), which is granted him, and he is at the same time commonly reminded that he cannot have it upon a second conviction (*g*). The judgment entered on this occasion is, “and therefore it is considered that he be set at liberty, according to the form of the statute in such case made and provided” (*h*). Before the 6 Geo. 4. c. 25. s. 3, when it was prayed by a clerk in holy orders, that fact was alleged, as entitling him to an immediate discharge; and an entry to that effect was made on the record (*i*).

(*a*) 2 Dyer, 205, a. Com. Dig. Justices, Y. 16.

(*b*) 2 Hale, 239.

(*c*) 1 Ry. & Mo. C. C. 21.

(*d*) 4 Bla. Com. 370, n. 2.

(*e*) 2 Hale, 321. 378. 381. Com. Dig. Justices, Y. 16. Burn, J. Clergy, II. 4. Williams, J. Felony, V. acc. Christian, 4 Bla. Com. 370, n. 2. Counsel's ar-

gument, 2 Leach, 1103, contra; and in cases of felony it must be prayed, 3 M. & S. 549, 50.

(*f*) 5 Harg. St. 180. 2 Hale, 396.

(*g*) 5 Harg. St. Tr. 180.

(*h*) 2 Hale, 396. See form, 2 Hale, 296. Post, last vol.

(*i*) See form, 2 Hale, 396. Post, last vol.

But now clerks in holy orders are, by the recent act, placed on How PRAYED,
the same footing with other persons.

On the benefit of clergy being demanded by a common person, COUNTER PLEA.
who can only once receive it, the crown may file a counter plea, stating that he has had it before, in order to bar his present claim (*a*). So when a party is indicted in one county for stealing goods, feloniously taken by him by robbery in another county, if he pray clergy, it is said that it must be answered by counterplea of the robbery (*b*). In this plea, the former indictment need not be stated with verbal precision (*c*). Nor can the prisoner take advantage of any defect in the proceedings, on which he has been previously convicted (*d*). But the court will allow him until the ensuing session, to frame his replication, if they think proper (*e*). In this he may reply nul tiel record, and deny that he is the person named in the plea of the prosecutor (*f*). Upon this issue will be joined, and a jury returned instantler to try it, any of whom the prisoner may challenge (*g*). The jury are then to be sworn to try the question of identity in issue (*h*). Of the former allowance of clergy, the certificate of the clerk of the crown or of the peace will be sufficient evidence (*i*). And if the jury find against the defendant, sentence of death must be pronounced against him, and the entry upon the record will be, “And because by the inspection of the record before our lord the king sent hither, it appears that I. S. was before indicted, for that he, &c. (setting forth the effect of the proceedings,) and that he is the same person, therefore it is considered that he be not allowed the privilege of clergy, but be hanged by the neck until he shall be dead” (*k*).

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But where no counterplea is filed, clergy is allowed of course,

(*a*) See 6 Geo. 4. c. 25. s. 4.
See form, 1 Leach, 402, 3, 4.
Cro. C. A. 124. Cro. C. C. 387.
Post, last vol. Stark. 722.

(*b*) 2 East, P. C. 777.

(*c*) 1 Leach, 405.

(*d*) 1 Leach, 401.

(*e*) 1 Leach, 477.

(*f*) 1 Leach, 404.

(*g*) 1 Leach, 404.

(*h*) See form of Oath, 1 Leach, 404. Post, last vol.

(*i*) 3 W. & M. c. 9. s. 7. See form of Certificate, Stark. 724. Post, last vol.

(*k*) 2 Hale, 396. See form, 2 Hale, 396. Post, last vol.

COUNTER PLEA. sentence for the inferior punishment is passed, and an entry is made on the roll of the whole of the proceedings (*a*). After this the clerk of the crown, of the peace, or of assize, is bound, at the request of the prosecutor, or any person on his majesty's behalf, to certify a transcript, briefly setting forth the tenor of the indictment, the conviction, and the allowance of clergy; which, we have seen, will be evidence against the prisoner, if ever he should again demand it (*b*).

[689] We have already considered, in some degree, the punishments which may be inflicted upon a defendant on being allowed the benefit of clergy; and the more minute consideration of them will be more properly included in a general view of the punishments which our law has prescribed for the guilty. These are rather the concomitants and conditions, than the consequences of clergy. Its principal effect on the felon relates to his restoration to credit as a man, and competence as a witness. This benefit, however, does not prevent the loss of his goods, which are forfeited to the crown, and being once vested in the king, cannot be restored to the offender (*c*). Nor is he, at all, regarded as restored to his rights, until he has actually suffered all the penalties to which he is liable, and which, as burning in the hand was formerly, are conditions precedent to his pardon (*d*). So that it is not a sufficient answer to an objection to his competency as a witness, to produce the record by which it appears he was admitted to his clergy, but it must be shown that he has suffered the punishment introduced, instead of burning in the hand, or the antecedent process of purgation (*e*). From this observation peers are, of course, excepted, as they are entitled to their discharge without any further infliction (*f*); though they, like the laity, forfeit their goods to the king on their conviction (*g*). And the king can, in

(*a*) See form, 2 Hale, 395. 4 Bla. Com. App. XIV. Post, last vol.

(*b*) 3 W. & M. c. 9. s. 7. See form, Stark. 724. Post, last vol.

(*c*) 2 Hale, 383. 4 Bla. Com. 373.

(*d*) 3 P. Wms. 487. 490. 4 Bla. Com. 374.

(*e*) 5 Harg. St. Tr. 172. 3 P. Wms. 487. 490.

(*f*) 2 Hale, 389. 390. 3 P. Wms. 487. 4 Bla. Com. 374. Ante, 670. 675.

(*g*) Ante, 675.

any other case, remit the sentence, and restore the offenders to credit, by an extension of his royal mercy (*a*).

CONSEQUENCES
OF
ALLOWANCE OF
CLERGY.

It is, however, sufficiently clear, that the admission to clergy, and the consequent endurance of the penalties inflicted by law, completely restore the defendant to competency as a witness, and operate, in every respect, as a statute pardon (*b*). This has arisen from a liberal construction of the words of 18 Eliz. c. 7, that upon burning in the hand "he shall be delivered;"—intending not only from confinement, but all further consequences of conviction (*c*). He is, therefore, restored to the profits of his lands, made capable of acquiring and enjoying personal estate, and is to be considered as having expiated his crime, by the penalties with which he has been visited (*d*). But he is not protected from punishment for felony committed before the allowance of his clergy (*e*). But, before the passing of this act, where the prisoner was convicted of manslaughter in February, 1819, and had his clergy, and in April following he was indicted for the murder of another person, but again found guilty of manslaughter, the stroke, in both cases, being on the same day, and at the same time, it was held that the former allowance of clergy protected him against any punishment on the second verdict (*f*). He is now no longer a felon. And if any one, adverting to his former conduct, should charge him with being so, he may recover satisfaction in an action for damages (*g*). It has been held, however, that a clergyman convicted of manslaughter at common law, may be libelled against in the spiritual court, in order to a deprivation, notwithstanding the allowance of clergy (*h*); and an attorney, in the same situation, may be struck off the rolls (*i*), because, in both of these cases, the conviction renders the offenders unfit to exercise their professions.

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(*a*) 5 Co. 110. 2 Hale, 389.
3 P. Wms. 488.

(*b*) 5 Harg. St. Tr. 172. 5 Co.
110. 2 Hale, 389. 4 Bla. Com.
374.

(*c*) 5 Harg. St. Tr. 172.

(*d*) 2 Hale, 389. 4 Bla. Com.
374.

(*e*) 6 Geo. 4. c. 25. s. 4. See
18 Eliz. c. 4. s. 14. Id. c. 7. s. 5.

(*f*) Russ. & Ry. C. C. 388.

(*g*) Hob. 67. 81. 294. Hawk.
b. 2. c. 33. s. 132. Burn, J.
Clergy, II. 5.

(*h*) Cro. Jac. 438.

(*i*) Tidd's Prac. 5th edit. 82.

Other proceedings in misdemeanors.

This privilege of benefit of clergy applies, of course, only to cases in which the punishment was originally capital, and not to misdemeanors (*a*). We must now, therefore, return to inferior offences, where several other incidental proceedings may become necessary, before the pronouncing of the judgment.

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After a conviction of a parish for neglecting to repair a highway, on an indictment removed into the King's Bench by certiorari, a rule may be obtained by the prosecutor, calling on the defendants to show cause why a specific fine should not be imposed on them; and the defendants may enlarge the rule, calling upon the trustees of the roads to show cause why it should not be apportioned between themselves and the parishioners (*b*). And on an inspection of the accounts of the latter appearing to be expedient, the court will enlarge the rule, to afford an opportunity for that purpose (*c*). But this application of the defendants to enlarge the rule, must be founded on an affidavit that the road has been sufficiently repaired since the conviction, and is likely so to continue (*d*). If an inferior court neglect to give judgment, it may be compelled so to do by a writ of mandamus (*e*).

Affidavits, &c. in mitigation, &c.

When the defendant has been convicted of a misdemeanor in the King's Bench, the prosecutor's solicitor gives the defendant's clerk in court, and solicitor, notice of motion for the judgment of the court on the defendant (*f*); or the defendant's solicitor may give the like notice to the prosecutor, who may on grounds have the time for giving judgment enlarged (*g*); and as the prosecutor is only permitted on the trial to produce such of his evidence as is sufficient to convict the defendant, therefore, upon this motion, affidavits may be read in aggravation of the offence (*h*): and on the defendant's part in mitigation, as the defendant, after conviction, may by affidavit lessen the degree of his guilt (*i*). Each party must, therefore, then come prepared with

(*a*) Ante, 675.

(*b*) 2 East, 413. 1 Bla. Rep. 295. 602. 3 Smith's Rep. 575.

(*c*) 2 East, 414.

(*d*) 3 Smith's Rep. 575.

(*e*) 7 T. R. 467.

(*f*) See Hand's Prac. 13.

(*g*) Hand's Prac. 13. Rep. temp. Hardw. 273, 9.

(*h*) Hand's Prac. 13.

(*i*) Hand's Prac. 14.

affidavits, disclosing all the circumstances of the case; taking care, however, not to attempt to dispute the propriety of the verdict (*a*). The defendant is usually brought up on a particular day appointed in the term for giving judgments, when the court may hear any matter in aggravation or extenuation of the offence (*b*). When the defendant has been convicted in the usual way by verdict, his affidavits in mitigation are first read, then the prosecutor's affidavits in aggravation, and then the defendant, or his counsel, is allowed to address the court, in order to lessen the apparent extent of his criminality, and procure a milder sentence; and then the prosecutor's counsel are heard in reply (*c*). When, on the other hand, the defendant suffers judgment by default, the prosecutor's affidavits are first read, then the defendant's; after which the counsel for the prosecution is heard, and then the counsel for the defendant (*d*). Where there are no affidavits, the defendant's counsel begins, and then the prosecutor's counsel (*e*). Both parties ought to have their affidavits prepared for inspection in the first instance (*f*) because the court will not, in general, receive the statement of one party first, and then admit the other to answer it, as that practice would be a perpetual temptation to perjury (*g*). But where the matter disclosed by the affidavits on either side is such, as the other party could not be supposed to be prepared to answer, the court will allow time to frame a reply (*h*). On this occasion, the prosecutor will be at liberty, in his affidavits, to bring forward any acts of the defendant, as the publication of another libel on the same prosecutor, subsequent to his conviction, by way of aggravating his punishment, even though they might be made the subject of a distinct prosecution; but

AFFIDAVITS,
&c.
IN MITIGATION,
&c.

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(*a*) Hand's Prac. 14. Where a defendant was convicted of a libel, which, on the face of it, purported to have been written in consequence of his having read a statement of facts in different newspapers, an affidavit, that he did read such statements in such newspapers, may be received in mitigation of punishment; but an affidavit that the facts contained in these statements were true, is not ad-

missible, 4 B. & A. 314.

(*b*) 3 T. R. 432.

(*c*) 2 T. R. 683, 4. Tidd, 8th edit. 513. Hand's Prac. 14, 15.

(*d*) 2 T. R. 684. Tidd, 8th edit. 513. Hand's Prac. 15.

(*e*) Tidd, 8th edit. 513. Hand's Prac. 15.

(*f*) 4 T. R. 487.

(*g*) 4 T. R. 488.

(*h*) Id. ib. 3 T. R. 432. Hand's Prac. 14.

AFFIDAVITS,
&c.
IN MITIGATION,
&c.

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the court will take care not to inflict a greater punishment than the principal offence itself warrants (*a*). An affidavit of what third persons have said, who might have sworn themselves, and that they refused so to do, cannot be admitted, unless it appears that they were under the influence or controul of the defendant (*b*). It seems, however, that such an affidavit may be received, if it is sworn that the original witnesses were prevented from making affidavit, by the interference of the culprit (*c*); and any matter, which is the consequence of the crime, may be stated in aggravation; as otherwise every prosecutor would be compelled, by stating every fact, to make his indictment as long as his evidence (*d*). On the part of the defendant, it is to be observed, that if one of several be acquitted, his affidavit may be afterwards received in mitigation of the guilt of his associates (*e*); and, where one of several defendants is less criminal than the others, the better course appears for him to file separate affidavits, as the court may, in cases where the punishment is discretionary, give a less severe sentence against him than his fellows (*f*).

The proceedings of this day being closed, the court, in case of misdemeanors, usually take some days to consider the punishment, which, under all the circumstances of the case, shall be awarded. During this interval, it is ordered that the defendant stand committed, unless the prosecutor consent to his remaining out on bail (*g*). If, indeed, any objection has been taken to the proceedings, so as to render it doubtful whether any sentence can be passed at all, he may be suffered to depart (*h*).

It is in this stage of prosecutions for misdemeanors, that the defendant, upon the recommendation of the court, to avoid the judgment, often consents to go before the master; that is, to refer the whole of the matter to him, and comply with what he

(*a*) 3 T. R. 432. 1 Stra. 140.
As to the practice of admitting
proof of other words in an ac-
tion of slander, see Peake's Rep.
125. 22. 166. 1 Campb. 48, 9.

(*b*) 2 East, 357. 6 T. R. 294,
295.

(*c*) 2 T. R. 203, in notis.

(*d*) 1 Stra. 139, 140.

(*e*) 6 T. R. 627.

(*f*) 2 Burr. 1027.

(*g*) 1 East, 159. 4 Burr. 2527.
2539. 2545. Hand's Prac. 15,
16.

(*h*) 11 Harg. St. Tr. 290.

shall think fit to direct the parties to do (a). When that is the case, his appointment must be obtained on the rule, which the clerk of the rules will draw up on the occasion, and a copy served by the prosecutor's solicitors, on the defendant's clerk in court, or attorney; upon this the solicitors attend the appointment, and deliver the master the briefs and affidavits, which may have been made in aggravation or excuse; which he will take into consideration, together with any other affidavits or matters the parties' solicitors may think proper to lay before him; after which he will deliver his opinion to the solicitors on the matter, and with that it is usual for the defendant to comply, as otherwise it is said, the court will proceed to pass their sentence on him (b). In these cases the master frequently directs the defendant to pay the costs, and make the prosecutor some specific compensation, either by apology or otherwise (c); and when he directs the defendant to pay the prosecutor's costs, the prosecutor's solicitor makes out his bill, and procures and serves the master's appointment on the rule to tax them, and then attends him with the bill, when the master will tax the costs, and the defendant commonly pays them (d). If the defendant does not comply with the decision of the master, an attachment may be issued, upon which he may be imprisoned, and will not, as we have seen, be entitled to his discharge as an insolvent debtor (e).

AFFIDAVITS,
&c.
IN MITIGATION,
&c.

(a) Hand's Prac. K. B. 16. 28. Hand's Prac. 16.
2 M. & S. 201. 13 East, 190. (d) Hand's Prac. 16, 17.
(b) Hand's Prac. 16. (e) 4 Burr. 2142. 2 M. & S.
(c) 13 East, 190. 2 M. & S. 201, acc. 13 East, 190, cont.

CHAPTER XVI.

OF THE JUDGMENT, AND ITS INCIDENTS (a).

When the defendants must be in court at the time judgment is given against them.

WHEN any corporal punishment is to be inflicted on the defendant, it is absolutely necessary that he should be personally before the court at the time of pronouncing the sentence (b). But where a pecuniary penalty only can be awarded, judgment may be given in his absence, if a clerk in court will undertake for the fine, and the court think fit to dispense with his attendance (c). And one reason of this distinction is, that a *capias pro fine* may be issued, to take him in case he refuse to pay the sum imposed on him, though it is said that there can be no process after judgment to bring him in, in order to set him in the pillory, or to visit him with any corporal infliction (d). But the chief ground for this practice is, that the example of defendants, who have been guilty of misdemeanors of a gross and public kind, being brought up for the animadversion of the court, and the open denunciation of punishment, may tend to deter others from the commission of similar offences (e). And, therefore, where the judgment may probably be of a corporal nature, or the offence is of a gross and public nature, the court, who may in all cases act in this respect according to their discretion, will insist on the

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(b) 1 Ld. Raym. 267. 1 Salk. 56. 400. Loft, 400. Hawk. b. 2. c. 48. s. 17. Skin. 684. Com. Dig. Indictment, N. Williams, J. Judgment. 2 Hale, 401. Williams, J. Judgment. In case of misdemeanor or new trial, 4 Barn. & Cres. 329.
 (c) 1 Salk. 55, 6. Hawk. b. 2. c. 48. s. 17. Com. Dig. Indictment, N. Williams, J. Judgment.
 (d) 1 Salk. 56. 400. 1 Lord Raym. 267. Com. Dig. Indictment, N. *Sed quære*.
 (e) 3 Burr. 1786, 7.

(a) As to the judgment in criminal cases in general, see 2 Hale, 391 to 406. Hawk. b. 2. c. 48, per totum. 4 Bla. Com. 375 to 380. Com. Dig. Indictment, N. Williams, J. Judgment. The judgment is the conviction, 4 M. & S. 72, 3.

appearance of the offender, even though a clerk assents to answer for the fine (*a*). And where he is committed to prison, it ought to appear upon the record, that he was present at the time of committal (*b*). So when judgment has been once pronounced on a traitor, and execution awarded against him, which is subsequently countermanded, so that he is not put to death at the time specified, and part of the ensuing term has elapsed, execution cannot afterwards be awarded, without bringing him again to the bar in person (*c*). But where the object of the prosecution is to remove a nuisance, or repair a road, to which the fine is to be applied, and is often in the nature of a mere trial of right, the defendant may obtain a rule to show cause, why his personal appearance should not be dispensed with, on his agent's engaging to pay such fine as the court shall think proper to impose (*d*). And if the other party agree, or, on argument, the judges think the request reasonable, they will make the rule absolute, and give their judgment in the defendant's absence.

WHEN
DEFENDANT
MUST BE
IN COURT.

The judges who are to pass sentence, ought not to deliver their opinions before the case comes immediately before them; because their impartiality will by that means be affected, and they may feel an anxiety to support the opinions they have thus prematurely exposed (*e*).

It seems to be doubted whether justices of assize or nisi prius had any power, at common law, to pass sentence upon a prisoner convicted before them (*f*). And it is certain that they had no authority to do so, upon an indictment sent down from the King's Bench, to be tried by writ of nisi prius; because the transcript only was sent, their commission ceased with the verdict, and their only remaining duty was to return, on the postea, the result of the proceedings (*g*). But by 14 Hen. 6. c. 1, they were enabled to do so in all cases of felony (*h*) and treason; though they are still

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Who, or what court, may pronounce the judgment.

(*a*) 3 Burr. 1786, 7.

(*b*) 1 Ld. Raym. 47, 8.

(*c*) 1 Ld. Raym. 482, 3.

(*d*) See form, 3 Burr. 1786. Post, last vol.

(*e*) Fortes. 389.

(*f*) 2 Hale, 403.

(*g*) 2 Hale, 403. 16 East, 405. 11 East, 514.

(*h*) The act does not expressly empower justices of nisi prius to inquire of felonies, though a practice of this sort prevails. See 4 M. & S. 447.

WHO
MAY PRONOUNCE
JUDGMENT.

left at liberty to return the postea, together with the criminal, into the court above, if they think proper (*a*). Justices of oyer and terminer, gaol delivery, and of the peace, have power to give judgment by virtue of their respective commissions. But, at common law, by granting a new commission, all the proceedings taken before the former commissioners expired, and therefore, if from any cause a prisoner had been convicted, but judgment delayed, or sentenced, and no execution awarded, before former commissioners, no judgment could be given, or execution ordered by their successors (*b*). And there was some reason for this restriction; for the subsequent judges were unacquainted with the circumstances of the case, as developed on the trial; and might therefore, unconsciously, be the occasion of injustice. Thus, an instance once occurred where a person was convicted of murder, on very unsatisfactory evidence, and reprieved by the judge who tried him, but afterwards ordered for execution by another, who went the same circuit, and found him in prison; in consequence of which he was hanged, with every possible circumstance of ignominy, when the party supposed to be murdered was alive (*c*). But the rule was abolished by the 11 Hen. 6. c. 6, as to justices of the peace, and by 1 Edw. 6. c. 7, as far as respected the judges of gaol delivery and oyer and terminer. Sir Matthew Hale, however, it is said, made it a rule never to give judgment, or award execution on any one, who had been reprieved by any other (*d*); and in this respect he has been, in general, imitated by those who have succeeded to his station. The court of a borough quarter sessions have authority to sentence and commit, in execution of such sentence, to the house of correction for the county, an offender convicted at the borough sessions for petit larceny (*e*). If an inferior court do not give judgment, a mandamus may be issued (*f*).

The King's Bench being the supreme court of criminal jurisdiction, may give judgment in every case, whether the indictment was originally taken there, or removed by certiorari from any

(*a*) 2 Hale, 403, 4.

(*b*) 2 Hale, 404, 5.

(*c*) 4 Harg. St. Trial, 204.
2 Hale, 406, *id.* n. h.

(*d*) 2 Hale, 406.

(*e*) 5 M. & S. 300.

(*f*) 7 T. R. 467.

WHO
MAY PRONOUNCE
JUDGMENT.

inferior tribunal (*a*); and, therefore, we have seen, that under the statute 13 Geo. 3. c. 84. s. 33, this court may apportion the fine for non-repair of a road between the parish and the trustees of a turnpike, though the indictment were originally preferred at the assizes, and afterwards removed before the superior tribunal (*b*). In the case of a removed indictment, the prisoner, if tried in the country, must be removed by habeas corpus, the record must be filed, and the prisoner must be committed to the marshal (*c*). When he is asked, why judgment of death shall not be passed upon him, as we have seen in the case of benefit of clergy, he may plead that he is not the same person, and allege a diversity of name (*d*). If the attorney-general confess this plea, he will be entitled to an immediate discharge (*e*). The former may take issue, and aver that the defendant is known as well by one name as the other, on which a jury will be returned instanter to try the identity in issue (*f*). And if, on being asked whether he has any thing to say why judgment should not be passed upon him, he stands mute, the court are bound to make inquiry, by inquest, before sentence is pronounced against him, whether he is the person convicted, unless he has been the whole time in the custody of the court, for he will not be concluded by the return of the sheriff upon a *cepi* or habeas corpus (*g*). And the same observations apply, when he is brought in upon process, after outlawry (*h*).

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When an issue, in case of misdemeanors, is sent down by writ of *nisi prius* to be tried, the King's Bench is the proper court to resort to for the judgment; and the judge, before whom the investigation took place, is considered as only the minister of the superior tribunal, and cannot pronounce judgment of acquittal, or against the defendant (*i*). So that on an information upon the

(*a*) Cro. Car. 175. 2 Hale, 401. 2 East, 413. And, in a late case, on an indictment at the quarter sessions, for lighting fires on the coast, contrary to 47 Geo. 3. sess. 2. c. 66, removed, and defendant tried and convicted before a judge at *nisi prius*, the court of King's Bench awarded sentence, 4 M. & S. 71.

(*b*) 2 East, 413.

(*c*) 2 Hale, 401. See 4 M. & S. 442.

(*d*) 2 Hale, 401, 2.

(*e*) 2 Hale, 402.

(*f*) Fost. 41.

(*g*) 2 Hale, 402.

(*h*) 2 Hale, 402.

(*i*) 11 East, 514. 16 East, 405.

WHO
MAY PRONOUNCE
JUDGMENT.

1 Geo. 1. c. 47, for persuading soldiers to desert, if thus tried at the assizes, and the defendant be convicted, he may be sentenced in the King's Bench, though the act directs the discretionary punishment to be ordered by the court in which he is found guilty; for, by construction of law, all the proceedings have, during the whole time, been taken in the court of superior jurisdiction (*a*). The sentence is, in general, to be given by the senior judge of the court; but, in case of high treason, by the Lord Chief Justice (*b*).

Time of giving
judgment.

The sentence, in capital cases, is usually given immediately after the conviction; and the 25 Geo. 2. c. 37, requires the sentence of death to be pronounced in open court, immediately after the conviction for murder; but, in other felonies, by the 4 Geo. 4. c. 48, the court may abstain from formally pronouncing in open court the sentence of death, and may simply record such sentence. The court may adjourn to another day, and then give judgment (*c*). But in indictments for not repairing bridges, the court are reluctant to stay the judgment (*d*). A man, upon whom sentence of death has passed, ought not, while under that sentence, to be brought up to receive judgment for another felony, although he was under that sentence when he was tried for the other felony, and did not plead his prior attainder (*e*).

How, and in
what manner,
judgment is to
be given.

Before judgment is pronounced upon the defendant, the crier makes proclamation, commanding "all manner of persons to keep silence, whilst sentence of death is passed upon the prisoner at the bar (or other judgment is given against him), upon pain of imprisonment" (*f*). But it is not necessary that this form should appear on the record, and its omission will not be material (*g*). It is now indispensably necessary, even in clergyable felonies, that the defendant should be asked by the clerk if he has any thing to say why judgment of death should not be pronounced

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(*a*) 16 East, 404. 2 East, 413.

(*b*) 1 Burr. 650. 1 Ventr. 254.

(*c*) 6 St. Tr. 833. See forms of adjournment, fresh proclamation, &c. post, last vol.

(*d*) 2 Chit. Rep. 215; and see ante, 628.

(*e*) Russ. & Ry. C. C. 268.

(*f*) See form, Cro. C. C. 482. Dick. Sess. 228. Post, last vol. 6 St. Tr. 833.

(*g*) 2 Ld. Raym. 1469.

on him (*a*); and it is material that this appear upon the record to have been done; and its omission, after judgment in high treason, will be a sufficient ground for the reversal of the attainder (*b*). On this occasion, he may allege any ground in arrest of judgment; or may plead a pardon, if he has obtained one, for it will still have the same consequences which it would have produced before conviction, the stopping of the attainder (*c*). If he has nothing to urge in bar, he frequently addresses the court in mitigation of his conduct, and desires their intercession with the king, or casts himself upon their mercy. After this nothing more is done, but the proper judge pronounces the sentence. This may safely be done in general terms, though a part of the indictment is defective, or the conduct charged in part is no legal offence, though the residue is sufficient; because the court will make the punishment proportioned to so much of the charge as is proved by the evidence (*d*). A joint sentence may be, and frequently is, passed on several offenders convicted of similar offences (*e*).

How
JUDGMENT IS TO
BE GIVEN.

The judge usually precedes the judgment by an address to the prisoner, especially if his crime be capital, in which he states that he has been convicted on satisfactory evidence, and informs him when there is little hope that mercy will be extended to him. Sometimes also he takes an opportunity of impressing the circumstances of the prisoner's guilt on the minds of the spectators, and traces out the remote but important causes which have led him to his unhappy condition (*f*). Even in case of an acquittal, he may often usefully warn the defendant against the circumstances which might again place him in an equivocal situation, especially if there seems reasonable ground to suppose him guilty (*g*). We have just seen, that by a recent act, 4 Geo. 4. c. 48, the court may abstain from formally pronouncing, in open

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(*a*) Com. Dig. Indictment, N. 4 Bla. Com. 375. 370, note 2. 4 Burr. 2086. 3 Salk. 358. Comb. 144. 3 Mod. 265. See form, 3 Harg. St. Trial, 212. 6 Harg. St. Trial, 833. Post, last vol.

(*b*) 3 Salk. 358. Comb. 144. 3 Mod. 265.

(*c*) 4 Bla. Com. 376.

(*d*) 2 Burr. 984. Ante, 249.

(*e*) 6 Harg. St. Trial, 833. 11 Id. 294. See form of passing sentence, Id. *ibid*.

(*f*) 1 Gisb. Duties of Man, 405.

(*g*) Id. 406.

How
JUDGMENT IS TO
BE GIVEN.

court, judgment of death on persons convicted of felony, except murder, and that such judgment is to be merely entered.

With respect to the form of the judgment, in a late case it has been held, that an entry in the following words, "It is ordered, &c." was not a judgment, but an order; and, on error, a superior court would direct a procedendo to the inferior court to give judgment, and bail in the mean time (*a*).

Of the several
kinds of judgment on different
prosecutions*.

We come now to consider the various *judgments* which may be given in criminal cases against the defendant. But first we may observe, to the honor of British jurisprudence, that no other punishments can be inflicted, however atrocious the crime, and aggravated the circumstances, than such as the laws prescribe (*b*). And, therefore, when Felton was convicted of the murder of the Duke of Buckingham, it was resolved that the court could not order his hand to be cut off, or make hanging in chains any part of his sentence (*c*). Nor can any penalty, of indefinite extent or duration, be awarded, so as to leave its degree to any subsequent discretion of the officers (*d*). It may be as well here to observe, that where an act, from its passing, repeals a former act, which ousted clergy from a certain offence, and imposes a new punishment on the same offence from and after its passing, an offence committed before the passing of the new act, but not tried till after, is not liable to be punished under either of these statutes (*e*).

Judgments against the defendant, are either by express sentence, or without any such sentence. And those which are of the first description may also be divided into two classes:—such as are fixed and stated—and such as vary according to the discretion of the court in which they are given. The express sentence is

(*a*) 1 B. & C. 711.

(*b*) Het. 126. 3 Inst. 140.

12 Co. 71. Hawk. b. 2. c. 48.
s. 2. 16 East, 404.

(*c*) Het. 126. Hawk. b. 2.

c. 48. s. 2.

(*d*) 3 Burr. 1903, 2.

(*e*) Russ. & Ry. C. C. 429.

* As to the duty of the judge in regard to his judgment, see Gisb. Duties of Man, vol. i. 385, 6, 7.

usually thus stated in the record of the proceedings, after asking the defendant why judgment should not be passed: "whereupon all and singular, the premises being seen, and by the said court here fully understood, it is considered by the court here, that, &c." (*a*). And then the sentence is stated, to the effect we shall now examine.

The judgment in case of *high treason* was, until very lately, an exception to the merciful tenor of our judgments. The least offensive form which is given in the books is, that the offender "be carried back to the place from whence he came, and from thence be drawn to the place of execution, and be there hanged by the neck, and cut down alive, and that his entrails be taken out and burned before his face, and his head cut off, and his body divided into four quarters, and his head and quarters disposed of at the king's pleasure" (*b*). Some of the precedents add other circumstances, of still more grossness and aggravation (*c*). But this horrible denunciation was very seldom executed in its more terrible niceties. The king always might pardon every part of it, except beheading, where that was included, and frequently exercised that prerogative (*d*). And the criminal was almost always deprived of life, by means of strangulation, before the executioner proceeded to mutilate his body. At length this dreadful sentence, which had disgraced our laws, though not our practice, from the earliest periods, was modified, and its most offensive parts taken away. By the 54 Geo. 3. c. 146, the judgment in future to be passed upon offenders convicted of high treason, is fixed, "that they be drawn on a hurdle to the place of execution, and be there hanged by the neck until they be dead; and that afterwards their heads shall be severed from their bodies, and the body, divided into four quarters, shall be disposed of as shall seem fit to his majesty." By the same statute, the king is empowered to

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Judgments by
express sentence.
Fixed and cer-
tain.
High Treason.

(*a*) 4 Bla. Com. Appendix, IV. 340. 409. Fost. 112. Williams, See supra, as to form, 1 B. & C. J. Judgment. 4 Bla. Com. 92. 711. Post, last vol.

(*b*) 2 Hale, 396, 7. Hawk. b. 2. c. 48. s. 3. See form, 3 Inst. 210, 211. 1 Hale, 350, 1. 2 Hale, 397. Plowd. 387. Co. Ent. 661. (c) 3 Harg. St. Tr. 340. 409. Comb. 257.

3 Harg. St. Tr. 214. 290. 314. (*d*) 1 Hale, 351. 4 Bla. Com. 92, 3.

FIXED EXPRESS JUDGMENTS. change the whole of the sentence into beheading, by a warrant under the sign manual.

Judgment in
treason for coin-
ing, &c.*

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Treasons relating to the *coin*, were never subject to the severities with which those affecting the government were formerly attended (*a*). In case of men, the judgment was merely to be drawn and hanged, for this was the rule of common law, and has not been altered by any subsequent statute (*b*). The sentence is, "that the defendant be drawn to the place of execution, and there be hanged until he shall be dead" (*c*). Some doubt indeed formerly prevailed respecting clipping, and other offences, made treason by statute; because it is a general rule, that where an act of parliament makes an offence treason or felony, it annexes to it, at the same time, all the consequences which, at common law, belong to offences of the same description (*d*); but as other treasons of the same kind were always visited with a milder punishment, the more merciful opinion has prevailed, and the present form of judgment is used in every case of the kind, however created (*e*). But women were both in this and high treason to be burned; which cruel sentence was, like the other, commonly evaded. The humanity of modern times has also removed this barbarism; for by the 30 Geo. 2. c. 48, women convicted of any species of treason, are to receive judgment to be drawn and hanged, without any further indignity or outrage.

Judgment for
Petit Treason†.

The judgment, in case of *petit treason*, is precisely the same when passed upon males, as that in offences relating to the coin and the sign manual (*f*). Formerly the judgment against females was the same as that to which they were anciently liable in every

(*a*) 1 Hale, 351. 4 Bla. Com. 93.

(*b*) 1 Hale, 351. 2 Hale, 398. 4 Bla. Com. 93. Hawk. b. 2. c. 48. s. 4.

(*c*) 1 Hale, 351. See form, 1 Hale, 351. Post, last vol.

(*d*) 3 Inst. 17. 1 Hale, 352, 3. 2 Hale, 398, 9. Hawk. b. 2. c. 48. s. 4.

(*e*) 2 Dyer, 230, b. 3 Keb. 278. 2 Leon. 98. Sir T. Jones, 233. Sir T. Raym. 234. 1 Vent. 254. Hawk. b. 2. c. 48. s. 4. Williams, J. Judgment.

(*f*) 3 Inst. 211. 2 Hale, 398, 399. Hawk. b. 2. c. 48. s. 5. Williams, J. Judgment. See form, 3 Inst. 211. Post, last vol.

* As to offence of, and judgment for, coining, see post, vol. ii. chap. vi.

† See post, vol. iii. 744.

case of treason, viz. to be burned to death as traitors. But, at the same time that it was provided that, in case of high treason, they should be drawn and hanged (*a*); the same regulation was extended to petit treason. And as some regulations had been made for the more solemn and speedy punishment of the crime of murder, it was resolved by all the judges, that in case of males, these additional severities should form a part of the sentence in petit treason (*b*). So that when women were placed on the same footing in other respects, by the abolition of burning, they were at the same time made liable to all the penalties inflicted by statute upon wilful murderers.

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JUDGMENTS.

There does not seem to have been any difference, at common law, between the judgment for *murder*, and other capital felonies. The present sentence is entirely regulated by the 25 Geo. 2. c. 37, which was passed, in order to strike the mind with a deeper horror of this enormous offence. By that statute the sentence is to be passed in open court, immediately after the conviction, and is to comprise the whole of the marks of infamy prescribed by the act, as well as the time and place of execution (*c*). With respect to these, it is provided that the murderer shall be put to death on the next day but one to that on which sentence is pronounced, unless that day happens to be on Sunday, and then on the Monday following (*d*). But it is not essential to award the day of execution in the sentence, the statute in that respect being only directory; and if a wrong day is awarded, it will not vitiate the sentence, if the mistake is discovered, and set right during the assizes (*e*). It is also directed that the body, if the execution should take place in London or Middlesex, shall be delivered by the sheriff to the hall of the surgeon's company; or, in the country, to such surgeon as the judge shall appoint, in order to dissection (*f*). But it is questionable, whether the award of dissection and anatomising is an essential part of the sentence, to

Judgment for
Murder*.

(*a*) 30 Geo. 2. c. 48.

(*b*) Fast. 107.

(*c*) Sec. 3. See form, 4 Bla. Com. Appendix, IV; and the judgment must still be so passed,

the 4 Geo. 4. c. 48, making no alteration in that respect.

(*d*) Sec. 1.

(*e*) Russ. & Ry. C. C. 230,

(*f*) Sec. 2.

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JUDGMENTS.

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be pronounced by the judge upon a conviction for murder (*a*). During the interval between sentence and execution, the criminal must be kept in a cell apart from other prisoners (*b*), and allowed no sustenance but bread and water, except in case medicine is necessary, or of the administering the sacrament of the Lord's Supper (*c*). The judge may, if he think proper, appoint the body to be hung in chains (*d*). But it has been holden, that the hanging in chains should never be made a part of the sentence, but should be directed by an order of the judge previous to the execution (*e*). In the operation of this statute peers as well as commons are included (*f*). And we have already seen, that petit treason, though not specially named, has been holden to be within its provisions (*g*). But the judges are invested with a discretionary power to respite the sentence, or the execution, for a longer time (*h*), or to dispense with any of its peculiar severities, if they see there is occasion for indulgence (*i*).

Judgment for
felony in general.

There is but one form of judgment for *every other description of felony*, which the benefit of clergy is not permitted to mitigate. The present form has prevailed ever since the reign of Henry 1 (*k*). It is, simply, that the offender be hanged by the neck till dead (*l*). It should not conclude that the felon be in mercy, &c (*m*). The judgment, as entered on the record, is with a singularly laconic brevity, *sus. per col.* instead of *suspendatur per collum*, as if the infliction of capital punishment were a circumstance of trifling moment (*n*).

Judgment for
Præmunire.

Another description of stated judgments, are those to be pronounced on a conviction of *præmunire*, which it will be proper to

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| (<i>a</i>) Russ. & Ry. C. C. 58. | (<i>h</i>) Sec. 3 & 4. 1 Leach, 361. |
| (<i>b</i>) Sec. 6. | (<i>i</i>) Sec. 7. |
| (<i>c</i>) Sec. 3. | (<i>k</i>) 3 Inst. 53. Hawk. b. 2. |
| (<i>d</i>) Sec. 5. | c. 48. s. 7. |
| (<i>e</i>) Fost. 107. 1 Leach, 24. | (<i>l</i>) See form, 3 Inst. 53. 211. |
| Hawk. b. 2. c. 51. s. 13. See | 2 Hale, 399. Co. Ent. 60. 352, |
| form of judgment on the statute, | 353. 355. 360. Rast. Ent. 52. |
| 10 Harg. St. Tr. 516. Post, | 53. 5. 2 Harg. St. Tr. 528. |
| last vol. | Hawk. b. 2. c. 48. s. 7. Wil- |
| (<i>f</i>) 10 Harg. St. Tr. 515, 16. | liams, J. Judgment. |
| Fost. 139. Hawk. b. 2. c. 51. | (<i>m</i>) 3 Campb. 266. |
| s. 11. | (<i>n</i>) 5 Mod. 22. Hawk. b. 2. |
| (<i>g</i>) Antc, 677. | c. 48. s. 7. 4 Bla. Com. 403. |

notice, though the statutes by which they are denounced are become obsolete. If the defendant be in prison at the time, the sentence to be pronounced upon him is, "that he shall be out of the king's protection, and that his lands and tenements, goods and chattels, shall be forfeited to the king, and that his body shall remain in prison at the king's pleasure;" and if he be condemned by default for not appearing, the words relative to the duration of the imprisonment are changed into a *capiatur*, by which he may be taken (*a*). The last instance of the execution of this sentence, was against several Quakers for refusing to take the oath of allegiance in the reign of Charles the Second (*b*), where the court resorted to the most illegal and unjustifiable modes of obtaining a conviction.

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The judgment against an offender convicted of *misprision or concealment of treason*, is the forfeiture of goods, the loss of the profits of lands during life, and imprisonment for the same period (*c*). *Misprision of felony* in a public officer is imprisonment for a year and a day; in a common person for a less discretionary time; and, in both, fine and ransom at the king's pleasure, which is construed to mean the discretion of his courts of justice (*d*).

Judgment for
Misprision of
Treason or
Felony.

Besides these crimes of a higher colour, there are some *mis-demeanors* to which peculiar judgments have been adapted. Thus, the judgment for drawing a sword on a judge, or striking any person in the king's higher courts, is, that he shall be imprisoned during life, forfeit all his goods, and the profits of his estate, and that his right hand shall be cut off at a certain place, mentioned in the sentence (*e*); but the king may dispense with a part of this sentence, by authorizing the attorney-general to enter a

Other express
fixed judgments
for Misdemeanors.

(*a*) See form, Rast. Ent. 465. Co. Lit. 129. 2 Harg. St. Tr. 470. 3 Inst. 218. Hawk. b. 2. c. 48. s. 9. 4 Bla. Com. 117. Williams, J. Judgment.

(*b*) 2 Harg. St. Tr. 463. 4 Bla. Com. 118, n. (*b*).
(*c*) 3 Inst. 36. 218. 1 Hale, 374. 2 Hale, 400. Bro. Abr. Treason, 19. 25. Hawk. b. 2. c. 48. s. 10. 4 Bla. Com. 120. Williams, J. Judgment.

(*d*) 3 Edw. 1. c. 9. 2 Hale, 374, 5. 4 Bla. Com. 121.

(*e*) 1 East, P. C. 408. 1 Keb. 751. 2 Rol. Abr. 76. Owen, 120. Dyer, 188, b. Cro. Eliz. 405. Hawk. b. 2. c. 48. s. 11. See form, id. ibid. Post, last vol.

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nolle prosequi, as to such parts of the indictment as would require the severer judgment (*a*). In some of the cases, it appears that judgment of forfeiture of lands, as well as of goods, was given generally, and without the addition of the words "during life," so that they would pass away not only from the offender himself, but those who might have succeeded him (*b*); but it seems to be the better opinion, that the loss of the profits, during life, was all that was intended. *Maliciously striking in the king's palace*, so that any blood be drawn, is also to be visited with a similar sentence (*c*). But the delinquent is not to lose his hand, in this case, unless blood be actually shed; so that the courts of justice are guarded with a more zealous care than the personal residence of his majesty (*d*). It seems also to be doubted, whether the act will be thus highly penal, unless committed within a palace where the king personally resides; and the contrary seems to be taken for granted by several authorities (*e*).

When a defendant is convicted of having *rescued* an offender from any of the superior courts, he is liable to the judgment of imprisonment for life, and the loss of all the profits of his lands, with the forfeiture of the whole of his personal estate (*f*). But he shall not be adjudged to lose his hand, unless some actual blow were struck in the attempt to rescue (*g*). By the 5 Eliz. c. 9. s. 6, any offender, convicted of *perjury* under that statute,

(*a*) 1 East, P. C. 409. 500.

(*b*) Dyer, 138, b. Owen, 120.

(*c*) 1 East, P. C. 403. 33 Hen. 8. c. 12. s. 7. 3 Inst. 140. Poph. 206. 11 Harg. St. Tr. 16; where see an account of the ceremonial of cutting off the hand. See post, vol. ii. 208, as to this offence.

(*d*) 3 Inst. 140.

(*e*) 6 Mod. 75, 6. 11 Harg. St. Tr. 133. 4 Bla. Com. 125. Bro. Abr. Pain, 16. Hawk. b. 1. c. 21. s. 2. 10 East, 578.

(*f*) 3 Inst. 141. Hawk. b. 1. c. 21. s. 5. The judgment for *rescuing*, or aiding or assisting in rescuing a person charged with felony, or if the offender be

convicted of felony, is fine and imprisonment for one year, or transportation for seven years; or imprisonment, with or without hard labour, for not less than one, and not more than three years, 1 & 2 Geo. 4. c. 88. s. 1. Before the passing of this act, rescuing a person under commitment for burglary, was not a transportable offence, but was punishable only as a felony, within clergy, at common law, Russ. & Ry. C. C. 432. See further, as to the offence of rescue and punishment, post, vol. ii.

(*g*) 3 Inst. 141. Hawk. b. 1. c. 21. s. 5.

is to forfeit the sum of £20, be imprisoned for six months, and rendered incompetent to bear testimony as a witness. But the more usual course is to proceed at common law, because prosecutions on the statute are attended with more difficulty, and require more formal exactness (*a*). And since this stated punishment was awarded, a power has been given to the court, to super-add imprisonment in a house of correction, or transportation for seven years (*b*); also, by another statute, hard labour may be respite to imprisonment (*c*); so that, at the present day, the punishment of this crime is rather to be referred to the class of discretionary, than of stated penalties. The peculiar case of perjury at elections, however, demands a different consideration; for the 18 Geo. 2. c. 18, enacts, that those who offend against its provisions, shall suffer the penalties contained in the two statutes to which we last referred; and, therefore, the courts will regard themselves as bound to pronounce a judgment, embracing all the punishments which those acts severally inflict (*d*).

The ancient judgment upon an indictment for a *conspiracy*, to affect the life of another, commonly called the villainous judgment, was of a very peculiar kind; by this the defendants were to lose the liberty and franchise of the law, to the intent that they should not be put upon any jury or assize; that their houses, lands and goods, should be seized to the king's use, their houses and lands estrepped and wasted, their trees rooted up and razed, and their bodies consigned to prison (*e*). But this sentence seems to have been confined to cases where the life of another was attempted, through the forms and appearances of justice (*f*); and it has long since been entirely disused, so that there has been no instance in which it has been passed since the reign of Edward the Third (*g*); but the practice is now for the court to award a punishment proportioned to the circumstances of the case, con-

(*a*) See post, vol. ii. 313, et seq.

(*b*) 2 Geo. 2. c. 25. 9 Geo. 2. c. 8.

(*c*) 3 Geo. 4. c. 114.

(*d*) 6 East, 327. Form of Judgment, 6 East, 328. Post, last vol.

(*e*) 3 Inst. 143. 2 Inst. 562. Carth. 416. Hawk. b. 1. c. 72. s. 9. See form, 3 Inst. 143.

(*f*) 12 Mod. 209. Carth. 416. Hawk. b. 1. c. 72. s. 9.

(*g*) 2 Burr. 997. 1027. Hawk. b. 1. c. 72. s. 9.

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sisting of fine, imprisonment, and sureties for good behaviour, or such of them as they shall deem proper (*a*).

There are several other cases of offences, created by acts of Parliament, in which the punishment of the offender is prescribed in express language. Thus, on an indictment for *persuading soldiers to desert*, on 1 Geo. 1. c. 47, the prisoner is to be fined in the sum of £40; and, if they think it proper to award any additional penalty, they are directed to sentence him to imprisonment, for any space not exceeding six months, and to a public exposure in the pillory (*b*). But by 56 Geo. 3. c. 138, the punishment of pillory is abolished. Under this act, before the 56 Geo. 3. c. 138, it was holden, that no discretion was given to the judges or magistrates to order the imprisonment without the pillory, but they were bound either to give judgment for the mere pecuniary fine, or to include both the heavier inflictions in their sentence (*c*). The judgment for *petit larceny* was formerly only whipping or imprisonment, by way of correction (*d*); but, by modern statutes, the offender may be transported (*e*), or hard labour may be imposed (*f*). The punishment for having naval stores in possession, without any right derived from legitimate authority, was, by the 9 & 10 W. 3. c. 41. s. 2, a fine of £200, and imprisonment until it was paid; which, by the 17 Geo. 2. c. 40. s. 10, and 9 Geo. 1. c. 8, was altered into imprisonment, to hard labour, and public whipping (*g*). But the old penalty of £200, subject to mitigation, has been revived by the 39 & 40 Geo. 3. c. 89, and a discretion has been given to inflict such a degree of pillory (*h*), whipping, or imprisonment, as the case shall demand (*i*). It is, however, holden, that the power of sentencing to hard labour is impliedly taken away by this statute; and, therefore, the court, in a case which came recently before them, de-

(*a*) 2 Burr. 1027. 1 Stra. 196. Hawk. b. 1. c. 72. s. 9. The punishment of pillory for conspiracy is taken away by the 56 Geo. 3. c. 138. See further, post, vol. iii. 1144.

(*b*) See post, vol. ii. 101 *a*.

(*c*) 16 East, 404.

(*d*) 2 Hale, 400.

(*e*) 2 Hale, 400, note p. 4 Geo. 1. c. 11. 6 Geo. 1. c. 23. 5 Geo. 4. c. 84. s. 2.

(*f*) 53 Geo. 3. c. 162.

(*g*) Whipping of females is abolished by 1 Geo. 4. c. 57.

(*h*) Abolished by 56 Geo. 3. c. 138.

(*i*) See post, vol. iii. 956, 7.

clined to state it in their judgment, and sentenced the offender to three months' imprisonment, and a public whipping (*a*). On the other hand, in favor of revenue officers acting *bonâ fide* in the execution of their office, it is provided, that if they be indicted for any seizure, and a verdict be obtained against them, and the judge shall certify that there was probable cause for the seizure, the defendant shall not be imprisoned, or be fined above 1s. (*b*). Several other instances might be adduced of statutable offences, which the court are either bound to visit with a particular penalty, or which set certain limits to their discretion. But, in general, the punishment of misdemeanors is left to their judgment, according to the peculiar circumstances with which they are attended (*c*). And this leads us to consider those judgments which fall under this description.

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JUDGMENTS.

It may be laid down as a general rule, that all those offences which exist at common law, and have not been regulated by any particular statute, are within *the discretion of the court to punish* (*d*). Such are petit larceny (*e*), perjury (*f*), forgery at common law (*g*), obtaining money, &c. by false pretences (*h*), every description of indictable fraud, not amounting to felony (*i*), conspiracy, which did not affect the life of another at all times, and since the disuse of villainous judgment, every species of that offence; and every description of misdemeanor or crime for which an indictment will lie at common law, not subjecting the offender to a capital penalty, is within the discretion of the judges (*k*). On an indictment for a misdemeanor, on the 22 Geo. 3. c. 58, the punishment should be fine, imprisonment, or whipping; imprisonment and fine, or imprisonment and whipping, cannot be inflicted (*l*).

Discretionary
and variable
judgments.

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| (<i>a</i>) 8 East, 53, 4. | (<i>g</i>) Sir T. Raym. 81. 1 Sid. 142. 278. 3 Leon. 170. Hawk. b. 2. c. 41. s. 14. Post, vol. iii. 1022. |
| (<i>b</i>) 28 Geo. 3. c. 37. s. 24. Tidd, 5th edit. 362. | (<i>h</i>) 30 Geo. 2. c. 24. s. 1. Post, vol. iii. |
| (<i>c</i>) Rep. temp. Hardw. 278, 279. Hawk. b. 2. c. 48. s. 24. | (<i>i</i>) Cro. Jac. 497, 8. Noy, 99. 103. 2 Rol. Abr. 78. |
| (<i>d</i>) Rep. temp. Hardw. 279. Hawk. b. 2. c. 48. s. 14. | (<i>k</i>) Rep. temp. Hardw. 278, 279. |
| (<i>e</i>) 2 Hale, 400. 3 Inst. 218. 4 Geo. 1. c. 11. 6 Geo. 1. c. 23. 53 Geo. 3. c. 162. | (<i>l</i>) Russ. & Ry. C. C. 253. |
| (<i>f</i>) Hob. 62. Post, vol. ii. | |

DISCRETIONARY
EXPRESS
JUDGMENTS.

Another large class of offences, in the punishment of which much is left to the wisdom of the court, arise from *clergyable felonies*. We have already shown how the ceremony of purgation was abolished, how that of burning in the hand was substituted in its room, and how other penalties of imprisonment, transportation, and corporal punishment, have been established in the place of the latter (*a*). At the present day, the judges, by the provisions of several statutes, may order the offender to be publicly or privately whipped, exposed in the stocks, fined, imprisoned for two, or transported for seven years, to his majesty's colonies (*b*). And by the 53 Geo. 3. c. 162, it shall be lawful for any court to pass upon any person convicted before such court, of felony with benefit of clergy, or of any grand or petit larceny, the sentence of imprisonment to hard labour, either simply and alone, or in addition to any other sentence which such court shall be authorized by law to pass; and such person shall thereupon be imprisoned and kept to hard labour, in such place and for such time as such court shall think fit to direct, not exceeding the time for which such courts may now imprison for such offences. The punishment for *manslaughter*, of burning in the hand, is abolished by the 3 Geo. 4. c. 38. s. 1; and now the offender may be transported for life, or a term of years; or be imprisoned only, or with hard labour, for not more than three years, or be fined. The offence of clerks or servants *robbing* their masters, in case the offender be entitled to the benefit of clergy, may be transported for not more than fourteen years, or be imprisoned, with or without hard labour, for not more than three years (*c*). The offence of counselling, hiring, procuring, or commanding any person to commit grand larceny, if the offender be convicted of felony, and be entitled to the benefit of clergy, may be punished with fine and imprisonment, for not more than one year; or be transported for seven years; or be imprisoned only, with or without hard

(*a*) Ante, 667 to 673.

(*b*) 5 Ann. c. 6. s. 2. 4 Geo. 1. c. 11. 6 Geo. 1. c. 23. 19 Geo. 3. c. 74. And now, by 5 Geo. 4. c. 84. s. 2, any person convicted of a transportable offence, shall be liable to be transported be-

yond the seas, for the term for which such offender shall be liable by law to be transported. For more particular statement, see ante, 673, as to the penalties consequent on clergy.

(*c*) 3 Geo. 4. c. 38. s. 2,

labour, for not exceeding three years (*a*). Accessories, before the fact, to burglary, robbery, or grand larceny (except where the principal felon be convicted), will be guilty of a misdemeanor, and punishable with imprisonment, with or without hard labour, for not exceeding two years, though the principal felon be concealed, or conveyed away, or not convicted, or be amenable to justice or not; but the offender, after conviction in such case, cannot be again liable to punishment, though the principal felon be afterwards convicted (*b*). The judgment for larceny, in general, is fine, imprisonment or whipping, or transportation, after clergy prayed. When the offence is created a larceny, by a particular statute, though the statute prescribes transportation for fourteen years, yet the court may fine or imprison (*c*). The offence of embezzlement by a clerk, contrary to the 39 Geo. 3. c. 85, is subject to the general punishment of larceny; and though the words of that act are, “that every such offender, his adviser, &c. *shall be liable to be transported* for any term not exceeding fourteen years, in the discretion of the court;” yet it is not imperative on the court to pass sentence of transportation on the offender (*d*).

But it must not be understood that the power thus vested in the judges, is a mere arbitrary discretion, which ignorant or malevolent magistrates would be allowed with impunity to abuse (*e*). There are two kinds of restraint by which their proceedings must be guided: one, that they can do nothing contrary to magna charta, and the fundamental principles of our legal system; the other, resulting from precedents, which they themselves have laid down in a variety of decisions (*f*).

By the first of these rules they are forbidden to impose any exorbitant fine to the oppression of the subject (*g*); and, therefore, where the judges imposed a fine of £30,000 upon the

(*a*) 3 Geo. 4. c. 38. s. 3.

(*b*) 3 Geo. 4. c. 38. s. 4.

(*c*) 3 M. & S. 514. 46. 49.

(*d*) Russ. & Ry. C. C. 285.

(*e*) Ante, 701; and as to legal discretion, see 4 T. R. 757. 4 Burr. 2539.

(*f*) See suggestions as to the exercise of the discretionary power, Dick. Sess. 223, note †. Gisb. Duties of Man, vol. i. 385, 6.

(*g*) 9 Hen. 3. c. 13. 24 Edw. 3. c. 3.

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Duke of Devonshire, for striking within the limits of one of his majesty's palaces, the House of Lords came to a determination that their conduct was oppressive and illegal, and subjected them to a severe censure (*a*). We may gather from this case, that the amount of the fines imposed by law for certain crimes, will form a proper criterion for the judges to follow, when they have a discretion to exercise (*b*). Before the revolution, indeed, the court of Star-chamber levied the most exorbitant fines upon the subject, in defiance of every principle of law, to enrich the treasures of the sovereign. Instances also occurred, in which the most cruel punishments were inflicted on misdemeanors inferior to felony; thus Oates, the celebrated jesuit, was sentenced, on an indictment for perjury, to be stripped of his canonical habits, pay a fine of a thousand marks, to be whipped from Aldgate to Newgate, and from Newgate to Tyburn, by the common hangman, to be imprisoned for life, and to stand five times every year in the pillory (*c*). But immediately after the revolution, these proceedings were declared oppressive and unlawful (*d*); and by the bill of rights it was specifically enacted, that excessive fines be not imposed, nor cruel and illegal punishments inflicted (*e*). And, since this provision, it is never usual to assess a larger fine than the delinquent is able to pay, without touching the means of his subsistence, but to sentence him to some corporal penalty (*f*); so that the court will not impose a fine upon a married woman, but will sentence her to imprisonment, if she has no property of her own, and her husband has absconded (*g*); and this is said to be the reason why fines, in the king's court, are frequently denominated *ransoms*, because they operate instead of a punishment, which would otherwise fall on the person, according to the maxim, "that he who cannot pay in purse, must pay in person;" a maxim which seems too much like making poverty a crime, and offering an indemnity to riches.

It is also an established rule of the English law, that the judges in the exercise of their discretion, can invent no new

(*a*) 11 Harg. St. Tr. 136.

(*b*) 11 Harg. St. Tr. 135.

(*c*) 4 Harg. St. Tr. 104, 5, 6.

(*d*) 4 Harg. St. Tr. 106.

(*e*) 1 W. & M. sess. 2. c. 2.

s. 11.

(*f*) 4 Bla. Com. 380.

(*g*) Rep. temp. Hardw. 279.

penalties to suit the offence, or to gratify their own caprices (*a*). It therefore follows, that they can inflict no punishment which did not exist at common law, except in those cases, where the law has expressly allowed its infliction. So that they cannot order a defendant, convicted of an ordinary misdemeanor, to be transported; though it is in their discretion to do so, on the admission of a felon to his clergy. And, upon the same principle, it has been holden, that a sentence against a defendant, convicted of insulting a magistrate in the execution of his duty, that he be imprisoned for a month, ask pardon at the prosecutor's house, and advertise it in newspapers, is void, except as to the imprisonment; and the defendant will, after his imprisonment, be discharged on habeas corpus (*b*).

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The more particular rules which might be deduced from the practice of the courts themselves, as applicable to particular crimes, and which influence their sentences, are, of course, infinitely various. Not only the nature of the offence, but the strength of the temptation, the age, sex, rank, health, and situation of the offender, as well as his conduct on the trial, will naturally influence the court in forming their decision (*c*); and, on this account, the court, when several defendants have been convicted on a joint prosecution, frequently pronounce a less severe sentence on one defendant than on the others (*d*). It is a general rule, that the judgment should be adapted to the nature of the case, as nearly as possible (*e*). Thus, the punishment of all infamous crimes at common law is, in general, disgraceful (*f*): as for keeping a house of ill-fame (*g*); and so regularly was this rule followed, that the association between the crime and the punishment became so strong in the mind, that the latter, and not the former, was thought to entail disability to become a witness (*h*). There were, indeed, instances (before the 56 Geo. 3. c. 138, abolishing the punishment of pillory) to the contrary;

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(*a*) 4 Bla. Com. 378.

(*e*) 2 Stra. 689. 8 T. R. 144.

(*b*) 1 Wils. 332. Com. Dig. Indictment, N.

(*f*) Willes, 666.

(*c*) Rep. temp. Hardw. 279. 2 Burr. 1027. Gisb. Duties of Man, vol. i. 385, 6.

(*g*) Rep. temp. Hardw. 279. Hard labour may be imposed,

3 Geo. 4. c. 114.

(*h*) Ante, 600.

(*d*) 2 Burr. 1027.

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where the pillory was inflicted, though the crime was not infamous, and passed over when infamy is the result. Thus, as an instance of the first description of cases, the 3 & 4 W. & M. c. 10, directs deer-stealers to forfeit £30; and if they have nothing by which it can be levied, to be set in the pillory; though it cannot be supposed that the want of £30 renders a man infamous (*a*). So also other enormous misdemeanors, as false rates by a public assessor, gross libels on magistrates, or on religion and government, are frequently punished with public exposure (*b*). Keeping a disorderly house is often subject to the same penalty (*c*), and hard labour may be imposed (*d*). On the other hand, the circumstance of the defendant's being a clergyman (*e*), even in the case of conspiracy, or a youth, or in ill-health, combined with other favorable circumstances, have induced the court to decline the infliction of the pillory, and to pronounce a milder sentence (*f*); thus, in the latter case, a married woman, who had nothing whereout to pay a fine, and was in ill-health, was sentenced to a year's imprisonment, and then to find sureties for her good behaviour for seven years (*g*). But they will visit a clerical offender with other punishments equally severe; and therefore, they sentenced a culprit for conspiracy, in an aggravated case, to a fine of £500, a year's imprisonment, and to find sureties for his good behaviour for seven years (*h*); and another person, not in orders, was sentenced to stand twice in the pillory, to be imprisoned for two years, to pay a fine of £50, and to find sureties for his good behaviour for three years (*i*). Before the 56 Geo. 3. c. 138, abolishing the punishment of pillory in all cases, except perjury, and subornation thereof, Lord Coke advised all judges and magistrates, in general, to be very careful how they inflicted the pillory on common misdemeanors, and to reserve it only for the

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(*a*) Willes, 144. Now pillory is taken away by 56 Geo. 3. c. 138, and offender may be fined or imprisoned.

(*b*) 6 Mod. 306, 7. Com. Dig. Tumbil, B. Williams, J. Pillory and Tumbil. Post, 715.

(*c*) Com. Dig. Judgment, N. Rep. temp. Hardw. 278, 9.

(*d*) 3 Geo. 4. c. 114.

(*e*) 1 Stra. 196.

(*f*) 2 Burr. 1027. Rep. temp. Hardw. 279. Gisb. Duties of Man, vol. i. 327.

(*g*) Rep. temp. Hardw. 279.

(*h*) 1 Stra. 196.

(*i*) 2 Burr. 1027.

more heinous offences (*a*); a caution which seems very reasonable when we consider that such an exposure deprives a man of the last remnant of character, fixes on him an indelible stigma, and frequently renders him desperate.

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Perjury, at common law, may be punished with pillory and transportation for seven years (*b*); and hard labour may be added to the imprisonment (*c*). The day of inflicting the punishment of pillory may be left to the choice and nomination of the sheriff; but, on motion, the court may enlarge the time fixed by him for the exposure (*d*).

The judgment for *libels* is commonly fine, imprisonment, and the finding of sureties, proportioned to the dangerous nature of the publication, and the circumstances of the defendant (*e*). And now, by the 60 Geo. 3, & 1 Geo. 4. c. 8, the court may, after verdict or judgment by default, make order for the seizure of copies of a blasphemous or seditious libel; and, for the second offence of publishing such libel, the offender may be imprisoned, or banished for any term the court may think fit (*f*). A peer has been sentenced to a fine of £100; confinement for three months, and to find sureties, for a libellous charge against an individual (*g*). But more signal penalties will be inflicted on *public misdemeanors*, attended with *violence*; thus, before the riot act, several rioters were sentenced to pay a fine of £500 each, to stand in the pillory, and one of them to be accoutred in a kettle on his head, for a helmet, and a sword in his hand, because he was thus armed when he committed the outrage (*h*). *Assaults* vary, of course, exceedingly, from the infinite variety of circumstances with which they are attended. Thus, assaults with intent to commit a rape, or unnatural crime, may require the utmost severity which the courts are empowered to exert, as their moral turpitude exceeds

(*a*) 3 Inst. 219.

(*b*) 3 Burr. 1901. See form of sentence, 3 Burr. 1901. The punishment of pillory for perjury, or subornation thereof, is excepted in the 56 Geo. 3. c. 133, and continues.

(*c*) 3 Geo. 4. c. 114.

(*d*) Burr. 1902.

(*e*) 11 Harg. St. Tr. 292. 294.
20 Cobb. St. Tr. 788, 9.

(*f*) See post, vol. iii. 877 *a*.

(*g*) 1 Esp. Rep. 229.

(*h*) Cro. Car. 507.

DISCRETIONARY EXPRESS JUDGMENTS. that of many capital felonies; while there are others, on the contrary, for which the most trifling fine is an adequate penalty (*a*). In all these cases, the practice of compelling the offender to find sureties for his good behaviour has prevailed, and has been found of the highest benefit (*b*). It is, indeed, one of the most salutary instances in which our laws are directed to the prevention of crimes, which is, at all times, so much better than their punishment.

The case of *nuisances* to highways, or suffering them to remain in a state of decay, is evidently of a different complexion to any other criminal proceeding. Its object is the remedy of the inconvenience, and not any vindictive or exemplary infliction on the party who ought to have prevented it. The judgment, in general, is, that the defendant pay a fine, and that the nuisance be abated (*c*). But the latter part is not always essential or proper. Thus, where the building itself is unobjectionable, but some noxious trade is carried on within it, there need be no judgment that the nuisance shall be abated (*d*). And where the nuisance is not stated in the indictment as still existing, no judgment can be given to abate it, because it does not appear on the record to be in existence (*e*). When only a part of an erection is complained of, judgment may be given to remove that part which is found injurious (*f*). Where a nonfeasance only is in question, as of not repairing, if it appear by justices' certificate, and affidavit, that the road is actually repaired, they will only give judgment for a nominal fine of 6*s.* 8*d.*, or 13*s.* 4*d.*, with nothing relative to its abatement (*g*). And if it be certified that the way has been since diverted, by an order of two justices, and that such part of the old way as is retained is in sufficient repair, the court will only give judgment for the nominal penalty (*h*).

(*a*) As to assaults in general, and in particular cases, and the respective punishments, see post, vol. iii. Index, "Assault."

(*b*) Dick. Sess. 177. See form, Leach, 536.

(*c*) Bro. Abr. Nuisance, 49. 8 T. R. 142, 3. See post, vol. iii. 575. 607 *b*.

(*d*) 2 Stra. 686. 2 Sess. Cas. 34. 7 T. R. 467. Com. Dig. Indictment, N.

(*e*) 8 T. R. 142.

(*f*) 9 Co. 53. Godb. 221.

(*g*) 13 East, 164. 1 Bla. Rep. 295. 602. 3 Smith, 575. 6 T. R. 635.

(*h*) 13 East, 166, 7.

The only judgment, at the present day, without express sentence, is that of outlawry; that of abjuration being long since obsolete. This judgment is given by the coroner at the fifth county court, upon the defendant's not appearing to the exigent, and is entered, "therefore the defendant, by the judgment of the coroner of our lord the king, is outlawed" (*a*). And it seems to be agreed, that when this judgment appears of record, by the sheriff's return of the exigent, in case of felony, the defaulter will be as much attainted, and liable to suffer the penalty of death, and incur the disabilities of attainder, as if he had been convicted by verdict, and sentenced in the regular course of judgment (*b*). And it has been holden, that if this do not appear on the return, but only by the answer of the coroner to a certiorari directed to him, requiring him to certify whether the defendant was outlawed or not, the same consequences will follow (*c*). When, therefore, he is brought in by *capias utlagatum*, no sentence of death is to be pronounced against him, for that is implied upon the outlawry (*d*). He is merely asked by the court if he has any thing to say, why execution should not be done upon him, according to law (*e*). To this he may plead, that he is not the person named in the process; which, like other collateral issues, will be tried *instanter* (*f*). If the outlawry then appear to be erroneous, he may assign errors, or any one, as *amicus curiæ*, may point them out to the court, who will stay execution, if the least technical objection can be supported (*g*). The defendant will be remanded until he has obtained a writ of error, which will be argued and decided in the way we have already shown in considering this kind of process (*h*). If, however, no error appear, the prisoner will be ordered for execution (*i*). Upon an outlawry for a misdemeanor, the defendant remains in custody, unless the outlawry be reversed for error, so that the outlawry does not operate as a con-

Judgments without express sentence.

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(*a*) Ante, 356, 361. 3 Inst. 212. 2 Dyer, 223. a. Hawk. b. 2. c. 48. s. 21.

(*b*) Finch, 467. Co. Lit. 128. 288. 3 Inst. 212. 52. Hawk. b. 2. c. 48. s. 22. Ante, 365.

(*c*) Co. Lit. 288. Hawk. b. 2. c. 48. s. 22. acc. Dyer, 223. cont.

(*d*) Fost. 113.

(*e*) Id. ib.

(*f*) Fost. 41.

(*g*) 1 Burr. 639. 3 Inst. 212. 2 Hale, 408. Hawk. b. 2. c. 48. s. 23.

(*h*) 1 Burr. 639. Ante, 369, 370.

(*i*) Fost. 113.

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WITHOUT
EXPRESS
SENTENCE.

viction (*a*). This distinction seems quite opposite to the general principle of our law, which, *in favorem vitæ*, allows many advantages in case of felony; as the plea of not guilty, after an objection in abatement or demurrer; while, in this solitary instance, the defendant is concluded by the outlawry without any trial, though here alone his life is in jeopardy.

Commencement
and duration of
punishment.

When the defendant is in execution on a former judgment in a criminal case, sentence of imprisonment, and other penalties, may be given against him, to commence from the expiration of the former confinement, previously awarded (*b*). So where he is charged with several offences at the same time, of the same kind, he may be sentenced to several terms of imprisonment, one after the conclusion of the other (*c*). The same might also be done in case of transportation; but it seems the court may, in their discretion, sentence the prisoner to another term, commencing before the expiration of that under which he is already labouring (*d*).

Judgments for
the defendant.

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When the defendant is acquitted upon the merits, by the verdict of a jury, or discharged on the allowance of a plea of pardon, the proper entry is, “whereupon all and singular the premises being seen and fully understood by the court of our said lord the king now here, it is considered and adjudged (*e*) by the said court here, that the said defendant be discharged of the premises, and do depart hence without day in this behalf” (*f*). And this judgment of acquittal, in case of misdemeanors, in the King’s Bench, cannot be given at *Nisi Prius*, but must be *in banc* (*g*). It seems to have been formerly supposed, that there was a great difference in the effect of a judgment, which included the words “eat inde quietus,” and one which was merely “eat sine die” (*h*).

(*a*) Ante, 366.

(*b*) 4 Burr. 2577, 8. See form, 4 Burr. 2577, 8. Post, last vol.

(*c*) 1 Leach, 536. See form, 1 Leach, 536. Post, last vol.

(*d*) 1 Leach, 451.

(*e*) The words, “It is ordered, &c.” are not proper, 1 Barn. & Cres. 711. Ante, 701, n. (*a*).

(*f*) 3 P. Wms. 499. 2 Sess. Cases, 282. 2 Hale, 391. See form, Co. Ent. 356. 360. Rast. Ent. 47, 48. 51. 56, 7. 2 Hale, 391, 392. 11 East, 508. 511. Hawk. b. 2. c. 48. s. 13. Post, last vol.

(*g*) 11 East, 514.

(*h*) 2 Hale, 393, 4.

For it is said, that if, after the latter, the first indictment proves to be defective, a new prosecution may be supported; but that, after the former, the previous acquittal may, in any case, be effectually pleaded (*a*). The first part of this proposition is, no doubt, correct at the present day; for it has been effectually shown, that where a party is acquitted, on the ground that the indictment is defective, he may, after judgment of “*eat sine die*,” be again indicted (*b*). But in this case the entry ought to be special, “and because it appears that the indictment is not sufficient, therefore it is considered that the defendant go thereof without day,” for then the cause is evident upon the face of the proceedings (*c*). Whether, if in such case, the judgment were erroneously entered, “*eat inde quietus*,” the prosecutor could be admitted to show that the cause of acquittal was a mere informality, does not seem to be decided. In case of an indictment for murder or manslaughter, where it appears that the defendant slew a robber or assassin in the attempt to rob or kill him, the judgment is, “*eat inde quietus*” (*d*). When the jury find him guilty per infortunium, or *se defendendo*, he has judgment to find bail, or “*remittitur prisonæ ad expectandam gratiam regis*” (*e*). The consequence of both these judgments is precisely the same; effectually to shield the defendant from any future prosecution on the same charge at the suit of his majesty (*f*).

JUDGMENTS FOR
DEFENDANT.

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When the judgment is pronounced, it ought, with all the preceding matter, to be entered on the record. After a conviction in the King’s Bench, this entry is made on the plea roll, but at the Old Bailey Sessions it is said that the proceedings are brought into the King’s Bench, placed in a bag, and laid aside (*g*). This record, in case of felony, states the session of oyer and terminer—the commission of the judges—the presentment by the oath of the grand jurymen by name—the indictment—the award of the *capias*

Of the record of
the judgment*.(*a*) 2 Hale, 394, 5.(*e*) 2 Hale, 395.(*b*) 4 Co. 44, a. 3 Inst. 214.
Ante, 304.(*f*) 3 Inst. 213, 14. 2 Hale,
395.(*c*) 2 Hale, 393.(*g*) Holt, 345. 1 Salk. 371.(*d*) 2 Hale, 395.

* See form, 11 East, 509. 4 Bla. Com. Appendix, I.

RECORD OF THE
JUDGMENT.

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or process to bring in the offender—the delivery of the indictment into court—the arraignment—the plea—the issue—the award of the jury process—the verdict—the asking the prisoner why sentence should not be passed on him—and the judgment of death passed by the judges (*a*). The record in the King's Bench is to the same effect (*b*). In this record, all the acts of the court ought to be stated in the present tense, as *præceptum est*, not *præceptum fuit*; but the acts of the parties themselves may be properly stated as past (*c*). And, therefore, if it state that the sheriff *was* commanded, instead of *is* commanded, the error will be fatal (*d*). It is not necessary, however, to set forth at large the commission on which the judges proceeded to the trial; and, if done, minute accuracy will not be requisite (*e*). Nor is it essential that any issue should be stated, as having been joined between the crown and the defendant (*f*). So the judges need not be shown expressly to have been “assigned by the king,” if it sufficiently appears that they are the king's justices; for their authority could be derived from no other source than his pleasure (*g*). And where several defendants are jointly indicted, and a special verdict only as to one of them is removed by certiorari, there will be no occasion, on the record, to notice any others than the one as to whom the removal has been made, whether they were acquitted or found guilty (*h*). But it must appear that the defendant was in court at the time of pronouncing the judgment, or the whole will be erroneous (*i*). But, as we have seen, it is not necessary on the record to notice the proclamation (*k*).

When an indictment for a misdemeanor has been removed by certiorari into the crown-office, and the defendant is convicted, judgment is signed in the office, as in the case of a civil action; and the award is “quod capiatur” (*l*). This is merely in the

(*a*) 4 Bla. Com. Appendix, I. to IV. 11 East, 509, &c. 1 Ld. Raym. 47, 8. 267.

(*b*) 11 East, 508.

(*c*) 1 Mod. 81. Comberb. 353. 2 Saund. 393, n. 1 T. R. 320.

(*d*) 2 Saund. 393.

(*e*) 4 Burr. 2085.

(*f*) 8 Harg. St. Tr. 286, 287. 4 Burr. 2085.

(*g*) 4 Burr. 2085.

(*h*) 4 Burr. 2086.

(*i*) 1 Lord Raym. 48. 267. Ante, 695. Rex v. Hollingberry, 4 B. & C. 329.

(*k*) 2 Lord Raym. 1469.

(*l*) 2 Burr. 201.

nature of an interlocutory judgment, and does not at all con-clude the defendant from afterwards moving to arrest it (*a*). When the defendant is absent at the time of conviction, and the offence is only fineable, the proper judgment is “quod capiatur”; or, if present, and does not pay it, “ideo committitur gaolæ”; for the first is only necessary when he is absent (*b*).

RECORD OF THE
JUDGMENT.

In cases of a traverse at the sessions, a record is also made by the clerk of the peace, comprising a complete history of the whole proceedings, the stile of the court, the indictment, the process to compel an answer, the traverse itself, the trial by the jury, their verdict, the judgment of the court, and the fine assessed by the magistrates (*c*).

If any part of the proceedings be stolen or lost, the deficiency may be supplied by a new entry (*d*). This may be done by the judges from the paper-books, as they have always power over their own proceedings (*e*). And, therefore, where a writ of error was brought in the House of Lords upon a conviction of perjury, for the want of a venire which had been lost, the House ordered a new one to be awarded (*f*). So if the postea be missing, a fresh one may be drawn from the notes of the associate (*g*).

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In case of misdemeanors, it is clear the court may vacate the judgment passed, before it becomes matter of record, and may mitigate, or pass another, even when the latter is more severe (*h*). And the justices at sessions have the same power during the session, because it is regarded as only one day; but they cannot do it at any subsequent period, unless an adjournment be entered on the roll (*i*). And no court can make any alteration, when once the judgment is solemnly entered on the record; but, if any

Of vacating the
judgment, and
giving another.

(*a*) 2 Burr. 801.

(*b*) Cro. Car. 340, 1.

(*c*) Dick. Sess. 155. See form, post, last vol.

(*d*) 1 Stra. 140. Fortes. 355. Lil. Ent. 523. 2 Stra. 833.

(*e*) Fortes. 355.

(*f*) Andr. 13, in notis. 1 Stra. 140, n. (1).

(*g*) 2 Stra. 1264. 1 Vent. 92, 93. And see Cro. Car. 144. Barnes, 14. 1 Salk. 47. 53.

(*h*) 6 East, 328. 1 M. & S. 442. Hawk. b. 2. c. 48. s. 20. Com. Dig. Indictment, N.

(*i*) 2 Salk. 606. Bac. Abr. Court of Sessions. Dick. Sess. 13, 14, 375, 6.

VACATING
JUDGMENT.

material defect appear on the face of it, the judgment may be reversed by writ of error (*a*). So the court of King's Bench will not mitigate, though they may set aside a fine imposed by an inferior court, on the removal of proceedings by certiorari thither (*b*). But the defendant, if oppressed, may obtain a remedy by petition to the lords commissioners of the Treasury, who will refer it to the attorney-general; and, if his report be favorable, will allow such mitigation, as they think the case requires (*c*). After judgment for a libel, the court will not, on the motion of the defendant, make an order on the prosecutor to deliver up the originals of a libellous matter, to be retained in the custody of an officer (*d*).

(*a*) 4 Mod. 395.

T. Raym. 376, 7.

(*b*) 8 T. R. 615. Court may
alter fine during same term, Sir

(*c*) 8 T. R. 618, n. (*d*).

(*d*) 2 East, 361.

CHAPTER XVII.

**OF THE CONSEQUENCES OF JUDGMENT OF
DEATH, viz. ATTAINDER, FORFEITURE, AND
CORRUPTION OF BLOOD.**

WHEN sentence has been pronounced upon a criminal for a capital offence, he is immediately, by operation of law, placed in a state of *attainder* (*a*). Upon an outlawry, also, in case of a charge of felony, the same consequences arise as from an express sentence (*b*); and when abjuration was allowed, that also had a similar effect (*c*). It does not take place upon conviction, because there is still, in contemplation of law, a possibility of the party's innocence; something may even yet be offered in arrest of judgment: the defendant may plead a pardon, or the proceedings may be shown to be erroneous; and though the strongest presumption is entertained of his guilt, he may still show his claim to indulgence or to a discharge (*e*). And, therefore, if a defendant dies at any time before judgment is pronounced against him, or he be outlawed, he will not be attainted, and none of the forfeitures consequent on attainder will ensue (*f*). And, therefore, it is said, that even if a man die fighting in open rebellion against his majesty, he shall not be attainted (*g*); though the chief justice, who is coroner for the whole of England, may take a view of the body, make a record of the manner of his death, and return it into the King's Bench, by which his lands and goods will be forfeited (*h*). Anciently a party, who, instead of an-

Of Attainder,
and when it
ensues.

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(*a*) Co. Lit. 390, b. 4 Bla. Com. 380.

(*b*) Co. Lit. 390, b. 4 Bla. Com. 380. Williams, J. Attainder.

(*c*) Co. Lit. 390. 3 P. W. 37, 38, n. B.

(*d*) 4 Bla. Com. 381.

(*e*) 4 Bla. Com. 381.

(*f*) Co. Lit. 390, b. note (2). 3 Inst. 12. 4 Rep. 57, b.

(*g*) Co. Lit. 390, b. note (n). 4 Rep. 47, b.

(*h*) 4 Rep. 57. Co. Lit. 390, b. note 2.

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swearing, stood obstinately mute, could not be attainted, except in case of high treason; and the lingering death of penance was, therefore, sometimes endured, in order to prevent the forfeiture (*a*). By the 12 Geo. 2. c. 20, this barbarous punishment was abolished, and at the same time the advantage which it incidentally produced was taken away; for standing mute, in all cases, amounts to a conviction, and subjects the offender to all the same consequences which a judgment on verdict or confession entails (*b*). There is also another mode of attainder, which has been sometimes exerted on great and perilous occasions, when the ordinary mode of justice would not ensure the public safety; this is, the attainting of state criminals by act of parliament. The attainder of Sir John Fenwick, for conspiring against William the Third, is one of the most remarkable instances of the kind in our history; but, just before he was tried for high treason, the act had been passed, requiring two witnesses to every indictment for that offence (*c*). On his trial, only one witness could be produced against him, and, therefore, it was found impossible to procure a conviction. To supply this defect, a bill of attainder was brought into parliament, which, after great opposition, passed, and the defendant was attainted and executed (*d*).

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Meaning and
effect of
Attainder.

The word *attainder* is derived from the Latin term *attinctus*, signifying *stained* or *polluted*, and includes, in its meaning, all those disabilities which flow from a capital sentence (*e*). On the attainder, the defendant is disqualified to be a witness in any court (*f*); he can bring no action, nor perform any of the legal functions which before he was admitted to discharge (*g*); he is, in short, regarded as dead in law (*h*). He is also incapable of making any will, for his property is no longer at his own disposal (*i*); though there is this difference between conviction and

(*a*) Co. Lit. 391, a. 4 Bla. Com. 326, note. Ante, 424, &c.

(*b*) Ante, 428.

(*c*) 7 & 8 W. 3. c. 3. s. 4. Ante, 428.

(*d*) See the whole of the proceedings in this case at great length, 5 Harg. St. Tr. 38 to 138.

(*e*) Jac. Law Dict. Attainder.

4 Bla. Com. 380.

(*f*) Ante, 599.

(*g*) 3 Inst. 213. 4 Bla. Com. 380. Williams, J. Attainder. 1 Tannt. 82. 2 Leach, 1006.

(*h*) 3 Inst. 213. 4 Bla. Com. 380. Williams, J. Attainder.

(*i*) 2 Hale, 205, &c. Toller on Exors, 11.

judgment, that if he die after the former, but before the latter, he may pass his real estate, but not his personal property; because the goods and chattels are forfeited on the verdict of guilty, but the lands are not divested until the attainder (*a*). But a party attainted, if allowed to purchase, and admitted to hold a copyhold worth more than £30, is competent to gain a settlement by forty days' unopposed residence (*b*). It seems too, that he may purchase lands, though he cannot retain them (*c*), and have them conveyed to himself and his heirs, though he can have no heir to succeed him (*d*). And it is to be observed, that this situation of civiliter mortuus is never allowed to protect him from the claims of private individuals, or the necessities of public justice; so that, though he can bring no action against another, he may be sued, and execution may be taken out against him (*e*). It is true, the circumstance of his being thus charged at the suit of a creditor, will not prevent the crown from putting the sentence of death into effect; but, if he be subsequently pardoned, the former will retain his rights over his person (*f*). And we have seen, that he is, in no case, allowed to plead autre fois attaint, except when any future prosecution would be superfluous, and of no avail (*g*). He may, therefore, be indicted of treason, after a conviction of felony, because the punishment on the former is more severe, and the forfeiture more extensive (*h*). And where he is concerned in another crime, as principal, he may be tried, in order to enable the court to sentence the accessaries (*i*); or he may be compelled to answer to former robberies, in order to restore the goods to the parties injured, under the statute (*k*). And if he commits any outrage, while under sentence of death, he may be prosecuted for it, after the attainder has been reversed, or a pardon been granted (*l*). But while under that sentence, he cannot

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(a) Tol. Ex. 11.

(b) 15 East, 463. 6 T. R. 117.

(c) Co. Lit. 2. b.

(d) Id. ibid.

(e) Fost. 61. 1 Wils. 217.

1 Bla. Rep. 31. 2 Stra. 873.

2 Anders. 38. 46. Cro. Eliz.

516. 15 East, 465. He may be

charged in execution, 6 Ves.

734.

(f) Fost. 61. 63.

(g) Ante, 464. 4 Bla. Com.

336. Co. Lit. 390, b. n. 2.

(h) 3 Inst. 213. Poph. 107.

2 Hale, 252. Hawk. b. 2. c. 36. s. 4.

(i) Poph. 107. 4 Bla. Com.

337. Hawk. b. 2. c. 36. s. 6.

(k) 21 Hen. 8. c. 11. 2 Hale, 252.

(l) Fost. 61.

MEANING
AND EFFECT OF
ATTAINDER.

be brought up to receive judgment for another felony, although he was under that sentence when he was tried for the other felony, and did not plead his prior attainder (*a*). And he cannot be allowed to petition the chancellor to supersede a commission of bankrupt issued against him, whether the attainder arose directly out of the proceedings, or from any distinct transaction (*b*).

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On the other hand, the person of an attainted felon is still under the protection of the law (*c*), and therefore the position of Blackstone, "that the law takes no further care of him than barely to see him executed (*d*)," must be taken with some allowance. To kill him without warrant is murder, and subjects the offender to a prosecution by the crown or an appeal at the suit of the widow (*e*). The heir, indeed, could maintain no appeal, because all relationship founded on consanguinity is dissolved by the attainder, but that which arises from the matrimonial contract can cease only with existence (*f*). If a rape were committed on a woman under sentence of death, or a wanton attack made on the person of a felon, there can be no doubt that the party offending would be liable to public justice; and, after a pardon, a person injured while under attainder might support an action in his own name to recover damages (*g*), and by 5 Geo. 4. c. 84. s. 26. felons transported receiving a remission of the sentence from the governor or lieutenant-governor of any colony, may sue for property acquired by him after conviction.

Its consequences
are,

The *consequences* of attainder are forfeiture and corruption of blood, which we must now proceed to consider.

Forfeiture.

The law of *forfeiture*, in criminal cases, is of very ancient origin, and seems to have been interwoven with the first elements of our ancient jurisprudence. Unlike many of our ancient usages, it was not derived from the feudal system, but was practised by our Saxon ancestors, and formed a part of the old Scandinavian constitution (*h*). At common law, therefore, all lands of inherit-

When real prop-
erty forfeited.

(*a*) Russ. & Ry. C. C. 268.

(*b*) 1 Taunt. 82. 2 Leach, 1006.

(*c*) Fost. 63.

(*d*) 4 Bla. Com. 380.

(*e*) Fost. 63.

(*f*) Id. Ib.

(*g*) Id. Ib. And see post.

(*h*) 4 Bla. Com. 383.

WHEN REAL
PROPERTY
FORFEITED.

ance whereof the offender was seized in his own right, and all rights of entry to lands in the possession of a wrongdoer, are forfeited to the crown upon an attainder of high treason, whether they are fee-simple or fee tail, to be vested absolutely and for ever in the crown (*a*). And the lands thus forfeited are immediately vested in his majesty without any office, because, as the blood of the felon is corrupted, the freehold must not remain in abeyance (*b*); though it seems that, at common law, this did not actually occur till the death of the traitor by whom they were formerly possessed (*c*). His wife also loses her dower (*d*), but the traitor does not forfeit lands he holds in another's right, as that of the church (*e*), or in that of his wife (*f*); nor, at common law, did he forfeit a use of lands holden in trust for him by another (*g*), unless it were fraudulently conveyed with intention to avoid a forfeiture (*h*). And it seems to be agreed that no right of action to lands of inheritance could ever be lost (*i*), or any right of entry into lands in the possession of a tenant holding under a lawful title (*k*). But it is said that the inheritance of this kind not lying in tenure, as fairs, markets, warrens, corodies, rent-charge, commons, &c. are forfeited to the king on an attainder of high treason; and, on sentence of death for felony, their profits will immediately belong to the crown during the offender's life, and the inheritance be extinguished at his death; for it cannot escheat because it lies not in tenure, nor can it descend because the blood is corrupted (*l*). It appears not to be a settled point whether a

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(*a*) 1 Cruise, 51, 2. Co. Lit. 8 a. 392. b. 3 Inst. 19. 1 Hale, 240. 359. 3 Co. 2, 3. Hawk. b. 2. c. 49. s. 1. Com. Dig. Forfeiture, B. 1. 4 Bla. Com. 381. Bac. Ab. Forfeiture, A. Burn, J. Forfeiture, I. Williams, J. Attainder.

(*b*) 4 Co. 58. 1 Leon. 21. 1 Hale, 242. Hawk. b. 2. c. 49. s. 1. Bac. Abr. Forfeiture, A.

(*c*) Co. Lit. 2. 1 Leon. 21. 1 Hale, 242. Hawk. b. 2. c. 49. s. 2. Bac. Abr. Forfeiture.

(*d*) 1 Cruise, 172.

(*e*) Staundford, P. C. 187, b. Com. Dig. Forfeiture, B. 1.

(*f*) Id. ibid.

(*g*) 12 Co. 2. Hard. 495.

1 Sid. 260. Hawk. b. 2. c. 49. s. 5. Com. Dig. Forfeiture, B. 1. Bac. Abr. Forfeiture, A. acc. Hardr. 405. dub.

(*h*) 2 Rol. Abr. 34. Hawk. b. 2. c. 49. s. 5. Bac. Abr. Forfeiture, A.

(*i*) 3 Co. 2, 3. 2 Hale, 242, 3. Hawk. b. 2. c. 49. s. 5. Com. Dig. Forfeiture, B. 1. Bac. Abr. Forfeiture, A.

(*k*) 3 Co. 2, 3. 3 Inst. 19. Hawk. b. 2. c. 49. s. 5. Com. Dig. Forfeiture, B. 1. Bac. Abr. Forfeiture, A.

(*l*) 3 Inst. 19. 21. Hawk. b. 2. c. 49. s. 4. Bac. Abr. Forfeiture, A.

WHEN REAL
PROPERTY
FORFEITED.

cestui qui trust loses his estate by the attainder of the trustee (*a*). It is held, however, that in case of the attainder of a mortgagor, the mortgagee shall hold till the crown thinks fit to redeem, for the court will not decree a foreclosure against his majesty (*b*).

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All copyhold estates are forfeited to the lord and not to the king, unless there is some act of parliament or express custom to the contrary (*c*). For the lord having the paramount interest, in contemplation of law, cannot be made to lose his right on the ground of the tenant's attainder; and as the blood is corrupted so that he can have no heir, the land naturally escheats to the lord as on default of issue. From this view of the subject it follows that the forfeiture does not accrue to him upon mere conviction, but only on complete attainder (*d*). But perhaps it might be otherwise by special custom (*e*). And it has been holden that if a surrender of a copyhold is made to a party who is executed before admittance, the land will not escheat to the lord, but return to the surrenderor, and descend to his successors (*f*).

In case of felony and petit treason, the forfeiture differs from that in high treason, both as to extent and the party who receives the benefit. At common law, and still where there is no provision to the contrary, the offender forfeits all his chattel interests absolutely, the profits of all estates of freehold during his life; and, after his death, all his real estate in fee simple and copyhold, but not in fee tail (*g*). The profits of an estate tail or for life, go to the king (*h*), but estates of inheritance accrue to the lord and not to his majesty (*i*), in which case the dower or free

(*a*) 1 Cruise, 500. Fonb. Tr. Eq. b. 2. c. 7. s. 1. Gilb. U. & T. by Sugden, 10. acc. Com. Dig. Forfeiture, B. 1. cont.

(*b*) Bridgm. Index, Treason. 2 Atk. 223.

(*c*) 1 Cruise, 361, 2. Hard. 434. 2 Ventr. 39. Com. Dig. Copyhold, M. 1.

(*d*) 3 B. & A. 510. 2 Vent. 38. 1 Lev. 263. Com. Dig. Copyhold, M. 1. Hawk. b. 2. c. 49. s. 7.

(*e*) 2 Vent. 38. Com. Dig.

Copyhold, M. 1. 3 B. & A. 510.

(*f*) 2 Wils. 13. Hawk. b. 2. c. 49. s. 7. n. (1).

(*g*) 1 Cruise, 52. 361, 2. Co. Lit. 41. a. 390. b. Com. Dig. Forfeiture, B. 3. 4 Bla. Com. 385. Burn, J. Forfeiture, I. Williams, J. Attainder.

(*h*) 3 Inst. 19. Hawk. b. 2. c. 49. s. 6.

(*i*) 3 Inst. 19. Bac. Abr. Forfeiture, A. 4 Bla. Com. 386. 1 Cruise, 361, 2.

WHEN REAL
PROPERTY
FORFEITED.

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bounty of the wife is not forfeited (*a*). Before, however, the latter can enter into the enjoyment of the lands, the king, at common law, had a right to waste them by pulling down the houses, extirpating the gardens, ploughing the meadows, and cutting down the woods (*b*). This was done professedly to strike terror into the mind of those who might see, in the devastation before them, the punishment of crime; but as it was found highly detrimental to the public interests, it was agreed, in the reign of Henry the First, that the king should have the profits of the lands for a year and a day, instead of that destruction which he was otherwise at liberty to commit (*c*). Hence the crown claimed the year and day in addition to the waste. This seems to be countenanced by the 17 Edw. 2. *de prerogativâ regis*, which speaks of the year, day, and waste, as belonging to the crown. But it is expressly directed by *magna charta*, that the king shall restore the lands at the end of the year and day, to the lord, without any mention of devastation. And this seems, according to the older authorities, to be the true construction (*d*); though later writers have contended that the king always possessed and still retains a right to the waste in addition to his enjoyment of the profits (*e*). This right of the crown is now usually compounded for by a pecuniary recompense (*f*). The profits of lands during life are forfeited upon conviction of misprision of treason (*g*), and striking in any of the superior courts of justice (*h*).

Personal property is, in fact, forfeited to the crown, on every conviction of treason, petit treason, or felony whether clergyable or otherwise (*i*), self murder or *felo de se* (*k*), standing mute,

Forfeiture of personal property.

(*a*) 1 Cruise, 210, 335.

(*b*) Co. Lit. 294. b. 4 Co. 124. b. 2 Inst. 37. 4 Bla. Com. 385. Bac. Abr. Forfeiture, A. Burn, J. Forfeiture, I. Williams, J. Attainder.

(*c*) 2 Inst. 37. Hawk. b. 2. c. 49. s. 8.

(*d*) 2 Inst. 36, 7, and the old writers there referred to.

(*e*) Hawk. b. 2. c. 49. s. 8. n. Bac. Abr. Forfeiture, A.

(*f*) 4 Bla. Com. 386.

(*g*) 3 Inst. 218. 4 Bla. Com. 386.

(*h*) 3 Inst. 218. 141. 4 Bla. Com. 386.

(*i*) Co. Lit. 41. a. 12 Co. 121. b. 5 Co. 109, 110. Hawk. b. 2. c. 49. s. 13. Com. Dig. Forfeiture, B. 3. Bac. Abr. Forfeiture, B. 4 Bla. Com. 386, 387. Williams, J. Attainder.

(*k*) 5 Co. 109, 10. Bac. Abr. Forfeiture, B. 4 Bla. Com. 387. Williams, J. Attainder.

FORFEITURE OF PERSONAL PROPERTY. [731] and the crime of striking in a court of superior jurisdiction (*a*). So also upon a coroner's inquest taken on a view of a dead body, and finding that the party when living was guilty of a crime which works a forfeiture, and that he fled for the same, his goods and chattels will be forfeited (*b*). And where a coroner cannot have a view of the body, it is said that the crown may obtain the effects by a presentment (*c*). It is also holden that the goods and chattels of an offender will be forfeited on the judgment of any tribunal competent to have tried the crime, that when apprehended on a charge of treason or felony, he fled from or resisted those by whom he was taken, and was at last killed in the attempt to secure him (*d*).

A forfeiture of goods and chattels is also incurred, when the jury, on an indictment of any capital offence, acquit the prisoner of the principal charge, but find that he fled; into which, we have seen, they are charged to inquire (*e*); the reason of which practice was, that it was thought an insult to public justice to elude and fly from its inquiries. It is, however, certain that the finding of the flight is, at all times, traversable, except when it is given by the coroner's inquest (*f*). And the particulars of the goods are always liable to a traverse (*g*). Since, indeed, personal property has become of so much importance, and frequently amounts to so considerable a value, the courts have considered its forfeiture as too severe a punishment for the mere natural inclination of man to preserve his freedom; in modern practice, therefore, the

(*a*) 4 Bla. Com. 387. Williams, J. Attainder. 2 B. & A. 258.

(*b*) Keilw. 68. a. 2 Dyer, 238. b. 5 Co. 109. Hawk. b. 2. c. 49. s. 14. Bac. Abr. Forfeiture, B.

(*c*) 5 Co. 110. Bac. Abr. Forfeiture, B.

(*d*) 5 Co. 109. b. Plowd. 260. 3 Inst. 227. Hawk. b. 2. c. 49. s. 16. Bac. Abr. Forfeiture, B.

(*e*) 5 Co. 110. Keilw. 68. Hawk. b. 2. c. 49. s. 14. Bac. Abr. Forfeiture, B. 4 Bla. Com. 387. Williams, J. Attainder. And it has been said that

the law is the same upon an acquittal of petit larceny, Hawk. b. 2. c. 49. s. 14. Bac. Abr. Forfeiture, B. 4 Bla. Com. 387. Williams, J. Attainder; though this would be rather singular, as it has been laid down by great authority, that this consequence does not follow as to the forfeiture of lands and tenements when the defendant is found guilty of the offence, Co. Lit. 41. Com. Dig. Forfeiture, B. 3.

(*f*) 1 Hale, 362. 2 Hale, 301. Hawk. b. 2. c. 49. s. 14. Bac. Abr. Forfeiture, B.

(*g*) Hawk. b. 2. c. 49. s. 14.

jury never find a flight, the inquiry has sunk into an empty form; and no goods are in such case forfeited (*a*).

FORFEITURE
OF PERSONAL
PROPERTY.

The last cause of forfeiting goods to which we need here allude, is the default of a defendant for not appearing on the exigent, in case of felony or treason (*b*). It has also been said, that the same consequence arises where the charge amounts to petit larceny (*c*). It is clear that property thus forfeited, will not be restored by the defendant's subsequent appearance and acquittal (*d*). But, on the other hand, it is agreed that it is saved by the reversal of the award of exigent, whether for any matter of form or of substance (*e*).

In the liability to this forfeiture every description of personal property is included (*f*). Choses in action and possession and rights of action are confiscated alike to the crown without office found (*g*); and bonds or leases made in trust for the defendant, and in which he is beneficially interested, are subject to the same seizure, as much as if he were legally concerned or had them in his own possession (*h*). Any conveyance also of his property, or trust of a term granted by him, to his own use, for the benefit of his family, will be taken if made in fraudulent anticipation of the forfeiture (*i*). But no such grant is forfeitable if it be made

(*a*) Hawk. b. 2. c. 49. s. 14. Bac. Abr. Forfeiture, B. 4 Bla. Com. 387.

(*b*) 5 Co. 110, 11. 1 Rol. Ab. 793. Finch, 352. Ante, 365, as to Process to Outlawry. Hawk. b. 2. c. 49. s. 15.

(*c*) Hawk. b. 2. c. 49. s. 15.

(*d*) Id. ib.

(*e*) 5 Co. 110, 11. Hawk. b. 2. c. 49. s. 15. Ante, 365, &c. as to process to Outlawry.

(*f*) Co. Lit. 391. a. Noy, 155. Hawk. b. 2. c. 49. s. 9. Com. Dig. Forfeiture, B. 3. Bac. Abr. Forfeiture, B.

(*g*) 2 B. & A. 258. The party convicted of a conspiracy cannot hold to bail. 4 D. & R. 144, and cases there cited; court will compel him to give security for

costs. 1 B. & A. 159. If party indicted for felony sue his bankers for produce of felony, court will stay proceedings in action. 4 Taunt. 325. See the 5 Geo. 4. c. 84. s. 26. empowering felons transported, receiving a remission of the sentence from the governor or lieutenant-governor of any colony, to sue for property acquired after conviction.

(*h*) Hob. 214. Cro. Jac. 312, 13. Hawk. b. 2. c. 49. s. 10. Bac. Abr. Forfeiture, B.

(*i*) 2 Keb. 564. 608. 644. 772. 1 Lev. 279. 1 Mod. 16. 1 Vent. 128. Hard. 465. 1 Anders. 294. Hawk. b. 2. c. 49. s. 11. Bac. Abr. Forfeiture, B. 4 Bla. Com. 387, 8.

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OF PERSONAL
PROPERTY.

bonâ fide, any further than it is for his own benefit, and this will always be presumed until the contrary appear (*a*). And property which he holds as the personal representative of another, is not liable to be taken with his own (*b*); nor is the power of revocation of the trust of a settlement reserved to the grantor, if it depend on some personal act to be done by himself, as making a deed or revocation under his hand and seal (*c*). The attainder determines a partnership of party attainted (*d*).

Forfeiture, as altered by statutes.

Such is the summary of the rules relating to forfeiture, as they stood at common law, and such they still remain, except where they have been affected by particular legislative provisions. The 26 Hen. 8. c. 13. and 33 Hen. 8. c. 20. seem merely to confirm the forfeiture as it stood at common law, and more accurately to ascertain the right of the crown on an attainder of treason. Neither of these statutes are repealed by 1 M. sess. 1. c. 1. which enacts, "that no pains of death, penalty or forfeiture shall enure to any offender for the doing any treason, petit treason, or misprision of treason, other than such as be within the statute 25 Edw. 3. st. 5. c. 2. ordained and provided;" for the words "*other than such*," have been rightly construed to refer to kinds of treason, and not to the penalties and forfeitures incidentally mentioned in the first part of the section (*e*). But treasons relating to the coin, belonging to a different class of offences to those which strike at the root of society and government, have been distinguished from them by the legislature in respect of the forfeiture they produce (*f*). It is provided by the several acts, constituting offences of this species and degree, that they shall work no corruption of blood (*g*), and that the wife shall not lose her dower (*h*).

(*a*) Id. *ibid.* Sed quære. See 1 Stark. C. N. P. 319, where it was held that a deed by which a felon on the eve of his trial for a capital offence, assigns his property to another, cannot be supported without proof of consideration.

(*b*) Hawk. b. 2. c. 49. s. 9. Bac. Abr. Forfeiture, B.

(*c*) 2 Keb. 564. 608. 644. 772. 1 Lev. 279. 1 Mod. 16. 1 Vent.

128. Hawk. b. 2. c. 49. s. 12. Bac. Abr. Forfeiture, B.

(*d*) Wats. 377.

(*e*) 3 Inst. 19. Hawk. b. 2. c. 49. s. 21. Bac. Abr. Forfeiture, C.

(*f*) 5 Eliz. c. 11. s. 2. 18 Eliz. c. 1. s. 2. 8 & 9 W. & M. c. 26. s. 8. 15 Geo. 2. c. 28. s. 4.

(*g*) Id. *ibid.*

(*h*) 5 Eliz. c. 11.

Clipping, washing, and rounding coin, as well as diminishing and impairing it (a), are not only exempted from the corruption of blood, but from the forfeiture of lands to the posterity of the offenders; but the treasons of this kind, subsequently created, favor only the dower and corruption of blood, and leave the forfeiture as at common law (b). For the better understanding of this distinction, it may be proper to observe, that where a statute saves the corruption of blood in case of *high treason*, it does not affect the forfeiture of lands, because the latter is a distinct right of the crown, independent of the former (c); but where the blood is preserved, in all its heritable qualities by an act respecting *felony*, the forfeiture is effectually prevented, because the land of a felon only escheats to the lord for default of an heir capable of deriving it from him, and not as a punishment of the offence (d).

An attempt was made in the reign of Queen Anne to abolish altogether the forfeiture of lands after death, and the corruption of blood in cases of high treason; and by the 7th Anne, c. 21. it was actually provided that those consequences should cease on the death of the pretender. However, before that event occurred, the 17 Geo. 2. c. 39. postponed the abolition until the death of the sons of the pretender should have relieved the government from all apprehensions of a rebellion; and by the 39 Geo. 3. c. 93. the expectancy is entirely removed, and the law firmly established on its original foundations. It would, indeed, have been a singular anomaly in legislation, if high treason had thus been privileged, while felony remained subject to the old confiscations with which both were originally visited. A more consistent and wise provision has recently taken the reverse, and the natural order, of relaxation and indulgence. The 54 Geo. 3. c. 45. has abolished both the corruption of blood and the forfeiture of lands after death, in every case except treason, petit treason, and murder, which still remain as at common law. So that, at the present

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(a) 18 Eliz. c. 1.

(b) 8 & 9 W. & M. c. 26.
15 Geo. 2. c. 28.

(c) 1 Salk. 85. Hawk. b. 2.

c. 49. s. 29. Bac. Abr. Forfeiture, C.

(d) 1 Salk. 85. 3 Inst. 47.

Hawk. b. 2. c. 49. s. 29. Bac. Abr. Forfeiture, B.

FORFEITURE
BY STATUTES.

day, on attainder of ordinary felony, the criminal forfeits only his goods and chattels, and the profits of land during life, while his real estate comes, in the ordinary channel of descent, to his heir, who is thus also restored to a full capacity to inherit.

To what time
the forfeiture
relates.

The forfeiture of lands in cases of treason, petit treason, and murder, reverts back to the time when the offence was committed, so as to avoid all alienations subsequently made to parties, however innocent (*a*). But the mesne profits of the lands will not be forfeited, except from the time of actual attainder (*b*). It is, therefore, material, at least in indictments for treason, to lay the proper day in the indictment on which the crime was perpetrated, as to that day the forfeiture of the lands will have relation (*c*), unless the jury specifically find the facts to have occurred on another (*d*).

The forfeiture of goods and chattels, when the party is convicted, relates to the time of conviction and not to the period of guilt (*e*). So on the finding of flight upon an acquittal, those things only are taken that belong to the felon at the time the inquisition is recorded (*f*). It has been said, indeed, that the personal estate of an individual who is *felo de se*, or who has been killed in resisting the attempts of justice, is forfeited to the crown from the moment of the fact, and vested in the king before the inquisition (*g*); but the better opinion seems to be that, at least, in the former case, the goods are not forfeited till after the finding

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(*a*) Plowd. 488. 8 Co. 170. Co. Litt. 390 b. 1 Hale, 360, 1, 62. Hawk. b. 2. c. 49. s. 30. Com. Dig. Forfeiture, B. 6. Bac. Abr. Forfeiture, D. 4 Bla. Com. 381. 386, 7.

(*b*) Co. Lit. 390 b. 8 Co. 170. Plowd. 488. Hawk. b. 2. c. 49. s. 32. Com. Dig. Forfeiture, B. 6. Bac. Abr. Forfeiture, D.

(*c*) Ante, 225. 1 Hale, 361. 3 Inst. 330. Bac. Abr. Forfeiture, D.

(*d*) 1 Hale, 361. 2 Inst. 318.

Bac. Abr. Forfeiture, D.

(*e*) 1 Hale, 362. Co. Lit. 391. Hawk. b. 2. c. 49. s. 30. Com. Dig. Forfeiture, B. 6. Bac. Abr. Forfeiture, D. 4 Bla. Com. 387. And this without office found, 2 B. & A. 258.

(*f*) Staundf. 192 a. 1 Hale, 362. Hawk. b. 2. c. 49. s. 30. Com. Dig. Forfeiture, B. 6. Bac. Abr. Forfeiture, B.

(*g*) 1 Lev. 8. 1 Hale, 362. Hawk. b. 2. c. 49. s. 30. Com. Dig. Forfeiture, B. 6. Bac. Abr. Forfeiture, D.

of the inquest (*a*). On an appeal, indeed, every forfeiture, whether of personals or realty, relates to the time of judgment, because in the writ on which that proceeding is grounded, no mention is made of time, and consequently nothing appears on the record to fix the date of the felony (*b*). It does not seem to be settled at what period the forfeiture relates on a conviction upon the statutes of *præmunire* (*c*); nor is it of much practical importance, as those provisions have long been obsolete. There is also a material distinction between treason and felony with respect to the time when the forfeiture actually takes effect. In the former case, there is no forfeiture until attainder, in the latter it takes place immediately on conviction (*d*). And therefore it is that we have seen the allowance of clergy does not restore the goods which are already vested in the crown (*e*); but if a party convicted of high treason were pardoned before sentence all his property would be secured from confiscation.

TO WHAT TIME
FORFEITURE
RELATES.

By the 1 Rich. 3. c. 3. the sheriff and other officers are precluded from seizing the goods of a party arrested or imprisoned for treason or felony until his attainder or conviction. This act is said to be only in affirmance of the common law (*f*), and extends to money as well as specific chattels (*g*). It seems, however, that the goods may be appraised or inventoried after indictment found in order that no sequestration or collusive transfer may defeat the crown of the forfeiture (*h*). This, indeed, does not extend to a removal; and it is clear that the party indicted may sell any of them for his own support in prison, or that of his family, or to assist him in preparing for his defence on the trial (*i*). But a frau-

What to be done
with the goods
of a felon, and
when he may
bonâ fide sell
them.

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(*a*) 1 Sid. 150. 1 Saund. 362. n. (1).

(*b*) Co. Lit. 390 b. 31 a. Com. Dig. Forfeiture, B. 6.

(*c*) Cro. Car. 172. Sir Wm. Jones, 217. Hawk. b. 2. c. 49. s. 31. Bac. Abr. Forfeiture, D.

(*d*) Co. Lit. 391 a. Com. Dig. Forfeiture, B. 4. 7.

(*e*) Ante, 689.

(*f*) Hard. 97. 3 Inst. 229. Com. Dig. Forfeiture, B. 4. Com. Dig. Justices, Z. Hawk. b. 2. c. 49. s. 39.

(*g*) Sir T. Raym. 414. Hawk. b. 2. c. 49. s. 39. Com. Dig. Forfeiture, B. 4. Com. Dig. Justices, Z.

(*h*) 1 Hale, 367. 3 Inst. 228. Hawk. b. 2. c. 49. s. 35. Bro. Abr. Forfeiture, 10. Burn, J. Forfeiture, I. Williams, J. Seizure of Felon's Goods.

(*i*) 4 Bla. Com. 387, 8. 8 Co. 171. Skin. 357, 58. 1 Hale, 361. Hawk. b. 2. c. 49. s. 33. Com. Dig. Justices, Z. Bac. Abr. Forfeiture, E. Williams, J. Seizure of Felon's Goods.

WHAT TO BE
DONE WITH
GOODS OF
FELON.

duleut conveyance without consideration, as a bill of sale to a felon's son, will be void, because, as the owner might, if acquitted, have recovered them back himself, so, if convicted, the transfer will not avail against his majesty (*a*). And though the property cannot be touched before, it is certain that it may be seized as soon as the forfeiture is completed (*b*). It seems, too, the whole township is answerable to the king for their production, and are therefore empowered to seize them wherever they may be conveyed (*c*). And, at common law, they could not exonerate themselves from responsibility by showing that they delivered the goods to an individual by whom they were secreted (*d*); but by the 31st Edw. 3. c. 3. they are admitted to excuse themselves by throwing the blame on the party actually culpable. The crown seems to take them free from liability to the previous debts of the convict, though it should seem that, in some cases, the crown will allow the creditors to reap benefit from them (*e*).

[738]

Of the loss of
dower.

By the ancient common law, the wife of a criminal attainted either of high treason, or any capital felony, lost not only the dower to which she was entitled at common law, but that which she might claim *ad ostium ecclesiæ, ex assensu patris*, or any special custom except gavelkind, whether the offence was committed before or after the marriage (*f*). But she did not forfeit lands given jointly to her husband and herself, by way of frank-marriage or otherwise, except for the year and day for which the king was entitled to hold them (*g*).

(*a*) 4 Blac. 388. Skin. 357, 8. 8 Co. 171. 1 Hale, 361. Hawk. b. 2. c. 49. s. 33. Com. Dig. Justices, Z. Bac. Abr. Forfeiture, E. Williams, J. Seizure of Felon's Goods. And see 1 Stark. C. N. P. 319. Ante, 733, note (*a*).

(*b*) Co. Lit. 391 a. Hawk. b. 2. c. 49. s. 40.

(*c*) Staundf. Prerog. 47. Bro. Abr. Charge, 45. Hawk. b. 2. c. 49. s. 40. Bac. Abr. Forfeiture, E.

(*d*) Hawk. b. 2. c. 49. s. 41. Bac. Abr. Forfeiture, E.

(*e*) Dougl. 542. See form of commission, to inquire of lands forfeited on outlawry, &c. 1 Lil. Ent. 304.

(*f*) Co. Lit. 316. 37 a. 41 a. 392. 1 Hale, 359. 3 Inst. 47. 211. Fitz. N. B. 150. Bro. Abr. Dower, 82. Hawk. b. 2. c. 49. s. 42. Bac. Abr. Forfeiture, B.

(*g*) 3 Inst. 216. Hawk. b. 2. c. 49. s. 43. Bac. Abr. Forfeiture, F.

A jointure in lieu of dower was, at all times, secure (*a*). By the 1st Edw. 1. c. 12. s. 17. the right to dower was restored in all cases whatsoever, where the other estate of the criminal was forfeited. This provision was repealed by the 5th & 6th Edw. 6. c. 11. so far as it related to high treason, but it is still in force with respect to felony. In every species of treason, therefore, except such as have been created since that statute, and taken by express exception out of its operation, the claim of the wife to dower is for ever precluded (*b*). The general term used in this act has been construed to include petit treason, which, therefore, causes a forfeiture of dowry (*c*). But in the offences relating to the coin subsequently created, the claim of the wife is made the subject of express exception, and consequently is still valid (*d*). And no felony of the husband, at the present day, takes away this right from the widow (*e*). For all such crimes as existed as felonies at the time of the 1st Edw. 1. c. 12. were exempted by that statute, and the acts by which felonies have, since that time, been created, expressly save the privilege (*f*).

OF LOSS OF
DOWER.

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If the husband be attainted of a crime for which the dower of his wife is forfeited, and afterwards receives a pardon, this cannot render her capable of being endowed of any lands which he possessed before the time to which the forfeiture had relation; but she may claim this proportion of any which he may afterwards obtain (*g*). But such an effect will naturally arise from a parliamentary reversal of the attainder (*h*). And, therefore, if a husband, having levied a fine with proclamations, is erroneously attainted of treason, and five years after his death the proceedings are reversed, the fine and non-claim will be no bar to the suit of the wife for her dower, because she could have taken no steps to regain it,

(*a*) Co. Lit. 36 b. 37 a.

(*b*) 1 Cruise, 172. Co. Lit. 37 a. 1 Hale, 359. Hawk. b. 2. c. 49. s. 46. 4 Bla. Com. 381. Burn, J. Forfeiture, II. Williams, J. Attainder.

(*c*) Co. Lit. 392 b. Hawk. b. 2. c. 49. s. 46.

(*d*) 5 Eliz. c. 11. s. 2. 18 Eliz. c. 1. s. 2. 8 & 9 W. & M.

c. 26. s. 8. 15 Geo. 2. c. 28. s. 4.

(*e*) Co. Lit. 392 b. 1 Cruise, 210. 335.

(*f*) Bac. Abr. Forfeiture, F. Williams, J. Attainder.

(*g*) 1 Leon. 3. Hawk. b. 2. c. 49. s. 42. Bac. Abr. Forfeiture, F.

(*h*) See post, 742, 3, &c.

OF LOSS OF
DOWER.

while the attainder was in existence (*a*). But if a feoffment be made of lands by a man who is afterwards condemned for treason, the wife can recover nothing from the feoffee (*b*).

Though the attainder of the husband of high treason deprives the wife of the claim to dower, if the wife be attainted for a crime after bearing issue, the husband will not be prevented from enjoying a tenancy by the curtesy in her lands; but it would be otherwise if the child were born after the crime, because the whole would then have been liable to forfeiture before the right of the husband had its inception (*c*).

[740]
Corruption of
blood.

Another consequence of attainder in certain cases of atrocity is, that the blood of the offender is corrupted (*d*). This is essentially distinct from the forfeiture; for we have seen, that the offender against the statutes respecting the coin, incurs the latter though he is exempted from the former (*e*). When this consequence flows from an attainder, the party himself is stripped of all his honors and dignities and becomes ignoble (*f*). He is not only deprived of all his possessions, but is rendered incapable of acquiring any other by inheritance (*g*). He can transmit no inheritance to his issue, either derived immediately from himself or through him from any remote ancestor (*h*). So that whenever it is necessary to derive a title through him, however distant the heir may be, the claim will be radically defective; for in him the whole heritable blood was tainted, and cannot afterwards flow through

(*a*) 3 Inst. 216. Moor, 639. Hawk. b. 2. c. 49. s. 44. Bac. Abr. Forfeiture, F.

(*b*) 2 Dyer, 140. Hawk. b. 2. c. 49. s. 42. Bac. Abr. Forfeiture, F.

(*c*) 1 Hale, 359. Co. Lit. 29, 30.

(*d*) 3 Cruise, 248. 373 to 381. 473. 1 Cruise, 52.

(*e*) Ante, 733, 734. 1 Salk. 85.

(*f*) Co. Lit. 3. 41. 3 Inst. 211. Hawk. b. 2. c. 49. s. 47.

Bac. Abr. Forfeiture, G. Burn, J. Forfeiture, III.

(*g*) Co. Lit. 3 a. 391. 392. 1 Hale, 356. Hawk. b. 2. c. 49. s. 43. 4 Bla. Com. 388. Bac. Abr. Forfeiture, G. Burn, J. Forfeiture, III. Williams, J. Attainder.

(*h*) Co. Lit. 3 a. 391, 392. 2 Hale, 356. Hawk. b. 2. c. 49. s. 43. Bac. Abr. Forfeiture, G. 4 Bla. Com. 388. Burn, J. Forfeiture, III. Williams, J. Attainder.

any other than a polluted channel (*a*). But it does not affect the succession of collateral issue; so that if a person whose blood is corrupted, has sons, one of whom acquires an estate of his own and dies without issue, his brother will inherit, because there is no necessity in such a case to make any mention of the father (*b*). And the heir *ex parte maternâ* may inherit from his maternal ancestors notwithstanding the attainder of his father (*c*). And it is a general rule, that where there is no necessity to name the individual attainted in a title, his corruption of blood will not vitiate, though the ancestor be ever so distant (*d*). Thus, for example, if there be a father and two sons, and the eldest is attainted in the life-time of the father and dies without issue, the younger son will succeed to those estates which otherwise would have descended to his brother; but if the elder son, who was attainted, survive the father but a day, so as to have been placed in his room, the lands must escheat and the succession be for ever defeated (*e*). And if the son of a party attainted purchase lands and leave no issue, they cannot descend to his uncle, because the father must be the link of connection between them, and that link is severed by the treason (*f*).

[741]

This corruption of blood originally followed every attainder of felony and treason (*g*). Several statutes, however, creating new felonies, contain provisos that this consequence shall not arise from offences against their enactments. All the treasons too, respecting the coin, which have been created by act of parliament since the reign of Mary, are deprived of this posthumous punishment (*h*). The same ineffectual attempt was made by the 7 Anne, c. 2. to remove the corruption of blood from high treason, as we

(*a*) Co. Lit. 8 a. 391. Cro. Car. 543. 1 Sid. 200, 1. 1 Lev. 60. Noy, 159. 166. 1 Vent. 417. 1 Hale, 356. Hawk. b. 2. c. 49. s. 49. 4 Bla. Com. 388. Bac. Abr. Forfeiture, F.

(*b*) Co. Lit. 8 a. 1 Hale, 357. Hawk. b. 2. c. 49. s. 49.

(*c*) Co. Lit. 187 a.

(*d*) Noy, 159. 166. 1 Vent. 413. 1 Lev. 60. 1 Sid. 200, 1. Hawk. b. 2. c. 49. s. 49. Bac.

Abr. Forfeiture, F.

(*e*) 1 Hale, 356, 7. Hawk. b. 2. c. 49. s. 50.

(*f*) 3 Inst. 241. 1 Hale, 357.

(*g*) Co. Lit. 8 a. 391. 392. 3 Inst. 311. Hawk. b. 2. c. 49. s. 47. Bac. Abr. Forfeiture, F. Burn, J. Forfeiture, HI.

(*h*) 5 Eliz. c. 11. s. 2. 18 Eliz. c. 1. s. 2. 8 & 9 W. & M. c. 26. s. 3. 15 Geo. 2. c. 28. s. 4.

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BLOOD.

have stated respecting forfeiture; its operation was in the same manner suspended by the 17 Geo. 2. c. 39; and, in the same way, finally determined by the 39 Geo. 3. c. 93. Thus the law remains in its ancient condition respecting high treasons which affect his majesty or the commonwealth, as well as petit treason and ordinary murder; but in every other case of felony, the corruption of blood has, by the 54 Geo. 3. c. 145, been abolished without exception or limit.

[742]

Neither the corruption of blood or the forfeiture, where they once occur, are removed by his majesty's pardon (*a*). For though the king may remit the punishment due to public justice by a gracious exercise of his prerogative, he cannot confer a favor which may deprive another of his subjects of a right to which he is entitled; and, therefore, he cannot take the escheat from the lord by an extension of mercy to the criminal (*b*). He may excuse a forfeiture which is due only to himself, but he cannot entrench on the rights of others (*c*). But an individual pardoned may afterwards acquire new property and may transmit it to his children (*d*). The only mode entirely to remove the stain, is an act of parliament reversing the attainder (*e*); the nature and effect of which we shall hereafter consider.

(*a*) Co. Lit. 8 a. 391, 392.
3 Inst. 240, 1. 1 Hale, 358.
Hawk. b. 2. c. 49. s. 51. Bac.
Abr. Forfeiture, F. Burn, J.
Forfeiture, III. Williams, J.
Attainder.

(*b*) 3 Inst. 240, 1.

(*c*) 3 Inst. 240, 1.

(*d*) Co. Lit. 8 a. 391. 392.
1 Hale, 358. Hawk. b. 2. c. 51.
s. 51. And see the 5 Geo. 4.
c. 84. s. 26. Ante, 727.

(*e*) 3 Inst. 240, 1.

CHAPTER XVIII.

OF REVERSAL OF THE JUDGMENT.

THE judgment, with all its consequences may, if sufficient cause be shown, be reversed ; in some cases by plea, and in others by writ of error.

The judgment may be avoided by *plea*, for matters either apparent on the face of the record, or for irregularities in the course of the proceedings.

There are, however, very few instances where the judgment can be avoided for a mistake apparent on the record, without a writ of error. For though it is the allowed practice of the court of Common Pleas, in civil cases, to suffer a defendant coming in on a *capias utlagatum*, in the same term on which the exigent is returnable, to reverse the outlawry on plea or motion, by showing any cause which renders it erroneous (*a*), it seems that, in criminal cases, the court of King's Bench will compel the party to bring a writ of error, in order to take advantage of any defect which appears on the face of the proceedings (*b*). Lord Coke, indeed, seems to be of opinion that, in *favorem vitæ*, a plea or motion would be admitted, and, therefore, the point may be open for consideration (*c*), though his opinion is not warranted by any recent practice. But it is certain that a conviction of felony, of which the party has had his clergy and been restored to his freedom, may be discharged by exception to the proceed-

Avoiding judgment without writ of error.

[744]

(*a*) Co. Lit. 259 b. 1 And. 638. Bro. Abr. Error, 158. 36. Hawk. b. 2. c. 50. s. 1, 1 Bulst. 109. Hawk. b. 2. c. 50. s. 1. and authorities from old books there cited.

(*c*) Co. Lit. 259 b.

(*b*) 1 Rol. Abr. 743. 1 Burr.

AVOIDING WRIT OF ERROR. ings, because, as an allowance of clergy is not, in such case, a judgment, he could have had no remedy by writ of error (*a*).

In general, the ground of falsifying a judgment by plea, is some extrinsic matter which does not appear on the record. Thus if the sentence were passed by a person who had no valid commission to judge the party condemned, it is void, and may be altogether set aside by shewing the defect without writ of error (*b*). So where a commission authorizes proceedings on a certain indictment taken before A. B. C. and twelve others, and the commissioners proceed and give sentence on one taken by eight only, or where they are empowered to act only in the presence of particular individuals and they proceed without them, the judgment may be thus summarily vacated (*c*). Although it appears upon a case reserved, that evidence has been admitted at the trial which ought not to have been received; yet if the judges are of opinion that there is ample evidence to support the indictment after rejecting such improper evidence, they will not set aside the conviction (*d*).

[745] The greatest number of cases in which judgment has been thus reversed are those of outlawry (*e*). Thus every judgment of this kind, in case of treason or felony, may, in favorem vitæ, be avoided by plea that the defendant was in prison, or in the king's service at the time of returning the exigent (*f*). This rule was restrained as to high treason, by 26 Hen. 8. c. 13, which provided that parties indicted of treason resident beyond the realm, should be outlawed by regular process, as if they had been within the kingdom. But it has been subsequently provided by the 5 & 6 Edw. 6. c. 4, that they may reverse the outlawry by surrendering themselves to the chief justice of the King's Bench

(*a*) Cro. Eliz. 439. Hawk. b. 2. c. 50. s. 1.

(*b*) 3 Inst. 231. Plowd. 390. Bulstr. 101. Hawk. b. 2. c. 50. s. 3. 4 Bla. Com. 392.

(*c*) Plowd. 390. 3 Inst. 231. 1 Bulst. 101. Hawk. b. 2. c. 50. s. 3.

(*d*) Russ. & Ry. C. C. 132. 164. 1 East P. C. 354.

(*e*) Ante, 369.

(*f*) Co. Lit. 269. 1 Burr. 640. Bro. Abr. Utl. 40, 57, 63. 3 Inst. 32. Hawk. b. 2. c. 50. s. 6.

within a year, and offering to traverse the indictment. These provisions have been holden to extend to treasons subsequently created (*a*). But no outlawry can be reversed on any matter of fact whatsoever, except where life will be forfeited by its affirmance (*b*).

AVOIDING WRIT
OF ERROR.

It seems, however, that any outlawry whatever may be avoided by the defendant, on his coming into court and pleading that his name, addition, degree, estate, or mystery is improperly described in the process (*c*). He may also plead that there is no such town as that of which he is described as conversant (*d*). So he may show, that at the time the writ was issued and ever since, he has lived in another place than that of which he is named in the process (*e*); though it is said this plea will only reverse it against him by whom it is pleaded; for he will be understood not to be the person intended, and so it will remain in force against the individual truly described on the record (*f*). And if a person come into court except on a *capias utlagatum*, of exactly the same description as the person named in the proceedings, he cannot avoid the outlawry by pleading that there are two persons of the same names and additions, and that the party really intended is the younger, and himself the elder (*g*). Though it has been laid down, that if a person taken on a *capias utlagatum* deny his identity, if the attorney-general confess it, he shall be discharged; if he deny it, the issue shall be tried; and if the party stand mute, the court shall have an inquest of office to ascertain the fact before sentence is passed upon him (*h*). It seems, indeed, that in all civil cases, before an outlawry is returned, a person of the same name may come into court, and show that he is not the

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(*a*) Fost. 46. 3 Inst. 32, 216. 3 Harg. St. Tr. 983, 4, notes. 3 Mod. 47, n. a. 2 Stra. 824. 1 Burr. 630. Hawk. b. 2. c. 50. s. 9.

(*b*) Co. Lit. 259 b. Hawk. b. 2. c. 50. s. 6.

(*c*) Bro. Abr. Ut. 1. 22, 23, 24, 25, 26, 32, 51. Id. Misnomer, 1. Hawk. b. 2. c. 50. s. 10.

(*d*) Bro. Abr. 26. Rast. Ent. 300, 1. Hawk. b. 2. c. 50. s. 10. *acc.* Hawk. b. 2. c. 50. s. 10, n. (*b*), *contra*.

(*e*) 2 Dyer, 192 b. Bro. Ab. 22, 25, 32, 33, 38. Keilw. 101. Hawk. b. 2. c. 50. s. 10.

(*f*) Bro. Abr. Ut. 34. 73. Hawk. b. 2. c. 50. s. 10.

(*g*) Hawk. b. 2. c. 50. s. 10.

(*h*) 2 Hale, 401, 2.

AVOIDING WRIT
OF ERROR.

individual against whom the writ is intended to operate, on which, if the plaintiff confess it, the diversity of the names is entered on the roll, and a new exigent awarded containing a more minute description of the real defendant (*a*). But this cannot be done in criminal proceedings, because it would create a variance between the process and the indictment, and the latter, as the finding of the jury, cannot be substantially amended (*b*). The remedy of the party erroneously taken is, in this case, by writ of identitate nominis, which he is at all times entitled to obtain (*c*). If the attorney-general confess the matter contained in this writ, or the party succeed in proving it, he will be entitled to his discharge, and the outlawry will remain in force against the individual really indicted.

If a man purchases land of another, and afterwards the vendee is either by outlawry or his own confession, attainted of treason committed previous to the alienation, whereby the estate becomes liable to escheat or forfeiture, the purchaser is at liberty, without any writ of error, to falsify the actual perpetration of the crime, and prove the innocence of the party attainted, nor will he be at all concluded by the outlawry or confession (*d*). But if the attainder was consequent on a verdict of guilty, he cannot dispute the offence itself, but may falsify it as to the time when it was committed, in order to show that it was subsequent to the transfer; because as it was not material to the conviction that the day laid in the indictment should be proved in evidence to be correct, it will not follow from a general verdict of guilty, that the jury found the statement to be, in this respect, accurate (*e*).

[747]

Of reversing a
judgment by
writ of error.

A writ of error, to reverse a judgment, lies from all inferior jurisdictions to the King's Bench, and from the King's Bench to the House of Peers; and it may be brought in the King's

(*a*) Fitz. N. B. 268. Hawk. Fitz. N. B. 268.
b. 2. c. 50. s. 10. (d) 3 Inst. 230. 1 Hale, 361.
(*b*) Fitz. N. B. 268, 9. Hawk. Hawk. b. c. 50. s. 2. 4 Bla.
b. 2. c. 50. s. 10. Bro. Abr. Com. 391.
Identitate Nominis, 2, 11. (e) 3 Inst. 230, 1. 1 Hale,
(*c*) Fitz. N. B. 268. Hawk. 361. Hawk. b. 2. c. 50. s. 2.
b. 2. c. 50. s. 10. See form, 4 Bla. Com. 391.

Bench to reverse an attainder before the Lord High Steward (*a*). REVERSING BY
WRIT OF ERROR. It may be brought by the party himself, or, after his death, by his heir or executor, to reverse an attainder of treason or felony, but by no other persons, whatever interest they may claim in the reversal (*b*). When once judgment is given, this is the only remedy for any defect in the proceedings (*c*). But it never can be obtained before judgment; and, therefore, a defendant, who had been admitted to clergy, cannot thus set aside the conviction, but may remove the indictment into the King's Bench, and there take advantage of mistakes, in the shape of exceptions (*d*). The history and nature of writs of error, in criminal cases, is stated by Lord Mansfield with great ability and clearness (*e*). According to his authority, until the reign of Queen Anne, a writ of error, in any criminal case, was held to be merely *ex gratia*. It was then laid down, that writs of error in criminal cases were not grantable *ex debito justitiæ*, but *ex gratia regis*; "and that, in such case, a man ought to make application to the king; and he will refer to his counsel; and if they certify that there is cause, he will grant a writ of error" (*f*). It never was granted, except when the king from justice, when there was really error, or from favor where there was no error, was willing the judgment should be reversed. After writ of error granted, the attorney-general never made any opposition, because either he had certified "there was error," and then he could not argue against his own certificate; or the crown meant to show favor, and then he had orders "not to oppose." The king, who alone was concerned as prosecutor, and who had the absolute power of pardon, having thus expressed his *willingness* that the judgment should be reversed, the court of King's Bench reversed it upon very slight and trivial objections, which could not have prevailed if any opposition had been made, or if the precedent had been of any consequence. The form of reversal "for the errors assigned, and other errors appearing upon the record," de-

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(*a*) 1 Sid. 208. Hawk. b. 2. Lit. 13, note (1). Hawk. b. 2.
c. 50. s. 17. 4 Bla. Com. 392. c. 50. s. 11. 4 Bla. Com. 392.
3 B. & P. 354. (c) Cro. Jac. 404.
(*b*) 5 Co. 111, a. Owen, 147. (d) Cro. Eliz. 489.
148. Cro. Eliz. 225. 273. 558. (e) 4 Burr. 2550, 1, 2.
1 Leon. 325. 1 Salk. 295. Co. (f) 1 Vern. 170. 5.

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WRIT OF ERROR.

livered the court from the necessity of specifying any ; and they, therefore, frequently reversed it, when there was really no error at all, because it was evidently with the king's concurrence ; and as he had, at all times, the power of refusing the writ, the precedent was thought of no importance (*a*).

[749]

But, in the third year of Queen Anne, it was resolved by ten of the judges, that in every case, under treason and felony, a writ of error was not merely a matter of favor but of right, and ought to be granted (*b*). Still it remains entirely in the breast of the crown, whether it shall be granted or refused on an attainder of felony or treason, so that the king may absolutely refuse, though the error is ever so manifest (*c*). And, in misdemeanors, notwithstanding the determination that it is a matter of right, this was only intended to mean when there is probable cause of error (*d*). It does not, therefore, issue as a matter of course, even in these cases, but under the fiat of the attorney-general (*e*). This, it is true, he is bound to grant, wherever probable grounds are laid, as a matter not of indulgence but of justice, and the court will order him, if he improperly refuse (*f*). And the attorney-general may take the opinion of the court before it is granted (*g*).

When the defendant was convicted at the sessions or assizes, it is laid down, that the most usual way of obtaining a writ of error, is to remove the record by certiorari into the crown-office, and then to bring a writ of error coram nobis ; but the writ of error may be first sued out, and the proceedings removed by its authority (*h*). It seems to have been formerly the practice to petition the attorney-general, setting forth the errors intended to be as-

(*a*) Per Ld. Mansfield. 4 Burr. 2550.

(*b*) 4 Burr. 2550. 2 Salk. 504.

(*c*) 4 Burr. 2551. 1 Sid. 69. 1 Bulst. 71. 3 Mod. 42. 1 Vern. 170. 5. 1 Burr. 641. Rep. temp. Hardw. 251. Hawk. b 2. c. 50. s. 11. 4 Bla. Com. 392. 2 Saund. 101, a. n. 1. 2 Salk. 504.

(*d*) 4 Burr. 2551. 4 Bla. Com. 391.

(*e*) 4 Burr. 2551.

(*f*) 8 Mod. 177. Fortes. 37. 4 Burr. 2530. 2550.

(*g*) Id. ibid.

(*h*) 6 Mod. 173. 1 Salk. 149. 266. Holt, 274. It is not the present practice to issue any certiorari.

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WRIT OF ERROR.

signed, accompanied by a certificate from counsel that they are real errors, and not merely calculated for delay (*a*). But the course, at the present day, is to send a copy of the record, or at least of the indictment, when that is defective, together with counsel's opinion as to its insufficiency, to the attorney-general, who verbally, through his clerk, signifies his determination as to allowing the writ. On his assent, thus signified, the præcipe for the writ (*b*) is prepared, and taken to the cursitor of the county, who prepares the fiat, which is then taken to the attorney-general, and signed by him; on which the writ, of course, issues (*c*). In cases of treason or felony, the error must be actually assigned before the writ can be awarded (*d*). When the writ is thus obtained, either by the sign manual, in case of heinous offences, or by the attorney-general's fiat in those of inferior moment, the solicitor for the defendant lodges it with the clerk of the peace at the sessions, or the clerk of assize, at the assizes, if the judgment was given in the country, who returns it, with the proceedings, into the crown-office (*e*). The prosecutor may, in this stage of the proceedings (if the error was not assigned previous to the issuing of the writ,) serve a rule in the office on the defendant to assign errors; and if he fails, may, on motion, obtain a peremptory rule, at the expiration of which, execution may be awarded (*f*). The defendant's clerk in court then makes an office copy of the rules for the solicitor, upon which he gets the *assignment of errors* drawn and signed, and delivers them to the clerk for engrossing (*g*). The defendant's clerk in court obtains from the clerk of the rules a *side-bar rule for judgment*, unless the pro-

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(*a*) Sav. 131. 2 Tidd, 5th edit. 1103, 4.

(*b*) See form, post, last vol. Hand's Prac. 462.

(*c*) Hand's Prac. 48. See form of writ of Error, Hand's Prac. 462. Writ, Assignment, and Proceedings, 3 Bos. & Pul. 356. Post, last vol. 1 Lil. Ent. 240.

(*d*) Hawk. b. 2. c. 50. s. 12. 1 Hen. 7. 13, B.

(*e*) Hand's Prac. 48. See

form of return and schedule, Hand's Prac. 464. Lil. Ent. 242. 4 Burr. 2535. Post, last vol.

(*f*) 6 Mod. 178. 1 Salk. 266.

(*g*) Hand's Prac. 48. See form of assignment of errors in K. B. Hand's Prac. 470. 3 Bos. & Pul. 356. 1 Lil. Ent. 241, 2. 4 Burr. 2536. In Parliament, from K. B. by Attorney-general, on reversal of judgment, 1 Lil. Ent. 243. Post, last vol.

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secutor joins in error within a certain time after notice of the rules (*a*). A copy of this rule is then served on the prosecutor, or his solicitor, with a copy of the assignment of errors, and an *affidavit of the service* is then made (*b*). If the prosecutor does not join in error, after this notice, at the expiration of the time allowed, the defendant will be entitled to judgment of reversal (*c*). In order to prevent this, the prosecutor's solicitor gets an office copy of the proceedings from his clerk in court, and instructs counsel to prepare the *joinder in error* (*d*), which is then engrossed and filed by the clerk (*e*). The defendant, thereupon, causes a *motion for a concilium* to be prepared, which need only be signed by counsel, and produces it to the clerk of the rules, to set it down in the crown paper for argument; and, when this is done, gives *notice* (*f*) to the prosecutor of the day for which the argument is appointed. The clerks in court then make office copies of the whole proceedings, now called the *paper book* (*g*), and deliver them to the judges by whom the cause is to be decided; and, at the time appointed, the errors are debated, and the judgment either reversed, affirmed, or ordered to stand over for further argument (*h*). If it stands over for further argument, it is generally delayed till the following term; and, in the mean time, the solicitors deliver the briefs to other counsel, who, when a second argument is expected, commonly have briefs, to take notes of the first; the cause is again inserted in the paper, and *notice* (*i*) given to the opposite side, by the party who is anxious for the decision. While the matter is thus pending, the defendant, in case of outlawry, even when indicted for a mere misdemeanor, cannot be admitted to bail; for he is in execution on the judgment, and, therefore, the court have no discretion, except the attorney-general consent to the enlargement of the prisoner (*k*). And, in case of felonies, the defendant must be in court upon all motions.

(*a*) Hand's Prac. 48.

(*b*) Hand's Prac. 48, 9. See form, Hand's Prac. 471.

(*c*) Hand's Prac. 49.

(*d*) See form, Hand's Prac. 471. Lil. Ent. 243. 4 Burr. 2537. Post, last vol.

(*e*) Hand's Prac. 49.

(*f*) See form, Hand's Prac. 473. Post, last vol.

(*g*) See form, Hand's Prac. 472. Post, last vol.

(*h*) Hand's Prac. 49, 50.

(*i*) See form, Hand's Prac. 474. Post, last vol.

(*k*) 4 Burr. 2539. 2545.

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Formerly, when it was supposed that it was at all times in the power of the crown to grant or refuse a writ of error, very nice objections were allowed to prevail; and, indeed, as the case was seldom argued, the judgment was reversed for no error at all, as a means of extending the mercy of the crown (*a*). But when, as we have seen, it was holden that in every judgment for a crime inferior to felony, a revision of the proceedings might, *ex debito justitiæ*, be obtained, on merely showing a probable reason, the practice naturally changed, and now a substantial error must be shown, in order to reverse the judgment, whether founded on outlawry or conviction (*b*). As the statutes of jeofails and amendments do not extend to criminal proceedings (*c*), it follows, that every error which would have been fatal on demurrer, or in arrest of the judgment, will be sufficient now to procure its reversal. A material objection also to the record of the judgment will be fatal. Thus, if the acts of the court are described in the past, instead of in the present tense, or if “*quia tam, &c.*” is left out in the award of venire, the error will be sufficient to vitiate (*d*). So if it does not appear that the defendant was in court at the time sentence of death was passed, the judgment will be considered as unduly given (*e*). And to such a degree of nicety have objections, even since the reign of Queen Anne, been carried, that if, after sentence, it be discovered that the indictment charged the offence to have been committed in the time of a former king, and conclude against the peace of the now king, the whole will be erroneous (*f*). In case of judgment of outlawry, more trifling objections have been admitted to prevail; for as the reversal of this sentence only causes an inquiry into the substantial merits of the case, the courts are always inclined to reverse it. Thus an outlawry was held bad, because the sheriff, in his return, merely stated that the defendant was exacted “at my county court,” without adding “of Middlesex,” and then proceeded, “held at my house, &c.” without adding the words, “for the county of

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(*a*) 4 Burr. 2550.

(*b*) 5 Burr. 2551.

(*c*) Ante, 297, 8. Cowp 392.
2 Saund. 308, a. Cas. K. B. 94.
2 Tidd, 721, 900.

(*d*) 1 Mod. 81. 2 Saund. 393,
n. 1. 1 Stra. 308.

(*e*) 1 Ld. Raym. 48. 267.

(*f*) 3 Burr. 1903. 4 Bla. Com.
391, 2.

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Middlesex (*a*). So if it appear from the writ of proclamation, and the return to it, that the defendant had a day in court after the outlawry, the judgment will be avoided (*b*). And on the petition of the heir of a party attainted and executed, the court will incline to the allowance of his claim. Thus attainder of high treason has been reversed, because the sentence of death, at common law, in stating that the entrails of the offender should be taken from his body and burned, omitted the words "in his sight," and "he being alive" (*c*).

When it appears, on a writ of error, that the judgment or proceedings are substantially erroneous, it becomes a matter of consideration how far they can be *amended*. But, as we have already, in every stage of the proceedings, discussed the mode in which a mistake may be aided therein, there are but few points of importance which now demand our attention (*d*). We have seen that, at common law, there is no difference as to amendments between civil and criminal proceedings (*e*): that an information may be amended before verdict (*f*); but that no alteration can be made in the finding of the jury of matter of substance, whether it be the decision of the grand (*g*) or the petit inquest (*h*). With respect to judicial acts or papers, there can be no doubt that they are amendable at any time before they become matters of record, and that of common right, and not by virtue of any statute (*i*). Thus, the court may alter their own judgment, any time in the same term in which it is passed, and either pass another, or remedy a defect in the former (*k*). And the justices at sessions may amend their judgment during the same sessions, because, in consideration of law, their sitting is but one day, but not at any

(*a*) 4 Burr. 2563. Ante, 357.

(*b*) 3 T. R. 499.

(*c*) 1 Lil. Ent. 241.

(*d*) See ante, 297 to 304. 335. 436. 478. 645. 721, 2, &c. as to Indictments, Captions, Pleas, Replications, Verdicts, Judgments, and Entries on the Roll.

(*e*) Ante, 297 to 304. 1 Ld. Raym. 1068. 2 Burr. 1099. 4 East, 175. 1 Salk. 51. 6 Mod.

285. 1 Saund. 250, d. n. Com. Dig. Amendment, C. Tidd, 5th edit. 720.

(*f*) Rep. temp. Hardw. 203.

(*g*) Rep. temp. Hardw. 203. Ante, 325.

(*h*) Ante, 645.

(*i*) 1 Salk. 47. 2 Burr. 1099. Tidd, 5th edit. 720.

(*k*) 6 East, 328. 1 M. & S. 442.

subsequent period, unless they professedly adjourn (*a*). But no amendment can be made by any authority, when once the term or the session is over, and the judgment solemnly entered on the record (*b*). Mere ministerial acts may, indeed, at any time be amended (*c*). And any matter not of record may be amended by the record, if a mistake has arisen in the former; thus the nisi prius roll of an indictment for forgery, after trial and special verdict, may be amended by the original indictment, to prevent a variance (*d*); and, in general, the roll of nisi prius may be amended, because it is made up by the defendant's clerk in court, and he will not be allowed to take advantage of his own negligence (*e*).

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When the errors come on to be argued, if they are errors in *fact*, the attorney-general may confess them on the behalf of his majesty (*f*). This is sometimes done when, after an outlawry, the king is willing to allow the defendant to be tried on the merits; or when an heir, after the execution of an ancestor, endeavours to reverse the attainder. But he cannot confess an error in law, though he has a warrant so to do under the sign manual, for the court must judge it to be error, and that judgment will form a precedent for future occasions (*g*). If, on argument, it appears to the court that the error is well founded, they will *pass judgment of reversal* (*h*); if otherwise, they will affirm the previous decision (*i*).

Besides these modes of avoiding a judgment by plea, or reversing it by writ of error, there is another mode by which an attainder of felony or treason may be done away, viz. by act of parliament to reverse it (*k*). This is, in general, resorted to by the heirs or relatives of the deceased, in order to procure a restitution of their honors, titles, and estates. It has been sometimes done, when the defendant suffered from the fury of an

Reversal of At-
tainer by Act
of Parliament.

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(*a*) 2 Salk. 606. Bac. Abr. Court of Sessions. Dick. Sess. 13, 14. 375, 6.

(*b*) 4 Mod. 395.

(*c*) 1 Saund. 249, 50 c. n. 1. 1 Stra. 136.

(*d*) 2 Ld. Raym. 1519. Rep. temp. Hardw. 43, 4.

(*e*) 1 Barnard, 31. Ante, 646.

(*f*) 4 Burr. 2551.

(*g*) Id. ib.

(*h*) See form, 1 Lil. Ent. 242. Post, last vol.

(*i*) See form, 1 Lil. Ent. 243. Post, last vol.

(*k*) 4 Bla. Com. 392.

REVERSAL BY
ACT OF
PARLIAMENT.

opposite political party during their influence, as in the case of Algernon Sydney, Mrs. Lisle, and Lord Russel (*a*). Sometimes it is granted when there is a gross irregularity in the proceedings, an improper conduct of the judge, or a departure from the rules of evidence on the trial. Frequently it proceeds from the merits of the criminal's descendants, which may well entitle them to be restored to that rank and estate of which the guilt of their ancestor has deprived them (*b*). This proceeding is, therefore, more of a political than legal nature, and is governed by the considerations of pity, or of substantial justice.

No attainder of felony against a person who has lands, can ever be reversed by writ of error, without a scire facias against all the terre tenants, and lords mediate and immediate (*c*); but this is not necessary in case of high treason (*d*). Nor is it requisite, when it is suggested on the roll, that the defendant had no lands, and the attorney-general confess the suggestion (*e*).

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On the reversal, if the execution alone were erroneous, that only will be reversed, and all the previous steps of the prosecution remain valid. But when the judgment is erroneous, that and all former proceedings in case of a conviction are defeated by the reversal (*f*). It is otherwise, indeed, when the attainder was consequent upon outlawry; for then nothing but the process after indictment is avoided, and the party will be immediately compelled to answer, as if he had been brought in on the first award of the *capias* (*g*). If the attainder of the principal be reversed, that of the accessory is ipso facto at an end, for the guilt of the latter is dependent on that of the former (*h*). The effect of the reversal of the attainder, is to restore the party to all the capacities which he had lost, and to all the honors, fortunes, and estates which he had forfeited (*i*). If his lands had been granted away by the king in the interval, without either suing out

(*a*) 8 St. Tr. 516.

(*b*) 4 Bla. Com. 392.

(*c*) 2 Salk. 495. Dyer, 34, a. Hawk. b. 2. c. 50. s. 14.

(*d*) Queen v. Stafford, Hawk. b. 2. c. 50. s. 14.

(*e*) 2 Salk. 495. 3 Keb. 29.

(*f*) Hawk. b. 2. c. 50. s. 19.

(*g*) 3 Mod. 42. 4 Bla. Com. 392. Hawk. b. 2. c. 50. s. 18. Ante, 269, as to Outlawry.

(*h*) 9 Co. 119. 1 Rol. Abr. 777. Hawk. b. 2. c. 29. s. 40.

(*i*) 4 Bla. Com. 393.

a scire facias against the possessor, or petitioning his majesty, he may re-enter, as if upon a common disseisor (*a*). If, indeed, the reversal proceeded expressly on the ground that there was technical error in the original indictment, or subsequent process, the defendant remains liable to a second prosecution, on the same ground that he is subject to it on demurrer or arrest of judgment. His life has never been in actual jeopardy, and the ends of public justice have not been satisfied, either in his conviction or acquittal (*b*).

REVERSAL BY
ACT OF
PARLIAMENT.

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- (*a*) 1 Andr. 188. Hawk. b. 2. fois Acquit and Convict, Pleas
c. 50. s. 20. 4 Bla. Com. 393. in Abatement, Demurrer, and
(*b*) 4 Bla. Com. 393. See ante, Motions in Arrest of Judgment.
452. 462, as to plea of Autre

CHAPTER XIX.

OF REPRIEVES, PARDONS, AND PLEAS OF
NON-IDENTITY.

Reprieve*.

IF the defendant does not succeed in reversing the judgment, there are yet two modes by which he can stay or prevent its execution. The first of these operates only in capital cases—a reprieve, which merely delays the execution; the second—a pardon, may be granted in any case, and is an absolute bar to punishment, as well as to all subsequent proceedings.

The term *reprieve* is derived from *reprendre*, to keep back, and signifies the withdrawing of the sentence for an interval of time, and operates in delay of execution (*a*). It is granted either by the favor of his majesty himself, or the judge before whom the prisoner is tried on his behalf, or from the regular operation of law, in circumstances which render an immediate execution inconsistent with humanity or justice.

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Reprieves ex
mandatio regis.

This temporary mercy may be extended *ex mandatio regis*, or from the mere pleasure of the crown, expressed in any way to the court by whom the execution is to be awarded (*b*). This intimation of his majesty may be signified ore tenus, by a verbal message, or by sending his ring in token of his design; but, at the present day, the intimation is usually made by the privy signet, or the master of the requests (*c*). On this the judge, of course,

(*a*) 4 Bla. Com. 394.

Hawk. b. 2. c. 51. s. 8.

(*b*) 2 Hale, 412. 1 Hale, 368.

(*c*) 1 Hale, 368. 2 Hale, 412.

* As to Reprieves in general, see 1 Hale, 368 to 370. 2 Hale, 412 to 414. Hawk. b. 2. c. 51. s. 8, 9, 10. Williams, J. Execution and Reprieve.

grants the prisoner a respite, either for a limited time, or during the pleasure of his majesty.

But the more usual course is, for a discretionary reprieve to proceed from the judge himself, who, from his acquaintance with all the circumstances of the trial, is most capable of judging when it is proper. The power of granting this respite belongs, of common right, to every tribunal which is invested with authority to award execution (*a*). And this power exists even in case of high treason, though the judge should be very prudent in its exercise (*b*). But it is commonly granted where the defendant pleads a pardon, which, though defective in point of form, sufficiently manifests the intention of the crown to remit the sentence (*c*); where it seems doubtful whether the offence is not included in some general act of grace (*d*); or whether it amounts to so high a crime as that charged in the indictment (*e*). The judge sometimes also allows it before judgment, or at least intimates his intention to do so, as when he is not satisfied with the verdict, and entertains doubts as to the prisoner's guilt; or when a doubt arises, if the crime be not within clergy; or when, from some favorable circumstances, he intends to recommend the prisoner to mercy (*f*). When he is disposed to spare the life of the criminal, on condition of transportation to the colonies, either limited or perpetual, he is, by a recent provision (*g*), enabled to do so, *ex mero motu*; and, as soon as his majesty's acquiescence has been obtained, to make an order for his conveyance to the place of his exile, without waiting till the next assizes after the conviction. By the same act, the fulfilment of the condition thus imposed, operates in all respects, like a pardon under the great seal. And the justices of assize may, by

Reprieves *ex arbitrio judicis* *.

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(*a*) Hawk. b. 2. c. 51. s. 8. Williams, J. Execution and Reprieve.

(*b*) 1 Hale, 368.

(*c*) Hawk. b. 2. c. 51. s. 8. Williams, J. Execution and Reprieve.

(*d*) 2 Dyer, 235, a. Hawk.

(*e*) 3 Dyer, 296, a. Hawk. b. 2. c. 51. s. 8. Williams, J. Execution and Reprieve.

(*f*) 2 Hale, 412. 4 Bla. Com. 394.

(*g*) 8 Geo. 3. c. 15.

* As to these reprieves, see observations, Gisb. Duties of Man, 390.

long practice, either grant arbitrary reprieves, or take them away, after the termination of their sessions; though this seems rather to stand on ancient usage, than any express authority, or recognized principle (*a*).

Reprieves, Ex
Necessitate Le-
gis. As pregnan-
cy, &c. and pro-
ceedings thereon.

There are also some cases in which *ex necessitate legis*, the judge is bound to reprieve. Thus, when a woman is convicted either of treason or felony, she may allege pregnancy in delay of execution (*b*). This humane practice is derived from the laws of ancient Rome, which direct “*quod pręgnantis mulieris damnatę pœna differatur quoad pariat*,” and has been established in England, from the earliest periods (*c*). In order, however, to render this plea available, she must be quick with child, at the time it is offered, for mere pregnancy, in any earlier stage, will not be regarded (*d*). Even when this is the case, it will not operate as a plea in bar at the trial, or as a cause for arresting the judgment, but can only be pleaded in stay of execution (*e*). To enable the criminal to do this, the clerk of assizes always asks her, whether she has any thing to allege why execution should not be awarded against her (*f*), as he would do to any male convict who had been sentenced at a former session or by another tribunal (*g*). If she allege that she is pregnant, a jury of twelve matrons are impannelled and sworn to try whether she is *quick with child*, for which purpose they retire with her to some convenient place; and if they find in the affirmative, which, it is said, the gentleness of their sex generally inclines them to do, when pregnancy exists at all (*h*), she is respited till a reasonable time after her delivery, or till the ensuing session (*i*). The latter mode of respiting seems to be preferable; because, according to the best authorities, if the

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(*a*) Dyer, 205, a. 1 Hale, 368. 2 Hale, 412. Hawk. b. 2. c. 51. s. 8. Williams, J. Reprieve and Execution.

(*b*) 3 Inst. 17, 18. 1 Hale, 368. 2 Hale, 406. 413. Hawk. b. 2. c. 51. s. 9. 4 Bla. Com. 395.

(*c*) 4 Bla. Com. 395.

(*d*) 3 Inst. 17. 1 Hale, 368. 2 Hale, 413. Hawk. b. 2. c. 51. s. 9.

(*e*) 3 Inst. 17. 2 Hale, 413. 1 Hale, 368. 4 Bla. Com. 395.

(*f*) 4 Bla. Com. 395, note 1. 1 Hale, 368. 2 Hale, 407. 413.

(*g*) 1 Hale, 368.

(*h*) 2 Hale, 413.

(*i*) 3 Inst. 17. 1 Hale, 368, 9. 2 Hale, 413. Hawk. b. 2. c. 51. s. 9. 4 Bla. Com. 395.

delivery take place in the interval, no execution can with propriety be awarded until the next assizes; for she ought again to be asked, if she has any thing to allege in bar of execution, as she may have obtained a pardon, or have something to urge in reversal of judgment (*a*). Besides, the first respite is considered as matter of record, though only entered in fact, by the clerk of assize in a book of agenda, and cannot be determined but by a new award of execution (*b*). If, at the next sessions, she has not been delivered, and, according to the course of nature, there is still a possibility that she may be delivered, she will be again respited till the session ensuing (*c*). And it is said, that where it is discovered that she was not quick with child, at the time of the verdict of the matrons, or even where she was not then with child at all, but has since become so, she ought to receive another respite (*d*). But it is certain, that if she has been once delivered, she has no right afterwards to claim any further delay of execution; because, as it is said, she ought not, by her own incontinence, or voluntary act, after sentence, to evade the sentence of the law (*e*). But, as the original delay was intended, not from forbearance to the mother, but pity for the innocent, this seems scarcely reconcileable with the humane principle which dictates the first reprieve; and, probably, in such a case, the judge would exercise the discretion he always possesses, in granting another respite (*f*).

REPRIEVES,
EX NECESSITATE
LEGIS.

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The other cause, for which the judge is bound to grant a reprieve, is the insanity of the prisoner. It has, from the earliest periods, been a rule, that though a man be in the full possession of his senses when he commits a capital offence, if he become non compos after it, he shall not be indicted; if, after indictment, he shall not be convicted; if, after conviction, he shall not receive judgment; if, after judgment, he shall not be ordered for execution (*g*). And this opinion is confirmed by the fact, that a statute

Reprieve, on account of insanity.

(*a*) 1 Hale, 369. 2 Hale, 414. Finch, 478. Hawk. b. 2. c. 51.

(*b*) 2 Hale, 414. 1 Hale, 369, s. 10.

(*c*) 1 Hale, 369. 2 Hale, 414. 4 Bla. Com. 395.

(*d*) 1 Hale, 369.

(*e*) 3 Inst. 17, 18. 4 Bla. Com. 395. 1 Hale, 369. 2 Hale, 413.

(*f*) 4 Bla. Com. 395, n. (1).

(*g*) 4 Harg. St. Trial, 205, 6.

3 Inst. 4. 1 Hale, 370. Hawk.

b. 1. c. 1. s. 4. 4 Bla. Com. 395.

Williams, J. Execution and Reprieve.

REPRIEVE,
ON ACCOUNT OF
INSANITY.

was passed in the reign of Henry the Eighth (*a*), to allow of execution of persons convicted of high treason, though insane, which was always thought cruel and inhuman, and was repealed in the reign of Philip and Mary (*b*). The true reason of this lenity is not that a man, who has become insane, is not a fit object of example, though this might be urged in his favor, but that he is incapable of saying any thing in bar of execution, or assigning any error in the judgment (*c*). The judge may, if he pleases, swear a jury to inquire, *ex officio*, whether the prisoner is really insane, or merely counterfeits; and, if they find the former, he is bound to reprieve him till the ensuing session (*d*). We have already seen [762] what provisions have been made, by a recent statute (*e*), for the security of criminal lunatics; and the same rules would, probably, apply to the case of one deprived of his reason, in this later stage of the proceedings (*f*).

Of pardons*.

The more certain course of avoiding execution, and which altogether relieves the criminal from danger, is by obtaining his majesty's pardon; which is more frequently granted after sentence, than in any former stage of the proceedings. The prerogative of pardoning is inseparably incident to the crown, in which it is vested for the benefit of the subject (*g*). It seems, indeed, that this right was once claimed by the Lords Marchers and others, who had *jura regalia* by ancient grant, or by prescription (*h*). But, by the 27 Hen. 8. c. 24. s. 1, this supposed power was entirely done away, and the sole right of dispensing with the sentence of the laws was vested for ever in the crown.

- (*a*) 33 Hen. 8. c. 20.
 (*b*) 1 & 2 Phil. & Mary, c. 10.
 4 Harg. St. Tr. 206. 1 Hale, 370.
 (*c*) 4 Harg. St. Tr. 205, 206.
 4 Bla. Com. 396.
 (*d*) 1 Hale, 370. 4 Bla. Com. 396.
 (*e*) Ante, 649. 39 & 40 Geo. 3. c. 94. 55 Geo. 3. c. 46. 56 Geo. 3.

- c. 117. 5 Geo. 4. c. 71. Russ. & Ry. C. C. 430. 456.
 (*f*) Ante, 649.
 (*g*) Show. 283. 4 Bla. Com. 396. Bac. Abr. Pardon, A. Burn, J. Pardon.
 (*h*) Hawk. b. 2. c. 37. s. 1. Bac. Abr. Pardon, A. Bro. Abr. Charter and Pardon, 22.

* As to Pardon in general, see 3 Inst. 233 to 240. Hawk. b. 2. c. 37, per totum. Com. Dig. Pardon. Bac. Abr. Pardon. 4 Bla. Com. 396 to 402. Burn, J. Pardon. Williams, J. Pardon.

PARDON.

In considering this mode of extending the royal mercy, we will briefly inquire in what cases a pardon may be, and in what it usually is granted—in what manner a pardon may be granted, how it is to be recognized and allowed, and what beneficial effects spring from its being acknowledged and received as valid.

As the king is himself the legal prosecutor of every indictment for a crime, it is a general rule that he may, by means of a pardon, remit any punishment due to public justice, or any fine or forfeiture which he himself would otherwise receive after the offence has been committed (*a*). It seems once to have been thought, that the king could not grant a pardon for murder by express name; and as, by the 13 Rich. 2. c. 2. st. 2. c. 1, it was provided, that he should never allow it by express name, it was thought that by this means he was restrained from exercising his mercy in any case thus deeply criminal (*b*). But it has been repeatedly holden, that the king may remit the punishment in this as well as in minor offences; and the atrocity of the charge now forms no ground of exception to the exercise of the royal prerogative (*c*). The only exceptions to this rule, are certain cases, where the liberties are made the object of attack, and where there would be too much danger of a prince disposed to be absolute to favor the criminal; and those in which private individuals have an interest of their own. Thus, to commit a subject to prison beyond the realm, is by the Habeas Corpus act made a *præmunire*, which the king himself cannot pardon (*d*). The sovereign is also restrained from granting a pardon to a person under par-

What offences
may be par-
doned.

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(*a*) 3 Inst. 233. Hawk. b. 2. c. 37. s. 33. Com. Dig. Pardon, A. 4 Bla. Com. 398. Bac. Abr. Pardon, B. By the 30 Geo. 3. c. 47, his majesty is empowered to authorize the governor or lieutenant-governor of any place to which convicts are transported, to remit, either absolutely or conditionally, the whole or any part of their term of transportation; which remission is to be of the same effect, as if his majesty had signified his inten-

tion of mercy under the sign manual; and the names of such convicts are to be inserted in the next general pardon which shall pass the great seal. And see the 5 Geo. 4. c. 84. s. 26. 6 Geo. 4. c. 25. s. 1.

(*b*) 3 Inst. 236.

(*c*) 1 Show. 284. 4 Mod. 61. 2 Salk. 499. Com. Dig. Pardon, A. Bac. Abr. Pardon, B. Burn, J. Pardon. 4 Bla. Com. 400, 1.

(*d*) 31 Car. 2. c. 2. s. 12.

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MAY BE
PARDONED.

liamentary impeachment, before that impeachment is concluded. This was twice decided by the House of Commons, before it was made the subject of a positive statute (*a*). At length it was enacted, by the act of settlement, that no pardon under the great seal of England should be *pleadable* in bar of an impeachment (*b*). But it does not seem, that after the proceedings are finished, the prerogative of the king is any further limited; and, consequently, we find an instance of its exertion, in the case of the six noblemen, who, in 1715, joined with the pretender in his attack on the monarchy of England (*c*).

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As appeals, though their consequences may be capital, are the civil actions of private individuals, and instituted for the sole purpose of gratifying their revenge, the prosecutor may release, but the king has no right to interfere (*d*). Upon the same principle, he can bar no right of entry, or of action, or any other legal interest or benefit actually vested in the subject; so that his pardon will be no plea to an action on a statute by the party grieved, or even by a common informer, if commenced before the indulgence of the crown was extended to the defendant (*e*). So, as the object of requiring sureties to keep the peace, is the security of an individual, the king can discharge no recognizance for this purpose, until it is forfeited (*f*). Neither can he pardon a party indicted for a public nuisance, while it remains unabated; though, perhaps, he may excuse the fine for the past injury; because this prosecution, though technically criminal, is in its effects a civil remedy, and the king cannot subject a number of persons to inconvenience, in order to bestow a favor on others (*g*). But it seems, that before a penal action is brought by a common informer, the king may altogether discharge the offender, so as to

(*a*) 4 Bla. Com. 399.

(*b*) 12 & 13 W. 3. c. 2.

(*c*) 4 Bla. Com. 400. Id. n. 2.

(*d*) 3 Inst. 237. 1 Hale, 251. Hawk. b. 2. c. 37. s. 36. Com. Dig. Pardon, B. 4 Bla. Com. 398. Bac. Abr. Pardon, B.

(*e*) 3 Inst. 238. 12 Co. 29, 30. Plowd. 487. Cro. Car. 199. 2 Rol. Abr. 178. Hawk. b. 2.

c. 37. s. 34. Bac. Abr. Pardon, B.

(*f*) 3 Inst. 238. 12 Co. 30. Hawk. b. 2. c. 37. s. 34. Dick. Sess. 422.

(*g*) 12 Co. 30. Plowd. 487. Vaug. 333. 3 Inst. 237. Hawk. b. 2. c. 37. s. 33. 4 Bla. Com. 398, 9. Bac. Abr. Pardon, B.

bar any subsequent prosecution for the same cause, unless the statute contain some express provision to the contrary (a). WHAT OFFENCES
MAY BE
PARDONED.

Extensive as the power of the crown to grant pardons is, it applies only to crimes actually committed; for it is certain that the king can in no way licence any act which is in itself unlawful, or dispense with any obligation which is primarily enjoined on the subject (b). But where an act indifferent in itself is made unlawful by any act of parliament, as regulations relating to the trade or revenue, it seems that the king may dispense with its operation in favor of a particular individual or corporation, for a limited time, or within a particular district, provided no material inconvenience arises, and the intention of the law is not frustrated (c). It is, however, certain that the king cannot exempt any one from the future operation of a statute expected to be passed but not in actual existence (d).

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This prerogative of pardon is in general a matter of pure discretion, to be exercised by his majesty according to the peculiar circumstance of each individual offence, which comes under the cognizance of his ministers. But there are certain cases where he is bound to allow it, and the grant is a matter of course and not of favor while there are others which come with so strong a claim to indulgence, that they are seldom, if ever, resisted. To the former of these classes belongs the case of a defendant, found by the jury, on an indictment of manslaughter or murder, to have killed the deceased by misfortune. It seems very extraordinary that such a finding should not always have been considered as an acquittal (e). In the legislation of Egypt indeed we find that inanimate objects which caused death, were destroyed or treated as accursed. Our law, it is supposed, forfeited them to his majesty. And so the party who innocently kills another, if it is so found

When pardons
must be, or usu-
ally are, granted.

(a) 3 Inst. 231. Dick. Sess. 344. 1 Dyer, 54. a. 92. a. 3 Dyer, 270, a. 303. a. Hawk. b. 2. c. 37.

(b) Finch, 234. Bro. Abr. s. 29. Bac. Abr. Pardon, B.

Charter & Pardon, 76. 12 Co. (d) Finch, 235. 1 Dyer, 52. 30. Hawk. b. 2. c. 37. s. 28. 1 Sid. 6. Hawk. b. 2. c. 37.

Bac. Abr. Pardon, B. Dick. s. 32.

Sess. 421. (e) 1 East P. C. 221, 2.

(c) Finch, 234, 5. Vaugh.

WHEN PARDONS GRANTED. by the jury, was regarded by the common law, as a person who stood in need of his majesty's clemency (*a*). It seems, however, that even at common law, he had a right to demand a pardon (*b*). And this has been put beyond doubt by the statute of Gloucester, c. 9. which provides, that on the report of the justices to the king, that a party tried for homicide did it in his defence or by misfortune, the king shall take him to his grace "if it please him." For though the latter words of this clause would seem to imply a discretion to grant or to refuse a pardon, it is settled that these words merely intend a respect for the crown, and do not affect that general right which every subject possesses (*c*). And it seems that they are issued as a matter of course by the chancellor, without laying the matter at all before his majesty (*d*). And upon removing the record by certiorari, he may obtain not only a pardon, but a writ of restitution for his goods which were forfeited on the verdict (*e*). But it is now usual, to avoid the expense thus incurred to direct a general verdict of acquittal (*f*).

Another instance of pardons grantable of common right is, where a statute creating an offence, or regulating the penalties with which it shall be visited holds out a positive engagement of immunity to accomplices who bring their associates to justice. Thus by 4 & 5 W. & M. c. 8. any person being out of prison, who causes two or more who have committed highway robbery to be convicted, is entitled to a free pardon for all crimes, of the same nature, of which he has been guilty before the discovery. A similar provision has been made in the case of offences relating to the coin by the 6 & 7 W. 3. c. 17. s. 2. and the 15 Geo. 2. c. 28. s. 8. Pursuant to the same principle, the 10 & 11 W. 3. c. 23. s. 5. ensures to any person who, being at large, as the means of detecting two offenders in any crime which is ousted of clergy by that statute (*g*), a free remission of any of those crimes, which shall operate not only in bar of an indictment, but also of an appeal.

(*a*) 1 East P. C. 221, 2.

(*b*) Fost. 284.

(*c*) 2 Inst. 316, 17. Hawk. b. 2. 37. s. 2. Bac. Abr. Pardon, C. Williams, J. Pardon, II. Dick. Sess. 424.

(*d*) 2 Inst. 317. Hawk. b. 2. c. 37. s. 2.

(*e*) Hawk. b. 2. c. 37. s. 2. Hawk. b. 1. c. 29. s. 25. Williams, J. Pardon, II.

(*f*) Fost. 279. 288. 1 East P. C. 221, 2.

(*g*) Ante, Chap. XV. as to Clergy.

By the 5th Anne, c. 31. s. 4. any one who will convict two others of burglary, or feloniously breaking into a house in the day-time, will be entitled to a pardon of every description of burglary and felony previously committed, except murder, and treason affecting the government, by which an appeal will be precluded (*a*). If an offender against the 5 Geo. 3. c. 11. respecting the destruction of fish in private waters, whether in custody or at large, make confession of his guilt, and cause the conviction of one or more of his accomplices, he will, by virtue of the 2nd section of that statute, be pardoned for the offence which he confesses. So a party who has used the same stamps twice, contrary to 12 Geo. 3. c. 48. may, if out of prison, procure immunity for the past by convicting two others of a similar crime (*b*). So by 29 Geo. 2. c. 30. s. 8. a person out of prison stealing lead, iron, &c. may, by convicting two others for receiving the lead, obtain a pardon for all such felonies before the discovery (*c*). And a like claim may be established by convicting a single offender of destroying locks on navigable rivers, under 8 Geo. 2. c. 20. s. 5. if the party informing is out of custody. By 6 Geo. 1. c. 21. s. 36. when persons to the number of eight or more resist officers of the customs with arms, any one may obtain a pardon by discovering two others to the commissioners of customs within two months, and £40 for each accomplice. By the 8th Geo. 1. c. 18. s. 7. any runner of foreign goods who within two months discovers two of his accomplices, so that the value of the goods recovered for the crown exceeds £50, is entitled to a free pardon for his own offence, and £40, for each offender he convicts. And by 9 Geo. 2. c. 35. s. 12. any one who shall have joined with three or more in running goods armed, may, within three months, and before conviction, by discovering two of his companions to the commissioners of assize, so as to bring them to justice, obtain a discharge for his own crime, and £50, for every offender he is instrumental in convicting. In the case of receiving stolen goods, the original felon is allowed to obtain a pardon by bringing the receiver to justice (*d*). And it is

WHEN PARDONS
GRANTED.

(*a*) The reward of £40, given by the act, is taken away by the 58 Geo. 3. c. 70.

(*b*) Sec. 2.

(*c*) By the 59 Geo. 3. c. 46.

appeals are taken away.

(*d*) 29 Geo. 2. c. 30. s. 8 & 9.
2 Geo. 3. c. 28. s. 14. 22 Geo. 3.
c. 58. s. 5.

WHEN PARDONS GRANTED. usual, in the acts which establish and regulate state lotteries, to insert a clause by which accomplices in forging lottery tickets, are entitled to a pardon on discovering their associates (*a*).

By the general words of these statutes, the accomplice, in order to have an absolute right of pardon, must be the means of convicting his associates (*b*). It will also be observed, that most of them, though not without exception, provide that the party entitled to a pardon, must be out of prison when he makes the disclosure. But when they succeed in assisting the purposes of justice, by coming in voluntarily to accuse their associates, they have an absolute right to pardon, and the court will bail them, to enable them to urge that claim in the proper channel (*c*). So also persons to whom the king has, by proclamation, promised immunity on discovering their associates, have an absolute right to his mercy (*d*).

But, except in these cases, accomplices who are, according to the usual phrase, admitted to be king's evidence have no absolute claim or legal right to a pardon (*e*). A justice of the peace, before whom the original examination is taken, has no power to promise an offender pardon on condition of his becoming a witness against others (*f*). They cannot even controul the authority of the judges before whom the prisoners are tried, so as to exempt the offender from prosecution; but if an attempt is made to try him, it will be for the court to decide under the circumstances how far he is entitled to favor (*g*). Even the superior court have no power absolutely to assure him of mercy. He gives his evidence in vinculis, in custody, and it depends entirely on his own behaviour whether his confession will save or condemn him (*h*). There is, however, no doubt, that when an accomplice admitted by the magistrates or the court to give evidence, appears, under all the circumstances of the case, to have acted a fair and ingenuous part, and to have made a full and true disclosure, he has an equit-

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(<i>a</i>) Williams, J. Pardon, II.	(<i>f</i>) Cowp. 336. 1 Leach, 121.
(<i>b</i>) Cowp. 335.	Ante, 82. 693.
(<i>c</i>) Cowp. 334. 1 Leach, 118.	(<i>g</i>) Cowp. 340. 1 Leach, 125.
(<i>d</i>) Id. ib.	Ante, 82. 603.
(<i>e</i>) Cowp. 336. 1 Leach,	(<i>h</i>) Cowp. 336. 1 Leach,
120, 1. Williams, J. Pardon, II.	118. Ante, 82. 603.

able claim to the mercy of the crown, and the court will, on application, put off his trial to enable him to apply for a pardon (*a*). These instances of pardon granted either expressly by statute and proclamation, or impliedly by usage, are derived from the old practice of approvement to which we have already alluded (*b*). Such pardons are, no doubt, necessary in particular cases, but as a regular system of jurisprudence they are liable to serious objections (*c*). The law confesses its weakness by calling in the assistance of those by whom it has been broken. It offers a premium to treachery, and destroys the last virtue which clings to the degraded transgressor. Still on the other hand, it tends to prevent any extensive agreement among atrocious criminals, makes them perpetually suspicious of each other, and prevents the hopelessness of mercy from rendering them desperate.

WHEN PARDONS
GRANTED.

With respect to those cases where favorable circumstances may induce the crown to extend its prerogative of remission, no general rules can, of course, be given. The king, by his coronation oath, is bound to administer justice with mercy. But nothing can tend more to unsettle the public ideas of crime than the frequent exercise of the latter. It is contended with great eloquence and ability by a celebrated writer on criminal law, that clemency should shine forth in the laws, and not in the executive (*d*). But it must be admitted that there are many cases to which no general rules can apply; where “*summum jus*” would be “*summa injuria*,” and where forgiveness is, at once, beneficial to the crown which bestows, and just to the party who receives it. And as there can be no new trial of capital offences (*e*), where the judge considers the conviction as improper, this is the only mode by which the defendant can be protected from the consequences of the verdict (*f*), and when the judge before whom a prisoner is convicted of a capital offence thinks fit to reprieve him, and to send a certificate to his majesty that he is a fit object of mercy, the recommendation is always attended to (*g*).

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(*a*) Cowp. 340. 1 Leach, 125. Williams, J. Pardon, II.

(*b*) Ante, 82. 603. Cowp. 334, 335. 1 Leach, 118, 19.

(*c*) Cowp. 336. 1 Leach, 120.

(*d*) Beccar. 175, 6, 7.

(*e*) Ante, 654.

(*f*) 13 East, 416, n. 1. 2 Leach, 848.

(*g*) 4 Bla. Com. 404, n. 1.

How a pardon
is to be granted.

We have next to consider in what manner a pardon must be granted. It may be either a general act of parliament, or a special pardon under the great seal (*a*). And now by 6 Geo. 4. c. 25. s. 1. it is enacted, “ that in all cases in which his late majesty, or the king’s majesty that now is, his heirs or successors, hath been or shall be pleased to extend his or their royal mercy to any offender convicted of any felony, whereby the offender was, is, or shall be excluded from the benefit of clergy, and by warrant under his or their royal sign manual, countersigned by one of his or their principal secretaries of state, hath granted, or shall grant, to such offender either a free pardon, or a pardon upon condition of transportation, imprisonment, or any other punishment, the discharge of such offender out of custody, in case of a free pardon, and the performance of the condition in case of a conditional pardon shall have the effect of a pardon under the great seal for such offender as to the felony whereof he or she was so convicted (*b*).

In order to render a pardon valid, it must express with sufficient accuracy, the crime it is intended to forgive (*c*). Thus a general pardon of “ all felonies ” will not annul an attainder, for it will be presumed that, as it is not mentioned, the king was not aware of its existence (*d*). So also it has been holden that the pardon of one found guilty by verdict, or confession, will be of no avail, unless it recite the indictment and the conviction (*e*). And it has been questioned whether, if a man be merely indicted, the indictment ought not to be recited (*f*); but this is settled not to be

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(*a*) See form of Pardons, post, last vol.

(*b*) Before this act it was held, that a warrant, under the privy seal, was not in itself a complete or irrevocable pardon, though, when obtained in proper form, it was a sufficient authority to admit the party to bail, in order to obtain a more effectual admission, See Form of Warrant, 15 East, 463. Post, last vol. 5 Harg. State Trials, 166. 173. 1 Bla. Rep. 480. Hawk. b. 2. c. 37.

s. 50. Williams, J. Pardon, III. 15 East, 466.

(*c*) Hawk. b. 2. c. 37. s. 8, 9. Bac. Abr. Pardon, D. 4 Bla. Com. 400.

(*d*) 3 Inst. 238. Kel. 28, 9. Hawk. b. 2. c. 37. s. 8. Bac. Abr. Pardon, D. Williams, J. Pardon, III.

(*e*) 1 Sid. 366. 430. 2 Keb. 363. 3 Keb. 694. Hawk. b. 2. c. 37. s. 8. Bac. Abr. Pardon, D. Williams, J. Pardon, III.

(*f*) Sir T. Jones, 56. 3 Keb. 30.

necessary as the words in the pardon "sive indictatus vel non" evidently suppose the contrary (*a*).

HOW PARDON
GRANTED.

It seems to be the better opinion that the crown cannot pardon any crime with effect, without specifically naming it, for the courts will not intend his majesty to be informed of the particular offence of which the defendant has been convicted (*b*). At all events it is certain that no general pardons have, for a long time, been granted by his majesty; but, when found expedient, have been issued under the sanction of an act of Parliament (*c*). It is also certain, that by the 13 Rich. 2. st. 2. c. 1. no pardon for rape, murder, or treason can be allowed, unless the offence be specially mentioned; and, in case of murder, it must set forth whether it was committed by lying in wait, assault, or malice prepense. Nor will any general pardon of felonies include piracy which was no felony at common law (*d*).

It is also a general rule, that wherever it may be reasonably intended that the king, when he granted the pardon, was not fully apprised of the heinousness of the offence, and how far the defendant stood convicted on the record, the pardon is altogether invalid (*e*). And, therefore, if it appear from the recital of a pardon, that the king was misinformed, either as to the nature of the case, or the state of the proceedings, the grant will be of no avail; as if it state the party to be attainted, when in fact no attainder had ever taken effect (*f*). And it is expressly enacted by 27 Edw. 3. c. 2. that every pardon of felony granted at the sugges-

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(*a*) 3 Keb. 694. Hawk. b. 2. c. 37. s. 8. Bac. Abr. Pardon, D. Williams, J. Pardon, III.

(*b*) Hawk. b. 2. c. 37. s. 9.

(*c*) Id. *ibid*.

(*d*) 4 Bla. Com. 400. Williams, J. Pardon, III.

(*e*) 3 Inst. 238. 6 Co. 13. Hawk. b. 2. c. 37. s. 8. Bac. Abr. Pardon, D. 4 Bla. Com. 400. Williams, J. Pardon, III.

(*f*) Sir T. Raym. 13. Hawk. b. 2. c. 37. s. 46. Williams, J. Pardon, III.

HOW PARDON
GRANTED.

tained is to be taken most beneficially in favor of the defendant, and most strongly against his majesty (*a*).

An act of grace by Parliament need not specify any particular instance of crime, as it does not seem that the limitations of the royal prerogative, ever extended to this solemn act of the legislature. And if a general act of mercy expressly pardons all petit treasons, but excepts murder, it cannot be avoided by indicting or appealing the criminal of murder only, for the less offence is included in the greater (*b*). So, if all felonies, except murder, are thus pardoned, felonious suicide will be intended as contained in the class pardoned, and not in that which is excepted; for though the putting an end to a man's own existence may sometimes be denominated "murder" it is clearly a different offence in the common feelings and intention of mankind to the crime which maliciously terminates the life of another (*c*). If a general pardon remits all misdemeanors, offences and injuries, except murder committed on a certain day, it pardons manslaughter, where the stroke was given before, though the death did not occur till after that period (*d*). But it will not pardon murder; for though, at the time of the act, the offence was only a misdemeanor, if death afterwards ensues, the crime is taken out of the statute (*e*). It seems, however, that a general pardon "of all misprisions, trespasses, offences, and contempts," will pardon making a false return; barratry, striking in Westminster Hall, præmunire, and every offence not capital (*f*).

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A pardon may be extended to the subject on any *condition* which his majesty thinks fit to annex, whether precedent or sub-

(*a*) 5 Co. 49. b. 4 Bla. Com. 401.

(*b*) 1 Dyer, 50. 6 Co. 13. Hawk. b. 2. c. 37. s. 19. Bac. Abr. Pardon, D. Williams, J. Pardon, III.

(*c*) 1 Lev. 8. 120. 1 Keb. 66. 548. 1 Sid. 167. Hawk. b. 2. c. 37. s. 20. Bac. Abr. Pardon, D. Williams, J. Pardon, III.

(*d*) Plowd. 401. 1 Hale, 426.

1 Dyer, 99. Fost. 64. Hawk. b. 2. c. 37. s. 21. Bac. Abr. Pardon, D. Williams, J. Pardon, III.

(*e*) Fost. 64. Bac. Abr. Pardon, D. Williams, J. Pardon, III.

(*f*) 1 Lev. 106. 1 Sid. 111. 1 Mod. 102. 2 Mod. 52. Hawk. b. 2. c. 37. s. 26. Bac. Abr. Pardon, D. Williams, J. Pardon, III.

sequent, on the performance of which the validity of the pardon will depend (*a*). And this prerogative is daily exerted in the pardon of felons, on condition of being confined to hard labour for a stated time, or of transportation to some foreign country for life, or for a term of years, such transportation being allowed by the act of habeas corpus and subsequent acts (*b*). And if he does not perform the condition of the pardon it will be altogether void, and he may be brought to the bar and remanded to suffer his original sentence (*c*). If after such a pardon the felon's wife become entitled to some personal estate, this will be decreed, in equity, to belong to the wife as to a feme sole (*d*).

HOW PARDON
GRANTED.

The mode of pardoning at the assizes or Old Bailey, if the judge thinks the conviction improper, is by respiting the execution of the sentence, and sending a memorial or certificate to the king (*e*), directed to the Secretary of State's office, stating, that from favorable circumstances appearing on the trial, he is induced to recommend the prisoner to mercy (*f*). If the king agree in the propriety of the suggestion, as is usual, a sign manual issues, signifying his intention to grant either an absolute, or a conditional pardon, and directing the justices of gaol delivery to bail the prisoner, in order to appear and plead the next general pardon that shall come out, which they do accordingly, taking his recognizance to perform the conditions of the pardon, if any are annexed to the indulgence (*g*).

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(*a*) Co. Lit. 274 b. Moor, 466. Hawk. b. 2. c. 37. s. 45. 4 Bla. Com. 401. Bac. Abr. Pardon, E. Williams, J. Pardon, III. In Russ. & Ry. C. C. 248, it was held, that a person who had been convicted of grand larceny, sentenced to transportation for seven years, confined in the hulks, and discharged at the end of seven years, was a competent witness, such confinement operating as a statute pardon, and that having escaped twice during such confinement for a few hours each time, did not destroy the effect of it.

(*b*) 31 Car. 2. c. 2. s. 14. 8 Geo. 3. c. 15. 19 Geo. 3. c. 74. 24 Geo. 3. c. 56. 31 Geo. 3. c. 46. 4 Bla. Com. 401. Williams, J. Pardon, II.

(*c*) Moor, 466. Bac. Abr. Pardon, E. Williams, J. Pardon, III. Dick. Sess. 431.

(*d*) 3 P. W. 37, 8.

(*e*) See form of certificate, post, last vol.

(*f*) Dick. Sess. 432, 3. 4 Bla. Com. 404, n. 1.

(*g*) 1 Bla. Rep. 479. 1 Leach, 74. 15 East, 463. Williams, J. Pardon, III. Dick. Sess. 430.

HOW PARDON
GRANTED.

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But it seems that the justices at sessions have no power to respite the execution of the sentences they pronounce beyond the session when they are passed, nor have they any means of obtaining the opinion of the judges (*a*). Their judicial authority terminates when they separate at the conclusion of their session (*b*). They have, therefore, no other means of obtaining a delay, to consider what conduct they shall adopt, than that of adjourning until they have decided (*c*). If a defendant convicted before them, intends to apply to the crown for a pardon, either absolute or conditional, he pursues the following method. He procures a *petition* to be drawn, setting forth the nature of his offence, the sentence of the court, the favorable circumstances on which he founds his claim, and concludes with a prayer for mercy (*d*). In order to render such petition more likely to be successful, the chairman of the session before whom he was tried, should indorse on this petition at least his approbation of its being presented, and is at liberty to add his own recommendation to mercy in such terms as the case may deserve (*e*). The petition, thus supported, must be transmitted by the clerk of the peace or town clerk, as the case may require, to the Secretary of State for the Home Department; and, in general, a pardon speedily follows an application made under this sanction (*f*). But, if the petition be presented through ignorance or mistake, without the indorsement of the chairman, or other justices present at the trial, it is usual to send it back for their concurrence. If this consent is refused, it is not usual for the Secretary of State to present the petition to his majesty, as the necessary conclusion is, that the petitioner is not a fit object for pardon (*g*).

Manner of allow-
ing a pardon.

We have already considered the manner in which a pardon is to be pleaded and allowed in the previous stages of the proceedings. If obtained after sentence, it may be as well pleaded now as before issue joined, or in arrest of judgment, and the same inci-

(*a*) Dick. Sess. 433.(*b*) Id. ib.(*c*) Dick. Sess. 434.(*d*) Id. ib.(*e*) Dick. Sess. 434.(*f*) See the Form of a pardon thereupon, post, last vol.(*g*) Dick. Sess. 434, 5.

dents will arise as those we have already considered (*a*). When the court allowed it, they were, by 10 Edw. 3. c. 2., to compel the defendant to find sureties for his good behaviour before the sheriff and coroners of the county (*b*); but that statute is repealed by 5 & 6 W. & M. c. 13, which, instead of this provision, gives the judges of the court a power to bind the criminal pleading such pardon to his good behaviour, with two sureties for any term not exceeding seven years. And it is said that if this recognizance is forfeited, the pardon becomes void, and the original judgment may be executed against the defendant (*c*).

MANNER OF
ALLOWING A
PARDON.

The effect of a pardon, like that of the allowance of clergy, is not merely to prevent the infliction of the punishment denounced by the sentence, but to give to the defendant a new capacity, credit, and character (*d*). Thus he may sustain an action for damages if called a felon, as though he had never been guilty (*e*). We have already seen, that when the pardon has passed the great seal, (or a warrant of pardon under the sign manual, countersigned by one of the principal Secretaries of State (*f*),) and its conditions are performed, though not before, or when granted by act of parliament, he is restored to competency as a witness (*g*). But where the disability is part of the sentence itself, and not the consequence of attainder, as in the case of perjury under the statute, the king's special pardon will not remove the incompetence; for this can be done only by act of parliament, which is of equal authority with the provision by which the offence is regulated or created (*h*). A pardon also will

The effect of a
pardon.

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(*a*) Ante, 466, as to plea of pardon.

(*b*) 4 Bla. Com. 402.

(*c*) Moor, 466. Bac. Abr. Pardon, E.

(*d*) Cro. Car. 55. 1 Sid. 222. 5 Co. 49. Hawk. b. 2. c. 37. s. 48. 4 Bla. Com. 402. Bac. Abr. Pardon, H. Williams, J. Pardon, V.

(*e*) Hob. 67. 81, 2. Owen, 150. 1 Rol. Abr. 87. Sir Tho. Raym. 23. Hawk. b. 2. c. 37. s. 48. Bac. Abr. Pardon, H.

Williams, J. Pardon, III.

(*f*) Ante, 770. 6 Geo. 4. c. 25. s. 1.

(*g*) Ante, 466, 7. Evidence. 1 Leach, 454. 98, 9. Hob. 67. 82. 4 Harg. St. Tr. 682. Holt, 685. Sir T. Raym. 379. 1 Ld. Raym. 39. 2 Hale, 278. Hawk. b. 2. c. 37. s. 48. Com. Dig. Testmoigne, A. 5. Bac. Abr. Pardon, H. Williams, J. Pardon, V.

(*h*) 3 Salk. 264. 155. 2 Salk. 514. 689. 690. 1 Lord Raym.

EFFECT OF
PARDON.

prevent any forfeiture which has not actually taken effect (*a*). But, after attainder, no charter from his majesty can entirely restore the blood which is corrupted, or divest any of the lands from those to whom they have escheated (*b*). But the party attainted may afterwards acquire an estate and transmit it to future children (*c*). A son born before the pardon is incapable of inheriting; and if another be afterwards born, and the father die leaving both of them surviving, the younger cannot inherit because his elder brother is living, and the land will escheat pro defectu hæredis, though if the elder had died in the life-time of the father without issue, his brother born since the attainder would have succeeded (*d*). The most beneficial, therefore, of all pardons, is that which is granted by authority of Parliament to reverse the attainder, by which every corruption of blood will be done away for ever (*e*). This may restore either the heritable capacity merely, or all the lands and other property actually forfeited, according to the degree of favor which the legislature intends to confer (*f*). When the latter is the case, the defendant will have the same equitable interest in every part of his estate which he possessed before the attainder (*g*).

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Plea of non-
identity.

The plea of non-identity may also probably occur in this stage of the proceedings. If the prisoner was attainted in another court, or has since his sentence been out of custody, it is open to him to allege that he is not the party against whom the sentence was given (*h*); or if the prisoner escapes and is re-taken, the same question may arise (*i*). In these cases, the court must

256. 2 Hale, 278. Bul. N. P. 292. Holt, 135. Hawk. b. 2. c. 46. s. 112. Williams, J. Pardon, V.

(*a*) 5 Co. 110. 2 Mod. 53. Owen, 87. Hawk. b. 2. c. 37. s. 54. Bac. Abr. Pardon, H. Williams, J. Pardon, V.

(*b*) Co. Lit. 8. 1 Hale, 358. Hawk. b. 2. c. 37. s. 55. Bac. Abr. Pardon, H. 4 Bla. Com. 402. Williams, J. Pardon, V.

(*c*) Co. Lit. 8. 391. 1 Hale, 358. Noy, 170. 4 Bla. Com.

402. Williams, J. Pardon, V.

(*d*) Co. Lit. 8. 1 Hale, 358. 4 Bla. Com. 302. Id. n. 4.

(*e*) Co. Lit. 8. 1 Hale, 358. 4 Bla. Com. 302. Bac. Abr. Pardon, H. Williams, J. Pardon, V.

(*f*) 1 Hale, 358. Bac. Abr. Pardon, H.

(*g*) Cowp. 237.

(*h*) Ante, 423. Fost. 40. 1 Bla. Rep. 3. 4 Bla. Com. 396.

(*i*) 3 Burr. 1310.

ask the party in custody whether he has any thing to say why execution should not be awarded against him (*a*). On this he may, *ore tenus*, and, without holding up his hand, aver that he is not the person mentioned in the record, to which the attorney-general may, in the same way, reply that he is the same, and that he is ready to verify it, and a venire will be awarded to try the issue thus joined returnable instanter (*b*). The prisoner may be allowed counsel to assist him, but the court will not put off the trial unless strong grounds are shown to presume that the party has been mistaken (*c*). Nor will time be allowed him to produce witnesses, unless he will positively swear that he is not the party attainted (*d*). Nor, though his life is in question, can he be allowed to make any peremptory challenges (*e*). During this trial if the offenders have escaped and are considered desperate, they may be chained together (*f*). If the jury find them to be the same persons, no proclamation ought to be made before the award of execution (*g*;) but execution will immediately be awarded according to the original sentence (*h*).

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If all these resources fail—if no reprieve is sent—no pardon obtained—and the identity of the prisoner is either indisputable, or thus ascertained—nothing remains but to execute the sentence. This brings us to the end and object of every criminal prosecution—the punishment of the offender.

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| (<i>a</i>) 1 Hale, 368. 3 Burr. 1810. 1 Bla. Rep. 4. Fost. 40. | 4 Bla. Rep. 4, 5. |
| (<i>b</i>) 1 Bla. Rep. 4. Fost. 40, 1. 3 Burr. 1810. * | (<i>c</i>) 1 Lev. 61. Fost. 42. 1 Bla. Rep. 6. 4 Bla. Com. 396. |
| (<i>c</i>) 3 Burr. 1810. Fost. 41. | (<i>f</i>) 3 Burr. 1812. |
| 1 Bla. Rep. 4. 4 Bla. Com. 396. | (<i>g</i>) 3 Burr. 1811. |
| (<i>d</i>) Fost. 42. 4 Bla. Com. 396. | (<i>h</i>) Id. ib. |
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CHAPTER XX.

OF THE EXECUTION OF THE SENTENCE.

HAVING, in the consideration of judgments, inquired into the general principles by which the measure of punishment is to be regulated, and what punishments are to be awarded for specific crimes (*a*), we have here only to show in what manner the sentence is to be carried into execution, and the nature of the penalties themselves which the criminal is compelled to undergo, since it is a general rule that the punishment must be conformable to the sentence (*b*).

Capital punishment of death *.

The punishment of *death* being the highest penalty which the law inflicts, is first to be considered. Into the right or the expedience of this infliction, it is not our business to inquire. We have only to examine the practical points which relate to the infliction, and which, it may be observed, apply, in a considerable degree, to the execution of inferior sentences.

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By what warrant the execution must be authorized,

And first let us inquire what warrant or order is necessary to command the actual infliction of the capital punishment. In the King's Bench, when judgment of death is given, and the execution is to be performed by the marshal of the court, in whose custody the prisoner is always supposed to continue, the entry is "*et præceptum est marescallo, &c. quod faciat executionem periculo incumbente*" (*c*). When a nobleman is attainted of felony or treason before the Lord High Steward, there is a precept for the execution in the name of the High Steward, and authenticated

(*a*) Ante, 695 to 722.

(*b*) Hawk. b. 2. c. 51. s. 5.

(*c*) 2 Hale, 5. 409.

* As to this subject in general, see 2 Hale, 406 to 411. Hawk. b. 2. c. 51. 4 Bla. Com. 403 to 407. Burn, J. Execution. Williams, J. Execution and Reprieve.

WARRANT FOR
EXECUTION.

by his seal (*a*). And a similar precept is said formerly to have been issued under the hand of the judge on every execution for a capital felony (*b*). In the high court of Parliament, before his majesty, the sentence is always put in force by a writ from the king (*c*). Formerly, when judgment was given by commissioners of oyer and terminer, the precept for execution was issued to the sheriff in the names, and under the seals of three of the commissioners, one of whom was of the quorum; and justices of gaol delivery were accustomed to award a similar instrument reciting the judgment, and commanding execution to be done, or entering on the record “*et dictum est per curiam hic vicecomiti comitatûs prædicti, quod faciat executionem periculo incumbente*” (*d*). But it has long been settled, that in capital cases, the prisoner may be put to death without any writ or precept (*e*). And when the proceedings of the court were in Latin, the execution of the prisoner was directed by the words “*sus. per col.*” written against his name in a calendar prepared for the purpose (*f*). The practice at the present day, at the assizes, is as follows:—When all the other public business of the court is terminated, the clerk of assize makes out in writing four lists of the prisoners, with separate columns, containing their crimes, verdicts, and sentences, and a blank column, in which the judge writes what is his pleasure respecting those capitally convicted, as to be executed, respited, or transported (*g*). If the sheriff afterwards receives no special order from the judge, he executes the judgment of the law in the usual manner, according to the directions of his calendar (*h*). In every county this important subject is settled with great deliberation by the judge and the clerk of assize, before the former leaves the town where the assizes are holden, but probably, in different counties, with some slight variation: as, in Lancashire, no calendar is left with the gaoler, but one is sent to the secretary of state for the home

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(*a*) 3 Inst. 31. 2 Hale, 409. 4 Bla. Com. 403. Williams, J. Execution and Reprieve.

(*b*) 4 Bla. Com. 403.

(*c*) Id. ib. Williams, J. Execution and Reprieve. See form, Fost. 140. 4 Bla. Com. App. VII. Post, last vol.

(*d*) 3 Inst. 31. 2 Hale, 409.

4 Bla. Com. 403. Williams, J. Execution and Reprieve.

(*e*) Finch, 478. 2 Hale, 409.

(*f*) 4 Bla. Com. 403. 2 Hale, 409.

(*g*) 4 Bla. Com. 404, note 1. 2 Hale, 409.

(*h*) 4 Bla. Com. 404, note 1.

WARRANT FOR
EXECUTION.

department (*a*). But, in London, the recorder, after reporting in person to the king the several cases of the prisoners, and receiving his royal pleasure that the law should take its course, issues his warrant to the sheriffs, directing them to perform the execution on the day, and at the place appointed (*b*). In the court of King's Bench, if the prisoner be tried at the bar, or brought thither by habeas corpus, a rule is made for the execution, either specifying the time and place, or leaving them to the discretion of the marshal (*c*). It seems to be the proper mode for the court not to name a day, when the execution is to take place in another county; but to make a rule to deliver the prisoners to the sheriff of that county where the punishment is to be inflicted (*d*).

By what court
the execution
may be appoint-
ed.

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In general the execution is ordered, as to its time and place, by the court in which the sentence is passed, in the manner we have seen already. But the court of King's Bench has not only power to award execution against persons tried or sentenced by its judges, but against persons attainted in Parliament, or any other court, on the removal thither of the record of attainder, or a transcript, and the prisoners being brought in by habeas corpus (*e*). And, therefore, it has been resolved, that if a peer be convicted of murder before the high court of Parliament, and the day appointed by 25 Geo. 2. c. 37, should lapse before the execution of the sentence, a new time may be appointed either by the lords themselves, if sitting, or, if their session is concluded, by the King's Bench, on the due removal of the record of attainder (*f*).

Time and place
of execution.

The *time* and *place* of execution are never part of the judgment itself; and though, in case of murder, the 25 Geo. 2. c. 37,

(*a*) 4 Bla. Com. 404, note 1.

(*b*) Id. ib. See form, 4 Bla. Com. App. VI. Post, last vol.

(*c*) Fost. 43. 6 Harg. St. Tr. 332. 3 Burr. 1812. 4 Bla. Com. 404. 2 Hale, 409. See form, 4 Bla. Com. App. IV. Post, last vol. 2 Hale, 409.

(*d*) 3 Burr. 1812.

(*e*) 1 Sid. 72. 1 Keb. 244.

1 Lev. 61. Cro. Car. 175. Cro. Jac. 495, 6. Poph. 131. 2 Hale, 4. Fost. 139, 40. Hawk. b. 2. c. 51. s. 2. Hawk. b. 2. c. 44. s. 18. Williams, J. Execution and Reprieve.

(*f*) Fost. 139, 40. 10 Harg. St. Tr. App. 109, 10. Hawk. b. 2. c. 51. s. 2. Williams, J. Execution and Reprieve.

TIME AND
PLACE
OF EXECUTION.

directs the criminal to be executed on the next day but one to that on which he was condemned, yet this act is only directory, and the time of execution does not form a necessary part of the sentence (*a*). In other cases, a longer time is usually allowed him; at the assizes, this is generally left to the discretion of the sheriff, who has no other warrant or direction than the marginal note in the calendar (*b*); at the Old Bailey, two Sundays are usually allowed to intervene between the order for execution and the death of the prisoner (*c*); and this appears to be the standard which regulates the proceedings of sheriffs in the country, in the exercise of their discretion (*d*). The court of King's Bench, on a judgment of high treason, have allowed a month to the prisoner, on the application of his solicitor, with the consent of the attorney-general (*e*). Thistlewood and his followers were condemned and executed within a few days after their trial. As far as the interests of the public are affected, it is certainly desirable that the punishment should follow the sentence with as little delay as possible. The minds of the populace are always disposed to separate the idea of punishment from that of guilt, and to look on the criminal merely as a sufferer; they are ever more inclined to feel, than they are competent to reason; and, as the only benefit that can be derived from the infliction of death is the terror excited by its example, it should be as immediate as circumstances will allow. If a long delay arise, the spectators look on the execution rather as a terrible sight, than the necessary consequence of transgression (*f*).

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The court may either appoint the *place* of execution, or they may leave it to the sheriff (*g*). When an offender is tried at the assizes, execution ought not to be awarded into a different county

(*a*) Russ. & Ry. C. C. 230, three judges diss. And it was there also thought, that notwithstanding the act, the judge might, if he saw fit, order a person convicted of murder to be executed immediately, or at any time within forty-eight hours after the conviction, as he might do in any other capital felony.

(*b*) Ante, 781, 2.

(*c*) 1 Bla. Rep. 7.

(*d*) Ante, 781.

(*e*) 1 Burr. 650. Williams, J. Execution.

(*f*) Beccar. c. 19. 4 Bla. Com. 404.

(*g*) 3 Burr. 1812. 4 Bla. Com. 404. Williams, J. Reprieve and Execution.

TIME AND
PLACE
OF EXECUTION.

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from that in which the defendant was convicted (*a*). But as it was enacted, that it might be lawful for the prosecutor of any offence committed in a city or town, which is a county of itself, to prefer his indictment at the assizes for the county adjoining (*b*), it has subsequently been provided that, in case of a conviction on an indictment so preferred, the court shall have power to order the sentence, whether of death or other punishment, to be executed either within the district where the crime was perpetrated, or that in which the offender was condemned (*c*). And the court of King's Bench have always the power of ordering a defendant, brought up by habeas corpus before them, to be executed in any county in England, on the prayer of the attorney-general, by which they think public justice may be most effectually promoted (*d*). The usual place of execution, when the judgments of that court are performed by the marshal, is St. Thomas-a-Watering's, in the county of Surrey (*e*). It seems that the officer, for convenience, may cause the criminal to be executed on private ground, and hang him there in chains; or, at least, that if an action of trespass be brought by the occupier of the land against the sheriff, and the jury find a verdict in his favor, the court will refuse to grant a new trial (*f*); but the owner will be entitled to the gibbet and the chain, after the body is wasted away (*g*).

By what officer
the sentence is
to be executed.

It is certain, that no sentence can be lawfully executed except by the proper officer, or his lawful deputy (*h*). If any unauthorized individual take upon himself to execute the sentence, he will be guilty of murder, for the person of the party attainted is as much under the protection of the law, as that of any other subject (*i*). In general, the officer who is to execute the sentence, is

(*a*) 2 Show. 511. 3 Mod. 124.
Hawk. b. 2. c. 51. s. 2. Wil-
liams, J. Execution and Re-
prieve.

(*b*) 38 Geo. 3. c. 52.

(*c*) 51 Geo. 3. c. 100. s. 1.

(*d*) 3 Burr. 1812. 3 Mod. 124,
125. 2 Show. 511. 1 Lev. 61.
1 Sid. 72. 2 Hale, 5. 1 Hale,
464. Hawk. b. 2. c. 51. s. 2.
Williams, J. Execution.

(*e*) 4 Burr. 2036. 1 Stra. 553.
3 Mod. 47, n. b. Hawk. b. 2.
c. 51. s. 2, notis.

(*f*) 2 Salk. 648.

(*g*) 1 Ld. Raym. 738.

(*h*) 1 Hale, 501. 3 Inst. 52.
Hawk. b. 2. c. 51. s. 6. 1 East,
P. C. 335.

(*i*) 1 Hale, 501. 3 Inst. 52.
Fost. 267, 268. 1 East, P. C.
335.

he in whose custody the prisoner is at the time it is pronounced against him; for he is usually remanded again to the same prison, to remain there till the time of his execution (*a*). And, therefore, where judgment is given at the assizes, this office is to be fulfilled by the sheriff, in whose custody the body of the prisoner is when in the county gaol, or by his under-sheriff or deputy, deriving their authority from his warrant (*b*); unless, under the provision of the 51 Geo. 3. c. 100, the judge directs a prisoner, tried in the county at large, to be delivered for execution to the sheriff or gaoler of the county of the city or place where the offence was committed. But if the criminal be confined in the Tower of London, which is not within the jurisdiction of the sheriff, as is sometimes the case, when the crime is of high importance, or the party of exalted station, he is brought before the court by a *precept* to the constable of the Tower; and if he is condemned, is commonly remanded thither, and the warrant for his execution must be directed to the lieutenant or constable, in whose custody he continues; there is usually, however, another precept, commanding the sheriff of London and Middlesex to assist the proper officer (*c*). In the last case of this kind that has occurred, the practice was, in some respects, different. It was that of the Earl of Ferrers, who was convicted by the high court of Parliament of murder, and after his sentence remanded to the Tower of London; a *writ for his execution* at Tyburn was issued under the great seal of England, directed jointly to the sheriffs of London and Middlesex, commanding them to receive the body of the criminal at the gate of the Tower, to convey him to the place appointed, and there, between the hours of nine in the morning, and one in the afternoon, to execute the sentence of the law (*d*). At the same time, *another writ* was directed to the lieutenant of the Tower, commanding him to deliver up the body of his prisoner to the sheriffs at the gate of the Tower at the proper time, and giving notice of the other precept (*e*). Pursuant to these direc-

BY WHAT
OFFICER
SENTENCE IS TO
BE EXECUTED.

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(*a*) 2 Hale, 410. Williams, J. Execution and Reprieve.

(*b*) 2 Hale, 410.

(*c*) Id. ib. Williams, J. Execution and Reprieve.

(*d*) 10 Harg. St. Tr. 213, 14.

See form, 10 Harg. St. Tr. Appendix, 213. Post, last vol.

(*e*) 10 Harg. St. Tr. 214. See form, 10 Harg. St. Tr. 214. Post, last vol.

BY WHAT
OFFICER
SENTENCE IS TO
BE EXECUTED.

tions, the sheriff received the body of the criminal at the gate, and gave a receipt for it to the lieutenant; after which they proceeded to execute the sentence (a).

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If a prisoner be *attainted* in the court of King's Bench for treason or felony he is usually remanded to the custody of the marshal, who is to order and superintend the execution, if it is done in Middlesex or in Surrey, which it may be, in whatever county the offence was committed (b). But the court may send him to Newgate, and order him to be executed by the sheriff of Middlesex (c). And where the prisoner is in the Tower of London, this court will pursue the same practice as that which was followed by the House of Peers in the case of the Earl of Ferrers; they will order a writ to the lieutenant of the Tower, to deliver the prisoner, and another to the sheriffs to receive him, and to execute the sentence (d); and if he has been previously attainted, and is brought into the court by habeas corpus, they will make a rule for his execution (e). And where it is expedient to execute a common prisoner in some foreign county, in order to make the punishment more exemplary, if the sheriff for that county is in attendance, the court will, by a similar rule, transfer the criminal immediately into his custody (f).

In what manner
the sentence is
to be executed.

The execution must be performed according to the judgment, which we have already considered (g). And if the sheriff, or other officer to whom it is entrusted, without order or any authority, wantonly changes the mode of death, as from hanging to beheading, he will be guilty of felony at least, if not murder (h). It has been even laid down by great authority, that the king him-

(a) 10 Harg. St. Tr. 214. See form, 10 Harg. St. Tr. 214. Post, last vol.

(b) 1 Hale, 501. 2 Hale, 411. Williams, J. Execution and Reprieve.

(c) 1 Hale, 502.

(d) Ante, 735.

(e) Fost. 43, 44. Cro. Jac. 495, 6. Williams, J. Execution and Reprieve.

(f) 3 Burr. 1812. Williams, J.

Execution and Reprieve.

(g) 3 Inst. 211. 2 Hale, 411. 4 Bla. Com. 404. 1 East, P. C. 335. Williams, J. Execution and Reprieve.

(h) 3 Inst. 211. 217. Hawk. b. 2. c. 51. s. 5. 1 Hale, 501. 2 Hale, 411. Fost. 267, 268. 4 Bla. Com. 404. 1 East, P. C. 335. Williams, J. Execution and Reprieve.

self cannot totally change the sentence, so as to order him to be beheaded, who was sentenced to die by hanging (*a*). But it is universally agreed, that where beheading is a part of the punishment, the king, who might by his prerogative pardon the whole, may remit the residue (*b*). And repeated instances have arisen, in which the ignominious, or more painful parts of the punishment of high treason, have been remitted; men, instead of being drawn, hanged, embowelled and quartered, and women, in the place of burning, have been ordered to suffer death by beheading; and the result of the authorities appears to be, that though the king cannot vary the execution, so as to aggravate the punishment, he may mitigate or remit a part of its severity (*c*). The former penalties for high treason having been executed, in several instances, with great cruelty, Queen Elizabeth is said to have given express directions, that the criminal should be hanged till he was quite dead, before the remaining mutilations were inflicted on his body (*d*): a humanity quite contrary to the sentence, which must, until the recent statute, have directed them to be done while the offender was living (*e*). And women, who, till lately, were burned for high and petit treason, were always strangled at the stake, before the commencement of the burning (*f*). In the case of the Earl of Stafford, who was condemned on a parliamentary impeachment to the ordinary punishment of treason, the king changed the sentence into beheading, by issuing his writ to the sheriffs, any judgment to the contrary notwithstanding; and, on the application of the sheriffs, both houses directed them to act according to his majesty's directions (*g*). Lord Coke, indeed, strenuously maintains, "*judicandum est legibus, non exemplis*;" but it is contended by others, that this power of the king, to render a punishment milder, is part of his prerogative by the common law (*h*). And it has been suggested, that as every

(*a*) 3 Inst. 211, 2. Hawk. b. 2. c. 146.

c. 51. s. 5.

(*b*) 3 Inst. 212. 52. Fost. 268. Hawk. b. 2. c. 51. s. 5.

(*c*) 3 Harg. St. Trial, 215. 1 Harg. St. Tr. 63. 394. 4 Id. 129. 6 Id. 16. Fost. 268. Hawk. b. 2. c. 51. s. 5.

(*d*) 1 Harg. St. Tr. 142.

(*e*) Ante, 702, 3. 54 Geo. 3.

(*f*) Fost. 268.

(*g*) 3 Harg. St. Tr. 215. 4 Bla. Com. 405. See form, 3 Harg. St. Tr. 215.

(*h*) Fost. 268, 9. 4 Bla. Com. 405. 1 East, P. C. 335. Williams, J. Execution and Reprieve.

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SENTENCE.

alteration of this kind has been for a less painful or ignominious death, and has been made as a matter of favor, on the petition of the party, or of his friends, it may come within the power of the crown to grant conditional pardons; so that the sentence is remitted, on condition of submitting to a milder kind of execution (*a*). It seems, at all events, to be agreed, that the sheriff, acting under the royal command, would, in such case, be sufficiently protected (*b*). At the present day, however, this is a question which can scarcely arise in practice; for the cruelties which, till lately, were thus awarded, have been entirely done away. By the 30 Geo. 2. c. 28, women convicted of any description of treason, are to be hanged like ordinary offenders. And, by the 54 Geo. 3. c. 146, the execution of traitors, in general, is merely to be drawn and hanged; and the same statute gives the king power, if he did not possess it before, to change the whole sentence into beheading.

We have seen, that the bodies of murderers may, by the 25 Geo. 2. c. 37. s. 5, be hung in chains, if the judge think fit to order it (*c*). This is no part of the judgment; but is to be directed by a *special order* of the judge to the sheriff, after the judgment is given (*d*).

By the 25 Geo. 2. c. 37, the body is to be delivered to the surgeons to be dissected and anatomized; but it has been lately questioned, whether it is necessary to award this in the sentence (*e*).

It is clear that if, from any mistake or collusion, the criminal is cut down before he is really dead, and afterwards revives, he ought to be hanged again (*f*). For, as the sentence was, "to be hanged by the neck till he was dead," the first hanging was no execution; and if a false tenderness were allowed to prevail, a

(*a*) 4 Bla. Com. 405.

(*b*) Fost. 268. 1 East, P. C. 335. Williams, J. Execution and Reprieve.

(*c*) Ante, 705.

(*d*) Fost. 107. 1 Leach, 24. 10 Harg. St. Tr. 516. Hawk.

b. 2. c. 51. s. 13.

(*e*) Russ. & Ry. C. C. 58.

(*f*) Finch, 467. 2 Hale, 412. Hawk. b. 2. c. 51. s. 7. Williams, J. Execution and Reprieve. Burn, J. Execution.

multitude of collusions might ensue (*a*). And it seems, that even when abjuration was allowed, a criminal thus reviving was not allowed to take sanctuary, and abjure the realm; but his fleeing to a consecrated place, was regarded as an escape in the officer (*b*).

EXECUTION OF
SENTENCE.

Transportation, or exile (c), is generally regarded as the next to death in the scale of punishment, though, perhaps, it amounts to scarcely any punishment at all, in the estimation of many of those criminals who actually endure it. It was altogether unknown as a penalty to the common law of England (*d*). The only case in which it arose, seems to have been that of abjuration, where the party accused fled to a sanctuary, confessed his crime, and took an oath to leave the kingdom at the port assigned him, and never to return without the permission of his majesty (*e*). This was evidently not a punishment, but a condition of pardon; for it was expressly provided by magna charta (*f*), that no free-man shall be banished, unless by the judgment of his peers, or by the law of the land. The first introduction of exile into the English law, after abjuration was abolished, was by the 39 Eliz. c. 4, respecting vagrants, which was repealed by the 12 Anne, st. 2. c. 23. Very soon after the restoration of Charles the Second, it became usual for the crown to grant pardons, on condition that the offender should be banished, either for life, or for some limited period, and that the original sentence should be revived on his breaking the stipulations of its remission (*g*).

Punishment of
transportation*.

(*a*) 4 Bla. Com. 406.

(*b*) Finch, 467, 8. 4 Bla. Com. 406.

(*c*) It was held, that by the word *transportation*, in the 8 Geo. 3. c. 15, (now repealed by 5 Geo. 4. c. 84,) was meant not merely the conveying of a felon to the place of transportation, but his being so conveyed and remaining there during the term for which he is ordered to be transported.

(*d*) 2 Hen. Bla. 223. 3 P. Wms. 38. 2 T. R. 584. Co. Lit. 133, a. 1 Bla. Com. 137. Williams, J. Felony, VI. Dick. Sess. 232.

(*e*) 4 Bla. Com. 333. 3 P. Wms. 37. Ante, 444, as to Plea of Sanctuary.

(*f*) 9 Hen. 3. st. 1. c. 29.

(*g*) Kel. Preface, iv. Kel. 45. 2 Hen. Bla. 223. Hawk. b. 2. c. 33. s. 137. Williams, J. Felony, VI.

* As to Transportation in general, see Hawk. b. 2. c. 33, per tot. Bac. Abr. Felony, H. Cro. C. C. 464 to 469. Burn, J. Transportation. Williams, J. Felony, VI. Dick. Sess. 232 to 237.

TRANSPORTA-
TION.

When this mode was pursued, the convicts were not to be sent away as slaves, but upon indentures by which they were bound to serve particular masters for seven or five years, during the last part of which they were to receive wages, and at the expiration of which time, they were to be allowed land and stock of their own, according to the usage of the plantations (*a*). An account was also to be given of the usage they met with, of the expiration of their time, and of their arrival or departure (*b*). The substitution of exile, for capital punishment, was expressly allowed by the Habeas Corpus act, which, in other cases, rendered all confinement beyond the realm, illegal (*c*). At length, by the 4 Geo. 1. c. 11, transportation was introduced in certain cases, (now extended to all clergyable felonies) (*d*), instead of burning in the hand, or whipping, which were, at that time, the conditions on which laymen were admitted to clergy. By that act, when any person entitled to clergy on undergoing those penalties was convicted of grand or petit larceny, or the felonious stealing of money or goods, the court before whom he was tried, was empowered, instead of the whipping, or burning in the hand, to order him to be sent to some of his majesty's plantations in America, for seven years, and to transfer them, by order, to the use of such persons, and their assigns, as would contract for their performance of the sentence. Prisoners convicted of knowingly receiving stolen goods, were also made subject to the same regulations, when transported for fourteen years; and now offenders may, in various offences, be transported for life (*e*).

[791] The principal act now in force regulating the transportation of offenders, is the 5 Geo. 4. c. 84, which revives and consolidates all the laws on the subject (*f*); and by the second section of that act,

(*a*) Kel. Pref. iv. Kel. 45.

(*b*) Kel. Pref. iv.

(*c*) 31 Car. 2. c. 2. s. 14.

(*d*) By 6 Geo. 4. c. 25. s. 2.

(*e*) Where a pardon is granted, on condition of transportation, and no term is specified, in that case the offender is to be transported for fourteen years, by the 4 Geo. 1. c. 11.

(*f*) The act repeals the 4 Geo. 1. c. 11. in part, the

6 Geo. 1. c. 23. in part, the 16 Geo. 2. c. 15. the 8 Geo. 3. c. 15. the 28 Geo. 3. c. 24. in part, the 31 Geo. 3. c. 46. in part, and the 43 Geo. 3. c. 15. the parts unrepealed will be found noticed in the text. This act does not extend to persons banished, under the 60 Geo. 3. and 1 Geo. 4. c. 8. for seditious libels.

offenders adjudged for transportation are to be transported under its provisions. TRANSPORTATION.

By the second section of the 5 Geo. 4. c. 84, whenever, in case of a capital felony, his majesty shall think fit to spare the life of the criminal, on condition of transportation either for life or a specific period, and such intention is signified by one of the secretaries of state to the court, or a subsequent court, or to a judge, such court or judge shall allow the offender a conditional pardon, and order his transportation; and if such allowance and order be made by a subsequent court or judge, such allowance or order shall operate in the same manner as if the intention of mercy had been signified, and the allowance and order made during the term or session at which the prisoner was convicted. Convicts adjudged, by courts out of the United Kingdom, to transportation, or pardoned on condition of transportation, when brought to England, may be imprisoned till transported (*a*).

A secretary of state may authorize persons to make contracts for the transportation of convicts, on giving security for the effectual transportation of them (*b*); but he may give the custody of offenders transported in the king's ships without security (*c*).

With respect to the place for the confinement of convicts in general, and the place of transportation, the king, by warrant under his sign manual, may appoint places of confinement within England or Wales, either on land or on board vessels, for the confinement of male offenders under sentence of transportation, to be under the management of a superintendant and overseer, and a secretary of state may direct the removal of a male offender under sentence of death, but reprieved or respited, or under sentence of transportation, who shall be free from distemper, to any of such places of confinement; and the sheriff or gaoler is to convey the offender

(*a*) 5 Geo. 4. c. 84. s. 17.

(*b*) 5 Geo. 4. c. 84. s. 3. See form, &c. of security required, *id.* s. 5. the contract is exempt from stamp duty, 55 Geo. 3. c. 184. end of schedule I. The 4th section directs the sheriff's

or gaolers, on receiving orders for removal of offenders for transportation, to deliver them over to the contractor, if free from distemper.

(*c*) 5 Geo. 4. c. 84. s. 7.

TRANSPORTA-
TION.

to the place appointed, and deliver a true attested copy of the caption and order by which the offender was sentenced for transportation, containing such sentence, and also a certificate describing the crime, age, &c. of the offender, his behaviour in general, &c. (*a*).

By the 56 Geo. 3. c. 63. convicts sentenced to transportation may be confined in the general penitentiary at Milbank, erected under 52 Geo. 3. c. 44. (*b*). The king may appoint any place beyond the seas for the transportation of offenders (*c*). Botany Bay and Port Jackson are the usual places to which convicts are transported. If an act direct an offender to be transported without saying to what place, it is in general understood to be the place where convicts are usually transported (*d*).

An act of 27 Geo. 3. c. 2. was passed, enabling the Governor of New South Wales, to hold courts within that territory, and there to try and punish offenders, either with death, if the offence be capital, or with any other corporal penalty, if it be of inferior magnitude.

The time of the imprisonment is to be deemed a part of the term of transportation (*e*). It may be here also observed, that when an offender has been sentenced to transportation for a term of years, and is afterwards tried for a distinct offence, to which a similar punishment is assigned by law, the court may, in their discretion, either make the second term to commence from the time of conviction, and so be in part concurrent with the first, or the latter to begin when the former concludes (*f*).

The king may appoint a superintendant of such places of confinement; and also, if necessary, an assistant or deputy, to be constantly resident, with an overseer and other officers and guards to reside within the building. The superintendant is personally to inspect the place of confinement four times a year, or oftener, when

(*a*) 5 Geo. 4. c. 84. s. 10.

(*b*) See post, as to the Penitentiary.

(*c*) 5 Geo. 4. c. 84. s. 3.

(*d*) 1 Hawk. 7th edit. 407.

(*e*) 5 Geo. 4. c. 84. s. 19.

(*f*) 1 Leach, 441. 536. 4 Burr, 2577.

necessary, and examine into the state of the places of confinement, the conduct of the officers, the treatment and condition of the prisoners, &c. and the amount of their earnings, with the expences attending the place of confinement, and shall make a report at least twice a year. Such superintendant and officers are to continue in office during the king's pleasure, and receive such salary as the secretary of state shall appoint; besides which, the superintendant shall be paid all expences incurred in discharging his duty (a). Regulations are also made by the 5 Geo. 4. c. 84. s. 12, for cleansing and purifying the offender and his clothes, &c. and a subsistence is to be allowed him, if necessary, on his discharge. With respect to the *powers and duties* of the superintendant and overseers, by the 15th section of the same act, they are to have the same powers over the prisoners as a sheriff or gaoler, and in like manner are answerable for an escape. If the offender be guilty of any misbehaviour, he may be punished to an extent allowed by the secretary of state. The superintendant or overseer must see that the offender be fed and clothed, according to a scale of diet and clothing, to be determined and notified in writing by the secretary of state; and he shall also keep the offender to hard labour, as prescribed by similar authority. In case of the superintendants' or overseers' absence, or vacancy of office, the duties are to be performed by the officer next in authority. By the 14th section of the act, the superintendant is to make returns of the prisoners to the secretary of state, as therein mentioned. By the 16th section the superintendant may act as a justice of the peace.

By the 18th section of the 5 Geo. 4. c. 84. convicts may be kept to hard labour whilst in the common gaol, if the health permits, a visiting justice giving a written order to that effect, and a secretary of state may order the convict to be removed to the House of Correction to be kept to hard labour; and the king in council may direct convicts to be kept to hard labour in any part of the king's dominions out of England, on land, or on board a vessel under the management of a superintendant and overseer (b). If the offender be guilty of misbehaviour or disorderly conduct on board the ship in which he is transported, he may be

(a) 5 Geo. 4. c. 84. s. 11.

(b) 5 Geo. 4. c. 84. s. 13.

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punished by the surgeon or principal medical officer of the ship, according to the authority given by the secretary of state, the master or principal officer of the ship signifying his approbation thereof in writing ; such punishment, and the particulars of the offence being entered the same day in the ship's log-book, under a penalty of £20 (*a*). On the other hand, by the 30 Geo. 3. c. 47. the king may authorize the governor or lieutenant-governor of any place to which convicts are transported, to remit, either absolutely or conditionally, the whole or any part of the term of their transportation, which remission is to be of the same effect as if the king had signified his intention of mercy under the sign manual (*b*).

The convicts may be carried through any part of Great Britain (*c*). The *expences* of delivering the offender out of custody are usually paid to the sheriff or gaoler, and the reasonable expences of the removal are to be paid by the county or place, &c. for which the court in which the offender was convicted was held ; and the treasurer of the county, &c. is to pay them, being first allowed by an order of justices ; and the clerk of the court is to be paid by the treasurer his usual fee for the order of transportation (*d*).

The governor of the colony, or person to whom the warrant is to be delivered, is to have the property in the service of the offender (*e*) ; but the king's prerogative is not affected by the act (*f*).

Offenders found at large before the expiration of their sentence, incur the punishment of death without benefit of clergy ; and persons rescuing convicts may be punished as if they had been confined in a gaol, in custody of the sheriff or gaoler, for the crime for which such offender shall have been convicted : and a party prosecuting a convict so being at large will be entitled to a reward

(*a*) 5 Geo. 4. c. 84. s. 6.

(*b*) And see the 5 Geo. 4. c. 84. s. 26. 2 B. & A. 258. 6 Geo. 4. c. 25. s. 1.

(*c*) Sec. 20.

(*d*) Sec. 21.

(*e*) 5 Geo. 4. c. 84. s. 8.

(*f*) Id. sec. 9.

of £20 (*a*). Convicts confined in the Penitentiary, breaking prison or escaping, are to be punished by an addition of three years of the term of their confinement; and upon a second breach of prison or escape, to be guilty of felony without clergy; and persons guilty of rescuing, or attempting to rescue, convicts, or officers permitting escape, or persons supplying means of escape, are to be severely punished (*b*).

TRANSPORTATION.

Where exile has been awarded, as a condition for the pardon of a capital felony, the delinquent who has escaped, and been retaken, may be remitted to his original sentence, for the pardon is made void by the breach of its conditions (*c*). But where a party is convicted of a clergyable felony, and sentenced to transportation to New South Wales, after which he receives a pardon on condition of transporting himself to any part beyond seas, it seems to be still doubtful whether, if he be afterwards found within the kingdom, he can be indicted for a capital offence within the statutes, or is only to be remitted to his original sentence (*d*). Where a prisoner is pardoned on condition of his giving security to leave the kingdom within a certain time, it seems that his entering into proper recognizances for that purpose is a compliance with the terms on which he receives the mercy of the crown; and if he is afterwards found at large, he will be guilty of no crime, but the securities will be forfeited (*e*). And it seems certain, that where the severer punishment is remitted on condition that the criminal shall leave the realm, and ill health or extreme poverty render this impracticable, he will be excused, if found here within that period (*f*).

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The punishment of whipping was inflicted at common law, on persons of inferior condition, who were guilty of petit larceny and other smaller offences (*g*). But it seems that, in the earliest periods, by the usage of the Star Chamber, it was never to be in-

Punishment of whipping.

(*a*) Sec. 22. 5 Geo. 4. c. 84. as to the escape and rescue of convicts, &c. see post, vol. ii. as to the return of convicts for libel, 60 Geo. 3. and 1 Geo. 4. c. 8. s. 6.

(*b*) 56 Geo. 3. c. 63. ss. 43,

44. See also the Annual Mutiny Act.

(*c*) 1 Leach, 223.

(*d*) 1 Leach, 395.

(*e*) 1 Leach, 396, n. (*a*).

(*f*) Id. *ibid*.

(*g*) Com. Dig. Tumbrel, C.

PUNISHMENT OF WHIPPING.

inflicted on a gentleman (*a*). And though it was inflicted, with great cruelty, on Titus Oates, on his conviction of perjury, his sentence was afterwards declared to be oppressive and illegal (*b*). This punishment seems first to have been introduced into the statute law, as a mode of allowing clergy. As women convicted of simple felony, were anciently liable to suffer death, the 21 Jac. 1. c. 6. allowed, that when convicted of larcenies under the value of ten shillings, they should, instead of receiving judgment to die, be sentenced to be whipped, stocked, or imprisoned for any period not exceeding a year. But now, by 1 Geo. 4. c. 57. the whipping of females is abolished, and instead thereof imprisonment or solitary confinement may be inflicted. And, when by the 19 Geo. 3. c. 74. s. 3. the ignominy of branding in the hand was abolished, the court were empowered in its room, in every case except that of manslaughter (and now in that case) (*c*), to order the offender to be either publicly or privately whipped, not more than three times for the same offence. At the same time, in order to prevent collusion, it was directed that every private whipping should

[797] take place in the presence of three persons. Besides these cases of clergyable felony, whipping is commonly inflicted for minor offences, which display meanness of disposition, and come before justices at the quarter sessions of the peace.

Punishment of pillory.

The punishments of the pillory and the tumbrel, are of very early origin; they are said, indeed, to have been used even in the times of the Saxon Heptarchy (*d*). The former is derived from the Pilastre, and signifies a pillar or column; and as it is a wooden machine in which the neck of the culprit is inserted, it was called in old law Latin “Collistrigium,” from that circumstance (*e*). The latter, which is now obsolete, originally signified a dung-cart, and was used as another means of exposure (*f*). According to some authorities, it seems to have been synonymous with the trebutchet or ducking stool, which was used as a punishment for scolding women (*g*). The stocks, formerly

(*a*) 2 Ruslw. 468. Com. Dig. Tumbrel, C.

(*b*) 4 Harg. St. Tr. 106.

(*c*) By 3 Geo. 4. c. 38, the offender in manslaughter may be transported or imprisoned.

(*d*) 3 Inst. 219.

(*e*) Id. *ibid*.

(*f*) Id. *ibid*.

(*g*) Com. Dig. Tumbrel, A. Burn, J. Pillory and Tumbrel. Williams, J. Pillory and Tumbrel.

called *furcæ*, seem to be of equal antiquity (*a*). These instruments of correction were, by common law, to be erected and maintained by the lord of every leet, who might lose the liberty by default (*b*), or be fined for his neglect to the king (*c*). And by the 51 Hen. 3. st. 6. s. 2, a pillory of convenient strength is to be maintained in every town as an appendage to the market. And by 51 Edw. 1. de pistoribus, it was further directed to be of sufficient strength, in order that execution might be done without peril to the body of the offender. It seems to be the practice in Middlesex, when a defendant is set in the pillory, for the prosecutor to defray all the charges of carrying the sentence into effect, but it has been decided that the sheriff has no legal demand on the occasion (*d*).

PUNISHMENT
OF PILLORY.

Of all disgraceful punishments that of the pillory is regarded ✓ [798] as the most ignominious (*e*). The time when it shall be executed is generally, in the King's Bench, left to the sheriff; for the rule (*f*) is drawn up "that the gaoler or marshal deliver the defendant to the sheriff; and that the sheriff do set him in and upon the pillory, for an hour, between the hours of ten and twelve on [*leaving the day in blank*] and then deliver him to the marshal, &c." and this blank is afterwards filled up at the discretion of the sheriff (*g*). But if, in consequence of illness, after the time is fixed, and the blank is filled up, the defendant cannot, without danger of his life, endure the exposure, the court, on affidavits of the fact, will interfere, and make a rule for enlarging the time until it can be done without danger (*h*). In the execution of this sentence, the defendant's head and hands ought to be put in and through the pillory, and so to remain for the whole time mentioned in the rule (*i*). And, therefore, where the under-sheriff allowed a person ordered to be thus exposed, to stand merely upon the platform, and to rest himself upon the pillory,

(*a*) Com. Dig. Tumbrel, A.

(*g*) 3 Burr. 1902.

(*b*) Cro. Eliz. 698. Com. Dig. Tumbrel, A.

(*h*) Id. ibid. See form of both rules, 3 Burr. 1902, post, last vol.

(*c*) Com. Dig. Tumbrel, A.

(*i*) 2 Burr. 796.

(*d*) Cowp. 726.

(*e*) Willes, 666.

(*f*) See form of rule, 3 Burr. 1902.

PUNISHMENT
OF PILLORY.

without confining him in it, and suffered a servant to stand by him, and hold an umbrella over him, he was holden liable to an attachment, fined £50, and committed for two months to the custody of the marshal (*a*).

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At the present day, the actual suffering inflicted on a defendant sentenced to the pillory, is entirely collateral to the judgment. It arises from the violence of the mob, who seize the opportunity to gratify their love of outrage under colour of the execution of justice. The offender is not, therefore, punished according to the opinion of judges who have heard his trial, and who are competent to weigh the circumstances of his offence, but by the unruly passions of the most degraded of the populace. It by no means follows, that because a man is more unpopular he is more guilty, for the best and the wisest have been frequently the objects of public indignation. Besides, by the pillory every private animosity is allowed its indulgence—every prejudice is called into active exercise—every principle of malice or of mischief is roused into exertion. The result of this tumult is sometimes the death of the party exposed, and that by a far more cruel process than the infliction of capital punishment in the regular administration of justice. On the other hand, if the multitude are disposed to favor him, the intention of the judges is entirely done away; disgust is turned into applause, and the punishment becomes a triumph. Thus justice is insulted in the very execution of its own sentences. The mob becomes a court of appeal from the judgment of the supreme tribunals, either to increase the penalty or to reverse it. The exercise of this strange power makes the people either factious on the one hand, or barbarous on the other. But, in the late reign, the punishment of pillory was abolished in all cases except in perjury, and subornation thereof, and instead of pillory, fine or imprisonment, or both, may be inflicted (*b*).

Punishment of
imprisonment.

The punishment of imprisonment forms a part of almost every sentence for crimes which are visited with any species of corporal

(*b*) 2 Burr. 797.

(*b*) 56 Geo. 3. c. 138.

privation or suffering (*a*). This is a species of punishment, the actual severity of which depends very much on the person upon whom it is inflicted, and should therefore be proportioned in its length to the situation in which he stands (*b*). As to the place where this confinement may be inflicted, the act of habeas corpus provides that no subject of this realm, residing in England, shall be confined in any part of Scotland, Ireland, or any foreign country whatever, and gives the party aggrieved an action for false imprisonment against all persons concerned, in which he shall, at least, recover £500 damages. But as all prisons within the realm are the king's, the court of King's Bench may commit an offender to any legal gaol within the kingdom (*c*); and at the assizes for a county at large, a party tried for an offence committed in the county of a city, or town corporate, may be ordered to be imprisoned in the county at large, or within the county of the city, or town, where the offence was committed (*d*). If the order of a court be to confine a person in a certain prison, the confining him in any other prison would be false imprisonment, for which he may recover damages (*e*). When a party convicted is actually in custody for one offence, and is afterwards tried for another, before the original term is expired, sentence of further imprisonment may be given, to commence from the termination of the first (*f*); or, judging by analogy to the case of transportation, the court may allow the latter term to begin from the time of judgment, and so to be, in part, concurrent with the former (*g*). When the prisoner is in custody of the marshal in execution on a criminal sentence, the court will not, on an affidavit of illness, allow him the benefit of the rules, as that would be to render the sentence invalid (*h*). All felons are, by 5 Hen. 4. c. 10, to be sent to the common gaol; but by 5 Ann. c. 6. s. 2, persons convicted of theft or larceny may be sent to the house of correction; and by the 4 Geo. 4. c. 64. s. 7, rogues and vagabonds are to be committed to the house of correction, and not to the common gaol.

PUNISHMENT OF IMPRISONMENT.

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(*a*) See the 3 Geo. 4. c. 114.
53 Geo. 3. c. 162.

(*b*) 11 Harg. St. Tr. 292.

(*c*) 8 T. R. 176. Barnes, 385,
388, 389. Loft, 436. 3 Inst.
100.

(*d*) 51 Geo. 3. c. 100.

(*e*) Salk. 408. Skin. 664.
Bac. Ab. Trespass, D. 3.

(*f*) 4 Burr. 2577. 1 Leach,
536.

(*g*) 1 Leach, 441.

(*h*) 1 Stra. 196, 197. 2 Stra.
817, 843, 845, 1122.

PUNISHMENT OF IMPRISONMENT. Before the passing of the 4 Geo. 4. c. 64, it was held that the Court of King's Bench had no authority to interfere in the regulation and management of the gaols of the kingdom (*a*).

A variety of very beneficial regulations have been, at different times, made by the legislature, to correct the abuses of prisons; but these are principally repealed by the 4 Geo. 4. c. 64, which still further provides for the comfort, health, and morals of prisoners, in gaols and houses of correction (*b*). By the 10th section of this act, amongst other things, after making provisions as to the duties of the keeper and matron, visiting of the wards, the keeper's journal, and providing means for the enforcement of punishment, by hard labour, the following rules are to be observed in the treatment and management of prisoners:—

Separation of Prisoners.

With respect to the separation of prisoners. The male and female prisoners are to be confined in separate parts of the prison, and the prisoners of each sex are to be divided into distinct classes, so that the prisoners of the following classes do not intermix. *In gaols:*—1. Debtors, and persons confined for contempt of court, on civil process. 2. Prisoners convicted of felony. 3. Of misdemeanors. 4. On charge or suspicion of felony. 5. On charge or suspicion of misdemeanors, or for want of sureties. *In Houses of Correction:*—1. Prisoners convicted of felony. 2. Of misdemeanors. 3. On charge or suspicion of felony. 4. On charge or suspicion of misdemeanors. 5. Vagrants, and prisoners intended as witnesses for the crown, are also to be kept separate; but justices may authorize the employment of prisoners in menial offices, or for instructing others; and, if the keeper thinks fit to confine a prisoner with another class, he may do so, till he receives the directions of a visiting magistrate. *Females* are to be attended by female officers. *Prayers*, and divine service, selected from the liturgy by the chaplain, are to be read every morning, as also portions of the scriptures; and prisoners

(*a*) 1 Dow. & Ry. 535.

(*b*) The act does not extend to Bethlehem, Bridewell, nor to the King's Bench or Fleet prisons; nor to the prison of the

Marshalsea or Palace Courts; nor the Penitentiary at Milbank or Gloucester; nor to the Hulks. Sec. 76; and 5 Geo. 4. c. 85. s. 27.

are to attend divine service on Sundays, and on other days, when IMPRISONMENT. performed, unless prevented by illness or otherwise, or unless such attendance be dispensed with by a visiting magistrate. *Instruction* in reading and writing is also to be given to prisoners, according to the expediency suggested by a visiting magistrate.

Hard labour and employment, as will be hereafter seen (a), is, in many cases, to be imposed on the prisoner; in others he may employ himself, at his option.

No prisoners are to be *put in irons*, except in case of absolute necessity; and the particulars of such case are to be entered in the keeper's journal, and notice given to one of the visiting magistrates; and in no case is the prisoner to be kept in irons more than four days, without a written order from a visiting magistrate.

Food, necessaries, bedding, exercise, &c.—Every prisoner, maintained at the expense of any county, &c. or place, is to be allowed a sufficient quantity of plain and wholesome *food*, to be regulated by the justices in general in quarter-sessions assembled, regard being had (so far as may relate to convicted prisoners) to the nature of the labour required from, or performed by such prisoners, so that the allowance of food may be duly apportioned thereto. And the justices may order for such prisoners who are not able to work, or, being able, cannot procure employment sufficient to sustain themselves by their earnings, or who may not be otherwise provided for, such allowance of food as the said justices from time to time think necessary; and prisoners under the care of the surgeon, are to be allowed such diet as he may direct. The provisions must be of proper quality, and legal weights and measures are to be provided, and rendered accessible to the use of any prisoners under the restrictions of the prison regulations.

Prisoners who shall not receive any allowance from the county, whether confined for debt, or before trial for any supposed crime

(a) Post, 808 *a. b.*

IMPRISONMENT. or offence, may procure for themselves, and receive at proper hours, any food, bedding, clothing, or other necessities, subject to a strict examination, and under such limitations and restrictions, (to be prescribed by the regulations to be made in the manner directed by the act,) as may be reasonable and expedient, to prevent extravagance and luxury within the walls of a prison. All articles of clothing and bedding are to be examined, in order that it may be ascertained that such articles are not likely to communicate infection, or facilitate escape.

No prisoner who is confined under the sentence of any court, nor any prisoners confined in pursuance of any conviction before a justice, can receive any food, clothing, or necessities, other than the gaol allowance, except under such regulations and restrictions as appear expedient to the justices in general or quarter sessions, with reference to the several classes of prisoners; except under special circumstances, to be judged of by one or more of the visiting justices (*a*). We shall hereafter have occasion to notice the prisoner's right to food, when he refuses to work (*b*). The 4 Geo. 4. c. 64. ss. 16. 39, and 5 Geo. 4. c. 85. ss. 22. 26, relate to the allowance and supply to a prisoner on his discharge.

Every prisoner is to be provided with suitable *bedding*; and every male prisoner with a separate bed, hammock, or cot, either in a separate cell, or in a cell with not less than two other male prisoners.

All prisoners shall be allowed as much air and *exercise* as may be deemed proper for the preservation of their health.

Illness, Prison-dress, Clothes, &c.—The surgeon is to examine every prisoner brought into the prison before he is passed into the proper ward, and no prisoner is to be discharged from prison if labouring under any acute or dangerous distemper, nor until, in the opinion of the surgeon, such discharge is safe, unless such pri-

(*a*) See the 53 Geo. 3. c. 21, to poor persons confined under
as to the allowance by commis- Exchequer process, &c.
sioners of excise and customs, (*b*) Post, 808 *a*.

soner shall require to be discharged (a). The wearing apparel of every prisoner is to be fumigated and purified if requisite, after which the same is to be returned to him or her, or in case of the insufficiency of such clothing, then other sufficient clothing is to be furnished, according to the rules and regulations of the prison, but no prisoner, before trial, can be compelled to wear a prison-dress, unless his own clothes be deemed insufficient or improper, or necessary to be preserved for the purposes of justice; and no prisoner who has not been convicted of felony, is liable to be clothed in a party-coloured dress, but if it be deemed expedient to have a prison-dress for prisoners not convicted of felony, the same is to be plain.

Cleansing Prison, &c.—The walls and ceilings of the wards, cells, rooms, and passages, used by the prisoners throughout every prison, shall be scraped and lime-washed at least once in the year; the day-rooms, work-rooms, passages, and sleeping-cells, shall be washed or cleansed once a week, or oftener if requisite. Convenient places for the prisoners to wash themselves shall be provided, with an adequate allowance of soap, towels, and combs.

Admission of Strangers.—Due provision is to be made for the admission, at proper times, and under proper restrictions, of persons with whom prisoners, committed for trial, may desire to communicate; and proper rules and regulations are to be made by the justices in general quarter sessions, for the admission of the friends of convicted prisoners; and the justices are also to impose such restrictions upon the communication and correspondence of all such prisoners with their friends, either within or without the walls of the prison, as they may judge necessary for the maintenance of good order and discipline in such prison (b).

(a) A prisoner convicted of a misdemeanor, and sentenced to imprisonment and fine in the King's Bench, may be, by the court, allowed the liberty of the rules in case of illness, and under particular circumstances, 4 D. & R. 832.

(b) In Thurtell's case, the court of K. B. in M. T. 1823, upon affidavit of a refusal by the magistrates to permit his attorney to have access to the prison, made a rule, directing the justices at proper times to admit such attorney.

IMPRISONMENT. *Spirituous Liquors.*—No tap is to be kept in any prison, nor are spirituous liquors of any kind to be admitted for the use of any of the prisoners, unless by a written order of the surgeon, specifying the quantity, and for whose use. No wine, beer, cider, or other fermented liquors is to be admitted for the use of any prisoner, except in such quantities, in such manner, and at such times as shall be allowed by the rules thereafter to be made in pursuance of the act. And, by sec. 40 of the same act, a heavy fine and punishment may be imposed on the person carrying, or attempting to carry into the prison, spirituous liquors; and a penalty may be also inflicted on the gaoler suffering it.

Gaming.—No gaming shall be permitted in any prison, and the keeper shall seize and destroy all dice, cards, or other instruments of gaming.

Death of Prisoner.—Upon the death of a prisoner, notice thereof shall be given by the keeper forthwith, to one of the visiting justices, as well as to the coroner of the district, and to the nearest relative of the deceased, where practicable. No prisoner is to sit on the inquest.

Copies of the Rules.—The rules of each prison, relating to the treatment and conduct of the prisoners, are to be printed in legible letters, and fixed up in conspicuous parts of the prison, in order that the prisoners may see them.

Refractory Prisoners.—The keeper may hear and determine complaints of the following nature:—Disobedience of prison rules; assaults in prison where no dangerous wound is given; profane cursing and swearing; indecent behaviour; irreverent behaviour at chapel; absence from chapel without leave; and idleness or negligence in work, or the wilful mismanagement of it. These offences may be punished by the keeper by close solitary confinement, and by keeping the offender upon bread and water only, for not exceeding three days (*a*). By the same act, sec. 42, if the prisoner be guilty of repeated offences, or of an offence for which the gaoler cannot punish him, a visiting justice may

(*a*) 4 Geo. 4. c. 64. s. 41.

order the offender to be punished by close confinement for not exceeding a month; or by personal correction, in case of prisoners convicted of felony, or sentenced to hard labour. By the 16th section, visiting justices may recommend prisoners to mercy who behave well.

Removal of Prisoners.—Justices in session may remove prisoners in case of want of repair of prison, or of contagious disease, and back again when the cause is removed.(a).

Fees—or gratuities, payable at gaols and bridewells, are now abolished by the 55 Geo. 3. c. 50; and by sec. 4 of the same act, prisoners charged with felony or misdemeanor, and acquitted, are to be discharged without payment of any fee, &c. And by s. 5, all fees usually paid to clerks of the court, assizes, &c. are abolished; and by sections 9 & 13, officers exacting fees are guilty of a misdemeanor, and rendered incapable of holding their offices. The 4 Geo. 4. c. 64. s. 10, prohibits garnish-money being taken. The 55 Geo. 3. c. 50, and the 56 Geo. 3. c. 116, points out how the officers are to be remunerated. The 55 Geo. 3. c. 50. s. 14, does not extend to the King's Bench, Fleet, Marshalsea, and Palace Court Prisons.

Visiting Justices are to be appointed by the sessions to inspect, and otherwise look into the state of prisons and the prisoners, and report abuses, &c.; and they may recommend prisoners to mercy for their good conduct (b).

Chaplain.—Justices of the peace are authorized to appoint a *clergyman* to each prison at a certain salary, sec. 28, 29, and their duties are fully pointed out in the 30th, 31st, and 34th sections of the act.

(a) 4 Geo. 4. c. 64. s. 51; and see id. ss. 52, 53. See also the 31 Car. 2. c. 2. s. 9. 24 Geo. 3. sess. 2. c. 56. s. 12.

(b) 4 Geo. 4. c. 64. ss. 16, 17, 18, 23. Before the passing of this act, it seemed that notwithstanding the 31st Geo. 3.

c. 46. s. 5, a secretary of state had the power of preventing those magistrates who were not visiting magistrates, from having access to state prisoners, 1 Gow. C. N. P. 138; and it should seem such power still exists,

IMPRISONMENT.

Surgeon.—A regular and experienced *surgeon* is to be appointed at a certain salary, to attend every prison, and to report to the justices in quarter sessions the state of the health of the prisoners (*a*).

Penitentiary at Millbank.

A further improvement in prison discipline was also attempted in the late reign. The 19 Geo. 3. c. 74, contains directions for the erecting, maintaining, and governing two penitentiary houses on a very extensive scale, one for the reception of male, and the other of female convicts, who should be sentenced to imprisonment and hard labour, in lieu of transportation to the colonies. Nothing effectual seems, however, to have been done in pursuance of this statute. At length an ingenious plan was laid before the lords commissioners of the treasury, by the celebrated Jeremy Bentham, which had for its object a most extensive scheme of reformation among convicts, in a building to be called "The Panopticon," from its being surveyed in its most distant cells from the apartment of the governor in the centre. For this purpose, the lords of the treasury entered into a contract with Mr. Bentham for the management of one thousand male convicts, according to his plan; a piece of ground was purchased at Millbank, and preparations were fast advancing to the fulfilment of the design. It was, however, thought proper in this stage of the proceedings to relinquish the intention by the legislature; Mr. Bentham was indemnified for his expences, and the premises purchased were applied to the erection of a penitentiary house, on a less adventurous plan, for the criminals of London and Middlesex (*b*). By the 52 Geo. 3. c. 44, minute directions are given for the internal regulation of this place of confinement, which it is unnecessary to detail, as they differ little from those appointed for houses of correction, except that offenders are divided into classes (*c*), are distinguished by a particular dress (*d*); and that rewards are regularly to be given to the deserving (*e*). The 56 Geo. 3. c. 63, and 59 Geo. 3. c. 136, more particularly regulate the penitentiary at Millbank; and the 4 Geo. 4. c. 82, and 5 Geo. 4. c. 19, relate

(*a*). 4 Geo. 4. c. 64. ss. 33, 34.

(*d*) Sec. 25.

(*b*) 52 Geo. 3. c. 44.

(*e*) Sec. 22.

(*c*) Sec. 23.

to the temporary change of the imprisonment, of persons in this IMPRISONMENT. prison, during the time of their removal therefrom, which took place on account of an alarming disease among the prisoners a few years ago.

Before we dismiss the subject of imprisonment, it may be proper to observe, that every gaoler is by the common law bound to treat his prisoners with humanity (*a*), and that if he oppress or confine any one in his custody, more strictly than the law allows, so that he die in consequence of ill-treatment, the party offending will, by the common law, be guilty of murder (*b*). And, therefore, if the keeper of a prison takes a person in his custody into a room where an infectious disorder is known to be, and detains him there against his will, so that he catch it and die, it will be felony in the offender (*c*); or, if he confine a prisoner in a damp and loathsome room, without fire or any convenience for the purposes of nature, so that he die “by duress of imprisonment,” he will be liable to punishment as a murderer (*d*). And therefore it is that whenever a man dies in prison, whether by accident or disease, the coroners must sit upon his body to ascertain the true cause of his death (*e*). On the other hand, the keeper or governor has full power to secure a felon with irons if there is danger of his escaping (*f*). And in case of an actual attempt to fly, and an assault made on himself, he will be justified in killing the prisoner whose flight cannot otherwise be prevented (*g*). And if he or any of his officers be killed in the affray, it will be murder in all aiding the resistance (*h*).

By the 4 Geo. 4. c. 64. s. 37, the visiting justice of the prison Hard labour. may, by order in writing, authorize the employment of a prisoner committed for trial, and the prisoner may if he chooses thus employ himself, and be paid such wages as such justice thinks fit,

(*a*) 3 Esp. Rep. 233.
 (*b*) 3 Inst. 91. Fost. 321, 2.
 Burn, J. Gaol and Gaoler, VII.
 (*c*) 2 Stra. 854. 1 Barnard,
 204. 240. 253. 275. Fost. 322.
 (*d*) 2 Stra. 862. 2 Ld. Raym.
 1574.
 (*e*) 2 Inst. 91. Fost. 321.

1 Hale, 432. 2 Hale, 57. Burn, J.
 Gaol and Gaoler, VII.
 (*f*) 1 Hale, 601. Dalt. c. 170.
 Burn, J. Gaol and Gaoler, VII.
 (*g*) 1 Hale, 496. Burn, J.
 Gaol and Gaoler, VII.
 (*h*) Fost. 321. Burn, J. Gaol
 and Gaoler, VII.

HARD LABOUR. but prisoners, who should be kept separate, must not be placed together to work. But the consent of such prisoner must be freely given, and at all events he must not be employed in the tread-mill (*a*); and such prisoner, if unable to work, may be allowed sufficient food without work. But if he be able to work, and refuse to do so, he is not entitled by law to have any food provided for him by the public; and in a late case, where a magistrate reported as an abuse to the justices at quarter sessions, that untried prisoners had been compelled to work at the tread-mill, and the justices at sessions ordered that the tread-mill should be applied to the employment of other prisoners, as well as those sentenced to hard labour, and that those committed for trial, who were able to work, and had the means of employment offered them, by which they might earn their support, but who refused to work, should be allowed bread and water only, the court of King's Bench refused to grant a mandamus to compel the justices to order such prisoners any other food (*b*).

Where an offender is *convicted* of felony with clergy, or of grand or petit larceny, the court before whom he is convicted may sentence him to imprisonment and hard labour, either alone or in addition to any other sentence which such court may lawfully pass on such offender (*c*). And assaulting, &c. persons, &c. to prevent the apprehension or detainer of persons charged with felony, if the offender be convicted of a misdemeanor, in addition to the other punishment for such offence, hard labour may be imposed (*d*). The 3 Geo. 4. c. 114, extends the provisions of the 53 Geo. 3, to a great many aggravated misdemeanors. A *convicted* prisoner, sentenced to imprisonment, but not to labour, may, by order of two visiting justices, be set to work, and if he is able to earn or provide for his subsistence, he will have no claim for support from the county, &c. unless he works accordingly; and the keeper is to keep an account of the work done, and an allowance is to be made accordingly (*e*).

(*a*) 5 Geo. 4. c. 85. s. 16.

(*b*) 2 B. & C. 286. 1 Dow. & Ry. 535.

(*c*) The 53 Geo. 3. c. 162, re-

peals the 52 Geo. 3. c. 44. s. 47.

(*d*) 1 & 2 Geo. 4. c. 88. s. 2.

(*e*) 4 Geo. 4. c. 64. s. 38.

With respect to the *time* which the prisoner is to be kept at HARD LABOUR. hard labour, he must, unless prevented by sickness, be employed not exceeding ten hours every day, exclusive of the time allowed for meals, except on Sundays, Christmas-day, and Good Friday, and on any day appointed by public authority for fasting or thanksgiving.

Fines are the lowest species of punishment, which courts of justice have power to inflict (*a*). There was, indeed, a time when they formed almost the only penalty to which the opulent were liable, when murder itself was commuted by a sum of money, when judges were in many cases mere agents for the crown, and collectors for the treasury (*b*). These abuses have, however, long ceased to impede the course and degrade the character of public justice. Fines are now, for the most part, retained in cases where they are peculiarly proper, and where they are in general applied to remedy the evil indicted. As to their degree, it is expressly declared by Magna Charta, that excessive fines ought not to be demanded (*c*), and such only ought, therefore, to be imposed, as the circumstances of the party will sustain. And by the Bill of Rights all excessive fines, as well as cruel punishments, are declared illegal (*d*). All fines and amerciaments belong of right to his majesty (*e*). The difference between these two penalties is, that the latter, though ordered by the court, is assessed or fixed by the jury, but the former is determined on by the judges and forms a part of their sentence (*f*). It seems that whenever fine and ransom are mentioned in a statute, the latter imports a sum three times the amount of the former (*g*). When an act of parliament directs a fine at the will of the king, this is always understood to mean at the discretion of the judges, and they fix it at their pleasure within constitutional boundaries (*h*). But where a statute specifies the sum to be forfeited, the court

Punishment by
fine.

[809]

(*a*) Sec 11 Harg. St. Tr. 292.

(*b*) 3 Salk. 32. Ante, 711,
as to impolicy of punishment
by fine.

(*c*) 9 Hen. 3. c. 14.

(*d*) 1 W. & M. sess. 2. c. 2.
s. 11.

(*e*) 3 Salk. 32.

(*f*) 8 Co. 40. 3 Salk. 33.

(*g*) 2 Dyer, 232 a. 3 Salk.
33. 4 Bla. Com. 380, acc. Co.
Lit. 127, cont.

(*h*) 3 Salk. 33. 4 Inst. 71.

PUNISHMENT OF
FINE.

[810]

have no power to mitigate it after conviction (*a*). Nor have the King's Bench, in any case, authority to lessen a fine imposed by an inferior tribunal; but, in both these cases, redress may be obtained; in the former case in the court of Exchequer (*b*), and in the latter by petition to the lords of the Treasury (*c*). Though we have seen that the defendant may be fined in his absence (*d*), he cannot move the court to mitigate it, unless he appear in person (*e*). When a married woman is convicted of a misdemeanor, some other punishment will be imposed in lieu of a fine, because, in contemplation of law, she can have nothing with which she may pay it (*f*). Though the fine of right belongs to the crown, the court of King's Bench, having the king's privy seal for that purpose, may give a third of it to the prosecutor, in satisfaction of the injuries he has sustained from the defendant (*g*). And it is said to be the constant practice of that court to intimate a design of mitigating the fine to the king, if the offender will pay the prosecutor's costs, and make satisfaction for his damages (*h*). In the case of indictments for suffering highways to continue in bad repair, the right of the crown to the fine, which in these cases is the usual punishment, is entirely taken away, and instead of being returned into the Exchequer is to be applied to the amendment of the evil for which the prosecution was instituted (*i*). And though the road be put in repair, the court will not accede to a motion of a defendant bound to repair *ratione tenuræ*, to set a nominal fine, until he has paid the costs of the prosecution (*k*). Though, where a parish has been indicted, such a motion is, of course, without payment of the costs (*l*). But where the prosecutor is entitled to costs the court will not allow him to move in aggravation of the fine, after they have been taxed by the master, unless he will abandon the costs (*m*).

(*a*) 3 Salk. 33.
 (*b*) Id. *ibid*.
 (*c*) 8 T. R. 613, n. (*d*).
 (*d*) Ante, 695, 6.
 (*e*) 1 Vent. 209, 10. 3 Salk.
 33.
 (*f*) Rep. temp. Hardw. 279.
 (*g*) 1 Kcb. 487. Hawk. b. 2.
 c. 25. s. 3. Bac. Abr. Indict-
 ment, A.

(*h*) Hawk. b. 2. c. 25. s. 3.
 Bac. Abr. Indictment, A.
 (*i*) 13 Geo. 3. c. 78. s. 47.
 1 Bla. Rep. 602.
 (*k*) 1 Bla. Rep. 602.
 (*l*) 1 Bla. Rep. 295.
 (*m*) 2 Ld. Raym. 854. 1 Salk.
 55.

If the defendant will not pay the fine, a *capias pro fine* may be awarded (*a*). A *levari facias* may also be issued after conviction of an indictment for not repairing (*b*). And where a defendant in an indictment for a misdemeanor, has received judgment of fine and imprisonment, it was held a *levari facias* may issue immediately to take his goods in execution of the fine (*c*). The sheriff is bound *ex officio* to levy the fine imposed upon a defendant convicted for a misdemeanor, and at all events the writ of *levari facias* is regular, if it has been adopted on the part of the crown (*d*). The court will not give the sheriff directions how he shall dispose of property remaining in his hands, which has been seized in execution towards the payment of a fine imposed upon a defendant convicted of a blasphemous libel, but if the sheriff has made an improper return, it may be quashed (*e*).

PUNISHMENT OF FINE.

If the king is willing to remit the fine, the attorney-general must acknowledge satisfaction by an entry to that effect on the record (*f*); but it should seem that the defendant is not entitled to his discharge from imprisonment in respect of such fine, on the ground of his being an insolvent debtor, as it is not a debt, but a punishment for a crime (*g*).

Besides these punishments there are others which may incidentally flow from the sentence to particular individuals. Thus an attorney convicted of a clergyable felony (*h*), or other offence which renders him unfit for an attorney (*i*), will be struck off the rolls, though the conviction was five years before, and his subsequent conduct unimpeachable, not so much to punish him, as to keep free from reproach the profession of which he was a member. And if an attorney practice after he has been convicted of forgery, perjury, subornation of perjury, or common

Of punishments collateral to the sentence.

(*a*) 1 Salk. 56.
 (*b*) Com. Dig. Execution. Rex v. Wade, Skin. 12.
 (*c*) 2 B. & A. 609. 1 Chit. Rep. 423, S. C.
 (*d*) 1 Chit. Rep. 583.
 (*e*) 1 Dow. & Ryl. 474.
 (*f*) Bumb. 40. Trem. P. C. 303. See form of entry of sa-

tisfaction, Trem. P. C. 303.
 4 Harg. St. Tr. 760.

(*g*) 2 M. & S. 201, accord. 4 Burr. 2142. 13 East, 190.

(*h*) Cowp. 829. Tidd's Prac. 8th edit. 84.

(*i*) 6 East, 143. 1 Chit. Rep. 537.

OF PUNISH-
MENTS COLLA-
TERAL TO SEN-
TENCE.

barretry, he is liable to be transported by order of a judge, upon a summary application, without the intervention of a jury (*a*). Where an attorney had been struck off the roll of the court of K. B., the court of C. P. refused to strike him off its rolls, it not appearing he had been struck off the rolls of the court of K. B. for any misdemeanor (*b*). On the same principle, a spiritual person convicted of manslaughter at common law, may be libelled against in the spiritual court, in order to a deprivation, notwithstanding the allowance of his clergy (*c*). A member of Parliament convicted of an infamous crime, may be expelled the House of Commons, and degraded from the honors of knighthood, though it seems his constituents may re-elect him as their representative if they think proper (*d*).

Detaining in civil
actions.

In general, the sentence of the law will be no protection to the convict against any civil action to which he may be liable (*e*). He cannot, indeed, be charged with a declaration, or in execution, without leave of the court in whose custody he remains, in term time, or of a judge in vacation (*f*). And as the court of Common Pleas cannot change the custody, they will not grant a habeas corpus, to bring up a prisoner in gaol, on behalf of the crown, in order to charge him with a declaration at the suit of one of his creditors (*g*), or in execution in a civil action (*h*). But, in general, leave will be granted, on motion, by the court of King's Bench, to charge a defendant in the custody of the marshal, with a suit, even though under sentence of death for a felony or

(*a*) 12 Geo. 1. c. 29. s. 4. Tidd, 84.

(*b*) 3 B. & B. 257. 7 J. B. Moore, 64; and see 1 B. & B. 522. 4 J. B. Moore, 319. S. C.

(*c*) Cro. Jac. 430.

(*d*) See Lord Cochrane's case, in the Journals of the House of Commons, 1814.

(*e*) 2 Stra. 873. Fost. 61. 1 Bla. Rep. 30. 2 Anders. 38, 40. 2 Ld. Raym. 1572. 1 Wils. 217.

(*f*) Sir T. Raym. 58. 1 Sid.

90. 1 Lev. 124. 146. 1 Salk. 354. Fost. 62. Cro. Eliz. 213.

Tidd's Prac. 8th edit. 347. By accepting the declaration and suffering judgment, waives the irregularity, Cas. Pr. C. P. 31; and see 1 T. R. 591. 1 Chit. Rep. 386.

(*g*) 2 N. R. 245.

(*h*) See 1 Marsh. Rep. 166. 5 Taunt. 503. 3 J. B. Moore, 259. 1 Brod. & Bing. 23. S. C. 1 Bing. 229.

treason (*a*). The right of the king cannot, it is true, be defeated by such permission; for he may still command execution to be done on his body (*b*), and if a pardon be actually granted to him under the great seal, on condition of transportation, the court will not permit the intention of the crown to be defeated, by allowing creditors to throw an obstacle in the way of his departure, but will make it a part of the rule, that the defendant's person shall not be taken in execution (*c*). There is, indeed, a distinction taken between a pardon actually obtained, and a mere promise to grant one; for, in the latter case, the court will not interfere to discharge the prisoner (*d*). And, in no case, can any court order a prisoner in the House of Correction, or any other custody, except its own, to be brought up by habeas corpus ad respondendum, for the purpose of being charged with bailable process. So that, whilst a party is in such confinement, he cannot be sued otherwise than by issuing process, and entering continuances on the roll, in order to prevent the operation of the statute of limitations (*e*).

When a criminal has given bail to a civil action, who are anxious to discharge themselves from further liability, they may sue out a habeas corpus cum causâ, on the crown side (*f*), to bring up the defendant before the court of King's Bench, who will remand him to his former custody, and enter an exoneretur on the bail-piece, as to his sureties (*g*), but the court of Common Pleas will not do so (*h*), and a certiorari will not lie to remove the record of judgment obtained against a defendant in the county palatine of Durham, for the purpose of enabling his bail to render him in the King's Bench, though he be a prisoner for debt in the custody of the marshal (*i*), and the bail must justify before the writ will be granted them in any case (*k*). And it may

(*a*) Fost. 62, 3. 1 Wils. 217.
1 Bla. Rep. 30. Rep. temp. Hard.
190. 3 D. & R. 31. *sed vide* 4 D.
& R. 271. 9 East, 154. *cont.*

(*b*) Fost. 62, 3.

(*c*) 2 Salk. 500. 7 Mod. 153.
2 Ld. Raym. 1572. 848. 2 Stra.
848.

(*d*) Fost. 62. 1 Bla. Rep. 30.

(*e*) 9 East, 154. 156.

(*f*) Ante, 132, as to this writ.
Rule to shew cause, 7 T. R. 226.

(*g*) 2 Stra. 1217. 9 East, 155,
n. c. 7 T. R. 226. Tidd, 8th ed.
289.

(*h*) 3 J. B. Moore, 259. 1
Brod. & Bing. 23. S. C. 13 East,
457.

(*i*) 2 D. & R. 177.

(*k*) 7 T. R. 223.

DETAINING IN
CIVIL ACTIONS.

be refused, if the defendant is actually on board a ship to be transported to our foreign plantations (*a*), but, in such a case, the court will sometimes permit an exoneretur to be entered without bringing up the convict (*b*). Where the prisoner is brought up in person, the court will, in general, remand him immediately to the custody in which he was previously confined (*c*); but, if he be only in prison, on a charge of felony, they may commit him to Newgate, on the accusation which is preferred against him (*d*).

Entries of Dis-
charge, &c.

It is the regular practice of every keeper of a public prison, to *register* the discharge of each individual in his custody when his sentence expires, or he otherwise obtains his freedom (*e*). And these entries, until they are falsified, are admissible evidence to prove the time when the imprisonment ended (*f*).

Where the crown is willing to remit any part of the punishment, or entirely to excuse a fine, an entry of satisfaction is made on the record by the Attorney-General (*g*). Or if in the country, he issues his warrant for the clerk of assize, to acknowledge satisfaction on the roll, which operates as an entire discharge to the party convicted (*h*).

(*a*) 4 Burr. 2034.

(*b*) 6 T. R. 247. Tidd, 8th ed. 347.

(*c*) 2 Stra. 1217. 9 East, 155, n. c. Tidd, 8th edit. 347.

(*d*) 7 T. R. 227.

(*e*) 1 Leach, 390, 1, 2.

(*f*) 1 Leach, 392.

(*g*) Bunb. 40. 4 Harg. St. Tr. 760. Ante, 722. See form, 4 Harg. St. Tr. 760. Trem. P. C. 303.

(*h*) Bunb. 40.

CHAPTER XXI.

**OF THE PROCEEDINGS AFTER EXECUTION, viz.—
 CERTIFICATES OF CONVICTION, &c.—ESTREATS—
 RESTITUTION OF STOLEN GOODS, &c.—REWARDS.
 IMMUNITIES—COSTS—FEES—ATTORNEY'S-BILL
 —AND REMEDIES FOR MALICIOUS PROSECU-
 TIONS.**

IN order to prevent any second conviction for the same offence, or the improper allowance of clergy more than once to the same person, the 34 & 35 Hen. 8. c. 14. s. 2 (a), directs the clerks of the peace, of the crown, and of assize, on the outlawry, conviction, or attainder of any criminal of felony in their respective courts, to certify a transcript, in a few words, of the effect of the indictment, outlawry, or conviction, with the time and place where the outlawry or conviction occurred, into the King's Bench, as the supreme court of criminal jurisdiction, where the clerk of the crown is, without reward, to receive them. It also directed, the latter officer, in whose custody these records were thus deposited, on the application of any justice of gaol delivery or of the peace, throughout the realm, to *certify the names* of the parties convicted, together with the nature of the offence of which they were found guilty (b). And when, by the 3 W. & M. c. 9, the benefit of clergy was taken away from several descriptions of offences, it was enacted (c), that when any convict is allowed that benefit, the clerk of the crown, of the peace, or of assize, shall, at the request of the prosecutor, or any other person on behalf of his majesty, briefly certify the tenor of the indictment, conviction, and allowance of the benefit of the statute; which shall be sufficient evidence that the offender is ousted of clergy on any subsequent prosecution against him (d).

Of certificates,
of conviction,
and allowance
of clergy, &c.

[816]

(a) Dyer, 253, b.

(b) Sec. 4.

(c) Sec. 7.

(d) Sec. 7. Ante, 667 to 690,
as to Benefit of Clergy.

Of estreats,
fines, &c.

After the sessions or assizes are concluded, it becomes the duty of the clerks to make out a proper *Estreat* or *list of the forfeitures* incurred, and the *fines* inflicted while the court were sitting (*a*). By the 7 Hen. 4. c. 3, the judges or justices before whom the fines and amerciaments are made, are directed to charge the clerks by their oaths, that they make out these documents distinctly, by express words of the cause of the loss, of the term of the year, and the parties who have incurred the pecuniary penalty. In pursuance of the same design, the 22 & 23 Car. 2. c. 22. s. 7 & 8, provides, that all clerks of the peace, and town clerks, shall deliver to the sheriff, within twenty days after the 29th of September, in every year, a perfect estreat or schedule of all fines, issues, amerciaments, and other forfeitures whatsoever, forfeited in any sessions before Michaelmas, under the penalty of £50, half to be paid to the king, and half to the informer. And they are compelled under a similar penalty, on or before the second Monday after the Morrow of All Souls, to deliver into the court of Exchequer, a duplicate certificate, and estreat of the estreats and schedules thus delivered to the sheriff. On this occasion, they are to make oath that they have carefully examined the matters contained in the estreat, and that, to the best of their knowledge, they have duly inserted every forfeiture (*b*). If it be discovered that they have withheld or mis-certified any part of the forfeitures, they are to forfeit treble, to lose their post, and to be rendered incapable of holding any office in the revenue (*c*).

The provisions of the 22 & 23 Car. 2. c. 22, relates to the fines, issues, and amerciaments, forfeited recognizances, &c. im-

(*a*) Williams, J. Estreat. Burn, J. Estreat. See form, Burn, J. Estreat. Williams, J. Estreat. Post, last vol. It is incumbent on persons under recognizance, who, in consequence either of bills not having been found, or of none having been preferred, may not be called upon to answer, or give evidence, to see that their appearance is recorded, so as to enable the court to

order their recognizances to be cancelled, as otherwise such attendance is no attendance at all. —Per Thomson, C. B. *Rex v. Miller*, the younger, 1808.

(*b*) 4 & 5 W. & M. c. 24. s. 5. See form of oath, Burn, J. Estreat. Williams, J. Estreat. Post, last vol.

(*c*) 22 & 23 Car. 2. c. 22. s. 9, and 3 Geo. 1. c. 15. s. 13.

posed at the quarter sessions, and of the 4 & 5 W. & M. c. 24, making the same perpetual; and the 41 Geo. 3. (U. K.) c. 85, are now repealed by the 3 Geo. 4. c. 46; which, together with the 4 Geo. 4. c. 37, provide for a more speedy method of the recovery of fines, &c. (*a*). By the 2d section of the 3 Geo. 4. c. 46, it is enacted, that all fines and forfeited recognizances, &c. are to be certified by the justice before whom they are set, or forfeited, to the clerk of the peace, in writing, containing the names and residences, trade, profession, or calling, of the party fined, &c. the amount, and the cause of the forfeiture, on or before the ensuing general or quarter sessions; and the clerk of the peace is to copy on a roll such fines, &c. at the quarter sessions, and is, within a time to be fixed by the court, not exceeding twenty-one days after the adjournment of the court, to send a copy of such roll, with a distringas and capias, or fieri facias and capias, according to the form therein given, to the sheriff, &c. to levy the fine, &c. The 3d section enacts, that the clerk of the peace, or town-clerk is, before delivery of such roll to the sheriffs, to make oath as to all fines, &c. which shall be paid (*b*). Section 4 enacts, that the justice before whom the recognizance is taken, is, at the time of entering into such recognizance, to give to the parties entering into it a written notice, therein pointed out. Section 5 gives a right of appeal to the quarter sessions against fines, &c. upon giving security. The 10th section gives an allowance to the sheriff and clerk of the peace on the sums levied; and imposes a penalty of £50 on a sheriff's officer, or clerk of the peace, neglecting the provisions of the act. The act, by section 11, is not to alter the usual mode of appropriating fines. By section 14, clerks of the peace, &c. are to deliver into the Exchequer, yearly, a certificate of all fines, &c. paid, that the sheriffs may be discharged in their account, and that parties entitled to fines, &c. may claim the same. By sections 15 and 16, there is a saving of rights to bodies corporate, or lords of manors, liberties, or franchises, and of the privileges of the city of London.

(*a*) See the 4 Geo. 3. c. 10, as to Exchequer practice.
for discharging estreated recognizances; and ante, 92, note (*d*),

(*b*) See form of oath, id.

ESTREATS,
FINES, &c.

By the 4 Geo. 4. c. 37. s. 1 (*a*), justices in session may insert in following rolls all such fines, &c. as have not been levied or accounted for by the sheriff, &c. or that have not been discharged; and the sheriff is to detain the original writs in his possession, which are to continue in force, and be authority to act upon. And the sheriff, on quitting his office, is to deliver over to his successor all rolls and writs, particularising fines, &c. that means may be used for recovery. By section 3, where the party subject to fines, &c. resides in another county, or has removed, the sheriff may issue his warrant to the sheriff acting for the place where the defaulter resides, or where his goods are found, requiring him to execute the writ. By section 4, the sheriff, &c. is to render an account yearly of all the persons incurring fines, &c. and the causes of non-payment are to be stated, and the amount is to be transmitted to the Treasury. By section 5, clerks of the peace, &c. are to send to the Treasury, within twenty days from the opening of the quarter sessions, copy of the rolls delivered by the sheriff.

Restitution of
property stolen*.

As we have now brought the prosecution to a termination, it will be proper to examine to what the prosecutor is entitled in case of a conviction, and what are his liabilities upon an acquittal. And the first benefit to which he is entitled is, to the restitution of his goods, after a conviction of theft, or robbery. At the common law, this was always the consequence, and most frequently (before the passing of the 59 Geo. 3. c. 46, abolishing appeals), the object of an appeal (*b*). But, at the common law, there could be no restitution of goods upon an indictment, because that mode of prosecution is nominally instituted by the crown, for the public advantage; and, therefore, in order to favor the party injured in bringing his appeal, no indictment was usually preferred against the offender, till after the time had passed in which an appeal might be commenced against him (*c*). But as

(*a*) By section 2, the 7th & 8th sections of 3 Geo. 4. c. 46, are repealed. Justices, A. 4 Bla. Com. 362. Burn, J. Restitution of Stolen Goods.

(*b*) 1 Hale, 538. Com. Dig. - (*c*) 3 Inst. 242. 4 Bl. Com. 362.

* As to this subject in general, see 1 Hale, 538 to 547. Com. Dig. Justices, A. 4 Bla. Com. 362 to 364. Burn, J. Restitution of Stolen Goods. Williams, J. Felony, VII.

it was, at length, considered, that the party who prosecutes for the injury done to the public, deserves fully as much compensation as he who institutes an appeal, restitution of goods was given on the conviction of a party indicted. To this end, the statute 21 Hen. 8. c. 11, enacts, that if any felon robs or steals money, or any other property, and is afterwards found guilty or otherwise attainted of the crime, in consequence of evidence given by the party injured, or by any other person by his procurement, the owner shall be restored to his property, and a writ of restitution may be awarded by the justices. The construction of this act being, in a great degree conformable to the law of appeals of robbery, the latter proceeding has fallen into total disuse (*a*). It seems, therefore, that if the prosecutor has been guilty of any gross neglect in his duty to the public, in bringing the offender to justice, he will not be entitled to the benefit of this statute, for it was only by prompt and vigorous exertion, that he could obtain his goods on an appeal (*b*). It is not, however, necessary that he should take the robber on fresh suit, but it will be sufficient if he used his endeavour; and if the caption be afterwards made by the sheriff or other officer, and he immediately institute proceedings, he will be entitled to the remedy (*c*). So if, after the prosecution is commenced, and before trial, the offender dies, or breaks prison, or if he stands mute, challenges more than the number he is allowed, without assigning a reason, or is admitted to the benefit of clergy, the right of the party injured will not be subverted (*d*). Nor is it only when he himself is personally robbed, that he has a right to demand restitution. If the property has been taken from a servant, and the latter, by the procurement of his master, gives evidence on which the offender is convicted, the owner will regain his property (*e*). So if the robbery was committed on an individual, who is since deceased, and the criminal is brought to justice by the exertions of the personal

(*a*) 4 Bla. Com. 363.

(*b*) 1 Hale, 540. Hawk. b. 2. c. 23. s. 56. Williams, J. Felony, IX. Burn, J. Restitution of Stolen Goods.

(*c*) 1 Hale, 540. Com. Dig. Justices, A. Burn, J. Restitu-

tion of Stolen Goods.

(*d*) 1 Hale, 540. Burn, J. Restitution of Stolen Goods.

(*e*) 1 Hale, 542. Staunf. 167. Com. Dig. Justices, A. Burn, J. Restitution of Stolen Goods.

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As to what goods the owner may recover, it seems that, if the felon waive them in his flight, on being pursued, they will become vested in the lord of the franchise; but the property of the party robbed is rather suspended than destroyed, for after having performed his duty in bringing the offender to justice, he will again be at liberty to claim them (*c*). And if the things stolen have been converted into money, the owner may have the produce, instead of the specific chattel; for the case, though not within the words, is clearly within the equity of the statute (*d*). And, it seems to be the stronger opinion, though it was formerly a matter of dispute, that if the goods stolen have been openly sold in market overt, the owner may have them restored, even from an innocent purchaser (*e*). And though this may seem hard upon the buyer, who has given value for them, it should be remembered, that either he or the original owner must suffer, and that the former has done a meritorious act in bringing an offender to justice; whereas the merit of the latter is only negative, in having been guilty of no unfair transaction (*f*). The maxim, therefore, "*spoliatus debet ante omnia restitui*," is founded on a principle of equity. But this rule cannot be extended, so as to affect any intermediate possessors of the property who have sold it before conviction; and the owner cannot maintain *trover* against them, even though he gave them notice that it was stolen,

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(*a*) 3 Inst. 242. 1 Hale, 542. Burn, J. Restitution of Stolen Goods.

(*b*) 5 T. R. 175. 2 Leach, 585. 2 East, P. C. 789, 839. Com. Dig. Market, E. Burn, J. Restitution of Stolen Goods.

(*c*) 5 Co. 109. Kel. 49. 1 Hale, 541. Hawk. b. 2. c. 23. s. 49. Com. Dig. Justices, A. Burn, J. Restitution of Stolen Goods.

(*d*) Noy, 128. Loft, 88. 1 Hale, 542. Burn, J. Restitution of Stolen Goods. Williams, J. Felony, VIII.

(*e*) Kel. 48. 35. 1 Hale, 542, 543, 4. Hawk. b. 2. c. 23. s. 54. 4 Bla. Com. 363. Com. Dig. Justices, A. id. Market, E. Burn, J. Restitution of Stolen Goods. Williams, J. Felony, VIII.

(*f*) 4 Bla. Com. 363.

while it remained in their possession (*a*). And the prosecutor can never recover any other things than those stated in the indictment; but any others which might have been stolen, will be forfeited to his majesty (*b*).

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The justices of gaol delivery are, by the statute 21 Hen. 8. c. 11, directed to award a writ of restitution to the owner, as soon as the felon is convicted. But, it is said, that no such writ has, for upwards of two hundred years, been issued; but the constant practice is for the judges or justices, without any precept, to order the goods brought into court to be restored to the parties indicting (*c*). And, after the conviction of the offender, the proprietor may take his goods wherever he can find them, so that it be effected without any breach of the peace, because he satisfied public justice, and is entitled to a writ of restitution, whenever he thinks fit to demand it (*d*). And if the felon be pardoned after conviction, and allowed the benefit of clergy, or even if he be *bonâ fide* acquitted, the owner may bring an action against him, in trespass or trover, to recover damages; for the civil right was not merged in the public injury, but only suspended, till the prosecution was concluded (*e*). But no action lies before prosecution; because if this were allowed, the inducement to punish offenders, would, in a great degree, be removed, and parties would seek their own immediate advantage, rather than the security of the public (*f*). Nor can the goods be taken again, though the original owner find them, for the same reason applies; and if it is done with intention to compound the offence, it will amount to theft bote, and the party will be punishable by imprisonment and fine (*g*). There is indeed a kind of

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(*a*) 2 T. R. 750. 2 Leach, 586, n. (*a*). Burn, J. Restitution of Stolen Goods. Williams, J. Felony, VIII.

(*b*) 5 Co. 110. Kel. 49. 1 Hale, 545. Com. Dig. Justices, A. Burn, J. Restitution of Stolen Goods.

(*c*) Loft, 88. 4 Bla. Com. 363. Williams, J. Felony, VIII.

(*d*) 1 Hale, 546. 4 Bla. Com. 363. Williams, J. Felony, VIII.

(*e*) 12 East, 409. Loft, 88. 1 Hale, 546. Bac. Abr. Trespass, E. 2. Trover, D. 4 Bla. Com. 363. Williams, J. Felony, VIII.

(*f*) 1 Hale, 546, 7. Noy, 82. 4 Bla. Com. 363. Williams, J. Felony, VIII.

(*g*) 1 Hale, 546. 4 Bla. Com. 363. Burn, J. Restitution of Stolen Goods.

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statutable exception to this rule, by 31 Eliz. c. 12, which provides, that if horses are stolen and sold in market overt, the owner may claim them within six months, and on paying the buyer the price for which he purchased them, may obtain them again, without instituting a prosecution against the offender (*a*); and this statute, as well as the 2 P. & M. c. 7, contains several regulations as to the sale of horses, in particular in market overt, which if not observed, render the sale wholly inoperative; and the original owner may sue the party who withholds the horse, though he has neglected to prosecute (*b*). It has been held, that a complaint having been made to a magistrate by A. the owner, that his horse had been stolen by B. without actual proof of its being stolen, an officer, though armed with a warrant against A. was not justified, under the 31 Eliz. c. 12. s. 4, in taking the horse out of the possession of a *bonâ fide* purchaser from B. (*c*).

It seems that if goods are restored in consequence of an erroneous conviction, and the judgment be reversed, a restitution was formerly awarded (*d*).

Restitution in
forcible entries.

In the case of a forcible entry and detainer, if the prosecutor be unjustly put out of possession, the court of King's Bench will make restitution of the lands (*e*). It has been held that an averment in an indictment for forcible entry, merely that the prosecutor was seised, is sufficient to found an application for a writ of restitution (*f*).

Rewards and
Immunities *.

The other rewards of the prosecutor on convicting an offender are, pecuniary gratuities, immunities, and exemptions from duty, and pardon to accomplices who bring their associates to justice.

(*a*) 2 Bla. Com. 450, 1. Com.
Dig. Market, E.
(*b*) Id. *ibid*.
(*c*) 2 Stark. C. N. P. 76.
(*d*) Cro. Jac. 151. Cro. Eliz.
490.

(*e*) Cro. Jac. 151. Alleyn, 50.
As to the award of restitution
in general, see Hawk. b. 1. s. 64.
s. 45 to 66.
(*f*) 2 Chit. Rep. 314.

* As to this subject in general, see Hawk. b. 2. c. 12. s. 21 to 38.
4 Bla. Com. 294, 5. Burn, J. Felony, IV. Williams, J. Felony, IX.

Pecuniary rewards are given to those who are the means of convicting offenders by a variety of statutes. By 6 Geo. 1. c. 23, persons discovering, apprehending, and prosecuting to conviction any one taking a reward for assisting others to recover stolen goods, contrary to its provisions, are entitled to £40 (*a*). By 5 Geo. 4. c. 84. s. 22, relating to transportation, any person discovering, apprehending, and convicting an offender sentenced to that punishment, at large before the expiration of his term, is entitled to receive £20. The 6 Geo. 1. c. 21. s. 37, provides, that any one who within three months after the commission of the offences against the customs therein mentioned, shall discover the offender to the commissioners, and ultimately procure his conviction, shall be paid £40 over and above any sum he may be entitled to claim on account of the goods he may seize from those whom he is the means of convicting (*b*). And the 9 Geo. 2. c. 35. s. 11, for apprehending smugglers who resist custom-house officers in the execution of their duty, with violence, gives £50 to the informer on conviction, or to the executors of the party killed in attempting to take them. And the 19 Geo. 2. c. 24. s. 6, gives to the personal representatives of any party killed on such an occasion, £100, to be recovered by action of debt against the inhabitants of the county where the fact was committed (*c*). Upon the same principle, the Black Act, 9 Geo. 1. c. 22. s. 12, provides, that if any person who shall apprehend, or cause to be convicted, a party offending against its provisions, shall be wounded so as to lose an eye, or the use of any limb, in the attempt to arrest him, shall receive £50; and if he die in the struggle, his executors shall obtain a similar reward. By 9 Geo. 1. c. 28, a party prosecuting to conviction any person opposing the execution of process in the Mint, will be entitled to a reward of £40. By the 8 Geo. 2. c. 16, a reward of £10 is given to a person apprehending a felon (robber) within the limited time of the act (*d*), whereby the hundred is discharged from liability to action.

(*a*) See Cro. Car. 10, 8th edit.

(*b*) See the 8th Geo. 1. c. 18. s. 17, as to £40 reward for convicting receiver of foreign goods.

(*c*) 12 East, 244.

(*d*) By sec. 3, the hundred is not liable if the felon be apprehended within forty days after notice in the Gazette.

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And by 4 W. & M. c. 8. s. 3, if any person be killed in endeavouring to apprehend a highwayman, his executors are to have £40 reward (a).

Besides these pecuniary rewards, until the 58 Geo. 3. c. 70, there were several others; but these being found productive of much roguery and mischief, that act abolished the following; viz. that allowed by the 4 & 5 W. & M. c. 8. s. 2, of £40, on the conviction of a highwayman; that by 6 & 7 Wm. 3. c. 17. s. 9, of £40 on conviction of a person who counterfeited or clipped the coin, or brought into the kingdom clipped or counterfeit coin; that by 5 Ann. c. 31. s. 1, of £40, on the conviction of a burglar or housebreaker; that by 14 Geo. 2. c. 6. s. 2, of £10, on the conviction of a sheep-stealer; and that by 15 Geo. 2. c. 28. s. 7, of £40, on the conviction for an offence of treason or felony, relating to the coin, upon that act; and of £40, upon a conviction for counterfeiting copper money.

Other immuni-
ties.

The next description of recompence consists in an *exemption from offices* of a burthensome and disagreeable kind. Thus by the 10 & 11 W. & M. c. 23, any person apprehending and convicting a felon guilty of burglary, house-breaking, horse-stealing, or private larceny, to the amount of 5s. from any shop, warehouse, coach-house, or stable, is entitled to a certificate from the judge, which will exempt him from all parish offices in the parish where the felony, was committed (b). And before the 58 Geo. 3. c. 70, before it was used for that purpose, it might be assigned or transferred once, and the purchaser would be entitled to the same exemptions with the original possessor (c); but now by that act these certificates are not transferrable. By virtue of this certificate or *Tyburn ticket*, as it is sometimes denominated, the holder is exempted from serving the office of collector of parish rates for the repair of the roads, and not only the usual, but all new

(a) By sec. 3, of 58 Geo. 3. c. 70, that act does not extend to this provision.

(b) 7 East, 183. 3 Smith, 189.

Burn, J. Felony, IV. See form, 7 East, 175. 3 Smith, 189. Post, last vol.

(c) 4 Bla. Com. 295, note (2).

created parish offices (*a*). So that though it is the only reward given to those who detect horse-stealers, or persons stealing to the value of 5s. in a dwelling-house, it is, in many parishes, of more value than the reward of £40. But the act only intended to exempt the proprietor from serving offices, the duties of which were actually to be performed within the parish or ward where the felony was committed, and not any which extend beyond its boundaries; and therefore, it will not dispense with the obligation of fulfilling the duty of constable of a manor which includes the parish, but extends beyond it (*b*), though, on the other hand, he will not be obliged to serve any office to which he may be appointed for any township or place within, though not co-extensive with the parish in which the felony was committed (*c*).

The inducements held out to *accomplices* to disclose the guilt of their associates have already been considered in the chapter respecting pardon (*d*).

As a further reward to persons apprehending highwaymen, by the 6th section of the 4 W. & M. c. 8, upon conviction, &c. they shall have the horse, furniture, and arms, money, and other goods of the offender taken from him, but not so as to take away the right of the owner to the horse, &c. from whom the same has been previously stolen (*e*).

With respect to the practical mode of obtaining these rewards, no great difficulty seems to arise. It is the practice after the assizes are finished, for the clerk of assize to make out all certificates of convictions for felony required by statute, and to attend the judge with the prosecutors, and the several claimants to settle the reward; at the same time he makes out the *Tyburn tickets*, which are signed by the judge, and enrolled

(*a*) Burn, J. Felony, IV. and see further as to what offices are exempted, Kenyon's Rep. 329.

(*b*) 2 Burr. 1182. 3 Smith, 190.

(*c*) 7 East, 174. 3 Smith, 182.

(*d*) Ante, 766, and see 4 Bla. Com. 321. 4 & 5 W. & M. c. 8. 6 & 7 W. & M. c. 17. 5 Ann. c. 31. s. 4. 29 Geo. 2. c. 30.

(*e*) The 58 Geo. 2. c. 70, by sec. 3, does not extend to this provision.

OTHER
IMMUNITIES.

in the office of the clerk of assize (*a*). The acts of Parliament which give the pecuniary rewards, in general direct the judges to grant a certificate to the prosecutor of the defendant's conviction by his exertions. And it is expressly provided by 38 Geo. 3. c. 52. s. 8, and 51 Geo. 3. c. 100, that where the indictment is, by virtue of that statute, tried in the county adjoining to a city which is a county of itself, the judges shall order the expences of the prosecution, of the witnesses, and the rewards of the parties indicting, in the same way as if the conviction had taken place at the assizes for the city or town corporate. And by sec. 5 of 58 Geo. 3. c. 70, it is enacted that the reward, &c. is to be paid by the sheriff, and in like manner, and upon the like certificate, and at the same period of time as the rewards are directed to be paid by the 4 W. & M. 6 W. 3. 5 Ann. and 3, 14, & 15 Geo. 2, and such certificate is to be made out by the clerk of the assize or clerk of the peace, and delivered to the person entitled to the same, on payment of 5s.

Of the prosecu-
tor's costs.*

In addition to these indemnities, there are some cases in which the prosecutor's costs are paid by the directions of particular statutes. At common law, indeed, as it is a general principle that the king neither pays nor receives costs, and as an indictment, though carried on by an individual, is always considered as his suit, no costs are payable, whatever may be the event of the prosecution (*b*). And, therefore, even in cases where the costs are afterwards allowed, throughout the whole of the proceedings, the prosecutor must defray his own expences, and the court will not allow him to proceed in formâ pauperis, unless some special ground be laid for the application (*c*). But by the 25 Geo. 2. c. 36. s. 11. (*d*) 18 Geo. 3. c. 19. s. 7. and the 58 Geo. 3. c. 78. this discouragement to the prosecution of offenders is removed. By the latter act it is enacted, that it may be in the power of the court, before whom any person has

(*a*) Cro. C. C. 9, 10. 7 East, 175, where see plea of this certificate enrolled.

(*b*) Hullock, 557.

(*c*) 3 Burr. 1308. Com. Dig.

Formâ Pauperis. Hullock, 223, note b. Ante, as to Formâ Pauperis.

(*d*) Cro. C. C. 11. 12. 4 Bla. Com. 361, 2.

* As to costs in criminal cases, in general, see Hullock on Costs, 601 to 607. Burn, J. Felony, I. and Costs. Williams, J. Felony, VII. and Costs. Cro. C. C. 11, 12. As to the costs upon informations, see post.

been prosecuted or tried for grand or petit larceny or any other *felony*, at the prayer of the prosecutor, or any person bound in recognizance to prosecute or give evidence, or subpoenaed to give evidence, or who shall appear to prosecute or give evidence, or who has been active in apprehending the offender, to order the sheriff or the treasurer of the county in which the offence was committed, to pay his costs and expences, and to make a further allowance for his loss of time and trouble. The costs, &c. are to be paid by the sheriff, in the manner above pointed out as to rewards (*a*). The order for this purpose is to be made out by the clerk of assize or of the peace, on the payment of one shilling (*b*). On the sight of this order, the money is to be paid by the treasurer and allowed to him in the statement of his disbursements. If the treasurer refuse to obey the order, an attachment or indictment may be supported against him; but a mandamus will not lie (*c*). By the 18 Geo. 3. c. 19. s. 9. the justices at quarter sessions are authorized to make and alter such rules as to the costs of prosecutors and witnesses as they may think fit, and which shall be strictly observed (*d*); and the same act, by sect. 4, as we have already seen, gives a remedy for a constable's costs, &c. (*e*). And the 38 Geo. 3. c. 52. s. 8. and 51 Geo. 3. c. 100. provide, that when indictments are tried in the adjoining county under that act, the court shall make the same orders respecting the costs and expences, as if the indictment had been preferred within the jurisdiction where the offence was committed.

OF THE PROSECUTOR'S COSTS.

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In the construction of these statutes it has been holden, that their provisions extend to charge inferior districts, as well as counties, which raise their own rates, if crimes arise within their limits, and are punished by the exertions of an individual (*f*). And it has been lately held, that the costs of a prosecutor in the borough

(*a*) Sect. 5.

(*b*) 58 Geo. 3. c. 70. s. 6.

(*c*) 1 Chit. Rep. 650. 4 M. & S. 515.

(*d*) 4 Bla. Com. 362. Cro. C. C. 11. & 12. Burn, J. Felony, I. 6 T. R. 237. See form of Rules, 6 T. R. 237. As to

the power of sessions to allow costs in the prosecution of vagrants, see the 5 Geo. 4. c. 40. s. 83.

(*e*) Ante, 5.

(*f*) 6 T. R. 237. Hullock, 603. Williams, J. Evidence, VI. Burn, J. Felony, I.

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court of Liverpool, for a felony committed within that borough, may be ordered by the court to be paid by the treasurer of the county of Lancaster, the borough of Liverpool not having exclusive jurisdiction, nor any treasurer like a county treasurer, nor any rate in the nature of a county rate, but contributing as a part of the county to the county rate (*a*). But these statutes, it will be observed, extend to felonies only; and, therefore, in general, on prosecutions for *misdemeanors*, the prosecutor can obtain no immediate remedy for his costs (*b*).

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The reason for this distinction may probably be, that the public interest is more powerfully concerned in the detection of felonies than of inferior offences. But surely there are some kinds of misdemeanors, as uttering base coin, obtaining money under false pretences, receiving stolen goods, conspiracy, and perjury, in which the security of the commonwealth is as deeply affected as by many transgressions which are capital (*c*). In some degree, to remedy this defect, we have seen, that the court of King's Bench, having the king's privy seal for the purpose, may give the prosecutor a third part of the fine; or they may intimate to the defendant their intention to mitigate his punishment on his making satisfaction to the prosecutor for his expences (*d*); and, therefore, a security given for the payment of costs by the direction of the quarter sessions, though expressly in mitigation of imprisonment, was holden valid (*e*). And the statute 5 W. & M. c. 11. s. 3. provides, in general, that if the prosecutor be the party grieved, or a magistrate or officer indicting for some offence against him in his public capacity, and the defendant remove the proceedings into the King's Bench by *certiorari*, and be there convicted, the latter shall pay the taxed costs, and if he neglect to do so ten days after demand, an attachment will issue against him. In the construction of this act, it has been held that it does not apply to persons intended to be aggrieved, but only to those who have

(*a*) 4 M. & S. 515.

(*b*) 7 T. R. 377. 4 T. R. 591.
4 Bla. Com. 362, n. See ante, 5,
as to constable's costs of prosecution under 13 Geo. 3. c. 19.
s. 4.

(*c*) 4 Bla. Com. 362, n.

(*d*) Ante, 7, &c. Hawk. b. 2.
c. 25. s. 3. Bac. Abr. Indictment, A. Hullock, 557, 8, 9.

(*e*) 11 East, 46.

suffered actual injury (*a*). A prosecutor for an obstruction to a footway, which he has used many years, is regarded as a party aggrieved (*b*). And, in a late case, several persons were held entitled to costs under this act as prosecutors of an indictment for not repairing a highway, one as constable of the manor within which the highway lay; the others as parties grieved, they having used the way for many years in passing and re-passing from their homes to the next market town, and being obliged, by reason of the want of repair, to take a circuitous route (*c*). The act extends to the costs of the prosecution of an offence, whether it be a nonfeasance or a malfeasance (*d*). Though this act uses the term *convicted*, its provision will not apply, if, after the defendant is found guilty, the judgment is arrested; for a conviction by judgment was intended (*e*). Nor can the prosecutor have the costs of a special jury (*f*). And he is not entitled to any allowance under this statute for loss of time and trouble, unless his name be indorsed on the bill as a witness (*g*). The costs thus given to persons acting in public capacities can only be claimed by them when they prosecute for some offence which actually comes within their own peculiar cognizance, and not a public grievance, with which they think fit to interfere (*h*). Nor can the prosecutor have the costs in addition to a third of the fine, but the court will order the latter to be deducted from the amount of the taxation (*i*). But if the right to costs is evident, and the defendant, after a demand made, refuses to pay them for more than ten days, an attachment for his contempt will be awarded (*k*). Where an indictment was removed by *certiorari*, at the instance of the defendant, who was brought up in the King's Bench to receive sentence, being that he should be imprisoned in Morpeth Gaol, it was held that the costs of conveying him there should be taxed to the prosecutor (*l*). We have already considered the rules

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(*a*) 1 Wils. 139.

(*b*) 7 T. R. 32. 1 T. R. 104.
1 Smith, 168, 9. Hullock, Ind.
tit. Attachment. As to a surveyor of roads costs, see Kenyon's Rep. 378, 9.

(*c*) 3 M. & S. 465.

(*d*) Ibid. 471.

(*e*) 15 East, 570.

(*f*) 1 Esp. Rep. 229.

(*g*) Ibid. 126, *quære*.

(*h*) 2 T. R. 47. 5 T. R. 33.

(*i*) 4 Burr. 2125.

(*k*) 1 T. R. 104. 1 Smith, 168, 9.

(*l*) 5 M. & S. 520. 2 Chit. Rep. 159. S. C. *sed quære contra*.

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by which the payment of costs is directed, when they have been increased by a removal by certiorari to the cognizance of a superior tribunal (*a*).

There is also a general exception to the rule respecting costs, on indictments for misdemeanors, in the case of prosecutions against persons for keeping bawdy-houses, gaming-houses, or other disorderly houses; and in prosecutions for suffering highways to remain in a state of decay. Thus the 25th Geo. 2. c. 36. s. 5. in the first description of prosecutions, directs that the constable or other officer shall be allowed all the reasonable expences of the prosecution, to be ascertained by any two justices of the peace, of the district where the offence was committed, and to be paid by the overseers of the poor of the parish, and who, in case of conviction, are to pay each of the two inhabitants instituting the prosecution £10, or forfeit double the sum themselves. The 13 Geo. 3. c. 78. s. 64. enacts, that the court before which any cause of this description shall be tried, shall have power to award (*b*) costs to the prosecutor, to be paid by the defendant, if they regard the defence set up as frivolous, and to be paid by the former to the latter, if the indictment appear to be vexatious. If the judge at nisi prius certify that the defence was frivolous, the prosecutor will have his costs, though a rule nisi has been granted to arrest the judgment (*c*). Under this act no precise form of words is necessary in the judge's *certificate*, nor is any actual award of costs requisite (*d*). The application by either party must be made on the trial at nisi prius, for the court of King's Bench cannot afterwards interpose (*e*). And where an individual indicted for not repairing, when bound to do so *ratione tenuræ*, applies to the court to submit to a small fine, on a certificate that the road is put in good repair, which is refused, and afterwards, on the trial, it appears that the repair has actually been effected, between the former request and the trial, the court will refuse to set a nominal fine, unless

(*a*) Ante, 401, &c. Certiorari.

(*b*) As to form of order, see 4 M. & S. 203. Post, vol. iii. 575 *a*.

(*c*) 6 M. & S. 130.

(*d*) 6 T. R. 344. Hullock, 553. See form of a certificate, post, last vol.

(*e*) 5 T. R. 272. Hullock on Costs, 553.

the costs of the prosecutor are paid subsequent to the former application (*a*). If the trial of an indictment for a misdemeanor is postponed on the motion of the defendant, he must pay the costs; but the prosecutor, unless a witness, will not be entitled to any remuneration for his loss of time or attendance (*b*). Where the defendants in an indictment for a misdemeanor submitted to a verdict of guilty, upon an understanding that they were not to be brought up for judgment; it was held that the prosecutor was not entitled to costs, no agreement having been expressly made respecting them (*c*).

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Where any costs have been incurred, the bail of the defendant, on a removal of the proceedings, will be liable to pay them, though the principal has been acquitted and is in custody on an attachment for neglecting to defray them (*d*). If the master on his taxation allow costs to the prosecutor to which it is apprehended he is not entitled, the defendant may move the court for a rule to discharge the recognizance, and to set aside the master's taxation of costs (*e*).

Justices of the peace cannot order the costs of a prosecution to be paid out of the county rates, on the ground that it was instituted at their desire, because none of the acts authorizing them to be collected sanction such a proceeding (*f*). But by 32 Geo. 3. c. 57. s. 11, one moiety of the expences of prosecuting a master for ill-treating his parish apprentice, may be paid out of the county rates.

As the crown does not pay, any more than receive, costs, it follows that the defendant, though acquitted, must, in general, bear all his own expences. This seems to be another defect in the statutes which relate to this subject; for it appears hard that an individual should be punished for the manifestation of his innocence. Besides this liability, a defendant committed by a magis-

Costs of the defendant.

(*a*) 1 Bla. Rep. 602.

(*b*) 1 Esp. Rep. 125, 6.

(*c*) 2 B. & C. 598.

(*d*) 3 Burr. 1461.

(*e*) 15 East, 570. See form of rule, 15 East, 570.

(*f*) 7 T. R. 377.

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trate to the county gaol to take his trial for any felony, or inferior offence, is, by 3 Jac. 1. c. 10. s. 1, to bear the reasonable charges of his own conveyance; and if he refuse to pay them, they are to be levied by warrant of distress upon his personal estate. If, however, he has no property from which satisfaction may be obtained, the statute proceeds to direct that the expence shall be borne by the inhabitants of the district where he was taken, by a rate to be made by the parish officers (*a*). The latter part of this provision was, however, found to discourage the apprehension of offenders, as no parish was anxious to burthen itself with the charges of his conveyance; and, therefore, the sum is to be fixed by a justice of the peace, and paid by the treasurer of the county to the constable, on the *warrant* of the magistrate (*b*). Where a wife is indicted for keeping a disorderly house, though separated from her husband by his violence, he will be liable to the attorney employed by her to pay the costs of her defence, if he knew both of the evil and the prosecution, and did not interfere to prevent the former, or to protest against defraying the expence of the latter (*c*). But where a delay is occasioned by the prosecutor's default, he must pay the extra costs to the defendant. Thus when an indictment for a misdemeanor has been removed into the King's Bench by certiorari, if the prosecutor give notice of trial, and afterwards withdraw the record, without countermanding his notice in time, he must pay the costs which he has been the means of augmenting (*d*). In favor of prisoners also who are acquitted on an indictment for any crime, it is enacted by the 14 Geo. 3. c. 20, that when they are found not guilty, or the grand jury throw out the bill, or they are entitled to their discharge for want of prosecution, they shall be immediately set at liberty without paying fees to any officer; and, that such fees as have been usually paid in respect of such discharge, not exceeding thirteen shillings and four pence for each prisoner, shall, on certificate of a judge or justice before whom such prisoner has been discharged, be paid out of the general county rate (*e*). And the

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(*a*) Sect. 2. Ante, 116, 17.

(*b*) 27 Geo. 2. c. 3. s. 1. See form of warrant, post, last vol.

(*c*) 3 Campb. 326.

(*d*) 8 East, 269. Rep. temp. Hardw. 159. Tidd's Prac, 8th edit. 819.

(*e*) Burn, J. Felony, I.

provisions of the highway act, extend, as we have seen, to the case of defendants as well as prosecutors; and when the former must pay all the costs when the court certify that the defence was frivolous, so the latter must do so when the prosecution was vexatious (*a*). But if the defendant be acquitted for want of prosecution at nisi prius, the court of King's Bench have no power to award him costs under this provision, but the application must be made to the court, before whom the trial should have proceeded (*b*). By the 55 Geo. 3. c. 50, however, all defendants acquitted by a jury, or otherwise fully discharged, are exempted from the payment of every description of fee, and it is made a misdemeanor in the officer to receive it (*c*).

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Besides these rules which affect each party respectively there is a recent provision which applies to both of them. The 18 Geo. 3. c. 19. enables justices of the peace, on any complaint before them, on which a warrant or a summons shall issue, to award such costs to be paid by either of the parties, as he in his discretion shall think proper (*d*). If the party ordered to pay a specific sum by such an order, neglect so to do, the magistrate is further empowered by *warrant* (*e*) under his hand and seal to levy the amount by distress upon the goods and chattels of the party neglecting the payment; and if none can be found, to commit him for any time not less than ten days, nor more than a month, to the house of correction for the county (*f*). It would be, perhaps, desirable to give the judges a similar power, in case of high offences.

(*a*) Ante, 828. 13 Geo. 3. c. 78. s. 64; and see 55 Geo. 3. c. 56.

(*b*) 5 T. R. 272. Hullock, 553.

(*c*) See post, vol. iii. 575 *a*.

(*d*) See form of order, Williams, J. Costs. Burn, J. Costs. Post, last vol. As to the power of the sessions to allow costs in the prosecutions of vagrants, see the 5 Geo. 4. c. 40. s. 83. The sessions are not authorized to order the payment by the bridge master to the clerk of the peace of a per centage on all money

raised for the repair of bridges in a particular district in lieu of all his fees, for indictments, presentments, &c. for bridges within it, although such per centage was claimed as an ancient fee, and had been paid without dispute for a long period of time, 1 B. & A. 312.

(*e*) See form, Burn, J. Costs. Williams, J. Costs. Post, last vol. Constables return, *id. ib.*

(*f*) See form of Commitment, Burn, J. Costs. Williams, J. Costs. Post, last vol.

OF FEES.

The fees of officers in the various stages of a criminal prosecution are regulated for the most part by ancient usage. Tables of them, as they stood before the 55 Geo. 3. c. 50, will be found in the books of practice (*a*). At common law, it is said that no reward could be taken by any officer concerned in the administration of justice (*b*). And this was further established by the statute of Westminster the First, c. 26, which forbids any sheriff, or other crown officer, to take a reward for any of his official duties, except from his majesty. Some fees have, however, been allowed from very early periods. Thus the fee of twenty pence, commonly called the bar fee, paid to the sheriff by every prisoner on his acquittal (*c*), and that of one penny to the coroner of every visne when he came before the justices in eyre, were always allowed until the late statute, because they were not claimed as rewards for any duty, but as perquisites affixed to the office (*d*). And courts of justice have, from time to time, permitted their ministers to take such fees as they have thought reasonable for their labour and attendance, and of these they could not be deprived but by an express legislative provision (*e*). Fees have likewise been frequently given by act of parliament, and those who are thus entitled to claim them may support actions to recover the amount (*f*). And where a statute recognizes a fee as lawful, without specifying any thing respecting its amount, the usage of the county may be given in evidence, and will be established as the criterion intended (*g*). Thus the statute 19 Geo. 3. c. 64, which we have seen substitutes hard labour and confinement in many cases in the room of transportation (*h*), provides, that the clerk of the court shall receive the same gratuity, on the sentence of an offender, to any of the penalties there enumerated, as if he had been condemned to transportation, except in case of petit larceny; and, therefore, on the Norfolk circuit, as the fee in the

(*a*) See the List of Fees, Cro. C. C. 490 to 573. Williams, J. Clerk of the Peace. As to fees on imprisonment, see ante, 803.

(*b*) Co. Lit. 368. 2 Inst. 176. Bac. Abr. Fees, A.

(*c*) Now abolished, ante, 831. 14 Geo. 3. c. 20.

(*d*) 2 Inst. 210. Bac. Abr. Fees, A.

(*e*) Co. Lit. 368. Pre. in Ch. 551.

(*f*) 2 Inst. 210. 2 Hen. Bla. 220. Bac. Abr. Fees, A.

(*g*) 2 Hen. Bla. 220. Bac. Abr. Fees, A.

(*h*) Ante, 794, 5.

latter case had long been fixed at a guinea, that sum was recovered by the clerk against the treasurer for the county (*a*). But an officer can have no lien on the records of the court for his fees, after default has been made in the payment (*b*). And if on the conviction of a defendant in the King's Bench, he receive sentence to be set on the pillory in a foreign county, the tipstaff cannot demand of the prosecutor any fees on the occasion, or even the necessary expences of the removal (*c*). For though the practice has been to allow such expenditure in Middlesex, there is no established precedent for it, which is necessary to render such a demand legal (*d*). It seems that the sheriff is allowed poundage out of a fine imposed by the Court of King's Bench after conviction of battery, for such allowance would otherwise be made in the Exchequer (*e*). But he can retain no poundage upon a sum due on an attachment, and it seems doubtful whether he can support an action to obtain it (*f*). It has also been recently holden, that where costs have been allowed to a prosecutor of an indictment for felony, to be paid by the treasurer, he cannot insist on any deduction, but will be liable to an attachment if he take it of his own accord.

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The fees of officers in criminal prosecutions, have been materially altered by the 55 Geo. 3. c. 50. (*g*). All prison fees, except in the King's Bench, the Fleet, the Palace Court, and the Marshalsea prisons, are entirely abolished (*h*). All fees paid to the clerks of assize, of the court, of the peace, or their deputies—as well as on the acquittal or other discharge of a prisoner—are done away, and the officers are forbidden to receive them (*i*). Any transgression of these regulations by parties demanding fees, are misdemeanors, punishable with imprisonment and fine (*k*). But provision is made to indemnify the officers by payments out of the county rate, proportioned to the amount they have been accustomed to receive (*l*). Even before this regulation, if the

(*a*) 2 Hen. Bla. 220.

(*b*) 1 Leach, 201.

(*c*) Cowp. 726.

(*d*) Cowp. 727.

(*e*) Sir T. Jones, 185. Skin. 12.
Bac. Abr. Fees, B. Imp. Off.
Sheriff, 505.

(*f*) 2 East, 411, 12.

(*g*) 55 Geo. 3. c. 50.

(*h*) Sec. 1. 14.

(*i*) Id. sec. 4, 5, 6. 13.

(*k*) Sec. 9. 13.

(*l*) Sec. 2, 3, 6, 7, 12.

OF FEES.

keeper of any gaol transgressed the regulations laid down for him, and took more than he was entitled to receive from a prisoner, an action was sustainable by the party aggrieved to recover it back, though it had been accounted for to the magistrate (*a*). By the 56 Geo. 3. c. 116. judges of assize may grant a certificate to certain officers to receive compensation for abolished fees, to be paid in the same manner as is provided by the 55 Geo. 3. c. 116. and the same act of 54 Geo. 3. points out how allowances to the gaoler of Dovor Castle Prison, &c. are to be paid.

Attorney's bill.

The regulation in the statute 2 Geo. 2. c. 23. respecting an Attorney's Bill, by which he is compelled to deliver it duly signed, a month before he brings an action, extends to business done in conducting a prosecution at the Quarter Sessions, and is not confined to courts of superior jurisdiction (*b*). And the bill in such case will be referred by the King's Bench to the master for taxation (*c*).

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Of the redress
for a malicious
prosecution.

Although the law naturally inclines to favor those who exert themselves to give effect to its criminal provisions, it will not allow its forms to be made the engine of oppressing the innocent without giving them an opportunity of redress. And, therefore, to restrain the savage spirit with which appeals were anciently prosecuted, the 13 Edw. 1. c. 12. directed, that if the appellee were acquitted, the appellor should suffer a year's imprisonment and pay a fine to the king, besides the satisfaction to the party whose life he by the prosecution attempted to destroy; and if the appellor were incapable of paying it, his abettors should be liable to do it for him, and to suffer imprisonment in their own persons (*d*). These severe penalties, and the restitution of goods being given on an indictment, soon rendered this proceeding rather a matter of curiosity than of practice (*e*). The ancient remedy for the malicious prosecution of an indictment was either a writ of conspiracy or an action on the case in the nature of a conspiracy,

(*a*) 3 Esp. Rep. 233. 1 Taunt. 359.

(*b*) 1 Esp. Rep. 137. 5 T. R. 694. Tidd's Prac. 8th edit. 26, 329, &c.

(*c*) 4 T. R. 496. acc. id. 124. cont.

(*d*) 4 Bla. Com. 316.

(*e*) Id. *ibid*.

or an indictment, when several parties united in the evil design (*a*). And, at the present day, the latter proceeding is sometimes resorted to, where the circumstances are of a very dark coloring (*b*). But an action on the case for a malicious prosecution is now the more usual, as it is the easier and more effectual remedy (*c*). Over the old writ of conspiracy it has great advantages; for the latter could only be brought where the life of the plaintiff had been in danger (*d*); and where he had been "lawfully acquitted," which intended such a discharge as would be a good bar to any subsequent proceeding (*e*); but the modern remedy by action on the case lies, wherever there has been a malicious prosecution of any criminal charge without probable cause, and which has occasioned any damage to the person, character, or property of the plaintiff (*f*). So it lies where the indictment has been thrown out by the grand jury (*g*), where it has been preferred before an improper tribunal (*h*), and where the discharge has arisen from a defect in the proceedings (*i*). Besides the writ of conspiracy could only be granted where more than one was accused of conspiring (*k*); and all the old cases of malicious prosecution called writs of conspiracy (*l*), are no more than mere actions on the case which were always valid against one alone (*m*). In the action for a malicious prosecution, the damage sustained by the plaintiff is the ground of the proceeding, and not any secret motives by which the guilt of the defendant may be increased (*n*); and, therefore, though the words "per conspiracyem per eos perhabitam" be introduced, they will be mere surplusage and can in no way affect the right of the party injured to recover (*o*). Thus, where these words are

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(*a*) 1 Saund. 230, n. 4. Cro. Car. 239. Cro. Eliz. 701. 2 Sel. N. P. 1053.

(*b*) 2 Burr. 993. 1 Bla. Rep. 368. 4 Wentw. 96. Staundf. P. C. b. 2. c. 23.

(*c*) 2 Sel. N. P. 1054.

(*d*) 1 Saund. 230, n. 4. Fitz. N. B. 116. 1 Ld. Raym. 379.

(*e*) Bro. Abr. Conspiracy, 23. Gilb. Cas. L. & E. 199. 2 Sel. N. P. 1054.

(*f*) 10 Mod. 148. 214. 12 Mod. 208. Gilb. Cas. L. & E. 185. 202. See precedent and notes, 2 Chitty on Pleading, 612, 4th

edit.

(*g*) 2 Rol. Rep. 138. Cro. Jac. 490.

(*h*) 1 Rol. Abr. 112.

(*i*) 4 T. R. 247. 2 Sel. N. P. 1055.

(*k*) Fitz. N. B. 116. 1 Saund. 230, n. a. Carth. 417.

(*l*) See Cro. Car. 239. Cro. Eliz. 701.

(*m*) Fitz. N. B. 116. Carth. 417. 1 Saund. 230 a.

(*n*) Carth. 416. Bul. N. P. 14.

(*o*) 1 Saund. 230, n. a.

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inserted, in a declaration against two persons, and one of them only appears, proceedings may be carried on against one alone (*a*). So if all the defendants are acquitted but one, he may be found guilty and judgment given against him (*b*).

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It seems to have been formerly thought that no action could be maintained where the acquittal arose from some technical objection, and no guilt was imputed by the indictment nor any imprisonment endured; but it is now settled that, in such a case, the mere fact of the plaintiff's having been put to expence by the proceedings is a sufficient ground to entitle him to redress (*c*). And an action lies for the malicious prosecution of a bad indictment for perjury (*d*). So an action lies for maliciously obtaining or executing a search warrant for smuggled goods, though none such are found (*e*). And a man may recover in an action for a malicious prosecution of his wife, of which he has paid the expences (*f*).

But though actions for malicious prosecution are thus allowed, they are by no means encouraged by the courts (*g*). In order to support them, there must have been want of probable cause for the prosecution—malice express or implied—and an injury sustained by the plaintiff either in his person by imprisonment, his reputation by scandal, or his property by expence (*h*).

There must have been no *probable ground* of prosecution (*i*). It is not necessary that there should have been any legal grounds

(*a*) Bro. Ab. Conspiracy, 38.
1 Ld. Raym. 397.

(*b*) 2 Inst. 562. Cro. Car.
239. Sir Wm. Jones, 94. 1 Rol.
Abr. 111, 12. 2 Show. 50.
6 Mod. 169. 1 Saund. 230, n. a.

(*c*) 1 Ld. Raym. 374. Carth.
416. 2 Stra. 691. 1 Salk. 13.
4 T. R. 247. Gilb. Cas. L. & E.
185. 10 Mod. 148. 214.

(*d*) 5 B. & A. 634. 1 Dow. &
Ry. 266.

(*e*) 1 T. R. 535, n. 1 Dow. &
Ry. 97. 2 Chit. Rep. 304.

(*f*) Rep. Temp. Hardw. 54.
2 Stra. 977.

(*g*) 1 Salk. 15.

(*h*) 2 Sel. N. P. 1056. 7.

(*i*) 3 Dow's Rep. 160. 180,
181, 2. 187. It is a mixed pro-
position of law and fact whether
there was probable cause, and
whether the circumstances al-
leged to shew it probable, are
true, and existed as matter of
fact: but whether or not, sup-
posing them to be true, they
amount to a probable cause is a
question of law. 1 T. R. 520.
534. Bul. N. P. 14. 4 Burr.
1974. 2 B. & C. 693. 4 Dow.
& Ry. 107. 1 Carr. Rep. 138.
204. 1 Gow. C. N. P. 20.

for the accusation ; for it will suffice to excuse the prosecutor if it appear, from the circumstances of the case, that he was not actuated by improper motives, but by a sincere belief that the party accused was guilty, and an anxiety to bring him to justice (*a*). But it is no answer to this action that the defendant was encouraged in what he did by the opinion of counsel, if the statement of facts was incorrect or the opinion ill-founded (*b*). A great restraint on this kind of action is, that it cannot be supported in evidence on the trial, without producing the record or a copy of the record of acquittal (*c*). And in case of *felony* this can only be obtained by *special order*, upon motion made *in open court*, which will not be granted if there was the least foundation for preferring the indictment ; for it would be a great discouragement to public justice, if prosecutors were liable to be sued whenever the defendant was acquitted (*d*). If however, the officer give the copy without such authority, it will be available in evidence, though the officer will be punishable for his contempt (*e*). But this rule does not apply to indictments for *misdemeanors*, which it is thought probably not so important to encourage ; for the defendant, when set at liberty, is entitled, as a matter of course, to a copy of the record (*f*). And the order need not, at any time, be produced in order to introduce the record as evidence ; and, therefore, where two persons were jointly indicted for felony, and a copy of the record was granted to one of them only, which was produced on a trial for malicious prosecution at the suit of the other, the plaintiff obtained a verdict which the court refused to set aside (*g*). When it becomes necessary, in order to support the action, that the plaintiff should be put in possession of the examinations before the justices, and also of the warrant on which he was apprehended, he may apply to the court on affidavit of

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(*a*) Cro. Jac. 193. In an action against a magistrate for a malicious conviction, it is not sufficient to shew that the plaintiff was innocent of the offence of which he was convicted, but he must also shew, from what passed before the magistrate, that there was a want of probable cause. 1 Marsh. 220. 5 Taunt. 580. S. C.

(*b*) 5 Taunt. 277. 2 B. & C. 693. 4 Dow. & Ry. 107. 1 Carr. Rep. 204.

(*c*) 14 East, 302. 4 Burr. 1971. 3 Bla. Com. 126.

(*d*) Kel. Pref. iii. 1 Ld. Raym. 253. Carth. 421.

(*e*) 14 East, 302.

(*f*) 1 Bla. Rep. 385.

(*g*) 2 Stra. 1122.

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demand and refusal, and obtain a rule calling on the magistrate and the constable respectively to show cause why they should not be inspected and copies taken, and the originals produced on the trial. On this, a rule will be made ordering the inspection, and commanding the respective parties to produce the originals in evidence on the trial (*a*). In a late case in an action for a malicious prosecution for an assault before a magistrate, the magistrate proved that the depositions taken before him were reduced into writing, and that he delivered them at the court of Quarter Sessions to the clerk of the peace or his deputy; the clerk of the peace stated that a bill of indictment for the assault was preferred, and that the grand jury returned *ignoramus*, and that it was usual in such case to throw away or destroy the depositions, and that he had searched among his papers and could not find them: it was held, that parol evidence of their contents was admissible, and it was not necessary to call the deputy clerk of the peace to shew that the original depositions were not in his possession, inasmuch as it was his duty if he had received them, to have delivered them to his principal, and not being in his custody, it was to be presumed they were lost or destroyed (*b*). Besides this necessity of obtaining a copy of the record of the acquittal, it has been holden, that if sufficient evidence were produced on the trial, on the behalf of the crown, to make the jury hesitate and consult together for a time what verdict they should deliver, no action can be supported (*c*). And the defendant will be at liberty, after proving circumstances of suspicion against the plaintiff, to adduce evidence of his general bad character, in order to show that there was probable cause for suspecting him to be guilty (*d*). And it is said that no action can be maintained for the malicious prosecution of a criminal information; because the proceeding is never allowed without a previous application to the court founded upon affidavits, and an opportunity afforded to the party accused to show cause against

(*a*) Barnes, 468, 9. 1 Stra. 126, 7. Tidd's Prac. 852, 8th ed.

(*b*) 2 B. & C. 494. 3 Dow. & Ry. 669.

(*c*) 3 Esp. Rep. 7, 8.

(*d*) 2 Esp. Rep. 720. Phil. Ev. 72. In an action for maliciously procuring plaintiff to be

arrested on a charge of larceny, the defendant cannot give evidence to shew that the plaintiff's character was suspicious, and that his house had been searched on previous occasions. 2 Stark. C. N. P. 69; and see Cro. Jac. 193. 3 Dow. & Ry. 160.

it; and, therefore, after it has been allowed, it must be presumed that there was *prima facie* ground for prosecuting it, as there manifestly was for allowing it (a).

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Besides the want of probable cause, *malice* must also be shown, either express or apparent from the proceedings. And, therefore, in an action for a malicious prosecution it will not be sufficient to show, in addition to the record of acquittal, that after the indictment was ready for trial, the prosecutor was called and did not appear, on which an immediate acquittal was directed, without proof of express malice, or at least of circumstances showing an entire want of all probable cause on which the proceedings rested (b). And it is said, that wherever the grand jury find the bill of indictment, express malice must be shown on the part of the individual indicting; though it will be otherwise if the facts necessarily lie within the knowledge of the original prosecutor, for then he must prove that he had reasonable grounds of suspicion, or the plaintiff will be entitled to recover (c). There seems also to be a material distinction between malicious prosecutions and malicious convictions; in the former, if it be shown that there was no probable cause whatever, malice must be inferred, because the prosecutor has sworn to the truth of a charge manifestly unfounded. But in actions for malicious convictions on penal statutes, the question of probable cause does not depend on the actual guilt or innocence of the party, but of the testimony given before the magistrate; and, therefore, to support the latter action, the depositions must be given in evidence (d). And even where the indictment has been thrown out by the grand jury, if it were only for a trifling misdemeanor, some evidence, however small, must be offered of a malevolent design (e). It has also been laid down, that where a defendant has been acquitted on the trial, he need not, in the first instance, show express malice in the party by whom he was indicted, in order to support an action for a malicious prosecution; but where the indictment is quashed for

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(a) 2 Woodes. 564; and see further as to the evidence in actions for malicious prosecutions, Stark. on Evid. Malicious Prosecutions.

(b) 9 East, 361.

(c) 1 Ld. Raym. 381. Bul. N. P. 14. 9 East, 362, n. b. 2 Selw. N. P. 1056, n. 1.

(d) 1 Marsh. 220.

(e) 1 Marsh. 12. 5 Taunt. 187. Sed vide 4 B. & C. 24.

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informality, an express malice must, in the first instance, be shown by the plaintiff (*a*). In general, both malice and the want of probable cause, either express or implied, must appear, to entitle the plaintiff to recover (*b*). It is certain that malice will not suffice if there were any apparent cause for the proceedings (*c*). And though malignity may, in some case, be fairly inferred from the want of grounds to support the proceedings, the latter can never be collected from the most positive proof of the former (*d*). So that, in every case, the plaintiff must give evidence, however slight, that no grounds existed for the proceedings, before the defendant can be called upon to answer (*e*). The question whether he has succeeded in doing this, is partly of law and partly of fact; whether the circumstances alleged on either side are true or false, is a matter of fact to be left to the jury; whether if true, they prove a reasonable ground of prosecution, or the reverse, is an inference of law on which the court alone can decide (*f*).

The *damage*, as we have just seen, must either be to the person, by imprisonment; to the reputation, by scandal; to the property, by expence. With respect to the imprisonment, any momentary detention seems sufficient. But the plaintiff cannot recover damages for an imprisonment after a gaol delivery, for it was his own fault to lie in prison after (*g*). As to the scandal, it seems that any charge which would be a libel if not preferred in the course of legal proceeding, would be sufficient; but an indictment for a mere trespass, as an assault, &c. would not (*h*). Injury to the property, by expence, is a sufficient ground for supporting the action (*i*).

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| (<i>a</i>) Willes, 520. | (<i>g</i>) Bro. Damages, pl. 115. |
| (<i>b</i>) Bul. N. P. 14. 4 Burr. | Sayer, Damages, 87. |
| 1974. | (<i>h</i>) See 12 Mod. 210. Gilb. |
| (<i>c</i>) Bul. N. P. 14. | L. & E. 202. 2 B. & C. 494. |
| (<i>d</i>) 1 T. R. 545. | 3 Dow. & Ry. 669. |
| (<i>e</i>) 2 Selw. N. P. 1056, n. (2). | (<i>i</i>) Gilb. L. & E. 185. 202. |
| (<i>f</i>) 1 T. R. 445. Bul. N. P. | 1 T. R. 518. Carth. 421. 14 East, |
| 14. 2 Sel. N. P. 1056, n. (1). | 302. 305. |
| Id. 1061. | |

CHAPTER XXII.

OF CRIMINAL INFORMATIONS*.

THERE are two kinds of informations, one in the name of Informations. the king, and the other at the suit of an informer (*a*). It is the first of these only that we have to consider at present, as the last are rather modes of *qui tam* action, for the recovery of a pecuniary penalty, than criminal proceedings. We proceed, therefore, to examine those informations which are filed solely on behalf of his majesty.

Criminal informations, properly so called, are analogous to declarations for the redress of a personal injury, except that the latter are at the suit of a subject for the satisfaction of a private wrong, and the former are in the name of the king, for the punishment of offences affecting the interests of the public (*b*). They are accusations or complaints for serious misdemeanors, which, whether they immediately affect the safety of the crown, or, in the first instance, encroach more nearly on individual rights, require to be speedily repressed for the good of society at large (*c*). The difference between this mode of proceeding and the more usual course of indictment is, that the latter is sanctioned by the finding of a grand jury, and the former, when it comes into court to be tried, is the mere allegation of the officer by whom it is preferred (*d*). But this is not the only reason why the crown, or a subject, supposing himself aggrieved, prefers the former to the latter remedy. Unlike an indictment, which, when found, can

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(*a*) Ante, 165, 6.

(*b*) Jac. Dict. Information.

(*c*) Bac. Abr. Informations, A. Ante, 165, 6.

(*d*) Bac. Abr. Informations, A.

* As to informations in general, see Hawk. b. 2. c. 84, per totum. Com. Dig. Information, per totum. Bac. Abr. Informations, per totum. 4 Bla. Com. 308 to 312. 2 Woodes. 560 to 561. Williams, J. Information. Dick. J. Information. Hand's Practice.

INFORMATIONs. never be altered in substance, an information may be amended at any time before trial, even before a single judge at chambers, because no finding of a jury or principle of right is affected by such a change (*a*). It is also said, that on the conviction of the defendant, he will be visited with a severer punishment than if he had been prosecuted by an indictment (*b*); but this opinion does not seem to rest on any substantial foundation. It has been said, however, that as this proceeding can only be resorted to by leave of the court in which it is filed, no action can be sustained for a malicious prosecution, though the defendant should be acquitted (*c*). And where an indictment has been thrown out by the grand jury for not repairing a highway, and they appear to have been actuated by manifest partiality and injustice, an information will be granted against the parish, as the only mode which remains of enforcing the desired repair (*d*).

[843] The practice of filing informations existed at common law, and may be traced to the earliest periods (*e*). For, as observed by Blackstone, "As the king was bound to prosecute, or, at least, to lend the sanction of his name to a prosecutor, whenever a grand jury informed him upon their oaths, that there was a sufficient ground for instituting a criminal suit: so, when his immediate officers were otherwise sufficiently assured that a man had committed a gross misdemeanor, either personally against the king or his government, or against the public peace or good order, they were at liberty, without waiting for any further intelligence, to convey that information to the court of King's Bench, by a suggestion on the record, and to carry on the prosecution in his majesty's name" (*f*). Informations for offences more immediately affecting the king, his ministers, or the state, were filed *ex officio*

(*a*) Ante, 297, 298. 4 Burr. 2527. 4 T. R. 457. 11 Harg. St. Tr. 332, 3.

(*b*) 2 Woodes. 563.

(*c*) 2 Woodes. 564.^a No action lies for filing a slanderous affidavit, 1 Saund. 131, 2, n. 1; and if a court of competent jurisdiction has once sanctioned a prosecution, this establishes that there was probable cause

for instituting it, and no action lies, though the prosecution ultimately fails. 1 Wils. 232. 1 T. R. 522—545.

(*d*) 1 Sess. Cas. 168. Sayer Rep. 92. Bac. Abr. Highways, H.

(*e*) 11 Harg. St. Tr. 312, 313. 4 Burr. 2556. 1 Show. 106, Hawk. b. 2. c. 26. s. 85.

(*f*) 4 Bla. Com. 309.

by the attorney-general, while those in which a private individual was the virtual prosecutor, were placed on record by the king's coroner or master of the crown office. But these proceedings, though legal in themselves, became the engines of tyranny in the hands of arbitrary princes. The court of Star Chamber, in which the members were sole judges of the law, the fact, and the penalty, was used in the reign of Henry 7, by Empson and Dudley, his corrupt and favorite ministers, as the engine of oppression to the subject, and of unjust emolument to the crown (*a*). During the prosperity of this oppressive tribunal, the common law authorities of the King's Bench fell into disuse, as being too feeble to satisfy the rapacity of ministers or the avarice of the sovereign. But when by 15 Car. 1. c. 10, the Star Chamber was finally abolished, the ancient power of the attorney-general and master of the crown office in filing informations, began to revive (*b*). At this time, both these officers had the power of thus accusing the subject at their discretion, which the attorney-general at present enjoys. Immediately after the revolution, therefore, a further reformation took place, and by the statute of 4 & 5 Wm. & Mary, c. 18, the coroner was reduced to a mere ministerial officer, and the informations exhibited by him in the crown office, subjected entirely to the control of the King's Bench, in that way which we shall presently examine. The attorney-general is not at all affected by this provision, and his authority remains in the same condition as before the statute was enacted (*c*).

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Informations, however, lie for misdemeanors only, nor can any man be convicted of treason or felony on this mode of proceeding (*d*). For, where life is in question, no one can be required to answer until the charge against him has been sanctioned by the oaths of a grand jury (*e*). When they are legal, they are filed in the court of King's Bench, except when they relate to matters of revenue, in which case they are usually commenced in the court of Exchequer, unless the offence has been accompanied with an

(*a*) See the indictment against Empson, 1 Anders. 156.

(*b*) 4 Bla. Com. 310.

(*c*) Hawk. b. 2. c. 26. s. 6.

(*d*) Ante, 165, 6. 2 Hale, 151.
1 Show. 109, 110. Hawk. b. 2.

c. 26. s. 3. Bac. Abr. Informations, A. 4 Bla. Com. 310. 2 Woodes. 561; see this elucidated by Lord Erskine, 1 vol. Speeches, 275.

(*e*) Id. ibid. 4 Bla. Com. 310.

INFORMATIONS. assault or other forcible obstruction of a revenue officer; in which case the proceeding is most frequently in the King's Bench.

We have seen that criminal informations at the present day are of two kinds—those filed *ex officio* by the attorney-general—and those which, by leave of the court, are prosecuted in the name of the coroner or master of the crown office—each of which we shall now proceed separately to examine.

I. Informations, *ex officio*, by the attorney-general.

By whom filed.

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Though, in general, informations *ex officio* are filed by the attorney-general alone, it is holden, that in case there be a vacancy in that office, it may be properly done by the solicitor-general; nor will there be any necessity for suggesting on the record the cause of this variance from the usual course of proceeding (*a*). And it is even said, that anciently the king's serjeant might thus prosecute on behalf of his majesty (*b*). So it appears, that in case of the illness of the attorney-general, his interest in the subject-matter, or other sufficient reason, his majesty may appoint any other to sue for justice in his name (*c*), though the officer who should interfere without proper authority, would do so at his peril (*d*).

When it lies.

Informations may be filed by the attorney-general for any offence, below the dignity of felony, which tends, in his opinion, to disturb the government or immediately to interfere with the interests of the public or the safety of the crown. He most frequently exercises this power in cases of libels on government, or high officers of the crown, obstructions of revenue officers, breaches of quarantine, bribery, and offering to bribe public officers. It seems indeed at his option to exert it, when any offence occurs which may thus be prosecuted in the crown office; but as he seldom interferes when the offence more immediately affects a private individual, we will defer the consideration of the cases in which informations in general lie, till we consider them as filed at the instance of a private individual (*e*).

(*a*) 4 Burr. 2553. Bac. Abr.
Informations, A. in notes.
(*b*) 4 Burr. 2553.

(*c*) 4 Burr. 2554.
(*d*) Id. *ibid*.
(*e*) See post.

The attorney-general is the sole judge of what public misdemeanors he will prosecute (*a*). He may file an information against any one whom he thinks proper to select, without oath, without motion, or opportunity for the defendant to show cause against the proceeding (*b*); but he generally pursues this course on grounds laid before him—by the affidavits of witnesses, as in the case of informations for obstructing a revenue officer, upon the oath of the officer himself; though where the offence is manifest, as in the case of a libel on government, no extrinsic evidence need be laid before the attorney-general. Neither he, nor any witness for the crown is bound by recognizance to prosecute with effect, and consequently the conduct, the continuance, the suspension, and the dropping the prosecution, are left entirely to his discretion (*c*). For he is not included in the regulations of the statute of William & Mary, which directs the proceedings when the information is filed by leave of the court; and, therefore, his power remains as at common law, without diminution and without control (*d*). Nor is he in any case liable to an action, on the supposition that the information was filed maliciously or unjustly (*e*).

How filed.

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The commencement of an information, *ex officio*, is as follows: Form of information, *ex officio* (*f*).
 “Be it remembered, that W. G. attorney-general of our sovereign lord the now king, who for our said lord the king prosecutes in this behalf in his proper person, comes here into the court of our said lord the king, before the king himself, at Westminster, in the county of Middlesex, on, &c. and for our said lord the king giveth the court here to understand and be informed, that,” &c. Where the solicitor-general prosecutes, during a vacancy, except in the difference of his description, the form is precisely similar (*g*). The substance of the charge then follows, in which all the requisites of an indictment must be observed, and the circumstances of the offence stated with the same accuracy and precision (*h*). But when the indictment would conclude with the

(*a*) 11 Harg. St. Tr. 270.
 4 Bla. Com. 312. 2 Woodes.
 562. Bac. Ab. Informations, A.

(*b*) Id. *ibid*.

(*c*) Id. *ibid*.

(*d*) Hawk. b. 2. c. 26. s. 6.

(*e*) 1 T. R. 514. 535.

(*f*) See form, post, last vol. 6.

11 Harg. St. Tr. 264.

(*g*) 4 Burr. 2553.

(*h*) 4 Burr. 2556. In revenue informations, not so much nicety

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words "against the peace of our said lord the king, his crown and dignity," the information proceeds further: "whereupon the said attorney-general of our said lord the king, who for our said lord the king in this behalf prosecutes, prays the consideration of the court here in the premises, and that due process of law may be awarded against the said C. D. (the defendant) in this behalf, to make him answer to our said lord the king, touching and concerning the premises aforesaid, &c." And the whole is then subscribed by the signature of the attorney-general, and filed in the crown office (*a*).

Copy of Infor-
mation,

By the 60 Geo. 3, and 1 Geo. 4. c. 4. s. 8, in informations for misdemeanors by the attorney or solicitor-general, the court are, if required, to order a copy of the information to be delivered after appearance, to the defendant or his clerk in court, or attorney, free of expence, provided no copy has been previously given (*b*).

Of quashing or
demurring to the
information.

So independant is the authority of the attorney-general, that the court will not quash his information on the motion of the defendant, but will compel him to plead or to demur (*c*). Nor will they quash it upon the motion of the attorney-general himself, if he find it to be defective, in order to enable him to file another; because he has the power of entering a nolle prosequi, and of preferring a new charge whenever he pleases (*d*). Informations both at common law, and against officers in the service of the East India Company, under the statutes (*e*), may be amended on demurrer, though if amendment after amendment were applied for merely to harass the defendant, the court would refuse any longer to lend their sanction (*f*).

Trial, &c.

The attorney-general having filed his information, might, before the 60 Geo. 3, and 1 Geo. 4. c. 4, bring it on to trial at what time

and particularity is required, 9 Price, 397. Ancient precedents are to be considered as good authority for the form of particular counts, 11 Price, 183.

(*a*) See form, 11 Harg. St. Tr. 266. Post, last vol. 6.

(*b*) See ante, 404.

(*c*) 1 Salk. 372. Com. Dig. Information, D. 4. Bac. Ab. Informations, A. *acc.* sed vide 1 Sid. 152, *cont.*

(*d*) Dougl. 239.

(*e*) 24 Geo. 3. c. 25. 26 Geo. 3. c. 57.

(*f*) 4 T. R. 457.

he thought proper (*a*); but now by that act it is enacted, that if the information be not brought to trial within twelve months after the plea of not guilty pleaded, the court may, on the defendant's application, of which twenty days notice must be given to the attorney or solicitor-general, allow the defendant to bring on the trial. And, independently of this act, it must be observed, that if the defendant can show that he has been aggrieved by unnecessary delay, he may apply to the court to fix a day for a trial at bar, which they will not refuse him (*b*). He cannot, however, carry down the trial to nisi prius by proviso, without the consent of the attorney-general, as that proceeding implies laches which can never be imputed to the crown or its officers (*c*). The court of Exchequer will not postpone the trial of an information on the application of the defendant, on the ground of his commission to examine witnesses not having been returned, if they think that there has been sufficient time for its return (*d*); but if the defendant can shew delay between the first process issuing against a defendant, and the filing of the information against him, and during that interval he has gone abroad on his duty, as well as some of his witnesses, that court will postpone the trial on motion (*e*). The affidavit by a defendant to ground a motion to postpone the trial on account of the absence of the witnesses, must be minute and circumstantially particular as to all the matters therein stated (*f*).

In general, the trial of the defendant is on the nisi prius side of the court of King's Bench, and is conducted in the same way as an indictment for a misdemeanor at the assizes (*g*). But the attorney-general is entitled to a trial at bar if he prefers it (*h*). He usually chooses to try before a special jury, the mode of summoning whom we have already considered (*i*),—a practice which

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(*a*) 11 Harg. State Trials, 272. Ante, 510. 487, 8.

(*b*) 2 East, 209. Ante, 510. 487, 8.

(*c*) 2 East, 202. Ante, 510. 487, 8.

(*d*) 3 Price, 221.

(*e*) 2 Price, 116.

(*f*) 11 Price, 229. 1 M'Clelland's Rep. 251. 11 Price, 232.

(*g*) See the course of proceed-

ing against Mr. Horne Tooke, 11 Harg. St. Tr. 264 to 289.

(*h*) 1 Stra. 644.

(*i*) Ante, 521, &c. and see 1 B. & A. 193. 1 Chit. Rep. 85, (a). 8 Price, 220. Tidd's Prac. 8th edit. 345, for further as to striking the special jury, but these cases were decided before the late Jury Act.

TRIAL, &c. has been objected to as too unfavorable to the subject, when the influence of the crown is opposed to a single individual, and state policy is in question (*a*).

On the trial, the attorney-general has the right to reply, even though the defendant calls no witnesses (*b*). He cannot himself be called as a witness to be examined as to his motives for commencing the prosecution (*c*).

If, on the trial, the defendant be acquitted, or if a *nolle prosequi* be entered, he has all his own expences to defray, as it is beneath the dignity of the crown either to receive costs or to pay them (*d*). If he be convicted, and actually in court at the time, he may be committed in the interval between the verdict and judgment, if the attorney-general moves the court to that effect, but he may be admitted to bail, and if he be absent it is more usual to permit him to remain at large on his recognizance till brought up to receive sentence. Judgment is not pronounced until moved for by the attorney-general, who may, if he thinks fit, exercise a virtual prerogative of pardon, by entering a *nolle prosequi* or declining to bring up the party convicted. But if he delays to the inconvenience of the defendant, he may voluntarily appear and demand judgment to be passed against him. When brought up to receive sentence, the attorney-general moves the judgment of the court on the defendant, who then, either personally or by his counsel, addresses the court in mitigation of punishment, and files affidavits to the same purpose (*e*). At this time the sentence is not always pronounced, but the party convicted is sometimes sent to some of the king's prisons on the motion of the attorney-general, for a few days, while the court deliberate on the facts before them, and resolve on the judgment. At the end of that time, he is again brought into court, and sentence is passed upon him. In deciding upon the severity of the punishment, the court will take into their consideration the time the defendant has been already in prison. The nature of the

(*a*) 11 Harg. St. Tr. 273.

(*b*) Ante, 627, 8, 9. 11 Harg. St. Tr. 289.

(*c*) 11 Harg. St. Tr. 283.

(*d*) Hullock on Costs, 557.

Ante, 825.

(*e*) See proceedings, ante, 691, 692.

sentence varies of course, according to the colour of the offence, TRIAL, &c.
and the aggravations or excuses with which it may attended (a).

Informations in the name of the master of the crown office seem, at common law, to stand on the same footing as those filed ex officio by the attorney-general, and the important distinctions which now exist, arise principally from the 4 & 5 W. & M. c. 11, and the practice which has subsequently regulated the mode and substance of the proceedings. The master of the crown office, in whose name they are filed, is, to this purpose, the officer of the public, as the attorney-general is the minister of the crown (b). They divide themselves into two classes—those filed against private individuals, and those which are granted against magistrates, for misconduct in the discharge of the duties of their office.

II. Informations in the name of the Master of the crown office against private individuals.

The 4 & 5 W. & M. c. 18. s. 2, prohibits the master of the crown office from exhibiting any informations without express leave of the court of King's Bench, in which tribunal, therefore, the whole jurisdiction over this class of information is vested. The object of our inquiries is, therefore, to determine, in what cases that court has power to sanction this mode of prosecution, and when, in their discretion, they will exert it. Their absolute power seems, in its strictest sense, to extend over every description of misdemeanor; but they have no more authority to suffer treason or felony to be thus prosecuted, than the attorney-general possesses (c). Upon regular motion, grounded on proper affidavits, and not sufficiently answered by the party accused (d), they will grant leave to file a criminal information, in case of all offences below the degree of felony, which do not so immediately affect the security of government, as to require the interference of the attorney-general, and which yet are important in themselves, and

I. Against private individuals, for what offences, and in what cases the court will grant them.

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(a) See the form of judgment on outlawry, Hand's Prac. 453. 6 T. R. 574.

(b) 4 Burr. 2570.

(c) 2 Hale, 151. 1 Show. 109, 110. Hawk. b. 2. c. 26. s. 3. 4 Bla. Com. 310. Bac. Abr. In-

formation, A. 2 Woodes. 561. Burn, J. Information. Williams, J. Information, Criminal, I. See ante, 165, 6, and Lord Erskine's Speeches, vol. i. 275.

(d) See post, 856, as to the necessary proceedings.

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in their consequences, materially affect the public welfare (*a*). Thus it has been allowed for offences immediately affecting God, religion, or morality, as for blasphemy, or obscene writings (*b*), for attempting to bribe a privy counsellor to procure the reversion of an office grantable by his majesty (*c*), for procuring a female apprentice to be assigned, though with her own consent, for purposes of prostitution (*d*), for seducing a woman addicted to drinking to make her will (*e*), for an imposture and conspiracy to defraud (*f*), and for enticing a young man or woman from their parents or guardians, to marry them, or with any other improper design, even though the parties accused have been committed for a contempt by the court of Chancery (*g*). An information has also been allowed for offences against public justice as for perjury, and suborning witnesses (*h*), extortions (*i*), embracery (*k*), rescuing persons in custody under legal process, or escaping from imprisonment upon a prosecution for a contempt (*l*), attempting to prejudice the minds of a jury, by distributing hand bills with that tendency, just before a trial (*m*), for publishing the proceedings before a coroner, accompanied with comments, although the statement be correct, and the party had no malicious motive in the publication (*n*) and for libelling or obstructing magistrates in the discharge of their duty (*o*).

(*a*) Hawk. b. 2. c. 26. 2 Hale, 151. Bac. Abr. Informations, A. & B. 2 Nolan's Poor Law, 262. Williams, J. Information, Criminal.

(*b*) 2 Stra. 789, (filed by the attorney-general.) Bac. Abr. Informations, B. in notes. See post, vol. ii. 13; and vol. iii. 871, 2.

(*c*) 4 Burr. 2494. Bac. Abr. Informations, B. in notes.

(*d*) 1 Bla. Rep. 439. Bac. Abr. Informations, B. Com. Dig. Information, C.

(*e*) 2 Burr. 1099. Bac. Abr. Informations, B. in notes.

(*f*) 1 Bla. Rep. 292. Bac. Abr. Informations, B. in notes.

(*g*) 2 Stra. 1107, 8. Andr. 310. Hawk. b. 2. c. 26. sects. 1 & 9. Bac. Abr. Informations, A. Williams, J. Information, Criminal, I.

(*h*) 1 Show. 111. 1 Sess. Cas. 177. Hawk. b. 2. c. 26. s. 1. Bac. Abr. Informations, B. Williams, J. Information, Criminal, I. for perjury before committee of the house of commons, 5 B. & A. 926.

(*i*) Hawk. b. 2. c. 26. s. 1. 2 Barn. 310. Bac. Abr. Informations, B. Williams, J. Information, Criminal, I.

(*k*) 1 Saund. 300, b.

(*l*) Cro. Car. 209. Hawk. b. 2. c. 26. s. 1. Bac. Abr. Information, A. Williams, J. Information, Criminal, I.

(*m*) 4 T. R. 285. Hawk. b. 2. c. 26. s. 9.

(*n*) 1 B. & A. 379.

(*o*) Carth. 14, 15. Bac. Abr. Informations, A. Williams, J. Information, Criminal, I.

This proceeding may also be obtained for offences against public police, as the spreading false news (*a*), nuisances (*b*), neglecting to repair highways (*c*), obstructing navigable rivers (*d*), keeping great quantities of gunpowder so as to endanger the neighbourhood (*e*), against the captain of a man of war for refusing to permit the coroner to come on board his vessel to take an inquest (*f*), against an overseer for forcibly removing a woman far advanced in pregnancy from one parish to another, in order to avoid the expence arising from the birth of her child (*g*), and for altering a rate after it has been made and allowed, by introducing a person therein for election purposes (*h*). This course may also be taken against a person for refusing to take upon himself the office of sheriff, as the vacancy of that situation is an obstacle to public justice (*i*). It may also be obtained for offences against the public peace, as for riots, and other acts of violence (*k*).

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Where the misdemeanor is of an atrocious nature, the same proceeding will be allowed, though it immediately affect an individual only, as for spiriting away a child to the plantations (*l*), for impressing a captain maliciously, as if he were a common seaman (*m*), for pretended conversations and communications with a ghost, tending to accuse a man of having committed murder (*n*), for an indecent libel on a married man, giving a ludicrous account of his mar-

(*a*) Hawk. b. 2. c. 26. s. 1. Bac. Abr. Informations, B. Williams, J. Information, Criminal, I. Burn, J. Information.

(*b*) Id. *ibid*.

(*c*) Sir T. Raym. 384. Hawk. b. 2. c. 26. s. 1. Bac. Abr. Informations, B. Williams, J. Information, Criminal, I. But this is not usual, unless under particular circumstances.

(*d*) Show. 112. 116. Hawk. b. 2. c. 26. s. 1. Bac. Abr. Informations, B. Williams, J. Informations, Criminal, I.

(*e*) 2 Stra. 1167. Hawk. b. 2. c. 26. s. 9. Bac. Abr. Informations, B. in notes.

(*f*) Andr. 231. 2 Stra. 1097.

Hawk. b. 2. c. 26. s. 9. Bac. Abr. Informations, B. in notes.

(*g*) 2 Nolan's P. L. 262.

(*h*) Id. *ibid*.

(*i*) 2 T. R. 731.

(*k*) Hawk. b. 2. c. 26. s. 1. Bac. Abr. tit. Informations, A. Burn, J. Information. Williams, J. Information, Criminal, I. Kenyon's Rep. 108.

(*l*) Sir T. Raym. 474. Hawk. b. 2. c. 26. s. 1. Bac. Abr. Informations, B. Williams, J. Information, Criminal, I.

(*m*) 1 Bla. Rep. 19. Hawk. b. 2. c. 26. s. 9. Bac. Abr. Informations, B. in notes.

(*n*) 1 Bla. Rep. 392. Hawk. b. 2. c. 26. s. 9.

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riage with an actress (*a*), and for a gross libel on a public body of men (*b*), or on an individual, which he will by affidavit positively swear to be untrue (*c*). So an information will be granted against a corporation for entering libellous reflections in their books respecting the issue of a trial and the administration of public justice (*d*), for bribery at a corporation election (*e*), for contempts of the king's authority, as departing from parliament without his licence, disobeying his writs, and uttering money without his sanction (*f*). It may also be obtained for notorious cheating, for forgery at common law, and for conspiracy whatever may be its object (*g*). A collector of taxes who obtains more than is due to apply to his own use, may be punished by this mode of proceeding (*h*). And where several persons went to the owner of a cottage on a waste which had been built for more than twenty years, demanding money, and threatened to demolish it on refusal, an information was granted against them (*i*). The statute [853] 24 Geo. 3. c. 25. s. 64, directs this proceeding either by the attorney-general, ex officio, or by motion in the King's Bench, for misdemeanors committed in our East India possessions, and prescribes the mode in which the prosecution shall be conducted (*k*). Formerly it was usual to grant an information against overseers for procuring the marriage of a pauper with an intent to throw the burthen of maintenance to another parish (*l*), but the court have long come to a resolution to refuse them and leave the applicant to seek a remedy by indictment (*m*).

But though the court has this extensive jurisdiction, yet in the exercise of their discretion there are many cases of misdemeanors where the court would refuse to grant an information either be-

(*a*) 1 Bla. Rep. 294. Hawk. b. 2. c. 26. s. 9. Bac. Abr. Informations, B. in notes.

(*b*) 5 B. & A. 595. 1 Dow. & R. 197.

(*c*) Dougl. 284. 387.

(*d*) 2 T. R. 199. Hawk. b. 2. c. 26. s. 9.

(*e*) 2 Ld. Raym. 1377. Hawk. b. 2. c. 26. s. 9. Bac. Abr. Informations, B. in notes. See 3 B. & A. 582, corrupt motives

should be shewn.

(*f*) Hawk. b. 2. c. 26. s. 1. Bac. Abr. Informations, B. Williams, J. Information, Criminal, I.

(*g*) Id. ibid.

(*h*) 1 Sess. Cas. 160.

(*i*) Cas. K. B. 93.

(*k*) 4 T. R. 457.

(*l*) 1 Wils. 41. 4 Burr. 2106.

(*m*) Cald. 246, 247, n. (a). 2 Nolan, 262.

cause the offence does not require so severe a proceeding—because the party applying is himself culpable—or because the consequences of such a measure would be peculiarly oppressive. Thus an information will not be granted for bribery at an election, before the expiration of the two years within which an action may be brought, nor if the motion arise from persons who have themselves been the subjects of a prosecution for a similar offence (*a*). Nor will it be granted for striking a magistrate in the execution of his office, where it appears that he was himself the aggressor (*b*); or against a cheat or gambler on the application of others of the same character (*c*); or for sending a challenge where it seems to have been instigated by the provocation of the accuser (*d*). So the court will not sanction this course against a husband for attempting to take back his wife, contrary to articles of separation between them (*e*); nor against several for rising in a body to quell a riotous assembly, for small irregularities which may occur in the pursuit of so laudable a design (*f*). It has also been refused where an attempt to suborn has been sworn to (*g*), where a private individual, in order to effect a private purpose, read a proclamation, pretending it was that required by the riot act, when it was merely a fabrication of his own (*h*), where a minister was accused of misapplying money collected on a brief to assist sufferers by fire (*i*), and where another of the same clerical office was charged with perjury on a simoniacal admission to his living (*k*). Applications against a dissenter for refusing the office of sheriff (*l*), against members of a corporation for improperly applying their funds (*m*), against a surveyor of roads for misapplying monies, no corrupt motive being alleged (*n*), against a party for burying a

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(*a*) 1 Bla. Rep. 542. Hawk. b. 2. c. 26. s. 9.

(*b*) Rep. temp. Hardw. 240. Com. Dig. Information, C.

(*c*) 1 Burr. 548. Hand's Prac. 20.

(*d*) 1 Burr. 316. Hawk. b. 2. c. 26. s. 9.

(*e*) 1 Bla. Rep. 18. Hawk. b. 2. c. 26. s. 9.

(*f*) 1 Bla. Rep. 47. Hawk. b. 2. c. 26. s. 9.

(*g*) Hawk. b. 2. c. 26. s. 9.

Rep. temp. Hardw. 242.

(*h*) 1 Bla. Rep. 2. Hawk. b. 2. c. 26. s. 9.

(*i*) 1 Bla. Rep. 443. Hawk. b. 2. c. 26. s. 9. Com. Dig. Information, C.

(*k*) 1 Stra. 70. Hawk. b. 2. c. 26. s. 9. Com. Dig. Information, C.

(*l*) 2 Stra. 1193. Hawk. b. 2. c. 26. s. 9.

(*m*) Hawk. b. 2. c. 26. s. 9.

(*n*) 1 Chit. Rep. 702.

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dead body without a coroner's inquest (*a*), and against a party for disobeying a private act of parliament (*b*), have been equally unsuccessful. And an information will not be granted against a party for a nuisance to a bridge, without a previous application to remove it, be sworn to (*c*). And to support an information against a mayor and town clerk for misconduct at an election of a member of parliament, strong corrupt motives must be shown (*d*). It is said that if a statute in one clause prohibit an act, and in another gives a penalty no information can be filed (*e*), though, as we have already seen, an indictment may in some cases be supported (*f*). And it is certain that where the statute not merely prohibits an act, but makes it void if done; as where 18 Hen. 6. c. 11, forbids any man to become a Justice of the Peace who has not £40 per annum, and makes his appointment a nullity, this proceeding cannot be resorted to in order to punish his assumption (*g*). Nor is it usual, except under particular circumstances, to grant an information in the case of a libel against a private individual, unless it be of a very malignant and injurious nature, and the prosecutor positively swears the allegation to be without foundation (*h*). Nor will it be allowed, where the defendant has been already indicted for the same offence, and acquitted (*i*), or it is intended as a mode of trying a mere civil right (*k*), or if the defendants are in a low situation of life, and it is probable the costs of the proceedings would oppress them (*l*). And as the court of King's Bench will presume the attorney-general competent to the discharge of his official duties, they will not interfere in any case which it is his more peculiar province to prosecute (*m*). So that when by lapse of time, the penalty forfeited under a penal statute has fallen entirely to the crown, they will leave it to the king to prosecute for it himself through the means of his own

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| (<i>a</i>) Kenyon's Rep. 250. | 498. Com. Dig. Information, |
| (<i>b</i>) 1 Burr. 385. Hawk. b. 2. | C. |
| c. 26. s. 9. | (<i>i</i>) Hawk. b. 2. c. 26. s. 8. |
| (<i>c</i>) Kenyon's Rep. 379. | (<i>h</i>) Cro. Jac. 212. Hawk. |
| (<i>d</i>) 3 B. & A. 382. | b. 2. c. 26. s. 8. |
| (<i>e</i>) 2 Woodes. 563. | (<i>l</i>) Cald. 246, 7. |
| (<i>f</i>) 4 T. R. 202. 2 Burr. 799. | (<i>m</i>) 4 Burr. 2089. 3 Burr. |
| (<i>g</i>) 2 Mod. 302. Com. Dig. | 1565. 4 Bla. Com. 309. Hand's |
| Information, C. | Prac. 19. 2 Woodes. 563. |
| (<i>h</i>) Dougl. 284. 387. 1 Stra. | |

officer (*a*). And offences beyond the seas, or within the admiralty jurisdiction, will not be thus punished, except where the court have power by some act of parliament to redress them (*b*).

I. AGAINST
PRIVATE
INDIVIDUALS.

Besides these cases by which the discretion of the court may be guided, they will take into their consideration all the circumstances of the charge before they lend their sanction to this extraordinary mode of prosecution. They will observe the *time* of making the application, and whether a long interval has elapsed since the injury, and to what cause it may fairly be ascribed; they will consider the *evidence* on which the charge is founded, and weigh the probabilities which it seems to offer; they will examine the character and motives of the applicant, at least his share in the matter before them; and they will look forward to the consequences of the measure, they are requested to allow in the peculiar situation of the defendants (*c*). The mode in which all these circumstances are brought before them by the course to be taken in applying for a criminal information, is now proper to examine.

It is, however, necessary here to observe, that before a party aggrieved applies to the court for leave to file a criminal information, he must resign his civil remedy, and drop any action which he has already commenced against the defendant, unless, from peculiar circumstances, the court see fit to allow him to continue, or to institute a civil proceeding (*d*). And if an action is actually depending, they will refuse to grant the information, unless there be a positive engagement to suspend all other remedies (*e*).

[856]

Though the rules adopted by the court respecting the time of moving for a criminal information apply, in strictness, only to the case of magistrates (*f*), it should be the object of the prosecutor, in every case, to bring forward his accusation as early as possible,

Time and notice
of motion.

(*a*) 2 Stra. 1234.

(*b*) 2 Stra. 918. 1 Sess. Cas. 246.

(*c*) 1 Bla. Rep. 542. As to when applications of this nature against magistrates should be made, see post, 875.

(*d*) 2 T. R. 198. 2 Burr. 830. 719. Hawk. b. 2. c. 26. s. 8, *in notis*. Hand's Prac. 5. Burn, J. Information. Tidd's Prac. 8th edit. 8, note (*h*).

(*e*) Rep. temp. Hardw. 241.

(*f*) See post, 875.

TIME AND
NOTICE OF
MOTION.

because, as we have already seen, any delay which he is unable to explain will operate greatly to his prejudice, and may even induce the court to refuse his application (*a*). But no notice of his motion, and of course, no affidavit of service is necessary, preliminaries which must be observed, where a magistrate is accused of misconduct in the discharge of the duties of his office (*b*).

Affidavits on
which the motion
is grounded *.

[857]

Before the statute 4 & 5 W. & M. c. 18, it was in the power of any individual to file an information without disclosing to the court the grounds on which it was exhibited (*c*). But as, by that provision, no proceeding of this kind can be allowed without leave of the court, that permission is only to be obtained upon affidavits stating the circumstances on which the applicant seeks to proceed by this extraordinary method. These must not only charge the defendant with such a crime as will justify the court in interfering, but must, in general, show the innocence of the party applying, and that his motives are honorable and sincere (*d*). To this rule there seem, however, to be some exceptions which rest on their own circumstances and do not affect the general principle. Thus where in a libel against a peer, the defendant accused him of treasonable words spoken in parliament, where nothing that is said is liable to question; and where a man has been libelled generally as a thief, or abused with any other charge expressed in general language, he will not be called on to swear the negative, as if particular facts had been alleged against him (*e*), and the affidavit need not negative the charge when the party libelled be abroad (*f*), and it need not do so where the libel is on a public body of men (*g*). The evidence offered upon these affidavits must be such as could be received before a grand jury or upon the trial; and therefore it must be sworn to by competent witnesses, and not depend upon hearsay or the unauthenticated declarations of another (*h*). There-

(*a*) Ante, 855. 1 Bla. Rep. 542. 5 B. & A. 612. Post, 374.

(*b*) Hand's Prac. 19. See post, in the case of Magistrates.

(*c*) 4 T. R. 290.

(*d*) Dougl. 284. 387. 588. 1 Burr. 402. Burn, J. Information.

(*e*) Dougl. 387, 390. 2 Chit. Rep. 162.

(*f*) 2 Chit. Rep. 162.

(*g*) 5 B. & A. 595. 1 D. & R. 197.

(*h*) 6 T. R. 294. Bac. Abr. Informations, D. in notes. See ante, as to Evidence, 568, 588.

* See forms of affidavits, post, last vol.

fore the statement of a quaker cannot be received in support of the application, though his affirmation may be read in exculpation of himself (*a*). So if a person apply to the court for a criminal information against another for sending him a challenge, and swears in his affidavit that the letter was delivered to him by a third, who told him he came from the defendant but had refused to make oath of that circumstance, the court will refuse his application and leave him to indict, when he may compel the attendance of his necessary witnesses by the usual process (*b*). On a motion for an information against two persons for endeavouring to raise the price of oil, it must distinctly appear that they combined together (*c*). But it is not necessary that the affidavits on which the charge is founded should have been originally taken for the purpose, for if the charge is having unduly endeavoured to prejudice the minds of the jury in a cause to be brought to issue, and the facts were disclosed in affidavits to put off the trial, an information may be granted against the party offending on the matters brought before the court with this collateral design (*d*). And where the witnesses who refuse to make affidavit appear to be directly under the controul of the party accused, it seems that the court will sometimes permit secondary evidence to be given of what they have previously asserted (*e*). So where the matter alleged to be criminal is contained in letters, copies of them sufficiently verified to be correct will suffice (*f*). And an affidavit that the defendant confessed the charge, if not sufficiently denied, will be sufficient to induce the court to grant an information against him (*g*). In moving for an information against a mayor, &c. for bribery at an election for parliament, the affidavit should show positively corrupt motives (*h*).

AFFIDAVITS ON
WHICH MOTION
IS GROUNDED.

[858]

It is not the practice for any of the affidavits in the course of an application of this nature, to be entitled in any cause previous to the rule being made absolute, but only "In the King's Bench" (*i*).

(*a*) Ante, 592.
 (*b*) 6 T. R. 294.
 (*c*) 2 Chit. Rep. 163.
 (*d*) 4 T. R. 285.
 (*e*) 2 T. R. 203, in notes, sed quære.

(*f*) 1 Burr. 402.
 (*g*) Andr. 384.
 (*h*) 3 B. & A. 582.
 (*i*) 6 T. R. 60. Com. Dig. Information, D. Andr. 313, 14. Hand's Prac. 3. 2 Stra. 704.

**AFFIDAVITS ON
WHICH MOTION
IS GROUNDED.**

It is indeed laid down that all documents of this description in support of a motion for leave to file a criminal information, must not be entitled, and if they are, the court will refuse to receive them, that if produced on showing cause against the rule, they may be either with or without a title, and that after the rule has been made absolute, they must be uniformly entitled (*a*). The substance of the affidavits should be very full and explicit, and contain all matters necessary to criminate the defendant, and justify the party applying, as it is the general rule of the court not to allow any supplementary matter to be afterwards sworn, either to supply what is defective or explain what is obscure (*b*).

**Moving for Rule
to show Cause.**

[859]

The affidavits being thus prepared, as no notice is requisite to the party accused (*c*), the next step is for the prosecutor, by his counsel, (for he cannot do it in person) (*d*) to move the court of King's Bench for a rule calling upon the defendant to show cause why leave should not be granted to file an information against him (*e*). If there then appears, *primâ facie*, upon the inspection of the ex parte statements in the affidavits of the prosecutor, reason to call on the other party for his reply, the motion is granted. On this the rule is drawn up by the clerk of the rules in the crown-office (*f*). Where several persons have been guilty of a joint offence, one motion should be made and one rule granted for leave to file a single information, or otherwise they could not all be joined in one information; for if a distinct rule be obtained against each, distinct proceedings must severally be taken against them (*g*).

**Service of Copy
of Rule Nisi on
Defendant.**

When the rule is thus drawn up, the next step is to serve a copy on the defendant (*h*). Personal service is not, in general, requisite, and if it be delivered to the wife of the party, it will, *primâ facie*, be supposed that the defendant received it (*i*). But the presumption thus raised may be overthrown by the wife's swearing that her husband was beyond seas, or at such a distance that it was impos-

(*a*) 6 T. R. 642. Andr. 313, 4. Com. Dig. Information, D. 1. 12 East, 165. Tidd's Prac. 8th edit. 499. Hand's Prac. 3. 2 Stra. 704.

(*b*) Hand's Prac. 3.

(*c*) Ante, 856.

(*d*) 1 Chit. Rep. 602.

(*e*) Hand's Prac. 3, 4.

(*f*) See form of the Rule Nisi, post, last vol.

(*g*) 3 Burr. 1270.

(*h*) Hand's Prac. 3.

(*i*) 2 Stra. 1044. 4 T. R. 464. 1 B. & P. 394.

SERVICE OF
COPY OF RULE
NISI ON
DEFENDANT.

sible the notice should reach him (*a*). It is, therefore, the safest course, if possible, to leave it personally with the party to whom it is addressed. At the same time, the party served must be shown the original rule, from which the copy left with him is taken (*b*). After this an affidavit of the service must be made by the person who was actually present, in order that the rule may be made absolute, in case the defendant, at the time appointed, does not think proper to resist it (*c*). Formerly this course was generally pursued; for it was thought more prudent to suffer the information to be granted, than prematurely to expose the grounds of defence on which the party accused must ultimately rely (*d*). But now it is more usual to resist the application in the present stage; for which purpose counter affidavits are prepared in order to meet the accusation when the day for showing cause arrives (*e*).

[860]

If the defendant is conscious of his innocence of the charge alleged against him, he should take care to deny it in the most express and comprehensive terms, and not confine himself to a mere contradiction of the evidence stated by his accuser. Thus where, on a motion for an information for publishing a libel, the only affidavit produced was that of a man who asserted that the defendant had confessed to him the publication of the matter charged as offensive, the affidavit of the defendant that no such confession was made, will not induce the court to discharge the rule, but he should have denied the fact of publication itself on which the charge was founded (*f*). And even where the facts of the accusation cannot be denied, it is still open to the party against whom it is made to allege the purity of his intentions, and to negative the allegations of corrupt design, which will frequently induce the court to refuse their sanction to the severer course, and leave the prosecutor to indict if he thinks proper (*g*). The affidavit of the prosecutor's wife may, it seems, be read on behalf of the defendant, though it is not settled whether she could be

Affidavits of the
Defendant.

(*a*) Rep. temp. Hardw. 271.
2 Stra. 1044. Hand's Prac. 4.
(*b*) Hand's Prac. 4.
(*c*) Id. ibid. See form of Affidavit of service, Hand's Prac. 88. Post, last vol.

(*d*) Id. ibid.
(*e*) Id. ibid.
(*f*) Andr. 384.
(*g*) Dougl. 588. 2 Burr. 1162.
Hand's Prac. 6.

AFFIDAVITS OF
THE DEFENDANT.

[861]

sworn as a witness on the trial (*a*); and we have seen that though a quaker's affirmation cannot be read in support of a criminal information, it may be read in exculpation of the defendant, though not of third persons (*b*). It seems that these affidavits may either be with or without a title (*c*); but it is more proper that they should be entitled, as there is now a cause before the court to which they relate (*d*). The mode of entitling it, in general, is in the name of the king against the party on whom the rule nisi is granted, and of the court of King's Bench in which all the proceedings are taken (*e*).

Of enlarging the
time.

It frequently happens, that upon the motion to make the rule absolute, if not soon after the service of the notice, the party against whom the accusation is preferred applies to the court to enlarge the time for showing cause, either on the ground that a copy of the rule had been served too late to admit of the due preparation of the defence, or some other reason which may induce the court to grant a further delay (*f*). This, like the motion in chief, is made upon affidavits stating the facts on which the application is founded (*g*). If the grounds there laid appear satisfactory, the court will make a *rule* enlarging the time, but will, by the same rule, compel the defendant to file his exculpatory affidavits by a particular day, and if the rule is enlarged to a subsequent term, will require him to consent to appear and plead immediately, in case the information be granted against him (*h*).

Proceedings on
showing cause.

On the arrival of the time specified in the rule nisi, unless it has been enlarged, if no cause be shewn on the part of the defendant, the court, on the production of the affidavit of the service of a copy of the rule will make the rule absolute, if they think the case is one proper to be tried in the way desired by the accuser. But it more frequently happens that cause is shewn on the behalf

(a) 1 Sess. Cas. 243.

(b) Ante, 592, 857.

(c) 6 T. R. 60, 642. 12 East,
166, 7. Tidd, 496.(d) Andr. 313, 14. Hand's
Prac. 4. Ante, 859.

(e) Hand's Prac. 4.

(f) Hand's Prac. 4, 5.

(g) See form of affidavit, post,
last volume.(h) Hand's Prac. 5. See form
of Rule, post, last volume.

PROCEEDINGS
ON SHOWING
CAUSE.

of the defendant. Either in person (*a*), or more frequently by his counsel, he addresses the court on the subject-matter of his own affidavits, or the deficiency of the prosecutor's case, and submits to the court that the proceedings ought to be withdrawn. The counsel for the opposite party are then heard in reply. If the judges are doubtful as to the course which they ought to pursue, or wish for more evidence, they will sometimes adjourn the discussion to a future day, or even a subsequent term, and will then, when both parties have closed, take time to advise (*b*). At length, having examined the affidavits and heard the arguments, they will openly pronounce their decision. If they think the grounds for the application insufficient, they will then make a rule to discharge the former (*c*). If they resolve on this, it still remains a question by whom the costs of the proceedings shall be defrayed. Where the court think the defendant has been culpable, but that his excuse in some degree palliates his offence, they will decline proceeding further against him, on condition that he pays, not only his own costs, but those which the prosecutor has incurred, in his endeavour to bring him to justice (*d*). Where they think the party accused has acted irregularly, but not criminally, and the prosecutor seems to have been actuated by unworthy motives, they will make no direction respecting costs, but leave to each party the payment of his own (*e*). Where, on the other hand, they entirely acquit the party accused of any criminality or default, and consider the applicant as having acted from officiousness or malice, they will discharge the rule nisi with costs, compelling him to defray the whole, and exempting the object of his charge from all loss by reason of a groundless or frivolous accusation (*f*). And where the attorney of the prosecutor of such a charge joined with him in the affidavit on which it was founded, and was proved to have uttered words expressive of his wish to harass and impoverish the defendant, on the discharge of the rule, he may be compelled to defray a moiety of the expences (*g*).

[862]

(*a*) The defendant cannot obtain a habeas corpus to bring him out of gaol to shew cause, 3 B. & A. 679.

(*b*) Dougl. 720, 1.

(*c*) See the form of rule to discharge rule nisi, 2 Burr. 722.

Post, last volume.

(*d*) Dougl. 314.

(*e*) 2 Burr. 722.

(*f*) 1 Burr. 556. 2 Burr. 787.
3 Burr. 1162. Hand's Prac. 7.

(*g*) 2 Burr. 654.

PROCEEDINGS
ON SHOWING
CAUSE.

[863]

When the rule is discharged with costs to be paid by either of the parties, the order should be obtained from the clerk of the rules, and taken to the master of the crown office, who will give his appointment for the taxation. A copy of this paper must then be served on the solicitor of the party who is to pay them. At the time fixed, the solicitor of the party who is to receive them, attends the appointment with his bill, when the master, in the presence of the solicitors and their clerks in court, taxes the costs, and gives his *allocatur* for the sum at which he fixes them (*a*). If they afterwards remain unpaid, the court, on affidavit of a personal demand, will grant an attachment against the party ordered to discharge them (*b*).

Of the recogni-
zance to prose-
cute *.

We are now to suppose the court see the grounds for the application, and that the rule is made absolute ; for if it be otherwise, all proceedings are here ended. The next step then is for the party who has thus far succeeded, to enter into the necessary recognizance to prosecute. This was rendered indispensable by the 4 & 5 W. & M. c. 18, which was intended to prevent the subject from being harassed by informations filed at the instance of private individuals, who might never bring the accusation to issue. By that statute it is enacted, that the master of the crown office shall issue no process upon any information filed by leave of the court, until a recognizance has been delivered to him from the person procuring it to be exhibited, with the place of his abode, and his title or profession, to be entered in favor of the defendant, in the penalty of £20, to prosecute the information with effect, and observe such orders as the court shall direct. The sum specified seems almost too small at the present period, when money is so much reduced in value. Every justice of the peace is empowered to receive such a recognizance acknowledged before him.

Form of recog-
nizance.

It is therefore the practice for the prosecutor's clerk in court to prepare the recognizance, and procure it to be acknowledged be-

(*a*) Hand's Prac. 7. See form
of *Allocatur*, post, last vol.

(*b*) Hand's Prac. 7.

* See form of the Recognizance, Hand's Prac. 88. Post, last vol.

fore the clerk of the crown, or a justice of the peace for the district where the cause of the prosecution arises (*a*). When taken to the office, it must be entered of record, and a memorandum of it placed in an open room, to which all who desire it may resort without fee to inspect it (*b*).

FORM OF
RECOGNIZANCE.

These preliminary matters being attended to, the *information* is now to be prepared. It commences with a memorandum: "Be it remembered that Sir J. B. knight, coroner and attorney of our lord the now king, in the court of our said lord the now king, before the king himself, who prosecutes for our said lord the king in this behalf, in his proper person, comes here into the court of our said lord the king, before the king himself, at Westminster, on, &c. and for our said lord the king gives the court here to understand and be informed, that C. D. late of, &c. on, &c." after which follows the substance of the charge; the requisites of which are the same as in an indictment, for whatever certainty is required in one is also necessary in the other (*c*). Thus, though informations are not named in the statute of additions, it is necessary to describe the defendant as in an indictment, or a plea in abatement may be supported (*d*). So the offence must be positively stated, and not by way of recital (*e*). But it has been holden, that where an information for perjury stated that it appeared by the rolls of the court that a certain action was brought, that a trial was had thereon, and that the defendant on the trial took the oath, which was false, &c. without repeating, "and the said coroner, &c. further gives the court here to understand and be informed" before the mention of the false swearing, the allegations were sufficiently positive (*f*). And an information for a libel need not contain the

Of the information itself, its form and requisites*.

(*a*) Hand's Prac. 8.

(*b*) Com. Dig. Information, A. 2.

(*c*) 4 Burr. 2556. Hawk. b. 2. c. 26. s. 4. Bac. Abr. Informations, C. Williams, J. Information, Criminal, C. Burn, J. Information.

(*d*) 4 Burr. 2556.

(*e*) 3 Salk. 375. Hawk. b. 2. c. 26. s. 4. 1 Show. 337. Com. Dig. Information, D. 3.

(*f*) Sir T. Raym. 34. Hawk. b. 2. c. 26 s. 4. Bac. Abr. Informations, D.

* See forms of Informations, Hand's Prac. 132 to 262, post, vol. ii. 7.

OF THE
INFORMATION
ITSELF, ITS
FORM AND
REQUISITES.

words "with force and arms," or allege that the matter is false (*a*). Care must be taken not to accumulate a number of charges, but to confine the case to a single and specific offence; and, therefore, where a ferryman was charged with several acts of extortion, without alleging the persons, the cattle, or the quantity of goods in respect whereof the excessive remuneration was demanded, the court arrested the judgment after a verdict of guilty (*b*). Several defendants may, however, be joined for singing two songs respecting two different individuals, and the judgment will not be arrested, though one of them should be wholly innoxious (*c*). The leave of the court to file the information does not appear on the record (*d*); and none of the statutes of Jeofails extend to informations; so that defects are not aided by verdict (*e*), though, as we have seen, they are amendable at any earlier stage of the prosecution (*f*).

Of filing the information, and of process.

The information being thus prepared, is engrossed and filed by the clerk in court whom the prosecutor employs (*g*). Process is then issued to compel the defendant to appear. But if this be issued before the requisite security to prosecute is taken, it will be set aside on motion; for the object of 4 & 5 W. & M. c. 18, was, that the master of the crown office should file no information without leave, and issue no process on it, without recognizance (*h*). When, therefore, this previous step has been taken, the practice of the crown office is to issue a *subpœna*, which the prosecutor's clerk in court makes out and engrosses, and a copy is served on the defendant, who has four days allowed him to make his appearance from the day of the return (*i*). At the expiration of this time, if the defendant does not appear, an affidavit is made of the ser-

(*a*) 7 T. R. 4.

(*b*) Carth. 226. 4 Mod. 102.
1 Show. 389. 3 Salk. 192, 201.
Com. Dig. Information, D. 2.
Bac. Abr. Information, C.

(*c*) 2 Burr. 980.

(*d*) Cowp. 501.

(*e*) Wood's Instit. b. 2. c. 4.
Burn, J. Information.

(*f*) Ante, 298.

(*g*) Hand's Prac. 8.

(*h*) Rep. temp. Hardw. 248.

(*i*) Hawk. b. 2. c. 27. s. 14.
Bac. Abr. Informations, D.
Hand's Prac. 8. Burn, J. Information. See form of Subpœna, post, last vol.

vice of the subpoena, and a *capias* is awarded (*a*). This, however, is only the case where the information is granted against a private individual, for when a corporation aggregate are thus prosecuted a *distringas* is the only course which can be adopted (*b*). If the latter process be issued into a foreign country, there must be fifteen days between the teste and the return (*c*).

OF FILING THE
INFORMATION,
AND
OF PROCESS.

Besides this usual course of proceeding, the court of King's Bench have the same power of issuing bench warrants at once to apprehend the party accused, when they think the nature of the case requires it (*d*). But as this subject applies in the same way to informations as to indictments, and the proceedings in both cases are similar, it will be sufficient to refer the reader to that part of the work where we have already discussed it (*e*).

If the defendant does not appear on any of these modes of requiring him so to do, it will be necessary to proceed to outlawry. It was, indeed, formerly thought that this process would not lie upon an information, but the contrary is now fully settled (*f*); and the proceedings are precisely similar with those on indictment for offences below the degree of felony (*g*). As in that case, the first step must be by *venire*, and the subpoena and *capias* will not be considered as any stages in the proceedings to outlawry.

When the defendant does not abscond, his clerk in court usually enters an appearance for him on the record, within the time limited for that purpose (*h*). If this be neglected, in case the defendant is in custody, the prosecutor should cause a copy of the information to be delivered to the party himself, or to the keeper or turnkey of the gaol in which he is confined, together with a notice, that if an appearance, and either a plea or demurrer be

Of appearance *.

(*a*) Hawk. b. 2. c. 27. s. 14. Hand's Prac. 8. Burn, J. Information. See the form of *Capias*, post, last vol.

(*b*) 1 Salk. 374. Hawk. b. 2. c. 27. s. 10. Burn, J. Information. See form of *Distringas*, post, last vol.

(*c*) 1 Salk. 374.

(*d*) 48 Geo. 3. c. 58. s. 1.

(*e*) Ante, 339 to 345.

(*f*) 4 Burr. 2555, 6, 7, 8, 9.

6 T. R. 573.

(*g*) See ante, 350 to 361.

(*h*) Hand's Prac. 8.

* As to appearance in general, see ante, 411, &c.

OF APPEARANCE not entered on his behalf, within eight days, he shall proceed to enter them for him: and, if this has no effect, he may go before any judge or commissioner of the court empowered to take depositions, and make affidavit of the steps that he has taken, after which he may lawfully act up to the notice he has given, cause all necessary proceedings to be entered, and proceed to trial as if the general issue had been actually pleaded by the defendant (*a*). An infant appears by clerk in court, in case of an information against him (*b*).

Of office copy of information, rules to plead, and imparlance.

On the entry of the appearance, the defendant's clerk in court delivers to his solicitor an office copy of the information, which, we have seen, in case of a prisoner in custody, must be left either with the party himself or with the keeper or turnkey of the prison (*c*). At the same time the prosecutor's clerk in court enters two four-day rules to plead (*d*), and when they are expired, a motion is made by counsel for a peremptory rule, which, in London and Middlesex, is two days, and in other counties ten, and which is drawn up by the clerk in court, and served by him on the defendant's clerk in court (*e*). But if the party accused be not in custody, and has duly appeared, he is entitled to an imparlance of course (*f*) till the term ensuing (*g*). Where, on the other hand, he is in prison, or comes in on a *cepi corpus*, outlawry, or attachment, he must plead immediately, because he has been guilty of a contempt, and no further time can be allowed him (*h*). After the expiration of the peremptory rule, and of the imparlance when the defendant is entitled to it, if no plea be put in, the prosecutor will be entitled to sign judgment by default (*i*), which the defendant sometimes chuses to allow, when he sees no probability of an acquittal—as well to save the expence of a trial,

(*a*) 48 Geo. 3. c. 58. s. 1. Ante, 411, 12.

(*b*) 2 Ld. Raym. 1284. Ante, 411.

(*c*) Hand's Prac. 9. 48 Geo. 3. c. 58. s. 1. Ante, 412.

(*d*) Ante, 432, 3. See forms of Four-day Rules, post, last volume.

(*e*) 6 T. R. 594. Hand's

Prac. 9. Ante, 432, 3. See form of peremptory rule, post, last vol.

(*f*) 1 Salk. 367. Com. Dig. Information, D. 5.

(*g*) 2 Salk. 514. Com. Dig. Information, D. 5.

(*h*) 2 Salk. 514. Com. Dig. Information, D. 5.

(*i*) Ante, 433.

as to operate in extenuation of his offence, when brought up to receive sentence (*a*).

Unlike an indictment which is the finding of a grand jury, and, therefore, cannot, in its substance, be altered after it is found, an information, being the mere assertion of the officer who files it, may be amended at any time before the trial (*b*), even the day before the trial it may be amended, without the consent of the defendant, before a single judge at his chambers (*c*). And a revenue information filed by the attorney-general, may be amended at any time as a matter of course, on his motion (*d*). So a mistake in any criminal information may be rectified, either when a demurrer is actually put in, or when it is expected (*e*); or after the defendant has pleaded in abatement, on payment of the extra expences (*f*). And these alterations may be very extensive and material: thus counts may be struck out (*g*), or new ones inserted (*h*). Nor will the defendant be always allowed to plead *de novo* (*i*). But after the record is gone down to trial, and been withdrawn, the court will not suffer the venue to be changed from one county into another (*k*). When the amendment is made before a judge at his chambers, the prosecutor must apply for a summons to shew cause why the alteration should not be effected (*l*). On this the judge will issue a summons in the cause directed to the defendant's clerk in court, agent, attorney, or solicitor, requiring him to attend him at his house or chambers, and shew cause why the specific amendment should not be made (*m*). But though he is thus desired to attend, his consent is not requisite (*n*). And the judge will proceed to make an order that the information be amended, by making the proper alteration in the part it is thought proper to alter (*o*).

Of amending
and quashing the
information.

(*a*) Hand's Prac. 9. Ante, 429, 30.

(*b*) 4 Burr. 2527, 2568, 9. 2 Stra. 871. 1 Stra. 185. 4 T. R. 457. Ante, 497, 8.

(*c*) 4 Burr. 2527.

(*d*) 3 Anstr. 714.

(*e*) 4 T. R. 457. 4 Burr. 2527.

(*f*) 2 Ld. Raym. 1307. 1472.

(*g*) Rep. temp. Hardw. 203, 9.

(*h*) 3 Anstr. 714.

(*i*) 2 Stra. 871. 1 Barnard, 342, 344.

(*k*) 2 Barnard, 6. 2 Stra. 911.

(*l*) 4 Burr. 2528.

(*m*) Id. *ibid*.

(*n*) Id. *ibid*.

(*o*) Id. *ibid*. where see forms of these proceedings.

OF AMENDING. As defective informations are thus amendable, the court will not quash them on the motion of the defendant (*a*), except it appear that the court have no jurisdiction to try it (*b*). But if there is an information for perjury committed on the trial of an information for conspiracy, the court, if they think fit, may, on the consent of all parties, arrest the judgment on the latter, and quash the proceedings on the former (*c*).

Of pleas and demurrers.

Before the expiration of the peremptory rule to plead, the defendant's clerk in court usually enters the plea, which is commonly the general issue, not guilty (*d*). The defendant may, indeed, plead another information depending—a previous acquittal or conviction, and any other matter in bar, as if he had been indicted (*e*). But it is of little use to plead in abatement or demur, where the defendant would sustain no inconvenience from the defect, since we have seen, the proceedings may immediately be amended (*f*). We have seen also, that where the defendant is in custody, and neither appears nor pleads, the prosecutor may, after due notice, enter the general issue for him, and proceed, at once, to trial (*g*).

Issue and notice of trial.

The pleadings being complete, the prosecutor's clerk in court makes up the issue, with notice of trial, and the solicitors of both parties take office copies of the forms (*h*). The time of the notice is the same as in proceedings on an indictment in K. B. (*i*). In the Exchequer, if the venue be in London or Middlesex, before the trial, six days' notice must be given, but if the trial be at the assizes, within six days after the expiration of the term preceding (*k*). In order to prevent defendants from being harassed by the wanton delay of the prosecutor, the 4 & 5 W. & M.

(*a*) 1 Stra. 185, 871. 1 Salk. 372. Com. Dig. Information, D. 4. Burn, J. Information, *acc.* 1 Sid. 140, *cont.*

(*b*) Com. Dig. Information, D. 4. 1 Burr. 385.

(*c*) 2 Stra. 1072.

(*d*) Hand's Prac. 9.

(*e*) Com. Dig. Information, D. 5. See ante, 432 to 430.

(*f*) 4 T. R. 457.

(*g*) Ante, 867. 48 Geo. 3. c. 58. s. 1.

(*h*) Hand's Prac. 9. See the Forms of Issue and Notice of Trial, post, last vol.

(*i*) Ante, 487, 8.

(*k*) Com. Dig. Information, D. 7.

c. 18, enacts, that if he neglects for a year after issue is joined, to bring on the cause to trial, the court may award them costs, and if the amount is not paid within three months, the defendant will be entitled to the benefit of the prosecutor's recognizance (*a*). And if, after notice given, the prosecutor neither countermands it in time, nor proceeds to trial, the costs must, by the course of the court, be paid to the defendant; though if the latter had drawn in the former, by giving him reason to believe that he would produce documents material to be brought forward in evidence, that might be a reason to induce the court to depart from their usual practice (*b*). The court of K. B. upon an application of the defendant, postponed the trial of an information for a misdemeanor, upon the defendant's consenting, by writing under his own hand, to the examination upon interrogatories of a witness for the crown (*c*).

In this stage of the proceedings, it is, that one of the parties, Special jury. most frequently the prosecutor, takes measures to bring the charge under the cognizance of a special jury (*d*). When this is the case, the solicitor for the party, who wishes for the special jury, draws up a motion paper for the rule, to which he obtains the signature of counsel, and on this the clerk of the rules, without any motion to the court, draws up the rule, on which the solicitor procures the master's appointment to name the jury (*e*). The mode of striking this jury, as well as the jury process in ordinary cases, the time, place, and mode of trial, the motion for a new trial, in arrest of judgment, and for judgment as well as the sentence itself, with the opportunities afforded for compromise, are precisely the same as in case of an indictment for a misdemeanor, either originally found in the King's Bench, or removed thither by certiorari, from some inferior tribunal (*f*). It has, indeed, been said, that the sentence will be more severe on this proceeding, than if the defendant had been convicted on an indictment, because it is only allowed where the offence is of a nature in-

(*a*) 4 & 5 W. & M. c. 18.
s. 2.

(*b*) 3 Burr. 1304.

(*c*) 2 M. & S. 602, and see
Tidd's Prac. 8th edit. 831.

(*d*) Hand's Prac. 9, 10.

(*e*) Hand's Prac. 10. See
forms, post, last vol.

(*f*) See ante, 521, &c.

SPECIAL JURY. jurious to the public interests (a); but that is only saying that enormous misdemeanors will be punished more severely than those which are trivial; for it cannot be supposed that if, on the trial of an offender in the ordinary course, he appeared to be guilty of a crime calling for marked punishment, he would receive a lighter sentence, because no information was filed against him.

The costs of the *prosecutor*, and the power of the court to award him a third of the fine towards paying them, seem also to be similar to the case of an indictment (b). But there are different rules established with respect to the *defendant's* expences; thus it is enacted, by 4 & 5 W. & M. c. 18, that if the prosecutor does not try within a year after issue joined, if the defendants be acquitted by verdict, or if a *nolle prosequi* be entered, the court of King's Bench are authorized to award them costs, unless the judge, before whom the information is tried, *certifies*, in open court, on the trial, that there was a reasonable ground for instituting the prosecution; and if the costs are not paid within three months after taxation, they will have the benefit of the recognizance entered into before the issuing of process (c). If the prosecutor neglects to apply for the judge's certificate at the trial, the court will have no discretion to refuse his costs to the defendant, even though the verdict was against the direction of the judge, and he certify *ore tenus* that it was contrary to evidence (d). The only *certificate*, therefore, which can be available for this purpose, is one entered on the *postea* (e). And wherever the defendant's case is such, as authorizes the court to award him costs, he will receive them *ex debito justitiæ*; for it is a general rule, that when judges are empowered by a statute to do an act of justice, they are bound, of course, to execute the power with which they are invested, and let the case be ever so hard, they have no discretion to exercise (f). But, if the information was tried at bar, the defendant will not in any case be entitled to costs, because the words of the statute are, that the court is authorized to award

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Form of Certificate.

(a) 2 Woodes. 563.

(b) Ante, 826, &c.

(c) See ante, 863.

(d) 2 Stra. 1131. Com. Dig. Information, A. 2.

(e) Comb. 345. Com. Dig. Information, A. 2.

(f) 2 Ch. Ca. 191. 2 Stra. 1131. Hawk. b. 2. c. 26. s. 21.

costs, &c. “ unless the judge before whom the information shall be tried shall, at the trial, in open court, certify, upon record, that there was a reasonable cause for exhibiting such information,” which is to be understood of a trial at nisi prius; and it would be absurd to suppose that the judges of the King’s Bench, at a trial before themselves, should make a certificate to themselves. But the better reason appears to be, that where the cause is of such consequence as to warrant a trial at bar, it may reasonably be supposed not to come within the intention of the statute, which was principally directed against trifling and vexatious prosecutions (*a*). And if there be several defendants, some of whom are acquitted, and others convicted, the former cannot have their costs under the statute, because, previous to its being past, no defendant, in an action, could have thus been reimbursed his expences under similar circumstances, and the act will not be construed to give them any right in criminal, which they did not formerly possess in civil proceedings (*b*). After all, the statute has only rendered the prosecutor liable to the extent of £20, named in his recognizance; for, on paying that sum, he will be discharged from all liability, though the actual expences should greatly exceed it (*c*). Nor will the court compel the prosecutor, at the time they grant the information, to give security to the defendant for the costs which may exceed the sum for which the recognizance is given; so that the defendant, though acquitted, will still receive only £20, towards the payment of his expences (*d*).

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Informations against magistrates are subject to nearly the same rules as those against private individuals; and we shall only, therefore, notice those circumstances in which they differ. These

Informations in
the Crown Office
against Magis-
trates.

(*a*) 7 Mod. 47. Hawk. b. 2. c. 26. s. 10. Bac. Abr. Informations, D. Hullock, on Costs, 388, 9. Williams, J. Information, Criminal, IV.

(*b*) 1 Salk. 194. Hawk. b. 2. c. 26. s. 11. Bac. Abr. Informations, D. Hullock, on Costs, 588. Williams, J. Information,

Criminal, IV.

(*c*) 2 T. R. 145. 3 Burr. 1819. Hawk. b. 2. c. 26. s. 12. Hullock, 589. Bac. Abr. Informations, D. Hand’s Prac. 18.

(*d*) 2 T. R. 197. Hawk. b. 2. c. 26. s. 12. Hullock, 589. Bac. Abr. Informations, D.

INFORMATIONS
AGAINST
MAGISTRATES.

In what cases
Informations
against Magis-
trates will be
granted.

[874]

variations are chiefly found in the causes for which the court will grant them; in the time within which the motion must be made; in the necessity for previous notice; and in the costs which the court will award, when they refuse to make the rule absolute.

As the court of King's Bench exercises a superintendancy over all inferior jurisdictions, and possesses authority to restrain the proceedings of inferior magistrates, it is invested with the power of inflicting punishment, by information, when they act corruptly, according to their discretion (*a*). Error in form is no ground for a criminal information (*b*). The question is not, whether the act done might, on full investigation, be found to be strictly right; but whether it proceeded from dishonest, oppressive, or corrupt motives (under which fear and favor may generally be included), or from mistake or error. In either of the latter instances, the court will not grant the rule (*c*).

This proceeding will, therefore, be granted, on motion, as against ordinary persons, in cases where the court think it proper to interfere. Thus it may be obtained against a mayor, for wilfully absenting himself from sessions, which could not be held without his presence (*d*)—against two justices, for neglecting to put an act of parliament in execution, from favor and partiality to an individual (*e*)—against a justice, for singly taking an examination, preparatory to making an order of removal; and against two others for signing the order, as if it had been taken before them all, without either summoning the party, demanding security, or entering into the merits of the question (*f*). This course may also be adopted where one magistrate, from illegal motives, discharges a person committed by another under the vagrant act (*g*)—

(*a*) See cases in the following notes, and Hand's Prac. 1, 2.

(*b*) 1 Chit. Rep. 219.

(*c*) 3 B. & A. 430. *Quære*, whether a criminal information will lie against justices for making a false return to a mandamus, unless the return is corruptly and wilfully false, 1 Dow. & Ry. 485, S. C. not S. P. 5 B. & A. 755.

(*d*) 1 Stra. 21. Hawk. b. 2. c. 26. s. 9. Bac. Abr. Informations, B. in notes; when not, see 5 East, 372.

(*e*) 1 Stra. 413. Hawk. b. 2. c. 26. s. 9.

(*f*) Andr. 238, 39. 2 Stra. 1092. Hawk. b. 2. c. 26. s. 9.

(*g*) 2 T. R. 190. Hawk. b. 2. c. 26. s. 9. Bac. Abr. Informations, B. in notes. Post, last vol.

where judges of an inferior court, illegally give freedom to a debtor confined in their prison (*a*)—and where a justice exceeds his power, in bailing a person accused of felony (*b*). An information also lies against magistrates for a malicious conviction (*c*), corruptly granting or refusing a licence to keep an ale-house (*d*), for illegally demanding a fee, previous to the discharge of a party arrested, and committing him on his refusal to pay it (*e*); against any magistrate, or collector of taxes, for extortion (*f*), for abusing the King's commission, to the oppression of the subject (*g*), and for making a false return to a mandamus of matters known to be untrue (*h*). But where a magistrate appears to have acted with pure and upright intentions, the court will not thus interfere, but leave the party who thinks himself aggrieved, to the more ordinary remedy (*i*). And as it is but reasonable that those, who, in general, assist the public justice, and police of the country, should be protected in the honest discharge of their official duties, strong ground for an information must be laid, before the court will consent to allow it, and some flagrant proof of corruption must appear (*k*). And, where the application is made by a party, who alleges himself to have been illegally convicted, or otherwise aggrieved by the justice, in the way of his official duties, he will be required to make an affidavit, exculpating himself from the charge originally made against him, and which formed the ground of the adverse proceedings (*l*).

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In favor of magistrates also, the time within which any application of this kind must be made against them is limited. Thus, Time of motion.

(*a*) Rep. temp. Hardw. 135. Hawk. b. 2. c. 26. s. 9. Bac. Abr. Informations, B. in notes.

(*b*) 2 Stra. 1216.

(*c*) Cald. 305.

(*d*) 1 T. R. 692. 13 East, 270. 322. 3 Burr. 1317. Hawk. b. 2. c. 26. s. 9. Bac. Abr. Informations, B. in notes.

(*e*) 1 Wils. 7. Bac. Abr. Informations, B. in notes.

(*f*) 1 Sess. Cas. 159, 160.

(*g*) Hawk. b. 2. c. 26. s. 1. Bac. Abr. Information, B.

(*h*) 1 Salk. 374. Hawk. b. 2.

c. 26. s. 1. Bac. Abr. Information, B. 1 Dow. & Ry. 485. 5 B. & A. 755. Ante, 874, note (*c*).

(*i*) 2 Burr. 719. 722. 1162.

(*k*) 1 Bla. Rep. 422. 2 Burr. 719. 722. 1162. 2 Stra. 1182. 1 T. R. 652. 2 Dougl. 589. Hawk. b. 2. c. 26. s. 9. Bac. Abr. Informations, B. in notes. Hand's Prac. 2.

(*l*) 3 T. R. 388. Hawk. b. 2. c. 26. s. 9. Bac. Abr. Informations, B. in notes.

TIME
OF MOTION.

the court will not grant an information at the end of the term, so late, that cause cannot be shewn before the next, for any misconduct alleged to have taken place before its commencement, though they will do so if the circumstances complained of arose within it (*a*). And it seems, that after the expiration of two terms, no motion of this kind will be entertained at all (*b*); nor, indeed, so late in the second term, as to prevent him from shewing cause before its conclusion (*c*), and this rule is strictly adhered to; and where facts, tending to criminate a magistrate, took place twelve months before the application to the court, they refused to grant a criminal information, although the prosecutor, in order to excuse the delay, stated, that the facts had not come to his knowledge till a very short time before the application was made (*d*).

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Notice of motion
for rule nisi.

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Another difference between the case of magistrates and that of private individuals, in favor of the former, is the necessity of giving notice of the motion for the rule nisi, in the first instance. This, in every information against a justice, is necessarily the first proceeding (*e*). The notice should state the ground of complaint, and should be served personally on the party to whom it is addressed; and, if that be impracticable, left at his usual place of abode (*f*). And this must be done in sufficient time before the motion, to enable him, if he think proper, in the first instance, to oppose the motion for the rule nisi; but he seldom avails himself of this opportunity, as he can more effectually make his defence, when the affidavit, containing all the circumstances of the charge is filed, on shewing cause why the rule should not be made absolute (*g*). An affidavit of the service must then be made, in order to induce the court to grant the rule nisi, in case no opposition is made on the part of the defendant (*h*).

(*a*) 7 T. R. 80. Tidd's Prac. 8th edit. 503, 4.

(*b*) 13 East, 270. Loft, 394. 273. Hand's Prac. 6. Tidd's Prac. 8th edit. 503, 4.

(*c*) 13 East, 322. Tidd's Prac. 8th edit. 503, 4.

(*d*) 5 B. & A. 612.

(*e*) 2 Barnard, 284. Hand's

Prac. 2.

(*f*) 4 T. R. 465. Hand's Prac. 3. See form of notice, Hand's Prac. 87. Post, last vol.

(*g*) Hand's Prac. 3.

(*h*) Id. ib. See form of affidavit, Hand's Prac. 87. Post, last vol.

When the court, on the application to make the rule absolute, think that there is no ground for permitting an information to be filed, and the only question is, how the costs already incurred shall be defrayed, they will consider the circumstance of the party accused being a magistrate, and acting in the discharge of his official duties, as very material to their decision. And, therefore, where the court was moved to grant a criminal information against magistrates, and several others, for a misdemeanor, relating to the conviction of a poacher, they discharged the rule, with costs to be paid to the magistrates, and left the others to defray their own expences (*a*). And, in general, whenever the charge is altogether groundless, costs will be directed to be paid to the magistrate; and that not only by the prosecutor himself, but by his attorney, who joined in the affidavit for the rule, if his motives be proved to be malicious (*b*). But where the justice, though cleared from all oppressive intentions, appears to have acted irregularly, the court, while they will discharge the rule, will leave him to pay his costs, as if he were a common defendant (*c*).

Of discharging
the rule nisi,
with costs.

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From this stage of the proceedings the course seems to be the same, whether the object of the prosecution be a magistrate or a private individual. It need only, therefore, be observed, that the court incline, throughout the prosecution, to protect those whose authority it is important to maintain, and who must be liable to error, in the honest discharge of their numerous and complicated duties.

(*a*) 2 Burr. 1162. Bac. Abr.
Informations, B. in notes.

(*b*) 2 Burr. 654.
(*c*) 2 Burr. 722.

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5. To note (a) add—"Styl. 346, and cases in 1 Bing. 401."
to note (e) add—"See 1 Geo. 4. c. 75."
20. add—"If a man be found attempting to commit a felony in the night, any one may apprehend him and detain him until he be carried before a magistrate. 1 Ry. & M. C. C. 93."
22. add—"Killing an officer will be murder, though he has no warrant, and was not present when the felony was committed, but takes the party upon a charge only, and though that charge does not in terms specify all the particulars necessary to constitute the felony. Russ. & Ry. C. C. 329."
23. add—"Attempting illegally to arrest a man is sufficient to reduce killing the person making the attempt, to manslaughter, though the arrest was not actually made, and though the prisoner had armed himself with a deadly weapon to resist such attempt if the prisoner was in such a situation that he could not have escaped from the arrest; and it is not necessary that he should have given warning to the person attempting to arrest him before he struck the blow. Ry. & M. C. C. 80."
24. in line 9 from bottom, after "permit" add—"But where the parish clerk refused to read in church a notice presented to him for that purpose, and the person presenting it read it himself, at a time when no part of the church service was going on, it was held, that though a constable might be justified in removing him from the church, and detaining him until the service was over, yet he could not legally retain him afterwards to take before a magistrate. 2 B. & C. 699."
"And a constable arresting a man on suspicion of felony must take him before a justice to be examined as soon as he reasonably can; and it seems a constable cannot justify hand-cuffing a prisoner, unless it be necessary to prevent his escape. 4 B. & C. 596."
32. add—"It is always safest to issue a summons. See 2 Bing. 63."
35. add—"Where a statute gives a justice jurisdiction over an offence, it impliedly gives him power to apprehend any person charged with such offence; therefore a magistrate may issue his warrant to apprehend an offender under the Malicious Trespass Act, 1 Geo. 4. c. 56, especially after defendant has neglected a summons. 2 Bing. Rep. 63. Hawk. b. 2. c. 13. s. 15. 12 Rep. 131 b. 10 Mod. 248."
51. add—"See 1 B. & A. 592."
59. As to what may be done after arrest, see cases in *Addenda* to 24.
61. add—"Killing an officer will be murder, though he has no warrant, and was not present when the felony was committed. Russ. & Ry. C. C. 329."
77. add—"Swearing witnesses, after examination taken, is improper, and censurable. 4 Dow. & Ry. 734."

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128. Add—"And, in a modern case, a prisoner committed for manslaughter was allowed to give bail before a magistrate in the country, by reason of his poverty, which rendered him unable to appear with bail in court. 6 M. & S. 108."
137. add—"See opinion of the solicitor and attorney-general, as to the power of justices to hold an original general sessions, or adjourned quarter sessions, for the trial of prisoners. 5 Burn, J. 24th edit. 203."
143. add—"If indictments are found at the sessions, and transmitted to the justices of assizes by justices at sessions, the judge at assizes must try them, though not removed by certiorari. Russ. & Ry. C. C. 381; and see 4 Edw. 3. c. 2. 4 Inst. 186. 2 Hale, P. C. 32. 2 Hawk. P. C. c. 5. s. 32. Crown Cir. Comp. 27. As to transmitting indictments preferred at the quarter sessions in Middlesex to Old Bailey."
148. add—"Upon an indictment found at sessions, and transmitted to the assizes by justices at session, though they be not removed by certiorari, the judge of assize should try them. Russ. & Ry. C. C. 281."
153. in line 14 from top, add—"And the 46 Geo. 3. c. 54, enables the king to issue a similar commission to any such four persons as the lord chancellor shall approve of, for trying such offences in the same manner, in any of his majesty's islands, plantations, colonies, dominions, forts, or factories."
177. in line 12 from top, observe—"That the right to challenge, for want of hundredors, is taken away by 6 Geo. 4. c. 50."
180. in line 13 from bottom, after the word "county," add—"Or on the high seas (and when on the high seas, according to the mode pointed out by 33 Hen. 8. c. 23.)"
182. in line 8 from top note, the 13 Geo. 3. c. 84. s. 42, is repealed by 3 Geo. 4, c. 126.
- 189 a. in line 5 from top, after the word "in" strike out the remainder of sentence, and read "In the King's civil or military service in the British colonies or plantations, may, by 42 Geo. 3. c. 85. be indicted and tried in England. 8 East. 31."
191. in line 18 from top, add—"So an indictment on 30 Geo. 2. c. 24. for obtaining money by false pretences, the venue should be laid where the money was obtained, not where the false pretence was used. 4 Barn. & Ald. 179."
197. in line 7 from top, after the word "Westminster" add—"And also within the precincts of St. Martin's-le-Grand."
201. add—"On an indictment for a misdemeanor the court of K. B. will permit a suggestion to be entered on record, for the purpose of carrying the trial into an adjoining county, where there appears to be a reasonable ground on the affidavits for believing that a fair and impartial trial cannot be had in the county where such inference is to be drawn, 3 Barn. & Ald. 444; but a certiorari was refused to remove an indictment for murder from Yorkshire, in order to have a trial at bar in another county, on the ground that the prisoners who had pleaded could not have a fair and impartial trial in the former county. 3 Dow. & Ry. 301."

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204. In line 24 from top, add—"But plea must give a better addition. 6 M. & S. 88."
207. add—"So is the addition of servant. 6 M. & S. 88."
235. add—"See the cases, post, vol. iii. 1040."
251. add—"An introductory averment that outrages had been committed 'in, and in the neighbourhood of N.' is divisible. 4 M. & S. 532."
- 257 a. add—"There are no accessaries in simony, all are principals. Cro. Eliz. 789. In personating seamen to obtain prize money, contrary to the 57 Geo. 3. c. 127. s. 4, all persons aiding and abetting are principals. Russ. & Ry. C. C. 353."
261. add—"There are no accessaries in simony. Cro. Eliz. 789."
266. as to time of trial of accessaries, add—"By 43 Geo. 3. c. 113. s. 5, accessaries before the fact in every felony may be tried either in the county where the principal felon is tried, or in the county wherein the offence of being accessory was committed. But if principal felony be committed on high seas, then he shall be tried like principal, under 28 Hen. 8. c. 15, but no one tried for an offence by one jurisdiction shall be afterwards tried for same offence in another jurisdiction."
267. strike out the bottom line, and the next, to the words, 'at the, &c.' and *read* "of being accessaries before the fact to grand larceny, and in which they are entitled to benefit of clergy, may be fined and imprisoned one year only, instead of the other punishment in force."
404. add—"See now the 6 Geo. 4. c. 50. s. 21, repealing the 7 Ann. c. 21."
461. in line 9 from top, erase the words "on the trial."
468. add—"But now by 6 Geo. 4. c. 25. s. 1, where prisoner is convicted of a non-clergyable felony, a pardon, under the sign manual, countersigned by one of the principal secretaries of state, is sufficient."

END OF VOL. I.

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