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Francis White, Hampſhire.
John White, Bath.
Samuel White, Charlotte.
Chapman White, Fluvanna.
Alexander White, Frederick.
William White, Norfolk.
William White, Orange.
Matthew Whiteman, Randolph.
Peter B. Whiting, Glo'ſter.
John Wiatt, do.
William Wiatt, Frederickſbg.
John Wickham, Richmond ci.
James Wigginton, P. William.
Hez: L. Wight, Richmond ci.
George Wilcox, Lee.
James Wiley, Fairfax.
John L. Wilkins, Brunſwick.
W. W. Wilkins, Greenſville.

James Wilkinſon, Southamptn.
William Williams, Halifax.
J: Williams, Monongalia.
William C. Williams, Culpr.
Iſaac Williams, Harriſon.
F: Williams, Norfolk borough.
John Williams, Dumfries.
David Williams, Richmond co.
James Williams, do.
John Williamſon jun. Henrico.
George Williamſon, do.
Geo: Williamſon, Powhatan.
Thomas Willock, Norfolk bo:
Benj: D. Wills, Fluvanna.
James Wills, Iſle of Wight.
Emanuel Wills, do.
Mills Wills, do.
William Wilſon, Auguſta.
James Wilſon, Berkley.
Matthew Wilſon, Botetourt.
James Wilſon, Buckingham.
John Wilſon jun: Halifax.
William Wilſon, Harriſon.
David Wilſon, Hardy.
Thomas Wilſon, Monongalia.
Willis Wilſon, Portſmouth.
Wm: Wilſon jun: Norfolk co.
Wm: Wilſon, Randolph.
Wm: Wilſon, Fredericksburg.
Willis Wilſon, Surry.
Joſiah Wilſon, do.
T: Wilſon, city of Waſhingtn:
John Wimbiſh, Halifax.
Charles Wingfield, Albemarle.
Chriſtopher Wingfield, do.
William Winſlow, Spotſylvania.
William Wirt, Albemarle.
Peter Wiſe, Alexandr.
Wm: Wiſeham, Richmond ci:
Thomas Withart, Suffolk.
David Wood, Albemarle.
James Wood, Richmond city.
J: Woodford, Caroline.
Wm: C: Woodford, do.
Andw: Woodrow, Hampſh. 2.
William Woods, Albemarle.
James Woods, Amherſt.
James Woods, Montgomery.
Archibald Woods, Ohio.
Tarlton Woodſon, Albemarle.
George Woodſon, Cheſterfield.
Miller Woodſon, Cumberland.
Blake B. Woodſon, do.
John Woodſon, do.
Samuel Woodſon, Goochland.
Frederick Woodſon, Powhatan.
Tarlton Woodſon, P: Edward.
Jacob Woodſon, do.
William Wootten, do.
John Wormington, Norf. co.
Thomas Wrenn, I. of Wight.
James Wrenn, Fairfax.
John Wright, Orange.
Cornelius Wynkoop, Berkley.
George Wythe, Richm. city.
Benjamin Wythe, Suſſex.

Y.

Charles Yancey, Albemarle.
Joel Yancey, do.
R. H. Yancey, Culpeper.
Robert Yancey, Louiſa.
Joſeph Yarborough, Lunenbg.
Thomas Yerby, Richm. co.
Robert Young, Alexandria.
James Young, I. of Wight.
James Young, Portſmouth.
John Young, Rockbridge.
A. Yuille and Co. Richmond.

Z

Ebenezer Zane, Ohio.
Reuben Zimerman, Culpeper.

THE NEW VIRGINIA JUSTICE,

COMPRISING THE

OFFICE AND AUTHORITY

OF A

JUSTICE OF THE PEACE,

IN THE

COMMONWEALTH of VIRGINIA.

TOGETHER

WITH A VARIETY OF USEFUL PRECEDENTS ADAPTED TO THE LAWS NOW IN FORCE.

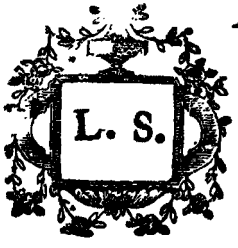
To which is added,

An APPENDIX containing all the moſt approved forms of CONVEYANCING, commonly uſed in this country, Such as Deeds, of Bargain and Sale, of Leaſe and Releaſe, of Truſt, Mortgages, &c.—Alſo the duties of a Juſtice of the Peace ariſing under the laws of the United States.

BY WILLIAM WALLER HENING,
ATTORNEY AT LAW.

RICHMOND: PRINTED BY T. NICOLSON, 1795.

District of *Virginia* o twit.



BE it remembered that on the third day of May, in the eighteenth year of the independence of the United States of America, WILLIAM WALLER HENING, *attorney at law of the said district, hath deposited in this office the title of a book, the right whereof he claims as author thereof, in the words following, to wit:* "The New Virginia Justice, *comprising the office and authority of a Justice of the Peace in the commonwealth of Virginia, together with a variety of useful precedents adapted to the laws now in force: To which is added an appendix containing all the most approved forms of conveyancing, commonly used in this country, such as deeds, of bargain and sale, of lease and release, of trust, mortgages, &c.— Also the duties of a Justice of the Peace arising under the laws of the United States." In conformity to the act of the Congress of the United States, entitled* An act for the encouragement of learning, by securing the copies of maps, charts, and books to the authors and proprietors of such copies during the time therein mentioned.

WILLIAM MARSHALL, C. V. D.

TO

The SUBSCRIBERS,

WHO, by patronizing this performance, have evinced their diſpoſition to encourage whatever may have a tendency to promote the public good,

This work

Is reſpectfully dedicated

By the author

WILLIAM W. HENING.

THE

PREFACE.

THE importance of the ſubject, of which the author has treated in the following work, has created, in him, an unuſual ſhare of diffidence, in ſubmitting it to the public. He is ſenſible that even on the moſt extenſive plan, it would have been a work of immenſe difficulty to convey the neceſſary information on all the various objects which fall under the juriſdiction of a magiſtrate, both as a conſervator of the peace, and as a judge of record. But when, in attempting this, he was confined to the narrow limits of a ſingle octavo volume of ſix hundred pages, the difficulty became conſiderably greater, and his hopes of attaining to any degree of perfection, were proportionably diminiſhed. It may, indeed, be aſked, why was the plan of the work ſo limited, as to preclude the admiſſion of *every thing* which related to the office of a Juſtice of the Peace in his ſeveral capacities? To thoſe, who conſider, that, in this ſtate, the only compenſation which a magiſtrate receives for his ſervices, is, a conſciouſneſs of having acted from patriotic motives, in the acceptance of a laborious office, and thus diſcharging his duty as a member of ſociety, the anſwer is obvious. Frugality, then, became an eſſential part of the plan —But the author would by no means infer that his attention to that point, has drawn him into a neglect of the more uſeful parts of the publication. He is well aſſured that in comparing this treatiſe with any other now extant, it will be found to contain not only more uſeful information on the ſame ſubjects, but a greater variety of *precedents*, beſides ſeveral *additional titles*, unnoticed in any other book of the kind hitherto publiſhed either in Great Britain or America.

Doctor Burn's Juſtice publiſhed in England, and Mr. Starke's in Virginia, have long afforded conſiderable aſſiſtance to our Magiſtrates. But as the former was calculated for the meridian of the country in which it was written, and the latter was publiſhed during our ſubjection to a regal government, and before our laws had acquired any degree of ſtability; it could not eſcape the obſervation, of any perſon, from the moſt ſuperficial view of thoſe books, that ſome other guide was indiſpenſably neceſſary. The *defects* of theſe writers, then, as they reſpect the preſent ſituation of America, are rather to be aſcribed to the materials from which their works were formed, than a want of judgment in the authors themſelves. Their *reputation* is too well eſtabliſhed to require the aid of panegyric, and the author hopes that no

expreſſion

expreſſion of his will be tortured into a meaning that he wiſhes to detract from it.

Convinced of the neceſſity of ſuch a publication, at this time, and flattered by the aſſurances of many of the authors friends, that he was not wholly unqualified for the taſk, he was prevailed on to undertake the preſent work. How far he has ſucceeded muſt be ſubmitted to the impartial judgment of his fellow citizens.

The materials of which this book is compoſed, have long been collecting, and would have aſſumed the form of a volume before now, had not the proſpects of a republication of our laws (for which the legiſlature made proviſion in the year 1789) made it neceſſary to wait the completion of that event.—No time has been loſt in haſtening this publication, ſince the reviſed code of laws, has been ſo far advanced, as to enable the author to avail himſelf of the uſe of it.

With reſpect to the books of authority, he has made uſe of all ſuch as are deemed ſufficiently authentic, and has generally adopted their own words, with a proper reference to the ſeveral parts of the book, where the doctrine may be found. In ſome inſtances, indeed, he has taken the liberty of varying the expreſſion ſo as to make it more agreeable to the ears of our republican citizens: Thus, inſtead of the words *King* and *ſubject*, he uſes the expreſſions *Executive* or *Commonwealth*, and *citizen*. This he hopes will render the work more generally uſeful, without affecting the ſenſe of the author.

He has, as far as poſſible, avoided the inſertion of any latin words, in the body of the work;—Conſcious that to *be uſeful*, not to *appear learned*, has been his principal object; and ſenſible that this book will fall into the hands of many who are ſtrangers to that language. Some technical words, indeed, or terms of art, are retained, becauſe having been in common uſe they are generally known and have become a part of our language. But, for the uſe of thoſe who have not been converſant in legal proceedings, he has prefixed "*An explanation*" of ſuch law terms as have occurred in the courſe of the preſent work.

It may be an objection with ſome that the great number of Indictments introduced into this work, has unneceſſarily increaſed the ſize of the book, in excluſion of other matter;—but the author could not otherwiſe diſcharge his obligations to the gentlemen of the bar, who have ſo generally promoted this publication;—nor will they be found wholly unuſeful to the Magiſtrates themſelves, as by obſerving the mode of expreſſion in the deſcription of the offence in the indictment, they may draw their Mittimus leſs liable to exception than has uſually been done.

PREFACE.

The Appendix, ſo far as it relates to the duties of a Juſtice of the Peace ariſing under the laws of the United States, has become a neceſſary appendage to the work from many of the objects of a magiſtrates juriſdiction under the ſtate governments, having been transferred to the Congreſs of the United States.—The other part of it containing forms of conveyancing ſpeaks its own utility.

To conclude: The author flatters himſelf, that on peruſing this work, it will be found that nothing material relating to the office of a Juſtice of the Peace, *out of court*, has been omitted.—That many important points of legal knowledge reſpecting the practical part of his duty, *in court*, are conveyed,—that private gentlemen, as well as the ſeveral officers of court, will find in it much uſeful information, and that in every inſtance, he has far exceeded his engagements with the public.

AUTHORS

Referred to in this Work.

A

Ambler.	Ambler's Reports.
Andr.	Andrew's Reports.
Atk.	Atkyns's Reports.

B

B. L. D.	Burn's Law Dictionary.
B. R. H.	Cases in the time of lord *Hardwicke.*
Bac. Abr.	Bacon's Abridgment.
Barnard. Cha.	Barnardiston's Reports in Chancery.
Barnard. K. B.	Barnardiston's Reports in King's Bench.
Blacks. / *Blacks. Comm.*	Blackstone's Commentaries.
Blacks. Rep.	Blackstone's Reports.
Brown.	Brown's Reports in Chancery.
Bull. N. P.	Buller's Nisi Prius.
Bunb.	Bunbury's Reports.
Burn. Just.	Burn's Justice. 15th ed.
Burr. / *B. M.*	Burrow's Reports.

C

Ca. Cha.	Cases in Chancery.
Chanc. Decis.	"Decisions of Cases in Virginia, by the High Court of Chancery," published in 1795, by the present Judge of that court.
Com. Dig.	Comyns's Digest.—By Kyd.
Co.	Coke's Reports.—The references are always to the *parts*, and not to the vols.
Co. Lit.	Coke's Commentaries upon Littleton.
Cro. Eliz.	Croke's Reports in the reign of Q. Elizab.
Cro. Jac.	Croke's Reports in the reign of James I.
Cro. Car.	Croke's Reports in the reign of Charles I. —Sometimes these reports are referred to by 1, 2, 3. Cro.
Crom.	Crompton's Justice.
Coup.	Cowper's Reports

D

Dalt.	Dalton's Justice.
Dyer.	Dyer's Reports.
Doug.	Douglas's Reports.

AUTHORS REFERRED TO.

F. N. B.	Fitzherbert's Natura Brevium.
Foſt.	Foſter's Crown law.
	G
Gilb. Dem.	Gilbert's Devises.
Gilb. Diſt.	Gilbert's Diſtreſſes.
	H
1 H. H. *2 H. H.*	Hale's Hiſtory of the Pleas of the Crown.
Hale's Pl.	Hale's Summary of the Pleas of the Crown.
1 Hawk. *2 Hawk.*	Hawkin's pleas of the Crown.—The references are generally to the laſt *folio* edition.—All the *octavo* editions have prefixed to each volume a table ſhewing what pages of the one edition correſpond with thoſe of the other.
Hob.	Hobart's Reports.
1 Inſt.	Coke upon Littleton.
2 Inſt.	The ſecond part of Coke's Inſtitutes.
3 Inſt.	The third part of Coke's Inſtitutes.
4 Inſt.	The fourth part of Coke's Inſtitutes.
	K
Kely.	Kelyng's Reports.
	L
Lamb.	Lambard's Juſtice.
Leon.	Leonard's Reports.
Lev.	Levinz's Reports.
Lit. §.	Littleton's Tenures.
Ld. Raym.	Lord Raymond's Reports.
	M
Mod.	Modern Reports.
Moo.	Moore's Reports.
	O
Ons. N. P.	Onſlow's Niſi Prius.
	P
P. Will.	Peere Williams's Reports.
Pl. Com.	Plowden's Commentaries.

R

Raym.	Thomas Raymond's Reports.
Rol. Abr.	Rolle's Abridgment.

S

Salk.	Salkeld's Reports.
Say.	Sayer's Reports.
Sid.	Siderfin's Reports.
Show.	Shower's Reports.
St. Tr.	State Trials.
Str.	Strange's Reports.

T

Term Rep.	Term Reports, by Durnford & East.
Theo. Ev.	Theory of Evidence.

V

Vent.	Ventris's Reports.
Vern.	Vernon's Reports.
Vez.	Vezy's Reports.
Vin. Abr.	Viner's Abridgment.
V. l.	Virginia Laws.—Commonly called the *Revised Code*, printed in 1794.

W

Wils.	Wilson's Reports.
Wood.	Wood's Institutes.

Y

Yelv.	Yelverton's Reports.

References not particularly enumerated above are such as are obvious to every reader.

AN EXPLANATION

Of the ſeveral LAW TERMS and ABREVIATIONS which have unavoidably been uſed in the following treatiſe.

A

Ad quod damnum. A writ by which the ſheriff is directed to inquire by a jury, what injury will accrue to the commonwealth, or to individuals, by granting a road, leave to erect a mill, &c.

Affidavit. An oath in writing taken before ſome perſon who has authority to grant it. They differ from a depoſition in this. That they are generally voluntary—do not require a commiſſion to iſſue from a court to authoriſe the taking of them, and are generally made uſe of on motions, as to diſſolve an injunction, and the like.

Alias. A ſecond or further writ, after a former writ hath been ſued out without effect: "We command you as we *formerly* have commanded you," *ſicut alias præcipimus.*

Alibi—In another place.

Amicus curiæ. If a Judge is doubtful or miſtaken in matter of law, a ſtander by may inform the court as *amicus curiæ* or a *friend to the court.* 2. Inſt. 178.

Anno Domini. *In the year of our Lord,* the computation of time from the incarnation of our Saviour.

Array, is the pannel of the jury returned by the ſheriff. And when a man intends to challenge the whole jury, as on ſuſpicion of partiality, or ſome default in the ſheriff who made the return, it is called *challenge to the array.*

Aſſumpſit, from the Latin, is a promiſe to pay on valuable conſideration; and is either *expreſs* or *implied.* See B. *Black's com.* 157.

Avowry, is where a perſon who takes a diſtreſs in his own right, *avows* and juſtifies in his plea for what cauſe he took it: If the defendent took the diſtreſs in right of another, he makes conuſance.

B

B. R. The initial of the latin words for the court of King's Bench.

Baron & Feme. The law French for huſband and wife.

Bona fide, is that which is done with *good faith,* honeſtly, without any fraud or deceit.

C

Capias ad audiendum. In caſe of a miſdemeanor, after the defendent hath appeared and is found guilty, and is not preſent in court upon his conviction, a *Capias* is awarded *ad audiendum judicium* (to hear and receive judgment) and if he abſconds, he may be proſecuted even to outlawry. 4. *Blacks. com.* 368.

Capias pro fine, is where one who is fined to the commonwealth, for ſome offence committed againſt a ſtatute, doth not diſcharge the fine according to the judgment. Whereupon his body is to be taken by this writ, and committed to priſon until he pay the fine.

Capias ad reſpondendum, is a writ, commanding the ſheriff to take the body of the defendant, in order that he may have it at a certain time in court to anſwer the demand of the plaintiff.—*Sec.* 3. *Blacks. com.* 282.

Capias ad ſatisfaciendum, is an execution againſt the body of the defendant. *Id.* 415.

Capias utlagatum, is a writ to apprehend the body of an outlaw. 3. *Blacks. com.* 284.

D

Damage feaſant. Doing damage. See Wood, B. 4. c 4.

De bene eſſe, in law, ſignifies that the thing done may be good for the preſent; but not if the party has it in his power to proceed by the ordinary method. 3. *Blacks. com.* 383.

De novo. Anew, over again.

Diſtrangas, is a writ directed to the ſheriff, commanding him to diſtrain one by his goods and chattels, to enforce his compliance, with what is required of him, as for his appearance in court on ſuch a day. F. N. B.

E.

Elegit. A writ of execution againſt the lands of the defendant. 1. *Inſt.* 289. 3. *Blacks. com.* 418.

Exigent. A writ which iſſues previouſly to an outlawry.

Ex officio, is ſo called from the power which an officer hath, by virtue of his office, to do certain acts without being particularly applied to. 1 *Hawk.* 137. 4 *Blacks. com.* 309.

F

Feme covert. A married woman.

Feme ſole. A ſingle woman.

Feræ naturæ. Animals of a *wild nature*, in which a perſon cannot have an abſolute, but only a qualified property. 2 *Blacks com.* 391.

Fieri facias. An execution againſt the goods. 3. *Blacks. com.* 417.

Forma pauperis (in the form of a poor person) is where a person being too poor to bear the expences of a law suit, is permitted to prosecute free from expence. 3 *Blacks. com.* 400.

H

Habeus corpus. See that title in the body of the work.

Habendum. That part of the deed which ascertains the quality of the estate granted. 2 *Blacks.* 298.

Habere facias seisinam. An execution for the possession of a freehold. If it is a chattel interest, and not a freehold, the writ is a *habere facias possessionem.* 3 *Blacks. com.* 412.

I

Jeofail, is compounded of the French *j'ay faillee,* that is, *I have failed;* and signifies an oversight in pleading, or other law proceedings. *Terms. L.*

M

Mesne proces. Generally the process which issue pending a suit, between the original commencement and the execution.

N

Ne exeat, &c. A writ issuing out of the High Court of Chancery, to restrain a person from going out of the state.—1 *Atk.* 521.

Nil dicit, is a failing by the defendent to put in an answer to the plaintiffs declaration by the day assigned; which being omitted, judgment is had against him of course, as *saying nothing,* why it should not.

Nil debet. The proper plea to an action on a contract not under seal, whereupon the defendant pleads, that he *owes nothing.* 3 *Blacks. com.* 305.

Nolle prosequi. A voluntary relinquishment of a prosecution. 2 *Lill.* 218.

Nomine pœnæ, is a penalty incurred for the non-payment of rent, or the like, at the day appointed by the lease or agreement for payment thereof. 2 *Lill.* 221. *Hob.* 82. 113.

Non assumpsit, is a plea in a personal action whereby a man denies any promise made, and originated from the form of expression used, while the proceedings were in latin.

Non compos mentis. A person of unsound mind. *See title "Lunatics."*

Non est factum. A plea to an action on a bond or deed, which is void in law, or which was never executed by the defendant. 2 *Lill.* 226.

Non est inventus, is the sheriffs return to a writ when the defendant is *not to be found* in his bailiwick.

Non pros' } is the letting a suit or action fall. 3 *Blacks. com.*
non suit, } 295.

Non

Non ſum informatus. A declaration made by an attorney that he is *not informed*, to ſay any thing material in defence of his client.

Nudum pactum. A bare naked agreement without any conſideration. T. L.——But if it is reduced to writing it is good againſt the party himſelf, but not ſtrangers. *Burr.* 1671.

O

Onus probandi. The burden of the proof.

P

Pluries. A third writ after two former writs have iſſued without effect.

Poſſe commitatus. The power granted the ſheriff of raiſing the power of his county to aid him in the execution of his office. 1 *Blacks. com.* 343.

Procedendo A writ by which a cauſe is remanded to an inferior court, from which it had been improperly removed.

Prochein Amy, is he that appears in court for an infant, who ſues any action, and aids the infant in the purſuit thereof.

Q

Quantum meruit (that is, as much as he has deſerved) in an action on the caſe, is where a man employs another to do a certain piece of work, without any ſpecial agreement, with reſpect to the price, the law implies that he ſhall pay as much as the other deſerved.

Qui tam.——See *Informations.*

S

Subpœna, is a proceſs to cauſe witneſſes to appear and give teſtimony *(ſub pœna)* under a penalty for diſobedience to the writ.

Subpœna duces tecum, is to compel the witneſs to *bring with him* ſome writing or other evidence neceſſary to be produced in the cauſe.

Superſedeas, is a writ that lies in a great many caſes, and ſignifies in general, a command to ſtay proceedings at law, on good cauſe ſhewn, which ought otherwiſe to proceed. F N B.

V

Venire (from thoſe words in the writ *venire facias)* is either in the nature of a *ſummons*, to cauſe the party to appear and anſwer an indictment or preſentment; or the proceſs directed to the ſheriff to cauſe a jury to appear. 4 *Blacks. com.* 313.

Voir dire (veritatem dicere) is where the party is examined upon oath to *make true anſwer*, to ſuch queſtions as the court ſhall demand of him. 3 *Blacks. com.* 332.—The caſes in which this practice is uſed, may be ſeen under title *Evidence.*

Other explanations may generally be found in thoſe parts of the book, in which the terms occur.

THE

NEW VIRGINIA JUSTICE,

ACCESSORY.

I. *Of acceſſories in general.*
II. *Of acceſſories before the fact.*
III. *Of acceſſories after the fact.*
IV. *How they are to be proceeded againſt.*
V. *Precedents of indictments againſt acceſſories.*

I. Of ACCESSORIES in general.

1 AN ACCESSORY *is he who is not the chief actor in the offence nor preſent at its performance, but is ſomeway concerned therein either before or after the fact committed.* 4. Blacks. 35.

2 In high treaſon there are no acceſſories, but all are principals: the ſame acts that make a man acceſſory in felony, making him a principal in high treaſon, upon account of the heinouſneſs of the crime. *Ibid.*

3 In petit treaſon, murder, and felonies with or without benefit of clergy, there may be acceſſories: except only in thoſe offences, which by judgment of law are ſudden and unpremeditated, as man-ſlaughter and the like; which therefore cannot have any acceſſories *before* the fact. 4 *Blacks.* 36.

4 In petit larceny, and in all crimes under the degree of felony, there are no acceſſories either *before* or *after* the fact; but all perſons concerned therein, if guilty at all, are principals: the ſame rule holding with regard to the higheſt and loweſt offences, though upon different reaſons. In treaſon all are principals, *on account of the heinouſneſs of the crime*; in treſpaſs all are principals, becauſe the law, *which doth not regard trifles*, does not deſcend to diſtinguiſh the different ſhades of guilt in petty miſdemeanors. 4 *Blacks.* 36.

5 It is a maxim, *that an acceſſory follows the nature of his principal*: and therefore an acceſſory cannot be guilty of a higher crime than his principal; being only puniſhed, as a partaker of his guilt. So that if a ſervant inſtigates a ſtranger to kill his maſter, this being murder in a ſtranger as principal, of courſe the ſervant is acceſſory only to the crime of murder; though,

had

had he been preſent and aſſiſting, he would have been guilty as principal of petty treaſon, and the ſtranger of murder. *Ibid.*

6 Lord Coke generally obſerves that when any offence is felony, either by the common law or by ſtatute, all acceſſories, both before and after the fact, are incidentally included. 3 *Inſt.* 59.

7 But yet the ſpecial penning of the ſtatute creating a felony, may greatly diverſify the offence of acceſſory or principal.

II. Of ACCESSORIES before the fact.

An acceſſory before the fact committed is he who being abſent at the time of the felony committed, doth yet procure, counſel, command, or abet another to commit a felony. 4 Blacks. 36.

Being abſent at the time of the felony committed] Abſence is neceſſary to make him an acceſſory; for, if ſuch procurer, or the like be preſent, he is guilty of the crime as principal. 4. *Blacks.* 36.

So alſo if divers come to commit an unlawful act, and be preſent at the time of the felony committed, tho' one of them only doth it, they are *all* principals. 1 *Hale.* P. C. 215.

So if one preſent move the other to ſtrike; or if one preſent did nothing, but yet came to aſſiſt the party if needful; or if one hold the party while the felon ſtrikes him; or if one preſent delivers his weapon to the other that ſtrikes: for they are *preſent* aiding, abetting, or comforting. *Ibid.* 216.

So if ſeveral perſons ſet out together, or in ſmall parties, upon one common deſign, be it murder or other felony, or for any other purpoſe unlawful in itſelf, and each taketh the part aſſigned him; ſome to commit the fact, others to watch at proper diſtances and ſtations to prevent a ſurprize, or to favour (if need be) the eſcape of thoſe who are more immediately engaged: They are all, provided the fact be committed, in the eye of the law preſent, at it. For it was made a common cauſe with them; each man operated in his ſtation at one and the ſame inſtant, towards one and the ſame common end; and the part each man took tended to give countenance, encouragement and protection to the whole gang, and to enſure the ſucceſs of their common enterprize. *Foſter's crown law.* 350.

But if one came caſually, not of the confederacy, tho' he hindered not the felony, he is neither principal nor acceſſory, altho' he apprehended not the felon; but for his negligence, he is puniſhable by fine and impriſonment. *Hale's* Pl. 216.

Alſo in ſome caſes even a perſon *abſent* may be principal; as he that puts poiſon into any thing to poiſon another, and leaves it,

it, tho' not preſent when it is taken: and ſo it ſeems all that are preſent when the poiſon is ſo infuſed, and conſenting thereunto *Hale's Pl.* 216.

Procure, counſel, command or abet.] In the conſtruction of theſe words, ſome diſtinctions are neceſſary to be obſerved: As,

(1) *When the principal doth not accompliſh the fact altogether in the ſame ſort, as it was beforehand agreed between him and the acceſſory.* And therefore if one commands another to lay hold upon a third perſon, and he lays hold upon him and robs him, the perſon commanding is not acceſſory to the robbery; for his command might have been performed without any robbery.—4 *Blacks.* 37.

But if the felony committed be the ſame in ſubſtance with that which is commanded, and only varying in ſome circumſtantial matters, as if, upon a command to poiſon *Titius*, he is ſtabbed or ſhot, and dies, the commander is ſtill acceſſory to the murder, for the ſubſtance of the thing commanded was the death of *Titius*, and the manner of its execution is a mere collateral circumſtance. 4 *Blacks.* 37.

So if the command had been to beat him, and the party commanded doth kill him, or beat him ſo that he dieth thereof; the perſon commanding ſhall be acceſſory to the murder: for it is a hazard in beating a man, that he may die thereof. *Dalt.* c. 161.

(2) *It is likewiſe a rule, that he who in any wiſe commands or counſels another to commit an unlawful act, is acceſſory to all that enſues upon that unlawful act; but is not acceſſory to any act diſtinct from the other.*] As in the caſe laſt above mentioned, where A commands B to beat C, and he beats him ſo that he dies, B is guilty of murder as principal, and A as acceſſory. But if A commands B to burn C's houſe, and he in ſo doing commits a robbery; now A tho' acceſſory to the burning, is not acceſſory to the robbery, for that is a thing of a diſtinct and unconſequential nature. 4 *Blacks.* 37.

So if one command another to ſteal a horſe and he ſtealeth an ox; or to rob a man by the high way of his money, and he robs him in his houſe of his plate; or to burn ſuch a ones houſe, and he burneth the houſe of another. There are other acts and felonies than he commanded to be done, and therefore he ſhall not be adjudged acceſſory to them. *Dalt.* c. 161.

(3) It ſeems to be generally agreed, *that he who barely conceals a felony which he knows to be intended, is guilty only of a miſpriſon of felony, and ſhall not be adjudged an acceſſory*; for this is not procuring, counſelling, or abetting. 2. *Hawk.* 317.

(4)

(4) It is ſettled that whoſoever procureth a felony to be committed, though it be by the intervention of a third perſon, is an acceſſory before the fact. 4 *Blacks.* 37.

(5) But of a man counſels or commands another to kill a perſon, and before he hath killed him, he who counſelled or commanded it repents, and *countermands* it, charging him not to kill him, and yet after he doth kill him; here ſuch perſon countermanding ſhall not be adjudged acceſſory to the murder: For generally the law adjudgeth no man acceſſory to a felony before the fact, but ſuch as continue in that mind at the time that the felony is done and executed. *Dalt.* c. 161.

(6) Yet if a perſon adviſe a woman to kill her child as ſoon as it ſhall be born, and ſhe kill it in purſuance of ſuch advice; he is an acceſſory to the murder, tho' at the time of the advice, the child being not born, no murder could be committed of it: For the influence of the felonious advice continuing till the child was born, makes the adviſer as much a felon, as if he had given his advice after the birth. 2 *Hawk.* 315.

III. Of ACCESSORIES after the fact.

An acceſſory after the fact may be, where a perſon knowing a felony to have been, receives, relieves, comforts, or aſſiſts the felon. 4 Blacks. 37.

Knowing a felony to have been.] There can be no doubt but that it is neceſſary that the receiver have notice of the felony, either expreſs or implied, and ſo to be laid in the indictment that the receiver *knew* that the perſon received by him, had committed the principal felony. 2 *Hawk.* 319.

A felony.] This as hath been ſaid holds place only in *felonies*, and in thoſe felonies, where by the law judgment of death regularly ought to enſue; and therefore not in petit larceny.——1 *H. H.* 618.

And therefore if a perſon do barely receive, comfort or conceal an offender guilty of any common treſpaſs, or inferior crime of the like nature, tho' he knew him to have been guilty, and that there is a warrant out againſt him, yet he is not an acceſſory to the offence; but perhaps in ſuch caſe he may be indictable for a contempt of the law, in hindering the due courſe of juſtice. 2 *Hawk*, 311:

Relieves, comforts, or aſſiſts the felon.] In the explication of theſe words, ſeveral points are worthy of obſervation.

(1) Generally, any aſſiſtance whatſoever given to one known to be a felon, in order to his being apprehended, or tried, or ſuffering the puniſhment to which he is condemned, is ſufficient

to

to bring a man within the deſcription, and make him acceſſory to the felony; as where one aſſiſts him with a horſe to ride away with, or with money or victuals to ſupport him in his eſcape.—2 *Hawk.* 317.

(2) But if a man knows that a perſon hath committed a felony, but doth not diſcover it, this doth not make him an acceſſory, but it is a miſpriſon of felony, for which he may be indicted, and upon his conviction fined and impriſoned. 1 *Hal.* P C 618.

(3) Alſo if a man ſees another commit a felony, but conſents not, nor yet takes care to apprehend him; this is a neglect puniſhable by fine and impriſonment, but it doth not make him an acceſſory. *Ibid.*

(4) In like manner, if one commit a felony, and come to a perſons houſe before he be arreſted, and ſuch perſon ſuffer him to eſcape without arreſt, knowing him to have committed a felony, this doth not make him acceſſory; but if he take money of the felon to ſuffer him to eſcape, this makes him an acceſſory: And ſo it is if he uſes any ſtratagem by which the purſuers of the felon are deceived, and he hath an opportunity to eſcape, this makes him an acceſſory; for here is not a bare omiſſion but an act done by him, to facilitate the felons eſcape. *Ibid.* 619.

(5) Alſo it ſeems to be ſettled at this day, that whoſoever reſcues a felon from an arreſt for the felony, or voluntarily ſuffers him to eſcape, is an acceſſory to the felony. 2 *Hawk* 318.

(6) But to relieve a felon in jail with clothes, or other neceſſaries is no offence: for the crime imputable to this ſpecies of acceſſory is the hindrance of public juſtice, by aſſiſting the felon to eſcape the vengeance of the law. 4 *Blacks.* 38.

(7) The ſame obſervations will apply to the caſe of a perſon bailed on ſuſpicion of felony. *Ibid.*

(8) So if a perſon ſends a letter in favour of a felon, or adviſes witneſſes not to appear, he is not an acceſſory to the felony; but it is a high contempt, and the laſt merits ſevere puniſhment: 1 *Burn's juſtice*, 6.

(9) But to convey inſtruments to a felon in jail to facilitate his eſcape, or to bribe the jailor to let him eſcape, makes the party an acceſſory. 1 *Hal. P C.* 621.

10 A man may be acceſſory to an acceſſory, by the receiving of him knowing him to be an acceſſory to a felony. *Hal. P. C.* 622.

(11) If a man hath goods ſtolen and he receives his goods again, ſimply, without any contract to favour the felon in his proſecution, this is lawful; but if he receive them upon agreement not to proſecute, or to proſecute faintly, this is theftbote

puniſhable by impriſonment and ranſom, but yet it makes him an acceſſory; but if he take money of him to favour him, whereby he eſcapes, this makes him acceſſory. 1 *Hale, P C.* 619.

(12) The felony muſt be complete at the time of the aſſiſtance given, elſe it makes not the aſſiſtant an acceſſory. As if one wounds another mortally, and after the wound given but before death enſues, a perſon aſſiſts or receives the delinquent, this does not make him acceſſory to the homicide; for till death enſues there is no felony committed. 4 *Blacks.* 38 *Hawk.* 320.

(13) but ſo ſtrict is the law where a felony is actually complete, in order to do effectual juſtice, that the neareſt relations are not ſuffered to aid or receive one another. If the parent aſſiſts his child, or the child his parent, if the brother receives the brother, the maſter his ſervant, or the ſervant his maſter, or even if the huſband relieves his wife, who have any of them committed a felony, the receivers become acceſſories after the fact.—— 4 *Blacks.* 38.—But a feme-covert cannot become an acceſſory by the receipt and concealment of her huſband; for ſhe is preſumed to act under his coercion, and therefore ſhe is not bound, neither ought ſhe to diſcover her lord. 4 *Blacks.* 39.

(14) But if the wife alone, the huſband being ignorant of it, do receive any other perſon being a felon; the wife is acceſſory and not the huſband. 2 *Hawk.* P. C. 320.

(15) But if the huſband and wife both receive a felon knowingly, it ſhall be adjudged only the act of the huſband, and the wife ſhall be acquitted. 1 *Hales.* P. C. 621.

(16) By Virginia laws. p. 216.—— 'It ſhall be lawful to 'proſecute and puniſh every perſon and perſons buying or receiving any ſtolen goods, knowing the ſame to be ſtolen, as for a 'miſdemeanor, to be puniſhed by fine and impriſonment, altho' 'the principal felon be not before convicted of the ſaid felony, 'which ſhall exempt the offender from being puniſhed as acceſſo'ry, if the principal ſhall be afterwards convicted.'—And buying the goods at an under value, is a preſumptive evidence that he knew they were ſtolen. 1 *Hal.* P C 619.

IV. *How they are to be proceeded againſt.*

(1) By the common law no acceſſory could be convicted or ſuffer any puniſhment, if the principal was not attainted, or had his clergy. But this is remedied by Virginia laws, p. 216.—Which enacts, 'that if any principal offender ſhall be convicted 'of any felony, or ſhall ſtand mute, or peremptorily challenge 'above the number of 20 perſons returned to be of the jury, it 'ſhall

'shall and may be lawful to proceed againſt any acceſſory, either 'before or after the fact, in the ſame manner as if ſuch principal 'felon had been attainted thereof, notwithſtanding ſuch prinipal 'felon ſhall be admitted to the benefit of his clergy, pardoned, 'or otherwiſe delivered, before attainder; and every ſuch acceſ-'ſory ſhall ſuffer the ſame puniſhment, if he or ſhe be convicted 'or ſhall ſtand mute, or peremptorily challenge above the num-'ber of twenty perſons returned to be of the jury, as he or ſhe 'ſhould have ſuffered if the principal had been attainted.'

2. Alſo, 'if any perſon or perſons ſhall receive or buy any 'horſe that ſhall be felonioufly taken or ſtolen, from any other 'perſon, knowing the ſame to be ſtolen, or ſhall harbour or con-'ceal any horſe ſtealer, knowing him, her or them to be ſo, ſuch 'perſon or perſons ſhall be taken and received as acceſſory or 'acceſſories to the ſaid felony; and being of either of the ſaid 'offences legally convicted by the teſtimony of one or more cre-'dible witneſs or witneſſes, ſhall incur and ſuffer the pain of 'death, as a felon convict.' V. l. p 188.

3. But, 'if any ſuch principal felon cannot be taken, ſo as 'to be proſecuted and convicted of any ſuch offence, yet never-'theleſs it ſhall and may be lawful to proſecute and puniſh every 'ſuch perſon and perſons buying or receiving any horſes ſtolen 'by any ſuch principal felon, knowing the ſame to be ſtolen, as 'for a miſdemeanor, to be puniſhed by fine and impriſonment, 'or other ſuch corporal puniſhment as the court ſhall think fit to 'inflict, altho' the principal felon be not before convict of the 'ſaid felony, which ſhall exempt the offender from being puniſh-'ed as acceſſory, if ſuch principal felon ſhall be afterwards taken 'and convicted.' *Ibid.*

4. 'An acceſſory to a murder or felony committed ſhall be 'examined by the court of that county or corporation, and tried 'by the court of that diſtrict, in which he became acceſſory, and 'ſhall anſwer upon his arraignment, and receive ſuch judgment, 'order, execution, pains and penalties, as are uſed in other caſes 'of murder or felony." V. l. p 111.

5. The acceſſory may be indicted in the ſame indictment with the principal, and that is the beſt and moſt uſual way; but he may be indicted in another indictment, but then ſuch indict-ment muſt contain the certainty and kind of the principal felony. 1 *Hal. P. C.* 623.

6 It ſeemeth that the acceſſory may be put to anſwer before the principal hath appeared; but his plea cannot be tried before ſuch appearance, unleſs he deſires it himſelf; but if he will put himſelf upon his trial, before the principal be tried, he may; and his acquittal or conviction, upon ſuch ſuch trial will be good.—2 *Hawk.* 322.

But

But it ſeemeth neceſſary in ſuch caſe to reſpite judgment, 'till the principal be convicted; for if the principal be after acquitted, that conviction of the acceſſory is annulled, and no judgment ought to be given againſt him: But if he be acquitted of the acceſſory, that acquittal is good, and he ſhall be diſcharged — 1 *Hal. P C.* 623, 624.

7. It ſeems to be ſettled at this day, that if the principal and acceſſory appear together, and the principal plead the general iſſue, the acceſſary ſhall be put to plead alſo; and that if he likewiſe plead the general iſſue, both may be tried by one inqueſt; but that the principal muſt be firſt convinced, and that the jury ſhall be charged, that if they find the principal not guilty, they ſhall find the acceſſory not guilty alſo. But it ſeems agreed, that if the principal plead a plea in bar, or abatement, or a former acquittal, the acceſſory ſhall not be forced to anſwer, till that plea be determined: For if it be found for the principal, the acceſſory is diſcharged; if againſt the principal, yet he ſhall after plead over to the felony and may be acquitted. 2 *Hawk*, 323. 1 *Hal. P C.* 624.

8. It ſeemeth not reaſonable, Mr. *Hawkin's* ſays, where a perſon is charged as acceſſory to more than one principal, to try him on the conviction of one, before all of them have appeared; becauſe thereby he may be ſubjected to the hardſhip and hazard of two trials for his life for the ſame offence, which is contrary to the general courſe of the law. 2 *Hawk.* 323.

But if a man be indicted as acceſſory to two or more, and the jury find him acceſſory to one, it is a good verdict, and judgment may paſs upon him. *Foſt.* 361. And therefore the court in their diſcretion (Sir *Michael Foſter* obſerves) may arraign him as acceſſory to ſuch of the principals who are convicted; and if he be found guilty as acceſſory to them or *any* of them, judgment ſhall paſs upon him. But on the other hand, if he be acquitted, that acquittal will not diſcharge him as acceſſory to the others, and when they come in and are convicted and attainted, or if judgment of outlawry paſſeth againſt them, he may be arraigned *de novo* as acceſſory likewiſe to them. Altho' it is the ſafer courſe according to lord *Hale*) to reſpite the arraignment of the acceſſory, 'till all appear or are outlawed. *Foſt.* 361.

9 If the principal be erroneouſly attaint, yet the acceſſory ſhall be put to anſwer, and ſhall not take advantage of the error in that attainder; but the principal reverſing the attainder, reverſeth the attainder of the acceſſory. 1 *Hale, P C.* 625.

But upon this Sir *Michael Foſter* diſtinguiſheth as follows. If the principal and acceſſory are joined in one indictment and tried together, which ſeems to be the moſt eligible courſe where both

both are amenable to the court; there is no room to doubt whether the acceſſory may not enter into the full defence of the principal, and avail himſelf of every matter of fact and every point of law tending to *his* acquittal. For the acceſſory in this caſe to be conſidered as a partner in the ſuit, and this ſort of defence neceſſarily and directly tendeth to his own acquittal. *Foſt.* 365.

But when the acceſſory is brought to trial *after* the conviction of the principal; it is not neceſſary to enter into the evidence on which the conviction was founded. Nor doth the indictment aver that the principal was in fact guilty. It is ſufficient if it reciteth, with proper certainty, the record of the conviction. This is evidence againſt the acceſſory ſufficient to put him upon his defence. For it is founded on a legal preſumption, that every thing in the former proceeding was rightly and properly tranſacted. But a preſumption of this kind muſt, as it ſeemeth, give way to facts manifeſtly and clearly proved. As againſt the acceſſory, the conviction of the principal will not be concluſive; it is as to him *a thing done among others* —Foſt. 365.

And therefore if it ſhall come out in evidence upon the trial of the acceſſory, as it ſome times hath and frequently may, that the offence of which the principal was convicted did not amount to felony in him, or not to that ſpecies of felony with which he was charged; the acceſſory may avail himſelf of this and ought to be diſcharged. *Foſt.* 365.

And as in point of *law* ſo alſo in point of *fact*, if it ſhall manifeſtly appear in the courſe of the acceſſory's trial, that the principal was innocent; common juſtice ſeemeth to require that the acceſſory ſhould be acquitted. As ſuppoſe a man is convicted upon circumſtantial evidence, ſtrong as that ſort of evidence can be, of murder. Another is afterwards indicted as acceſſory to this murder; and it cometh out upon the trial by inconteſtable evidence, that the perſon who was ſuppoſed to be murdered is ſtill living; in this caſe ſurely the perſon indicted as acceſſory to this murder ſhall be acquitted. Or ſuppoſe the perſon to have been in fact murdered, and that it ſhould come out in evidence to the ſatisfaction of the court and jury, that the witneſſes againſt the principal were miſtaken in his perſon (a caſe of which kind Sir *Michael Foſter* ſays he has known) that the perſon convicted as principal was not nor could poſſibly have been preſent at the murder. *Ibid* 367, 368.

10 If one be indicted as principal, and another as acceſſory, and both be acquitted, yet the perſon indicted as acceſſory may be indicted as principal, and the former acquittal as acceſſory is no bar. 1 *Hal. P C.* 625.

11 But if a perſon be indicted as principal and acquitted;

lord

lord *Hale* says, he shall not be indicted as accessory before: And if he be, he may plead his former acquittal in bar, for it is in substance the same offence. 1 *Hal. P C.* 626.

But, on this point, Sir *Michael Foster* observes, that in the eye of the law, the offences of principal and accessory do specifically differ; and if a person indicted as principal cannot be convicted upon evidence tending barely to prove him to have been accessory before the fact, which must necessarily be admitted, it doth not appear how an acquittal upon one indictment, can be a bar to a second for an offence specifically different from it —— *Fost.* 362.

12 So if a man be indicted as principal, and acquitted, he may be indicted as accessory after, for they are offences of several natures. 1 *Hal. P C* 626.

13 And so it is if he be indicted as accessory before, and acquitted; yet for the same reason he may be indicted as accessory after. 1 *Hal. P C.* 626.

V. *Precedents of* INDICTMENTS *against* ACCESSORIES.

1 INDICTMENT of an accessory before the fact, for murder, taken from *Coke's* report of lord Sanchars case, 9 *Co.* 116.—and adapted to the practice of this country.

——— *county to wit:*

The jurors for the body of the counties of composing the district court, appointed by law to be holden at upon their oaths do present, That whereas A O *late of the county of merchant, and* B O *late of the county aforesaid, labourer, not having God before their eyes, but seduced by the instigation of the devil, the day of in the year and in the year of the commonwealth of Virginia, at the county of aforesaid*

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* The very literary encouragement given, by the gentlemen of the bar to this work, has determined the author to render it as worthy of their patronage as possible, by inserting in their proper places, several precedents of indictments and special pleadings, as well in civil as in criminal law. Nor will this be thought inconsistent with the general plan of the publication, if as an eminent judge † observes, 'good pleading is the sure test of the law.' For by an attentive perusal of the constituent parts of pleading, the law itself is necessarily discovered, and a reference to more voluminous compilations, thereby saved.

ſaid, that is to ſay, in the pariſh of in the county aforeſaid, and within the juriſdiction of the diſtrict court aforeſaid, with force and arms, &c. † *feloniouſly and of their aforethought malice, in and upon one* C D *then and there in the peace of God, and of the ſaid commonwealth being, made an aſſault and affray, and the aforeſaid* A O *a certain gun called a piſtol, of the value of then and there charged with gun-powder, and a leaden bullet, which gun the ſaid* A O *in his right hand then and there had and held, in and upon the aforeſaid* C D, *then and there feloniouſly voluntarily and of his malice aforethought, did ſhoot off and diſcharge; and the aforeſaid* A O *with the leaden bullet aforeſaid, from the gun aforeſaid then and there ſhot off and diſcharged, the aforeſaid* C D, *in and upon the left part of the breaſt of him the ſaid* C D, *near the left pap of him the ſaid* C D, *then and there feloniouſly ſtruck, giving to the ſaid* C D, *then and there with the leaden bullet aforeſaid out of the gun aforeſaid then and there ſhot off and diſcharged, in and upon the left part of the breaſt of him the ſaid* C D, *one mortal wound of the breadth of half an inch, and depth of five inches, of which mortal wound the aforeſaid* C D *at the county of aforeſaid, in the pariſh aforeſaid, inſtantly died: And that* B O *feloniouſly and of his forethought malice, then and there was preſent, aiding, aſſiſting, abetting, comforting and maintaining the aforeſaid* A O, *to the felony and murder aforeſaid, in form aforeſaid to be done and committed; and ſo the aforeſaid* A O *and* B O, *the aforeſaid* C D, *at the county aforeſaid, in the pariſh aforeſaid, and within the juriſdiction aforeſaid, in manner and form aforeſaid, feloniouſly, voluntarily and of their forethought malice, killed and murdered, againſt the peace and dignity of the commonwealth*; And that one E O, late of the pariſh of in the county of aforeſaid, Eſquire, not having God before his eyes, but being ſeduced by the inſtigation of the devil, before the felony and murder aforeſaid by the aforeſaid A O and B O, in manner and form aforeſaid done and committed, that is to ſay, the day of in the year of the commonwealth of Virginia aforeſaid, at the pariſh of in the county of aforeſaid, and within the juriſdiction of the diſtrict court aforeſaid, the aforeſaid A O to the felony and murder aforeſaid, in manner and form aforeſaid to be done and committed, maliciouſly, feloniouſly, voluntarily and of his forethought malice, did incite, move, abet, counſel and procure, againſt the peace and dignity of the commonwealth.]

If

† By V. l. p. 112.—it is enacted, that 'in any inquiſition 'or indictment, the words *force and arms*, or any particular 'words deſcriptive of any particular kind of force or arms, ſhall 'not of neceſſity be put or comprized.'

If after the FACT, then the form may be thus:

And that E O, *late of in the county of esquire, well knowing the said (offender) to have done and committed the said felony in manner and form aforesaid, to wit, on the day of in the year of the commonwealth of Virginia aforesaid, at the county of aforesaid, and within the jurisdiction aforesaid, with force and arms, him the said (offender) did then and there feloniously, and of his forethought malice, receive, aid, and comfort; against the peace and dignity of the commonwealth.*

2. *Indictment for a misdemeanor, in receiving stolen goods as accessory, the principal felon being unknown.*

County, to wit,

The jurors for the body of the county of aforesaid, upon their oaths do present, that late of aforesaid, labourer, and his wife, being persons of evil name and fame, and of dishonest conversation, and common buyers and receivers of stolen goods, on the day of in the year and of the commonwealth of Virginia the with force and arms, at the county of aforesaid, six silver table spoons of the value of twenty dollars, of the goods and chattels of one H B, by a certain ill disposed person (to the jurors aforesaid, yet unknown) then lately before feloniously stolen, of the same ill disposed person unlawfully, unjustly, and for the sake of wicked gain did receive, and have, (they the said and his wife, then and there well knowing, and each of them well knowing, the said goods and chattels to have been feloniously stolen) to the evil example of the good citizens of this commonwealth, the great damage of the said H B, against the form of the act of the General Assembly in that case made and provided, and against the peace and dignity of the commonwealth.*

3 Indictment

* *Note, It frequently happens that the court of examination, do not think the crime, with which the prisoner is charged, of sufficient magnitude to send him for further trial, to the District court. In that case they possess a power of binding him over to the next court of their county, in which there will be a grand jury, who generally act upon an indictment in the above form.—See title Criminals.*

3. Indictment againſt an acceſſory to a felony or burglary before the fact.

After you have drawn the indictment againſt the principal felon, bring the charge againſt the acceſſory on the ſame piece of paper, as follows:

And the jurors aforeſaid, upon their oaths aforeſaid, do further preſent, That E O, *late of the pariſh of in the county of aforeſaid, labourer, before the ſaid felony* * *and burglary was committed in form aforeſaid, to wit, on the day of in the year aforeſaid, with force and arms at the pariſh aforeſaid, in the county aforeſaid, did feloniouſly and maliciouſly,* † *incite, move, procure, aid and abet the ſaid* A O, *to do and commit the ſaid felony and burglary in manner and form aforeſaid, againſt the peace and dignity of the commonwealth.*]

4. Indictment againſt an ACCESSORY for receiving the principal felon.

And the jurors aforeſaid upon their oaths aforeſaid do further preſent, That E O, *late of the pariſh of in the county of aforeſaid, eſquire, well knowing the ſaid* A O, *to have done and committed the ſaid felony and burglary, in form aforeſaid, afterwards to wit, the day of in the year aforeſaid, with force and arms, at the pariſh aforeſaid, in the county aforeſaid, him the ſaid A O, did then and there feloniouſly receive, harbour and maintain, againſt the peace and dignity of the commonwealth.*

5. Indictment againſt an acceſſory for receiving or buying a ſtolen Horſe; alſo for harbouring, or concealing the horſe-ſtealer.

And the jurors aforeſaid upon their oaths aforeſaid do further preſent, That E O, *late of the pariſh of in the county of labourer, afterwards, to wit, on the day of in the year aforeſaid, with force and arms, at the pariſh aforeſaid, in the county aforeſaid, one gelding, of a black colour, of the price of dollars, of the goods and chattels of the ſaid abovementioned, ſo as aforeſaid feloniouſly taken, ſtolen and lead away, did receive, buy and have, (he the ſaid* E O, *then and there well knowing the ſaid gelding, the goods and chattels laſt mentioned, to have been feloniouſly*

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* *If felony only leave out the word burglary.*

† *Inſtead of the words incite, move, procure, aid and abet, you may ſay, counſel, hire, or command.*

feloniouſly taken, ſtolen and lead away) againſt the form of the act of the General Aſſembly in that caſe made and provided, and againſt the peace and dignity of the commonwealth.

If againſt the perſon who harbours or conceals a horſe-ſtealer, purſue the above form to the word 'labourer' then proceed—*well knowing the ſaid* A O, *to have done and committed the felony aforeſaid, in form aforeſaid, afterwards, to wit, on the day of in the year aforeſaid, with force and arms, at the pariſh aforeſaid, in the county aforeſaid, him the ſaid* A O, *did then and there feloniouſly harbour and conceal, againſt the form of the act of the General Aſſembly &c.—conclude as above.*

ADDITION.

ADDITION *ſignifies, a title given to a man, beſides his chriſtian and ſirname, ſetting forth his eſtate or degree, his trade, and the place where he inhabits, Burn's L. D.* 14.

To prevent the inconvenience of miſtaking one perſon for another, it is enacted by V. laws. p. 112.

'THAT in indictments, in which the exigent ſhall be awarded, in the names of the defendants, in ſuch indictments, additions ſhall be made of their eſtate or degree or myſtery, and of the counties * of which they were or be, or in which they be or were converſant, and if on the proceſs upon the ſaid indictments, in which the ſaid additions be omitted, any outlawaces be pronounced, they ſhall be void, fruſtrate and holden for none, and before the outlawries be pronounced, the ſaid indictments ſhall be abated by the exception of the party, wherein the ſaid additions be omitted.'

As this law *ſubſtantially* agrees with the ſtatute of England of 1. H. 5. c. 5. the ſame rules of conſtruction will equally apply to it.

1. *In which the exigent ſhall be awarded.*] The exigent is a writ whereby the ſheriff is commanded to proclaim the party in

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* *It is obſervable that this act requires, with reſpect to the addition of* place. *only the addition of the* county, *and not the pariſh, town, hamlet &c. as in the act of* 1. *H.* 5. *and is conformable to the act of the General Aſſembly on this ſubject (V. l.* 112.*) which declares that no omiſſion, in an indictment of* pariſh town, ville or hamlet, *ſhall vitiate ſuch indictment.*

in the county court, in order to his being outlawed. And by theſe words the act extendeth only to caſes where proceſs of outlawry may be awarded; and therefore it extendeth not to an indictment for encroaching on the highway, becauſe in that caſe proceſs of outlawry lieth not, but a diſtreſs. *Cro. Elez.* 148. 1 *Wilſon.* 244.

2. *In the names of the defendants*] Regularly by the common law, every natural man, ought to be named in all original, and other ſuits, by his chriſtian name, and ſirname, and that before this act ſufficed. 2. *Inſt.* 665.

If it be a corporation aggregate of many perſons, as mayor and commonalty; the mayor need not be named by his chriſtian name, becauſe that ſuch a corporation ſtandeth in lieu both of the chriſtian name and ſirname. 2. *Inſt.* 666.

3. *Additions ſhall be made*] Additions of *eſtate or degree*, are, yeoman, gentleman, eſquire, and the like. B. L D 15.

Additions of *trade or occupation*, are thoſe of merchant, clothier, carpenter, taylor, huſbandman, labourer, and all other lawful occupations. *Ibid.*

Additions of *place*, are, of ſuch a town, or of ſuch a county &c. *Ibid.*

The addition as well of the eſtate, degree or miſtery, as the place, ought by force of this act to be alledged in the firſt name; for an addition after the *alias dictus (otherwiſe called)* is ill: As for inſtance, where the indictment was againſt W R, otherwiſe called W R, of H, for without the *alias dictus* there is no addition of the ville; and if the party is not ſufficiently named in the firſt part, the *alias* cannot aid or help it. 2. *Inſt.* 669. 3. *Salk.* 20.

Where there are ſeveral defendants, of different names and the ſame addition, it is ſafeſt to repeat the addition after each of their names, applying it particularly to every one of them 2. *Hawk.* 187.

Where the father hath the ſame name, and the ſame addition, with a defendant being his ſon, the action is abateable unleſs it add the addition of the *younger*, to the other additions; but where the father is the defendant, it is ſaid that there is no need of the addition of the *elder*. 2. *Hawk* 187.

Clerk is a good addition of a *clergyman* 1. Black. 405.

Gentleman and *gentlewoman* are good *additions*. 1. Black. 406.

Yeoman is a good addition; and (tho' ſeldom uſed in this country,) in its legal acceptation, comprehends thoſe who may do any act where the law requires one that is *a good and lawful man* 1. Black. 406.

Widow or *ſinglewoman*, or, (as ſome ſay) *wife* of ſuch a one, are

are all of them good additions of the eſtate or degree of a woman; but no ſuch addition is good, for the eſtate and degree of a man. Alſo *ſpinſter* is a good addition of a woman. 2. *Hawk.* 188.

Eſquire is properly annexed to Juſtices of the Peace, or thoſe who hold any office of truſt under the commonwealth. 1. *Blacks. com.* 405.—But, in America, it is a mere complimentary title indiſcriminately beſtowed on all ranks and profeſſions, and ſeems to have no determinate ſignification.——*Quere*, if in indictments, greater propriety ſhould not be obſerved.

But *ſervant*, *groom*, or *farmer*, are not additions within this act, becauſe they are not of any myſtery. And *chamberer*, *butler*, *pantler*, or the like, are additions of offices, and not of any myſtery or occupation. 2. *Inſt.* 668.

Neither doth this act extend to unlawful practices, as extortioner, maintainer, thief, vagabond, heretic, and ſuch like. 2. *Hawk.* 188.

If a man hath divers arts, trades or occupations he may be named by any of them; and in general a man ſhall be named by his worthieſt title of addition. 2. *Inſt.* 668. 669.

4. *Of which they were or be.*] The addition of the eſtate, degree, or myſtery, ought to be as the defendant was of at the day of the indictment brought, and not *late* of ſuch a degree or myſtery; but it is a good addition to name the defendant *late* of ſuch a town or place, becauſe men do often remove their habitation. 2. *Inſt.* 670. State trials vol. 9 p 12. Lord Balmerino's trial.

5. *Shall be void.*] This being a judgment in law, is interpreted to be made void by a writ of error, or by the plea of the party coming in upon a *capias utlagatum*; for tho' the ſtatute ſaith they ſhall be void, yet they are but voidable by a writ of error or plea. 2. *Inſt.* 670.

6. *By the exception of the party.*] But if the defendant appeareth upon proceſs, and plead, taking no advantage thereof by exception, he hath loſt the benefit hereof: But it ſeemeth that the bare appearance of the party, without plea, doth not ſalve the want of a good addition. 2. *Hawk.* 190.

AFFIRMATION ſee OATHS.

I. What is an affray. 22—24.
II. How far it may be ſuppreſſed by a private perſon. 24.
III. How far by a conſtable. 24—26.
IV. How far by a juſtice of the peace. 26.
V. Puniſhment of an affray. 26.
VI. Precedents of warrants, indictments &c. againſt affrayers. 26—32.

I. What is an AFFRAY.

1. AN affray is a public offence to the terror of the commonwealth's citizens; ſo called (according to lord Coke) becauſe it affrighteth and maketh men afraid. 3 *Inſt.* 158.

2. From whence it ſeemeth evidently to follow, that there may be an *aſſault*, which will not amount to an *affray*; as where it happens in a private place, out of the hearing or ſeeing of any, except the parties concerned; in which caſe it cannot be ſaid to be to the terror of the people. 1. *Hawk.* 134.

3. Alſo it is ſaid that no quarrelſome or threatening words whatſoever ſhall amount to an affray; and that no one can juſtify laying his hands on thoſe who ſhall barely quarrel with angry words, without coming to blows; yet it ſeemeth, that the conſtable may, at the requeſt of either party threatened, carry the perſon who threatens to beat him, before a juſtice in order to find ſureties. 1. *Hawk* 135.

4. Alſo, it is certain, that it is a very high offence to challenge another, either by word or letter, to fight a duel, or to be the meſſenger of ſuch a challenge; or even barely to endeavour to procure another to ſend a challenge, or to fight; as by diſperſing letters to that purpoſe; full of reflections, and inſinuating a deſire to fight. 1. *Hawk.* 135.

5. But altho' no bare words, in the judgment of law, carry in them ſo much terror as to amount to an affray, yet it ſeems certain, that in ſome caſes there may be an affray, where there is no actual violence; as where a man arms himſelf with dangerous and unuſual weapons, in ſuch a manner as will naturally cauſe a terror to the people; which is ſaid always to have been an offence at the common law, and is ſtrictly prohibited by ſtatute: For by the act of Aſſembly (V. l. p. 33) it is enacted, 'That no man, great nor ſmall, of what condition ſoever he be, 'except the miniſters of juſtice, in executing the precepts of the 'courts of juſtice, or in executing of their office, and ſuch as be

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'in their company aſſiſting them, be ſo hardy as, come before 'the juſtices of any court, or either of their miniſters of juſtice, 'doing their office, with force and arms, on pain, to forfeit 'their armour to the commonwealth, and their bodies to priſon, 'at the pleaſure of a court; nor go nor ride armed by night 'nor by day, in fares or markets, or in other places, in ter-'ror of the country, upon pain of being arreſted and com-'mitted to priſon by any juſtice on his own view, or proof by 'others, there to abide for ſo long a time as a jury, to be ſworn 'for that purpoſe by the ſaid juſtice, ſhall direct, and in like 'manner to forfeit his armour to the commonwealth; but no 'perſon ſhall be impriſoned for ſuch offence by a longer ſpace 'of time than one month.'

It hath been holden upon the ſtatute of 2. Edw. 3. c. 3. from which the above act is nearly copied, that no perſon is within the intention of the law who arms himſelf to ſuppreſs dangerous rioters, enemies &c. and diſturbers of the peace of the commonwealth. 1. *Hawk.* 136.

Nor unleſs ſuch wearing be accompanied with ſuch circumſtances as are apt to terrify the people; from whence it ſeems clearly to follow, that the wearing of common weapons, or having the uſual number of attendants, merely for ornament or defence, where it is cuſtomary to make uſe of them, will not ſubject a perſon to the penalties of this act. 1 *Hawk* 136.

It is holden, that a man cannot excuſe the wearing ſuch armour in public, by alledging that ſuch a one threatened him, and that he wears it for the ſafety of his perſon from ſuch aſſault; but it hath been reſolved, that no one ſhall incur the penalty of the ſtatute for aſſembling his neighbours and friends in his own houſe, againſt thoſe who threaten to do him any violence therein, becauſe a man's houſe is his caſtle. 1 *Hawk.* 136.

It is holden that any juſtice of the peace, or other perſon empowered to execute this act, may proceed thereon *ex officio*; and if he find any perſon in arms contrary to the form of the ſtatute, he may ſeize the arms, and commit the offender to priſon; and that he ought alſo to make a record of the whole proceeding, and certify the ſame to the next county court. 1 *Hawk.* 136.

But, in exerciſing this office, the act of Aſſembly of Virginia materially differs from the act of Parliament of 2. Edw. 3. and is certainly a very great improvement on it; being more favourable to liberty. There, the duration of the impriſonment is unlimited, but here it cannot exiſt, by law, for a longer ſpace of time than one month, nor even that length of time, unleſs ſanctioned by the verdict of a jury. It appears then, that as ſoon as a Juſtice of the Peace has apprehended an offender againſt

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the latter part of this act, either from his own view, or proof by others; he ſhould iſſue his warrant directing a jury to be ſummoned, to determine what length of time (leſs than one month) the party ſhould be impriſoned. (See the warrant precedent VII.)

II. *How far it may be ſuppreſſed by a private perſon.*

It ſeems agreed, that any one who ſees others fighting, may lawfully part them, and alſo ſtay them till the heat be over, and then deliver them to the conſtable to be carried before a Juſtice, to find ſureties for the peace. 1 *Hawk.* 136.

And the law doth encourage him hereunto; for if he receives any harm by the affrayers, he ſhall have his remedy by law againſt them; and if the affrayers receive hurt, by endeavouring only to part them, the ſtanders by may juſtify the ſame, and the affrayers have no remedy by law. 3 *Inſt.* 158

But if either of the parties be ſlain, or wounded, or ſo ſtricken that he falleth down for dead; in that caſe the ſtanders by ought to apprehend the party ſo ſlaying, wounding, or ſtricking, or ſo endeavouring the ſame by hue and cry; or elſe for his eſcape they ſhall be fined and impriſoned 3. *Inſt.* 158.

III. *How far by a* CONSTABLE.

The power of a conſtable, as a peace officer, is derived from the common law of England; and altho' as a part of the common law, the doctrine relating to that ſubject, is entitled to a place in this work, yet few inſtances, I believe, have occured, in this ſtate, where the ſame latitude of power as exerciſed in England, has beeen attempted. *For more of the power and duty of conſtable ſee title* 'Conſtable.'

It ſeems agreed, that a conſtable is not only impowered, as all private perſons are, to part an affray which happens in his preſence, but is alſo bound at his peril to uſe his beſt endeavours to effect this purpoſe; and not only to do his beſt endeavours himſelf, but alſo to demand the aſſiſtance of others, which if they refuſe to give him, they are puniſhable with fine and impriſonment. 1 *Hawk:* 137.

And it is ſaid, that if a conſtable ſee perſons either actually engaged in an affray, as by ſtriking or offering to ſtike, or drawing their weapons, or the like; or upon the very point of entering upon an affray, as where one ſhall threaten to kill, wound, or beat another, he may either carry the offender before a juſtice, to find ſureties for the peace, or he may impriſon him of his own authority for a reaſonable time, till the heat ſhall be over, and alſo afterwards detain him 'till he find ſuch ſurety by obligation: But it ſeems, that he has no power to impriſon ſuch an offender

der in any other manner, or for any other purpoſe; for he cannot juſtify the committing an affrayer to jail, till he ſhall be puniſhed for his offence: And it is ſaid, that he ought not to lay hands on thoſe, who barely contend with hot words, without any threats of perſonal hurt, and that all he can do in ſuch caſe, is to command them under pain of impriſonment to avoid fighting. 1 *Hawk.* 137.

But he is ſo far intruſted with a power over all actual affrays, that tho' he himſelf is a ſufferer by them, and therefore liable to be objected againſt as likely to be partial in his own cauſe, yet he may ſuppreſs them; and therefore, if an aſſault be made upon him, he may not only defend himſelf, but alſo impriſon the offender, in the ſame manner as if he were no way a party. 1. *Hawk.* 137.

And if an affray be in a houſe, the conſtable may break open the doors to preſerve the peace; and if affrayers fly to a houſe, and he follow with freſh ſuit, he may break open the doors to take them. 1. *Hawk.* 137.

But it is ſaid that a conſtable hath no power to arreſt a man for an affray done out of his own view, without a warrant from a juſtice, unleſs a felony were done or likely to be done; for it is the proper buſineſs of a conſtable to preſerve the peace; not to puniſh the breach of it. 1 *Hawk.* 137.

IV. How far by a JUSTICE *of the* PEACE.

There is no doubt but that a juſtice of the peace may and muſt do all ſuch things to that purpoſe, which a private man or conſtable are either enabled or required by the law to do: But it is ſaid, that he cannot without a warrant authoriſe the arreſt of any perſon for an affray out of his own view; yet it ſeems clear, that in ſuch caſe he may make his warrant to bring the offender before him, in order to compel him to find ſureties for the peace. 1 *Hawk.* 137.

V. Puniſhment of an AFFRAY.

All affrayers in general are puniſhable by fine and impriſonment. 1 *Hawk.* 138.

And as, under the common law, they may be inquired into, in the leet, as common nuiſances; there can be no doubt but that they may be preſented by the grand jury. 3. *Inſt.* 158.

VI. Precedents of warrants, indictments &c. againſt AFFRAYERS.

1. Upon complaint made to a juſtice of the peace, he may iſſue his warrant to apprehend the offender; but if it be upon the application

application of any particular person, he should first administer to him the following oath.

The information which you shall give against A O, *of the county of labourer, shall be the truth the whole truth, and nothing but the truth. So help you God.*

Warrant to apprehend affrayers.

To all constables and other officers in the county of county to wit.

Whereas A I, *of the said county gentleman, hath this day made oath before me* P S, *one of the commonwealth's justices of the peace for the county aforesaid, that on the day of in the year of our Lord and of the independence of the commonwealth of Virginia the* A O, *of the county of aforesaid, labourer, and* B O, *of the said county, labourer, at in the said county, in a tumultuous manner made an affray, wherein the person of the said* A I, *was beaten and abused by them the said* A O, *and* B O, *without any lawful or sufficient provocation given to them or either of them, by him the said* A I. *These are therefore to command you forthwith to apprehend the said* A O, *and* B O, *and bring them before me, or some other of the commonwealth's justice of the peace for the said county, to answer the premises. Herein fail not, at your peril. Given under my hand and seal this day of one thousand &c.* *

When the offender is apprehended by this warrant, and brought before the justice, he may admit him to bail, or refuse it, on due consideration of the nature and circumstances of the case; and on this subject, the act of Assembly concerning bail, will best regulate his conduct. *See title* 'Bail.'

The sum in which the offender and his securties should be bound, is left to the discretion of the magistrate; but it should be recollected that *excessive bail*, should in no instance be required, from the express letter of the declaration of rights.

II. Recognizance of Bail.

Memorandum, on this day of in the year if our Lord and in the year of the independence of the commonwealth of Virginia, personally came before me P S, *one of the commonwealth's justices of the peace for the county of* A O, *of the county aforesaid, labourer, and* B R, *and* C R, *both of the same county, carpenters, and acknowledge that they owe to esquire governor or chief magistrate of the commonwealth of Virginia, namely, the said*

* *In all criminal process the dates should be written in words at length.*

ſaid A O, *fifty dollars*, * *and the ſaid* B R, *and* C R, *each reſpectively twenty-five dollars, current money; to be levied of their reſpective goods and chattels, lands and tenements, to the uſe of the ſaid commonwealth if default is made in performance of the condition here under written.*

The condition of this recognizance is ſuch that if the above bound A O, *ſhall perſonally appear before the commonwealth's juſtices of the peace, at the next court to be held for the county of to anſwer to ſuch matters as ſhall then and there be objected againſt him by* A I, *of the ſaid county, gentleman, concerning the aſſaulting, beating, and wounding the ſaid* A I, *by him the ſaid* A O, *and concerning other miſdemeanors tending to a breach of the peace, and if he do not depart without leave of the court, then this recognizance to be void, or elſe to remain in full force and virtue.*

The condition of the recognizance being read to the parties, the juſtice ſhould take their acknowledgement in the following manner. *You* A O, *acknowledge yourſelf to be bound to eſq. governor &c. in the ſum of fity dollars, and you* B R, *and you* C R, *in twenty-five dollars each, to be levied of your reſpective goods and chattels &c.*

The juſtice muſt certify this recognizance to the next court, in order that further proceedings may be had thereupon; and if it appears to the court upon hearing the evidence, that there is juſt cauſe of proſecution, they will direct the attorney for the commonwealth to prefer an indictment againſt the offender, and may commit or bail him, or bind him to his good behaviour, for any time, in ſuch ſecurity and ſum, or diſcharge him as they ſhall judge moſt proper to be done. *Starke. V. J.*

If the offender fails to comply with his recognizance to appear before the court, the clerk muſt record his default, to entitle the commonwealth to its forfeiture; or if, when brought before the juſtice, he refuſes to enter into a recognizance, or give ſecurity, he muſt be forthwith committed by ſuch juſtice.

III. MITTIMUS.

To the ſheriff of county, or keeper of the jail of the ſaid county.

County to wit.

Theſe are in the name of the commonwealth, to command you to receive into your jail the body of A O, *late of the county aforeſaid labourer,*

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* *Since the act of Congreſs altering the denomination of our money, from pounds, ſhillings, pence and farthings, to dollars, diſmes, cents and mills, and the act of Aſſembly of* 1792 *(V. l.* 218.*) adopting the ſame, it ſeems more proper, to expreſs all ſums* officially *mentioned by Juſtices of the Peace in dollars.*

labourer, taken by my warrant, and brought before me, being charged upon oath, by A I, *of the ſaid county, gentleman, with aſſaulting, beating, and wounding the ſaid* A I, *in an affray, by the ſaid* A O, *and others, lately made; and that you ſafely keep him in your ſaid jail and cuſtody, until he be thence diſcharged by due courſe of law. Given under my hand and ſeal this day of in the year of our lord*

Where the commitment is for an affray, or for threatening and ſtriking in the preſence of the juſtice, the mittimus may be as follows:

To the ſheriff &c.—as above.

County to wit.

I ſend you herewith the bodies of of &c. and of &c. whom I require you, in the name of the commonwealth to receive into your cuſtody, being convicted, by my own view, of an affray by them made in my preſence; and you are hereby commanded to keep them and each of them, the ſaid and ſafely in your jail, until they, or either of them reſpectively, ſhall procure two ſufficient perſons to be bound with them, or either of them, ſeparately, to the governor or chief magiſtrate of the commonwealth of Virginia; that is to ſay, each of the ſecurities in the ſum of dollars, and the ſaid and each, in dollars, to appear at the next court to be held for the ſaid county of to anſwer the premiſes, and in the mean time to be of good behaviour, or until they, or either of them ſhall be otherwiſe diſcharged by due courſe of law. Given under my hand and ſeal &c.

If a conſtable takes the offender on his own authority, and carries him before a juſtice to whom he refuſes to give ſecurity, the mittimus may be drawn in the ſame form, except that the cauſe of commitment ſhould be varied and very clearly ſet forth.

V. Indictment for an AFFRAY *generally.*

county to wit.

The jurors for the body of the county aforeſaid, upon their oath do preſent, That A O, *of the county of aforeſaid taylor, and* B O, *of the ſaid county, blackſmith, with force and arms, on the day of in the year of our lord and in the year of the independence of the commonwealth of Virginia, at the county aforeſaid, being arrayed and unlawfully aſſembled together in a warlike manner, did make an affray, to the terror and diſturbance of divers of the citizens of this commonwealth, then and there being, and to the evil example of all other the citizens of the ſaid commonwealth, and againſt the peace and dignity of the commonwealth.*

VI.

VI. Indictment for an AFFRAY *and beating another.*

county to wit.

The jurors for the body of the county of aforesaid, upon their oath do present that A O, *late of the parish of in the county of aforesaid, clerk, and* B O, *late of the parish of in the same county merchant, with force and arms, on the day of in the year of our lord and in the year of the commonwealth of Virginia, at the county of aforesaid, of their malice aforethought made an assault and affray in and upon one* R S, *of the said county, yeoman, then and there being in the peace of God, and of the commonwealth aforesaid, and struck upon the head, the said* R S, *with certain swords, which the said* A O, *and* B O, *then and there severally held in their right hands, and then and there gave to the said* R S, *divers wounds, which put him in great danger of his life, so that his life was greatly dispaired of, to the bad example of other citizens of the said commonwealth, and against the peace and dignity of the commonwealth.*

The foregoing precedents, under this title, are adapted to affrays considered as offences at the common law. It yet remains to discuss the duty of a Justice of the Peace, in suppressing an affray prohibited by the act of Assembly (V. l. 33). This statute seems to contemplate two distinct offences; the one, where the affray is made in presence of a court of justice, or its ministers of justice, *doing their office*, the other, where the affray arises from going armed, 'in fairs or markets, or in other places, in terror of the country.' In the first instance, the punishment is a forfeiture of the armour, and imprisonment of the offender, *at the pleasure of a court*; in the second, a forfeiture of the armour also, and imprisonment for so long time as a jury to be sworn for that purpose, by the justice committing the offender, either upon *his own view*, or *proof by others*, shall direct, which imprisonment however cannot exceed the space of one month. *See the act ante page* 17.

VII. Warrant to summon a JURY under the above recited act.

county to wit.

To the constable of in the said county,

Whereas it hath been fully proven to me by the oath of A J, *and* B J, *of the said county, that* A O, *of the county aforesaid, labourer, and* B O, *of the said county, labourer, on the day of in the year of our lord and in the year of the commonwealth of Virginia, with force and arms, viz. with swords, guns, and other warlike instruments, at in the county aforesaid, being arrayed, and unlawfully assembled together in a warlike*

like manner, did make an affray, by riding armed as aforesaid, in the said county, in terror of the country: These are therefore to require you, in the name of the commonwealth, immediately upon sight hereof to summon twelve good and lawful men of the vicinage of the said in the said county to be and appear before me J P, one of the commonwealth's justices for the said county, at aforesaid in the said county, on the day of then and there to enquire of, do, and execute all such things as on the commonwealth's behalf shall be lawfully given them in charge touching the affray aforesaid. And be you then there to certify what you shall have done in the premises, and further to do and execute what in behalf of the said commonwealth shall be then and there enjoined you. Given under my hand and seal this day of in the year of our lord

As it is probable there will seldom be occasion to enforce this act, I shall add no other precedents founded on it; but only observe that the form of the oath to be administered to the jurors and witnesses, will naturally arise out of the subject.

APPEALS.

AN appeal in its common legal acceptation is the removal of a cause from an inferior to a superior jurisdiction.

It is also a prosecution against a supposed criminal offender, by the party's own private action, and which, in respect to the offence, is likewise a prosecution for the commonwealth. 2 *Hawk.* 155.

But as this practice has become obsolete even in England, and, I believe, was never adopted in America, it will not be necessary to enlarge further upon it.

The practice of appeals in *civil* cases, as regulated by the laws of this commonwealth, not falling within the plan of this publication, and being easily found in the *Revised Code* of laws, printed in 1794, it will be sufficient to refer to that work, for more particular information.

APPRENTICES.

APPRENTICES (from *apprendre*, to learn) are usually bound for a term of years, by deed indented, to serve their masters, and be maintained and instructed by them. 1 *Blacks.* 426.

In treating of this subject I shall shew.

I.

I. *Who may be bound apprentice.*
II. *By whom they ſhall be bound.*
III. *The manner in which they ſhall be bound.*
IV. *Reciprocal duties of maſter and apprentice.*
V. *How the grievances of an apprentice ſhall be redreſſed.*
VI. *Adjudged caſes on the ſubject of apprenticeſhips.*
VII. *Precedents:*

I. Who may be bound APPRENTICE.

1. Poor orphans &c.—See V. l. p. 182. ſect. 11.
2. Wards. *Ibid.* Sect. 12.
3. Baſtards. See V. l. p. 193. ſect. 25.
See alſo V. l. p. 335. ſect. 12.

II. By whom they ſhall be bound.

This duty belongs either to the overſeers of the poor, as in the caſe of *poor orphans*, or *baſtards*; or to guardians, who may, with the approbation of the court bind out their *wards*.—See V. l. p. 191. ſect. 9.—*Ibid.* p. 193. ſect. 25.—*Ibid.* p. 182. ſect. 12.

III. The manner in which they ſhall be bound.

It has been already ſeen under the two former diviſions of this title, who may be bound, and by whom: but as thoſe caſes reſpect chiefly apprentices, who are compellable to be bound, under the laws of this commonwealth, it will be neceſſary here to enlarge the ſubject, and to conſider alſo the manner in which apprentices are to be bound by the common law.

One cannot be bound an apprentice without deed. 1 *Salk.* 68.

By the common law, perſons under the age of 21 years could not bind themſelves in ſuch a manner as to entitle their maſters to an action for a breach of any covenants of their indentures; and therefore it has been cuſtomary for the parent, or friend to become party to the indenture in their behalf. *Bac. Abr.* Maſter and ſervant.

Altho' by the laws of this commonwealth the county and corporation courts are poſſeſſed of power to 'hear and determine 'complaints of maſters or miſtreſſes againſt their apprentices or 'hired ſervants, for deſertion without good cauſe, and may ob-'lige the latter, for loſs thereby occaſioned, to make retribu-'tion, by further ſervices after expiration of the times for which

'they

'they had been bound,'—(Virg. laws p. 183. 258.) Yet it hath been determined under similar laws in England, that this power extends to the compulsion of *service* only, and that neither by the common law nor by the statute, will the covenant of an infant bind so far as to give the master an action against him for a breach of the covenant. *Cro. Car.* 179.

But if his father or other person doth covenant for him, such covenant shall bind the father or such other person: as in the case of *Whitley and Loftus.* In the indenture of apprenticeship, the father covenants to pay the apprenticeship money; the son covenants to account for his masters goods; and in the conclusion, the father and son each bind themselves for the true performance of all covenants therein. By the court: The end of binding the father was to answer wrongs done by the son, and he must answer for any; and the covenant that each did bind himself must be so, where the son is bound to perform the thing for which the covenant was made; and this clause is usually inserted, that the covenants may be taken distributively, to wit, that each of the covenantors should perform his part; and this makes the covenant of the son bind the father, who covenanted for him as well as for himself. 8. *Mod.* 190.

So, in the case of *Branch and Ewington (Doug.* 500.) it was held by lord Mansfield, in an action by the master against the father of the apprentice bound by indenture in the common form, that the father was liable for the elopement of the son from the service of his master, notwithstanding there were no express covenants on the part of the father to be answerable for such elopement, and altho' the statute had given the master another remedy by a retribution in services.

And as the infant may be bound by indenture, so the apprenticeship may be *determined* by consent of all the parties concerned; which in the case of parish poor children, includes the parish officer; in other cases the father (or guardian,) master, and infant. *Burrow's settlement cases.* 562. 760.

But a covenant between the master and a third person, the infant not being party, maketh not an apprenticeship. 2. *Salk.* 479.

IV. Reciprocal duties of master and apprentice.

Besides the express covenants usually inserted in indentures of apprenticeship, which the master and apprentice are mutually bound to perform, there exist other relations between them, which deserve to be noticed.

Thus a master may by law chastise, and correct his apprentice, for neglect or other misbehaviour, so it be done with moderation:

deration: Tho' it doth not ſeem to be lawful for the maſter or miſtreſs to beat any other ſervant of full age. 1 *Blacks.* 428.

So, it hath been determined that where an apprentice became lame, and in the opinion of ſurgeons incurable, the maſter ought not to be diſcharged of him; for the maſter takes the apprentice for better for worſe, and ſhould provide for him in ſickneſs and in health *Str.* 99.

So, it was adjudged that a maſter could not compel his apprentice to go beyond ſea, if he did not go with him, unleſs the nature of the apprenticeſhip imported it; as if the maſter was a mariner, or merchant adventurer. *Brownl.* 67. *Hob.* 134.

V. How the greivances of an apprentice ſhall be redreſſed.

The mode of proceeding in this caſe, is preſcribed by *Virginia laws*, page 183. ſect. 15. *which ſee.*

This act does not direct the maſter or miſtreſs to be ſummoned on the complaint of an apprentice, yet natural juſtice ſeems to require it, and orders of ſeſſions in England have been quaſhed becauſe it did not appear that the maſter had been ſummoned, or was preſent. *See Str.* 143. 1013.

VI. Adjudged caſes on the ſubject of apprenticeſhips.

There yet remain ſeveral points worthy of obſervation, on this doctrine, which are not eaſily reducible to any particular diviſion of the ſubject. They will therefore be collected in this place, and will complete the preſent title.

It ſeems now to be ſettled that an apprenticeſhip being a perſonal truſt, becomes determined by the death of the maſter; unleſs there are ſpecial words in the indenture to the contrary. *Bur. Set. Ca.* 320.

But altho' it is held that the covenant for inſtruction fails by the death of the maſter; yet the apprentice continues ſo as to maintainance out of the eſtate of his maſter, on the covenants to maintain. *See* 1 *Salk.* 66.

The above points appear to be recognized in the caſe of *Baxter* (widow and executrix) againſt *Burfield.* In debt on a bond conditioned for *Mathias Anderſons* performance of the covenants in an indenture of apprenticeſhip, whereby he was bound to the plaintiff's teſtator who was a mariner; the defendant pleaded that *Anderſon* ſerved faithfully to the death of the teſtator. The plaintiff replied that ſince the death of the teſtator, *Anderſon* had abſconded from her ſervice. To this replication the defendant demurred. And after argument at bar, *Lee.* C J, delivered

the

the reſolution of the court, that they were all of opinion the defendant ſhould have judgment, and that the executrix could maintain no ſuch action. The binding was to the *man* to learn *his* art and ſerve *him*, without any mention of executors. And as the words are confined ſo is the nature of the contract; for it is fiduciary, and the apprentice is bound from a perſonal knowledge of the integrity and ability of the maſter. *Hillary* term. 8 *Annæ*, *Horne v Black*, an award that an apprentice ſhould be aſſigned was held void, unleſs there was a *cuſtom*, or *concurrence* of the apprentice; and they held it not material that according to the caſe in *Cro. Eliz.* 553. the aſſets were liable on the maſters covenant to maintain. *Str.* 1266.

The words in *Cro. Eliz.* are, 'that covenant lies againſt an 'executor, in every caſe, tho' not named, unleſs it be ſuch a 'covenant as is to be performed by the perſon of the teſtator 'which they cannot perform'

It is now certainly eſtabliſhed that apprentices bound by order of court cannot be aſſigned from one maſter to another without the conſent of the court in which their indentures are lodged. *See Virg. laws.* p. 182.

Yet it hath been determined that an aſſignment of an apprentice by conſent of all the parties, and an actual reſidence during the time required by ſtatute was ſufficient to gain him a ſettlement in the laſt pariſh, *Str.* 1155.

The power of the court in directing money to be refunded, on the diſcharge of an apprentice with whom it had been given, ſeems conſequential upon their power to diſcharge, tho' not expreſsly mentioned in the act,—*See* 1 *Salk.* 68. 2. *Bac. Abr.* maſter and ſervant.

If an apprentice flee from his maſter's ſervice and gain money by the ſame, or a different occupation, the maſter is entitled to receive it. 1 *Vezy.* 83.

Inticing away an apprentice from his maſter, is not an offence of a public nature for which an indictment will lie; but the party's remedy is by an action on the caſe, which he may well maintain. 6 *Mod.* 182. *Burrow.* 1306.

VII. PRECEDENTS.

I. Indenture of an apprentice bound by the overſeers of the poor under an order of court.

'This Indenture made this day of in the year of our 'Lord and in the year of the independence of the United 'States of America, between A B, and C D, overſeers of the 'poor of diſtrict, in the county of of the one part, and

'A M, of ſaid county of the other part, witneſſeth, that the 'ſaid A B, and C D, overſeers of the poor as aforeſaid by vir-'tue of an order of the court of the aforeſaid county, bearing 'date the day of in the year have put, placed and 'bound, and by theſe preſents do put place and bind A P, a 'poor boy, whoſe parents B P, and C P, are not able to main-'tain him, of the age of years, to be an apprentice with him 'the ſaid A M, and as an apprentice with him the ſaid A M, 'to dwell from the date of theſe preſents, until the ſaid A P, 'ſhall come to the age of 21 years, (or, if a female, until the 'ſaid A P, ſhall come to the age of 18 years) according to the 'act of the General Aſſembly in that caſe made and provided. 'By and during all which time and term, the ſaid A P, ſhall 'the ſaid A M, his ſaid maſter well and faithfully ſerve, in all 'ſuch lawful buſineſs as the ſaid A P, ſhall be put unto by his 'ſaid maſter, according to the power wit and ability of him the 'ſaid A P, and honeſtly and obediently in all things ſhall behave 'himſelf towards his ſaid maſter, and honeſtly and orderly to-'wards the reſt of the family of the ſaid A M. And the ſaid 'A M, for his part, for himſelf, his executors, and adminiſtra-'tors, doth hereby promiſe and covenant to and with the ſaid 'overſeers of the poor, and every of them, their and every of 'their executors and adminiſtrators, and their and every of their 'ſucceſſors for the time being, and to and with the ſaid A P, 'that he the ſaid A M, ſhall the ſaid A P, in the craft, myſtery 'and occupation of a taylor, which he the ſaid A M, now uſeth, 'after the beſt manner that he can or may teach inſtruct and 'inform, or cauſe to be taught inſtructed and informed as much 'as thereunto belongeth, or in any wiſe appertaineth: And 'that the ſaid A M, ſhall alſo find and allow unto the ſaid ap-'prentice ſufficient meat, drink, apparel, waſhing, lodging, and 'all other things needful, or meet for an apprentice during the 'term aforeſaid: And alſo that the ſaid A M, ſhall teach, or 'cauſe to be taught to the ſaid A P, reading, * writing, and 'common arithmetic including the rule of three; and will 'moreover pay to the ſaid A P, the ſum of twelve dollars, at 'the expiration of his aforeſaid term. In witneſs whereof the 'parties to theſe preſents have interchangeably ſet their hands 'and ſeals the day and year firſt above written.

II.

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* *The act of Aſſembly expreſsly directs that the indentures of an apprentice bound out by the overſeers of the poor, ſhall contain theſe laſt covenants, beſides the uſual ones of teaching the apprentice ſome* art, *or* buſineſs, &c.

II. Indenture of an apprentice bound together with his father.

'This Indenture made this day of in the year of our 'Lord and in the year of the commonwealth, between 'A F, and B S, of the county of of the one part and D M, 'of the ſaid county of the other part witneſſeth, that the ſaid 'B S, voluntarily, and with the approbation of the ſaid A F, 'his father, hath put placed and bound himſelf, and by theſe 'preſents doth put place and bind himſelf to be an apprentice 'with him the ſaid D M, and as an apprentice with him the 'ſaid D M, to dwell 'till the ſaid B S, ſhall attain the age of '21 years, which will be on the day of in the year 'During all which term the ſaid A F, and B S, doth covenant 'and agree to and with the ſaid D M, that the ſaid B S, the 'ſaid D M, ſhall well and faithful ſerve in all ſuch lawful buſi-'neſs as the ſaid B S, ſhall be put unto by his ſaid maſter, ac-'cording to the beſt of the power, wit, and ability of him the 'ſaid B S, and honeſtly and obediently ſhall behave himſelf to-'wards the ſaid D M, and honeſtly and orderly towards the fa-'mily of the ſaid D M. And the ſaid D M, on his part, doth 'covenant and agree to, and with the ſaid B S, that he the ſaid 'D M, will well and truly inſtruct the ſaid B S, in the art or 'myſtery of a carpenter, which the ſaid D M, now followeth, 'and will uſe all due diligence to make the ſaid B S, as perfect 'in the ſaid art or myſtery of a carpenter as poſſible. And that 'the ſaid D M, will allow to the ſaid B S, good and ſufficient 'meat, drink, apparel, waſhing, lodging, and all other things 'ſuitable for an apprentice during the ſaid term. And alſo &c. '*(the parties may inſert any other covenants which may be agreed 'on.)* In witneſs whereof the parties to theſe preſents have 'hereunto ſet their hands and affixed their ſeals the day and year 'firſt above written.

ARMS. See SLAVES.

ARRAIGNMENT.

WHEN an offender comes into court, or is brought in by proceſs, ſometimes by *capias* and ſometimes of *habeas corpus*, directed to the jailor of another priſon, the firſt thing that follows thereupon is his arraignment 2 *H. H.* 216.

Arraignment is nothing elſe but calling the offender to the bar of the court, to anſwer the matter charged upon him. 2 *H. H.* 216.

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The priſoner on his arraignment, tho' under an indictment of the higheſt crime, muſt be brought to the bar, without irons, and all manner of ſhackles or bonds, unleſs there be a danger of eſcape, and then he may be brought with irons. 2 *H. H.* 219.

Alſo there is no neceſſity that a priſoner, at the time of his arraignment, hold up his hand at the bar, or be commanded ſo to do; for this is only a ceremony for making known the perſon of the offender to the court; and if he anſwers that he is the ſame perſon it is all one. 2 *Hawk.* 308.

Accordingly this ceremony was diſpenſed with in the caſe of the *King* and *Radcliffe*. *See* 1 *Blacks. Rep.* 3.

ARREST.

AN arreſt, in law, ſignifies, the reſtraint of a man's perſon, depriving him of his own will and liberty, and binding him to become obedient to the will of the law: and it may be called the beginning of impriſonment, *Lamb.* 93.

Under this title, (which will chiefly be confined to arreſts in criminal caſes,) I ſhall ſhew,

I. Who may or may not be arreſted.
II. For what cauſes of ſuſpicion an arreſt may be.
III. By whom the arreſt ſhall be made.
IV. The manner of an arreſt.
V. What is to be done after the arreſt.

I. Who may or may not be arreſted.

Perſons privileged from arreſt in *civil* caſes, are,

1. All perſons on *Sunday*.—*See V. l. p.* 129. *ſect.* 16.

2. Perſons attending their duty at any muſter of militia,——or any election of members of the ſtate legiſlature,——of the United States,——or of electors to vote for a preſident——witneſſes duly ſummoned, and attending on any ſurvey made by order of court, or on commiſſioners appointed to take depoſitions in the caſe of conteſted elections,——are privileged from arreſt except for treaſon, felony &c.—*See V. l. p.* 129. *ſect.* 16.

3. *Witneſſes* attending at court &c. being duly ſummoned, and *actually* a witneſs in the cauſe expreſſed in the *ſubpœna*, are privileged during their attendance, and in coming to and returning from thence, allowing one day for every twenty miles from their places of abode —*See V. l. p.* 289. *ſect.* 6.

4 The ſame privilege is allowed to *electors*.—*See V. l. p.* 23. *ſect.* 7.

5.

5. Alſo to *grand jurors*.—*See V. l. p.* 107. *ſect.* 8.

6. And to *members* of the *General Aſſembly*; during whoſe privilege proceſs in which they are parties ſhall be ſuſpended;—if delivered by privilege from execution, they ſhall return as ſoon as the privilege ceaſeth, or be liable to an eſcape.—*See V. l. p.* 26. *ſect.* 19.

7. The *Governor*——*Members of the Privy Council*——*Judges* of the *Superior Courts*——and the *Sheriff* of any county, during his continuance in office, cannot be arreſted by the ordinary proceſs; but inſtead thereof a ſummons ſhall iſſue &c.—*See V. l. p.* 83. *ſect* 23.—And in all ſuch caſes, after judgment, and the return of a *fieri facias*, by the ſheriff of the county in which the defendant reſides, that no effects, or not ſufficient are to be found, a *capias ad ſatisfaciendum* may iſſue as in other caſes. *Ibid.*

8. Any *miniſter* of *religion* licenſed according to the rules of his ſect, who has taken the oath or affirmation of fidelity to the commonwealth, while he is publickly preaching or performing religious worſhip, in any church, meeting-houſe &c.—*See V. l. p.* 287. *ſect* 3.

9. A *corporation* cannot be *arreſted*, but the proceſs is a *diſtringas*. 3 *Salk.* 46.

But none of thoſe privileges from arreſt extend to caſes of treaſon, felony, riot, breach of the peace, or an eſcape out of priſon or cuſtody.—*See V. l. p.* 129. *ſect.* 16.

II. For what cauſes of ſuſpicion an arreſt may be.

The cauſes of ſuſpicion which are generally held ſufficient to juſtify the arreſt of an innocent perſon are theſe which follow:

(1) The common fame of the country; but it ſeems, that it ought to appear upon evidence, in an action brought for ſuch arreſt, that ſuch fame had ſome probable ground. 2 *Haw.* 76.

(2) The being found in ſuch circumſtances as induce a ſtrong preſumption of guilt; as coming out of a houſe wherein murder hath been committed, with a bloody knife in one's hand; or being found in poſſeſſion of any part of goods ſtolen, without being able to give a probable account of coming honeſtly by them. 2 *Haw.* 76.

(3) The behaving one's ſelf in ſuch a manner as betrays a conſciouſneſs of guilt; as where a man accuſed of felony, on hearing that a warrant is taken out againſt him, doth abſcond. 2 *Haw.* 76.

But the party who flies from an arreſt for a capital offence, is not thereby guilty of a capital offence. 2. *Hawk.* 122.

(4)

(4) The being found in company with one known to be an offender, at the time of the offence, or generally at other times keeping company with perſons of ſcandalous reputation. 2 *Haw.* 76. 2. *Inſt.* 52.

(5) The living an idle, vagrant, and diſorderly life, without having any viſible means to ſupport it. 2 *Haw.* 76.

(6) The being purſued by hue and cry. 2 *Haw.* 76. for if a felony is done, and one is purſued upon hue and cry, that is not of ill fame, ſuſpicious, unknown, nor indicted, he may be attached and impriſoned by the law of the land. 2. *Inſt.* 52.

But generally, no ſuch cauſe of ſuſpicion, as any of the above mentioned, will juſtify an arreſt, where in truth no ſuch crime hath been committed; unleſs it be in the caſe of hue and cry. 2 *Haw.* 76.

In the caſe of *Samuel* againſt *Payne* and others, (*Doug.* 345) the plaintiff *Samuel* brought an action of treſpaſs and falſe impriſonment againſt *Payne* a conſtable and two others, the facts were theſe: *Hall* one of the defendants, charged the plaintiff with having ſtolen ſome laces from him which he ſaid were in the plaintiff's houſe. A ſearch warrant was granted by a juſtice upon this charge, but there was no warrant to apprehend him. On the ſearch, the goods were not found, however, *Payne*, *Hall*, and the other defendant an aſſiſtant of *Payne*, arreſted the plaintiff and carried him before a magiſtrate, who upon examination diſcharged him. The cauſe was tried before lord *Mansfield*, and a verdict found againſt all the three defendants. At the trial, the court and counſel on both ſides looked upon the rule of law to be, that if a felony hath actually been committed, any man, upon reaſonable probable grounds of ſuſpicion, may juſtify apprehending the ſuſpected perſon to carry him before a magiſtrate but that, if no felony has been committed, the apprehending of a perſon ſuſpected, cannot be juſtified by any one. The court therefore left it to the jury to conſider whether any felony had been committed. The rule, however, was conſidered as inconvenient and narrow, becauſe if a man charges another with 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 doth his duty in carrying the accuſed before a magiſtrate, who is authorized to examine, and commit or diſcharge. On this ground, a motion was made for a new trial; and, after cauſe ſhewn, the court held, that the charge was a ſufficient juſtification to the conſtable, and his aſſiſtant, and the rule for

a new

a new trial was made abſolute. On which new trial a verdict was found againſt *Hall*, and for the other two defendants.

III. By whom the arreſt ſhall be made.

1. In criminal caſes, a perſon may be apprehended and reſtrained of his liberty, not only by proceſs out of ſome court, or warrant from a magiſtrate, but frequently by a conſtable, watchman, or private perſon, without any warrant or precept.

2. Thus all perſons, who are preſent when a felony is committed, or a dangerous wound given, are bound to apprehend the offender, on pain of being fined and impriſoned for their neglect. 2 *Haw.* 74.

Alſo, every private perſon is bound to aſſiſt an officer demanding his help, for the taking of a felon, or the ſuppreſſing of an affray. 2 *Haw.* 75.

If a private perſon have a priſoner in cuſtody arreſted on ſuſpicion of felony, treaſon, or murder, and negligently ſuffer him to eſcape before he is committed to jail, he may be fined, on being found guilty in the diſtrict court, where the eſcape was ſuffered *V. l. p.* 127.

3. Alſo, a watchman may arreſt a night walker, without any warrant from a magiſtrate. 2. *Inſt.* 52.

4. In like manner, a conſtable, may ex officio arreſt a breaker of the peace in his view, and keep him in his houſe, till he can bring him before a juſtice. 1 *H. H.* 587.

5. Or any perſon whatſoever, if an affray be made to the breach of the commonwealth's peace, may without any warrant from a magiſtrate, reſtrain any of the offenders, to the end the commonwealth's peace may be kept; but after the affray is ended, they cannot be arreſted without an expreſs warrant. 2 *Inſt.* 52.

6. So much concerning an arreſt *without* a warrant; next follows arreſting *with* ſuch warrant:

7. The warrant is ordinarily directed to the ſheriff or conſtable, and they are indictable, and ſubject thereupon to a fine and impriſonment, if they neglect or refuſe it. 1 *H. H.* 581.

8. If it be directed to the ſheriff, he may command his under ſheriff to execute it; but a conſtable cannot depute and muſt perſonally execute it. 2 *Hawk.* 86.—Yet it ſeems that any one may lawfully aſſiſt him. *Ibid.*

9. If a warrant be generally directed to all conſtables, no one can execute it out of his own precinct, for in ſuch caſe it ſhall be taken reſpectively to each of them within their ſeveral diſtricts, and not to one of them to execute it within the diſtrict of another; but if it be directed to a particular conſtable (*Mr. Hawkins* ſays, to a particular conſtable *by name*,) he may execute

cute it any where within the juriſdiction of the juſtice, but is not compellable to execute it out of his own conſtablewick — *L. Raym.* 546. 1 *H. H.* 581.—2 *H. H.* 110—2 *Hawk.* 86.

10. The juſtice that iſſues the warrant, may direct it to a private perſon if he pleaſeth, and it is good; but he is not compellable to execute it, unleſs he be a proper officer. 1 *H. H.* 581.

11. But by the juſtices oath of office, the warrant ought not to be directed to the party, but to ſome indifferent perſon to execute it.

12. If a warrant is directed to two or more jointly, yet any one of them alone may execute it. *Dalt. c.* 169.

IV. The manner of an arreſt.

1. The officer to whom a warrant is directed and delivered, ought with all ſpeed and ſecrecy to find out the party, and then to execute the warrant. *Dalt. c.* 169.

2. It is certainly an offence of a very high nature, to oppoſe one who lawfully endeavours to arreſt another for treaſon or felony: and it ſeems, that a perſon who ſo oppoſes an arreſt for treaſon, whereof he knows the party to have been guilty, is thereby guilty of the treaſon; and that he who ſo oppoſes an arreſt for felony, is an acceſſary to the felony. 2 *Haw.* 121.

3. An arreſt in the night is good, both at the ſuit of the commonwealth and of the citizen, elſe the party may eſcape. 9 *Co.* 66.

4. A juſtice of the peace cannot, authoriſe the arreſt of a felon by a warrant iſſued by him while he is out of the county, in which he is juſtice; altho' the felony was committed in the county in which the juſtice reſides. 1 *H. H.* 581.

5 A private perſon cannot raiſe power to arreſt or detain a felon. 1 *H. H.* 601.

But any juſtice, or the ſheriff, upon juſt cauſe, may take of the county any number that he ſhall think meet, to purſue, arreſt, and impriſon traitors, murderers, robbers, and other felons; or ſuch as do break, or go about to break, or diſturb the commonwealth's peace: and every man being required and not aged and infirm, ought to aſſiſt and aid them, on pain of fine and impriſonment. *Dalt. c.* 171.

And in ſuch caſe it is referred to the diſcretion of the juſtice, ſheriff, or other officer, what number they will have to attend on them, and how and after what manner they ſhall be armed or otherwiſe furniſhed. *Dalt. c.* 171.

6. As to the caſe of breaking open doors, in order to apprehend offenders, it is to be obſerved, that the law doth never allow

allow any ſuch extremities, but in caſes of neceſſity; and therefore, that no one can juſtify the breaking open another's door to make an arreſt, unleſs he firſt ſignify to thoſe in the houſe the cauſe of his coming, and requeſt them to give him admittance. 2 *Haw.* 86.

But where a perſon authoriſed to arreſt another, who is ſheltered in a houſe, is denied quietly to enter into it, in order to take him; it ſeems generally to be agreed, that he may juſtify breaking open the doors in the following inſtances.

(1) Upon a *capias* grounded on an indictment for any crime whatſoever; or upon a *capias* from the chancery or other ſuperior court, to compel a man to find ſecurities for the peace or good behaviour. 2 *Haw.* 86.

(2) When one known to have committed a treaſon or felony, or to have given another a dangerous wound, is purſued either with or without a warrant, by a conſtable or private perſon; but where one lies under a probable ſuſpicion only, and is not indicted, it ſeems the better opinion at this day (Mr. *Hawkins* ſays) that no one can juſtify the breaking open doors in order to apprehend him: and this opinion he founds on *Coke's* 4. *Inſt.* 177. and *Hale's pleas of the crown.* 91. 2 *Haw.* 87.

But lord Hale in his hiſtory of the pleas of the crown ſays, that upon a warrant for probable cauſe of ſuſpicion of felony, the perſon to whom ſuch warrant is directed, may break open doors to take the perſon ſuſpected, if upon demand he will not ſurrender himſelf as well as if there had been an expreſs and poſitive charge againſt him; and ſo (he ſays) hath the common practice obtained notwithſtanding the contrary opinion of lord *Coke.* 1 *H. H.* 580. 583. 2 *H. H.* 117.

And as he may break open ſuch perſon's own houſe, ſo much more may he break open the houſe of another to take him; for ſo the ſheriff may do upon a civil proceſs: But then he muſt at his peril ſee that the felon be there; for if the felon be not there he is a treſpaſſer to the ſtranger whoſe houſe it is. 2 *H. H.* 117.

But it ſeems that he that arreſts as a *private man* barely upon ſuſpicion of felony, cannot juſtify the breaking open doors to arreſt the party ſuſpected, but he doth it at his peril, that is, if in truth he be a felon, then it is juſtifiable, but if he be innocent, but upon a reaſonable cauſe ſuſpected, it is not juſtifiable. 1 H. H. 82.

But a conſtable in ſuch caſe may juſtify, and the reaſon of the difference is this: becauſe that in the former caſe it is but a thing permitted to private perſons to arreſt for ſuſpicion, and they are not puniſhable if they omit it; and therefore they cannot break

break open doors; but in caſe of a conſtable he is puniſhable if he omit it upon complaint. 2 H. H. 92.

(3) Upon a warrant from a juſtice of the peace, to find ſureties for the peace or good behaviour. 2 *Haw.* 86 1. H. H. 582. 2 H. H. 117.

And in general, Mr. *Dalton* ſays, an officer upon any warrant from a juſtice, either for the peace or good behaviour, or in any caſe where the commonwealth is party, may by force break open a man's houſe, to arreſt the offender. *Dalt. c.* 169.

(4) On a warrant to ſearch for ſtolen goods, the doors may be broke open, if the goods are there; and if they are not there, the conſtable ſeems indemnified, but he that made the ſuggeſtion, is puniſhable. 2 H. H. 151.

(5) Where forcible entry or detainer is found by inquiſition before juſtices of the peace, or appears on their view. 2 *Haw.* 86.

(6) On a *capias utlagatum*, or *capias pro fine*. 2 *Haw* 86.

(7) On the warrant of a juſtice of the peace for the levying of a forfeiture, in executing of a judgment, or conviction for it, grounded on any ſtatute, which gives the whole or any part of ſuch forfeiture to the commonwealth. 2 *Haw.* 86.

(8) Where an affray is made in a houſe, in the view or hearing of the conſtable, he may break open the doors to take them. 1 *Haw.* 137. 2 *Haw.* 87.

(9) If there be diſorderly drinking or noiſe in a houſe, at an unſeaſonable time of night, eſpecially in inns, taverns, or alehouſes, the conſtable or his watch, demanding entrance, and being refuſed, may break open the doors, to ſee and ſuppreſs the diſorder. 2 H. H. 95.

(10) Wherever a perſon is lawfully arreſted for any cauſe, and afterwards eſcapes, and ſhelters himſelf in an houſe. 2 *Haw.* 87.

(11) But upon a general warrant, without expreſſing any felony or treaſon, or ſurety of the peace, the officer cannot break open a door. 1 H. H. 584.

(12) Neither ought doors to be broke open to take a perſon, who is required to take certain oaths by virtue of a ſtatute, becauſe in ſuch caſe the warrant is not grounded on a precedent offence. 2 *Haw.* 87. 12. *Co.* 131.

(13) In a civil ſuit, the officer cannot juſtify the breaking open an outward door or window in order to execute proceſs. If he doth, he is a trepaſſer. But if he findeth the outward door open, and entereth that way, or if the door be opened, to him from within, and he entereth, he may break open inward doors if he findeth that neceſſary in order to execute his proceſs. *Faſt.* 319.

For

For a man's houſe is his caſtle, for ſafety and repoſe to himſelf and family; but if a ſtranger, who is not of the family, upon a purſuit taketh refuge in the houſe of another, this rule doth not extend to him, it is not his caſtle, he cannot claim the benefit of ſanctuary therein. *Foſt.* 320.

And it is always to be remembered, that this rule muſt be confined to the caſe of arreſt upon proceſs in civil ſuits only. For where a felony hath been committed, or a dangerous wound given, or even where a miniſter of juſtice cometh armed with proceſs founded on a breach of the peace; the party's own houſe is no ſanctuary for him: in theſe caſes, the juſtice which is due to the public muſt ſuperſede every pretence of private inconvenience. *Ibid.*

(14) Finally, in all theſe caſes, if an officer, to ſerve any warrant, enters into a houſe, the doors being open, and then the doors are locked upon him, he may break them open in order to regain his liberty, 2 *Haw.* 87.

7. If there be a warrant againſt a perſon, for a treſpaſs or breach of the peace, and he flies and will not yield to the arreſt, or being taken makes his eſcape; if the officer kills him it is murder. 2 H. H. 117.

But if ſuch perſon, either upon the attempt to arreſt, or after the arreſt, aſſault the officer, to the intent to make his eſcape from him, and the officer ſtanding upon his guard kills him, this is no felony: for he is not bound to go back to the wall as in common caſes of *ſe defendendo*, for the law is his protection. 2 H. H. 118. *Str.* 499.

But where a warrant iſſueth againſt a perſon for felony, and either before arreſt, or after, he flies and defends himſelf with ſtones or weapons, ſo that the officer muſt give over his purſuit, or otherwiſe cannot take him without killing him, if he kill him it is no felony. And the ſame law is, for a conſtable that doth it by virtue of his office, or on hue and cry. 2 H. H. 118.

But then there muſt be theſe cautions: 1. He muſt be a lawful officer; or there muſt be a lawful warrant. 2. The party ought to have notice of the reaſon of the purſuit, namely, becauſe a warrant is againſt him, 3. It muſt be a caſe of neceſſity, and that not ſuch a neceſſity as in the former caſe, where an aſſault is made upon the officer, but this is the neceſſity, namely, that he cannot otherwiſe be taken. 2 H. H. 119.

But tho' a private perſon may arreſt a felon; and if he fly ſo as he cannot be taken without he be killed, it is excuſable in this caſe for the neceſſity; yet it is at his peril that the party be a felon, for if he be innocent of the felony, the killing (at leaſt before the arreſt) ſeems at leaſt manſlaughter; for an innocent

perſon

perſon is not bound to take notice of a private perſons ſuſpicion. 2 H. H. 119.

8. A perſon ſworn and commonly known, and acting within his own precinct, need not ſhew his warrant; but he ought to acquaint the party with the ſubſtance of it. 2 *Haw.* 85.

And an officer giveth ſufficient notice what he is, when he ſaith to the party, I arreſt you in the commonwealth's name; and in ſuch caſe, the party at his peril ought to obey him, tho' he knoweth him not to be an officer; and if he have no lawful warrant, the party grieved may have his action of falſe impriſonment. *Dalt. c.* 169.

But the learned editor of *Hale's* hiſtory obſerves hereupon, that the books referred to intend the general warrant conſtituting ſuch perſon an officer, as a bailiff, or the like, in a civil action; tho' it may be otherwiſe in caſe of felony, becauſe in ſuch caſe a private perſon may arreſt a felon without any warrant at all. 2 H. H. 116.

But if he acts out of his precinct, or is not ſworn and commonly known, he muſt ſhew his warrant if demanded. 2. *Haw.* 85. 86. otherwiſe the party may make reſiſtance, and needs not to obey it. *Dalt. c.* 169.

But if the conſtable has no warrant, but doth it by virtue of his office, as a conſtable, it is ſufficient to notify that he is conſtable, or that he arreſts in the name of the commonwealth. 1 H. H. 583.

9. If the conſtable come unto the party, and require him to go before the juſtice, this is no arreſt nor impriſonment. *Dalt. c.* 170.

For bare words will not make an arreſt without laying hold on the perſon, or otherwiſe confining him. But if an officer comes into a room, and tells the party he arreſts him, and locks the door, this is an arreſt; for he is in cuſtody of the officer. 1 *Salk.* 79. 2 *Haw.* 129. *caſes in the time of lord Hardwicke.*

10. It hath been holden, that if a conſtable, after he hath arreſted the party by force of a warrant, ſuffer him to go at large, upon his promiſe to come again and find ſureties, he cannot afterwards arreſt him by force of the ſame warrant; However if the party return, and put himſelf again under the cuſtody of the conſtable, it ſeems that it may be probably argued, that the conſtable may lawfully detain him, and bring him before the juſtice, in purſuance of ſuch warrant, but in this the law doth not ſeem to be clearly ſettled. 2 *Haw.* 81.

But if the party arreſted do eſcape, the officer upon freſh ſuit may take him again and again, ſo often as he eſcapeth, altho' he were out of view, or that he ſhall fly into another town or county. *Dalt. c.* 169.

V.

V. What is to be done after the arreſt.

I. When a private perſon hath arreſted a felon, or one ſuſpected of felony, he may detain him in cuſtody till he can reaſonably diſmiſs himſelf of him; but with as much ſpeed as conveniently he can, he may do any of thoſe three things:

(1) He may carry him to the common jail, but that is now rarely done. 1 H. H. 589. 2 H. H. 77.

(2) He may deliver him to the conſtable, who may either carry him to jail or to a juſtice of the peace. 1 H. H. 589.

(3) He may carry him immediately to a juſtice of the peace. 1 H. H. 589.

If the arreſt is by virtue of a warrant, when the officer hath made the arreſt, he is forthwith to bring the party according to the direction of the warrant: If it be to bring the party before the juſtice ſpecially, then the officer is bound to bring him before the ſame juſtice; but if the warrant be to bring him before any juſtice of the county, then it is in the election of the officer, to bring him before what juſtice he thinks fit, and not in the election of the priſoner. 1 H. H. 582—2 H. H. 112.

But if the time be unreaſonable, as in or near the night, whereby he cannot attend the juſtice, or if there be danger of a preſent reſcue, or if the party be ſick, he may ſecure him, till the next day, or ſuch time as it may be reaſonable to bring him. 2 H. H. 120.

And when he hath brought him to the juſtice, yet he is in law ſtill in his cuſtody, 'till the juſtice diſcharge, or bail, or commit him. 2 H. H. 120.

But it is ſaid, the conſtable is not obliged to return the warrant itſelf, but may keep it for his own juſtification, in caſe he ſhould be queſtioned for what he had done; but only to return what he had done upon it. *L. Raym.* 1196.

Arreſting and avoiding judgments (*ſee* JUDGMENTS.

Aiſon, *ſee* BURNING.

ASSAULT AND BATTERY.

I. Aſſault, what.
II. Battery, what.
III. In what caſes they may be juſtified.
IV. How Puniſhed.

I. Aſſault, what.

ASSAULT, *aſſultus*, from the French *aſſayler*, is an attempt or offer, with force and violence, to do a corporal hurt

hurt to another, as by ſtriking at him with or without a weapon; or preſenting a gun at him, at ſuch a diſtance to which the gun will carry; or pointing a pitchfork at him, ſtanding within reach of it; or by holding up one's fiſt at him; or by any other ſuch like act, done in an angry threatning manner. 1 *Hawk.* 133.

And from hence it clearly follows that one charged with an aſſault and battery, may be found guilty of the aſſault, and yet acquitted of the battery: But every battery includes an aſſault; therefore on an indictment of aſſault and battery, in which the aſſault is ill laid, if the defendent be found guilty of the battery, it is ſufficient. 1 *Hawk.* 134. 263.

It ſeems agreed at this day, that no words whatever can amount to an aſſault, notwithſtanding the many ancient opinions to the contrary. 1 *Hawk.* 134. 263.

II. Battery, what.

Battery, (from the Saxon *batte*, a club, or *beatan*, to beat, from whence cometh alſo the word *battle*) is, when any injury whatſoever, be it ever ſo ſmall, is actually done to the perſon of another, in any angry, or revengeful, or rude, or inſolent manner, as by ſpitting in his face, or any way touching him in anger, or violenty juſtling him out of the way, and the like. 1 *Hawk.* 134.

III. In what caſes they may be juſtified.

A man may juſtify an aſſault in defence of his perſon, or his wife, or maſter, or parent, or child within age; and may even *wound* in defence of his perſon, tho' not of his poſſeſſions. 3 *Salk.* 46.

If an officer authoriſed by warrant lay hands on another to arreſt him, or if a parent, in a reaſonable manner, chaſtiſe his child, a maſter his ſervant, a ſchoolmaſter his ſcholar, or a jailor his priſoner, or if one confine a friend by force, who is mad, or if one wreſts a ſword from another who offers violence therewith, in all thoſe caſes, and many others of a ſimilar nature, it is juſtifiable. 1 *Hawk.* 130.

Alſo, if a perſon comes into my houſe, and will not go out, I may juſtify laying hold of him, and turning him out. 3 *Blacks com.* 120.

So alſo, one may juſtify aſſaulting another who attemps to force him from his watercourſe, or highway, or any other legal poſſeſſion *Pult.* 42.

And wherever, a man, in his own defence, beats another who firſt aſſaults him, he may take advantage thereof, both upon an

an indictment, and in an action; but with this distinction, that on the indictment he may give it in evidence upon the plea of *not guilty*, but in an action he must plead it specially. 1 *Hawk.* 134.

IV. How Punished.

Persons guilty of this offence are punishable both by fine and imprisonment, on a prosecution by indictment at the suit of the commonwealth; and also in damages, by action, at the suit of the party injured. 1 *Hawk.* 134.

Warrant for an assault &c.
Mittimus.
Recognizance of bail &c.
} See title 'Warrant,' 'commitment,' 'Recognizance,' & 'Criminals,'—under which all the necessary *forms* may be found, and the *description* of the offence may be drawn from the following indictment, and the nature and circumstances of the case.

Indictment for a common assault.

county to wit.

The jurors of the commonwealth, for the body of the county aforesaid, upon their oath do present, That A O, *of the said county, labourer, on the day of in the year and in the year of the commonwealth, with force and arms, at the county aforesaid, in and upon one* A J, *taylor, in the peace of God, and of the said commonwealth then and there being, did make an assault; and him the said* A J, *then and there did* beat, wound, and ill-treat, *so that his life was greatly despaired of; and other wrongs to the said* A J, *then and there did, to the great damage of the said* A J, *and against the peace and dignity of the commonwealth.*

(In indictments for assault and battery, the court may rule the prosecutor to security for costs, and on failure, may dismiss the indictment with costs. *V. l. p.* 113.)

ATTACHMENT.

UNDER this title I shall only consider that species of attachment peculiar to the laws of this state, which is granted by a single magistrate against absconding debtors.

This authority has long been exercised by the magistrates of this commonwealth, and is now founded on *Chap.* 78. *of the Revised Code. p.* 122—125.

I. Where the debt or demand exceeds five dollars, or two hundred pounds of tobacco.

This

(This attachment and the ſubſequent proceedings thereon are founded on *ſect.* 6, 7, 8 & 9. of the above recited law, *which ſee.*)

Bond to be entered into by the party for whom the attachment is iſſued.

Know all men by theſe preſents, that we of and of are held and firmly bound to of in the ſum of lawful money of Virginia; to which payment, well and truly to be made, to the ſaid his heirs, executors, adminiſtrators, or aſſigns, we bind ourſelves, and each of us, our and each of our heirs, executors, and adminiſtrators, jointly and ſeverally, by theſe preſents. Witneſs our hands and ſeals, this day of in the year &c.

The condition of the above obligation is ſuch, that whereas the above bound hath this day obtained from a juſtice of the peace, for the county of an attachment againſt the eſtate of the above named for the ſum of returnable to the next county court, if therefore the ſaid ſhall ſatisfy and pay all coſts which ſhall be awarded to the ſaid in caſe the ſaid ſhall be caſt in the ſaid ſuit, and alſo all damages which ſhall be recovered againſt the ſaid for his ſuing out of the ſaid attachment, then this obligation to be void, elſe to remain in force.

Sealed and delivered before,

This bond muſt be returned by the juſtice to the ſame court to which the attachment is returnable, or the attachment ſhall be declared void, and be diſmiſſed, as is alſo the caſe where no bond is taken.

Warrant of Attachment.—On ſect. 6.

To the ſheriff of county

to wit,

Whereas of hath this day complained before me one of the commonwealth's juſtices of the peace for the ſaid county, that of is indebted to him in the ſum of current money, and that the ſaid hath privately removed himſelf out of this county, or ſo abſconds or conceals himſelf, that the ordinary proceſs of law cannot be ſerved upon him: theſe are therefore, in the name of the commonwealth to require you to attach the eſtate of the ſaid or ſo much thereof as ſhall be of value ſufficient to ſatisfy the ſaid debt and coſts, and ſuch eſtate ſo attached in your hands to ſecure, or ſo to provide that the ſame may be liable to farther proceedings thereupon to be had at the next court to be held for this county; and that you then and there make return, how you have executed this warrant. Given under my hand, this day of &c.

This

This precept is to be executed by the ſheriff or his under ſheriff, to whom directed, unleſs he is a party intereſted, and then by the coroner or ſerjeant, who muſt thereupon return what eſtate he has attached; or may take bond, with good ſecurity, for the debtor's appearance at the court to which the attachment is returnable, and for his performance of the order and judgment of ſuch court therein.

Condition of the bond to the ſheriff.

The condition of the above obligation is ſuch, that whereas an attachment from gentleman, a juſtice of the peace for this county, againſt the eſtate of the above bound at the ſuit of hath been levied on Sundry goods of the ſaid which have been reſtored to him upon his giving this bond; if therefore the ſaid ſhall appear at the next court to be held for this county, and anſwer the ſaid attachment, and abide by and perform the order or judgment of the court therein, then &c.

Slaves, goods, and chattels, belonging to the debtor, though the ſame be found in another county, may, in the ſame manner, be attached by a warrant from a juſtice of the peace of the county where ſuch eſtate is found. For tho' the expreſſion of the law is, that the property of the defendant may be attached '*wherever the ſame ſhall be found*;' yet it can by no conſtruction extend the juriſdiction of a magiſtrate beyond the limits of his own county. The neceſſity then of obtaining an attachment in the county where the property is to be found for all ſums of this dignity, is ſufficiently obvious. In the next caſe, indeed, there is no neceſſity to get an attachment, except in the county in which the debtor reſides; but this power proceeds from the expreſs letter of the law, which authoriſes the magiſtrate to direct the warrant, in caſes of this ſort '*to all ſheriffs, ſerjeants, and conſtables*,' in the commonwealth.—This is commonly called a *running attachment*; and being an exception from the preceding caſe fully proves the poſition there advanced.

II. Where the debt doth not exceed twenty dollars, current money, or one thouſand pounds of tobacco. on ſect. 10.

'By the beforementioned act, (*V. l. p* 124. *ſect.* 10.) it is declared to be lawful for any creditor, whoſe debt doth not exceed 'twenty dollars current money, or one thouſand pounds of tobacco, to make oath before any juſtice of the county where 'the debtor reſides, how much is due to him, and that he has grounds to ſuſpect, and verily believes, ſuch debtor intends to

remove his effects; whereupon the juſtice may iſſue an attachment againſt the debtor's eſtate, returnable to the next county court, directed to all ſheriffs, ſerjeants and conſtables, within the commonwealth.

Warrant of Attachment.—on ſect. 10.

To all ſheriffs, ſerjeants and conſtables, within the commonwealth of Virginia.

to wit.

Whereas of &c. hath this day complained, and made oath before me one of the commonwealth's juſtices of the peace for the county of that is juſtly indebted to him in (by obligation, account &c. as the caſe may be) *and that the ſaid has grounds to ſuſpect, and verily believes, the ſaid intends to remove his effects: theſe are therefore, in the name of the commonwealth, to will and require you, and every of you, within your reſpective counties, corporations and precincts, to attach ſo much of the eſtate of the ſaid* (if to be found therein) *as will be ſufficient to ſatisfy the ſaid debt and coſts, and the ſame in your hands to ſecure, or ſo to provide that the ſame may be liable upon farther proceedings thereon, to be had at the next court to be held for the ſaid county of to which you are to make return of your proceedings herein. Given under my hand, &c.*

The ſheriff, ſerjeant, or conſtable of *any* county or corporation in the commonwealth may execute the above warrant, which is to be returned to the court of the county from whence it iſſued; whereupon ſuch proceedings are to be had without a petition as in other caſes of attachment—*See V. l. p.* 124. *ſect.* 10.

III. Where the debt or demand is under five dollars, or two hundred pounds of tobacco —on ſect. 11.

Attachments in this inſtance are finally determinable before a juſtice of the peace. *See V. l. p.* 124 *ſect.* 11.

As the ſame proceedings are to be had in this caſe, as are directed upon attachments returnable before a court, the form of the *bond* already given may be adopted, with this variation, in the *condition*, 'hath obtained an attachment for returnable 'before me, or ſome other juſtice of the peace for the ſaid county of &c.

Warrant of Attachment.—on ſect. 11.

To any conſtable, or ſworn officer of the county of

to wit.

Whereas of &c. hath this day made complaint before me one of the commonwealth's juſtices of the peace of the ſaid

said county that of &c. is indebted to him shillings current money; and that the said is removing himself out of the county privately, or conceals himself so that a warrant cannot be served upon him. I therefore command you to attach the estate of the said or so much thereof as shall be of value sufficient to satisfy the said debt, and costs, and the same in your hands to secure, so as to be liable to further proceedings thereupon, to be had before me, or some other justice of this county, to whom you shall make return how you have executed this warrant. Given under my hand, this day of

The constable, or other officer, is to execute, and make a return upon this warrant agreeable to the truth of the case.

'Where any attachment returnable to the county court, or 'before a justice of peace, shall be returned executed, and the 'goods or effects attached shall not be replevied, as by the said 'act is directed, the plaintiff shall have judgment for his whole 'demand, and take execution thereupon, and all goods and ef- 'fects attached, and not replevied, shall be sold and disposed of 'towards satisfying the plaintiff's judgment, as goods taken by '*fieri facias*; and all garnishees in whose hands attachments are 'returned executed, for all sums of money or tobacco due from 'them to the party absconding, or in their possession, also all 'goods and effects in their hands, shall be liable to such judg- 'ment and execution. *V. l. p.* 124.

'Upon proof being made before a magistrate, that a debtor 'is actually moving or absconding on *Sunday*, it shall be law- 'ful to issue and serve an attachment against such debtor, as is 'directed on any other day. *V. l. p.* 125.

Returns upon warrants of attachment where no effects.

The within named hath no estate in my precinct whereof I can make the sum within mentioned

Constable.

Where the attachment is levied.

By virtue of this warrant, to me directed, I have attached, of the goods and chattels of the within named which I have ready, as by the warrant I am required.

Where a debt is attached in the hands of another person.

By virtue, &c. I have attached the within mentioned sum of shillings and costs, of the estate of the within named in

the

the hands of &c. as by the warrant I am required, and have ſummoned the ſaid to appear before on the day of next, to declare what effects he hath in his hands.

The defendant failing to appear hereupon, the plaintiff, upon proof of his debt, ſhall be entitled to a judgment; to be granted to him by the juſtice.

JUDGMENT.

to wit.

A B, *againſt* C D, *in debt.*

The attachment obtained by the plaintiff, againſt the eſtate of the ſaid defendant, being returned executed before me one of the commonwealth's juſtices of the peace for the ſaid county, and the ſaid defendant failing to appear, the plaintiff proved his debt according to law; and it is thereupon conſidered that the ſaid recover againſt the ſaid ſhillings current money, and the coſts of this ſuit, and the conſtable is ordered to ſell the goods attached according to law, to ſatisfy this judgment.

The expences of ſupporting live ſtock taken by attachment ſhall be ſettled by the court before whom the attachment is tried;—if the plaintiff obtains judgment, the expences are to be taxed in the bill of coſts, for which execution may iſſue; but if the plaintiff is caſt, the expences ſhall alſo be taxed in the bill of coſts, againſt him, for which the defendant may take out execution with the other coſts. *See V. l. p.* 125.

The goods muſt be ſold for ready money, or tobacco, according to the demand; and, after ſale, the following return is to be made.

By virtue of the within order, I have cauſed to be made the within mentioned ſum of of the goods and chattels of the within named which ſaid ſum of before the juſtice within mentioned, at the day within contained, I have ready, as required.

Conſtable.

The money and tobacco ſo levied muſt be by the officer, immediately paid to the plaintiff, or his attorney.

The overplus, if any ariſes by the ſale, after deduction of charges, muſt be paid to the owner of the goods, or his attorney, if to be found; otherwiſe to remain in the officers hands, till claimed.

Where the attachment is returned executed in the hands of another perſon, the party muſt be ſummoned to appear before a juſtice of the peace, where he is to declare, upon oath, how much of the defendant's eſtate is in his hands; and if it appear that he hath ſufficient, the plaintiff may have judgment for his whole debt, or ſo ſuch as appears to be in the hands of the party ſummoned, againſt ſuch party.

If

If the party does not appear upon the return of the ſummon executed, and declare, as aforeſaid, that he hath not any of the defendant's eſtate in his hands; the plaintiff may have judgment.

THE JUDGMENT.

to wit

A B, *againſt* C D, *in debt.*

The attachment obtained by the ſaid plaintiff, againſt the eſtate of the ſaid defendant, being returned, executed in the hands of and it appearing to me that there is now in the hands of the ſaid of the eſtate of the ſaid ſufficient to ſatisfy the plaintiff's debt and coſts, and the ſaid plaintiff having before me, proved his debt aforeſaid: it is conſidered that the ſaid recover againſt the ſaid ſhillings current money, and the coſts of this ſuit.

Coſts for cents.

Upon this judgment an execution may iſſue againſt the goods of the garniſhee, in the ſame manner as upon a judgment in the ordinary caſes for debt, cognizable before a ſingle magiſtrate, the form of ſuch execution may be ſeen under title Warrants.

But if the defendant appears, and upon trial, the plaintiff is caſt, the defendant's goods are to be reſtored and he is entitled to a judgment for his coſts.

JUDGMENT.

to wit.

A B, *againſt* C D, *in debt.*

The attachment obtained by the plaintiff againſt the defendant being retured executed, and the ſaid defendant, as well as the ſaid plaintiff, this day perſonally appearing before me, it is conſidered that the ſaid plaintiff take nothing by his plea; and that the ſaid defendant's eſtate at the ſuit of the plaintiff, attached, be reſtored to him; and that the ſaid plaintiff do pay the ſaid defendant his coſts, by him about his defence expended.

The coſts to be here taxed.

For *attachments* againſt tenants removing from the *premiſes*, before the expiration of their term, ſee title Rents.

ATTAINDER.

THIS is derived from the latin word *attinctus*, tainted, ſtained, or corrupted.

In caſes of treaſon or felony, a man is ſaid to be *convicted* before judgment is pronounced againſt him, as if a man be convicted

victed by verdict, or his own confeſſion; but he is ſaid to be *attainted*, only after judgment paſſes on ſuch verdict or confeſſion. 1 *Inſt.* 390.

The penalties conſequent on ſuch *attainder*, by the common law, were, that neither his children nor relations could derive any inheritance thro' him, nor could his wife claim her dower of his eſtate. To remedy which inconvenience, as well as to ſave the neceſſity of paſſing a ſpecial act of the legiſlature (which alone could relieve from the forfeiture) for every caſe which might occur, it is enacted by *M. l. p.* 113: That, 'Whenſoever any perſon ſhall happen to be attainted, convicted, or outlawed of any treaſon, miſpriſion of treaſon, murder or felony whatſoever, there ſhall in no caſe be a forfeiture to the commonwealth of dower, or of lands, ſlaves, or perſonal eſtate, but the ſame ſhall deſcend and paſs in like manner as is by law directed in caſe of perſons dying inteſtate; nor ſhall any *attainder* work a corruption of blood.'

'Saving to all perſons &c. (other than the offenders) their rights &c. to the ſaid eſtate.'

AWARD.

ALTHO' the ſubject of this title does not ſtrictly fall under the conſideration of a magiſtrate as a *conſervator of the peace*, yet as cases ariſing under it, may frequently be brought before him in his *judicial capacity*, and as almoſt every perſon, from a poſſibility of being called on to act as an arbitrator, may be intereſted in a knowledge of it; I ſhall make no apology for treating of the ſeveral parts of the doctrine, with ſome conſiderable degree of minuteneſs: Under which I ſhall ſhew,

I. *What an award is.*
II. *Who may, or may not be arbitrators.*
III. *Who may or may not ſubmit to arbitration.*
IV. *What things may be ſubmitted, and the extent of ſuch ſubmiſſion.*
V. *The ſeveral kinds of ſubmiſſion.*
VI. *When a ſubmiſſion may be revoked.*
VII. *Of the award; when it ſhall be good and when not.*
VIII. *Of the umpire.*
IX. *What ſhall be a breach of the award.*
X. *Of the remedy for non-performance.*
XI. *How an award may be relieved againſt.*

I.

I. *What an award is.*

An award is the judgment, or decree of perſons elected by the parties, to arbitrate and determine the matters in controverſy, ſubmitted to them. 1 *Com. Dig.* 534.

II. *Who may or may not be arbitrators.*

An arbitrator being a judge elected by the party, every one capable of making an arbitrament, may be an arbitrator. 1 *Com. Dig.* 534.

But a perſon of *non ſane* memory; a perſon, who by nature or accident, has not diſcretion; an infant; a *feme covert*: a man attainted of treaſon or felony; or a perſon who is not indifferent with reſpect to the deciſion of the cauſe, cannot be an arbitrator, and in the laſt mentioned caſe an award made by ſuch an arbitrator would be ſet aſide in a court of equity. 1 *Com. Dig.* 534.

III. *Who may or may not ſubmit to arbitration.*

Every one capable of making a diſpoſition, or a releaſe of his right, may make a ſubmiſſion to an award 1 *Com. Dig.* 537.

But an infant cannot ſubmit to arbitrament, for his ſubmiſſion is void, *Ibid.*

Yet if an infant and a man of full age join in a ſubmiſſion, it is good; for tho' the infant cannot be obliged to ſtand to it, yet his ſubmiſſion is only voidable, and he may agree or diſagree to the award at his full age. *Ibid.*

And a father may be obliged, that he and his ſon an infant ſhall ſtand to an award: and ſuch obligation binds the father. *Ibid.*

And therefore, if the father pleads to the obligation, that his ſon was within age, it is no bar. 3 *Lev.* 17

So a father may ſubmit for him and his ſon, and it is good for the ſon. 1 *Lev.* 139.

So a *feme covert*, cannot ſubmit herſelf to an award. 1 *Com. Dig.* 537.

But the huſband may ſubmit for him and his wife. *Stile*, 351.

So, if the huſband only ſubmit, it is ſufficient for a debt due from the wife as executrix or adminiſtratrix; for the huſband is chargeable with it by the intermarriage. 1 *Com. Dig.* 537.

So, if there be a ſubmiſſion by the huſband only for a leaſe for years, which his wife has as executrix; and this binds the wife after his death. *Ibid.*

Or, for a debt upon a bond made to his wife before coverture. *Mar.* 77.

So,

So, if there be a controverſy between A, of the one part, and B & C, of the other; and B ſubmit *for himſelf and C*, and there be an award, *that B ſhall pay &c.* this is good, tho' C, be a ſtranger. 1 *Com. Dig.* 538.

So, if B ſubmit for *himſelf, and his partner*; and the award is *that B, ſhall pay.* 2 Mod. 228.

So, if B ſubmit, *as the attorney of C*, B ſhall be bound. 1 *Salk.* 70.

IV. What things may be ſubmitted, and the extent of ſuch ſubmiſſion.

All perſonal actions and things of an uncertain nature may be determined by arbitration. 1 *Com. Dig.* 538.

So, a debt on a ſpecialty or record, tho' certain, may be ſubmitted *amongſt other things.* 1 *Lev.* 292. 1 *Bac. Abr. Abitrament.*

But freehold, or inheritance of lands, cannot be determined by arbitrament. 1 *Rol.* 242. *l.* 10.

And therefore there cannot be a partition by an award; for freehold does not paſs without livery. 1 *Rol.* 242. *l.* 16.

So, the intereſt of an eſtate for years, cannot be transferred by an award; for it is a chattel real, 1 *Rol.* 242. *l.* 20.—*Contra Cro. Eliz.* 223.—*See* 1 *Bac. Abr. Arbitrament.*

Nor, a thing certain; as a debt upon bond, *by itſelf.* 1 *Lev.* 292. Otherwiſe if the ſubmiſſion be by bond, for then the award would be a good bar. 1 *Bac. Abr. Arb.*

Or, a debt upon record; as arrears of an account found before auditors. 1 *Com. Dig.* 538.

But an award may be of the arrearages of a rent reſerved upon a leaſe for years. 1 *Rol.* 242. *l.* 25.

So, if a man be bound to ſtand to an award, and the arbitrators make an award, *that land ſhall be conveyed*; if the party refuſes the conveyance, he forfeits his obligation. 1 *Rol.* 244. *l.* 5.

So, if the condition of an obligation is, to ſtand to an award, concerning lands; and the arbitrator awards the land to one, *and that the other ſhall releaſe to him*: if he doth not releaſe, the obligation is forfeited. 1 *Bac. Abr. Arbitrament.*

But if the arbitrator awards the land to one, it ſeems the obligation is not forfeited, tho' the other do not convey to him; for the arbitrator hath not awarded any act to be done by the party, as in the above caſe, and the award itſelf cannot transfer the right: for the awarding the land to one cannot be expounded that the other ſhall infeoff him. *Ibid.*

And altho' there be no bond, yet if the arbitrator do award that the one ſhall infeoff the other; it ſeems that an action on

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the caſe may be maintained for not doing it: *See* 1 *Bac. Abr. Arbitrament.*

If an award be, *that one ſhall pay ſo much in ſatisfaction of a ſpeciality*; tho' the ſpecialty is not thereby diſcharged, yet if he commence an action on the ſpecialty afterwards, he forfeits his obligation. 1 *Com. Dig.* 538.

Criminal matters, as treaſons, murders, felonies, and other offences indictable at the ſuit of the commonwealth, cannot be ſubmitted to arbitrament; for it is for the good of the commonwealth that ſuch offenders be made known and puniſhed: and the commonwealth in ſuch caſes is a party, for whom the other parties cannot undertake. And altho' the ſubmiſſion be by bond, yet the obligation is void; and the parties may be puniſhed for entering into ſuch bond. 1 *Bac. Abr. Arbitrament.*

But if the party injured proceeds by way of action, as he may in aſſaults and batteries, libels and the like; the damages he ſuſtained or expects to recover, may be ſubmitted to arbitration: for in ſuch caſes the action is for himſelf and not for the commonwealth. *Compleat Arbitrator.* 28.

Alſo matrimonial cauſes, or any thing concerning the contract or diſſolution of marriages, cannot be ſubmitted to arbitrament. 1 *Rol.* 252.

But the damages a perſon ſuſtained by a promiſe of marriage, or any thing relating to a marriage portion, may be ſubmitted. 10 *Id.* 4. 2.

If there be a ſubmiſſion *of all actions and complaints*; cauſes of actions are ſubmitted. 1 *Rol.* 245.

If, *of actions perſonal, and ſuits and quarrels:* actions real are ſubmitted: 1. *Rol.* 246.

If there be a ſubmiſſion of *all matters between them two*; an action by one of them and his wife againſt the other, is not ſubmitted 1 *Rol.* 246.

If, *of all demands*; title to land is ſubmitted. *Kel.* 99.

If *of all debts*; ſpecialties and judgments for them may be releaſed 2 *Sand.* 190.

If, *of all differences*; all demands may be releaſed. 1 *Com. Dig.* 539.

But by a ſubmiſſion *of all actions*, cauſes of action are not ſubmitted. 1 *Rol.* 245

By a ſubmiſſion *of actions perſonal, ſuits and complaints*, actions real are not ſubmitted; for *perſonal* applies to the whole. 1 *Rol.* 246.

By a ſubmiſſion by A & B. of the one part, and C of the other, *of all matters between them*, an action by A alone againſt C, is ſubmitted; for it ſhall be taken diſtributively. 1 *Rol* 246.

By a ſubmiſſion of A, *of all matters*, a debt due from the wife of A, as executrix is ſubmitted. 2 *Cro.* 447.

If all matters in difference are ſubmitted, it extends to a demand as Executor. *Str.* 1144.

If there be a ſubmiſſion generally, upon the trial of a particular action, yet the arbitrators may determine all other matters between the parties. 1 *Com. Dig.* 537.

See 3 *Viner's Abridgment* 48—52.

V. The ſeveral kinds of ſubmiſſion.

1. A ſubmiſſion, to arbitrament may be by *parol*, or *words*; and an *aſſumpſit*, lies for non-performance. 1 *Com. Dig.* 535. But as the ſubmiſſion may be revoked at any time before the award made, and becauſe it is liable to introduce too much perjury, the judges will rarely enforce the performace of an award made on ſuch ſubmiſſion. *Comp. Arb.* 21.

2. A ſubmiſſion may alſo be by an indenture, with *covenants*, to ſtand to the award of ſuch perſons. 2 *Mod.* 73. But this method is ſeldom uſed; for tho' it contains the ſame certainty with a bond, yet the method of ſuing on a covenant is different and more difficult than on a bond. *Comp. Arb.* 7. 46.

3. Or a ſubmiſſion may be by *bond*, with a condition to ſtand to the award of the arbitrators appointed between the parties.—In this caſe each party muſt give to the other a bond; which bond, and the condition, muſt contain exactly the ſame words, only changing the names of the parties. And the penalty of the bond ſhould be at leaſt the value of the thing ſubmitted; ſo that the party may rather abide by the award, than forfeit his obligation. *Comp. Arb.* 46.

Or, by ſeveral obligations; for if A give an obligation to B, and C another, the ſubmiſſion appears upon all. *Cro. Car.* 433.

So, if a bond of ſubmiſſion be made to A & B, and it appears that A, was a truſtee for B, and the condition mentions the arbitrators to be elected only on the part of A, yet here is a ſubmiſſion by B, alſo. *Lut.* 576.

So, there may be a ſubmiſſion to ſtand to the award of four, *ſo that an award be made by all, or three of them*; and an award by three will be good. 2 *Cro.* 278. 1 *Com. Dig.* 535.

4. A ſubmiſſion may alſo be by *rule of court*; and is made in purſuance of the act of the General Aſſembly of Virginia, firſt paſſed in the year 1789. This practice however prevailed much earlier, in our courts, and was chiefly regulated by the act of Parliament of England of 9 & 10, W. III. c. 15 tho' that ſtatute was not ſtrictly obligatory on us. Our act is now collected in the *Reviſed Code*, page 54: and is as follows, 'It 'ſhall and may be lawful for all merchants, and traders, and 'others deſiring to end any controverſy, ſuit or quarrel, for which

'which there is no other remedy but by perſonal action or ſuit 'in equity, by arbitration to agree, that their ſubmiſſion of the 'ſuit to the award or umpirage of any perſon, or perſons, ſhould 'be made a rule of any court of record, which the parties ſhall 'chuſe, and to inſert ſuch their agreement in their ſubmiſſion, or 'the condition of the bond or promiſe, whereby they oblige 'themſelves reſpectively to ſubmit to the award or umpirage of 'any perſon or perſons; which agreement being ſo made and 'inſerted in their ſubmiſſion or promiſe, or condition of their re-'ſpective bonds, ſhall or may upon producing an affidavit thereof 'made by the witneſſes thereunto, or any one of them in the 'court, of which the ſame is agreed to be made a rule, and 'reading and filing the ſaid affidavit in court, be entered in the 'proceedings of ſuch court, and a rule ſhall be made thereupon 'by the ſaid court, that the parties ſhall ſubmit to and finally be 'concluded by the arbitration or umpirage, which ſhall be made 'concerning them, by the arbitrators or umpire purſuant to 'ſuch ſubmiſſion.'

'And the award made in purſuance of ſuch ſubmiſſion may 'be entered up as the judgment or decree of the court, and the 'ſame execution or proceſs may iſſue thereupon, as on other 'judgments or decrees, and the court ſhall not invalidate ſuch 'award, arbitrament, or umpirage, unleſs it be made appear to 'ſuch court, that ſuch award arbitrament or umpirage was pro-'cured by corruption or other undue means, or that there was 'evident partiality or miſbehaviour in the arbitrators, or um-'pires, or any of them. And any award, arbitrament or umpi-'rage procured by corruption or other undue means, or where 'there ſhall have been ſuch evident partiality or miſbehaviour as 'aforeſaid ſhall be deemed and judged void and of none effect, 'and accordingly ſet aſide by the court in which the ſubmiſſion 'ſhall be made, ſo as complaint of ſuch corruption or undue 'means or evident partiality or miſbehaviour as aforeſaid be 'made before the end of the ſecond court of quarter ſeſſions in 'the caſe of a county court, or at the end of the ſecond term of 'any other court, next after ſuch award, arbitrament, or um-'pirage be made and returned to ſuch court.'

'Not to affect the power of courts of equity over awards, &c.'

And this is allowed to be the moſt expeditious way; and the method is, to get a counſel to move in any of the courts to get it made a rule, which in ſuch caſe is never denied; and then the party is liable to the ſame penalties that he would be for diſobeying any other rule of court. *Comp. Arb* 6 47.

5. Sometimes the ſubmiſſion is both by bond and rule of court, by adding the parties conſent at the bottom of the condi-

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on of the bond; and this is ſtill the beſt way, for then the party may proceed which way he pleaſes: and it is ſaid, that he may proceed both ways; that is, both by an action on the bond, and by way of attachment for the contempt. *Salk.* 73.

As the courts will ſeldom ſet aſide awards except for corruption and partiality in the arbitrators; and the method by which it is effected being uſually by bill in equity in which the arbitrators are made parties; to prevent this inconvenience, there is ſometimes inſerted in the condition of the bond, a reſtriction *that no bill in equity ſhall be filed againſt the arbitrators.* If, however, a bill ſhould be exhibited againſt the arbitrators, in any ſuch caſe, the court, upon motion will order their names to be ſtruck out. 2 *Atkyns* 395.

The court will compel a witneſs to a ſubmiſſion to arbitration, to make affidavit of the execution, in order to make a rule of court. *Str.* 1. *Barnes* 58.

A ſubmiſſion may be made a rule of court, on motion of one party, and producing the bond executed by the other. *Barnes* 55.

It may be made a rule of court, tho' no part of the *condition*, only a *memorandum* ſigned before execution of the bond. *Barnes* 55.

And if the ſubmiſſion be by rule of court, the court will oblige performance, without making the award alſo a rule of court. 1 *Salk.* 71.

A conſent in the ſubmiſſion bond, to make the *award* a rule of court, will not warrant the court's interpoſing; the *ſubmiſſion* muſt be made a rule of court. *Str.* 1178.

To bring a ſubmiſſion within the *ſtatute*, it muſt be confirmed by rule of court *prior* to making the award. 3 *P. Wms.* 361.

If a bond ſays, *and if he conſent to have the ſubmiſſion a rule of court*, it is ſufficient. 1 *Sal.* 72.

If the party does not obey an award by a rule of court, an attachment ſhall be granted againſt him, if he does not ſhew cauſe to the contrary upon notice, upon which he ſhall be impriſoned for his contempt. 1 *Sid.* 452. 1 Salk. 83.

And he muſt obey it, tho' it be defective in other reſpects; unleſs it be made by practice, or corruption, or be irregular. 1 *Salk.* 71. 73. 83.

So, a *parol* award may be inforced by attachment, *Barnes* 54.

It hath been holden on the ſtatute of 9 & 10, *W.* III *c.* 15. that if the ſubmiſſion be by *obligation*, the award muſt be complained againſt before the end of the next term, but not ſuch awards as are made in purſuance of a rule of *niſi prius*; and that nothing is a ground within that ſtatute to ſet aſide an award, but

but manifeſt corruption in the arbitrators, *Stra.* 301.—Yet the court in this laſt caſe, tho' they will not ſet aſide the award, will refuſe any proceſs to compel performance, if the award be irregular &c. *Andr.* 297.

Yet it is ſaid that an award upon a ſubmiſſion made a rule of court purſuant to the above ſtatute, may be avoided for other defects as well as corruption; otherwiſe judgment will be one way when given upon a bond, and another way when given upon a rule of court. 1 *Com. Dig.* 537.

If a reference be agreed, a ſtay of proceedings ſhall be conſequent. 1 *Mod.* 24.

And if there be an action upon a bond for non-performance; it will be a good breach, *that he proceeded to execution.* 1 *Com. Dig* 537.

So, if one ſerve a *ſi bpœna* upon the other after ſubmiſſion by rule, it will be a breach. 1 *Salk.* 73.

But, non-performance during conteſt is no contempt. 1 *Salk.* 73.

So, if any part of the award be impoſſible, for the non performance of ſo much, no attachment goes: 1 *Salk.* 83.

VI. When a ſubmiſſion may be revoked.

In which way ſoever the ſubmiſſion is made, the ſame may nevertheleſs be revoked, tho' made irrevocable by the ſtrongeſt words; for a man cannot by his own act, make ſuch authority or power not countermandable, which by the law, and its own nature is countermandable. 8. *Co.* 82.

If two ſubmit on one part, and one on the other; one of thoſe two may revoke without the other. 1 *Com Dig* 529.

But if the ſubmiſſion be by bond, if the party revokes, he forfeits his obligation, for that he hath broken the words of the condition, which are, that he ſhall ſtand to, and abide the award. 8. *Co.* 82.

And if the ſubmiſſion be made a rule of court, purſuant to the ſtatute; if either of the parties revokes, the court will grant an attachment. *Comp Arb* 82.

If the ſubmiſſion was by bond, the revocation muſt be in writing. 8 Co. 82.

But if a ſubmiſſion be revoked; it is of no avail till notice of the revocation to the arbitrators. 8 Co 82.

If the ſubmiſſion be by word, the party may revoke at pleaſure, and he forfeits nothing; but he muſt likewiſe give notice of the revocation, tho' it need not be in writing: and the notice muſt be to the arbitrators themſelves. 8 *Co.* 82.

If there be a ſubmiſſion by a *feme ſole*, who marries before an award made, it will be a revocation. 1 *Com Dig.* 539.

So, if the woman and B, ſubmit on one part, and the woman marries, it will be a revocation as to B, alſo 1 *Rol.* 331. *l.* 45.

VII.

VII Of the award; when it ſhall be good and when not.

1. An award ought to be purſuant to the ſubmiſſion: and therefore if it be made of a thing merely out of the ſubmiſſion it is void. 1 *Rol* 242.

As, if it be awarded, that a ſtranger ſhall do ſuch an act; it is void for ſo much: as *that a ſtranger ſhall give a bond.* 1 *Rol.* 243. 10. *Co.* 131.

So, an award *to pay upon the land, or within the houſe of a ſtranger.* 1 *Rol.* 247.

Otherwiſe, if it be *at the houſe*; for that does not make him a treſpaſſer. 1 *Rol.* 247. *See* 1 *Com. Dig.* 540.—3 *Vin. Abr.* 52.—*Cro. Car.* 226.

2. An award of a thing after the time of the ſubmiſſion is void: as, if it be *of rent which ſhall be due at Michaelmas next.* 1 *Rol.* 243.

So, a releaſe of all actions till the day of the award made. 1 *Rol.* 242.

So, an award, *that one ſhall pay for writing the award,* is void for ſo much; for this goes to a thing happening after the ſubmiſſion. 1 *Rol.* 254:—2 *Cro.* 578.

But now it is decided that the power of awarding coſts, is neceſſarily conſequent to the authority confered on the arbitrators of determining the cauſe. 2 *Term. Rep.* 645.—*See* 1 *Com. Dig.* 541.

3. An award of a thing not ſubmitted is void: as, if the ſubmiſſion be of *all matters depending,* and the award be of *all matters* generally. 1 *Rol.* 243.

If the ſubmiſſion be, *of all matters except an obligation*; and the award be *of all demands.* 1 *Rol.* 261.

But if on a reference of all matters in difference between two partners, the award be that the partnerſhip be diſſolved, this is within the ſubmiſſion and therefore good. 1 *Blacks Rep.* 475.

So, if the reference be of all matters in difference, *in this cauſe,* and general releaſes be awarded, it is good as to matters refered, tho' void as to the reſidue. 2 *Blacks Rep.* 1117.

A ſubmiſſion of all matters in difference 'in this cauſe be-'tween the parties,' is only a reference of the cauſe in queſtion; but a ſubmiſſion of all matters in difference, 'between the par-'ties in this cauſe,' is a general ſubmiſſion. 2 *Term. Rep.* 647. *See* 1 *Com. Dig.* 541.

4. If the ſubmiſſion be, *ſo that the award be made of the premiſes,* the award ſhall be of all matters in controverſy, of which they have knowledge; otherwiſe it will be void. 1 *Rol.* 256. *l.* 27.—8. *Co.* 98.

The like law, if a ſubmiſſion be, *of all matters ſo that the ſame award be made ſuch a day*, omitting, *that it be made of the premiſes*; for the words, *the ſame award &c.* are tantamount. *Cro. Eliz.* 838.

If there be a ſubmiſſion to the award of *A and B, ſo that* &c. and if they do not to an *umpire*, the clauſe *ſo that* extends to the umpirage. 1. *Lev.* 140.

And therefore if there be a ſubmiſſion *of ſuch and ſuch things*, ſpecially named, *ſo that* &c. an award not made of all is void; for they ought to take notice of them being ſpecially named in the ſubmiſſion, without other information. 1 *Rol.* 256.

See 3. *Vin. Abr.* 70—76.

5. If there be a ſubmiſſion of all controverſies, *between* A *and* B, *of the one part, and* C *of the other, ſo that &c.* an award of all between A & C, omitting B, is void. 1 *Rol.* 261.

But if the ſubmiſſion be general without a *ſo that &c.* the award may be of part of the matters in difference. 1 *Rol.* 256. *Cro. Eliz.* 838.—8 *Co.* 98.

See 1 Com. Dig. 542.

6. But, if a thing awarded to be done be out of the ſubmiſſion, it is immaterial, if the matters for which the award is made are within it; as if the award be, *that one of them ſhall give an obligation, horſe &c. to the other, in ſatisfaction of all matters ſubmitted.* 1 *Rol.* 245.

See 1 Com. Dig. 543.

7. So, an award of a thing to be done to a ſtranger is good, where the ſtranger is only an inſtrument: as, *to pay money to a ſtranger for the uſe or benefit of the parties.* 1 *Rol.* 247.—1 *Salk.* 74.

So, if a ſubmiſſion be by ſeveral who are ſeverally bound, an award, *that* A *and* B *pay*, is good; for upon the whole of the caſe it appears, that B, tho' not named in the bond given by A, is not a ſtranger. *Cro. Car.* 433.

But an award does not bind a ſtranger *to do* any act, as a releaſe, confirmation &c. *Mo.* 3.

See 1 *Com. Dig.* 543—544.

8. So, if an award exceeds and goes to matters *out* of the ſubmiſſion, it is good for ſo much as is *within* the ſubmiſſion: As, if an award be, *that* A *and a ſtranger pay* &c. it is good againſt A and he is bound to pay, tho' it is void as to a ſtranger. 1 *Rol.* 244.

Or, *that* A *be bound with ſureties* &c. ſhall be good as to A. 2 *Lev.* 6. *Show.* 82. *Carth.* 159.

9. And there ſhall not be a ſtrained conſtruction to make it to be out of the ſubmiſſion: And therefore if there be a ſub-

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miſſion *of all actions perſonal, ſo that &c.* and the award be, *of and concerning the premiſes, that one ſhall pay ſo much at a future day, and then ſhall make a releaſe of all actions perſonal*; the releaſe ſhall be only of all actions till the ſubmiſſion.

So, an award *of general releaſes*, extends only to matters at the time of the ſubmiſſion. 3 *Mod.* 264—See 1 *Com. Dig.* 545.

10. And if an award does not appear not to be purſuant to the ſubmiſſion, it ſhall not be intended: And therefore if an award *of the premiſes* be *of all matters till the time of the award*, it is good; unleſs it be avered that matters aroſe between them after the ſubmiſſion, and before the time of the award. 1 *Rol.* 244.

So, a ſubmiſſion *of all matters, ſo that the award be made of the premiſes &c*; an award *of the premiſes*, of a ſingle matter is good; for others ſhall not be intended unleſs they are ſhewn. 8 *Co.* 98—2 *Cro.* 285.—See 1 *Com. Dig.* 545.

11. So, an award ought to be certain: And therefore, if the award be, *that one ſhall make an obligation for the enjoyment of lands*, without ſaying in what ſum it will be void for the uncertainty. 5 *Co.* 77—2 *Cro.* 314.

But an award, *that one ſhall pay the coſts of a ſuit*, generally is good. 2 *Vent.* 243—*Carth.* 157.—See 1 *Com. Dig.* 545—547.

12. So, an award ought to be poſſible and lawful: and therefore, if it be impoſſible, it ſhall be void: as an award to pay at a day paſt. 1 *Rol.* 244.

If an award be that one of the parties kill, ſteal, forge a deed, or the like, it is void. 1 *Inſt.* 206.

Alſo it is held that where a thing is awarded to be done, which afterwards becomes impoſſible by the act of God, the party is excuſed; as if an award be, to deliver a horſe before ſuch a day, and he dies before that day. 21 *Ed.* 4. 70.

But if it becomes impoſſible by the act of the party himſelf, or of a ſtranger, he ſhall be bound to perform it. 2 *Mod.* 27. 28.

13. So, an award ought to be reaſonable: and therefore, if the award be *that one ſhall releaſe his land to the other in ſatisfaction of a treſpaſs*, it is void. 1 *Rol.* 249.—See 1 *Com. Dig.* 547.

14. So, an award ought to be mutual: and therefore if it be of one part only and nothing of the other it ſhall be void. 1 *Rol.* 253.—See 1 *Com. Dig.* 547—549.

15. So, an award ought to be final: and therefore an award, *to pay ſo much and if there be proof within a month of more due to pay that alſo*, is void. 1 *Rol.* 251.

Or,

Or, *to make ſubmiſſion to* B, *in ſuch manner and place as* B *ſhall ſay*; for B, will determine for himſelf. 1 *Salk.* 7.

Or, *that one ſhall give a bond to the other, with ſuch ſureties as he ſhall approve, and that they ſhall make mutual releaſes*; for if he will not approve of the ſecurities, nothing is done. 3 *Mod.* 272.

But an award, *to give a bond for payment* is good. 1 *Rol.* 249. See 1 *Com Dig.* 550.

16. So, an award muſt be intire; and therefore if it be made part at one day and part at another, tho' all be made before the time limited for it, it ſhall be void. 1 *Rol.* 250.

But the arbitrators may aſſemble and ſettle the matters at ſeveral days, but their award upon the whole muſt be intire. 1 *Rol.* 250.

17. So, an award ought to give a benefit or ſatisfaction for the thing ſubmitted. And therefore if an award orders nothing to be paid or done it ſhall be void. 1 *Rol.* 251.

As, if an award be *that one ſhall go to Rome*; for this is no advantage to the other. 1 *Rol.* 252.

But an award *that all differences do ceaſe, is good*, for this is a mutual advantage. *Mod. Cas.* 34 35.

18. If an award be void for all that is to be done on one part it is void for the whole. 1 *Rol.* 258.

So, if it be unreaſonable, or defective. 2 *Cro.* 353.

19. But an award may be void for part and good for the reſidue. 2 *Wils.* 268. 293.

And therefore, if an award be of matters out of the ſubmiſſion, it is void only for thoſe. *vide ante page.* 59.

So, an award unreaſonable, or impoſſible in part ſhall be good for the reſidue. 1 *Rol.* 259.

Yet if by the nullity of the award in any part, the one ſhall not have all the advantage intended him as a recompence for that which he does to the other, it ſhall be void for the whole, tho' it would be mutual, notwithſtanding the null part were rejected. 1 *Com. Dig.* 551.

As, an award *that* A *pay* 10*l. and* B, *his wife and ſon, convey land to him*, is void for the whole; for tho' by the conveyance of B, the award would be mutual, yet he has not all the benefit intended for him, for perhaps the eſtate was in his wife and ſon. 1 *Rol.* 259.

20. A *parol* award ſhall be void, which awards money to be paid by one and a releaſe by the other; for there is no remedy for the releaſe, where the award was by parol. 1 *Sid* 160. for a *parol* award gives no remedy for a collateral thing. 1 *Lev.* 11.

But

But an award by *parol* may be good;

Tho' not the expreſs words, but the effect and ſubſtance of them only are mentioned. *Carth.* 157.

Tho' the ſubmiſſion ſays, *ſo that it be made and ready to be delivered &c.* for when it is made it is ready to be delivered. 1 *Sal.* 75.

See on the ſubject of awards, 1 *Com. Dig.* 540—552:
Alſo 3 *Viner's Abridgment,* 48—92.

It is now determined that in the conſtruction of awards, greater latitude, and leſs ſtrictneſs ſhould be obſerved than heretofore; as in the following caſe, which was an award made by a cobler, on a ſubmiſſion of all diſputes. 'Whereas there has 'been a ſuit at law between the parties, that has run to a great 'expence on both ſides; and it being left to me to make an end 'of it: I determine that they ſhall each of them pay their own 'charges at law; and that the defendant pay the plaintiff 5s. 'for his making the firſt breach in the law.' And the award was held to be ſufficiently certain and final. Burrow, 274. *Hawkins v. Colclough.*

And in the caſe of *Lucas and Wilſon. Burrow* 701, lord Mansfield ſaid, the court will not enter at all into the merits of the matter refered to arbitration, but only take into conſideration *ſuch legal objections as appear upon the face of the award, and ſuch objections as go to the miſbehaviour of the arbitrators.*

Nearly the ſame obſervations were made by lord *Hardwicke,* in the caſe of *Tittenſon v. Peat,* in the chancery: *See* 3 *Atkyns* 529—644.

It muſt however be obſerved that there are a variety of inſtances, in which courts of equity have given relief, when it has been refuſed in courts of law, either from a want of juriſdiction, as where a ſpecific performance is to be decreed; or where the action is brought on the arbitration bond, or the award itſelf, in which laſt caſes it is thought that no relief can be had in a court of law, except where legal objections appear on the face of the award, or the arbitrators have been guilty of corruption.—*See* 2 *Veſey* 315.

VIII. Of the Umpire.

If there be a ſubmiſſion to arbitrament, it may be, *that if the arbitrators do not agree, the parties ſhall ſtand to the umpirage of ſuch an one.* 1 *Com. Dig.* 552.

Or, *if they do not agree for all the matters they ſhall ſtand to an umpirage for the reſidue.* 1 *Rol.* 262.

And

And the words shall be construed liberally; and therefore, a submission to the award *of* A *and* B *and* D, *being an umpire*, is *tantamount*, as that D, shall be an umpire. 1 Rol. 262.

And if the umpire elected refuse, they may chuse another. 3 *Lev.* 263. 2. *Vent.* 114, 115. *Cont.* per Holt. unless the election of him who refuses be conditional, *if he does accept it.* 1 *Salk.* 70.

If the submission be, *so that there be an award before the first of M. and if they do not agree to stand to an umpire*; they may elect after the first of M. 2 *Mod.* 169.

But now it is decided that arbitrators having power to elect an umpire, may elect one before they enter into an examination of the matters refered to them at all 2. *Term Rep.* 644.

See 1 *Com. Dig.* 552—553.

Arbitrators cannot proceed on a reference after they have named an umpire; for then their authority ceaseth, tho' the time for making the award is not expired. *Rep. of Pract. C. B.* 116.

IX. *What shall be a breach of the award.*

If a man does not do all that the award requires of him, it will be a breach: As if an award be, *that* A, *enjoy an house paying rent to* B, if he does not pay the rent it will be a breach. *Cro. Eliz.* 211.

But failure in a matter collateral to the award is not a breach: as if an award be, *that* A, *make a lease to* B, *rendering rent*; if B, do not pay the rent, it is no breach, for A, has a remedy for it by distress. *Mo.* 3.—See 1 *Com. Dig.* 553.

X. *Of the remedy for non performance.*

1. If the submission be by bond, and the award be not performed, an action *of debt* on the penalty lies. 1 *Com. Dig.* 554.

2. If by articles of agreement, indenture &c. under hand and seal, an action of *covenant*, may be brought 2 *Mod.* 73.

3. Or, debt lies for a sum awarded. 2 *Cro.* 354. 1 *Leo.* 72.

4. If the submission be by *parol*, *assumpsit* lies for non-performance. 1 *Rol.* 7. *l.* 15.

5. The remedy to compel performance of an award made in pursuance of a rule of court, by way of *attachment*, is unusual in this State; for as the act of Assembly authorises the party in whose favour the award is made to issue any kind of execution or process to carry it into effect, it is generally more expedient to pursue those measures, than to issue an attachment.

With

With respect to the pleadings in awards the following rules are essentially necessary to be known.

(1) If an action be upon an obligation &c. for performance of an award; the defendant cannot plead performance generally; but must first take *Oyer* of the obligation and condition, and then shew the award, and how he has performed it. *Mo.* 3. And must shew performance of the whole award on his part. 3 *Lev.* 24.

Or, a tender and refusal which is tantamount. *Id.*

And it is sufficient, that the defendant alledges, that he performed as much as the words of the award require him to perform: As if an award be, *that a suit do cease, and the plaintiff stand acquitted of it*, it is sufficient to say, *that he did not prosecute the suit, but the plaintiff was thence discharged of it*, without shewing a discharge in fact. 2 *Cro.* 340. 1 *Rol.* 7.

(2) So, to debt on an obligation for performance of an award, the defendant, after *oyer* of the condition may plead, *that the arbitrators made no award.* 2 *Sand.* 184. *Lev. Ent.* 40. 1 *Com. Dig.* 556.

If he pleads *no award*, he can say nothing by rejoinder, but what shews the award void. 1 *Lev.* 245.

If an award be void, it is safest to plead *no such award*; for if he sets out the award, and pleads performance, the plaintiff by his replication may say that the award was also in such a manner, (which will make it good) and join issue upon the performance, and the defendant cannot afterwards deny or traverse the award. 1 *Rol.* 6. 1 *Com. Dig.* 556.

And if the defendant plead a bad plea, the plaintiff may demur, and shall have judgment without shewing the award in his replication, or assigning any breach. 3 *Lev.* 17.

Yet if he plead *no award*, and the plaintiff shews an award upon a submission *so that* &c. (which would be a conditional submission) he cannot say that there were other contests of which there was no award; for that will be a departure. 1 *Lev.* 127. 4 *Wils.* 122.

(3) If the defendant pleads, *that the arbitrators made no award*, the plaintiff by his replication must shew the award, and assign a breach of it. *Lev. Ent.* 40 1 *Com. Dig.* 556.

And the plaintiff in debt upon the obligation must shew the whole arbitrament; and therefore, to say, *among other things it was awarded*, is not good. *Lit.* 313. 1 *Com. Dig.* 556.

So if he shews an award which has a material variance, it will be a bar; if the defendant prays *oyer* or joins issue. 1 *Selk.* 72.

And

And he muſt ſhew the time and place of the award made. 2 *Vent.* 72. *Cont.* 3. *Lev.* 239. And what arbitrators made it 9. H. 6. 5 If the arbitrament ſhewn be void or not well pleaded the defendant may demur, and have judgment for him. 1 *Com. Dig.* 557. *Lev. Ent.* 40.

But if the award ſhewn be good as to part, and void as to part, tho' he muſt ſet out the whole award, yet he may aſſign as a breach only non-performance of that which is good, and on demurrer which confeſſes the breach aſſigned, judgment ſhall be given for the penalty of the bond, which will be a bar to any other action on the ſame bond. 2 *Wils.* 268.

If the defendant ſhew an award imperfectly in his bar, the plaintiff in his replication muſt ſhew the whole award, otherwiſe he might be tricked. 1 *Sand.* 326.

(4) So, the plaintiff by his replication muſt ſhew that the award was made in all points purſuant to the authority of the arbitrators. 1 *Com. Dig.* 557.

And therefore, if an award ought to be made before ſuch a day, the plaintiff ſhall ſhew it was made accordingly. *Id.*

If it ought to be *ready to be delivered to the parties before ſuch a day*, he muſt ſhew that it was *ready to be delivered accordingly*. 1 *Rol.* 416 *l.* 5.

If the award was to be made *in writing under hand and ſeal*, and the plaintiff replies that it was made *in writing*, it is not well. *Sir.* 116.

If it was to be under *hand and ſeal*, if he does not alledge, *that it was ſealed*, it is bad. 2 *Cro.* 278.

Or, if he does not ſay *under his hand*, tho' he produces the award ſealed. 2 *Mod.* 77. *Pal.* 109, 112, 121—2 *Rol.* 243. 1 *Bul.* 110.

If it ought to be delivered *to either of the parties*, he ought to alledge a delivery to both. 2 *Rol.* 250. *Cro. Eliz.* 797.

So a *parol* award, if it be pleaded, *that it was ready to be delivered*, is good; for when it is pronounced, it is a delivery. 1 *Salk.* 75. *Mod. Ca.* 160. 176.

If there be a ſubmiſſion, *to be delivered ſuch* a day and place; if he alledges a delivery to the parties the day before, it is ſufficient. 2 *Lev.* 68.

If it be, *to be delivered to the party who deſires it*; it is not neceſſary to alledge that it was delivered; for it ſhall come from the other ſide, that it was deſired. 3 *Mod.* 330. *Sho.* 242.

If an award was by *parol*, it is ſufficient to ſhew the ſubſtance or effect of it; for the words are not neceſſary. 2 *Vent.* 242.

If

If there was an award to do two things, and as to one, it was not without the ſubmiſſion; it is ſufficient to ſay that he performed the other. 1 *Com. Dig.* 558.

So if an award be, *to pay ſo much or to give ſurety to pay ſo much*; it is ſufficient to ſay *that he did not pay*, for the other part of the diſjunctive was void. *Sav.* 120.

If the defendant pleads *no ſuch award*, it is not ſufficient, that the plaintiff ſhews the award, he muſt alſo aſſign a breach. *Yel.* 78.

But if the defendant plead a collateral matter &c. and the plaintiff join iſſue upon it, he need not aſſign a breach. *Yel.* 79. *Lut.* 528. 3 *Lev.* 24.

If the plaintiff ſhews an award and aſſigns a breach; the defendant cannot afterwards alledge payment, or performance of the thing in which the breach was aſſigned, for that will be a departure. 1 *Com. Dig.* 559.

(5) In debt on the *award*, the plaintiff need not ſet forth the whole award, only what is neceſſary to ſupport his claim, and the defendant may impeach the award if he can. 1 *Bur.* 278.

But in debt for a ſum awarded, if the plaintiff ſhews a defective award, tho' more than he need to do, the declaration is bad. *Litt.* 313.

On *nil debet* pleaded, partiality in the arbitrators cannot be given in evidence. 2 *Wils.* 148.

(6) If *aſſumpſit* be brought for not performing an award, the declaration muſt ſhew an award good in all reſpects. 1 *Com. Dig.* 555.

XI. How an award may be relieved againſt.

It has been already obſerved in the foregoing part of this title 'that the court (meaning a court of common law) will not enter at all into the merits of the matters refered to arbitration, 'but only take into conſideration ſuch legal objections as appear 'upon the face of the award, and ſuch objections as go to the 'miſbehaviour of the arbitrators.' The ſeveral modes by which the party injured may avail himſelf of thoſe objections, have alſo been fully pointed out. But as caſes may ſometimes occur, in which, the above rule would be highly rigorous, it is neceſſary in the laſt reſort, to apply to a court of chancery. This title then ſhall be concluded with a recital of ſuch caſes in chancery, as a court of law either did not poſſeſs juriſdiction over, or from an adherence to the above rule could not afford the neceſſary relief.

There

There can be no doubt but that where the award is made in purſuance of a rule of court, the court itſelf before which it is turned, will, take notice of any legal objections appearing on the face of the award, or ſuch as go to the miſbehaviour of the arbitrators, provided they be made within the time limited by the act above recited. 1 *Black's Rep.* 363.

But it is doubted whether there can be a defence at common law, to an action brought on an award procured by *corruption*, unleſs the award be made under a rule of court. *See* 2 *Veſey* 315.

A court of equity will take cognizance of an award after the time elapſed, by the ſtatute. *Bunb.* 265.

So, *chancery* will inforce an award, made on ſubmiſſion of the parties, without an order of the court. 1 *Ch. R.* 85. 142. 2 *Com. Dig.* 375.

So, a court of *chancery* will decree the ſpecific performance of an award to convey an eſtate, where the party ſubmitting has received the money, the conſideration for doing it. 3 *P. W.* 187.

So, if an award made by the order of court, be unreaſonable, *chancery*, will avoid it; as if it be awarded that a guardian ſhall give bond that the infant at full age ſhall convey. *Ca. Ch.* 280.

Or, if the award in any caſe bind an infant. *Id.*

So, if it appears that the arbitrators miſtook the fact or the law. 2 *Vern.* 705 —So alſo will a court of law correct an error in law.—*See* 1 *Black's Rep.* 363.

If there is a palpable miſcalculation, the party aggrieved may bring a bill againſt the other party, and not againſt the arbitrators. 3 *Akyns* 644.

But it is improper to come into a court of chancery to ſet aſide an award merely for an objection in point of form. 2 *Atk.* 501.

If part of the evidence is not ſhewn to one of the arbitrators and he ſwears if he had ſeen it, that he would not have made the award, it ſhall be ſet aſide. 1 *Atkyns*, 63.

So, chancery will admit exceptions, tho' the reference is by order of court, with a clauſe that the award ſhall be confirmed by the court without exception or appeal. 2 *Vern.* 100.

An award was ſet aſide becauſe the reference was made by the defendant's ſolicitor, without the defendant's own aſſent. *Ca. Cha.* 87.

If one of the parties hearing that the arbitrator intends to make his award, deſires him to defer it till he can talk with him to ſupport ſtated accounts, notwithſtanding which he makes his award, the time expiring in two or three days, the court will ſet aſide the award. 3 *P. W.* 361.

A court of chancery will ſet aſide an award, if it be made only for part of the matters refered 1 *Ca. Cha.* 87. 186.

Or, if an award is repugnant, or impoſſible. 1 *Ca. Cha.* 87.

And therefore the court may examine the reaſons and grounds of the proceedings of the arbitrators, and what matters they conſidered. 1 *Ch. Ca.* 186.

A ſubmiſſion to reference by order of the court of chancery, is revocable; but if the revocation be without cauſe, it will be a contempt to the court. *Ca. Cha.* 185.

If an award is made upon private ſubmiſſion without an order of court, *chancery*, may avoid it, if it be made by corruption, or if it exceeds the authority of the arbitrators. 1 *Ca. Cha.* 377.

So, if an umpire, before the time of the referees is elapſed, declares that he will give ſo much, and afterwards does give ſo much, which was more than was demanded by either referee, the award ſhall be avoided; for it induces a preſumption of corruption. 2 *Ver.* 100.

If an arbitrator makes an improper declaration, as that he will make A pay coſts, or that A having miſuſed B, he will now mulct him in his repreſentatives, the arbitrator ſhall pay coſts. 2 *Vezey.* 315.

If an arbitrator promiſes to hear witneſſes, and afterwards refuſes, or omits to do it, the award ſhall be ſet aſide. 2 *Vern.* 251.

If a reference is to three, or any two of them, and two without conſulting the third (after finding that his opinion differed from theirs) make up an award, it ſhall be ſet aſide. 2 *Vern.* 514.

So, if the arbitrators admit and hear one party, and conceal their meetings from the other. 2 *Vern.* 515.

So, if an arbitrator is a party who has an intereſt in the matter in queſtion;—or is a near relation to one of the parties. 2 *Vern.* 251.

Or, if they chooſe an umpire by lot. 2 *Vern.* 485.

But the court of chancery will not avoid an award on account of exceſſive damages, if no fraud or partiality appears. 2 *Ca. Cha.* 140. 1 *Vern.* 157.

Nor, for the non-attendance of one party, if he had an opportunity and would not attend to be heard. *Eq. Ca.* 63.

On a bill to ſet aſide an award, the plaintiff will not be ſuffered to go into legal objections, except for partiality and corruption; but if the bill is for an account, and prays to ſet aſide an award, in order to let in ſuch account, there the plaintiff may make legal objections. *Ambler* 245.

After

After employing ſo many pages on the doctrine of *awards* alone, it may appear ſtrange to thoſe whoſe profeſſional avocations never made it neceſſary to examine the extent of the ſubject, that I ſhould ſtill refer to other authorities, and declare that the limits preſcribed to myſelf in my engagements with the public, abſolutely precluded me from dwelling any longer on the ſubject than would be ſufficient to give the neceſſary precedents, adapted to the foregoing title.

See on the doctrine of Awards. 1 *Com Dig* 534—559 2 *Com. Dig.* 375—379 —3 *Viner's Abr.* 40—140 —*Bacon's Abr. title Arbitrament. Kyd's treatiſe on awards, and Wiſon on arbitrations.*

(A) Form of ſubmiſſion by rule of court.

(*Note.* If a ſuit is inſtituted and depending between the parties, there is no neceſſity for this form, but the order is entered on the minutes of the court, on motion of either party by their counſel. The following form is only neceſſary where no action is actually depending.

Whereas divers diſputes and controverſies have ariſen and are now depending between A B, *of of the one part, and* C D, *of of the other part: Now for the ending and deciding thereof, it is hereby mutualy agreed by and between the ſaid parties, that all matters in difference between them ſhall be refered and ſubmitted to the arbitrament, final end and determination of* A A, *of* B A, *of and* C A, *of or any two of them, arbitrators indifferently elected by the ſaid parties, ſo as the ſaid arbitrators, or any two of them, do make and publiſh their award in writing, ready to be delivered to the ſaid parties, or ſuch of them as ſhall deſire the ſame, on or before the day of next enſuing the date hereof: And it is hereby mutually agreed by and between the ſaid parties, that this ſubmiſſion ſhall be made a rule of court. In witneſs whereof the parties to theſe preſents have hereunto ſet their hands this day of in the year &c.*

(B) Arbitration bond.

Know all men by theſe preſents that I A B, *of am held and firmly bound unto* C D, *of in the ſum of of lawful money of Virginia, to be paid to the ſaid* C D, *or to his certain attorney, his executors adminiſtrators or aſſigns: To which payment well and truly to be made, I bind myſelf, my heirs, executors and adminiſtrators firmly by theſe preſents, ſealed with my ſeal and dated this day of in the year of our lord and in the year of the commonwealth.*

The Condition

Condition to ſtand to the award of two arbitrators in the common form:

The condition of the above obligation is ſuch, that if the above-bound A B, *his heirs, executors, and adminiſtrators, and every of them, for and on his and their parts and behalfs, do and ſhall well and truly ſtand to, obey, abide, perform, obſerve and keep the award, order, arbitrament, final end and determination of* A A, *of and* B A, *of arbitrators indifferently named, elected, and choſen, as well for and on the part and behalf of the above bound* A B, *as the above named* C D, *to arbitrate, award, order, adjudge and determine, of and concerning all manner of action and actions, cauſe and cauſes of action and actions, ſuits, bills, bonds, ſpecialties, judgments, executions, extents, accounts, debts, dues, ſum and ſums of money, quarrels, controverſies, treſpaſſes, damages and demands whatſoever, both in law and equity, or otherwiſe howſoever, which at any time or times heretofore have been had, made, moved, brought, commenced, ſued, proſecuted, committed, omitted, done or ſuffered by or between the ſaid parties, ſo that the ſaid award be made in writing, and ready to be delivered to the ſaid parties, on or before the day of next enſuing; [and if the ſaid* A B, *his heirs, executors, or adminiſtrators, or any of them, ſhall not prefer, or cauſe to be prefered any bill in equity againſt the ſaid* A A, *and* B A, *or either of them, for or concerning their award in the premiſes;] then this obligation to be void, otherwiſe to remain in full force.*

If the parties have a mind to make their ſubmiſſion a rule of court, then this may be added:

And the above named A B, *doth agree and deſire, that this his ſubmiſſion may be made a rule of court.*

Condition to ſtand to the award of three arbitrators, or any two of them, and an umpire appointed.

The condition of this obligation is ſuch, that if the above bound A B, *his heirs, executors, and adminiſtrators, for and on his and their parts and behalfs, ſhall and do well and truly ſtand to, obey, abide, obſerve, perform, fulfil, and keep the award, order, arbitrament, final end and determination of or any two of them, arbitrators indifferently elected and named, as well by and on the part and behalf of the ſaid* A B, *as by and on the part and behalf of the ſaid* C D, *to arbitrate, award, order, judge and determine, of and concerning all and all manner of action and actions, cauſe and cauſes of action and actions, ſuits, bills, bonds, ſpecialties, covenants,*

covenants, contracts, promiſſes, accounts, reckonings, ſums of money, judgments, executions, extents, quarrels controverſies, treſpaſſes, damages and demands whatſoever, at any time heretofore had, made, moved, brought, commenced, ſued, proſecuted, done, ſuffered, committed, or depending, by or between the ſaid parties, ſo that the award of the ſaid arbitrators or any two of them be made and ſet down in writing, under their or any two of their hands and ſeals, ready to be delivered to the ſaid parties in difference, on or before the day of next enſuing, then this obligation to be void, elſe to be and remain in full force.

And if the ſaid arbitrators ſhall not make ſuch their award of and concerning the premiſes, within the time limited as aforeſaid, then if the ſaid A B, *his heirs, executors, and adminiſtrators, for and on his and their part and behalf, do and ſhall well and truly ſtand to, obſerve, perform, fulfil, and keep the award, determination, and umpirage* [if the umpire be agreed on between the parties, and named] *of being a perſon indifferently named and choſen between the ſaid parties for umpire:* [but if not named,] *of ſuch perſon as the ſaid arbitrators ſhall indifferently chuſe for umpire, in and concerning the premiſes; ſo as the ſaid umpire do make and ſet down his award and umpirage in writing, under his hand and ſeal, ready to be delivered to the ſaid parties in difference, on or before the day of next enſuing; then &c.*

To this the parties may add a clauſe as in the firſt precedent, if they think it neceſſary to reſtrain any ſuit being brought in equity:—alſo to make the ſubmiſſion a rule of court.

Form of an award.

To all to whom theſe preſents ſhall come, we A B, *of and* C D, *of do ſend greeting.*

Whereas there are ſeveral accounts depending, and divers controverſies have ariſen between of of the one part, and of of the other part: And whereas for the putting an end to the ſaid differences, they the ſaid and by their ſeveral bonds, or obligations bearing date laſt paſt, are reciprocally become bound each to the other in the penal ſum of to ſtand to, abide, perform, and keep the award, order and final determination of us the ſaid ſo as the ſaid award be made in writing and ready to be delivered to the parties in difference, on or before next enſuing, as by the ſaid obligations and conditions thereof may appear: Now know ye, that we the ſaid arbitrators, whoſe names are hereunto ſubſcribed, and ſeals affixed, taking upon us the burden of the ſaid award, and having fully examined and duly conſidered the proofs and

and allegations of both the ſaid parties, do make and publiſh this our award between the ſaid parties in manner following; that is to ſay; firſt we do award and order, that all actions, ſuits, quarrels and controverſies whatſoever, had moved, ariſen and depending between the ſaid parties in law or equity, for any manner of cauſe whatſoever touching the ſaid premiſes, to the day of the date hereof, ſhall ceaſe and be no further proſecuted; and that each of the ſaid parties ſhall pay and bear his own coſts and charges in any wiſe relating to, or concerning the premiſes. And we do alſo award and order, that the ſaid ſhall deliver or cauſe to be delivered to the ſaid at within the ſpace of &c. And further, we do hereby award and order, that the ſaid ſhall on or before pay or cauſe to be paid unto the ſaid the ſum of We do alſo award and order &c And laſtly, we do award and order that the ſaid and on payment of the ſaid ſum of ſhall in due form of law, execute each to the other of them, or to the other's uſe, general releaſes, ſufficient in the law for the releaſing by each to the other of them, his heirs, executors, and adminiſtrators; of all actions, ſuits, arreſts, quarrels, controverſies and demands, whatſoever, touching or concerning the premiſes aforeſaid, or any matter or thing thereunto relating, from the beginning of the world, until the day of laſt paſt (viz *the day of the date of the arbitration bonds.*) In witneſs whereof we have hereunto ſet our hands and ſeals the day of &c.

Form of an umpirage.

Recite the arbitration bonds, as in the award.

Now know ye, that I umpire indifferently choſen by having deliberately heard and underſtood the griefs, allegations and proofs of both the ſaid parties, and willing, (as much as in me lieth) to ſet the ſaid parties at unity and good accord, do by theſe preſents arbitrate, award, order, decree and judge as followeth; that is to ſay &c.

BAIL.

BAIL (from the French *bailler*, to deliver) ſignifies the delivery of a man out of cuſtody, upon the undertaking of one or more perſons for him, that he ſhall appear at a day limited, to anſwer and be juſtified by the law. *Hale's Pl.* 96.

The laws of this commonwealth having aſcertained thoſe caſes in which bail ſhall, or ſhall not be required, much of the obſolete matter which has heretofore appeared in our books, on

this

this ſubject (ſo far at leaſt as reſpects the doctrine of bail in this ſtate) may now be expunged.

The arrangement which I ſhall purſue under this title will be to conſider,

I. *The difference between bail and mainpriſe.*
II. *When a perſon may be diſcharged without bail.*
III. *Who may or may not be bailed.*
IV. *Who may bail and the manner of it.*
V. *Of granting bail where it ought to be denied.*
VI. *Of refuſing bail where it ought to be admitted.*
VII. *Requiring exceſſive bail.*
VIII. *Of bail by writ of* habeas corpus.
IX. *In what caſes bail ſhall be required in civil actions.*
X. *In what caſes bail ſhall not be required in civil actions.*
XI. *Of the power of a magiſtrate in directing bail, in civil actions.*
XII. *Special caſes in which bail is directed by the laws of this commonwealth.*
XIII. *Offences puniſhable, by the laws of this commonwealth, by imprisonment without bail or mainprise.*
XIV. *Various precedents.*

I. The difference between bail and mainpriſe.

The difference between bail and mainpriſe is, that mainpernors are only ſurety, but bail is a cuſtody; and therefore the bail may retake the priſoner, if they doubt he will fly, and detain him, and bring him before a juſtice, and the juſtice ought to commit the priſoner in diſcharge of the bail, or put him to find new ſureties. *Hal. Pl.* 96.

II. When a perſon may be diſcharged without bail.

If a priſoner be brought before a juſtice of peace expreſſly charged with felony by the oath of a party, the juſtice cannot diſcharge him, but muſt bail or commit him. 2 *H. H.* 121.

But

But if he be charged with ſuſpicion of felony only, yet if there be no felony at all proved to be committed, or if the fact charged as a felony be in truth no felony in point of law, the juſtice of peace may diſcharge him. 2 *H. H.* 121.

III. Who may or may not be bailed.

By the common law, bail was allowed in all caſes but homicide, but now the act of Aſſembly of this commonwealth p. 20. directs what offenders ſhall be admitted to bail and what not.

It enacts 'That thoſe ſhall be let to bail who are apprehended 'for any crime not puniſhable in life or limb: And if the crime 'be ſo puniſhable, but only a light ſuſpicion of guilt fall on the 'party, he ſhall in like manner be bailable: But if the crime 'be puniſhable in life or limb, or if it be manſlaughter, and 'there be good cauſe to believe the party guilty thereof he ſhall 'not be admitted to bail.'

'No perſon ſhall be bailed after conviction of any felony.

For thoſe caſes puniſhable in life or limb, ſee titles *clergy*, [*benefit of*] and *Felony*.

IV. Who may bail, and the manner of it.

It ſeems to be a general rule, that ſo far as any perſons are judges of any crime, ſo far they have power of bailing a perſon indicted before them of ſuch crime. 2 *Hawk.* 103—160. But whether a ſingle magiſtrate may admit a perſon to bail or not, brought before him and charged with a felonious offence, *before* indictment ſeems to have been matter of doubt among our ancient writers on criminal law. *See* 2 *Hawk.* 160—163. *Dalt. c.* 12. But I have no doubt, but that in all caſes *bailable* by our act of Aſſembly recited in the preceding diviſion of this title, a ſingle magiſtrate may admit to bail before conviction of the felony.

The power of the ſheriff and conſtable to admit to bail perſons ſuſpected of felony, is taken away by ſeveral ſtatutes.—*Lamb.* 15.

Any one juſtice might always in his diſcretion either bail or impriſon one who has given another a dangerous wound according as it ſhall appear from the whole circumſtances that the party is moſt likely to live or die. 2 *Hawk.* 160.

A perſon who is to take bail may examine them on their oaths as to their ſufficiency. 2 *H. H.* 125.

And if a perſon who has power to take bail be ſo far impoſed upon as to ſuffer a priſoner to be bailed by inſufficient perſons, it is ſaid that either he, or any other perſon, who hath power to bail

bail him, may require the party to find better ſureties, and to enter into a new recognizance with them, and may commit him on his refuſal; for that inſufficient ſureties are no ſureties. 2 *Hawk.* 141.

No perſon ſhould be admitted to bail by leſs than two ſureties, either of which ſhould be ſufficient to anſwer the ſum in which they are bound. 2 *Hawk* 141.

With reſpect to the power of bailing an offender ſent for further trial by the court of examination, ſee title *Criminals*.

V. Of granting bail where it ought to be denied.

'If any juſtice let any go at large who is not bailable, or refuſe to admit to bail, any who have right to be admitted, after they ſhall have offered ſufficient bail, he ſhall be amerced at the diſcretion of a jury.' *V. l. p.* 20.

An information was granted againſt a juſtice of the peace for the county of Surry, in England, for admitting a man to bail on ſuſpicion of ſtealing a mare. *Stra.* 1216.—*King v. W. Clarke.*

VI. Of refuſing bail where it ought to be admitted.

Denying bail where it ought to be granted is a miſdemeanor, not only by the ſtatute, but alſo by the common law, and puniſhable thereby as an offence againſt the liberty of the citizen, not only by action at the ſuit of the party injured, but alſo by indictment at the ſuit of the commonwealth. 2 *Hawk.* 143.

VII. Requiring exceſſive bail.

By the declaration of rights made by the Convention in May 1776, article 9; it is declared 'That exceſſive bail ought not 'to be required, nor exceſſive fines impoſed, nor cruel nor unuſual puniſhments inflicted.' *V. l. p.* 4.

VIII. Of bail by writ of habeas corpus.

As the enlargement of a priſoner may in moſt caſes be procured by writ of *habeas corpus*, it has been uſual in treatiſes of this kind to confound that ſubject with the doctrine of bail. I ſhall, however, make it a diſtinct title by itſelf, and give the neceſſary inſtructions for its uſe. See title, *habeas corpus*.

IX. In what caſes bail ſhall be required in civil actions.

In all actions of *debt*, founded on any writing obligatory, bill or note in writing, for the payment of money or tobacco, and all actions of *covenant*, or *detinue*, the plaintiff or his attorney

ſhall

ſhall on pain of having his ſuit diſmiſſed with coſts, endorſe on the original writ or ſubſequent proceſs the true ſpecies of action, and that appearance bail is required. *V. l. p.* 85.

The above law applies both to the diſtrict and county court.

See the form of a recognizance of ſpecial bail both in the diſtrict and county courts, among the precedents to this title, No. 2.

X. In what cases bail ſhall not be required in civil actions.

In all actions to recover the penalty for breach of any *penal law*, not particularly directing ſpecial bail to be given, in actions of *ſlander*, *treſpaſs*, *aſſault and battery*, *actions on the caſe*, *for trover or other wrongs*, *and all perſonal actions*, except thoſe above enumerated, viz. *debt covenant* and *detinue*, the plaintiff or his attorney ſhall in like manner and under like penalties indorſe on the original writ or ſubſequent proceſs, the true ſpecies of action, '*that the ſheriff to whom the ſame is directed, may be* '*thereby informed whether bail is to be demanded on the execution* '*thereof.*' *V. l. p.* 85.

'No ſpecial bail ſhall be requirable in any ſuit brought on a 'penal law, unleſs by ſuch law it is expreſsly directed.' *V. l. p.* 113.

Nor of a reſident of one county, on a *capeas ad reſpondendum* iſſued againſt him in another—unleſs the cauſe of action originated where the ſuit is brought, or a *non eſt inventus*, is not returned in his own county. Such writ without an indorſement of '*no bail required*,' ſhall be diſmiſſed. *V. l. p.* 94.

XI. Of the power of a magiſtrate in directing bail in civil actions.

This power has long been given to the judges of the ſuperior courts of common law in this commonwealth; but was never expreſsly granted to the juſtices of the peace till the year 1792. After enumerating the ſeveral caſes in which the true ſpecies of action ſhall be indorſed on the writ, for the *information* of the ſheriff in demanding bail, the law concludes: '*provided always*, 'That any juſtice of the peace, in actions of treſpaſs, aſſault 'and battery, trover and converſion, and in actions on the caſe, 'whereupon proper affidavit, or affirmation, it ſhall appear to 'him proper, that the defendant or defendants ſhould give ap-'pearance bail, may, and he is hereby authoriſed to direct ſuch bail to be taken by endorſement on the original writ, or ſub-

'ſequent

'ſequent proceſs; and every ſheriff ſhall govern himſelf ac-'cordingly. *V. l. p.* 93.

Note. The ſame remedy is now given to the common bail who actually pays money on account of the principal, as to ſecurities on ſpecialties againſt their principal. *V. l. p.* 293.

XII. Special caſes in which bail is required by the laws of this commonwealth.

BALLAST. In any ſuit brought for the penalties againſt the owner of a veſſel, for unlading ballaſt or caſting dead bodies into the water contrary to law. *V. l. p.* 214.

CONVICTS. In all actions for the penalty of 5cl. for bringing any convict into this ſtate. *V. l. p.* 44.

FLOUR. On actions for the penalties on the act to regulate the inſpection of flour and bread. *V. l. p.* 241.

HOGSTEALING. In all ſuits or informations brought againſt free perſons for hogſtealing. *V. l. p.* 186.

QUARANTINE. In ſuits for penalties for breach of laws of quarantine. *V. l. p.* 256.

SAILORS &c. *ſick or diſabled.* In any action of debt or information brought againſt the maſter of a veſſel for putting on ſhore any ſick or diſabled ſailor or ſervant, without providing for their maintainance and cure. *V. l. p.* 214.

SLAVES. Againſt the maſter of a veſſel for carrying a ſlave out of the ſtate. *V. l. p.* 201.

TRANSPORTING DEBTORS *out of the ſtate.* In all actions againſt the maſters of veſſels for carrying debtors out of the country without having advertiſed their intention to depart, for ſix week ſucceſſively in the *Virginia Gazette*. *V. l. p.* 125.

XIII. Offences puniſhable by the laws of this commonwealth, by impriſonment without bail or mainprize.

CONVICTS. For bringing any convict into this ſtate, three months impriſonment without bail. *V. l. p.* 44.

COUNTERFEITING LETTERS, *or privy tokens.* Impriſonment without bail for any ſpace not exceeding one year. See *Cheats.*

MARRIAGES. Miniſters celebrating marriages without licence or publication of banns,—twelve months impriſonment without bail. *See V. l. p.* 202.

Granting falſe certificate of publication of banns, the ſame penalty as next above.

Clerk of the court granting marriage licenſe contrary to law. *See V. l. p.* 204.

White persons marrying with negroes or mulattoes, six months imprisonment without bail. *See V. l. p.* 205.

ORDINARIES. A person convicted of keeping a tipling house, or a second time of retailing liquors without licence.—Six months imprisonment, without bail. *V. l. p.* 212.

PERJURY. A person guilty of it, is punishable by fine not exceeding 200 pounds, and imprisonment 12 months without bail or mainprize.

WOMEN. Taking away a woman under the age of 16 years, imprisonment without bail &c. not exceeding two years. *See Women*, and *V. l. p.* 206.

Taking away and deflouring; five years imprisonment without bail. *Id.*

XIV. Various Precedents.

(A) Recognizance of bail in a criminal offence.

Be it remembered that on the day of in the year of our lord and in the year of the independence of the United States of America, A O, of the county of labourer, A B, of the said county labourer, and B B, of the said county labourer, came before me J P, one of the commonwealth's justices of the peace for the county of and severally acknowledged themselves to be indebted to A G, governor or chief magistrate of the commonwealth of Virginia, and his successors, that is to say, the said A O, dollars, and the said A B, and B B dollars each, to be respectively levied of their lands and tenements, goods and chattels, if the said A O, shall make default in performance of the condition under written.

The condition of this recognizance is such, that if the above bound A O, shall personally appear before the commonwealth's justices assigned to keep the peace in and for the county of aforesaid, on the day of then and there to answer to the commonwealth aforesaid, for and concerning (here recite the offence) with which the said A O, stands charged before me, and to do and receive what by the said court shall then and there be ordered and adjudged, and shall not depart thence without the leave of the said court, then this recognizance shall be void, or else remain in full force and virtue.

Acknowledged before me.

The precedents for bailing an offender after a court of examination has been held, are reserved for title *Criminals*, as it is my wish to collect under one head full and correct forms for all kinds of criminal proceedings.

(B)

(B) *Recognizance of special bail in the district and county courts.*

county to wit.

Memorandum, That upon the day of in the year of our lord A B, of the county of perſonally appeared before me J P, (one of the judges of the general court, or a juſtice of the peace for the county aforeſaid *as the caſe may be*) and undertook for C D, at the ſuit of B P, in an action of now depending in the diſtrict court appointed by law, to be holden at [or, in an action of now depening in the court of county,] that in caſe the ſaid C D, ſhall be caſt in the ſaid ſuit, he the ſaid C D, will pay and ſatisfy the condemnation of the court, or render his body to priſon in execution for the ſame, or that he the ſaid A B, will do it for him.

Form of a bail piece, uſually given to the bail by the judge or magiſtrate before whom he enters into the recognizance.

C D, of the pariſh of in the county of is delivered to bail, on a *capi corpus*, unto A B, of the pariſh and county aforeſaid, at the ſuit of B P, the day of in the year of our lord

'Any judge of the general court, when the diſtrict court is 'not ſitting, or any juſtice of the peace, may take recognizance 'of ſpecial bail in any action therein depending, which ſhall be 'tranſmitted by the perſon taking the ſame, before the next ſuc-'ceeding court, to the clerk of the ſaid court, to be filed with 'the papers in ſuch action; and if the plaintiff or his attorney ſhall 'except to the ſufficiency of the bail ſo taken, notice of ſuch ex-'ception ſhall be given to the defendant or his attorney, at leaſt 'ten days previous to the day on which ſuch exception ſhall be 'taken, and if ſuch bail ſhall be adjudged inſufficient by the 'court, the recognizance thereof ſhall be diſcharged, and ſuch 'proceedings ſhall be had, as if no ſuch bail had been taken.' *V. l. p.* 85.

Special bail may be taken in court at the quarterly ſeſſions, or at the monthy courts.' *V. l. p.* 92.

Any juſtice of the peace, when the courts are not ſitting, may take recognizance of ſpecial bail in any action therein depending, which ſhall be returned by the juſtice taking the ſame to the clerk of the court, before the next ſucceeding quarterly court, to be filed with the papers in ſuch action. *V. l. p.* 94.

For the form of a *bail bond* to the ſheriff, ſee title 'ſheriff.'

See *Virginia laws, chap.* 108. *p.* 214. of the *Reviſed Code.*

Certificate to be given by the balliſt maſter, to the maſter or owner of a veſſel.

county to wit.

I DO hereby certify, that purſuant to notice to me given by A B, maſter of the ſhip now riding at on river, I did repair to the ſaid ſhip, and there attend until I had cauſed the ballaſt on board her to be delivered out, and put on ſhore in ſuch places that the ſame cannot, in any wiſe, obſtruct navigation, or be waſhed into the channel of the ſaid river. Given under my hand this day of in the year of

C D, ballaſt maſter.

BANK NOTES.—See ſurety for the good behaviour.

BARRATRY.

I. What it is.
II. How puniſhed.

BARRATRY, is derived either from the *Danes* or *Normans*: *baratta* in the *Daniſh*, and *baret* in the *Norman* languages equally ſignifying a quarrel or contention.

And a *barrator*, in legal acceptation, ſignifies, *a common mover, exciter, or maintainer of ſuits or quarrels, either in courts, or in the country.* 1 *Inſt.* 368. 1 *Hawk.* 524.

1. *Barratry* may be committed in courts, by maliciouſly ſtirring up unjuſt actions or ſuits between other men. 1 *Inſt.* 368.

But a perſon cannot be guilty of *barratry* in conſideration of a ſingle act, for every indictment muſt charge the defendant with being a *common barrator.* 1 *Hawk.* 525.

Neither can an attorney be ſaid to be a *barrator* in reſpect of his maintaining another in a groundleſs action, to the commencing whereof he was no way privy. 1 *Hawk.* 525.

Nor ſhall a man be adjudged a *barrator* for any number of falſe actions brought by him in his own right, becauſe in ſuch caſes he is liable to pay coſts. 1 *Hawk.* 525.

But ſuing another in a fictitious name, either not in being at all, or where the nominal plaintiff is ignorant of the ſuit is *barratry.* 4 *Blacks. Com.* 134.

2. *Barratry*, may be committed in the country. 1. By any kind of diſturbance of the peace. 2. By taking and keeping of poſſeſſion

poſſeſſion of lands in controverſy, not only by force, but alſo by ſubtilty and deceit, and moſt commonly in ſuppreſſion of truth and right. 3. By falſe inventions, and ſowing of calumniations, rumours, and reports, whereby diſcord and diſquiet may grow between neighbours. 1 *Inſt.* 368.

By *Virginia laws p.* 219. 'Perſons who forge or divulge any 'falſe reports, tending to the trouble of the country, ſhall be by 'the next juſtice of the peace ſent for, and bound over to the 'next county court; where if he produce not his author, he 'ſhall be fined forty dollars (or leſs if the court ſhall think fit to 'leſſen it) and beſides give bond for his good behaviour, if it 'appear to the court that he did maliciouſly publiſh or invent it.'

II. How puniſhed.

If the offender is a common perſon, it is ſaid, he ſhall be fined and impriſoned, and bound to his good behaviour, and if they be of any profeſſion relating to the law, he ought alſo to be further puniſhed by being diſabled to practice for the future. 1 *Hawk.* 526.

Barratry and common ſcolding are the only offences for which a general indictment will lie, without ſetting forth any of the particular facts; for barratry is of a complicated nature, conſiſting in the repetition of divers acts to the diſturbance of the peace, and the enumeration of them would render an indictment much too prolix. For this reaſon it is ſufficient to charge the offender generally as a common barrator, and before the time of trial to give the offender a note of the particular facts intended to be proved againſt him. Without this notice it would be impoſſible for a perſon to defend himſelf againſt ſo general and uncertain a charge, which may be proved by ſuch a variety of different inſtances; and therefore the court will not ſuffer the proſecution to be brought on to trial without ſuch notice being given to the defendant. 1 *Hawk.* 526.

Alſo it hath been holden, that an indictment of this kind may be good, without alledging the offence at any particular *place*, becauſe from the nature of the thing, conſiſting in the repetition of ſeveral acts, it muſt be intended to have happened in ſeveral places; for which cauſe it is ſaid that the trial ought to be by a jury from the body of the county. 1 *Hawk.* 526.

Warrant againſt a barrator.

To *or any other conſtable of the county of* *and to the keeper of the common jail of the ſaid county.*

county,

county to wit.

Whereas of and of have this day given information to me J P, [*or, if on the juſtice's own view*; whereas it appears to me J P,] one of the commonwealth's juſtices of the peace for the county aforeſaid, that A O, of the ſaid county labourer, is a common barrator, quarreller and diſturber of the peace, [*if on the juſtice's own view*, whereof he is convicted by my own view,] in exciting and maintaining unjuſt ſuits and controverſies: Theſe are therefore in the name of the commonwealth, to command you forthwith to bring the ſaid A O, before me or ſome other juſtice of the peace for this county, to find ſurety, himſelf in dollars, and two ſureties in dollars each, for his perſonal appearance at the next court to be held for this county, and to do what ſhall be then and there enjoined him by the ſaid court, and in the mean time to be of good behaviour; and if he the ſaid A O, ſhall refuſe ſo to do, that then you convey him to the common jail of the ſaid county, and deliver him ſafely to the keeper thereof, together with this precept. And you the ſaid keeper, are hereby required to receive the ſaid A O, into your cuſtody, and him ſafely to keep in your jail until he ſhall find ſuch ſecurity as aforeſaid, or until he ſhall thence be diſcharged by due courſe of law. Given under my hand and ſeal this day of in the year

When the offender is brought before the juſtice he muſt enter into a recognizance, with two ſufficient ſureties, for his appearance at the next court, which recognizance, as well as that entered into by the witneſſes, (where the offender is apprehended from the information of others) ſhould be certified, by the juſtice to the next court; that if they fail to appear, when called, their default may be recorded, and their recognizance forfeited to the commonwealth.

If the offender refuſes to give ſecurity before the juſtice, he may commit him.

MITTIMUS.

To the keeper of the common jail of the county of

I ſend you herewith the body of A O, of the county aforeſaid, labourer, apprehended by my warrant and brought before me for common barratry, and other miſdemeanors by him committed againſt the peace; and you are hereby required, in the name of the commonwealth, to receive the ſaid A O, into your cuſtody, and him ſafely to keep in the common jail, until he ſhall procure two ſufficient ſecurities to be bound with him in a recognizance

recognizance to the governor or chief magistrate of this commonwealth, that is to say himself in dollars, and each of the said securities in dollars, for his personal appearance at the next court, to be held for this county, and to do what shall then and there be enjoined him by the said court, and in the mean time to be of good behaviour. Given under my hand and seal this day of in the year

Whenever information is made to a justice of the peace, by two informers at the least, against any person for barratry, such justice should take a recognizance, of the informers to appear at the next court, to give evidence against the offender, before he issues his warrant.

Recognizance of the Witnesses.

Memorandum, That on this day of in the year A W, of and B W, of came before me J P,——one of the commonwealth's justices of the peace for the county aforesaid, and personally acknowledged that each of them is indebted to D G, governor or chief magistrate of the commonwealth of Virginia and his successors, in dollars lawful money, to be levied of their goods and chattels, lands and tenements, respectively; upon condition that if they, the said A W, and B W, do personally appear before the commonwealth's justices of the peace, at the next court to be held for this county, and do then and there prefer, or cause to be preferred a bill of indictment against A O, of labourer, for the matters wherewith he is by them charged before me, and do also then and there give evidence concerning the same to the jurors who shall inquire thereof, on behalf of the said commonwealth, and upon the trial of the said A O, for the same, then this recognizance to be void else to remain in full force.

Acknowledged before me.

Indictment for being a common barrator.

county, to wit.

The jurors of the commonwealth for the body of the county aforesaid upon their oath do present, That A O, *late of the county aforesaid, labourer, on the day of in the year and on divers other days and times as well before as afterwards, was and yet is a common barrator; and that he the said* A O, *on the said day of and on divers other days and times, at the county aforesaid, divers quarrels, strifes, suits, and controversies, among the honest and quiet citizens of the said commonwealth, then and there did move, procure, stir up, and excite, to the evil example of all others in the like case offending, and against the peace and dignity of the commonwealth.*

I. Who ſhall be deemed a baſtard.
II. Proceedings againſt the reputed father of a baſtard child.
III. Capacity of a baſtard as to inheritance.
IV. Concealing the death of a baſtard child.

I. Who ſhall be deemed a baſtard.

THE word *baſtard* is derived from the *Saxons*, and compounded of *baſe*, ignoble, and *ſtart* or *ſteort* a riſe or original. By the common people in the north (among whom is retained much of the ancient Saxon) it is ſtill pronounced *baſtart*, denoting a perſon ſprung from a vile or ſpurious origin; as an *upſtart* is a perſon ſprung from a mean extraction in general. 1 *Burn's Juſt.* 179.

Lord Coke ſays, we term all baſtards that are born out of lawful marriage.—But ſee *Virg. laws, p.* 178, *ſect.* 19, where baſtards become legitimate by the ſubſequent intermarriage of the parents.

By the common law, if the huſband be within the four ſeas, that is within the juriſdiction of the country of which he is a citizen, if the wife hath iſſue, no proof could be admitted to prove the child a baſtard, unleſs the huſband had an apparent *impoſſibility* of procreation; as, if the huſband be but eight years old, or under the age of procreation, ſuch iſſue is a baſtard, altho it be born within marriage. But if the iſſue be born within a month, or a day, after marriage, between parties of full lawful age, the child is legitimate. 1 *Inſt.* 244.

In the caſe of *Lomax and Holmden*, in ejectment; on a trial at bar, the queſtion was whether the leſſor of the plaintiff was ſon and heir of *Caleb Lomax*, *eſquire*, deceaſed, which depended upon the validity of his mother's marriage; and that being fully proved, and evidence being given of the huſband's being frequently in *London*, where the mother lived, ſo that acceſs muſt be preſumed, the defendants were admitted to give evidence of his inability from a bad habit of body. But their evidence not going to an *impoſſibility*, but an *improbability* only, that was not thought ſufficient, and there was a verdict for the plaintiff. *Str.* 940.

Formerly it was held that if the huſband was within the four ſeas no proof of *non acceſs* to his wife ſhould be admitted; but the child was deemed to be his; but as this notion was built on no rational foundation, it is now entirely departed from; and

tho'

tho' the husband and wife are both in *England* if there is sufficient proof that the husband could have no access to her, the child will be a bastard, agreeable to the following determination. An issue was directed out of chancery, in the case of *Pendrell and Pendrell*, to try whether the plaintiff was heir at law to one *Thomas Pendrell*. It was agreed that the plaintiff's father and mother were married, and cohabited for some months; that they afterwards parted, she staying in *London*, and he going into *Staffordshire*; that at the end of three years, the plaintiff was born. And there being some doubt upon the evidence, whether the husband had not been in *London* within the last year, it was sent to be tried. And the plaintiff rested at first upon the presumption of law in favour of legitimacy, which was encountered by strong evidence of no access. And it was agreed by the court and counsel that on the trial at *Guildhall* before lord chief justice *Raymond*, that the old doctrine of being within the four seas was not to take place, but the jury were at liberty to consider of the point of access, which they did, and found against the plaintiff. And the court of chancery acquiesced. *Stra.* 625.

See also on the above doctrine the cases of *the King* and inhabitants of *Bedall* in *Yorkshire*. Strange 1076—The *King* and *Abberton*. *lord Raym.* 395, 396.

But the *non access* of the husband ought to be proved otherwise, than upon the wife's oath; as in the case of *K.* and *Reading*. The defendant Reading was adjudged to be the putative father of a bastard child, begotten of the wife of one *Almont*, of *Sherborne*. The said woman on the appeal gave evidence that the said Reading had carnal knowledge of her body in or about August 1732, and several times since; and that her husband had no access to her from May 1731, to the time of her examination in that court, being the 3d of October 1733, and that the said Reading was the father of the said child. And the question in K B, was whether the wife in this case should be admitted as an evidence for or against husband, and to bastardize her own child. And the whole court were of opinion that the wife could be a witness to *no other fact but that of incontinence*, and that this she must be a witness to from the necessity of the thing; but not to the absence of her husband, which might properly be proved by other witnesses; and likened it to the case of hue and cry, where the person robbed shall be admitted a witness of the fact of robbery, but not to prove any other matter relating thereto, as in what place the robbery was committed, and the like. 2 *Sess Ca.* 175.

See also the case *A & Rooke*. 1 *Wms.* 340.

In the caſe of *Alſop and Bowtell*, the queſtion was whether the woman being delivered of a child forty weeks and nine days after the death of her huſband, ſuch child ſhould be deemed a baſtard. And it was proved that ſhe ſuffered very great abuſe from the father of her deceaſed huſband, who cauſed her to lie in the ſtreets; and three phyſicians (two of them being doctors of phyſic) made oath that the child was born in convenient time to be the child of the party who died; and that the uſual time for a woman to go with child is nine months and ten days; to wit, ſolar months at thirty days to the month, and not lunar months; and that by reaſon of the want of ſtrength in the woman or the child, or by reaſon of ill uſage, ſhe might be a longer time, to wit, to the end of ten months or more. And the phyſicians farther affirmed, that a perfect birth may be at ſeven months, according to the ſtrength of the mother or child, which is as long before the time of the proper birth. And by the ſame reaſon it may be as long defered by accident, which is commonly occaſioned by infirmities of the body or paſſions of the mind. And the child was adjudged to be legitimate. *Cro. Ja.* 541.

By Virginia laws, p. 178. *ſect.* 18. 'Where a man having 'by a woman one or more children, ſhall afterwards intermarry 'with ſuch woman, ſuch child or children, if recognized by 'him, ſhall be thereby legitimated. The iſſue alſo in marriages 'deemed null in law, ſhall nevertheleſs be legitimate.

II. *Proceedings againſt the reputed father of a baſtard child.*

Having ſeen who are deemed baſtards, by the common law, it will next be neceſſary to conſider the proceedings which are authoriſed by the laws of this commonwealth, againſt the reputed father of ſuch child or children, when there is a probability of their becoming chargeable to the county.

Theſe proceedings are regulated by *Virginia laws, chap.* 102. *p.* 193—*ſect.* 23 & 24 of the Reviſed Code, *which ſee.*

(A) *Examination of the Woman.*

county to wit.

The examination of A M, *of in the ſaid county, ſingle-woman, taken up on oath before me* J P, *one of the commonwealth's juſtices of the peace for the county aforeſaid, this day of in the year who ſaith that on the day of laſt paſt,*

paſt, at in the county aforeſaid, ſhe the ſaid A M, *was delivered of a (male) baſtard child, and that the ſaid baſtard child is likely to become chargeable to the ſaid county, and that* A F, *of the ſaid county labourer, did get her with child of the ſaid baſtard child.*

Taken and ſigned the day and year above written before me J. P. } *A. M.*

(B) *Warrant againſt the reputed father.*

county to wit.

To or any other conſtable of county.

Whereas A M, *of in the ſaid county, ſinglewoman, hath by her examination taken in writing upon oath before me* J P, *one of the commonwealth's juſtices of the peace for the county aforeſaid, declared, that on the day of now laſt paſt, at in the county aforeſaid, ſhe the ſaid* A M, *was delivered of a (male) baſtard child, and that the ſaid baſtard child is likely to become chargeable to the ſaid county, and hath charged* A F, *of in the ſaid county labourer, of having gotten her with child of the ſaid baſtard child: And whereas* O P, *one of the overſeers of the poor in the county aforeſaid, in order to indemnify the ſaid county in the premiſes, hath applied to me to iſſue my warrant for apprehending the ſaid* A F: *I do therefore hereby command you, immediately to apprehend the ſaid* A F, *and to bring him before me or ſome other of the commonwealth's juſtices of the peace for the ſaid county, to find ſufficient ſecurity in the ſum of* thirty dollars, *for his perſonal appearance at the next court, to be held for the ſaid county of and then and there to abide by and perform the order of the ſaid court herein, in purſuance of the act of the General Aſſembly, entitled 'An act providing for the poor, and declaring who ſhall be deemed vagrants.' Given under my hand and ſeal, this day of in the year*

(C) Another warrant.

From Starke's Juſtice, p. 48.

To or any other conſtable of county, [and to the keeper of the jail of the ſaid county.]

&c.

Whereas complaint is made to me by and overſeers of the poor, of the county aforeſaid (or of the county of *as the caſe may be*) that of the aforeſaid county ſinglewoman hath been lately delivered of a baſtard child within the

the ſaid county, which child is likely to become chargeable thereto; and whereas the ſaid hath charged, upon oath of the county of (or of the ſame county) to have begotten the ſaid child on her body: Theſe are, in the name of the commonwealth, to command you to cauſe the ſaid to appear before me, or ſome other juſtice of the peace of this county, to find ſufficient ſecurity, in for his perſonal appearance, at the next court to be held for this county, then and there to abide by, and perform the order of the ſaid court herein, and in the mean time to be of good behaviour. (And if the ſaid ſhall refuſe ſo to do, that then you ſhall convey him to the jail aforeſaid, and deliver him ſafely to the keeper thereof, together with this warrant. And you the ſaid keeper are alſo commanded to receive the ſaid into your cuſtody, and him ſafely to keep in the common jail until he ſhall find ſuch ſecurity as aforeſaid, or until he ſhall be diſcharged by due courſe of law.) Given under my hand and ſeal this day of in the year

The foregoing precedent has ſo long been in uſe that it may appear preſumptuous in me, at this time, to doubt the validity of any part. I cannot, however, think that part of it which authoriſes the conſtable to convey the reputed father to priſon in caſe of refuſal to find ſecurity, warranted by law. Theſe proceedings are unknown to the common law, and exiſt only by virtue of the ſtatute. Does the act of Aſſembly authoriſe the conſtable to take ſecurity for the appearance of the party at court?—or can the magiſtrate transfer the power veſted in him to the conſtable?—or can the conſtable adminiſter an oath to the ſecurities in order to judge of their ſufficiency?

When the father is brought before the juſtice he muſt enter into a recognizance, with ſecurity for his appearance at the next court to be held for the county, to which court the juſtice ſhould certify the recognizance as uſual.

(D) The Recognizance.

county to wit.

Memorandum, That upon this day of in the year of our lord A F, *of the county of labourer,* A B, *of the ſaid county, labourer, and* B B, *of the ſaid county labourer, perſonally appeared before me* J P, *one of the commonwealth's juſtices of the peace for the county aforeſaid, and acknowledged that they do owe to* A G, *governor or chief magiſtrate of the commonwealth of Virginia, and his ſucceſſors, to wit, the ſaid* A F, *in*

the

the ſum of thirty dollars, and the ſaid A B, *and* B B, *each ſeverally in the ſum of fifteen dollars, of lawful money of Virginia; to be levied of their reſpective goods and chattels, lands and tenements, to the uſe of the ſaid commonwealth of Virginia, if default ſhould be made in performance of the condition here underwritten.*

The condition of this recognizance is, that whereas A M, of the county of (or of the ſaid county, *as the caſe may be*) ſinglewoman, hath by her examination on oath before me, (or before one of the commonwealth's Juſtices of the peace for the county of *as the caſe may be*) declared that on the day of laſt paſt, ſhe was delivered of a baſtard child in the county of (or, in the county aforeſaid) which is likely to become chargeable to the ſaid county, and hath charged the above bound A F, with having gotten her with child of the ſaid baſtard child: Now if the ſaid A F, ſhall perſonally appear before the commonwealth's juſtices of the peace, at the next court to be held for the county of and ſhall abide by and perform the order or orders of ſuch court, as ſhall be made in the premiſes, then this recognizance to be void, otherwiſe to remain in full force.

Acknowledged before me.

If the reputed father refuſes to enter into a recognizance, the juſtice may commit him.

(E) MITTIMUS.

To the ſheriff, or keeper of the jail of the county of

county to wit.

I herewith ſend you the body of A F, of this county labourer, who was this day brought before me J P, one of the commonwealth's juſtices of the peace for the ſaid county, being charged on oath by A M. of the county aforeſaid, ſinglewoman, to have gotten her with child, of a baſtard child, of which ſhe hath been lately delivered within the ſaid county, and which child is likely to become chargeable to the ſaid county; and the ſaid A F, labourer having refuſed, before me, to find ſufficient ſecurity for his appearance at the next court to be held for this county, to anſwer the ſaid charge: Theſe are therefore in the name of the commonwealth, to command you to receive the body of the ſaid A F, into your cuſtody, and him ſafely to keep in the common jail, until he ſhall thence be diſcharged by due courſe of law. Herein fail not at your peril. Given under my hand and ſeal &c.

Where

Where the perſon charged with being the father of a baſtard child is an inhabitant of another county, the examination ſhould be certified to a juſtice of that county, upon the application of the overſeers of the poor of the county where the child is born, for a warrant to apprehend the father; and by ſuch juſtice be returned, with the recognizance for the appearance of the father, to the next county court.

III. Capacity of a baſtard as to inheritance.

By *Virginia laws p.* 178. *ſect.* 18. 'Baſtards ſhall be capable of inheriting, or of tranſmitting inheritance on the part 'of their mother, in like manner as if they had been lawfully 'begotten of ſuch mother.'

IV. Concealing the death of a baſtard child.

This act was declared to be murder by 9 *Annæ, (1710) chap. II. p.* 59. *of the edition of* 1769; which law was nearly copied from the ſtatute of England 21. J. c. 27.

By theſe ſtatutes a new felony was not created, but the *act of concealment* was made undeniable evidence of a felony; therefore the indictment need not be drawn ſpecially or conclude againſt the form of the ſtatute. *See* 2 *Hawk.* 438.

Formerly the bare attempt to conceal the death of a baſtard child was held concluſive evidence of murder. 2 *Hawk.* 438.—But now ſome kind of preſumptive evidence is neceſſary that the child was born alive. 4 *Blacks* 198.

Whether the legiſlature of *Virginia* intended to aboliſh the diſtinction between this offence and the common caſes of murder, or whether it was a mere omiſſion in them, it is difficult to determine, but, ſo it is that theſe ſtatutes have not been publiſhed in the *Reviſed Code* printed in 1794.

It would ſeem, however, from the rules of legal conſtruction, and from the principle eſtabliſhed by the high court of chancery, in *Virginia*, that the *act of* 9 *Ann.* is ſtill in force, not having been expreſsly repealed. *See Wythe's Chancery deciſions.* 33. *Harriſon & al. v. Allen.*

Should it be conſidered that the above law is in force, the precedents under titles *Warrants, Commitment, Recognizance, Criminals, and Homicide*; may eaſily be adopted.

Bigamy

Battery. (See Aſſault.)

Bawdy-houſe. See Lewdneſs.)

Beef. See Pork, Beef, Pitch, Tar, and Turpentine.

Behaviour. See Surety.

BIGAMY.

BY the term *Bigamy*, is generally meant, in the law, the crime of marrying a ſecond huſband or wife, the former being alive: tho' in common acceptation, the word *Polygamy* ſeems more expreſſive of the offence. This is made felony, by the laws of this commonwealth. *p.* 205. *ſect.* 14—which ſee.

It hath been holden upon the *Stat.* 1 *Ja.* 1 *Chap.* 11. in England which our act of Aſſembly nearly follows, that in the caſe of the huſband or wife living continually beyond the ſeas for the ſpace of ſeven years, which forms the firſt exception in the act, the party is not deprived of the benefit of the exception even if they have notice that the other is alive. 1 *H. H.* 693.

But in the caſe of the huſband or wife being abſent in any part of the United States of America, or elſewhere for the ſpace of ſeven years, ignorance of their ſituation is made expreſsly neceſſary by the above act in order to entitle the party to the benefit of the ſecond exception. *Id.*

The age of conſent, is twelve years in females, and fourteen in males. 3 *Inſt.* 89.

If either party be within age of conſent, the benefit of the exception extends to both of them; for till they have both conſented firmly and obligatorily, either of them may re-elect. 1 *H. H.* 694.

The firſt and true wife may not be allowed as a witneſs againſt the huſband to prove the ſecond marriage, but the ſecond wife may, for ſhe is not legally his wife. 1 *H. H.* 693. And ſo *vice verſa* of a firſt and ſecond huſband. 4 *Blacks Com.* 164.

(A) Indictment for having two wives at one and the ſame time.

county to wit.

The jurors for the commonwealth upon their oath do preſent, That A O, late of the county of yeoman, on the day of in the year at the county of did marry one A W, ſpinſter, and her the ſaid A W, then and there had for his wife; and that the ſaid A O, afterwards, to wit, on the

day

day of in the year with force and arms, at the ſaid county of felonioufly did marry and take to wife one B W, ſpinſter, and to the ſaid B W, was then and there married (the ſaid A W, his former wife being then living and in full life) againſt the form of the ſtatute in ſuch caſe made and provided, and againſt the peace and dignity of the commonwealth. * And the jurors aforeſaid upon their oath aforeſaid, do further preſent, That the ſaid A O, afterwards, to wit, on the day of in the year laſt aforeſaid, was apprehended and taken in the ſaid county of for the felony aforeſaid.

(B) Indictment for having two huſbands, at one and the ſame time.

county to wit.

The jurors for the commonwealth, upon their oath do preſent, That *Elizabeth*, the wife of A B, late of the county of planter, on the day of in the year of our lord being then married, and then the wife of the ſaid A B, with force and arms, at the county of did felonioufly marry and take to huſband C D, of (the ſaid A B, her huſband, being then alive) againſt the form of the ſtatute in ſuch caſe made and provided, and againſt the peace and dignity of the commonwealth. And the jurors aforeſaid upon their oath aforeſaid do further preſent, That the ſaid Elizabeth heretofore, to wit, on the day of in the year at the county of by the name of Elizabeth C, did marry the ſaid A B, and him the ſaid A B, then and there had for her huſband; and that ſhe the ſaid *Elizabeth* being married and the wife of the ſaid A B, afterwards, to wit, on the day of in the year with force and arms, at the ſaid county felonioufly did marry and take to her huſband the ſaid C D, of (the ſaid A B, her former huſband, being then alive) againſt the form of the ſtatute in ſuch caſe made and provided, and againſt the peace and dignity of the commonwealth.

NOTE, In an indictment for bigamy a marriage in fact muſt be proved, preſumption by cohabitation &c. is not ſufficient. *Bur.* 2057.

Blaſphemy

* *This part may be left out when the priſoner is taken where the felony is committed.*

IT muſt afford real pleaſure to every friend to civil and religious liberty to be informed that the acts which have hitherto, *by law*, conſtituted the crime of *blaſphemy*, are now conſidered as mere ſpeculative topics, which every citizen is authoriſed freely to diſcuſs; and that the ſeveral laws impoſing ſuch ſevere penalties on the offenders, which have diſgraced the code of almoſt every civilized nation in Europe, and were implicitly adopted in America, prior to the late revolution, are now entirely done away by that bulwark of our religious rights, the act '*eſtabliſhing religious freedom*:—an act which deſerves to be tranſlated into every language in the world, and to be deeply impreſſed on the mind of every citizen. The crime of *Blaſphemy* then as it has been heretofore preſcribed by law no longer exiſts, and the other part of this title (*Profaneneſs*) which has generally been coupled with it, will more properly be treated of under title *Swearing*, which ſee.

BREAD, *See* FLOUR.

BREAKING HOUSES, *See* CLERGY & LARCENY.

BRIBERY, *See* EXTORTION.

BUGGERY.

BUGGERY from the *Italian Bugarone*, (the vice being ſaid to have been firſt introduced into *England* by the *Lombards* from Italy) is defined by lord Coke to be a deteſtable and abominable ſin amongſt chriſtians not to be named committed by carnal knowledge againſt the ordinance of the creator, and order of nature, by mankind with mankind, or with brute beaſt, or by woman kind with brute beaſt (3 *Inſt.* 58)—and in ſupport of the laſt part of this definition, he mentions the caſe of a great lady in England, who cohabited with a *Baboon*, and conceived by it. *See* 3 *Inſt.* 59.

The puniſhment of buggery is death without benefit of clergy, by the laws of this commonwealth. *p.* 188.

For the honor of human nature it muſt be obſerved that this crime is ſeldom committed. Should a magiſtrate, however, have to act in his official character in ſuch caſes, he may readily adopt the precedents to be found under title *Criminals*, obſerving to deſcribe the offence as in the following indictment.

Indictment for Buggery.

county to wit.

The jurors for the commonwealth upon their oath do preſent that of the county of aforeſaid, labourer, not having

ing the fear of God before his eyes, nor regarding the order of nature, but being moved and ſeduced by the inſtigation of the devil, on the day of in the year of our lord with force and arms, at the county aforeſaid, in and upon * *one a youth about the age of years*, then and there being, feloniouſly did make an aſſault, and then and there feloniouſly, wickedly, diabolically, and againſt the order of nature, had a venereal affair with the ſaid and then and there carnally knew the ſaid and then and there feloniouſly wickedly, and diabolically, and againſt the order of nature, with the ſaid did commit that deteſtable and abominable crime of buggery (not to be named amongſt *Chriſtians*) to the great diſpleaſure of Almighty God, to the great ſcandal of all human kind, againſt the form of the ſtatute in ſuch caſe made and provided, and againſt the peace and dignity of the commonwealth.

BURGLARY.

I. What is Burglary.
II. How it is puniſhed.
III. Precedents.

I. What is Burglary.

THE *word Burglary* is thought to have been brought into *England* by the *Saxons* from *Germany*, in whoſe language *burg* ſignifies a houſe, and *larron* a thief, probably from the latin *latro*.

Burglary is a felony at common law, in breaking and entering the manſion houſe of another, in the night, with intent to commit ſome felony within the ſame, whether the felonious intent be executed or not. Hale's pl. 79.

Breaking. Every entrance into the houſe by a treſpaſſer, is not a breaking in this caſe, but there muſt be an actual breaking. As if the door of a manſion houſe ſtand open, and the thief enter, this is not a breaking. So it is if the window of the houſe be open, and a thief with a hook or other engine draweth out ſome of the goods of the owner, this is no burglary, becauſe there is no actual breaking of the houſe. But if the thief breaketh the glaſs of the window, and with a hook or other engine draweth out ſome of the goods of the owner, this is burglary, for there was an actual breaking of the houſe. 3 *Inſt.* 64.

And

* *If for* beſtiality, *ſay*, upon *a certain mare, cow, &c.* (as the caſe may be) feloniouſly, wickedly, diabolically, &c.

And the following acts amount to an actual breaking: opening the caſement or breaking the glaſs window, picking open the lock of a door, or putting back the lock, or the leaf of a window, or unlatching the door that is only latched. 1 *H. H.* 552.

At a meeting of the judges upon a ſpecial verdict in *January* 1690, they were divided upon the queſtion, whether breaking open the door of a *cupboard* let into the wall of the houſe was burglary or no. Upon which Mr. *Foſter* obſerves, that with reſpect to cupboards, preſſes, lockers, and other fixtures of the like kind, it ſeemeth that in favour of life, a diſtinction ought to be made between caſes relating to mere property, and ſuch wherein life is concerned. In queſtions between the heir or deviſee and the executor, thoſe fixtures may with propriety enough be conſidered as annexed to and parts of the freehold. The law will preſume, that it was the intention of the owner, under whoſe bounty the executor claims that they ſhould be ſo conſidered; to the end that the houſe might remain to thoſe who by operation of law, or by his bequeſt, ſhould become entitled to it, in the ſame plight he put it, or ſhould leave it, intire and undefaced. But in capital caſes, it ſeemeth, that ſuch fixtures, which merely ſupply the place of cheſts and other ordinary utenſils of houſehold, ſhould be conſidered in no other light than as mere moveables, partaking of the nature of thoſe utenſils, and adapted to the ſame uſe. *Foſt.* 108, 9.

In the caſe of K. and *Gray.* One of the *ſervants*, in the houſe, opened his lady's chamber door (which was faſtened with a braſs bolt) with deſign to commit a rape; and it was ruled to be burglary, and the defendant was convicted and tranſported. *Str.* 481.

The caſe of *Joſhua Cornwall*, is conſidered of great importance, as it goes to ſhew how far an act may be conſtrued into burglary which does not ſeem to fall expreſsly under the definition given by lord *Hale* of that offence. He was indicted with another perſon for burglary. And upon the evidence it appeared, that he was a ſervant in the houſe where the robbery was committed, and in the night time opened the ſtreet door, and let in the other priſoner, and ſhewed him the ſide-board, from whence the other priſoner took the plate: and the defendant opened the door and let him out; but the defendant did not go out with him, but went to bed. Upon the trial it was doubted whether this was burglary in the ſervant, he not *going out* with the other. But afterwards at a meeting of all the judges at *Sergeants Inn*, they unanimouſly agreed that it was burglary in both, and not to be diſtinguiſhed from the caſe where one watches

watches at the ſtreet end, while the other goes in and commits the burglary, which hath been often ruled to be burglary in both: and upon report of this opinion the defendant was executed. *Str.* 881.

And entering] It is deemed an entry when the thief breaketh the houſe, and his body, or any part thereof, as his foot, or his arm is within any part of the houſe; or when he putteth a gun into a window which he hath broken, or into a hole of the houſe which he hath made, of intent to murder or kill, this is an entry and breaking of the houſe: but if he doth barely break the houſe, without any ſuch entry at all, this is no burglary. 3 *Inſt.* 64.

In the caſe of *George Gibbons*, at the *old Bailey* in *June* 1752; *Gibbons* was indicted for burglary in the dwelling houſe of *John Allen*. It appeared in evidence, that the priſoner in the night time cut a hole in the window ſhutter of the proſecutor's ſhop, which was part of his dwelling houſe; and putting his hand thro' the hole, took out watches and other things which hung in the ſhop within his reach: but no entry was proved otherwiſe than by putting his hand thro' the hole. This was held to be burglary, and the priſoner was convicted. *Foſt.* 107, 8.

If divers come in the night to do a burglary, and one of them break and enter, the reſt of them ſtanding to watch, at a diſtance, it is burglary in all. 3 *Inſt.* 64.

The manſion houſe.] This includes alſo a church: and Mr. Hawkins ſays, all out buildings, as barns, ſtables, dairy houſes, adjoining to a houſe, are looked upon as part thereof, and conſequently burglary may be committed in them: But if they be removed at any diſtance from the houſe, it ſeems that it hath not been uſual of late to proceed againſt offences therein as burglaries. 1 *L. Hawk.* 163.

And lord *Hale* ſays more explicitly, the manſion houſe doth not only include the dwelling houſe, but alſo the out houſes that are parcel thereof, as barn, ſtable, cow-houſe, dairy houſe, if they are parcel of the meſſuage, tho' they are not under the ſame roof, or joining contiguous to it; and ſo he ſays it was agreed by all the judges; but if they be no parcel of the meſſuage, as if a man take a leaſe of a dwelling houſe from one and of a barn &c. from another; or if it be far remote from the dwelling houſe, and not ſo near to it, as to be reaſonably eſteemed parcel thereof, as if it ſtand a bow ſhot off from the houſe, and not within or near the curtilage of the chief houſe; then the breaking is not burglary, for it is not a manſion houſe, nor any part thereof. 1 *H. H.* 558, 9.

To break, and enter a *ſhop*, not parcel of the manſion houſe,

in

in which the ſhop-keeper never lodges, but only works or trades there in the day time, is not burglary, but only larceny; but if he or his ſervant uſually, or often lodge in the ſhop at night, it is then a manſion houſe, in which burglary may be committed. 1 *H. H.* 557, 8.

It is not neceſſary to make it burglary, that any perſon be actually in the houſe, at the very time of the offence committed. 1 *Hawk.* 164.

At *Newgate* ſeſſions, in *January* 1750, *John Nutbrown* and *Miles Nutbrown*, were indicted for burglary in the dwelling houſe of one Mr. *Fackney* at *Hackney*, and ſtealing divers goods. It appeared by Mr. Fackney's evidence, that he held this houſe for a term of years not yet expired, and made uſe of it as a country houſe in ſummer, his chief reſidence being in *London*: That about the latter end of the laſt ſummer, he removed with his whole family to the city, and brought away a conſiderable part of his goods: That in *November* laſt his houſe was broke open and in part rifled; upon which he removed the remainder of his houſehold furniture, except a clock, and a few old bedſteads, and ſome lumber of very little value; leaving no bed, or kitchen furniture, or any thing elſe for the accommodation of a family. Mr. *Fackney* being aſked whether at the time he ſo diſfurniſhed his houſe he had any intention of returning to reſide there, declared that he had not come to any ſettled reſolution whether to return or not; but was rather inclined totally to quit the houſe and to let it for the remainder of his term. The fact with which the priſoners were charged was ſufficiently proved; and was committed about mid-night the firſt of *January* laſt. The court was of opinion that the proſecutor having left his houſe, and diſfurniſhed it in the manner before mentioned, without any ſettled reſolution of returning, but rather inclining to the contrary, it could not under theſe circumſtances be conſidered his dwelling houſe at the time the fact was committed, and accordingly directed the jury to acquit the priſoners of the burglary, which they did, but found them guilty of felony in ſtealing the clock, and ſome other ſmall matters. And they were ordered for tranſportation —And the diſtinction is this: Where the owner quiteth the houſe, *with an intention of returning*,* it may ſtill be conſidered as his manſion houſe, tho' no perſon be left in it; many citizens and ſome lawyers do ſo from a principle of good huſbandry, in the ſummer, or for a long vacation But there muſt be an *intention of returning*, otherwiſe it will be no burglary. *Foſt.* 76, 77.

In

* *Animo revertendi.*

In the night.] Lord *Coke* ſays, as long as the day continues, whereby a man's countenance may be diſcerned, it is called day; and when darkneſs comes and day light is paſt, ſo as by the light of day, you cannot diſcern the countenance of a man, then it is called night. And this doth aggravate the offence; ſince the night is the time when man is at reſt, and when beaſts run about ſeeking their prey. Hence in ancient records, the twy-light was ſignified, when it was ſaid, *inter canem et lupum*, (between the dog and the wolf;) for when the night begins the dog ſleeps, and the wolf ſeeketh his prey. 3 *Inſt.* 63. *See* 4 *Black's Com.* 224.

An indictment was held inſufficient for burglary, which ſtated the fact to have been committed in the night, without expreſſing the particular hour, and the priſoner was found guilty of ſimple felony only. K. and *Waddington*, at the *Lancaſter* lent aſſizes. 1771.

With intent to commit felony.] There can be no burglary, but where the indictment both expreſsly alledges, and the verdict alſo finds, an intention to commit ſome felony; for if it appear that the party only intended to commit ſome treſpaſs as to beat the party or the like, he is not guilty of burglary. 1 *Hawk.* 164.

However it ſeems the much better opinion, that an intention to commit a rape or other ſuch crime, which is made felony by ſtatute, and was only a treſpaſs at common law, will make a man guilty of burglary, as much as if ſuch offence was a felony at common law; becauſe wherever a ſtatute makes any offence felony, it incidently gives it all the properties of a felony at common law. 1 *Hawk.* 164.

Whether the felonious intent be executed or not.] Thus they are burglars, who break any houſe or church in the night with intent to commit a felony, whether they take any thing away or not. And herein this offence differs from robbery, which requires that ſomething be taken, tho' it is not material of what value.

Where a man commits burglary and at the ſame time ſteals goods out of the houſe, it is alſo larceny; and if he be acquitted of the burglary, he may notwithſtanding be indicted of the larceny; for they are ſeveral offences, tho' committed at the ſame time. And burglary may be where there is no larceny, and larceny may be where there is no burglary. 2 *H. H.* 246.

See 1 *L. Hawk.* 164, *in notes.*

II. How it is puniſhed.

Burglary is one of the offences in which the benefit of clergy is

is not allowed by *Virginia laws p.* 50. either to principals in the firſt or ſecond degree, or to acceſſories *before* the fact.

But acceſſories *after* the fact, in burglary, are admitted to their clergy. 2 *H. H.* 364.

III. PRECEDENTS.

(A) Warrant to apprehend a Burglar.

county to wit.

To the conſtable of

Whereas A J, *of the county of aforeſaid, merchant, hath this day made information and complaint upon oath before me* J P, *one of the commonwealth's juſtices of the peace for the ſaid county, that on the day of in the night, the dwelling houſe of him the ſaid* A J, *at the county aforeſaid, was feloniouſly and burglariouſly broken open, and one gold watch of the value of one hundred dollars, of the goods and chattels of him the ſaid* A J, *feloniouſly and burglariouſly ſtolen, taken and carried away from thence, and that he hath juſt cauſe to ſuſpect, and doth ſuſpect that* A O, *of in the county of labourer, the ſaid felony and burglary did commit. Theſe are therefore, in the name of the commonwealth to command and require you, that immediately upon ſight hereof, you do apprehend the ſaid* A O, *and bring him before me, or ſome other juſtice of the peace for this county, to anſwer the premiſes, and to be further dealt with according to law. Herein fail not. Given under my hand and ſeal &c.*

If the perſon charged upon oath with the burglary, is not well and certainly known, it is uſual in the warrant to inſert a clauſe directing purſuit by hue and cry; this may come in after the words, '*to command and require you,*' thus, *and each of you, to ſearch diligently for the ſaid* A O, *within your ſeveral precincts, and likewiſe to make hue and cry after him, from town to town, and from county to county, as well by horſemen as footmen; and if you ſhall find the ſaid* A O, *that then you apprehend him, and carry him before ſome juſtice of the peace for the county where he ſhall be taken, and there deliver him together with this warrant. The ſaid* A O, *is a perſon* [here deſcribe his ſtature, age, apparel &c. particularly.]

The juſtice before whom the ſuſpected party is brought, may ſummon witneſſes to give evidence againſt him if he finds it neceſſary.

(B)

(B) *Summon for a witneſs.*

To A C, or any other conſtable of county.

county to wit.

You are hereby commanded, in the name of the commonwealth, to ſummon A W, *to come before me at in this county, to-morrow by o'clock in the forenoon, to teſtify and the truth to ſay concerning a certain burglary and felony, ſuſpected to be done by* A O, *of &c. and that you then and there attend with this warrant, to ſhew how you have executed the ſame. Given under my hand &c.*

If upon the examination of the felon and the witneſſes it ſhould appear proper to the juſtice to call a court for the further examination of the criminal, he ſhould take the recognizance of the witneſſes, to appear at ſuch court, and commit the offender to jail.

For the form of the recognizance ſee title *Criminals.*

(C) MITTIMUS.

To the ſheriff of county, or to the keeper of the jail of the ſaid county.

county to wit.

Theſe are to command and require you in the name of the commonwealth, to receive into your jail the body of A O, *late of the county of labourer, taken and brought before me for felony and burglary by him committed, in breaking and entering the dwelling houſe* (or if any other houſe, deſcribe the kind particularly) *of* A J, *of the county of merchant, on the day of in the night time, at o'clock of the ſaid night, and feloniouſly taking and carrying away from thence, one gold watch of the value of one hundred dollars, of the goods and chattels of him the ſaid* A J, *in the ſaid dwelling houſe, then and there being, wherewith the ſaid* A O, *ſtands charged before me,* (*or,* and the ſaid A O, having before me confeſſed the ſame) *you are hereby commanded to keep the ſaid* A O, *ſafely in your jail and cuſtody, without bail or mainprize, until he ſhall thence be diſcharged by due courſe of law. Given under my hand and ſeal &c.*

(D) Indictment for proper Burglary.

county to wit.

The jurors for the commonwealth upon their oath do preſent that A O, *late of the county of aforeſaid labourer, on the*

day

day of in the year at the hour of one in the night of the ſame day, with force and arms, at the county aforeſaid, the dwelling houſe of A J, *feloniouſly and burglariouſly did break and enter, with intent him the ſaid* A J. *of his goods in the ſame dwelling houſe then being, feloniouſly and burglariouſly to ſpoil and rob, and the ſame goods feloniouſly and burglariouſly to ſteal, take and carry away; againſt the peace and dignity of the commonwealth.*

As it is difficult to eſtabliſh an intention to commit a felony without proof of ſome actual felonious deed, the foregoing precedent is ſeldom uſed.—The following one will be found more generally uſeful.

(E) Indictment for burglary and larceny.

county to wit.

The jurors for the commonwealth, upon their oath do preſent, that A O, *late of the county of aforeſaid, labourer, on the day of in the year between the hours of* ten and eleven *in the night of the ſame day, with force and arms at the county aforeſaid, the dwelling houſe of* A J, *feloniouſly and burglariouſly did break and enter, and* one gold watch *of the value of* one hundred dollars *in the ſame dwelling houſe then and there feloniouſly and burglariouſly did ſteal, take and carry away againſt the peace and dignity of the commonwealth.*

BURNING.

I. Of burning houſes, conſidered as offences againſt the laws of this commonwealth.
II. Of arſon or burning at the common law.
III. Precedents.

I. Of burning houſes, conſidered as offences againſt the laws of this commonwealth.

BY *V. l. page* 215. 'All and every perſon, and perſons, 'that ſhall at any time either in the night or the day, ma-'liciouſly, unlawfully and willingly; burn any houſe or houſes 'whatſoever, or ſhall comfort, aid, abet, aſſiſt, counſel, hire, 'or command, any perſon or perſons to commit any of the ſaid 'offences, being thereof convicted or attainted, or being in-'dicted

'dicted thereof, ſhall ſtand mute, or will not anſwer directly 'to the indictment, or ſhall peremptorily challenge, above the 'number of twenty perſons returned to be of the jury, ſhall be 'adjudged a felon, and ſhall ſuffer death as in caſe of felony, 'and ſhall not have the benefit of his, her, or their clergy.'

And by *V. l. p.* 50. the benefit of clergy ſhall not be allowed to thoſe guilty, 'of the wilful burning of any court-houſe, or 'county or public priſon, or of the office of the clerk of any 'court within this commonwealth.

II. Of arſon or burning at the common law.

Maliciouſly and voluntarily burning the houſe of another by night, or by day, is felony by the common law. 1 *Hawk.* 165.

Maliciouſly and voluntarily.] For if it be done by miſchance or negligence, it is no felony. 3 *Inſt.* 67.

Yet if a man maliciouſly intending only to burn one perſons houſe, happens thereby to burn the houſe of another, it is certain that he may be indicted as having maliciouſly burned the houſe of that other; for where a felonious deſign againſt one man, miſſeth its aim, and takes effect upon another, it ſhall have the like conſtruction, as if it had been levelled againſt him who ſuffers by it. 1 *Hawk.* 167.

Burning.] Neither a bare intention to burn a houſe, nor even an actual attempt to do it by putting fire to a part of a houſe, will amount to felony, if no part of it be burned; but if any part of the houſe be burnt, the offender is guilty of felony. notwithſtanding the fire afterwards be put out, or go out of itſelf. 1 *Hawk.* 167.

The houſe.] Not only a manſion houſe, and the principal parts thereof, but alſo any other houſe, and the out buildings, as barns and ſtables adjoining thereto; and alſo barns full of corn, whether they be adjoining to any houſe or not, are ſo far ſecured by law, that the malicious burning of them is felony at common law. 1 *Hawk.* 165.

Of another.] Mr. *Hawkins* ſays. A perſon ſeized in fee, or but poſſeſſed for years, of a houſe ſtanding by itſelf at a diſtance from all others, cannot commit felony in burning the ſame: Alſo that it ſeems the much ſtronger opinion, that a man ſo ſeized or poſſeſſed of a houſe in a town, who burns his own with an intent to burn his neighbour's, but in the event burns his own only, is not guilty of felony; but however it is certainly an offence highly puniſhable, in regard of the malice thereof, and the great danger to the public which attends it; and the of-

fender

ſender may be ſeverely fined, and impriſoned, and ſet on the pillory, and bound to his good behaviour. 1 *Hawk.* 166.

See *Holme's* caſe. *Cro. Charles* 376, to the above point.

See alſo the caſe of *Elizabeth Harris*, Foſter's crown law. p. 113. 349.

The benefit of clergy is taken away from principals in the firſt and ſecond degree, and from acceſſories before the fact, for '*Arſon at the common law.*' *V. l p.* 50.

III. PRECEDENTS.

(A) Warrant for burning a houſe.

To all conſtables, and other, the commonwealth's officers of the county of

county to wit.

Whereas A J, of the county of aforeſaid merchant, hath this day made complaint, upon oath, to me J P, one of the commonwealth's juſtices of the peace for the county aforeſaid that on the day of a houſe, viz. (deſcribe the kind) belonging to him the ſaid A J, and in his poſſeſſion was wilfully and maliciouſly ſet on fire, and burnt, and that he hath juſt cauſe to ſuſpect, and doth ſuſpect that A O, of the county aforeſaid, labourer, did felonioufly, voluntarily and maliciouſly burn the ſaid houſe. Theſe are therefore, in the name of the commonwealth to require you immediately to apprehend the ſaid A O, and to bring him before me, or ſome other juſtice of the peace for the ſaid county, to be examined concerning the premiſes, wherewith he is ſuſpected. Given under my hand and ſeal &c.

For other precedents ſee title *Criminals*.

(B) Indictment for wilfully burning a houſe.

county to wit.

The jurors for the commonwealth, upon their oath do preſent that A O, late of the county of aforeſaid, labourer, not having the fear of God before his eyes, but being moved and ſeduced by the inſtigation of the devil, on the day of in the year about the hour of in the night of the ſame day, with force and arms, at the county aforeſaid, a certain houſe, * called *(deſcribe the kind)* of one A J, there ſituate, felonioufly, voluntarily and maliciouſly did ſet fire to, and the ſame houſe then and there, by ſuch firing as aforeſaid, felonioufly,

* *Sufficient without ſaying* dwelling houſe. 1 *Hawk.* 166.

felonioufly, voluntarily and maliciouſly did burn, and conſume, againſt the form of the ſtatute in ſuch caſe made and provided, and againſt the peace and dignity of the commonwealth.

BUYING OF TITLES.

I. By the common law.
II. By ſtatute.

I. By the common law.

IT ſeems to be a high offence at common law, to buy or ſell any doubtful title to lands known to be diſputed, to the intent that the buyer may carry on the ſuit, which the ſeller doth not think it worth his while to do, and on that conſideration ſells his pretenſions at an under rate; and it ſeems not to be material whether the title ſo ſold be a good or bad one, or whether the ſeller were in poſſeſſion or not, unleſs his poſſeſſion were lawful and unconteſted, for all practices of this kind are by all means to be diſcountenanced, as manifeſtly tending to oppreſſion, by giving opportunities to great men to purchaſe the diſputed titles of others, to the great grievance of the adverſe parties, who may often be unable or diſcouraged to defend their titles againſt ſuch powerful perſons, which perhaps they might ſafely enough, maintain againſt their proper adverſary. 1 *Hawk.* 553.

II. By ſtatute.

By *V. l. p.* 40. 'No perſon ſhall convey or take, or bargain to convey or take, any pretended title to any lands or tenements, unleſs the perſon conveying or bargaining to convey, or thoſe under whom he claims, ſhall have been in poſſeſſion of the ſame, or of the reverſion or remainder thereof, one whole year next before; and he who offendeth herein knowingly, ſhall forfeit the whole value of the lands or tenements; the one moiety to the commonwealth, and the other to him who will ſue as well for himſelf as for the commonwealth: But any perſon lawfully poſſeſſed of lands or tenements, or of the reverſion or remainder thereof, may nevertheleſs take, or bargain to take the pretended title of any other perſon, ſo far and ſo far only, as it may confirm his former eſtate.'

See a declaration for buying a pretended title—*Plowden* 78. 80. *Partridge* v. *Strange* and *Crocker*.

Carriers

THE term *Carrier* is ſeldom uſed in common converſation; but in its legal acceptation it comprehends all perſons carrying goods for hire, as maſters and owners of ſhips, lightermen, ſtage coachmen, and in our phraſe *waggoners*, and the like, who are chargeable on the general cuſtom of the country for their faults or miſcarriages. 1 *Bac. Abr.* 343. *Bullers niſi prius* 67.

A carrier ſhall not evade the law, by refuſing to carry goods at the prices limited. For if a common carrier, who is offered his hire, and who hath convenience, refuſes to carry goods, he is liable to an action in the ſame manner as an innkeeper who refuſes to entertain a gueſt, or a ſmith who refuſes to ſhoe a horſe. 1 *Bac. Abr.* 344.

So an action will lie againſt a common ferryman, who refuſeth to carry paſſengers. *Id.*

But if the porter puts up the box of a paſſenger behind a ſtage coach, and the maſter as ſoon as he knows of it ſays, he is already full, and refuſes to take the charge of it, the maſter ſhall not be liable. For this is the ſame with an hoſt who refuſeth his gueſt, his houſe being full, and yet the party ſays he will ſhift, or the like, if he be robbed, the hoſt is diſcharged. *Id.*

So a carrier may refuſe to admit goods into his warehouſe at an unſeaſonable time, or before he is ready to take his journey; but he cannot refuſe to do the duty incumbent upon him by virtue of his publick employment. L. *Raym.* 652.

It hath been holden that a carrier imbezelling goods which he has received to carry to a certain place, is not guilty of felony, becauſe there was not a felonious *taking*; but is liable only to a civil action. 1 *Haw.* 89, 90.

But it hath been reſolved, that if a carrier open a pack, and take out part of the goods, with intent to ſteal it, he may be guilty of felony; in which caſe it may be ſaid, not only that ſuch poſſeſſion of a part diſtinct from the whole, was gained by wrong, and not delivered by the owner; but alſo that it was obtained baſely, fraudulently, and clandeſtinely, in hopes to prevent it being diſcovered at all, or fixed upon any one when diſcovered. 1 *Haw.* 90.

Alſo it ſeems clear, that if a carrier, after he has brought the goods to the place appointed, take them away ſecretly, with intent to ſteal them, he is guilty of felony; becauſe the poſſeſſion, which he received from the owner, being determined, his ſecond taking is in all reſpects the ſame, as if he were a mere ſtranger. 1 *Haw.* 90.

Alſo it hath been reſolved, if goods be delivered to a carrier, to be carried to a certain place, and he carries them to another

place,

place, and diſpoſeth them to his own uſe, that this is felony; becauſe this declareth that his intention originally was not to take the goods, upon the agreement and contract of the party, but only with a deſign of ſtealing them. *Kelynge.* 82.

Where goods are delivered to a carrier, and he is robbed of them, he ſhall be charged, and anſwer for them, by reaſon of the hire: and this was at the common law, before the hundred was anſwerable for him; becauſe ſuch robbery might be, by conſent and combination, carried on in ſuch a manner, that no proof could be had of it. 1 *Salk.* 143.

And altho it may be thought a hard caſe, that a poor carrier who is robbed on the road, without any manner of default in him, ſhould be anſwerable for all the goods he takes; yet the inconvenience would be far more intolerable, if he were not ſo, for it would be in his power to combine with robbers, or to pretend a robbery, or ſome other accident, without a poſſibility of remedy to the party; and the law will not expoſe him to ſo great a temptation, but he muſt be honeſt at his peril. 12 *Mod.* 482.

And generally, if a man delivers goods to a common carrier, to carry to a certain place: if he loſes or damages them, an action upon the caſe lies againſt him: for by the cuſtom of the country he ought to carry them ſafely. 1 *Bac. Abr.* 343. And if he be a common carrier tho' there be no agreement, or rate ſettled, or promiſe of payment; yet he ſhall recover his hire on a *quantum meruit*, and therefore ſhall be liable for loſs and damages. *Id.* ...

Alſo if a perſon, who is no common carrier, takes upon himſelf to carry my goods, tho' I promiſe him no reward, yet if my goods are loſt or damaged by his default, I ſhall have an action againſt him. *Id.*

For the very taking of the goods is a general conſideration, tho' he be not a common carrier: and the acceptance of the goods makes him liable. *Show.* 104.

M. 11. G. 3. *Davis and James.* On an action againſt a common carrier, the queſtion was, In whoſe name the action ought to have been brought. The declaration charged, that the plaintiff being poſſeſſed of cloth, as of his own proper goods, delivered the ſame to the defendant to be carried to *London* and delivered to a certain perſon there. The goods were loſt, and the plaintiff obtained a verdict againſt the carrier. It was moved for a new trial, on the objection that the action ought to have been brought in the name of the perſon to whom the goods were conſigned, and not in the name of the conſignor. For the conſignor parted with his property upon his delivering the goods

goods to the carrier, and no property remained in him after the delivery. Upon this it was anſwered, that the queſtion doth not turn upon the ſtrict property. The carrier has nothing to do with the veſting of the property. It does not lie in his mouth to ſay, that the conſignor is not the owner. He is the owner with reſpect to the carrier, who undertook to him, and was to be paid by him.—Lord *Mansfield* ſaid there was neither law nor conſcience in the objection. The veſting of the property may differ according to the circumſtances of caſes: But it does not enter into the preſent queſtion. This is an action upon the agreement between the plaintiff and the carrier. The plaintiff was to pay him. Therefore the action is properly brought by the plaintiff who agreed with him, and was to pay him. *Bur. Manſf.* 2680 —See alſo 1 *Term Rep.* 659.

A delivery to the carrier's ſervant, is a delivery to the carrier; and if goods are delivered to a carrier's porter, and loſt, an action will lie againſt the carrier. *Read. Car.*

At Bury aſſizes, 1732, in the caſe of *Harvey* againſt *Syliard* and his wife; the plaintiff brought his action againſt *Syliard* and his wife, for a box with 80l. in it, which was delivered to her as book-keeper for her brother, who was a carrier, in order to be ſent by the waggoner to London; which 80l. was afterwards loſt: It was adjudged that the action would not lie againſt her, but it ought to have been brought againſt the brother himſelf and the plaintiff was nonſuited. 2 *Barnard.* 234.

If a box is delivered generally to a carrier, and he accepts it; he is anſwerable, tho' the party did not tell him there is money in it. But if the carrier aſks, and the other ſays no, or if he excepts it conditionally, provided there is no money in it, in either of theſe caſes the carrier is not liable. *Str.* 145.

If a man delivers a box to a carrier to carry, and he aſks what is in it, and the man tells him, a book and tobacco (as the caſe was) and in truth there is 100l. beſides; yet if the carrier is robbed, he ſhall anſwer for the money; for the other was not bound to tell him, all the particulars of the box, and it was the buſineſs of the carrier to have made a ſpecial acceptance. 1 *Bac. Abr.* 345.

But if a perſon, being a common carrier, receives by his book-keeper from another man's ſervant, two bags of money ſealed up, containing as was told him 200l. and the book-keeper gives a receipt for his maſter to this effect, received of ſuch a one two bags of money ſealed up, ſaid to contain 200l. which I promiſe to deliver on ſuch a day at ſuch a place, unto ſuch a perſon, he to pay 10s. *per cent.* for carriage and riſque; tho' the bags contain 400l. and the carrier is robbed, he ſhall be anſwerable

ſwerable only for 200l. for this is a particular undertaking; and as it is by reaſon of the reward that the carrier is liable when the plaintiff endeavours to defraud him of it, it is but reaſonable he ſhould be barred of the remedy, which is only founded on the reward. 1 *Bac. Abr.* 346.

A man took a place in a ſtage coach, and in the journey the defendant by negligence loſt the plaintiffs trunk: upon not guilty pleaded, the evidence was, that the plaintiff gave the trunk to the man that drove the coach, who promiſed to take care of it, but loſt it: *Holt* chief juſtice held, that the maſter was not chargeable, and that a ſtage coach-man is not within the cuſtom as a carrier is, unleſs the maſter make a diſtinct price for the carriage of the goods as well as of the perſons, 1 *Salk.* 282.

But by the cuſtom and uſuage of ſtage coaches, every paſſenger uſes to pay for the carriage of goods above ſuch a weight; and in ſuch caſe the coachman ſhall be charged for the loſs of goods beyond ſuch weight. *Comyn.* 25.

In the caſe of *Gibbon* and *Paynton*, E. 9 G. 3. An action was brought againſt the *Birmingham* ſtage coach-man, for 100l. in money, ſent from *Birmingham* to *London* by his coach, and loſt. It was hid in hay, in an old nail-bag. The bag and the hay arrived ſafe; but the money was gone. The coach-man had inſerted an advertiſement in a *Birmingham* news paper, with a *nota bene*, that the coach-man would not be anſwerable for money or jewels, or other valuable goods, unleſs he had notice that it was money or jewels or other valuable goods that was delivered to him to be carried. He had alſo diſtributed hand bills, of the ſame import.

It was notorious in that country, that the price of carrying money from *Birmingham* to *London* was three pence in the pound. The plaintiff was a dealer at Birmingham; and frequently ſent goods from thence. It was proved that he had been uſed, for a year and an half, to read the news paper in which this advertiſement was publiſhed; though it could not be proved that he had ever actually read or ſeen the individual paper within which it was inſerted. A letter of the plaintiff's was alſo produced, from whence it appeared that he knew the courſe of this trade, and that money was not carried from that place to *London* at the common and ordinary price of the carriage of other goods. And the jury found a verdict for the defendant. On behalf of the plaintiff, it was moved for a new trial; and a rule was obtained to ſhew cauſe. On ſhewing cauſe, the court were of opinion that the verdict was right. By the general cuſtom of the realm, a common carrier inſures the goods, at all events.

events. And it is right and reaſonable that he ſhould do ſo. But he may make a ſpecial contract; or he may refuſe to contract, in extraordinary caſes, but upon extraordinary terms. And certainly, the party undertaking ought to be apprized what it is that he undertakes: and then he will, or at leaſt may, take proper care. But he ought not to be anſwerable where he is deceived. Here he was deceived: The money was hid in an old nail-bag; and it was concealed from him, that it was money. The true principle of a carrier's being anſwerable, is the reward. And a higher price ought in conſcience to be paid him for the inſurance of money and other valuable things, than for inſuring common goods of ſmall value.—And the rule was diſcharged. *Burrow. Mansf.* 2298.

Where goods are ſtolen from the carrier, he may prefer an indictment againſt the felon, as for his own goods; for tho' he has not the abſolute property, yet he has ſuch a poſſeſſory property, that he may maintain an action of treſpaſs againſt any one who takes them from him, and ſo may indict a thief for taking them; and the indictment were good alſo, if it had been brought by the real owner. *Kelynge.* 39.

And there is a ſpecial caſe, wherein it is ſaid, that a man may commit larceny by ſtealing his own goods delivered to the carrier, with an intent to make him anſwer for them; for the carrier had a ſpecial kind of property in the goods, in reſpect thereof, if a ſtranger had ſtolen them, he might have been indicted generally as having ſtolen the ſaid carrier's goods, and the injury is altogether as great, and the fraud as baſe, where they are taken away by the very owner. 1 *Haw.* 94.

In an action of *trover* againſt a common carrier, for goods delivered to him to carry; on not guilty pleaded, the defendant gave in evidence, that he offered to deliver the goods to the plaintiff, if he would pay him his hire; but that the plaintiff refuſed, and therefore he retained them. And it was ruled by *Holt* chief juſtice, that a carrier may retain the goods for his hire. And by his direction a verdict was given for the defendant. *L. Raym.* 752.

And even if the goods be ſtolen goods, yet the right owner ſhall not have them without paying for the carriage. For the carrier being obliged to receive and carry the goods, the law will not deprive him of the remedy for the reward due for the carriage. *Ibid.* 166.

By the general cuſtom of the country, the common carrier inſures the goods at all events; but he may make a ſpecial contract, in extraordinary caſes, on extraordinary terms. 4 *Burr.* 2302. 1 *Term. Rep.* 33.

A ſhip-maſter who undertakes to carry goods ſafe, muſt deliver them ſo, unleſs damaged by the act of God, or the enemies of the commonwealth; and in an action, the plaintiff need only prove their good order when delivered on board, and their being damaged when delivered out, evidence will not be allowed to ſhew that the defendant was careful. 1 *Wils.* 281.

But the maſter of a hoy ſhall not be chargeable for goods loſt or damaged by tempeſt. *Str.* 128.

A carrier who undertakes for hire to carry goods, is bound to deliver them at all events, except damaged or deſtroyed by the act of God, or the commonwealth's enemies; even tho' the jury expreſsly find, that the goods were deſtroyed *without any actual negligence in the carrier.* 1 *Term. Rep.* 27.

And an action lies againſt the executor or adminiſtrator of a carrier; for it is founded upon the contract. 5 *Mod.* 92.

CATTLE.

THE regulations preſcribed by law for driving cattle thro' this ſtate, may be found in the *Reviſed Code* (printed in 1794) page 285. ſect. 6, 7, 8.—which book being in the hands of every magiſtrate, it will be unneceſſary to inſert the law, in this place: The following forms, it is preſumed will ſuffice.

(A) Warrant to two freeholders to view the cattle previous to granting a bill of health.

county to wit.

To A F, and B F, two freeholders of the ſaid county.

Whereas A D, *hath this day, according to act of Aſſembly, made application to me* J P, *one of the commonwealth's juſtices of the peace for the county aforeſaid, for the purpoſe of obtaining a bill of health for head of nett cattle, driven by him into this commonwealth from the ſtate of* North-Carolina, *and now at in this county; a deſcription of which cattle is hereto annexed: Theſe are therefore in the name of the commonwealth, to require you immediately upon the receipt hereof, to repair to the ſaid and to examine into the health and condition of the ſaid cattle, and forthwith make report thereof to me, or ſome other juſtice of the peace for this county. Herein fail not. Given under my hand this day of in the year*

J P.

I have

I have thought it moſt proper to draw the warrant annexing to it a deſcription of the cattle, becauſe the magiſtrate is required to ſign the bill of health, deſcribing the cattle particularly, but not until two freeholders have reported them to be ſound,—which is all they are required to do.

(B) Deſcription of head of cattle brought into this ſtate from North-Carolina, by A D, *and refered to in the foregoing warrant.*

Bulls marked &c.
Steers marked &c.
Cows marked &c.
Heifers marked &c.

(C) Report of the freeholders.

county to wit.

Purſuant to a warrant to us directed by J P, a juſtice of the peace for the ſaid county, we have this day examined into the health and condition of head of cattle, ſhewn to us by A D, and anſwering to the deſcription annexed to the ſaid warrant, and do find them to be free from all kinds of contagious diſtemper. Given under our hands &c.

A. F.
B. F.

(D) Bill of health.

county to wit.

I J P, *a juſtice of the peace for the ſaid county, do hereby certify that the health and condition of head of cattle driven by* A D, *from the ſtate of* North-Carolina, *a deſcription of which ſaid cattle is hereto annexed, have in obedience to my warrant, and according to law, been examined into by two freeholders of this county; and the ſaid freeholders have reported to me that the ſaid cattle are, free from all kinds of contagious diſtempers. Given under my hand and ſeal &c.*

J. P.

(E) Warrant againſt a freeholder refuſing to act.

To conſtable.

county to wit.

Whereas complaint &c. by A D, *a driver of cattle thro' this county, that* A F, *a freeholder of the ſaid county, to whom my warrant hath been directed, for the purpoſe of examining into the health of the ſaid cattle, doth altogether refuſe to obey the ſaid warrant,*

rant, contrary to the act of Assembly in that case made and provided: These are therefore &c.

Penalty for not acting, any sum not exceeding 5 dollars.

(F) Warrant for slaughtering the cattle where they are reported distempered, and the driver refuses to impound them, or suffers them to escape, before a justice certifies that they may be removed with safety.

county to wit.

Whereas it appears to me J P, *one of the commonwealth's justices of the peace for the county aforesaid, from the report of* A F, *and* B F, *two freeholders of the said county, to whom my warrant was directed, for the purpose of examining into the health and condition of head of cattle driven into this county from the state of North-Carolina, by* A D, *(a description of which cattle is hereto annexed) that the said cattle are infected with a contagious distemper; and that the said* A D, *refuses to impound the said cattle* (or, *hath suffered them to escape without having first obtained a certificate from some justice of the peace for this county, that they may be removed without annoying others,* as the case may be.) *These are therefore in the name of the commonwealth to require you, immediately to kill all the cattle in the said drove, and to bury the carcases with the hides on, at least four feet deep, but so cut or mangled, that none may be tempted to take them up and flay them. Herein fail not. Given under my hand and seal this day of in the year*

To A B, B B, C B, &c. *to execute.*

Fee 83 cents each head of cattle, to be paid by the county.

(G) Warrant against a person refusing to execute the foregoing warrant.

To constable,

county to wit.

Whereas complaint &c. that A B, *one of the persons to whom my warrant was directed, for the purpose of slaughtering head of cattle driven into this county by* A D, *from the state of* North-Carolina, *(which were reported to me to be infected with a contagious distemper by* A F, *and* B F, *two freeholders appointed by me, to view the said cattle) hath altogether refused to execute the said warrant. These are therefore to require you &c. to summon &c.*

(H)

(H) Licence of a magiſtrate to remove cattle impounded in conſequence of their having been diſtempered.

county to wit.

Whereas head of cattle driven into this county by A D, *from the ſtate of* North-Carolina, *have been impounded by the ſaid* A D, *from the day of laſt paſt, in conſequence of a report having been made to me by* A F, *and* B F, *two freeholders of this county appointed to view the ſaid cattle; that the ſaid cattle were infected with a contagious diſtemper; and it appearing to me from ſatisfactory information that the ſaid cattle may now be removed without annoying others: Theſe are therefore to authorize the ſaid* A D, *to proceed on his journey with the ſaid cattle, ſubject only to ſuch regulations as may be further impoſed by law. Given under my hand and ſeal &c.*

(I) Certificate of a magiſtrate to be made on the back of the driver's manifeſt.

county to wit.

I J P, *a juſtice of the peace for the county aforeſaid, in the commonwealth of Virginia, do hereby certify that* A D, *of the county of in the ſtate of* North-Carolina, *did this day produce to me bills of ſale for the within mentioned cattle according to law; and did moreover take an oath before me, that he knew of no more cattle in his drove than thoſe contained in the within manifeſt, and bills of ſale. Given under my hand and ſeal &c.*

(J) Warrant againſt a driver for failing to produce a manifeſt.

To the ſheriff, or any conſtable of the county of

county to wit.

Whereas complaint hath this day been made before me J P, one of the commonwealth's juſtices of the peace for the ſaid county, by A J, that A D, hath brought into this county, from the ſtate of *North-Carolina*, a drove of nett cattle and hath failed to produce to the next juſtice of the county in this ſtate, a manifeſt, and bills of ſale for the ſaid cattle, and to take the oath preſcribed by law: Theſe are therefore, in the name of the commonwealth, to authorize and require you to raiſe ſufficient force within the ſaid county, to ſeize and detain the ſaid drove of cattle. And I do further hereby require you, to bring the ſaid A D, before me or ſome other juſtice of the peace for this

this county, to anſwer the premiſes. Herein fail not at your peril; and make return how you have executed this warrant. Given under my hand and ſeal &c.

If the cattle are brought into any county in this ſtate, to be carried into any other ſtate,—for neglect to produce a manifeſt &c. ſay; *hath brought head of nett cattle into this commonwealth, in order to be driven into the ſtate of Maryland, and hath failed to produce to the next juſtice of the county wherein they were brought &c.*

(K) JUDGMENT.

On hearing the matter of the within complaint, it is adjudged that the drove of cattle within mentioned amounting to head, are forfeited; therefore the ſheriff is directed to ſell the ſame in like manner as goods taken in execution, and to return an account of the ſales, as alſo the expence of maintaining the ſaid cattle from the time of their ſeizure, till ſuch ſale, to me, or ſome other juſtice of the peace for this county, that the ſame may be adjuſted, and the money ariſing therefrom applied according to the directions of the act of the General Aſſembly in that caſe made and provided. Given under my hand &c.

(L) Juſtice's order on return of the ſales.

The ſheriff having returned an account of ſales amounting to dollars, and claiming dollars as his commiſſion thereon, alſo dollars, as an allowance for keeping the ſaid cattle from the day of the ſeizure to the day of ſale, at the rate of three cents each for every twenty-four hours, and the ſame being examined and approved by me; and three months having expired ſince the ſale, and no perſon except the driver and his employers having claimed any part of the ſaid cattle, the ſaid ſheriff is allowed to retain the ſum of dollars for his commiſſion and allowance as afore ſaid, and is ordered to pay dollars, being one half of the reſidue of the amount of ſales to the overſeers of the poor of the diſtrict, for the uſe of the ſaid diſtrict; and dollars the other half of the ſaid reſidue to the ſaid A J, the informer. Given under my hand &c.

(M) Order of reſtitution.

To the ſheriff &c. of county.

county to wit.

Whereas B O, hath this day appeared before me J P, a juſtice of the peace for the ſaid county, and duly proved his property

perty to head of cattle, being part of a drove of head, driven into this county from *North-Carolina* by A D, and by me adjudged on the day of laſt paſt, on the complaint of A J, to be forfeited for failure of the ſaid A D, to produce to the next juſtice of the county a manifeſt &c. of the ſaid cattle according to law: Theſe are therefore to require you to reſtore to the ſaid B O, the ſaid head of cattle, he firſt paying you for the ſame, the ſum of three cents per head each for every twenty four hours they have been maintained by you; and for ſo doing this ſhall be your warrant. Given &c.

The foregoing precedents are drawn ſo as to ſuit thoſe caſes where all the buſineſs is conducted by the ſame magiſtrate. It may ſometimes happen that proceſs iſſued by one magiſtrate may be returned before another; in that caſe the precedents can eaſily be varied, ſo as to ſuit the particular ſituation of the caſe.

CERTIORARI.

THIS writ, like many others in the law, derives its name from one of the initial words uſed in it, while all the proceedings were in latin.

It is an original writ, iſſuing out of a ſuperior court, directed to the judges of an inferior one, for the purpoſe of *certifying* or removing the records of a cauſe depending before ſuch inferior court, to a ſuperior tribunal,—and is uſually granted upon a ſuggeſtion ſupported by affidavit, that impartial juſtice will not be adminiſtered in the court below, in ſuch cauſe.

Under this title will be ſhewn,

I. In what caſes it is grantable.
II. In what manner to be granted and allowed.
III. The effect of it.
IV. The return of it.

I. In what caſes it is grantable.

A *Certiorari* lies in all judicial proceedings, in which a writ of error does not lie; and it is a conſequence of all inferior juriſdictions erected by ſtatute, to have their proceedings returnable into the ſuperior court. *1. Raym.* 469. 580.

And therefore a *certiorari* lies to juſtices of the peace, even in ſuch caſes where they are empowered by ſtatute finally to hear

hear and determine; and the ſuperintendency of the ſuperior courts is not taken away without expreſs words. 2 *Hawk.* 406.

But it ſeems agreed, that a certiorari ſhall never be granted to remove an indictment after a conviction, unleſs for ſome ſpecial cauſe; as where the judge below is doubtful what judgment to give. *See* 2 *Hawk.* 408. *and the authorities there cited.*

A certiorari ſhall be granted for the commonwealth, or a private perſon proſecuting for the commonwealth, without ſpecial cauſe alledged; but it is otherwiſe on the application of the defendant. 2 *Hawk.* 407.

See 2 *Com. Dig.* 185—189.

II. In what manner to be granted and allowed.

Theſe proceedings are regulated by *Virginia laws*, page 88. ſect. 49, 50—page 87. ſect. 45—page 98. ſect. 67. page 76. ſect. 9, page 74. ſect. 51, of the *Reviſed Code*, which ſee.

Writs of *certiorari* are ſeldom applied for in criminal proceedings, and will be granted only in extraordinary caſes, and upon particular cauſe ſhewn; to wit, that there cannot be an indifferent trial had in the county where the information was made, or indictment found. But whenever a certiorari is delivered to an inferior court, or juſtice of peace, or coroner, they ought reſpectively to make the certificate, as they ſhall abide by it at their peril, for it cannot be amended after it is filed; and if it is not true, an action on the caſe, at the ſuit of the party, or information at the ſuit of the commonwealth, will lie. *Dalt. Ch.* 195.

III. The effect of it.

It is agreed by all the books that after a certiorari is allowed by the court below, it makes all the ſubſequent proceedings on the record that is removed by it, erroneous. 2 *Hawk.* 417.

But it hath been adjudged, that if a *certiorari* for the removal of an indictment before juſtices of the peace be not delivered before the jury be ſworn for the trial of it, the juſtices may proceed. 2 *Hawk.* 418.

And the juſtices may ſet a fine to compleat their judgment, after a certiorari delivered. *L. Raym.* 1515.

A certiorari removes all things done between the teſte and return. *L. Raym.* 835, 1305.

A certiorari removes the record itſelf out of the inferior court; and therefore if it remove the record itſelf againſt the principal, the acceſſory cannot there be tried. 2 *Hawk.* 459.

And

And if the defendant be convicted of a capital offence, the perſon of the defendant muſt be removed by *habeas corpus*, in order to be preſent in court if he will move in arreſt of judgment. And herein the caſe of a conviction differs from that of a ſpecial verdict; where the preſumption of innocence may be ſuppoſed to continue, and therefore the perſonal preſence of the defendant in that caſe is not neceſſary at the argument of it. *Bur.* 930.

It hath been holden that a certiorari for the removal of a recognizance for the good behaviour, or for an appearance at ſeſſions, will ſuperſede its obligation. But this would be highly inconvenient; and the contrary opinion ſeems to be ſupported by the better authority. 2 *Hawk.* 418.

If a *ſuperſedeas* come out of a ſuperior court, to the juſtices, they ought to ſurceaſe, altho' the *ſuperſedeas* be awarded againſt law; for they are not to diſpute the command of a ſuperior court, which is a warrant for them. *Crom.* 129.

IV. The return of it.

Every return of a *certiorari* ought to be under the ſeal of the inferior court, or of the juſtice or juſtices to whom it is directed; and if ſuch court have no proper ſeal, it ſeems that the return may well be made under any other. 2 *Hawk.* 419.

Alſo every ſuch return muſt be made by the very ſame perſon to whom the *certiorari* is directed. For if it be directed to the juſtices of peace of ſuch a place, and the clerk of the peace only return it; or to the conſtable, or to the recorder of B, and the deputy conſtable, or deputy recorder return it, without ſhewing in the return that the principal had power to make a deputy, nothing is removed. 2 *Hawk* 419.

If the *certiorari* iſſue to uſe the record as evidence, then the tenor, if returned is ſufficient, and countervails the plea of *no ſuch record*; but if the record is to be proceeded upon, the record itſelf muſt be removed, and this, whether it is before judgment or after; and in this caſe, the writ muſt be ſuperſeded, and not quaſhed, which can only be done on a view of the record itſelf. *Woodcroft v. Kinaſton.* 2 *Atkyns.* 317.

Mr. *Hawkins* ſays, it is adviſeable, that a return of a *certiorari* directed to juſtices of peace for the removal of an indictment taken before them, have the clauſe, *as alſo to hear and determine divers felonies &c.* as well in the deſcription of the juſtices who make the certificate, as of thoſe before whom the indictment is laid to be taken in the caption. 2 *Hawk.* 420.

If

If the perſon to whom a *certiorari* is directed, do not make a return, then an *alias*, that is, a ſecond writ; then a *pluries*, that is, a third writ, or *cauſam nobis ſignifices*, ſhall be awarded, and then an attachment. *Crom.* 116.

Beſides theſe general rules which are common to all *certioraries*, there are many times ſpecial directions about them, in particular caſes.

Form of a return of a certiorari, *to remove an indictment.*

Firſt, on the back of the writ endorſe theſe or the like words: *The execution of this writ appears in a ſchedule to the ſame writ annexed.*

And that ſchedule may be thus, on a piece of paper by itſelf, and annexed to the writ.

county to wit.

I J P, *one of the commonwealth's juſtices of the peace for the county aforeſaid, by virtue of this writ to me delivered, do under my ſeal certify unto the commonwealth's judges of the court of the indictment of which mention is made in the within writ, together with all things touching the ſame indictment. In witneſs whereof I the ſaid* J P, *have ſet my ſeal to theſe preſents. Given at in the ſaid county, the day of in the year of our lord and in the year of our foundation.*

Then take the record of the indictment, and cloſe it within the ſchedule, and ſeal and ſend them up both together with the *certiorari*.

It muſt be obſerved that the above form, will not ſuit every return. However, it may eaſily be varied ſo as to comply with the injuctions of the writ, which is all that is neceſſary.

CHALLENGE. See juries.

CHAMPERTY. See maintenance.

CHANCE MEDLY. See homicide.

CHEATS,

Puniſhable by public proſecution are,

I. By the common law.

II. By ſtatute.

I. By the common law.

CHEATS puniſhable by the common law, may in general be deſcribed to be deceitful practices in defrauding or endeavouring

deavouring to defraud another of his known right, by means of some artful device, contrary to the plain rules of common honesty; as by playing with false dice, or by causing an illiterate person to execute a deed to his prejudice by reading it over to him in words different from those in which it was written; or by persuading a woman to execute writings to another, as her trustee, upon an intended marriage, which in truth contained no such thing, but only a warrant of attorney to confess a judgment; or by suppressing a will; and such like. 1 *Hawk.* 188.

It seems to be the better opinion, that the deceitful receiving of money from one man to another's use, upon a false pretence of having a message and order to that purpose, is not punishable by a criminal prosecution, because it is accompanied with no manner of artful contrivance, but wholly depends on a bare naked lie; and it is said to be needless to provide severe laws for such mischiefs, against which common prudence and caution may be a sufficient security. 1 *Hawk.* 188.

On an indictment against the defendant, a miller, for changing corn delivered to him to be ground, and giving bad corn instead of it, a motion was made to quash the indictment, it being only a private cheat, and not of a public nature. It was answered that being a cheat in the way of trade, it concerned the public, and therefore was indictable. And the court unanimously agreed not to quash it. 1 *Sess. C.* 217. *R. v. Wood.*

As there are frauds which may be relieved civilly, and not punished criminally (which are properly cognizable in courts of equity) so there are other frauds, which in a special case may not be helped, and yet shall be punished criminally: Thus if a minor goes about the town, and pretending to be of age, defrauds many persons, by taking credit for considerable quantities of goods, and then insists on his nonage; the persons injured cannot recover the value of their goods, but they may indict and punish him for a common cheat. *Earl.* 180.

In the case of *K.* and *Wheatly*, a distinction was taken between cheats merely of a private nature and such as affect the public, which will serve as a guide in all future decisions.—The defendant was indicted and convicted of selling beer short of the due and just measure, to wit, 16 gallons as and for 18. It was moved in arrest of judgment. And by the court, this is only an inconvenience and injury to a private person, arising from that private persons own negligence and carelessness in not measuring the liquor, upon receiving it, to see whether it held out the just measure or not. Offences that are indictable must be such as affect the public. As if a man uses false weights and measures, and sells by them to all or many of his customers or

uses

uſes them in the uſual courſe of his dealing; ſo if there is a conſpiracy to cheat: For theſe are deceptions that common care and prudence are not ſufficient to guard againſt. Theſe are much more than private injuries, they are public offences. But in the preſent caſe it is a mere private impoſition or deception. No falſe weights or meaſures are uſed; no conſpiracy: Only an impoſition on the perſon he was dealing with, in delivering him a leſs quantity inſtead of a greater; which the other carelefsly accepted. It is only a non performance of his contract; for which non-performance he may bring his action. So, the ſelling an unſound horſe for a ſound one, is not indictable: The buyer ſhould be more upon his guard. And the diſtinction which was laid down as proper to be attended to in all caſes of this kind, is this: That in ſuch impoſitions or deceits where common prudence may guard perſons againſt their ſuffering from them, the offence is not indictable, but the party is left to his civil remedy for the redreſs of the injury that has been done to him; but where falſe weights and meaſures are uſed, or falſe tokens produced or ſuch methods taken to cheat and deceive, as people cannot by any ordinary care or prudence be guarded againſt, there it is an offence indictable. *Bur.* 1125. *Blacks Rep.* 273.

II. By ſtatute.

By *Virginia laws* (14 R. Cond. 1789) chap. 45. ſect. 2, 3. page 50. of the *Reviſed Code*, it is enacted, 'That if any perſon ſhall falſely and deceitfully obtain or get into his hands or poſſeſſion, any money, goods or chattels of any other perſon, by colour and means of any falſe token, or counterfeit letter, made in any other man's name, every perſon ſo offending, and being thereof lawfully convicted in the court of the diſtrict, in which ſuch offence ſhall have been committed, ſhall have and ſuffer ſuch correction and puniſhment, by impriſonment of his body, without bail or mainprize, for any ſpace, not exceeding one year, and ſetting upon the pillory, as ſhall be unto him, limited, adjudged, or appointed by the ſaid court.'

Saving to the party injured, ſuch remedy by action, as if this act had never been made &c.

Get into his hands or poſſeſſion] A perſon endeavouring by a counterfeit letter, to defraud another of goods, and being apprehended on ſuſpicion of ſuch fraud, before he hath got the goods into his poſſeſſion, ſeems not to be within the ſtatute. 2 *Sid. Ca.* 27. *R. v. Brian.*

Falſe token.] On motion to quaſh an indictment, which was, that the defendant came pretending that ſuch a perſon had ſent him

him to receive twenty pounds, and received it, whereas such person did not send him: By the court, it is not indictable, unless he came with *false* tokens, for we are not to indict one man for making a fool of another. *Blackerby.* 79.

It was adjudged that an indictment avering the offence to be by false tokens, without shewing what those false tokens are, is not sufficient; and that the fraudulently procuring a note from a person, by falsely affirming that there was one in the next room who would pay the money due upon it, whereas in fact there was no such person in the next room, is not a *false token*, but a false affirmation only. *Str.* 1127. *K. v Munoz.*

For cheating in gaming, see title *gaming*.

For precedents, see *Warrant*, *Commitment*, *Recognizance*, and *Criminals*.

CLERGY. [BENEFIT OF]

THE privileges and disabilities of *clergymen*, as such, are confined within such narrow limits since the American revolution, that they do not seem to require any particular notice.—The most important distinctions between that class of citizens and others, are, their exclusion from a seat in the legislature, and the privy council, by the 14th article of the constitution of this state, their exemption from service in the militia, by *V. l. p.* 295.—and their privilege from arrest, while performing religious worship, by *V. l. p.* 287.

But the *benefit of clergy*, which, during the times of papal usurpation, originated in an exemption claimed by those in holy orders, from criminal process before the secular judge, merits a considerable degree of attention; as the phrase is adopted in our laws to signify a commutation of capital punishment for burning in the hand.

The various mutations which this benefit of clergy has undergone from its first introduction into England may be seen in Blackstone's Commentaries. *4th vol. p.* 365—369.

At present, it is sufficient to observe that the privilege is equally allowable to males and females; who, for the first offence shall be discharged of the capital punishment of felonies within the benefit of clergy, on being burnt in the hand. 4 *Black's. Com.* 373.

I shall now shew, I.

I. *To what persons and in what cases clergy was allowed by the common law.*

II. *To what persons and in what cases it is allowed by the laws of this commonwealth.*

III. *At what time it must be demanded.*

IV. *The effect of clergy allowed.*

I. To what persons and in what cases clergy was allowed by the common law.

It has already been observed that this privilege was peculiarly claimed by the clergy, or those in holy orders; and until it was modified by several statutes, it was almost exclusively granted to them.

But in some cases it was not allowed by the common law, even to the clergy; as, in trespass, petit larceny, and high treason. See *Hale's pl.* 230. 2. *H. H.* 326.

Yet, it was allowed, by the common law, in all cases of felony, except *robbery, on the high way, and arson, or house burning.* 2 *H. H.* 330—333.

A woman by the common law could not have the benefit of clergy, but this is now remedied by statute. *See the next division of this title.*

II. *To what persons and in what cases it is allowed by the laws of this commonwealth.*

By Virginia laws (14 *R. Cod.* 1789) page 50, of the Revised Code, *it is declared,* That the benefit of clergy shall not be allowed to principals in the first degree, 1st, in murder; 2d, or in burglary; 3d, or in arson at common law; 4th, or for the wilful burning of any court house, or county or public prison, or of the office of the clerk of any court within this commonwealth; 5th, or for the felonious taking of any goods or chattels out of any church, chapel, or meeting-house belonging thereto; 6th, or for the robbing of any person or persons in their dwelling houses or dwelling place, the owner or dweller in the same house or dwelling-place, his wife, his children, or servants, then being within, and put in fear and dread by the same: 7th, or for the robbing of any person or persons in or near about any highway; 8th, or for the felonious stealing of any horse, gelding, or mare; 9th, or for the felonious breaking of any dwelling-house by day, and taking away of any goods or chattels, being

being in any dwelling-house, the owner or any person being therein and put in fear.

II. The benefit of clergy shall not be allowed to principals in the second degree, in any of the cases abovementioned.

III. It shall not be allowed to accessaries before the fact, 1st, in murder; 2d, or burglary; 3d, or arson at common law; 4th, or for the wilful burning of any court house, or county, or public prison, or of the office of the clerk of any court within this commonwealth; 5th, or for the robbing of any person or persons in their dwelling-houses or dwelling places, the owner or dweller in the same dwelling-house or dwelling-place, his wife, his children or servants then being within and put in fear and dread by the same; 6th, or for the robbing of any person or persons in or near about any highway.

IV. It shall be allowed to principals and accessaries in all offences which would otherwise be without clergy, whether the same be newly created by any act of the General Assembly, or exist under the common law, unless it be taken away by the express words of some act of Assembly.

V. It shall not be allowed to any person more than once, except in the following case, that is to say: Whensoever any person shall have been admitted to the benefit of clergy, such admission shall not operate as a pardon or discharge for other offences of a clergyable nature, committed by him before that admission to the benefit of clergy, but he shall be again allowed the benefit of clergy for every other offence of a clergyable nature committed by him before that admission to the benefit of clergy, and shall be burned in the hand for every such offence.

VI. But if any person who shall have been once admitted to the benefit of clergy, shall before that admission have committed any offence, in which the benefit of clergy is not allowed by law, or shall after that admission commit any offence in which the benefit of clergy is even allowed by law, he shall suffer death without the benefit of clergy.

VII. A female shall in all cases receive the same judgment, and stand in the same condition with respect to the benefit of clergy, as a male.

VIII. A slave shall in all cases receive the same judgment, and stand in the same condition, with respect to the benefit of clergy, as a free negro or mulatto.

IX. Nothing in this act contained, shall be construed to take away the benefit of clergy, from any offence, in which it is now allowed by any act of the General Assembly, or to allow it in any offence, from which it is now expressly taken away, by any act of the General Assembly.

Beſides the caſes particularly mentioned in the foregoing law, there are many others in which clergy is taken away by ſpecial acts of the legiſlature, which being interſperſed under their proper titles, it will be ſufficient here barely to refer to thoſe titles.

Clergy is taken away for the following offences, viz.

BUGGERY, See 'BUGGERY.'

BURNING HOUSES &c. See 'BURNING.

CERTIFICATES. Stealing them &c. See LARCENY.

COUNTERFEITING Coin &c. See 'COIN.'

COUNTERFEITING the ſeal of the regiſter of the land-office. *V. l. p.* 261.

FORGERY, in various inſtances, See 'FORGERY.'

INSPECTORS of TOBACCO—Iſſuing receipts for tobacco not delivered to them, or more than one receipt for the ſame tobacco, unleſs authoriſed by law.—See *V. l. page* 278.

LAND-WARRANTS—Stealing them. See 'LARCENY, and *V. l. p.* 261.

LOAN-OFFICE CERTIFICATES—Stealing them, or preſenting them for payment, knowing them to be ſtolen. See 'LARCENY,' and *V. l. p.* 261.

RAPE, See 'RAPE.'

SLAVES—Conſpiring to rebel &c. See 'SLAVES.'

SLAVES—Adminiſtering medicine, unleſs it appears to the court that it was done with no ill intent, and that no bad conſequences reſulted. See 'SLAVES.'

STEALING, OR SELLING any free perſon as a ſlave, *V. l. p.* 199.

STEALING A SLAVE. *V. l. p.* 199.

TREASON—By levying war againſt the commonwealth, within the ſame, or adhering to its enemies, giving them aid and comfort;—or eſtabliſhing a government within its limits, independent of it. *V. l. p.* 282.

WARE-HOUSE OR STORE-HOUSE—Breaking them in the night or day, and ſtealing thereout above the value of 4 dollars.—See 'LARCENY,' and *V. l. p.* 216.

WOMEN—Unlawful and carnal knowledge of a woman child under ten years old. See WOMEN.

WRECKS—Stealing from a veſſel wrecked; felony without clergy. See 'WRECKS.'

The letters with which the perſon admitted to clergy was directed to be burnt by the ſtatute of 4 *Hen.* 7. *c.* 13. viz. M. for murder, and T. for other felony, in the brawn of the left thumb, ſtill continues in practice in this country.

But

But no man ſhall be ouſted of his clergy a ſecond time, by the bare mark in his hand, or by a parol averment without the record teſtifying it; and it ſeems, that if he deny he is the ſame perſon, iſſue muſt be joined upon it, and tried to be the ſame perſon, before he can be ouſted of clergy. 2 *H. H.* 373.

Where the law creates a new felony and does not expreſſly take away the benefit of clergy it is to be allowed. *H. Pleas.* 230.

But if the law enacts generally that it ſhall be felony without benefit of clergy, or that he ſhall ſuffer as in caſes of felony without benefit of clergy, this excludes it in all circumſtances and to all intents. 2 *H. H.* 235.

In all caſes where a law ouſteth clergy in caſe of any felony created by ſtatute, the indictment muſt preciſely bring the party within the caſe deſcribed by the ſtatute; otherwiſe, altho' poſſibly the fact itſelf be within the ſtatute, and it may ſo appear upon the evidence, yet if it be not alleged in the indictment, the party tho' convict ſhall have his clergy. 2 *H. H.* 336.

But altho' the caſe be ſo laid in the indictment as to bring it within the ſtatute, and ouſt the priſoner of clergy, yet, if upon the evidence, it appears to be without the ſtatute, and a felony only, the jury ought to find him guilty of the felony only, and not of the matter laid in the indictment, and thereupon the priſoner ſhall be admitted to his clergy. And this is commonly done. *Id.*

However, if the offence was capital at common law, and a ſtatute only excludes it from clergy, the indictment, in ſuch caſe, need not conclude *againſt the form of the ſtatute*; becauſe the ſtatute doth not alter the nature of the offence, but leaves it to its proper judgment, and only takes away a perſonal privilege of exemption from ſuch judgment. 2 *Hawk* 342.

Where an act taketh away clergy from the principal, and ſaith nothing of the acceſſory, the acceſſories before as well as after the fact, ſhall have their clergy. 11. *Co.* 37. *Foſt.* 355.

III. At what time it muſt be demanded.

By the ancient common law, the benefit of clergy was demanded as ſoon as the priſoner was brought to the bar, before any indictment or proceeding againſt him. But this was found a great inconvenience to the priſoner, becauſe poſſibly he might have been acquitted of the felony; or if not, yet in caſe of an inqueſt of office he loſt his challenge to ſuch inqueſt, and upon ſuch inqueſt found, he loſt his goods and the profits of his land.

And

And therefore C J, Priſot, with the advice of the o her judges in the reign of Hen. 6. for the ſafety of the innocent, would not allow the priſoner the benefit of clergy before he had pleaded to the felony, and (having the benefit of his challenges and other advantages) had been convicted thereof; which courſe hath been generally obſerved ever ſince. 2 *Inſt.* 164. 2 *H. H.* 378.

And this benefit of clergy may be allowed by the court in diſcretion, tho' the party challenge it not. *H. Pleas.* 239.

IV. The effect of clergy allowed.

A perſon receiving the benefit of clergy by being burnt in the hand, is reſtored to his credit and may be a good witneſs. 2 *H. H.* 338.

And it is holden that after a man is admitted to his clergy it is actionable to call him felon; becauſe his offence being pardoned by the ſtatute, all the infamy and other conſequences of it are diſcharged. 2 *Hawk.* 365.

The forfeitures which formerly accrued on attainder or conviction of felony, are now aboliſhed by our laws. See '*Attainder.*

C O I N.

See title '*Coin*,' in the *Appendix* to this work.

TO counterfeit, aid or abet in counterfeiting any coin made current in this commonwealth, or to make or aſſiſt, aid or abet in making baſe coin, or to paſs any ſuch counterfeit or baſe coin, knowing it to be counterfeit, or baſe, is felony without benefit of clergy. *V. l. p.* 260.

C O M M I T M E N T.

WHEN a perſon is arreſted, by any of the means mentioned under title *Arreſt*, and brought before a magiſtrate, he ſhould, after examining into the nature and circumſtances of the crime alleged, either *diſcharge*, *bail*, or *commit* him. See 4 *Blacks.* 296.

A *commitment* or *mittimus*, then, is a warrant by which a criminal is ſent to priſon; and *mittimus* is ſo called, from the firſt word when wrote in latin,—under which will be ſhewn,

I. *Who may be committed; and to what place.*
II. *The form of the commitment.*
III. *That the jailor ſhall receive the priſoner.*
IV. *Shall certify the commitment.*
V. *Commitment diſcharged.*
VI. *Precedents of commitments.*

I. Who may be committed; and to what place.

If the offence be not bailable, or the party cannot find bail, he is to be committed to the county jail by the *mittimus* of the juſtice, or warrant under his hand and ſeal, containing the cauſe of his commitment; there to abide till delivered by due courſe of law. 4 *Black's.* 300.

And it is ſaid, that whereſoever a juſtice is impowered by any ſtatute to bind a perſon over, or to cauſe him to do a certain thing, and ſuch perſon being in his preſence ſhall refuſe to be bound or to do ſuch thing, the juſtice may commit him to the jail, to remain there till he ſhall comply. 2 *Haw.* 116.

If a priſoner be brought before a juſtice expreſsly charged with felony upon oath, the juſtice cannot diſcharge him, but muſt bail or commit him. 2 *H. H.* 121.

But if he be charged with ſuſpicion only of felony, yet if there be no felony at all proved to be committed, or if the fact charged as a felony be in truth no felony in point of law, the juſtice may diſcharge him: as if a man be charged with felony for ſtealing a parcel of the freehold or for carrying away what was delivered to him, and ſuch like, for which tho' there may be cauſe to bind him over as for a treſpaſs, the juſtice may diſcharge him as to felony, becauſe it is not felony. But if a man be killed by another, tho' it be by miſadventure, or ſelf defence (which is not properly felony) or in making an aſſault upon a miniſter of juſtice in execution of his office (which is not at all felony) yet the juſtice ought not to diſcharge him, for he muſt undergo his trial for it; and therefore he muſt be committed, or at leaſt bailed. 2 *H. H.* 121.

But commitment by the juſtices of the peace almoſt in all caſes (except for the peace, good behaviour, felony or higher offences) is but to retain the party till he hath made fine; and therefore if he offer to pay it, or find ſureties by recognizance to pay it, he ought not to be committed, but to be delivered preſently. *Dalt. c.* 170.

II.

II. The form of the commitment.

1. It must be in writing, either in the name of the commonwealth, and only tested by the person who makes it, or it may be made by such person in his own name, expressing his office, or authority, and must be directed to the jailor, or keeper of the prison. 2 *Haw.* 119.

Yet the mention of the name and authority of the justice (*lord Hale says*) in the beginning of the mittimus, is not always necessary, for the seal and subscription of the justice to the mittimus, is sufficient warrant to the jailor, for it may be supplied by averment, that it was done by the justice. 2 *H. H.* 122.

2. It should contain the name and surname of the party committed, if known; if not known, then it may be sufficient to describe the person by his age, stature, complexion, colour of his hair, and the like, and to add that he refuseth to tell his name 1 *H. H.* 577.

3. It is safe but not necessary, to set forth, that the party is charged upon oath. 2 *Haw.* 120.

4. It ought to contain the cause, as for treason, or felony, or suspicion thereof; otherwise, if it contain no cause at all, if the prisoner escape it is no offence at all: whereas if the mittimus contained the cause, the escape were treason or felony, tho' he were not guilty of the offence; and therefore for the commonwealth's benefit, and that the prisoner may be the more safely kept, the mittimus ought to contain the cause. 2 *Inst.* 52.

And hereupon it appeareth, that a warrant or mittimus to answer to such things as shall be objected against him, is utterly against law. 2 *Inst.* 591.

Also, it ought to contain the certainty of the cause; and therefore if it be for felony, it ought not to be generally for felony, but it must contain the special nature of the felony, briefly, as for felony *for the death of such an one*, or for burglary, *in breaking the house of such an one*: and the reason is, because it may appear to the judges upon an *habeas corpus*, whether it be felony or not. 2 *H. H.* 122. 3 *Blacks* 134.

But the want hereof seems not to make the commitment absolutely void, so as to subject the jailor to a false imprisonment; but it lies in averment to excuse the jailor or officer, that the matter was for felony. 1 *H. H.* 584.

5. It must have an apt conclusion; as if it is for felony, to detain him till he be thence delivered by law, or by order of law, or by due course of law 2 *H.* 120. 2 *H. H.* 123.

But if the conclusion be irregular, it doth not seem to make the warrant void, but the law will reject that which is surplus-

age

age, and the reſt ſhall ſtand; ſo that if the matter appear to be ſuch, for which he is to remain in cuſtody, or be bailed, he ſhall be bailed or committed as the caſe requires, and not diſcharged, but the wrong concluſion ſhall be rejected. 1 *H. H.* 584.

It is alſo to be obſerved that a commitment grounded on a ſtatute ought to be conformable to the method preſcribed by it. As where the overſeers were committed for refuſing to account, and the warrant concluded in the common form, until they be duly diſcharged according to law; upon the return of an *habeas corpus* the court held the commitment void, becauſe the warrant ought to have concluded, there to remain until he ſhall account as the 43 *El. c.* 2. doth appoint. And a difference is, where a man is committed as a criminal, and where only for contumacy; in the firſt caſe, the commitment muſt be, until diſcharged according to law; but in the latter, until he comply. 2 *How Not.* 33.

Where a ſtatute appoints impriſonment, but limits no time how long, in ſuch caſe the priſoner muſt remain at the diſcretion of the court. *Dalt. c.* 170.

6. It muſt be under ſeal; and without this the commitment is unlawful, the jailor is liable to falſe impriſonment and the wilful eſcape by the jailor, or breach of priſon by the felon, makes no felony. 1 *H. H.* 583.

But this muſt not be intended of a commitment by the ſeſſions, or other court of record; for there the record itſelf, or the memorial thereof, which may at any time be entered of record, is a ſufficient warrant, without any warrant under ſeal. 1 *H. H.* 584.

It ſhould alſo ſet forth the place at which it is made (that it may appear to be within the juriſdiction of the juſtice) 2 *How.* 119.

It muſt alſo have a certain date, of the year and day. 2 *H. H.* 123.

III. That the jailor ſhall receive the priſoner.

If the jailor ſhall refuſe to receive a felon, or take any thing for receiving him, he ſhall be puniſhed for the ſame by the juſtices. *Dalt. c.* 170.

It ſeems, that regularly no one can juſtify the detaining a priſoner in cuſtody out of the common jail, unleſs there be ſome particular reaſon for ſo doing; as if the party be ſo dangerouſly ſick, that it would apparently hazard his life to ſend him to jail, or there be evident danger of a *reſcous* from rebels, or the like. 1 *How.* 118.

IV.

IV. Shall certify the commitment.

The jailor being an officer bound to give his attendance at court, 'to bring thither his priſoners, and to receive ſuch as 'may be committed, (*Dalt c.* 195,') ought always to certify his commitment with the priſoner.

V. Commitment diſcharged.

It ſeems that a perſon legally committed for a crime, certainly appearing to have been done by ſome one or other, cannot lawfully be diſcharged till he be acquitted on his trial, or have an *ignoramus* (*not a true bill*) found by the grand jury, or none to proſecute him on a proclamation for that purpoſe made by the juſtices. But if a perſon be committed on a bare ſuſpicion without an indictment, for a ſuppoſed crime, where afterwards it appears that there was none, as for the murder of a perſon thought to be dead, who afterwards is found to be alive; it hath been holden, that he may be ſafely diſmiſſed without any farther proceeding, for that he who ſuffers him to eſcape is properly puniſhable only as an acceſſary to his ſuppoſed offence; and it is impoſſible that there ſhould be an acceſſary, where there can be no principal; and it would be hard to puniſh one for a contempt, in diſregarding a commitment founded on a ſuſpicion, appearing in ſo unconteſted a manner to be groundleſs. 2 *Haw.* 121.

VI. Precedents of commitments.

1. General warrant of commitment.

county to wit.

To (ſheriff or conſtable *as the caſe may be*) and to the keeper of the jail in the ſaid county.

Theſe are to command you the ſaid (ſheriff (*or* conſtable) *in the name of the commonwealth, forthwith to convey and deliver into the cuſtody of the ſaid keeper of the ſaid jail, the body of* A O, *of* &c. *charged before me of* &c. (here describe the offence) *And you the ſaid keeper are hereby required to receive the ſaid* A O, *into your cuſtody in the ſaid jail, and him there ſafely to keep, until he ſhall thence be diſcharged by due courſe of law. Given under my hand and ſeal at the county aforeſaid, this day of in the year* &c.

2.

2. Mittimus for felony.

county to wit.

To the keeper of the jail of the said county.

Whereas A O, *late of* &c. *labourer, hath been arrested for suspicion of a felony, by him, as it is said, committed, in stealing of the value of the property of of* &c. *Therefore on behalf of the said commonwealth I command you, that you receive the said* A O, *into your custody in the said jail there to remain till he be delivered from your custody by due course of law. Given under my hand and seal, at the said county, the day of in the year of the commonwealth.*

3. ANOTHER.

county to wit.

J P, a justice of the peace for the said county, to the keeper of the jail in the said county.

These are in the commonwealth's name to charge and command you, that you receive into your said jail, the body of A O, *late of in the said county, yeoman, taken by* A C, *constable of in the said county, and by him brought before me for suspicion of felony, that is to say, for stealing and that you safely keep the said* A O, *in your said jail until he shall thence be delivered by due course of law. Given under my hand and seal* &c.

4. ANOTHER.

county to wit.

To the keeper of the jail in the said county.

I send you herewith the body of A O, *late of* &c. *labourer, taken and brought before me for* &c. (here describe the offence) *And you the said jailor are hereby commanded to receive the said* A O, *into your jail and custody, and him there safely to keep till he shall be thence discharged by due course of law. Given under my hand and seal* &c.

5. Mittimus in the name of the commonwealth.

county to wit.

The commonwealth of Virginia to the keeper of the jail of the said county, greeting:

Whereas A O, *late of in the said county, yeoman, is arrested for suspicion of felony by him, as it is said, committed, in feloniously taking and carrying away of the value of*

the

the property of You are therefore commanded to receive the said A O, *into your custody in the said jail, there to remain till he be delivered out of your custody by the laws of this commonwealth. Witness* J P, *one of the commonwealth's justices assigned to keep the peace for the said county, at the county aforesaid, this day of in the year and in the year of the commonwealth.*

CONFESSION.

A confession is either *express*, or *implied*.

UPON a simple and plain confession of the indictment, the court hath nothing to do but to award judgment: but it is usually very backward in receiving and recording such confession, out of tenderness to the life of the prisoner; and will generally advise him to retract it, and plead to the indictment. 4 *Blacks Com.* 329.

An implied confession is where a defendant, in a case not capital, does not directly own himself guilty, but in a manner admits it, by yielding to the mercy of the commonwealth's judges or justices, and desiring to submit to a small fine, which the court may accept without putting him to a direct confession. 2 *Hawk.* 333.

Mr. Hawkins says, I take it for granted, that no confession whatsoever, shall, before final judgment, deprive the defendant of the privilege of taking exceptions in arrest of judgment, to faults apparent in the record; for the judges must *ex officio*, take notice of all such faults, and any one as *amicus curiæ* may inform them. 2 *Hawk.* (6. *ed.*) 470.

The confession of the defendant, taken on an examination before justices of the peace, or in discourse with private persons, it is said, may be given in evidence against the party confessing, but not against others. 2 *Hawk.* 604.—But it should be observed, that this examination of the offender, being taken in pursuance of the statute of England of 1 & 2 P. & M. c. 13. which is not in force in this country, the trial of a criminal, in this State, must be governed by the rules of the common law, and our own acts of Assembly; neither of which will justify his own examination in order to commit him. See 4 *Blacks.* 296. *V. l. p.* 109 of the *Revised Code.*—In the case of a private confession, it seems now to be the most modern opinion, that it should be received with great caution; and it is said, that if it be made either thro' the flattery of hope, or the impressions of fear, it is not admissible. See 2 *Haw.* (6 *ed.*) 604 notes (1) (2) 4 *Blacks* 357.

I What it is.
II. How punishable.

BY the common law there can be no doubt, but that all confederates whatsoever, wrongfully to prejudice a third person, are highly criminal; as where divers persons confederate together by indirect means to impoverish a third person, or falsly and maliciously to charge a man with being the reputed father of a bastard child, or to maintain one another in any matter whether it be true or false. 1 *Haw.* 190.

By *V. l (11 R. Cod.* 1786. *c.* 22.) *p.* 33. of the *Revis'd Code* it is enacted, 'That conspirators be they that do confederate and bind themselves by oath, covenant, or other alliance, 'that every of them shall aid and bear the other falsely and maliciously, to move or cause to be moved, any indictment or 'information against another on the part of the commonwealth, 'and these who are convicted thereof at the suit of the common-'wealth, shall be punished by imprisonment and amercement, 'at the discretion of a jury.'

From this definition of conspirators, it seems clearly to follow, contrary to the opinion of *lord Coke*, that not only those who actually cause an innocent man to be indicted, and also to be tried upon the indictment, whereupon he is lawfully acquitted, are properly conspirators, but that those also are guilty of this offence, who barely conspire to indict a man falsly and maliciously, whether they do any act in prosecution of such conspiracy or not. 1 *Haw.* 189. *L. Raym.* 1169.

But an *action* will not lie for the conspiracy, unless it be put in execution; for in such case, the *damage* is the ground of the action *L Raym.* 378.

Also it plainly appears from the words of the statute, that one person alone cannot be guilty of conspiracy, within the purport of it; from whence it follows, that if all the defendants who are prosecuted for such a conspiracy be acquitted but one, the acquittal of the rest is the acquittal of that one also: And upon the same ground it hath been holden, that no such prosecution is maintainable against a husband and wife only, because they are esteemed but as one person in law; but it is certain, that an action on the case, in the nature of a conspiracy, may be brought against one only; also, it hath been resolved, that if such an action be brought against several persons, and all but one be acquitted, yet judgment may be given against that one only. 1 *Haw.* 192.

In the case of *K.* against *Cope* and others. The husband, and wife and servants were indicted for a conspiracy to ruin the

trade of the profecutor, who was the king's card maker. The evidence againſt them was, that they at ſeveral times had given money to the profecutor's apprentices, to put greaſe in the paſte, which had ſpoiled the cards. But there was no account given, that ever more than one at a time was preſent, tho' it was proved they had all given money in their turns. It was objected, that this could not be a conſpiracy; for ſeveral perſons might do the ſame thing, without having any previous communication with each other. But it was ruled, that the defendants being all of a family, and concerned in making of cards, it would amount to evidence of a conſpiracy. *Str.* 144.

K. againſt *Kinnerſley* and *Moore.* An information was brought, ſetting forth that the defendants being evil diſpoſed perſons, in order to extort money from my lord *Sunderland*, did conſpire together to charge my lord with endeavouring to commit ſodomy with the ſaid *Moore*. The defendant *Kinnerſley* only appears, and pleads to iſſue, and is found guilty. And now exception was taken in arreſt of judgment, that to every conſpiracy there muſt be two perſons at leaſt; whereas here is only one brought in and found guilty, and the other poſſibly may be acquitted. But it was anſwered, that this is arguing from what has not happened, and probably never will; for tho' *Moore* may have an opportunity to acquit himſelf, and is not concluded by the verdict as *Kinnerſley* is, yet as the matter now ſtands, *Moore* himſelf is found guilty, for the conſpiracy is found as it is laid, and therefore judgment may be given againſt one, before the trial of the other. And a cauſe was quoted, where ſeveral were indicted for a riot, *with many others*, and two only were found guilty; and it was objected, that there muſt be three to make a riot; but upon the words, *with many others* judgment was given againſt the defendants. And the court over-ruled the exception. And the defendant had ſentence. And in the *Eaſter* term following *Moore* alſo was convicted, and had judgment. *Str.* 193.

K. againſt *Eliza Niccols.* She was indicted for conſpiring with *Tho. Bygrave*, unjuſtly to charge *William Frankland* with a robbery, and for that purpoſe going before a juſtice, where *Bygrave* ſwore it upon him: *Niccols* only came in and pleaded not guilty, and the jury found that ſhe was guilty, but that *Bygrave* died before the indictment was perfered. Exception was taken, that one alone cannot be guilty of a conſpiracy, and here is but one convicted. But the court over-ruled this, on the authority of *Kinnerſley's* caſe, in which caſe there was a poſſibility of contradictory verdicts, which here cannot be. *Str.* 1227.

II.

II. How punished.

It is clear that those who are convicted of conspiracy at the suit of the party, shall have judgment of fine and imprisonment, and to render the plaintiff his damages. 1 *Haw.* 193.

Also it is certain that he who is convicted at the suit of the commonwealth of a conspiracy to accuse another of a matter which may touch his life, shall have judgment that he shall lose the freedom and franchise of the law (whereby he is disabled from being put upon any jury, or to be sworn as a witness, or even to appear in person in any of the commonwealth's courts) and also that his houses, lands and goods shall be seized into the commonwealth's hands, and his houses and lands striped and wasted, his trees rooted up, and his body imprisoned. And this is commonly called *villainous* judgment, and is given by the common law, and not by any statute, and is said generally in some books to be the proper judgment upon every conviction of conspiracy at the suit of the commonwealth, without any restriction to such as endangered the life of the party; but this point doth not seem to be any where settled. 1 *Haw.* 193.

But this judgment hath seldom been given; there being no instance of it since *Edward* the third. *Burrow.* 996, 1027.

In the case of *Kinnersly* and *Moore*, above-mentioned, Kinnersly was sentenced to be fined 500l. to suffer a years imprisonment, and to find sureties for his good behaviour for seven years. *Moore* was sentenced to stand in the pillory, suffer a years imprisonment, and to find sureties in like manner for seven years. *Str.* 196.

It hath been determined that getting money out of a man by conspiring to charge him with a false fact, is indictable whether the fact charged be, or be not, criminal in itself. 1 *Blacks. Rep.* 370.

So the fact of conspiring need not be proved but may be collected from other circumstances 1 *Blacks. Rep.* 392.

In an *action* against two persons for a *conspiracy*, if one is found not guilty, the judgment must be arrested, but it is otherwise on a special action on the *case* for a wrong done. *Subly v. Mott. &c.* 1 *Wils.* 210.

CONSTABLE.

VARIOUS as the conjectures have been among the learned, with respect to the origin of this word, and the antiquity

tiquity of the office, they all agree that it was once an office of considerable trust and consequence in England, particularly in pleas of the crown. *See* 1 *Burn. Just.* 383. *Conductor Generalis* title '*Constable.*'

These officers have long been recognized by the laws of this commonwealth, but the power of appointing them was not expressly given till our separation from Great-Britain, when it was provided by the 15th article of the constitution, that 'the 'justices should appoint constables,' &c.

For many parts of the duty of constables, see titles *Affray*, *Arrest*, and *Warrant*.

Every constable by the common law, is a principal conservator of the peace. 2 *Hawk.* 33.

The power of a constable in suppressing an affray, &c. has already been shewn under title, '*Affray*,' *which see*.

It hath always been held that the constable is the proper officer to a justice of the peace, and bound to execute his warrants; and therefore it hath been resolved, that where a statute authorises a justice of the peace to convict a man of a crime, and to levy the penalty by warrant of distress, without saying to whom such warrant shall be directed, or by whom it shall be executed, the constable is the proper officer to execute it, and indictable for disobeying it. 2 *Hawk.* 262.

The duties of *Constables* under the laws of this commonwealth, will be found under the titles to which the cases properly belong.

Constables are exempted from serving on grand juries, by *V. l. p.* 106.

Also from the payment of county levies, *V. l. p.* 261.

FEES.	Dols.	Cents.
For serving a warrant,	0	21
For summoning a witness.	0	10
For summoning a coroners jury and witness.	1	5
For putting in the stocks.	0	21
For whipping a servant (to be paid by the owner and repaid by the servant.	0	21
For serving an execution or attachment returnable before a justice.	0	21
For serving an attachment, returnable to the county court, against the estate of a debtor removing his effects out of the county.	0	63
For whipping a slave (to be paid by the overseer, if the slave is under an overseer, if not, by the master.)	0	21

For

	Dols.	Cents.
For removing any person suspected to become chargeable to the county (to be paid by the overseers of the poor) for every mile.	0	4

The same for returning.

See V. l. p. 229.

CONVICTS.

TO prevent the further importation of convicts into this state, it is enacted by *V. l.* (13 *R. Cod.* 1788. *c.* 35) page 44 of the Revised Code, 'That from and after the first 'day of January next, no captain or master of any vessel, or any 'other person, coming into this commonwealth, by land or by 'water, shall import or bring with him, any person who shall 'have been a felon convict, or under sentence of death, or any 'other legal disability incurred by a criminal prosecution, or 'who shall be delivered to him from any prison or place of con-'finement, out of the United States.'

'Every captain or master of a vessel, or any other person 'who shall presume to import or bring into this commonwealth 'by land or by water, or shall sell or offer for sale, any such 'person as above described, shall suffer three months imprison-'ment, without bail or mainprize, and forfeit and pay for every 'such person so brought and imported, or sold or offered for 'sale, the penalty of fifty pounds current money of Virginia, 'one half to the commonwealth, and the other half to the per-'son who shall give information thereof; which said penalty 'shall be recovered by action of debt or information, in any 'court of record, in which the defendant shall be ruled to give 'special bail.'

CORONER.

CORONERS are ancient officers by the common law, so called because they deal principally with the pleas of the crown, and were of old times the principal conservators of the peace within their county. 2 *Haw.* (6 *ed.*) 70.

Among the statutes of England, which have been ingrafted into our Revised Code of laws, the act of parliament of 4 *Edw.* 1. commonly called the statute *de officio coronatoris* has been adopted, with such variations, as the change of our situation made necessary. And as the appointment, qualifications, many

parts

parts of the duty of a coroner, and his puniſhment for neglect, are preſcribed by that act, I ſhall firſt refer to the act itſelf, and then conſider ſuch other parts of his duty ariſing from the common law, and our acts of Aſſembly, as are not noticed in it.

See Virginia laws, (17 *R. Cond.* 1792) *chap.* 81. *page* 131. *of the Reviſed Code.*

It is obſerved upon the ſtatute of 4. *Edw.* 1. that the ſame being wholly directory and in affirmance of the common law doth neither reſtrain the coroner from any branch of his power, nor excuſe him from the execution of any part of his duty, not mentioned in it, which was incident to his office before. 2 *Hawk.* (6 *ed.*) 77.

The other parts of the power and duty of a coroner, not mentioned in the foregoing law, will be conſidered in the following order,

I. His power and duty as a judicial officer, in an inqueſt of death.
II. His power and duty as a miniſterial officer.
III. His fees.
IV. Precedents.

I. His power and duty as a judicial officer, in an inqueſt of death.

He ought to execute his office in perſon, for he is a judicial officer. *Wood's Inſt.* 83.

By *Holt.* C J, the coroner need not go *ex officio* to take the inqueſt, but ought to be ſent for, and that when the body is freſh; and to bury the body before, or without ſending for the coroner, is a miſdemeanor. *Salk.* 377. 2 *Hawk.* (6 *ed.*) 78. *note.* (3)

The *judicial* office of a coroner being confined to the taking of inquiſitions, on the death of perſons who came to a violent or unnatural death, and that *upon view of the body* alone, it is a matter puniſhable, by amercement to let a body lie till putrefaction, without giving him notice.—*Wood. B.* 4. *ch.* 1. p. 491.—2 H. H. 57. *Summary.* 170.

But if a priſoner in jail dies a natural death, yet regularly the jailor ought to ſend for the coroner to enquire, becauſe it may be poſſibly preſumed that the priſoner died by the ill uſage of the jailor. 2 H. H. 57. 2 *Hawk.* (6 *ed.*) 77.

For if a priſoner, by the ill uſage of the jailor comes to an untimely death, it is murder in the jailor, and the law implies malice

malice in reſpect of the cruelty. And this is the cauſe (ſays lord Coke) that if any man dieth in priſon the coroner ought to ſit upon his body, to the end it may be inquired of whether he came to his death by the *dures* of the jailor or otherwiſe:—and this ſitting of the coroner continueth to this day. 3 *Inſt.* 52.

And this inqueſt upon priſoners ought to conſiſt of a party jury, that is, ſix of the priſoners (if ſo many there be) and ſix who are not priſoners. *Umfrevilles Coron.* 212.

A coroner may lawfully, within convenient time, as the ſpace of fourteen days after the death, take up a dead body out of the grave in order to view it, not only for the taking of an inqueſt, where none hath been taken before; but alſo for taking of a good one where an inſufficient one hath been taken before. 2 *Hawk.* 78.

So he may dig up the body if the firſt inquiſition be quaſhed *Stra.* 533.—But not without leave of the court. *Stra.* 167. And the juſtices will exerciſe their diſcretion, according to the length of time the body has laid, and the circumſtances of the caſe. *Salk.* 377. *Stra* 22.

If there is danger of infection from digging up the body, or if the body is drowned and cannot be found, or if it has lain ſo long before the coroner is called in, to take the inqueſt, that no aſſiſtance can be had from the view, he ought not to proceed. In ſuch caſes the inquiry may be by witneſſes of the felony, by juſtices of the peace, juſtices of oyer and terminer, or in a court, by preſentment of the grand jury. *See Wood's Inſt.* 491. 2 *Hawk.* 78. 2 H. H. 59.

Where the body had been buried five years and the ſkull was dug up, which the coroner aſſured the jury was the ſkull of the deceaſed, and the inqueſt was taken upon that, the court refuſed to file the inquiſition. *Stra.* 22. *R. v. Bond.*

It is not neceſſary that the inquiſition ſhould be taken in the very ſame place where the body was viewed; for it hath been reſolved, that an inquiſition taken at *D.* on the view of a body lying dead at *L.* may be good. 2 *Haw.* 78,

A coroner hath no power either by common law or ſtatute to inquire of any acceſſories *after* the fact, to a felony; but of acceſſories *before*, he hath ſuch power. 2 *Hawk.* 78.

If the coroner omits to take an inquiſition upon an untimely death it may be done by juſtices &c. but it muſt be done openly, and if it be done ſecretly it may be quaſhed. 1 *Bur.* 17.

For miſmanagement in the coroner &c. the filing of the inquiſition may be ſtoped, or the coroner may be ordered to attend, and amend his inquiſition. *Wood's Inſt.* 492.

If

If he hath been guilty of corruption or bribery in taking the inquiſition, a *melius inquirendum* may be awarded to ſpecial commiſſioners to take a new one, who ſhall proceed on the teſtimony of witneſſes, not on view of the body. If the inquiſition is good, he that is ſuſpected to have committed the felony may be tried upon the inquiſition, as well as upon an indictment. *Wood's Inſt.* 492.

If the conſtables make not a return, or the jurors returned appear not, their defaults are to be returned to the coroner: and the conſtables or jurors in default ſhall be amerced by the court, having cognizance of the proceedings. 2 H. H. 59.

The jury appearing is to be ſworn and charged by the coroner to enquire, upon view of the body, how the party came by his death. 2 H. H. 60.

The opinion formerly held that a coroner's inqueſt was not traverſable, is now generally exploded. 1 *Bac. Abr. Coron. D.* 2 *Hawk.* 81.

II. His power and duty as a miniſterial officer.

This is preſcribed by *Virginia laws page* 134. *ſect.* 21, 22.—It will, therefore be ſufficient to obſerve that the *juſt exception* to the ſheriff of a county, or ſergeant of a corporation which uſually makes it neceſſary to direct proceſs to a coroner, is when the ſheriff, or ſergeant is a party intereſted.—The coroner to whom the proceſs is thus directed ſtands preciſely in the ſituation of the ſheriff or ſergeant in all things which the ſheriff or ſergeant might or ought to have done.

III. His fees.

	Dols.	Cents
For taking an inquiſition on a dead body (to be paid out of the eſtate of the deceaſed) if the ſame be ſufficient, if not by the county.	2	80
For all other buſineſs done by him, as are allowed the ſheriff for the ſame ſervices.		

See Reviſed Code, page 227—*Alſo* 313, *fees on executions.*

IV. Precedents.

Precept to ſummon a jury.

To the ſheriff, or conſtable of county.
county to wit.

Theſe are in the name of the commonwealth to command you to ſummon twenty four free-holders of this county (or of the pariſh of

of , in this county) to appear before me one of the commonwealth's coroners of the ſaid county, to morrow morning, by ten of the clock, (or on the day of) at the houſe of (or the place where the body lies) in the county aforeſaid, to enquire of ſuch things as ſhall be given to them in charge on the behalf of the commonwealth, and you alſo be then there to ſhew how you have executed this warrant. Given under my hand this day of

The jury appearing at the appointed time and place, and the body upon view before them, the officer is to make return of his warrant, and call the jury, to the number of twelve, to anſwer; one of whom the coroner ſhould appoint the foreman, and ſwear in the following words.

FOREMAN'S OATH.

You ſhall diligently enquire, and true preſentment make, on behalf of the commonwealth, how, and in what manner A D, (or a perſon unknown, as the caſe is) here lying dead, came by his death; and of ſuch other matters relating to the ſame as ſhall be required of you, according to your evidence. So help you God.

The reſt of the jury.

Such oath as the foreman of this inqueſt, hath taken on his part, you, and every of you, ſhall well and truly obſerve, and keep on your parts reſpectively. So help you God.

The objects of the jury's conſideration may be found in the above recited act; to theſe the coroner muſt direct their attention, and when they have heard the teſtimony the inquiſition muſt be drawn up on a paper indented, agreeable to the fact, to which the coroner and each of the jurors muſt put their hands and ſeals.

The witneſſes are then to be called and ſworn..

Oath of a witneſs.

The evidence which you ſhall give to this inqueſt, on behalf of the commonwealth, touching the death of A D, ſhall be the truth the whole truth, and nothing but the truth. So help you God.

Inquiſition of murder.

to wit.

Inquiſition indented, taken at in the county aforeſaid, the day of in the year of the commonwealth, be-

fore me one of the coroners of the commonwealth, for the county aforeſaid, upon the view of the body of A D, *late of &c. then and there lying dead, and upon the oaths of* A B C D, *&c. good and lawful men of the county aforeſaid, (or of the pariſh of in the ſaid county) who being ſworn, and charged to enquire, on the part of the ſaid commonwealth, when, where, how and after what manner the ſaid* A D, *came to his death, do ſay, upon their oath, that one gentleman, late of the pariſh of in the county of not having God before his eyes, but being moved and ſeduced by the inſtigation of the devil, on the day of in the year of the commonwealth aforeſaid, with force and arms, at in the county aforeſaid, in and upon the aforeſaid* A D, *then and there being in the peace of God, and of the ſaid commonwealth, feloniouſly, voluntarily, and of his malice forethought, made an aſſault; and that the aforeſaid then and there, with a certain ſword, made of iron and ſteel, of the value of five ſhillings, which he, the ſaid then and there held in his right hand, the aforeſaid* A D, *in and upon the left part of the belly of the ſaid* A D, *a little above the navel of the ſaid* A D, *then and there violently, feloniouſly, voluntarily, and of his malice forethought, ſtruck and pierced, and gave to the ſaid* A D, *then and there, with the ſword aforeſaid, in and upon the aforeſaid left part of the belly of the ſaid* A D, *a little above the navel of the ſaid* A D, *one mortal wound, of the breadth of half an inch, and of the depth of three inches, of which ſaid mortal wound the aforeſaid* A D, *then and there inſtantly died, and ſo the ſaid then and there feloniouſly killed and murdered the ſaid* A D, *againſt the peace and dignity of the commonwealth;* and the ſaid jurors farther ſay, upon their oath aforeſaid, that of &c. and of &c. were feloniouſly preſent, with drawn ſwords, at the time of the felony and murder aforeſaid, in form aforeſaid committed, that is to ſay, on the day of in the year aforeſaid, at aforeſaid, in the county aforeſaid, then and there comforting, abetting, and aiding the ſaid to do and commit the felony and murder aforeſaid, in manner aforeſaid, againſt the peace and dignity of the commonwealth; *and moreover, the jurors aforeſaid, upon their oath aforeſaid, do ſay, that the ſaid had not, nor any of them had, nor as yet have or hath, any goods or chattels, lands or tenements, within the county aforeſaid, or elſe-where, to the knowledge of the ſaid jurors, (or, and the jurors aforeſaid, upon their oath aforeſaid, do ſay, that the ſaid at the time of the doing and committing of the felony and murder aforeſaid, had goods and chattels, contained in the inventory to this inquiſition annexed) in witneſs whereof as well the aforeſaid coroner, as the jurors aforeſaid, have to this inquiſition*

put

put their ſeals, on the day and year aforeſaid, and at the place aforeſaid.

A B.
C D.
E F, &c. *jurors.*

A C, coroner.

Where one drowns himſelf.

As above, to oath——— do ſay, that the ſaid A D, not having God before his eyes, but being ſeduced and moved by the inſtigation of the devil, at aforeſaid, in the county aforeſaid, then and there being alone, in a common river there called himſelf voluntarily and felonioufly drowned; and ſo the jurors aforeſaid upon their oath aforeſaid, ſay, that the aforeſaid A D, in manner and form aforeſaid, then and there himſelf voluntarily and felonioufly, as a felon of himſelf killed and murdered, againſt the peace &c.

Where one dies a natural death.

——that the ſaid A D, on the day of in the year aforeſaid, at the pariſh and in the county aforeſaid, to wit, at was found dead; that he had no marks of violence appearing on his body, and died by the viſitation of God, in a natural way, and not otherwiſe. In witneſs &c.

Where the murderer is unknown.

——that a certain perſon unknown, did kill and murder the ſaid &c. and add———and the ſaid jurors, upon their oath aforeſaid, farther ſay, that the ſaid perſon unknown, after he had committed the ſaid felony and murder, in manner aforeſaid; did fly away, againſt the peace &c.

Where one hangs himſelf.

as above, to———not having God before his eyes, but being ſeduced and moved by the inſtigation of the devil, at aforeſaid, in a certain wood, at aforeſaid, ſtanding and being, the ſaid A D, being then and there alone, with a certain hempen cord, of the value of three pence, which he then and there had and held in his hands, and one end thereof, then and there put about his neck; and the other end thereof tied about a bough of a certain tree, himſelf then and there, with the cord aforeſaid, voluntarily and feloniouſly, and of his malice aforethought

aforethought, hanged and ſuffocated; and ſo the jurors aforeſaid; upon their oath aforeſaid, ſay, that the ſaid A D, then and there, in manner and form aforeſaid, as a felon, of himſelf, feloniouſly, voluntarily, and of his malice afore-thought, himſelf killed, ſtrangled and murdered againſt the peace &c.

An inquiſition on one for cutting his throat.

——by the inſtigation of the devil, at aforeſaid, in the county aforeſaid, in and upon himſelf, then and there being in the peace of God, and of the ſaid commonwealth, feloniouſly, voluntarily, and of his malice fore-thought, made an aſſault; and that the aforeſaid A D, then and there, with a certain razor, of the value of one penny, which he the ſaid A D, then and there held in his right hand, himſelf, upon his throat, then and there feloniouſly, voluntarily, and of his malice fore-thought, did ſtrike, and gave to himſelf, then and there, with the razor aforeſaid, upon his throat aforeſaid one mortal wound, of the breadth of inches, and the depth of inches, of which ſaid mortal wound the ſaid A D, at aforeſaid, in the county aforeſaid, languiſhed, and languiſhing lived, from the ſaid day of in the year aforeſaid, to the day of and that the ſaid A D, on the day of aforeſaid, in the year aforeſaid, in the county aforeſaid, of that mortal wound died; and ſo the jurors aforeſaid &c.

For killing another in his own defence.

——upon their oath ſay, that A K, late of gentleman, at aforeſaid, in the ſaid county, on the day of in the year of in the peace of God and of the commonwealth then being, A M, late of in the county of at the houſe of in the afternoon of the ſame day, did come and upon him the ſaid A K, then and there of his malice forethought, did make an aſſault, and him the ſaid A K, did then and there endeavour to beat and kill, by continuing the aſſault aforeſaid, from the houſe of one W H, in aforeſaid, to a certain place called in the county aforeſaid; and the ſaid A K, ſeeing that the ſaid A M, was ſo maliciouſly diſpoſed, to a certain in the ſaid place, did flee, and from thence, for fear of death, could not eſcape, and ſo the ſaid A K himſelf, in preſervation of his life, againſt the ſaid A M, continued to defend, and in his own defence him the ſaid A M, upon the right part of the breaſt of him the ſaid A M, with a certain of the price of one ſhilling, which he the ſaid A K, then and there held

held in his right hand, did ſtrike, then and there giving to the ſaid A M, one mortal wound, of the breadth of inches, and of the depth of inches, of which ſaid mortal wound the ſaid A M at aforeſaid, in the county aforeſaid, languiſhed, and languiſhing lived, from the ſaid day of to the day of from thencenext enſuing, and that the ſaid A M, on the ſaid day of in the year aforeſaid, at aforeſaid, in the ſaid county, of that mortal wound died, and ſo the ſaid A K, did then and there kill him the ſaid A M, in his own defence.

Inquiſition where the death was occaſioned by chancemedley.

——that A B, late of the pariſh aforeſaid, in the county aforeſaid, labourer, on the day of in the year aforeſaid, at the pariſh and in the county aforeſaid, a certain gun of the value of eight ſhillings, then and there charged with gun powder and a leaden bullet, which he the ſaid A B, then and there had and held in both his hands, then and there caſually, and by misfortune, and againſt the will of him the ſaid A B, diſcharged and ſhot off; and that the ſaid A B, with the leaden bullet aforeſaid, then and there diſcharged and ſhot out of the ſaid gun, by the force of the gun powder aforeſaid, him the ſaid C D, in and upon the left breaſt of him the ſaid C D, caſually, by misfortune, and againſt the will of him the ſaid A B, did then and there ſtrike and penetrate, giving unto him the ſaid C D, then and there, with the bullet aforeſaid, out of the gun aforeſaid, ſo as aforeſaid ſhot off and diſcharged by the force of the ſaid gun powder, in and upon the ſaid left breaſt of him the ſaid C D, one mortal wound, of the breadth of one inch, and the depth of three inches; of which ſaid mortal wound he the ſaid C D, then and there inſtantly died; and ſo the jurors aforeſaid upon their oath aforeſaid, do ſay, that the ſaid A B, him the ſaid C D, in manner and by the means aforeſaid, caſually, and by misfortune, and againſt the will of him the ſaid A B, did kill and ſlay; but what goods or chattels the ſaid A B, had at the time of ſuch killing and ſlaying by misfortune, as aforeſaid, the jurors know not. In witneſs &c.

Indictment againſt a coroner for refuſing to take an inquiſition.

The jurors for the commonwealth upon their oath preſent, that on the day of in the year of the commonwealth,

monwealth, one C D, at in the county of was drowned and ſuffocated in a certain pond, and of that drowning and ſuffocating ſhe the ſaid C D, then and there inſtantly died; and that the body of the ſaid C D, at aforeſaid, in the county aforeſaid, lay dead, of which one W C, late of in the county aforeſaid, gentleman, afterwards to wit, on the ſaid day of in the year aforeſaid, then being one of the coroners of the commonwealth for the county aforeſaid, at aforeſaid, had notice: nevertheleſs, the ſaid W C, the duty of his office in that behalf not regarding, afterwards, to wit, on the ſaid day of in the year aforeſaid, at aforeſaid, in the county aforeſaid, to execute his office of and concerning the premiſes, and to take inquiſition for the commonwealth, according to the laws and cuſtoms of this commonwealth, concerning the death of the ſaid C D, unlawfully, obſtinately, and contemptuouſly, did neglect and refuſe; and that the ſaid W C, no inquiſition in that behalf as yet hath taken, to the great hindrance of juſtice in contempt of the laws of this commonwealth and againſt the peace and dignity of the commonwealth.

COUNTERFIETS.—See *Cheats*, *Clergy*, and *Felony*.

CRIMINALS.

THIS title being of conſiderable importance to magiſtrates and others concerned in criminal proſecutions, and being a term very comprehenſive in itſelf; I ſhall, in order to render it as generally uſeful as poſſible, inſert under it a complete ſet of *forms*, from the *warrant* to the *indictment*.

The act of Aſſembly by which the mode of proceeding in criminal caſes is pointed out, is now collected in the *Reviſed Code*, chap. 74. page 109. to which it will be ſufficient to refer.

If the offender is not already apprehended by ſome of the means mentioned under title *arreſt*, the magiſtrate ſhould iſſue his warrant directed to the *ſheriff*, or (moſt commonly) to the conſtable, commanding him to bring the party accuſed before him, or ſome other juſtice of the peace, to anſwer the accuſation; or he may direct it to a *private perſon*, tho' it is ſaid, he is not compellable to execute it. *See titles* 'Arreſt,' and 'Warrant.'

(A) Form of a warrant.

county to wit.

Whereas A J, *of* *hath this day given information upon oath*

oath to me J P, *a juſtice of the peace for the ſaid county of that on the day of laſt paſt, at the county of aforeſaid,* A O, *of labourer,* (here deſcribe the offence) *Theſe are therefore in the name of the commonwealth to require you, to apprehend the ſaid* A O, *and to bring him before me, or ſome other juſtice of the peace for this county, to anſwer the premiſes, and further to be dealt with according to law. Given under my hand and ſeal, at the county of aforeſaid, this day of in the year and in the year of the commonwealth.*

To conſtable.

The juſtice, before whom the priſoner is brought, is bound immediately to examine the circumſtances of the crime alleged. 4 *Blacks* 296.—But the power of examining the priſoner himſelf and committing his examination to writing ſeems not to be recognized by our laws. This authority was granted by a ſtatute of England of *Ph. & M.* which not having been adopted by our legiſlature, is conſequently not in force. *See V. l. p.* 302. ſect. 3. of the *Reviſed Code.*—And that theſe proceedings are repugnant to the common law, will appear not only from *Lambard* (*Eirenarch. b.* 2. *c.* 7) where he obſerves that, *it was the firſt warrant given for the examination of a felon in the Engliſh law*: but from *judge Blackſtone,* who ſays, that at the common law, *no man was bound to betray himſelf*;* and his fault was not to be wrung out of himſelf, but rather to be diſcovered by other means and other men. *See* 4 *Blacks* 296.

The inſtitution of a court of examination for perſons charged with criminal offences, previous to their arraignment and trial by a jury, and veſting that court with an abſolute and conclusive power of acquittal, is peculiar to the laws of this commonwealth; and it muſt be acknowledged is a very great improvement, on all other modes of criminal proſecution. Thus may the raſhneſs or ignorance of a ſingle magiſtrate be corrected without putting either the party accuſed or the commonwealth to the expence and delay of a regular trial by jury; and thus is there afforded to the party another opportunity of acquittal, unknown in almoſt any other country.

The practice of taking the *information of the witneſſes* in writing, by the juſtice, depends on the ſame ſtatute of *Ph. & M.* above mentioned, (*See* 4 *Blacks* 296,) and for the reaſons juſt mentioned, I conceive, is not in force in this country.—Other reaſons may alſo be urged in oppoſition to the practice.—1ſt, The act of Aſſembly requires nothing more of a magiſtrate, after

* *nemo tenebatur prodere ſeipſum.*

ter he has formed his opinion as to the guilt of the party, than that he ſhall take the recognizance of the witneſſes, preparatory to the calling of a court of examination. *See V. l. p.* 109. *ſect.* 1. 2d. The power of taking the information of the witneſſes which was granted by the ſtatute of *Ph. & Mary.* to a *ſingle magiſtrate*, is transfered by our laws to the court of examination, conſiſting of *four magiſtrates*, at leaſt.—3d. The doctrine laid down in the books, that the *examination of a witneſs* taken before a magiſtrate in purſuance of the above ſtatute, may be read againſt a criminal in caſe of the death of the witneſs, or his inability to attend, is liable to theſe objections;—that the priſoner may be concluded by evidence however objectionable the witneſs may be in point of intereſt, guilt &c. and that the accuſed party has not the ſame advantage of croſs examination, which he would poſſeſs before a court, with the aſſiſtance of counſel.

If witneſſes are neceſſary to eſtabliſh the fact, the magiſtrate may iſſue a ſummon for them.

(B) Summon for a witneſs.

county to wit.

To the ſheriff of the county of or the conſtable of in the ſaid county.

Whereas oath hath been made before me J P, *one of the commonwealth's juſtices of the peace for the county aforeſaid, by* A I, *that the ſtore-houſe of the ſaid* A I, *was lately broken open, and ſundry goods ſtolen thereout* (or other facts, as the caſe is) *and that he hath good cauſe to believe that* A W, *is a material witneſs to prove by whom the ſaid felony was committed: Theſe are therefore, to require you to cauſe the ſaid* A W, *forthwith to come before me, to give ſuch evidence as he knows concerning the ſaid offence. Given under my hand and ſeal &c.*

(C) Recognizance of the witneſſes.

county to wit.

Memorandum, that upon this day of in the year and in the year of the commonwealth, A W, *of &c. and* B W, *of &c. came before me* J P, *one of the commonwealth's juſtices of the peace for the county aforeſaid, and each of them of his proper perſon acknowledged himſelf indebted to* A G, *eſquire, governor or chief magiſtrate of the commonwealth of Virginia, and his ſucceſſors, in the ſum of dollars to be levied ſeverally of each of their goods and chattels, lands and tenement,*

nements, respectively, to the use of the said commonwealth; upon condition that if each of them do personally appear before the commonwealth's justices of the peace for the said county of on the day of at a court by them to be held for the examination of A O, &c. and do then and there, on behalf of the said commonwealth, give such evidence as he knoweth against the said A O, concerning the matters wherewith he is charged, and that neither he, nor either of them, do depart without leave of the said court, then this recognizance to be void, else to remain in full force.

If a witness refuses to enter into a recognizance, he may be committed, or bound to good behaviour. 1 *H. H.* 586.

(D) *Mittimus.*

county to wit.

To the sheriff (*or any constable*) of the said county, and to the keeper of the jail of the said county.

These are to command you the said sheriff (or constable *as the case may be*) *in the name of the commonwealth, to convey and deliver into the custody of the said keeper of the said jail, the body of* A O, *late of &c. charged before me with &c.* (here specify the offence particularly, for which the description in the indictment, under the title to which the offence belongs, will generally be the best guide) *And you the said jailor, are hereby required to receive the said* A O, *into your jail and custody, and him there safely to keep, till he shall thence be discharged by due course of law. Given under my hand and seal, this day of in the year and in the year of the commonwealth.*

The power of a sheriff to impress a guard for the safe keeping of a criminal in jail, with the allowance to such guard, and mode of payment, may be found in the *Revised Code, page* 130. *sect.* 21.

(E) *Warrant for summoning a court.*

county to wit.

To the sheriff of the said county.

Whereas A O, *late of &c. was this day committed to the jail of this county, by my warrant, it appearing to me, that the felonious offence wherewith he stands charged, ought to be examined into by the county court; therefore, on behalf of the commonwealth, I require you that you summon the justices of your said county to meet at the court-house, on the day of and then and there to hold a court for the examination of the fact, with which the*

thi ſaid A O, *ſtands charged, and for ſuch other purpoſes concerning the premiſes, as is by law required and directed; and that you have then there this warrant. Given &c.*

The ſheriff ſhould be very particular in his obedience to this warrant.

To this court the juſtice is to return the recognizance of the witneſſes.

(F) Recognizance of bail, where the priſoner is bound over to the next grand-jury.

A O, of &c. labourer, B B, of &c. and C B, of &c. ſeverally acknowledge themſelves indebted to A G, eſquire, governor or chief magiſtrate of this commonwealth, and his ſucceſſors, that is to ſay, the ſaid A O, in dollars, and the ſaid B B, and C B, in dollars each, to be levied of their ſeveral and reſpective lands and tenements, goods and chattels, to the uſe of the ſaid commonwealth, in caſe the ſaid A O, ſhall fail to appear perſonally at a court to be held for this county, on *(the firſt day of the next quarterly court)* then and there to anſwer an indictment to be perfered to the grand-jury, againſt the ſaid A O, for *petit larceny, (or other offences, as the caſe is)* whereof he ſtands charged; or in caſe ſo appearing he ſhall depart without leave of the court.

(G) Recognizance of bail, where the priſoner is ſent for further trial to the diſtrict court; but is, in the opinion of the court of examination, bailable.

county to wit.

Be it remembered, that on the day of in the year and in the year of the commonwealth, A C, of labourer, A B, of yeoman, and B B, of yeoman, came before me J P, one of the commonwealth's juſtices of the peace for the county of aforeſaid, and ſeverally acknowledged themſelves to owe and be indebted to A G, eſquire, governor or chief magiſtrate of the commonwealth of Virginia, and his ſucceſſors, that is to ſay the ſaid A O, in *(the ſum muſt exactly correſpond with that directed by the court of examination)* and the ſaid A B, and B B, dollars each, to be reſpectively levied of their lands and tenements, goods and chattels; yet upon this condition, that if the ſaid A O, ſhall make default in performance of the condition under written:

The

The condition of this recognizance is such that if the above bound A O, shall personally appear before the commonwealth's judges of the district court, appointed by law, to be holden at on the first day of the next term, then and there to answer to the said commonwealth, for and concerning *(here recite the offence)* wherewith the said A O, stood charged before the commonwealth's justices of the peace, for the said county of at a court held for the examination of the said A O, on the day of last past, who were of opinion that the said A O, ought to be tried for the said offence in the district court, and that he was by law bailable for the same, as appears to me of record; and if the said A O, shall also then and there do and receive what shall by the said court be ordered and adjudged, and shall not depart thence without the leave of the said court, then this recognizance shall be void, else shall remain in full force.

Acknowledged before me.

Where a prisoner is bailable in the opinion of the court of examination, and that opinion shall be entered in their proceedings, with the sum in which he shall be bound, such bail may be taken before a magistrate at any time within twenty days, after the court of examination is held, or by a judge of the general court, at any time afterwards. *See V. l. page* 109. *sect.* 2.

(H) Recognizance of bail taken before a judge of the general court, after the offender is committed to the district jail.

Be it remembered that on the day of in the year and in the year of the commonwealth, A B, of and B B, of personally came before me J J, one of the judges of the general court, and took in bail until the next district court appointed by law to be holden at one A O, of labourer, committed and now detained in the jail of the said district court, by virtue of a warrant under the hands and seals of J P, and J P, two of the commonwealth's justices of the peace for the county of for the felonious &c. *(here describe the offence)* for which said offence, at a court held by the commonwealth's justices of the peace for the said county of on the day of last past, for the examination of the said A O, it was the opinion of the said court, that the said A O, ought to be tried in the district court, and that he was by law bailable for the same, as appears to me of record; and the said A B, and B B, took upon themselves each severally

severally under the penalty of dollars lawful money of Virginia, of the goods and chattels, lands and tenements, of them and each of them, to the use of the commonwealth, to be levied, if the said A O, shall not personally appear at the next district court appointed by law, to be holden at to answer concerning the felony aforesaid, according to the laws of this commonwealth.

Taken and acknowledged before me, the day and year first above written.

The above recognizance is to be transmitted by the judge to the clerk of the district court, and thereupon a warrant issued for the prisoner's deliverance. *See sect.* 2.

(I) Warrant for the deliverance of a prisoner bailable by law, but detained in the district jail for want of bail.

J J, one of the judges of the general court, to the keeper of the jail of the district court, appointed by law to be holden at greeting. Forasmuch as A O, late of the county of labourer, hath before me found sufficient sureties to appear before the judges of the district court, appointed by law, to be holden at on the first day of the next succeeding court, to answer such things as shall then and there, on the behalf of the commonwealth, be objected against him, and namely to the felonious &c. (*here describe the offence*) for which offence, the said A O, was committed to the said jail, by warrant under the hands and seals of J P, and J P, two of the justices of the peace for the county of (the court held for the examination of the fact, with which the said A O, stood charged, on the day of last past, at the said county of being of opinion that the said A O, ought to be tried for the said offence, in the district court, and that he was by law, bailable for the same, as appears to me of record:) You are hereby commanded in the name of the commonwealth, that if the said A O, do remain in your said jail, for the said cause, and for none other, then you forbear to detain him any longer, but that you deliver him thence, and suffer him to go at large, and that upon the pain that will thereon ensue. Given under my hand and seal &c.

A prisoner may also be bailed by any two judges of the general court, when it is not sitting, tho' the court of examination may have been of a different opinion, (*V. l. p.* 109. *sect.* 3.)

The

The form of the recognizance, and warrant for diſcharge, in ſuch caſes, may purſue the two laſt, with ſuch variations as will readily occur to a *judge*, by whom they are to be executed.

(J) Mittimus to the diſtrict jail.

To the ſheriff of the county of and to the keeper of the jail of the diſtrict court, appointed by law to be holden at

county to wit.

Whereas, at a court held by the commonwealth's juſtices of the peace for the ſaid county of on the day of laſt paſt, for the examination of A O, late of &c. then a priſoner in the jail of the ſaid county, charged with the felonious &c. (*here recite the offence*) it was the opinion of the ſaid court that the ſaid A O, for the ſaid felony, ought to be tried in the diſtrict court, and thereupon he was remanded to the jail of the county aforeſaid as appears to us of record: We J P, and J P, two of the commonwealth's juſtices of the peace for the ſaid county of hereby require and command you the ſaid ſheriff, on behalf of the commonwealth, that you forthwith remove the body of the ſaid A O, from your jail aforeſaid, and him ſafely convey to the public jail of the diſtrict court appointed by law to be holden at and there deliver to the keeper of the ſaid public jail, together with this precept. And we authorize and empower you the ſaid ſheriff, as well within your county, as in all other counties thro' which you paſs with your ſaid priſoner legally to impreſs ſuch and ſo many men, horſes, and boats, as ſhall be neceſſary for the guard and ſafe conveyance of your ſaid priſoner, to the jail aforeſaid. And we charge and command you, the keeper of the ſaid public jail, to receive the ſaid A O, into your jail and cuſtody, and him there ſafely to keep, until he ſhall be thence diſcharged by due courſe of law. Given under our hands and ſeals at in the county of aforeſaid, this day of in the year and in the year of the commonwealth.

The ſheriff delivering the priſoner to the jailor, ſhould take a receipt for him in the following form.

'Received into the public jail the body of A O, late of &c. committed for felony by warrant of and juſtices of the peace for the county of and delivered into my cuſtody by the ſheriff of the ſame county.'

A K, keeper PJ.

The law which authorizes the ſheriff to impreſs men, horſes, &c. for the conveyance of criminals, and directs him to proceed therein as in caſes of other impreſſes, ſeems only to confine his

proceedings

proceedings to the *valuation* of the property, and not to the allowance for the use of it; which allowance is to be made by the county courts, in the months of *September* or *October* annually. *See V. l. p.* 111. *sect.* 14.—If the property is lost, then the valuation, without the allowance for the use is to be certified to the auditor for payment. *See V. l. c.* 146. § 28. *p.* 298. So that it appears from a view of these two acts, that if the property is lost the *valuation only*, made by two freeholders, without any allowance for the use is to be paid by the auditor; but if not lost, then the *allowance for the use* is to be paid on a certificate of the clerk of the court, made at a *September* or *October* court.

(K) Form of the valuation made by two or more freeholders.

We A F, and B F, two freeholders of the county of having been appointed by the sheriff of the county of to value a horse this day impressed by the said sheriff, from A M, of for the purpose of conveying a criminal from the jail of the said county of to the jail of the district court, appointed by law to be holden at and having been first duly sworn to appraise the said horse, do value him at dollars. Certified this day of &c.

A F.
B F.

(L) Sheriff's Certificate.

'I do hereby certify that I had a horse the property of A M, of the county of days, for the purpose of conveying a criminal, viz. A O, from the jail of the county of to the jail of the district court, appointed by law to be holden at Certified this day of A S.'

This certificate should be presented by the owner of the horse, to the court of the county, having jurisdiction of the examination and trial of the criminal, at a *September* or *October* court, who will make the necessary allowance.

(M) Warrant to convey a culprit from the county in which he is arrested, to that in which the fact was committed.

county to wit.

To the sheriff of the said county.

Whereas A O, late of labourer, hath this day been arrested,

arrested, and brought before me J P, one of the commonwealth's justices of the peace, for the said county of on suspicion of &c. *(here recite the offence)* (or *charged on oath by* A J, *of with &c.* as the case may be) and it appearing to me that the offence wherewith the said A O, stands charged, was committed in the county of : These are therefore to command and require you, in the name of the commonwealth forthwith to convey the said A O, to the said county, and there deliver him to some justice of the peace for the said county, to be dealt with as the law directs. Given under my hand and seal, this day of in the year &c.

The sheriff in executing this warrant, has the same power as to impressing men, horses, &c. as in conveying prisoners from the county to the district jail, the *forms* in which cases have already been given. And as he has also the same allowance *per* mile, it seems necessary that the magistrate to whom he delivers the prisoner, should give him a receipt for the same, in which it may not be improper to certify the distance of the removal, that the court to which the claim is made may be informed what allowance to make.

(N) Receipt of the Magistrate.

county to wit.

This is to certify that A S, sheriff of the county of did this day bring before me J P, a justice of the peace for the county of a certain A O, late of &c. arrested in the said county of on suspicion of felony, and by warrant from J P, one of the justices of the peace for the said county, directed to be conveyed to some justice of the peace in this county, it appearing to the said J P, that the fact, wherewith the said A O, was charged, was committed in this county. And I do also certify, that the distance, in my opinion, which the said A O, was conveyed by the said A S, is miles. Given &c.

The keeper of the district jail may, by order of two justices of his county, impress a sufficient number of guards for the safe keeping of the prisoners committed to his care. *V. l. p.* 83.

Order of the justices.

county to wit.

Whereas J R, keeper of the district jail, at F, hath given information unto us J P, and K P, two of the justices of the peace for the county of aforesaid, that the said jail is insufficient for the safe keeping of the prisoner, (or prisoners) now committed

committed thereto, and hath made application to us for our warrant to authorize the impreſſing of a ſufficient guard for that purpoſe: Theſe are therefore, to authorize the ſaid J K, to impreſs ſuch a number of guards, as will be ſufficient to keep ſafely the priſoner, (or priſoners) now committed to his care; and for ſo doing this ſhall be his warrant. Given &c.

J P.
K P.

The foregoing precedents ſeem to be all that are neceſſary under this title, many of which, indeed, are to be found in various parts of this book, adapted to the particular caſes to which they belong. The formal and conſtituent parts of *Indictments*, will be found under that title.

The proceedings on the trial of ſlaves, which have been conſiderably altered ſince *Mr. Starke* wrote, are to be found under title '*Slaves*,' to which I muſt refer.

For the rules in allowing clergy to ſlaves ſee title '*Clergy*.'

The charges of proſecuting criminals are to be paid out of their eſtate, if convicted, if not by the public.

CURSING, *See* 'SWEARING.'
DEBT, *(for ſums under five dollars)* See WARRANTS.'
DEBTORS, *abſconding*, See 'ATTACHMENT.'
DEBTORS INSOLVENT, (*See* INSOLVENTS.)
DECEIT, *See* 'CHEATS.'

DEODAND.

DEODAND, *(from deodandum, i. e. given to God)* is when any moveable thing inanimate, or beaſt animate, doth move to, or cauſe the untimely death of any reaſonable creature, by miſchance, without the will or fault of himſelf, or of any other perſon. 3 *Inſt.* 57 1 *Blacks Com.* 300.

As this ſubject exiſted under the common law, it might be improper to paſs it over in ſilence; tho' it ſeems to be virtually abolished by the 9th article of the conſtitution of this State. I ſhall, however, only obſerve, that it originated in the pious, tho' rediculous ſuperſtition of our European anceſtors, who, while they believed that remiſſion of ſins might be obtained for the ſouls of the deceaſed, appropriated the inſtrument which occaſioned an untimely death to the purchaſe of maſſes, for the uſe of the ſoul, thus prematurely hurried out of exiſtence.——But this *deodand* being forfeited to the king's almoner, to be applied by him to thoſe pious uſes, it was ſoon conſidered as one of the caſual

revenues

revenues of the crown, and by the king granted, as other franchiſes, to lords of manors. Thus is this infamous practice continued to this day in England, by the king and thoſe lords to whom the right of deodands was granted, as a mean to rob the widow and orphan of the deceaſed perſon's property, when the reaſon for doing it had long ceaſed. The juries, however, of late have greatly diſcountenanced this buſineſs, by finding ſome very inconſiderable part of the property, (as the wheel of a waggon &c.) the cauſe of the death; and as no forfeiture, in this caſe, can accrue, till the coroner's inqueſt has found that the object occaſioned the death, conſequently no part is forfeited except that ſo found.

DISORDERLY-HOUSES, (*See* LEWDNESS.)
DISTRESS, (*See* RENTS.)
DOORS BREAKING OPEN, (*See* ARREST.)
DOWER, (*See* FORFEITURE.)
DRIVER, (*See* CATTLE.)
DRUNKENNESS, (*See* SWEARING.)
DUELLING, (*See* HOMICIDE.)
EMBRACERY, (*See* MAINTENANCE.)

ESCAPE.

AN eſcape is, where one that is arreſted gaineth his liberty before he is delivered by courſe of law. *Termes de la ley.* Eſcapes are of three kinds. 1ſt. By a perſon who hath the offender in his cuſtody; this is properly called an *eſcape*. 2d. Cauſed by a ſtranger; this is commonly called a *reſcue*. 3d. By the party himſelf; either without force, which is simply an eſcape, or with force, which is *priſon breaking*. *Reſcous* and *priſon breaking* are treated of under their reſpective titles, and this title treats only of eſcapes properly ſo called. Concerning which will be ſhewn,

I. *Of eſcape by the party himſelf.*
II. *Eſcape ſuffered by a private perſon.*
III. *Eſcape ſuffered by an officer.*
IV. *What is a voluntary, and what a negligent eſcape.*
V. *Concerning the retaking of a perſon eſcaped.*
VI. *Indictment for an eſcape.*

VII. Trial and conviction for an escape.
VIII. Punishment of an escape.
IX. Of escapes in civil cases.
X. Escape warrants.

I. Of escape by the party himself.

As all persons are bound to submit themselves to the judgment of the law, and to be ready to be justified by it; whoever in any case refuses to undergo that imprisonment which the law thinks fit to put upon him, and frees himself from it by any artifice, before such time as he is delivered by due course of law, is guilty of an high contempt, punishable with fine and imprisonment. 2 *Haw.* 122.

But escape committed by the party himself, belongs more properly to the title *prison breaking*.

II. Escape suffered by a private person.

It seems to be a good general rule, that wherever any person hath another lawfully in his custody, whether upon an arrest made by himself or by another, he is guilty of an escape, if he suffer him to go at large, before he hath discharged himself of him, by delivering him over to some other who by law ought to have the custody of him. 2 *Haw.* 138.

And the law is generally the same in relation to escapes suffered by private persons, as by officers. 2 *Haw.* 138.

III. Escape suffered by an officer.

In order to make an escape, there must be an actual arrest, and therefore if an officer having a warrant to arrest a man, see him shut up in a house, and challenge him as his prisoner, but never actually have him in his custody, and the party get free, the officer cannot be charged with an escape. 2 *Haw.* 129.

And as there must be an actual arrest, such arrest must be also justifiable; for if it be either for a supposed crime, where no such crime was committed, and the party neither indicted nor appealed, or for such a slight suspicion of an actual crime, and by such an irregular mittimus as will neither justify the arrest or imprisonment, the officer is not guilty of an escape, by suffering the prisoner to go at large. 2 *Haw.* 129.

And as the imprisonment must be justifiable, so it must be also for a criminal offence. 2 *Haw.* 129.

Also

Alſo if a priſoner be acquitted, and detained only for his fees, it will not be criminal to ſuffer him to eſcape, tho' the judgment were, that *he be diſcharged paying his fees*, ſo that till they be paid, the firſt impriſonment continued lawful as before; for inasmuch as he is detained, not as a criminal, but only as a debtor, his eſcape cannot be more criminal than that of any other debtor. Yet if a perſon convicted of a crime, be condemned to impriſonment for a certain time, and alſo *till he pay his fees*, and he eſcape after ſuch time is elapſed, without paying them, perhaps ſuch eſcape may be criminal, for that it was part of the puniſhment that the impriſonment be continued till the fees ſhould be paid; but it ſeems, that this is to be intended where the fees are due to others as well as to the jailor, for otherwiſe the jailor will be the only ſufferer by the eſcape, and it will be hard to puniſh him for ſuffering an injury to himſelf only, in the non-payment of a debt in his power to releaſe. 2 *Haw.* 129. 130.

Alſo, it is an eſcape in ſome caſes, to ſuffer a priſoner to have greater liberty, than by the law he ought to have; as to admit a perſon to bail, who by law ought not to be bailed, but to be kept in cloſe cuſtody. 2 *Haw.* 130.

So if a jailor, or other officer, ſhall licence his priſoner to go abroad for a time, and to come again; this is an eſcape, becauſe the priſoner is found out of the bounds of his priſon, tho' the priſoner return again, according as he ſhall be preſcribed. *Dal.* c. 159.

If the jailor ſo cloſely purſues the priſoner who flies from him, that he retakes him, without loſing ſight of him, the law looks on the priſoner ſo far in his power all the time, as not to adjudge ſuch a flight to amount at all to an eſcape; but if the jailor once loſe ſight of the priſoner, and afterwards retake him, he ſeems in ſtrictneſs to be guilty of an eſcape. And if he kill him in the purſuit, he is in like manner guilty of an eſcape, tho' he never loſt ſight of him, and could not otherwiſe take him; becauſe the public juſtice is not ſo well ſatisfied by the killing him in ſuch an extrajudicial manner. 2 *Haw.* 130.

IV. What is a voluntary, and what a negligent eſcape.

Wherever an officer, who hath the cuſtody of a priſoner, charged with and guilty of a capital offence, doth knowingly give him his liberty, with an intent to ſave him from his trial or execution, this is a voluntary eſcape. 2 *Haw.* 130.

A negligent escape is, when the party arrested or imprisoned doth escape, against the will of him that arrested or imprisoned him, and is not freshly pursued and taken again, before he hath lost the sight of him. *Dalt. c.* 159.

If the constable or other officer shall voluntarily suffer a thief, being in his custody, to go into the water to drown himself, this escape is felony in the constable, and the drowning is felony in the thief: Otherwise if the thief shall suddenly, without the assent of the constable, kill, hang, or drown himself, this is but a negligent escape in the constable. *Dalt. c.* 159.

V. Concerning the retaking of a person escaped.

If an officer hath arrested a man by virtue of a warrant, and then taketh his promise that he will come again, and so letteth him go; the officer cannot, after arrest, take him again by force of his former warrant, for that this was by the consent of the officer: But if he return, and put himself again under the custody of the officer, it seems that it may be probably argued, that the officer may lawfully detain him, and bring him before the justice in pursuance of the warrant. *Dalt. c.* 169. 1 *Haw.* 81.

But if the party arrested had escaped of his own wrong without the consent of the officer, now upon fresh suit, the officer may take him again and again, so often as he escapeth, although he were out of view, or that he shall fly into another town or county, and bring him before the justice, upon whose warrant he was first arrested. *Dalt. c.* 169.

And it is said generally in some books, that an officer who hath negligently suffered a prisoner to escape, may retake him wherever he finds him, without mentioning any fresh pursuit; and indeed since the liberty gained by the prisoner is wholly owing to his own wrong, there seems to be no reason he should take any manner of advantage from it. 2 *Haw.* 131. 132.

And wherever a person is lawfully arrested for any cause, and afterwards escapes, and shelters himself in an house, the doors may be broke open to take him, on refusal of admittance. 2 *Haw.* 87.

It is perhaps the better opinion, that wherever a prisoner, by the negligence of his keeper, gets so far out of his power, that the keeper losses sight of him, the keeper is punishable for the escape, notwithstanding he retook him immediately after: And it is clear that he cannot excuse himself from an escape, by killing a prisoner in the pursuit, tho' he could not possibly retake him, but must in such case be content to submit to such punishment, as his negligence shall appear to deserve. 2 *Haw.* 132.

VI.

VI. Indictment for an escape.

It seems clear that every indictment (A) for an escape whether negligent or voluntary, must expressly shew, that the prisoner was actually in the defendant's custody for such a crime; and that he went at large: And if for a voluntary escape, that the defendant feloniously and voluntarily suffered him to go at large; and must set forth, not the felony in general, but the particular kind of felony: But it seems questionable, whether such certainty, as to the nature of the crime, be necessary in an indictment for a negligent escape; for that it is not material in this case, whether the person who escaped were guilty or not. 2 *Haw.* 133. 229.

VII. Trial and conviction for an escape.

If the prisoner be of record in a court, and the jailor being called, cannot give an account where he is, this is a conviction of an escape; but seems not a conviction of a voluntary escape; unless the jailor confesseth it: And the jailor may be fined in such a case; but not convicted of felony, without indictment or presentment. 1 *H. H.* 599. 603.

And it seems to be clear, that a keeper who voluntarily suffers another to escape, who was in his custody for felony, cannot be arraigned for such an escape as for felony, until the principal be attainted, for that the felony of the prisoner shall not be tried between the commonwealth and the keeper, because the prisoner is a stranger thereunto, yet he may be indicted and tried for a misprision, before the attainder of the principal offender. 2 *Haw.* 135. 2 *Inst.* 591. 592.

VIII. Punishment of an escape.

If a felon escapes before an arrest, it is not punishable in him as felony: but for the flight he forfeits his goods when presented. *Hale's Pl.* 111.

If a private person arrest a felon, and he escape by force from him, the township shall be amerced, but it seems it excuseth the party, because he cannot raise power to assist him, but if a constable or other officer hath the custody of a prisoner, bringing him to the jail, it seems that a simple escape by the rescue of the prisoner himself, doth not wholly excuse him, because he may take sufficient strength to his assistance. 1 *H. H.* 601.

Wherever a person is found guilty upon an indictment or presentment of a negligent escape of a criminal actually in his custody,

cuſtody, he is puniſhable by fine and impriſonment, according to the quality of the offence. 2 *Haw.* 136. 139. 1 *H. H.* 600. 604.

And it ſeems to be the better opinion, that the ſheriff is as much liable to anſwer for a negligent eſcape ſuffered by his bailiff, as if he had actually ſuffered it himſelf, and that the court may charge the ſheriff or bailiff for ſuch an eſcape; and if a deputy jailor be not ſufficient to anſwer a negligent eſcape, his principal muſt anſwer for him. 2 *Haw.* 135.

If a priſoner for felony break the jail, this ſeems to be a negligent eſcape in the jailor, becauſe there wanted either that due ſtrength in the jail, that ſhould have ſecured him, or that due vigilance in the jailor, or his officers to have prevented it; and therefore it is lawful for the jailor to hamper them with irons to prevent their eſcape, for if a jailor might not be puniſhed for this as a negligent eſcape, they would be careleſs either to ſecure their priſoners, or to retake them that eſcape. 1 H. H. 601.

It ſeems to be generally agreed, that a voluntary eſcape ſuffered by an officer, amounts to the ſame kind of crime, and is puniſhable in the ſame degree, as the offence of which the party was guilty, and for which he was in cuſtody, whether it be treaſon, felony, or treſpaſs. 2 *Haw.* 134.

But yet a voluntary eſcape is no felony, if the act done were not felony at the time of the eſcape made, as in caſe of a mortal wound given, and the party not dying till after the eſcape; but the officer may be fined to the value of his goods. *Dalt. c.* 159.

Alſo, a voluntary eſcape ſuffered by one who wrongfully takes upon him the keeping of a jail, ſeems to be puniſhable in the ſame manner, as if he was never ſo rightfully intitled to ſuch cuſtody; for that the crime is in both caſes of the ſame ill conſequence to the public; and there ſeems to be no reaſon that a wrongful officer ſhould have greater favour than a rightful, and that for no other reaſon but becauſe he is a wrongful one. 2 *Haw.* 134.

But it ſeemeth to be clear, that no one is puniſhable as for felony, for the voluntary eſcape of a felon, but the perſon only who is actually guilty of it; and therefore that the principal jailor is only fineable for a voluntary eſcape ſuffered by his deputy; for that no one ſhall ſuffer capitally for the crime of another. 2 *Haw.* 135.

And therefore, altho' in all civil cauſes, the ſheriff is to be reſponſible, or the jailor at election, yet if the jailor do voluntarily ſuffer a felon in his cuſtody to eſcape; this, inaſmuch as it reacheth to life, is felony only in the jailor, that was immediately

diately trusted with the custody, and not in the sheriff. 1 H. H. 597.

For the escape must be voluntarily permitted in him that permitted it, which could not be in the high sheriff, tho' it were such in the jailor, for he was not privy to it, and therefore could not do it feloniously; but it was a negligent escape in him, in trusting such a person with the custody of his prisoners, that would be false to his trust, and therefore the sheriff shall pay, but not corporally suffer for the miscarriage of his jailor. 1 H. H. 597. 598.

But altho' the felony for which a man is committed be not within clergy; yet the person who voluntarily suffers him to escape, shall have the benefit of clergy. 1 H. H. 599.

The power of a sheriff and jailor to impress guards, in order to prevent the escape of criminals, may be found under titles '*Criminals*,' and '*Sheriff*.'

IX. Of escapes in civil cases.

The proceedings on escapes in civil cases are directed by *Virginia laws, chap.* 79. *page.* 125 of the *Revised Code, which see.*

X. Escape Warrants.

1. In civil cases.

(*Where the defendant was committed on an execution*)

To all sheriffs, mayors, sergeants, bailiffs, and constables, within the commonwealth of *Virginia*.

to wit.

Complaint being this day made to me, upon oath, by T J, *of &c. that* J D, *who was charged in execution, in the jail of the said county* (or within the bounds of the jail of this county) *at the suit of* A C, *&c.* (here mention the several executions particularly) *did, on or about the day of last past, escape out of the said jail* (or prison bounds) *and is now going at large: These are therefore in the name of the commonwealth, to require you, and every of you, in your respective counties, cities, towns and precincts, to seize and retake the said* J D, *and him so retaken to commit to the prison where debtors are usually kept, in the county where he is so retaken, and deliver him to the keeper thereof, together with this warrant; hereby commanding and requiring the said keeper to receive the said* J D, *and him safely to keep in the said jail, without bail or mainprize, until satisfaction be made to*

the

the said A C, *for the said debt and costs, or until he be thence delivered by due course of law: and to return this warrant to the court of the said county of pursuant to the act of the General Assembly, in that case made and provided. Given under my hand and seal &c.*

[ON MESNE PROCESS.]

If the escape was upon mesne process, then say,

Complaint &c. by J S, *under sheriff of the said county, that* J D, *who was committed to the jail of the said county, for want of bail, at the suit of* A C, *&c.* (here recite the cause of action) *did, on or about the day of last past, make his escape out of the jail of the said county, and is now going at large: These are &c:* (as in the other precedent to *jail*; and then add,—*until a certificate, under the hand of the clerk of the court of the said county, that the said* J D, *hath given bail in the said suit, be delivered to you, and to return &c.* as before.

This warrant may be executed at any time or place.

2. Escape warrant against a criminal.

to wit.

J P, one of the commonwealth's justices of the peace for the said county, to all sheriffs, mayors, bailiffs, constables, and headboroughs, within the commonwealth of *Virginia*.

Whereas complaint is made to me this day, upon the oath of A W, *that* A O, *labourer, who was lately committed to the jail of the said county of by warrant from* J P, *a justice of the peace of the said county, on suspicion of felony, did on the day of last past, forcibly escape from the said jail, and is now going at large: These are therefore in the name of the commonwealth, to require you, and every of you, in your respective counties, cities, towns, and precincts, to make diligent search, by way of hue and cry for the said A O, and him having found, to seize and retake, and safely convey, or cause him to be safely conveyed, to the jail of the said county of there to be kept until he shall be thence discharged by due course of law. Given under my hand and seal &c.*

(A) Indictment against a constable for an escape.

county to wit.

The jurors &c. upon their oath do present, that on the day of in the year and in the year of the commonwealth,

monwealth, at in the county aforesaid, one A I, of came before J P, then and yet one of the justices of the commonwealth, assigned to keep the peace in the said county; and the said A I, did then and there upon his oath, before the same justice charge, accuse, and give information against one A O, of aforesaid, in the county aforesaid, yeoman, for a certain felony, in feloniously &c. *(here describe the offence)* at in the said county: Whereupon the said J P, the justice aforesaid, did then and there, to wit, at aforesaid, in the county aforesaid, make a certain warrant, under his hand and seal, in due form of law, directed to the constable of aforesaid, in the county aforesaid, thereby commanding him to bring the body of the said A O, before the said J P, to answer to such matters and things as should be alledged against him, touching the said felony: Which said warrant afterwards to wit, on the same day and year above mentioned, at aforesaid, in the county aforesaid, was delivered to one A C, then being constable of in the said county, in due form of law to be executed; by virtue of which said warrant, the said A C, afterwards, to wit, on the said day of in the year aforesaid, at aforesaid, in the said county, did take and arrest the body of the said A O, and him the said A O, in his custody for the cause aforesaid had: Nevertheless the said A C, of aforesaid, in the county aforesaid, yeoman, afterwards, to wit, on the said day of in the year aforesaid, the duty of his office, in that part not regarding, at aforesaid, in the county aforesaid, unlawfully and negligently did permit the said A O, to escape, and go at large, out of the custody of him the said A C, to the great hindrance of justice, in contempt of the laws of this commonwealth, and against the peace and dignity of the commonwealth.

ESTRAYS.

THERE is no part of the duty of a magistrate productive of more trouble than the proceedings on taking up *estrays*, nor is there any subject relating to his office on which less information can be derived from any treatise heretofore published. The act of Assembly from which Mr. *Starke* made his compilation under the title '*Strays*,' even supposing it ever to have been in force, (which he himself doubts) has long been repealed, by the act of 1785, '*concerning estrays*,'—It is now collected in

in the Reviſed Code page 21, and is materially different from the former acts, on the ſame ſubject.

Under this title I ſhall conſider,

I. What ſhall be deemed eſtrays.
II. The mode of proceeding on taking up eſtrays.
III. Adjudications on this ſubject.
IV. Precedents.

I. What ſhall be deemed eſtrays.

Eſtrays are ſuch valuable animals as have abandoned the paſtures and lands of their proprietors, and are found wandering on the lands of others, where the owner is not known.

Any beaſts may be eſtrays, that are by nature tame, or reclaimable, and in which there is a valuable property, as ſheep, oxen, ſwine, and horſes, which we in general call cattle: 1 *Blacks Com.* 298.

But animals upon which the law ſets no value, as a dog or cat, and animals, *ferae naturae*, as a bear, or wolf, cannot be conſidered as eſtrays. *Id.*

II. The mode of proceeding on taking up eſtrays.

By *Virginia laws* (10 R. Cond. 1785) chap. 16. p. 21. of the *Reviſed Code*, it is enacted,

1ſt. Any perſon by himſelf or agent, may take up an eſtray on his own land, and ſhall forthwith give information thereof to a juſtice of the ſaid county, who ſhall iſſue his warrant to three diſintereſted freeholders of the neighbourhood, commanding them, having been firſt duly ſworn, to view and appraiſe ſuch eſtray, and certify the valuation under their hands, together with a particular deſcription of the kind, marks, brand, ſtature, colour, and age; which certificate, the juſtice ſhall tranſmit to the clerk of the county within 20 days, who ſhall enter it in a book to be kept for that purpoſe, and receive 10 pounds of tobacco, to be paid down by the taker up.

2d. The clerk ſhall alſo cauſe a copy of every ſuch certificate to be publickly affixed at the door of his court-houſe, on two ſeveral court days next after he receive the ſame, for which and a certificate thereof, he ſhall likewiſe receive 10 pounds of tobacco.

3d. If the valuation is under 20 ſhillings, and no owner appears till notice has been twice publiſhed as aforeſaid, the property

perty is then vested in the owner of the land on which the estray was taken;—if it exceeds 20 shillings, the owner shall, within three months after the appraisement, send to the public printer a copy of the certificate to be advertised three times in the Virginia Gazette, with notice of the place where the estray is, for which the printer may demand 4 shillings for each estray; and if no owner appears within a year and a day after publication, the property is vested in the owner of the lands whereon it was taken. But the former owner in either case may at any time within 5 years afterwards, upon proving his property, demand and recover the valuation money, deducting therefrom the clerk's and printer's fees, and 5 shillings for every horse, or head of neat cattle, and 1 shilling for every other beast.

4th. The same proceedings are to be had in the case of a boat or vessel adrift, describing her by her *kind, burthen, and built.*

Provided, that if after notice published, any estray shall die, or get out of the possession of the taker-up, without his default, he shall not be answerable for the same, or the valuation thereof; nor shall any taker up be answerable for a boat or other vessel lost as aforesaid.

III. *Adjudications on this subject.*

He that takes an estray, is bound so long as he keeps it, to find it in provisions and preserve it from damage; and may not use it by way of labour, but is liable to an action for so doing. Yet he may milk a cow, or the like; for that tends to the preservation, and is for the benefit of the animal. 1 *Blacks Com.* 299. *Cro. Jac.* 148.

In trespass for taking and carrying away a gelding, if the defendant justify as for an estray, a replication that the defendant *used* the gelding is proper, and is not a departure in pleading; for he is thereby rendered a trespasser *from the beginning*. *Cro. Jac.* 148. 1 *Term. Rep.* 12.

So in trespass for taking a hog, if the defendant pleads that he took the hog *damage feasant*, the plaintiff may reply that after the taking and impounding the defendant converted the hog to his own use.—*See the pleadings.* 3 *Wils.* 20.

Our act of Assembly merely prescribes the mode of proceeding on taking up estrays, and does not, I conceive, interfere with the doctrine on that subject, arising under the common law. On this presumption, the case of *Healy v. Walsh.* 2 *Salk.* 686, is worthy of observation.

Trespass,

Treſpaſs for his horſe: Defendant pleaded, that one *Pooly* was owner of the horſe, and that the horſe eſtrayed out of his poſſeſſion, and came to the hands of the plaintiff, and that he by command of *Pooly*, demanded the horſe within the year &c. and tendered amends, and that the plaintiff refuſing to deliver him, he took him. To this there was a frivolous replication, and upon that a demurrer.

And by the court. 1ſt. Without telling any marks, or making any proof of property (which may be done upon trial) the owner may ſeize his horſe where he finds him.—*but quære.*

2d. Tho' the defendant does not plead directly that he tendered amends, but only that he demanded the horſe, *offering ſatisfaction*, yet the court held this a direct affirmation.

3d. The court held, that tho' it was ſaid he tendered amends *generally*, and did not expreſs any ſum certain, yet that was good in this caſe, and a difference was taken between this caſe, and that of a tender of amends for a treſpaſs. In that of a treſpaſs, if the defendant pleads a tender of amends, he muſt ſhew what he tendered, for he muſt tender a certain ſum; and the law puts this difficulty upon him, becauſe he is the wrong-doer, and the other is confeſſedly a party injured: But the owner of the eſtray is no wrong-doer, and it is impoſſible he ſhould know how long his horſe had been in poſſeſſion of the taker-up, nor how much will make a proper ſatisfaction.

IV. Precedents.

(A) Warrant to three freeholders, to view, appraiſe, and deſcribe an eſtray.

county to wit.

To A F, B F, and C F, freeholders of this county.

Whereas A T, *of the ſaid county, hath this day given information to me* J P, *a juſtice of the peace for the county aforeſaid, that he hath taken up an eſtray* (here expreſs the kind) *upon his own land: Theſe are therefore, in the name of the commonwealth, to command you, having been firſt duly ſworn for that purpoſe, before me, or ſome other juſtice of the peace for this county, to view and appraiſe the ſaid eſtray, and to certify the value thereof under your hands, together with a particular deſcription of the kind, marks, brand, ſtature, colour, and age of the ſaid eſtray; which certificate ſo made, you are forthwith to return to me. Given under my hand &c.*

J. P.

(B)

(B) Form of the oath to be adminiſtered to the freeholders.

You A F, B F, and C F, *ſhall ſwear that you will faithfully and to the beſt of your ſkill and judgment, view and appraiſe a certain eſtray* (expreſs the kind, whether horſe, cow &c.) *taken up by* A T, *of this county, and that you will certify the valuation thereof under your hands, to me* (or *to* J P, *a juſtice of the peace for this county*, if the warrant iſſued from him) *together with a particular deſcription of the kind, marks, brand, ſtature, colour, and age of the ſame. So help you God.*

(C) Certificate of the freeholders.

(On the back of the warrant, or on a piece of paper annexed to it, make the following return)

Purſuant to the within (or *the above*) warrant to us directed, we have this day viewed an eſtray (*expreſs the kind, whether horſe, mare, cow &c.*) ſhewn to us by A T, of this county; and do find the ſame to be (*here deſcribe the kind, marks, brand, ſtature, colour, and age of the eſtray*) and we do appraiſe the ſaid to the ſum of Certified under our hands this day of in the year

A. F.
B. F.
C. F.

The freeholders cannot well be too particular in the deſcription of the eſtray; becauſe not only the injunctions of the law as expreſſed in the warrant require it; but an imperfect deſcription, often defeats the object of the law itſelf.

EVIDENCE.

I. Of evidence in general.
II. Of written evidence.
III. Of the evidence of witneſſes.
IV. Of proceſs to cauſe witneſſes to appear.
V. Of the manner of giving evidence.

I. Of evidence in general.

EVIDENCE, in legal underſtanding, doth not only contain matters of record, as letters patent, fines, recoveries, inrolments, and the like, and writings under ſeal, as charters and

deeds

deeds, and other writings without ſeal, as court rolls, accounts, and the like; but in a larger ſenſe it containeth alſo the teſtimony of witneſſes, and other proofs to be produced and given, for the finding of any iſſue joined between the parties. And it is called evidence, becauſe thereby the point in iſſue is to be made evident to the jury. 1 *Inſt.* 283.

But it is a general rule in all caſes, civil and criminal, the beſt evidence that may be had, or that the nature of the thing will bear, is to be given; and it is upon this reaſon that a copy of the record is admitted, becauſe one cannot have the record itſelf; but a copy of a copy will not do. *Law of Evid.* 286.

Many times juries, together with other matter, are much induced by preſumptions: whereof there are three ſorts, violent, probable, and light or temerary. Violent preſumption many times amounts to full proof; as if one be run through the body in a houſe, whereof he inſtantly dieth, and a man is ſeen to come out of that houſe, with a bloody ſword, and no other man was at that time in the houſe. Probable preſumption moveth little; but light or temerary preſumption moveth not at all. 1 *Inſt.* 6.

If all the witneſſes to a deed be dead (as no man can keep his witneſſes alive, and time weareth out all men) then violent preſumption, which ſtands for a proof, is continual and quiet poſſeſſion; altho' the deed may receive credit, from a comparing of ſeals, writing and the like. 1. *Inſt.* 6.

The common law did not require any certain number of witneſſes, for the trial of any crime whatſoever. 2 *Haw.* 428.

Two witneſſes are neceſſary in caſes of treaſon. *V. l. p.* 282.

In thoſe courts which proceed by the rules of the civil law, as the courts of equity, two witneſſes are generally required: and the reaſon why the civil law requires two witneſſes is, becauſe their trial is by witneſſes, and not by a jury of twelve men. 1 *Inſt.* 6. *b. Plowd.* 12. *a.*——But a better reaſon ſeems to be, becauſe the defendant, in a court of equity, being called on to give evidence againſt himſelf, his oath ſhall be conſidered as good evidence, till the contrary appear; and if but one witneſs ſwears, in oppoſition to the defendant's anſwer, it is but oath againſt oath.

II. Of written evidence.

Acts of Aſſembly relate either to the commonwealth in general, and are therefore called general acts, or only to the concerns of private perſons, and are thence called *private* acts. *Theory of Evid.* 2.

A general act is taken notice of by the judges and jury, without being ſhewed; and hence it is that it hath been ſaid, that the

the printed ſtatute book is good evidence of general acts; not that the printed ſtatutes are the perfect and authentic copies of the records themſelves, but every perſon is ſuppoſed to know the law; and therefore the printed ſtatutes are allowed to be evidence, becauſe they are the hints of that which is ſuppoſed to be lodged in every mans mind already. *Id.* 2. 8.

'Private acts of Aſſembly may be given in evidence without 'pleading them ſpecially.' *V. l. p.* 119.

'Papers read in evidence, tho' not under ſeal, may be carried from the bar by the jury.' *V. l. p.* 119.

Records of the courts prove themſelves, and cannot be proved by witneſſes. No razure or interlining ſhall be intended in them. 10 *Co.* 92.

And nothing ſhall be admitted as evidence of what was done at another trial, till the record of that trial be produced. *Read Evid.*

But a record of a criminal conviction ſhall not be given in evidence in a civil action; becauſe ſuch conviction might have been upon the evidence of a party intereſted in the civil action. *Caſes in the time of lord Hardwicke.* 312.

Depoſitions of witneſſes may be read when the witneſs is dead, but not when the witneſs is living; for whilſt the witneſs is living, they are not the beſt evidence, the nature of the thing is capable of. *Theory of Evid.* 30.

Yet they may be read when a witneſs is ſought and cannot be found; for then he is in the ſame circumſtances, as to the party that is to uſe him, as if he were dead. *Id.*

So if it is proved that a witneſs was ſubpœnaed, and fell ſick by the way; for in this caſe likewiſe, the depoſition is the beſt evidence that can be had, and that anſwers what the law requires. *Id.*

But a depoſition cannot be given in evidence againſt any perſon that was not party to the ſuit; and the reaſon is, becauſe he had not liberty to croſs-examine the witneſs; and it is againſt natural juſtice, that a man ſhould be concluded by proofs in a cauſe to which he was not a party. For this reaſon, depoſitions in chancery ſhall not be read for or againſt the defendant upon an information or indictment, for the commonwealth was no party to the ſuit. *Id.*

Yet this rule admits of ſome exceptions; as particularly, in all caſes where hearſay and reputation are evidence; for undoubtedly what a witneſs, who is dead, hath ſworn in a court of juſtice, is of more credit than what another perſon ſwears he hath heard him ſay. So a depoſition taken in a cauſe between either parties, will be admitted to be read, to contradict what the ſame witneſs ſwears at a trial. *Id.* 30. 31.

As to the admiſſion of the information of a witneſs taken on an examination before a juſtice, ſee title '*Criminals*.'—*Alſo* 1 *Salk.* 281.

Anciently, depoſitions taken in *perpetuam rei memoriam* were not publiſhed till after the death of the witneſſes, becauſe they were no evidence while the witneſſes were living; but this practice was found very inconvenient, becauſe thereby witneſſes became ſecure in ſwearing whatever they pleaſed, inaſmuch as they never could be proſecuted for perjury. *Theory of Evid.* 32.

What a man, who is living, hath ſworn at one trial, can never be given in evidence at another to ſupport him, becauſe it is no evidence of the truth; for if a man be of that ill mind to ſwear falſely at one trial, he may do the ſame at another on the ſame inducement; but what a man ſays in diſcourſe, without premeditation or expectation of the cauſe in queſtion, is good evidence to ſupport him, becauſe that ſhews that what he ſwears is not from any undue influence. But if a man hath ſworn at one trial different from what he hath ſworn at another, this is good evidence as to his diſcredit. *Id.* 35.

No verdict ſhall be given in evidence, but between ſuch who were parties or privies to it; becauſe otherwiſe, a man would be bound by a deciſion, who had not the liberty to croſs-examine: and nothing can be more contrary to natural juſtice, than that any body ſhould be injured by a determination, that he, or thoſe under whom he claims, was not at liberty to controvert. *Theory of Evid.* 18. 19.

And a verdict will not be admitted in evidence, without likewiſe producing a copy of the judgment founded upon it; becauſe it may happen, that the judgment was arreſted upon a new trial granted. But this rule doth not hold, in the caſe of a verdict on an iſſue directed out of chancery; becauſe it is not uſual to enter judgment in ſuch caſe; and the decree of the court of chancery is equally proof that the verdict was ſatisfactory, and ſtands in force. *Id.* 21.

A decree in chancery may be given in evidence between the ſame parties, or all claiming under them; for their judgments muſt be of authority in theſe caſes, where the law gives them a juriſdiction: for it would be very abſurd, that the law ſhould give them a juriſdiction, and yet not ſuffer what is done by force of that juriſdiction to be full proof. *Theory of Evid.* 36, 37.

And note, wherever a matter comes to be tried in a collateral way, the decree, ſentence, or judgment of any court, having competent juriſdiction, is concluſive evidence of ſuch matter: and in caſe the determination is final in the court, of which it is a decree, ſentence, or judgment, ſuch decree, ſentence, or judgment

judgment will be concluſive in any other court, having concurrent juriſdiction. *Id.* 37.

A deed was offered to be produced, which bore date 38 years before, without proving that the witneſſes were dead. And allowed by the court. They ſaid that in general 40 years was allowed to be the rule; but the courts never tied themſelves up ſtrictly to that rule, but 39, 38, nay 35, have been allowed. 1 *Barnard.* 348.

Upon a trial at bar, a deed was offered in evidence, executed 36 years ago, without proving the hands; which was oppoſed by the other ſide; but admitted by the court, who ſaid, there was no fixed rule about it, but that it had often been allowed, where a deed was but 25 or 30 years old. 12 *Viner.* 57.

In caſes where writings have been loſt by burning of houſes, by rebellion, or when robbers have deſtroyed them, or the like; the law in ſuch caſes of neceſſity, allows them to be proved by witneſſes *Jenk.* 19. *Wood. b.* 4. *c.* 4.

If a man deſtroys a thing that is deſigned to be evidence againſt himſelf, a ſmall matter will ſupply it; and therefore the defendant having torn his own note ſigned by him, a copy ſworn was admitted to be good evidence to prove it, *Ld. Raym.* 731.

Where the defendant himſelf has the deed which concerns the land in queſtion, and refuſes (after notice) to produce it; a copy thereof will be permitted to be given in evidence, on its being proved to be a true copy. And if the party has no copy, he may produce an abſtract, nay even give parol evidence of the contents; becauſe in ſuch caſe it may be impoſſible to give better evidence. In civil cauſes, the court will ſometimes oblige parties to produce evidence which may prove againſt themſelves; or leave the refuſal to do it (after proper notice) as a ſtrong preſumption, to the jury. The court will do it, in many caſes, under particular circumſtances, by rule before the trial; eſpecially, if the party from whom the production is wanted applies for a favour. But in a *criminal* or *penal* cauſe, the defendant is never forced to produce any evidence, though he ſhould hold it in his hands in court. *Theory of Evid.* 54. *Burrow. Manſf.* 2489.

Where an original note of hand is loſt, and a copy of it is offered in evidence to ſerve any particular purpoſe in a cauſe; ſufficient probability muſt be ſhewed to ſatisfy the court, that the original note was genuine, before the copy will be allowed to be read. 1 *Atk.* 446.

But by lord *Hardwicke*, Ap. 16, 1740. On exceptions to a maſter's report. Where a rent charge is granted by deed, and

and the deed happens to be loſt, the plaintiff cannot read a copy in evidence at law, but muſt either ſet up a preſcriptive title to the rent, from a conſtant and uninterrupted payment, or he muſt bring his bill in equity, to be relieved againſt the accident of the original's being loſt. And the ſame rule holds in caſe of a bond; for though an hundred witneſſes could prove the ſubſtance of it, yet it is not ſufficient at law, for the plaintiff muſt declare upon it, ſetting forth that he produceth it in court. 2 *Atk.* 61.

An indenture to guide the uſes of a common recovery, was offered in evidence, but the ſeals were torn off; yet it being proved to have been done by a little boy, it was allowed to be read. *Palm.* 402. *See* 11 *Mod.* 11.

If upon a collateral iſſue, it is to be proved, that ſuch a one was juſtice of the peace, or the like; common reputation is ſufficient proof, without ſhewing the commiſſion. *Tr. per. pais.* 347.

The copy of the probate of a will certified by the clerk of the court, may be given in evidence in any court of record in this commonwealth. *V. l. p.* 173.

For the rules of admitting foreign deeds as evidence, See *Virginia laws, p.* 168. of the *Reviſed Code.*

And generally, wherever an original is of a public nature, and would be evidence if produced, an immediate ſworn copy thereof will be evidence, as a copy of a bargain and ſale, of a deed inrolled, and the like; but where an original is of a private nature, a copy is not evidence, unleſs the original is loſt or deſtroyed. 3 *Salk.* 154.

On a warrant to a conſtable to diſtrain goods by virtue of an act of Aſſembly; the conſtable makes diſtreſs, and returns the overplus to the offender, but keeps the warrant. Reſolved, that a copy of the warrant in this caſe will be good evidence. 6 *Mod.* 83.

An inquiſition *poſt mortem* is evidence, but not concluſive, 2 *T. Jones.* 224.

The entry of the names of perſons in a church-book either for marriages or births is evidence, but not concluſive evidence of the marriage or birth of any perſons, unleſs the identity of the perſon (by ſuch entries intended) is fully proved, and alſo ſtrenghtened with circumſtances, as cohabitation, the allowance of the parties themſelves, and the like. 12 *Vin.* 89.

The indorſement on a bond by the obligee, of payment of intereſt; was allowed to be given in evidence by the adminiſtrator, to take off the preſumption from the length of time. *L. Raym.* 1371.—But if the indorſement is made after the preſumption has taken place it is not evidence. *Stra.* 827. A.

A ſhop-book was allowed for evidence, it being proved that the ſervant that writ the book was dead, and this was his hand, and he accuſtomed to make the entries, and no proof was required of the delivery of the goods; and *Holt.* Ch. J. ſaid it was as good evidence as the proof of a witneſs's hand to an obligation; and he held, that tho' the ſtatute of the 7 J. ſays, a ſhop-book ſhall not be evidence after the year, yet it is not of itſelf evidence within the year 2 *Salk.* 690.

A man's book of accounts is no evidence for the owner of the book, but for the adverſe party; for his book cannot be of better credit than his oath, which would not ſerve in his own caſe. *Tr. per pais.* 348.

A copy of an inſcription on a grave ſtone, hath been allowed to be given in evidence.

The examination of an Almanack, that ſuch a day of the month was *Sunday*, was ruled to be ſufficient; and that a trial of this by a jury is not neceſſary, altho' it is a matter of fact. *Cro. Eliz* 227.

An Almanack wherein the father had writ the nativity of his ſon, was allowed as evidence to prove the non age of his ſon. *Raym.* 84.

A general hiſtory may be read to prove a matter relating to the country in general, but not a particular one. 1 *Salk.* 281.

It ſeems to have been generally holden, ſince the reverſal of the attainder of *Algernon Sydney*, that ſimilitude of hands is not evidence in any criminal caſe, whether capital or not capital. 2 *Hawk.* 431. *L. Raym.* 39.

And generally, it is ſaid, that ſimilitude of hands is no evidence; but ſaying that he was well acquainted with his writing, and knew it to be the party's is evidence. 12 *Viner.* 204.—*But ſee Buller's Niſi prius* 225.

And in general caſes, the witneſs ſhould have gained his knowledge from having ſeen the party write; but under ſome circumſtances that is not neceſſary: as where the hand writing to be proved is of a perſon reſiding abroad, one who has frequently received letters from him in a courſe of correſpondence, would be admitted to prove it, tho' he had never ſeen him write. So where the antiquity of the writing makes it impoſſible for any living witneſs to ſwear he ever ſaw the party write; as where a parſon's book was produced to prove a modus, the parſon having been long dead, a witneſs who had examined the pariſh books, in which was the ſame parſon's name, was permitted to ſwear to the ſimilitude of the hand writing, for it was the beſt evidence in the nature of the thing, for the pariſh books

were

were not in the plaintiff's power to produce. *Theory of Evid.* 25. 26.—1 *Blacks Rep.* 384.

On the trial of an iſſue out of chancery, before lord *Manſfield*, where it was diſputed, whether the name of one *William Jones*, ſubſcribed to a declaration of truſt, was genuine; and, to prove the hand writing forged, a witneſs was produced, who had frequently correſponded with *Jones*, but had never ſeen him write: Lord *Manſfield*, upon debate, held him to be a good evidence, and his teſtimony accordingly was admitted, *Black. Rep.* 384.

Parol evidence ſhall not be admitted to annul, or ſubſtantially vary a written agreement. 3 *Wils.* 275.—2 *Blacks Rep.* 1249. 3 *Term. Rep.* 590. *Str.* 794. *Str.* 1261.

But where the meaning of a written inſtrument is ambiguous, parol evidence may ſometimes be admitted to explain it. 3 *Wils.* 276.—*Cowp.* 53. 3 *Term. Rep.* 473. *Id.* 474. *Id.* 609.

III. Of the evidence of witneſſes.

See the obſervations under title '*Confeſſion*,' as to the admiſſibility of a man's own confeſſion, in criminal cafes.

There are many circumſtances that diſable a juror, that are not ſufficient exceptions againſt a witneſs: Thus the exception of kindred is a good cauſe of challenge againſt a juror, but not againſt a witneſs; therefore the father may be a competent witneſs for or againſt his ſon, or the ſon for or againſt his father. Theſe and the like exceptions may be to the credit or credibility of the witneſs, but are not exceptions againſt his competency. 2 *H. H.* 276.

For, the exceptions to a witneſs are of two kinds. 1. Exceptions to the credit of the witneſs, which do not at all diſable him from being ſworn, but yet may blemiſh the credibility of his teſtimony; and in ſuch caſe the witneſs is to be allowed, but the credit of his teſtimony is left to the jury. 2. Exceptions to the competency of the witneſs, which do exclude him from giving his teſtimony, and of theſe exceptions the court is the judge. 2 *H. H.* 276, 277.

It ſeems agreed, that an attainder, judgment, or conviction of treaſon, felony, piracy, perjury, or forgery, and alſo a judgment in attaint for giving a falſe verdict, or in conſpiracy at the ſuit of the commonwealth, and alſo judgment for any heinous crime to ſtand on the pillory, or to be whipped or branded, are good cauſes of exception againſt a witneſs, while they continue in force. 2 *Hawk.* 432. *Theory of Evid.* 107.

In the caſe of *Pendock* and *Mackender*, the queſtion was, whether a perſon convicted and whipped for petit larceny ſhall be allowed to be a witneſs. And the court were clearly of opinion, that he ſhall not; and laid it down as a rule, that it is the crime that creates the infamy, and not the puniſhment for it. Petit larceny is felony; and there is no caſe where a perſon convicted thereof was ever admitted to be a witneſs. 2 *Wilſon.* 18.

But it is agreed, that no ſuch conviction or judgment can be made uſe of to this purpoſe, unleſs the record be actually produced in court. 2 *Haw.* 433.

Alſo, it is a general rule, that a witneſs ſhall not be aſked any queſtion, the anſwering to which might oblige him to accuſe himſelf of a crime; and that his credit is to be impeached only by general accounts of his character and reputation, and not by proofs of particular crimes, whereof he never was convicted. 2 *Haw.* 433.

And a man ſhall not be permitted to ſwear, that he was ſuborned and perjured. *St. Tr. V.* 3 427.

And lord *Coke* ſays, a witneſs alleging his own infamy or turpitude, is not to be heard. 4 *Inſt.* 279.

Thus a wife was diſallowed to be a witneſs to prove her huſband had no acceſs to her in a caſe of baſtardy. *Seſs. Caſes. V.* 2 175.

It ſeems clear at this day, that outlawry in a perſonal action is not a good exception againſt a witneſs, as it is againſt a juror. 2 *Haw.* 433.

A perſon convicted of felony, who is admitted to his clergy, and burnt in the hand, is thereby re-enabled to be a witneſs. 2 *Haw.* 433.—*V. l. p.* 288.

And it ſeems agreed, that the executive's pardon of treaſon, or felony, after a conviction or attainder, reſtores the party to his credit. 2 *Haw.* 433

But a perſon convicted of perjury ſhall never be a witneſs. *V. l. p.* 289.

Want of diſcretion is a good exception againſt a witneſs; on which account alone it ſeems, that an infant may be excepted againſt. 2 *Haw.* 434.

But if an infant be of the age of 14 years, he is as to this purpoſe of the age of diſcretion, to be ſworn as a witneſs; but if under that age, yet if it appear that he hath a competent diſcretion, he may be ſworn. 2 *H. H.* 278.

And in many caſes an infant of tender years may be examined, where the exigence of the caſe requires it; which poſſibly, being fortified with concurrent evidences, which may be of

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some weight; especially in cases of rape, buggery, and such crimes as are practised upon children. 2 *H. H.* 279. 284.

But in no case shall an infant be admitted as evidence without oath *Str.* 700. 1 *Atkyns* 29.

Infancy is to be tried by inspection, and if upon inspection the court have any doubt of the age of the party, it may proceed to take proofs of the fact; and, particularly, may examine the infant himself, upon an oath of *voir dire*, (*to speak the truth,*) that is to make true answers to such questions as the court shall demand of him: or the court may examine his mother, his godfather and the like. 3 *Blacks Com.* 332.

It seems an unconverted rule in all cases, that it is a good exception against a witness that he is either to be a gainer or loser by the event of the cause, whether such advantage be direct and immediate, or consequential only. 2 *Haw* 433.

Thus in an information upon the statute of usury, the party to the usurious contract shall not be admitted to be a witness against the usurer, for in effect he should be witness in his own cause, and should avoid his own bonds and assurances, and discharge himself of the money borrowed. 1 *Inst.* 6.

Thus also an attorney ought not to be examined against his client, because he is obliged to keep his secrets; but of his own knowledge before retainer, he may be examined as a witness, if served with a subpœna. *Wood. b.* 4. *c.* 4.

So, a *bail* cannot be a witness for his *principal.* 1 *Term. Rep.* 64.

A factor who received a commission on the sale of the goods was allowed to be a good witness to prove their delivery. 3 *Wils.* 10.

A person interested, may be restored to his competency, by parting with his interest; before he is sworn, by a release &c. *See* 2 *Salk* 691. 1 *Burr.* 423. 3 *Term. Rep.* 27. *Doug.* 134. 1 *Blacks Rep.* 365.

But upon an indictment for battery, or the like, the party grieved may be a witness against the defendant, because the prosecution is at the suit of the commonwealth. *Wood. b.* 4. *c.* 5.

And in many criminal cases, from the necessity of the thing, interested persons are allowed as witnesses. As where the owner prosecutes an indictment of felony for stolen goods, he is concerned in interest; for he will be intitled to restitution: and yet his evidence is admitted &c.—*See* 10. *Mod.* 193.

Also it seems agreed, that it is no good exception against a witness, that he has a maintenance from the commonwealth; for every one may maintain his own witnesses. 2 *Haw.* 434.

A truſtee may be a witneſs, if he hath releaſed his truſt; but not if he hath conveyed it over. *Sid.* 315.

An heir at law may be a witneſs concerning the title to the land, but the remainder man cannot, for he hath a preſent intereſt, but the heirſhip is a mere contingency. 1 *Salk.* 283.

A witneſs laying a wager in the cauſe, is no hindrance to his being a witneſs; for the other has an intereſt in his evidence, which he cannot deprive him of. *Farell* 31. *Str.* 652.

If a perſon apprehends himſelf to be intereſted, tho' in ſtrictneſs of law he is not, yet he ought not to be ſworn; as where the witneſs for the plaintiff apprehended that if the plaintiff ſhould recover, he would remit a claim of ſome money which he (the plaintiff) had upon this witneſs; but if he ſhould not recover, he would not remit it; although in ſtrictneſs of law his recovering or not recovering in that caſe, would not alter the claim; or as in caſe where the witneſs owned himſelf to be under honorary, though not under a binding engagement to pay the coſts. *Str.* 129.

If a man hath been examined on interrogatories, being at the time diſintereſted, and afterwards becomes intereſted, his depoſition may be given in evidence; becauſe his evidence muſt be taken as it ſtood at the time of his examination. So if a witneſs to a bond becomes afterwards repreſentative of the obligee, his hand muſt be proved in like manner as if he were dead. 2 *Atk* 615. 2 *Vezey.* 44.

Intereſted witneſſes may be examined upon a *voir dire*, if ſuſpected to be ſecretly concerned in the event; or their intereſt may be proved in court. 3 *Blacks Com.* 370.

It ſeems agreed, that the huſband and wife being as one, and the ſame perſon in affection and intereſt, can no more give evidence for one another, in any caſe whatſoever, than for themſelves; and that regularly the one ſhall not be admitted to give evidence *againſt* the other, by reaſon of the implacable diſſention which might be cauſed by it, and the great danger of perjury from taking the oaths of perſons under ſo great a bias, and the extreme hardſhips of the caſe. Yet ſome exceptions have been allowed in caſes of evident neceſſity; as in the lord *Audley's* caſe, who held his wife, while his ſervant by his command ravithed her; or where a man is indicted on a forcible marriage on the ſtatute; or where either a huſband or wife have cauſe to demand ſureties of the peace, againſt the other. 2 *Hawk.* 431, 432.

On

On an indictment for bigamy, the firſt wife cannot be a witneſs, but the ſecond may; for the ſecond marriage is void. *Bull. N. P.* 287.

So on an indictment againſt the huſband for an aſſault on the wife, ſhe may be a witneſs. *Stra.* 633.

In an action againſt the huſband for his wife's wedding clothes; the wife's mother was ſuffered to give evidence that they were bought on the credit of her own huſband. *Str.* 5[illegible].

So, the declarations of the wife, as to the price for nurſing the defendant's child, have been given in evidence to charge the huſband; ſuch matters being uſually tranſacted by women. *Stra.* 527.—*But this caſe has been denied to be law. See Eppingaſt's N. P.* 722.

In an action for wages earned by the wife of the plaintiff from the defendant's inteſtate, the wife's acknowledgment of the receipt of 20*l.* was not allowed to be given in evidence againſt her huſband. *Stra.* 1092.

It ſeems agreed, that it is no exception againſt a perſon giving evidence either for or againſt a priſoner, that he is one of the judges or jurors who are to try him. 2 *Haw.* 432.

But where a juror is called upon to give his evidence, he ought to give it upon oath openly in court, and not be examined privately by his companions. *Bac. Abr. Evid. A.* 2—*V. l. p.* 108.

It hath been long ſettled, that it is no exception againſt a witneſs, that he hath confeſſed himſelf guilty of the ſame crime, if he hath not been indicted for it; for if no accomplices were to be admitted as witneſſes, it would be generally impoſſible to find evidence to convict the greateſt offender. 2 *Haw.* 432.

'But an approver ſhall in no caſe be admitted.' *V. l. p.* 113.

If any perſon be arbitrarily made a defendant to prevent his teſtimony, and nothing be proved againſt him, he may be a witneſs for the other defendants. *Bul. N. P.* 245.—2 *Hawk.* 432.

It hath been adjudged, that where three perſons are ſued in three ſeveral actions on the ſtatute for a ſuppoſed perjury in their evidence concerning the ſame thing, they may be good witneſſes in ſuch actions for one another. 2 *Haw.* 432.

'No negro, mulatto or *Indian* ſhall be admitted to give evi'dence, but againſt or between negroes, mulattoes, or indians. *V. l. p.* 289.

There were two witneſſes to a deed, and one of them was blind. It was ruled by *Holt* chief juſtice, that ſuch deed might be proved by the other witneſs, and read; or might be proved, without proving that this blind witneſs is dead; or without having

ing him at the trial, proving only his hand. *L. Raym.* 734. *Wood* and *Drury.*

If a witneſs is beyond the ſea, it is uſual to prove his hand, and that he is beyond the ſea. 12 *Viner.* 224.

There were two witneſſes to a bond, one in *Africa*; and the other in BEDLAM, mad: On an order to prove an exhibit *viva voce* in chancery, a witneſs proved theſe facts, and their hands to the bond as if dead. 12 *Viner.* 224.

If a witneſs to a deed is dead, it is not ſufficient to prove his hand writing, but it muſt be proved alſo that he is dead. 2 *Atk.* 48.

And where a perſon has lived abroad ſome years, after atteſting a deed, there muſt be ſtrict proof of his death; otherwiſe it is, where the witneſs has lived conſtantly in the country, from the time of ſubſcribing his name to the day of his death; for in that caſe, a ſlight evidence of his death is ſufficient, eſpecially where the perſon who proves his hand knew him intimately, and ſwears that he believes him dead. *Id.*

But where the witneſs is dead, it is ſufficient to prove the witneſs's hand, without proving the hand of the party. 12 *Viner.* 224.

The ſayings of a dead man are not to be given in evidence to prove a particular fact, they are only to be admitted in proof of general uſages and cuſtoms; but as for a particular fact, lying in the knowledge of a particular perſon, by his death the evidence is loſt. *St. Tr. V.* 5 456

And it hath been agreed, that the evidence given by a witneſs at one trial, cannot in the ordinary courſe of juſtice be made uſe againſt a defendant, on the death of ſuch witneſs at another trial. 2 *Haw.* 430.—But this muſt be underſtood in criminal caſes, for in civil actions the practice is otherwiſe. See *Onſl. N. P.* 231.

In the caſe of murder, what the deceaſed declared after the wound given, may be given in evidence. 12 *Viner.* 111.

But where ſuch declaration is reduced into writing, the writing itſelf muſt be produced, and not evidence thereof given *viva voce*. *Id.* 119.

It is a general rule that hearſay is no evidence; for no evidence is to be admitted but what is upon oath; for if the firſt ſpeech was without oath, another oath that there was ſuch ſpeech, makes it no more than a bare ſpeaking, and ſo of no value in a court of juſtice; and beſides, the adverſe party had no opportunity of a croſs examination; and if the witneſs is living, what he has been heard to ſay is not the beſt evidence that the nature of

of the thing will admit. But tho' hearſay ought not to be allowed as direct evidence, yet it may be allowed in corroboration of a witneſs's teſtimony, to ſhew that he affirmed the ſame thing before on other occaſions, and that he is ſtill conſtant to himſelf. So where the iſſue is on the legitimacy of a perſon, it ſeems the practice to admit evidence of what the parents have been heard to ſay, either as to their being or not being married, for the preſumption ariſing from the cohabitation is either ſtrengthened or deſtroyed by ſuch declaration, which altho' not to be given in evidence directly, yet they may be aſſigned by the witneſs as a reaſon for his belief one way or other. So hearſay is good evidence to prove who was a man's grand-father, when he married, what children he had, and the like, of which it is not reaſonable to preſume that there is better evidence. So to prove that a man's father or other kinſman beyond the ſea is dead, the common reputation and belief of it in the family gives credit to ſuch evidence; and for a ſtranger it would be good evidence, if a perſon ſwore that a brother or other near relation told him ſo, which relation is dead. So in queſtions of preſcription, it is allowable to give hearſay evidence, in order to prove general reputation; and where the iſſue was of a right to a way over the plaintiff's cloſe, the defendants were admitted to give evidence of a converſation between perſons not intereſted, then dead, wherein the right to the way was agreed. *Theory of Evid.* III. 112.

By *V.* 1. (11. *R. Cond.* 1786. *c.* 26) *p.* 36. it is enacted, 'That any perſon abſenting himſelf beyond ſea, or elſewhere, for 'ſeven years ſucceſſively, ſhall be preſumed to be dead, in any 'caſe wherein his death ſhall come in queſtion, unleſs proof be 'made that he was alive within that time. But an eſtate reco-'vered in any ſuch caſe, if in a ſubſequent action or ſuit, the 'perſon preſumed to be dead, ſhall be proved to be living, ſhall 'be reſtored to him who ſhall have been evicted; and he may 'moreover demand and recover the rents and profits of the eſ-'tate, during ſuch time as he ſhall have been deprived thereof, 'with lawful intereſt.'

IV. Of process to cause witnesses to appear.

The compulſory means to bring in witneſſes, are of two kinds. 1. By proceſs of *ſubpœna* iſſued in the commonwealth's name, by the juſtices, or others, where the trial is to be. 2. Which is the more ordinary and more effectual means (in criminal caſes) the juſtices who commit the offender may at that time, or at any time after, and before the trial, bind over the witneſſes

witneſſes to appear at court, and in caſe of their refuſal either to come, or to be bound over, may commit them for their contempt in ſuch refuſal. 2 *H. H.* 282,

Where a witneſs is a priſoner in execution for debt, he muſt be brought up by *habeas corpus ad teſtificandum*, to give his evidence. *St Tr. V.* 2 580. *V.* 4. 37.

Witneſſes are privileged from arreſt, by the laws of *Virginia*. See '*Arreſt.*'

An *attachment* was granted againſt a witneſs for failing to attend, after having been ſerved with a ſubpœna, and receiving one guinea, and the promiſe of a guinea a day, during his attendance, and his charges paid; altho' the party for whom he was ſummoned, had his remedy, by action, on the ſtatute of *Eliz. L. Raym.* 1529. *Wyat & Winkford.*

But, to ground an attachment the ſervice of the ſubpœna muſt be on the *perſon* of the witneſs, and not on his ſervant:—And by *Lee C. J.* it hath been ſolemnly determined, that you muſt not only have an affidavit of tendering the real fees, but likewiſe of a tender of reaſonable charges, to ground an attachment. *Cas. Hardw.* 313. *Stra.* 1054 *Small & Whitmill.*

So where a ſum was tendered to a witneſs, which, in the opinion of the court, was too ſmall, an attachment was refuſed. *Stra.* 1150.—*Chamion & Poynton.*

So, where a witneſs was ſubpœnaed at home, but no tender of fees made, who afterwards attended at court, but refuſed to be ſworn, altho' he was there tendered his fees; the court refuſed an attachment, ſaying, that a witneſs improperly ſubpœnaed was to be conſidered as a ſtander by, and it was no contempt for a ſtander by to refuſe to be ſworn. *Blacks. Rep.* 36. *Boodle & Johnſon*

And by the court, in the caſe of *Hammond* and *Steward*, the witneſſes ought to have a reaſonable time to put their affairs in order, that their attendance upon the court may be as little prejudice to themſelves as poſſible. *Str.* 510.

In criminal caſes, if a witneſs hath been bound over, and do not appear, he ſhall forfeit his recognizance.

V. Of the manner of giving evidence.

He who affirms the matter in iſſue, whether plaintiff or defendant, ought to begin to give evidence. *Lit.* 36.

The evidence both for and againſt a priſoner, ought to be upon oath.

But this is not always neceſſary; and may now be diſpenſed

with

with, in favour of thoſe whoſe religious ſcruples will not permit them to take an oath. *See title 'Oaths.'*

It is no ſatisfaction for a witneſs to ſay, that he thinks or perſuades himſelf; and this for two reaſons; by *Coke* chief juſtice: 1. Becauſe the judge is to give abſolute ſentence, and ought to have more ground than thinking. 2. Becauſe judges, as judges, are always to give judgment, *ſecundum allegata et probata*, notwithſtanding that private perſons think otherwiſe. *Dyer.* 53.

The court may indulge a priſoner in examining the witneſſes apart, but he cannot demand it of right. *St. Tr. V.* 4. 9.

In caſes of life, no evidence is to be given againſt a priſoner but in his preſence. 2 *Haw.* 428.

In every iſſue, the affirmative is to be proved. A negative cannot regularly be proved; and therefore it is ſufficient to deny what is affirmed, until it be proved; but when the affirmative is proved, the other ſide may contest it with oppoſite proofs, for this is not properly the proof of a negative, but the proof of ſome propoſition totally inconſiſtent with what is affirmed: as if the defendant be charged with a treſpaſs, he need only make a general denial of the fact, and if the fact be proved, then he may prove a propoſition inconſiſtent with the charge, as that he was at another place at the time, or the like. *Theory of Evid.* 116. 117.

But to this rule there is an exception of ſuch caſes, where the law preſumes the affirmative contained in the iſſue. Therefore in an information againſt lord *Hallifax* for refuſing to deliver up the rolls of the auditor of the exchequer: the court of exchequer put the plaintiff upon proving the negative, namely, that he did not deliver them; for a perſon ſhall be preſumed duly to execute his office, till the contrary appear. *Id.* 117.

A priſoner may not call witneſſes to diſprove what his own witneſſes have ſworn. *St. Tr. V.* 4. 764. 792.

A witneſs ſhall not be permitted to read his evidence, but he may look upon his notes to refreſh his memory. *St. Tr. V.* 445.

A witneſs ſhall not be croſs examined, till he has gone thro' the evidence for the party on whoſe ſide he was produced. *St. Tr. V.* 2. 792.

And it ſeems agreed, that where a witneſs at one trial varies from his own evicence at another, in relation to the ſame matter, ſuch variance may be given in evidence to invalidate his teſtimony at the ſecond trial. 2 *Haw.* 430.

The counſel of that party which doth begin to maintain the iſſue, ought to conclude. *Tri. p. pais.* 220.

If,

If, in the courſe of the trial, either party offer evidence which is thought to be inadmiſſible by the other, and the court do notwithſtanding admit it, the party who moved the court to reject the evidence, may *except to their opinion.* See *Bull. N. P.* 314.

But, if on the evidence given a doubt in law ariſes, or either party conſiders it as inſufficient to ſupport the iſſue joined, he may *demur to the evidence*, and thus arreſt the cauſe from the cognizance of the jury, (except ſo far as to aſſeſs conditional damages) and ſubmit it to the court, on the law ariſing from the facts ſtated in the demurrer. *See Bull. N. P.* 313. *Hargrave's Coke Littleton* 155. *b. note* (5)

As *bills of exceptions*, and *demurrers to evidence*, frequently occur in practice, it is preſumed that the following precedents will be a proper concluſion to this title.

Bill of Exceptions.

A. P. *v.* B. D. } In *debt, (caſe* &c. as the action is.)

Be it remembered that on the trial of this cauſe, the counſel for the plaintiff (or defendant, as the caſe may be) *to maintain and prove the iſſue, on his part gave in evidence, That &c.* (here ſet out the evidence offered:) *To which evidence the defendant (or plaintiff,* as the caſe may be) *by his counſel, objected as improper to go to the jury; whereupon the matter was referred to the court; who being of opinion that the ſaid evidence, was proper to go to the jury, the defendant (or plaintiff,* as the caſe may be) *by his counſel, excepted to ſuch opinion, and prayed that theſe his exceptions might be ſealed and inrolled, purſuant to the act of the General Aſſembly in that caſe made and provided; and it is accordingly done.*

Theſe exceptions muſt be ſigned by a majority of the juſtices preſent. *See V. l. p.* 49.

Bills of exceptions may alſo be taken for a miſdirection in the judges or juſtices. See *Hargrave's Coke Littleton* 156. 3 *Blacks* 372

This bill is to prevent the precipitancy of the judges, and ought to be allowed in all courts, and in all places of pleadings, and may be put in at any time before the jury have given their verdict. *Trials per pais.* 229.

It muſt be tendered at the trial;—and reduced to writing while the thing is tranſacting. *Bull. N. P.* 315.

If a judge allow the matter to be evidence, but not concluſive, and ſo refer it to the jury, no bill of exception will lie. *T. Raym.* 404, 405.

It

It ought to be upon some point of law, either in admitting or denying of evidence, or a challenge, or some matter of law arising upon facts not denied, in which either party is over-ruled by the court. *Bull. N. P.* 316.

If a bill be tendered, and the exceptions in it are truly stated, the judges ought to set their seals to it; but if the bill contain matters false, or untruly stated, or matters wherein the party was not over-ruled, they are not obliged to seal it. *Bull. N. P.* 316. 3 *Blacks* 372.

If the judge refuses to sign the bill, a writ on the statute may be awarded against him, commanding him to do it. If he returns that the facts are not truly stated, when they are, an action for a false return will lie, and if they are found true, damages will be given, and a peremptory writ commanding the same 2 *Inst.* 426.

The party grieved may have a writ of error, and may assign error upon that bill sealed, and also in the record, or in one of them at his pleasure. *F. N. B.* 21.

A bill of exceptions has been refused in criminal cases. 1 *Lev.* 68. *Keyling.* 15. 1 *Sid.* 84.—But it has been allowed in an indictment for a trespass. 1 *Leon.* 5.—Also in an information in nature of a *quo warranto*. 1 *Vent.* 366.

Demurrer to evidence.

A. P. } In *debt* (*case* &c. as the action is.)
v.
B. D. }

The plaintiff, by his counsel, in this cause, produces in evidence to the jury, to prove and maintain the issue joined on his part, That &c. (here state the evidence) *And the said defendant says that the aforesaid matter to the jurors aforesaid, in form aforesaid, shewn in evidence by the said plaintiff, is not sufficient in law to maintain the said issue joined, on the part of the said plaintiff, and that he the said defendant to the matter aforesaid shewn in evidence, hath no necessity, nor is he obliged by the laws of the land to answer; and this he is ready to verify: Wherefore for want of sufficient matter in that behalf shewn in evidence to the jury aforesaid, the said defendant prays judgment, and that the jurors aforesaid, be discharged from giving any verdict upon the said issue &c. and that the plaintiff be barred of having a verdict &c.*

Joinder in Demurrer.

And the said plaintiff saith, that he hath given sufficient matter in evidence, to which the defendant hath given no answer &c.

and

and demand judgment, and that the jury be discharged, and that the defendant be convicted &c.

A demurrer to evidence admits the truth of all facts, which, upon the evidence stated, *might* be found by the jury in favour of the party offering the evidence *Doug.* 133.

The judgment on a demurrer to evidence is, *that the evidence was or was not sufficient to maintain the issue. Doug.* 223. *Bull. N. P.* 313.

When *evidence* is demurred to; the jury may assess the *damages* conditionally —If they do not, and judgment on the demurrer is given for the plaintiff, there shall be a writ of enquiry —And after the execution thereof the defendant may take advantage of any objection to the declaration, by moving in arrest of judgment, or bring a writ of error. *Doug.* 223.

If one demur properly the other ought to join. *Bull. N. P.* 313. EXAMINATION, *See* 'CRIMINALS.'

EXECUTION.

UNDER this title I shall only consider the execution of a criminal: So much of executions in civil cases as comes within the plan of this publication is treated of under title '*Sheriffs.*'

Where a person attainted hath been at large, after his attainder, and afterwards is brought into court, and demanded why execution should not be awarded against him, if he deny that he is the same person, it shall be immediately tried by a jury returned for that purpose 2 *Hawk.* 463.

The court may command execution to be done without any writ. *Ibid.*

In fixed and stated judgments the law makes no distinction between a common and an ordinary case, and one attended with extraordinary circumstances; for which reason it hath been adjudged that the court could not order the hand to be cut off, or the body to be hung in chains. 2 *Hawk.* 413.

But the execution of the judgment may be pardoned in part by the executive; as where the judgment is hanging, beheading, embowelling, and the like; all may be pardoned but the beheading, whereby the judgment is not altered, but part of it remitted 2 *H. H.* 412.

It is clear that if a man condemned to be hanged come to life, he shall be hanged again, for the judgment was not executed till he was dead. 2 *Hawk.* 463.

Extortion

IT is said that extortion in a large sense signifies any oppression under colour of right; but that in a strict sense, it signifies the taking of money by any officer, by colour of his office, either where none at all is due, or not so much is due, or where it is not yet due. 1 *Hawk.* 170.

Justices of the peace are bound by their oath of office, to take nothing for their official proceedings. And generally no public officer in this commonwealth, shall take any other fee, or reward for doing any thing relating to his office, than some law in force gives him; it hath been determined that officers doing otherwise are guilty of extortion. *Dalt. c* 41.

It has often been resolved, that a promise to pay them money for doing of any thing, which the law will not suffer them to take any thing for, is merely void. 1 *Hawk.* 170.

Punishment.

At the common law, this offence is severely punishable at the suit of the commonwealth, by fine and imprisonment, and also by removal from the office in the execution whereof it was committed. 1 *Hawk.* 171.

The punishment of this offence in certain officers is declared by *V. l.* (17 *R. Cond.* 1792) *p.* 63. which enacts, 'That no 'treasurer, keeper of any public seal, councillor of state, 'counsel for the commonwealth, judge, clerk of the peace, 'sheriff, coroner, escheator, nor any officer of the common-'wealth, shall take any manner of reward for doing his office, 'other than is allowed by law. And he that doth, shall pay to 'the party grieved, the treble value of that he hath received, 'shall be amerced and imprisoned at the discretion of a jury, and 'discharged from his office forever. Any person may sue for 'himself and the commonwealth, and shall have the third part 'of the amercement.

'2. A candidate for the General Assembly, who shall di-'rectly, or indirectly give or agree, to give any elector, or pre-'tended elector, money, meat, drink, or other reward, in or-'der to be elected, or for having been elected for any county '&c. shall be expelled, and rendered incapable of being elected 'for 3 years.

'3. A candidate for Congress, or any person in his behalf, 'being guilty of the above offence, forfeits 1500 dollars, reco-'verable by action of debt, to the use of any person who will 'sue.

An indictment will lie against the offender, notwithstanding the special penalty provided by this act. *Dav. Ch.* 71.

(A)

(A) Indictment againſt a coroner for extortion.

, county to wit.

The jurors for the commonwealth &c. upon their oath preſent, that W N, *late of the pariſh of* S, *in the county of gent. (the ſaid pariſh of* S, *being the uſual place of abode of him the ſaid* W N,*) on the day of in the year of the commonwealth &c. then being one of the coroners of the ſaid commonwealth for the county of at the pariſh aforeſaid, in the county aforeſaid, by colour of his ſaid office, unlawfully and unjuſtly did demand, extort, receive, and take of and from one* R S, *the ſum of dollars of lawful money of this commonwealth, for and as his fee, for executing and doing of his office aforeſaid, to wit, upon the view of the body of one* J C, *late of in the ſaid county of glazier, who at the pariſh of* S, *aforeſaid, in the county aforeſaid, on the day and year above mentioned, was ſlain by miſadventure, and there lay dead, in contempt of the laws of this commonwealth, to the great damage of the ſaid* R S, *againſt the form of the ſtatutes in ſuch caſe made and provided, and againſt the peace and dignity of the commonwealth.*

FALSE NEWS, (*See* BARRATRY)
FALSE TOKEN, (*See* CHEAT)
FELO DE SE, (*See* HOMICIDE)

FELONY, MISPRISION OF FELONY, AND THEFTBOTE.

I. Felony.

SO various are the derivations of the word *felony*, that it would be an uſeleſs taſk to undertake a recital of the different opinions of writers on the ſubject. Suffice it to obſerve, in the words of judge *Blackſtone*, that '*Felony in the general acceptation of the Engliſh law, compriſes every ſpecies of crime, which occaſioned at common law the forfeiture of lands or goods.*' 4 *Blacks.* 95.

II. Miſpriſion of felony.

Miſpriſion of felony (from the *French* word *meſpris*, a neglect or contempt, (3 *Inſt.* 36.) is the concealing of a felony which

a man knows, but never conſented to: for if he conſented, he is either a principal or acceſſary in the felony, and conſequently guilty of miſpriſion of felony and more. 1 *H. H.* 374.

For it is ſaid, that every felony includes miſpriſion of felony, and may be proceeded againſt as a miſpriſion only. 1 *Haw.* 125.

If any perſon will ſave himſelf from the crime of miſpriſion, he muſt diſcover the offence to a magiſtrate, with all convenient ſpeed that he can. 3 *Inſt.* 140.

Miſpriſion in a larger ſenſe, is uſed to ſignify every conſiderable miſdemeanor, which hath not a certain name given it by the law. 2 *Burn. Juſt.* 172.

This offence is uſually puniſhed by fine and impriſonment.

III. Theftbote.

Theftbote (from the *Saxon* words *theft*, and *bote boot* or *amends*) is, where one not only knows of a felony, but takes his goods again, or other amends not to proſecute. 1 *Haw.* 125.

But the bare taking of one's own goods again, which have been ſtolen, is no offence unleſs ſome favour be ſhewn to the thief. 1 *Haw.* 125.

This offence is very nearly allied to felony, and is ſaid to have been anciently puniſhed as ſuch; but at this day it is puniſhable only with ranſom and impriſonment, unleſs it were accompanied with ſome degree of maintenance given to the felon, which makes the party an acceſſary after the fact. 1 *Haw.* 125.

IV. Felonies by the laws of this commonwealth.

Arſon at common law—Felony without clergy. See 'BURNING.' and *V. l. p.* 50.

Bigamy—Marrying a ſecond huſband or wife, the former being alive, is felony. See *V. l. p.* 205.

Breaking dwelling-houſes &c.—Felony without clergy. See 'LARCENY.' and *V. l. p.* 50.

Buggery—Felony without clergy. See 'BUGGERY,' and *V. l. p.* 256.

Burglary—Felony without clergy. See 'BURGLARY,' and *V. l. p.* 50.

Burning—Felony without clergy, to burn any houſe &c. See 'BURNING,' and *V. l. p.* 215. 50.

Certificates—Felony without clergy, to ſteal them or preſent them for payment, knowing them to be ſtolen. See 'LARCENY.'

CENY.' aud *V. l. p.* 261.—Alſo felony without clergy to forge certificates &c. *V. l. p.* 260.

Church, chapel, or meeting-houſe—Stealing thereout, felony without clergy. See 'LARCENY.' and *V. l. p.* 50.

Coin.—Counterfeiting, or paſſing counterfeit, knowingly,—felony without clergy. See 'COIN.' and *V. l. p.* 260.

Flour—Forging the receipt or ſtamp of any inſpector of flour, felony without clergy. *V. l. p.* 260.

Forgery—See various inſtances under title 'FORGERY.'—which is felony without benefit of clergy.

Hemp—Forging the receipt of any inſpector of hemp, felony without clergy. *V. l. p.* 260.

Hogſtealing—A perſon convicted a third time of hogſtealing, ſhall be adjudged a felon. *V. l. p.* 187.

Horſe-ſtealing—Felony without clergy, to ſteal any horſe, mare, or gelding, foal or filly. See 'HORSE-STEALING.' and *V. l. p.* 188.—Felony to receive any horſe knowing him to be ſtolen, or to harbour or conceal the horſe-ſtealer *V. l. p.* 188.

Land Warrants—Stealing them, felony without clergy. See 'LARCENY.' and *V. l. p.* 261.

Loan-Office certificates &c.—Stealing them, or preſenting them for payment, knowing them to be ſtolen, felony without clergy. See 'LARCENY,' and *V. l. p.* 261.

Maim—Felony to maim &c. See 'MAIM,' and *V. l. p.* 188.

Murder—Felony without clergy. See 'CLERGY,' and *V. l. p.* 50.

Rape—Felony without clergy. See 'RAPE,' and *V. l. p.* 256.

Robbery—Felony without clergy. See 'ROBBERY,' and *V. l. p.* 50.

Records—Stealing record, writ &c. felony. See 'LARCENY,' and *V. l. p.* 50.

Regiſter of the land-office—Counterfeiting his ſeal, felony without clergy. See *V. l. p.* 261.

Slaves—Conſulting, adviſing, or conſpiring to rebel, make inſurrection, or commit murder, felony without clergy. *V. l. p.* 198.—Preparing, exhibiting, or adminiſtering medicine, felony without clergy. *Id.* § 22.—But if not exhibited &c. with ill intent, or attended with bad conſequences, ſhall be acquitted. *Id.* § 23.

So, if adminiſtered &c. by conſent of owner, and employer, it is not felony. *Id.* § 24.

Stealing free perſon and ſelling him as a ſlave, felony without clergy. *Id.* § 28.

Stealing ſlaves, felony without clergy. *Id.* § 29.

Tobacco—Stealing tobacco on the high way, felony. *V. l. p.* 291.

Tobacco—Inſpectors of, iſſuing receipts for tobacco not delivered &c. felony without clergy—See *V. l. p.* 278.—Forging the ſtamp or receipt of any inſpector of tobacco, the ſame. *V. l. p.* 260.

Wrecks—Stealing from a veſſel in diſtreſs, or wrecked, felony without clergy. *V. l. p.* 15.

Ware-houſes or Store-houſes—Breaking them in the night or day, and ſtealing thereout, above the value of 4 dollars.—felony without clergy. See 'LARCENY,' and *V. l. p.* 216.

Women—Taking away heireſſes &c. felony. See 'WOMEN,' and *V. l. p.* 206.

The comprehenſive term *Felony*, would naturally embrace a great variety of heads, ſuch as *Homicide*, *Robbery*, *Burglary*, *Rape*, *Forgery*, *Larceny &c.* But as all felonies are treated of under their reſpective titles, and the method of bringing the offender to juſtice, may be found under titles *Criminals*, *Arreſt*, *Hue & Cry*, *Bail*, *Commitment*, *Jail & Jailor*, *Arraignment*, *Indictment*, *Mute*, *Confeſſion*, *Juries & Jurors*, *Evidence*, *Clergy*, *Judgment*, and *Execution*, it would be an unneceſſary repetition to inſert any matter in this place, relative to theſe ſeveral titles.

FEME COVERT, *See* 'WIFE,'

F E N C E S.

BY V. l. page 284, of the *Reviſed Code*, 'If any horſes, 'mares, cattle, hogs, ſheep, or goats, ſhall break into 'any grounds incloſed with a ſtrong and ſound fence, 5 feet 'high, and ſo cloſe that the beaſts could not creep through,—or 'with an hedge 2 feet high, upon a ditch 3 feet deep, and 3 'feet broad—or inſtead of ſuch hedge, a rail fence of 2 feet and 'a half high, the hedge or fence being ſo cloſe that none of the 'ſaid creatures can creep thro', which ſhall be accounted a law-'ful fence, the owner of ſuch creatures, ſhall, for the firſt of-'fence, make reparation to the party injured, for the true value 'of the damage, and for every ſubſequent treſpaſs, double da-'mages; to be recovered with coſts in any court of record:—'For a third offence, the party injured may either kill the beaſt, 'without being liable to an action, or may ſue for his dama-'ges.'

2. 'Upon complaint made to a juſtice for the county, wherein 'ſuch treſpaſs ſhall be, ſuch juſtice ſhall, without delay, iſſue 'his order, to three honeſt, and diſintereſted houſe-keepers, re- 'citing the complaint, and requiring them to view the fence 'where the treſpaſs is complained of, and to take memorandums 'of the ſame, and their teſtimony in ſuch caſe ſhall be good evi- 'dence to the jury, touching the lawfulneſs of the fence.'

3. 'If any perſon demnified for want of ſuch ſufficient fence, 'ſhall injure, or cauſe to be injured, in any manner, any of the 'kind of animals above mentioned, he ſhall pay to the owner 'double damages, with coſts, recoverable as aforeſaid.'

Warrant to three houſe-keepers to view the fence.

county to wit.

To A H, B H, and C H, houſe-keepers of this county.

Whereas J K, *of the ſaid county, planter, hath this day complained to me* J P, *a juſtice of the peace for the county aforeſaid, that a horſe belonging to* W N, *of the ſaid county, did laſt night break into the corn field of the ſaid* J K, *which was fenced and incloſed according to the directions of the act of the General Aſſembly in that caſe made and provided, whereby he hath ſuſtained conſiderable damage, theſe are therefore to require you forthwith to go and view the fence of the ſaid corn field, and take a memorandum of the ſame in writing, the better to enable you to teſtify, if you ſhould be required, concerning the premiſes. Given, &c.*

The act of 22. Geo. II, Ch. 15. gave to a ſingle magiſtrate power to determine the caſe, where the treſpaſs was under twenty five ſhillings. Under this law *Mr. Starke* has inſerted the form of a warrant, and conviction.—But as the clauſe granting ſuch power to a ſingle magiſtrate is omitted in the Reviſed Code, and is certainly unconſtitutional, I have thought it improper to give any precedents for that purpoſe.

FLOUR.

THE exportation of Flour having become an article of conſiderable importance in this ſtate, the legiſlature have found it neceſſary to inforce obedience to the ſeveral requiſitions of the act for, 'regulating the inſpection of flour and bread,' by impoſing certain penalties, many of which are recoverable before a juſtice of the peace.

By

By V. l. (17 *R. Cond.* 1792) *page* 238, of the *Reviſed Code*, (after enumerating the ſeveral places at which inſpections of flour and bread ſhall be eſtabliſhed) it is enacted, *ſect.* 3. That the courts of the ſeveral counties in which thoſe places are ſituated, ſhall annually in *September* or *October*, appoint a perſon of good repute, and ſkill in the quality of flour, as inſpector. In caſe of the death, refuſal, or neglect, of a perſon ſo appointed, the juſtices of the county, or any three, may fill the vacancy, by appointment of another, 'till the next court, when another appointment ſhall be made for the balance of the year. The court failing to appoint at the time directed, the governor and council may, and the perſon appointed after taking the oath hereafter mentioned, before a juſtice of the peace, ſhall in every inſtance be conſidered as appointed by the court.

Sect. 4. All wheat flour brought to any inſpection for exportation, ſhall be merchantable, of due fineneſs, and without any mixture of the flour of any other grain.

Sect. 5. All bread and flour caſks, for exportation ſhall be well made, of ſeaſoned materials, tightened with 10 hoops, nailed with 4 nails in each chine hoop, and 3 nails in each upper bilge hoop; the flour barrels ſhall be 27 inches in length in the ſtaves, and 17 $\frac{1}{2}$ in the head in diameter; half barrels ſhall be 23 inches in length, and 12 $\frac{1}{2}$ inches in the head in diameter.

Sect. 6. Every miller of flour and baker of bread ſhall brand every caſk for exportation with a diſtinguiſhable brand-mark, and mark the tare and nett weight, before removed from the place of manufacture; under a penalty of 42 cents for every caſk of flour not nailed and hooped as aforeſaid, and for every caſk of flour or bread, not branded and marked as aforeſaid, to be recovered from the miller or baker; or from the perſon bringing them to market, who may recover it again from the miller or baker, provided he can prove he gave them notice he intended to carry it away for exportation.

Sect. 7. Every barrel of flour ſhall contain 196 pounds, and every half barrel 98 pounds of flour; for the deficiency of every pound under three, the miller and bolter forfeits 8 cents, and more than three, 17 cents.

Sect. 8. All caſks wherein bread (*and flour**) ſhall be packed, ſhall be weighed and the tare marked thereon. And if any perſon ſhall put a falſe or wrong tare on to the diſadvantage of the purchaſer, he ſhall forfeit for every caſk ſo falſely tared 83 cents; and the inſpector, *his deputy*, or aſſiſtant, upon ſuſpicion, or

* *By* V. l. (18 *R. Cond.* 1793. *c.* 155. *ſect.* 1) *p.* 323.

or at the requeſt of the purchaſer, ſhall unpack any caſk of flour or bread; and if there is a leſs quantity of flour, than above directed, or if the caſk wherein bread *(or flour)* is packed ſhall be found to weigh more than is marked thereon, the miller, baker or bolter, ſhall pay the charges of unpacking and re-packing, over and above the penalties aforeſaid; but otherwiſe the charges ſhall be paid by the inſpector, or by the purchaſer, if the trial be made at his requeſt.

Sect. 9. Every baker of bread for exportation ſhall deliver with it a manifeſt of the contents, with his brand marked thereon, and his name ſubſcribed thereto, under the penalty of ſeven dollars for every manifeſt delivered contrary thereto, and if on trial any caſk of bread be found lighter than it is ſpecified in the manifeſt, the baker forfeits in the ſame proportion as is directed in the caſe of flour.

Sect. 10. Any caſk of flour brought to an inſpection for exportation, ſhall be examined by an inſpector, by boring thro' the head of the caſk, with an inſtrument not exceeding half an inch in diameter:—if he ſhall judge it merchantable agreeable to the directions of this act, he ſhall plug up the hole, and brand the caſk in the quarter, with the name of the place at which he is inſpector, with a public brand-mark, to be provided for him, and alſo the degree of fineneſs, as *ſuperfine*, *fine*, *middling*, *ſhip-ſtuff*; for which the inſpectors at *Alexandira*, *Frederickſburg*, *Falmouth*, *Richmond*, *Mancheſter*, *Peterſburg*, *Pocahuntas*, and *Blandford*, ſhall receive *two* cents for each caſk; at all other inſpections *three* cents. Unmerchantable flour, according to the meaning of this law, ſhall be marked on the bilge, by the inſpector, with the word 'condemned,' or may be ſecured for further examination, to be made within 20 days, and the inſpector ſhall receive from the owner, the ſame rate and prices as if it had paſſed. A perſon diſſatisfied with the judgment of an inſpector may apply to a juſtice, who ſhall iſſue his warrant to three indifferent perſons well ſkilled in the manufacture of flour, to view and examine the ſame; who having taken the oath hereinafter directed for an inſpector, ſhall view and examine the ſame; and if they or two of them think it merchantable, the inſpector ſhall eraſe the word 'condemned,' and put ſuch brand on as they or any two ſhall direct, and repay to the complainant his coſts; but if the judgment of the inſpector be confirmed, the owner ſhall pay the coſts of the review, and the inſpector three cents for each caſk. A perſon lading on board any veſſel, for exportation any caſk of flour, marked 'condemned,' or not inſpected, and branded as directed by law, forfeits ten dollars for each caſk exported, or laden for exportation.

Sect.

Sect. 11. A perſon packing flour or meal in a caſk, which has been inſpected and branded with the name of a miller, forfeits 20 dollars each caſk, recoverable by petition and ſummons, one half to the uſe of the informer, and the other to the miller who has been injured by ſuch packing; and is liable to the action of the party aggrieved.

Sect. 12. Where any mill is ſituated on navigable water, below the falls, the owner may require the inſpector neareſt thereto to attend and inſpect the flour manufactured by him; and the inſpector or his deputy ſhall attend and inſpect the flour in the ſame manner as if it had been brought to the inſpector.

Sect. 13. Every inſpector of flour before he enters upon the execution of his office ſhall make oath or affirmation.

That he will without favour, affection, malice, or partiality, carefully inſpect all flour brought to him, and which he ſhall be required to examine; that no flour ſhall be paſſed or branded by him, without his inſpecting the ſame, that he will not brand, or cauſe to be branded, as paſſed, any caſk or caſks of flour, that do not appear to him to the beſt of his ſkill and judgment, to be ſufficiently clean, well ground, ſweet and merchantable, that he will mark on all caſks of flour the degree thereof, according to the directions of this act; that he will carefully examine the caſks in which flour brought for inſpection ſhall be contained; and that he will not paſs or brand any ſuch caſks, unleſs they be of ſuch ſize, goodneſs and thickneſs, as by this act required.

Sect. 14. No inſpector ſhall purchaſe any flour condemned, or of any other kind, except for his own uſe, under penalty of ſeven dollars for each barrel.

Sect. 15. If any perſon ſhall alter the mark ſtamped on any caſk of flour by an inſpector, or ſhall mark or brand any caſk of flour, which has not been inſpected, with any mark or brand ſimilar to, or in imitation of an inſpector's mark or brand, or after an inſpector ſhall have paſſed any caſk of flour as merchantable, ſhall pack into ſuch caſk any other flour, or after any caſk of flour ſhall be branded 'condemned,' ſhall unpack and re-pack the ſame in other caſks for exportation, ſuch perſon ſhall forfeit and pay the ſum of ſeven dollars for every caſk.

Sect. 16. Inſpectors may appoint aſſiſtants, if he cannot alone examine all the flour brought with ſufficient diſpatch, or ſhall be incapacitated thro' ſickneſs; the aſſiſtant ſhall take the ſame oath as directed for an inſpector, and ſhall be authoriſed to act as ſuch.

Sect. 17. The courts of the ſeveral counties in which an inſpection is ſituated, may at any time remove from office any inſpector

inſpector of flour, for neglect, malfeazance, or corrupt practices, and may ſupply the vacancy by appointing another for the reſidue of the year.

Sect. 18. Where the penalties in this act do not exceed *five* dollars, they may be recovered before a ſingle magiſtrate;—where they are over that ſum and do not exceed *twenty* dollars, by petition,—and where they exceed *twenty* dollars, by action in the county where the defendant reſides, or where the offence was committed:—and the proſecutor may make oath before a juſtice of the peace of the nature of the action, and that he verily believes the defendant hath incurred the penalty and forfeiture thereby demanded, which the clerk upon a certificate thereof to him produced, ſhall indorſe upon the back of the writ, and the defendant ſhall be ruled to give ſpecial bail.

By V. 1. (18 *R. Cod.* 1793. *c.* 155. § 2) *p.* 323 of the *Reviſed Code*; 'That part of the penalties which is to go to 'the uſe of the commonwealth, ſhall be paid to the inſpector at 'the place where the offence ſhall be diſcovered, who ſhall an-'nually, to the court of his county, held in the month of *Sep-'tember*, render a fair and juſt account thereof upon oath, a 'copy whereof ſhall be certified by the ſaid court, and being ſo 'certified, ſhall be by their clerk tranſmitted to the auditor of 'public accounts, who ſhall debit the inſpector therewith, and 'the inſpector ſhall annually pay the amount thereof, deducting '*ſix per cent*, into the public treaſury, on or before the firſt day 'of *January*, in each year; and in caſe of failure may be pro-'ceeded againſt in the ſame manner as delinquent ſheriffs.'

(A) Warrant againſt a miller, or perſon bringing flour to an inſpection, under ſections 5 & 6.

county or corporation of to wit.

To the conſtable of the ſaid county, (or *of the corporation of*

Whereas information on oath hath this day been made to me J P, *one of the juſtices of the peace for the county* (*or* corporation) *aforeſaid, by* A J, *that* A O, *of the county of hath brought to this place for exportation, caſks of flour, which are not* well made of good ſeaſoned materials, tightened with ten hoops, ſufficiently nailed with four nails in each chine hoop, and three nails in each upper bilge hoop, *agreeable to the act of the General Aſſembly in that caſe made and provided: Theſe are therefore to require you to ſummon the ſaid* A O, *to appear before me or ſome other juſtice of the peace for the county* (*or* corporation) *aforeſaid*

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ſaid, to ſhew cauſe why the penalty of forty two cents for each caſk of flour, as aforeſaid, ſhould not be levied upon him according to law. Given under my hand &c.

If for any other offence againſt the above ſections, the warrant may be in the ſame form, except in the deſcription of the offence, which muſt vary to ſuit the caſe.

JUDGMENT.

Upon hearing the teſtimony it appears to me that the within-mentioned caſks of flour to the number of are not nailed and hooped, as required by the act of the General Aſſembly, in that caſe made and provided, therefore it is conſidered that the ſaid A O, do forfeit and pay the ſum of being the ſum of forty-two cents for each caſk of flour not nailed and hooped as required by law. Given under my hand &c.

J P.

(B) Warrant, on ſection ſeven.

(As in warrant *(A)* to the word *flour) which do not* contain the quantity of one hundred and ninety ſix pounds of flour, *as required by the act of the General Aſſembly, in that caſe made and provided: Theſe are &c. to ſhew cauſe why the penalty of eight cents for each pound of flour under three, and of ſeventeen cents for each pound over three, of which each barrel falls ſhort of the ſaid quantity required by law, may not be levied on the ſaid* A O. *Given &c.*

(C) Warrant on ſection eight, and on ſection one, of chap. 155, *of the Revised Code.*

(As in warrant *(A)* to the word *flour*) (or *bread*) *on each of which caſks the tare is falſely marked; Theſe are therefore &c. to ſhew cauſe why the penalty of eighty three cents ſhould not be levied on the ſaid* A O, *for each caſk ſo falſely tared, according to law. Given &c.*

(D) Warrant to three indifferent perſons to review flour condemned by an inſpector.

county to wit.

To A J, B J, and C J.

Whereas A C, *of the county of hath this day complained to me* J P, *a juſtice of the peace for the county of aforeſaid, that thro'*

thro' the ill judgment and want of skill in B J, *an inspector of flour at* , *barrels of flour brought by the said* A C, *to the said place for exportation, hath been condemned as unmerchantable, and the said* A C, *being desirous to have a review of the same according to law: These are therefore, to require you, having first taken the oath required by the act of the General Assembly, entitled* 'An act reducing into one the several acts, for regulating the inspection of flour and bread,' *to view and examine the said barrels of flour, and if you, or any two of you, shall think the same to be merchantable, that you cause the said inspector to erase the word 'condemned,' and to put such brand on the said flour as you, or any two of you, shall direct; distinguishing the degree as directed in the tenth section of the above recited law. And you the said inspector are hereby required to pay due obedience to the injunctions contained in this warrant, so far as the same respects the acts to be done by you. Given &c.*

FORCIBLE ENTRY AND DETAINER.

THIS offence is committed by violently taking or keeping possession of lands and tenements, with menaces, force, and arms, and without the authority of law. This was formerly allowable to every person disseised, or turned out of possession, unless his entry was taken away or barred by his own neglect, or other circumstances. But this being found very prejudicial to the public peace, it was thought necessary, by statute, to restrain all persons from the use of such violent methods, even of doing themselves justice; and much more if they have no justice in their claim. So that the entry now allowed by law is a peaceable one; that forbidden is such as is carried on and maintained with force, with violence, and unusual weapons: 4 *Blacks* 147.

However, even at this day, in an *action* of forcible entry, grounded on these laws, if the defendant make himself a title which is found for him, he shall be dismissed without an inquiry into the force; for however he may be punishable *at the suit of the commonwealth*, for doing what is prohibited by statute, as a contemner of the laws, and disturber of the peace, yet he shall not be liable to pay any damages for it to the plaintiff, whose injustice gave him the provocation in that manner to right himself. 1 *Hawk.* 141.

Offences of this nature being made such, not by the common law, but by statute, I shall consider them, with the interpreta-

tions

tions which have been put on similar statutes in England, in the following order.

I. *What is a forcible entry, and detainer.*
II. *How they are punishable by action at law.*
III. *How punishable by indictment.*
IV. *How punishable by a justice, sheriff, mayor, &c.*
V. *How punishable on a* certiorari.
VI. *How punishable as a riot.*
VII. *Precedents.*

I. What is a forcible entry, and detainer.

By V. L. p. 159, of the *Revised Code*, 'None shall make any 'entry into any lands and tenements, or other possessions what-'soever, but in case where entry is given by law; and in such 'case not with strong hand, nor with multitude of people, but 'only in a peaceable and easy manner, and that none who shall 'have entered into the same in a peaceable manner, shall hold 'the same afterwards with force; and if any shall do to the con-'trary, on complaint thereof to any justice or justices of the 'peace, such justice or justices shall take sufficient power of the 'county, and go to the place where such force is made; and all 'the people of the county, as well the sheriff as others, shall be 'attendant on the same justices, to go and assist them to arrest 'such offenders, upon pain of imprisonment and amercement, 'at the discretion of a jury.'

The term '*possessions*,' is thought not to extend to a *way*, *common*, *office* &c. 1 *Hawk.* 146.

Not with strong hand, nor with multitude of people.] It seems certain, that if one who pretends a title to lands barely go over them, either with or without a great number of attendants, armed or unarmed, in his way to the church or market, or for such like purpose, without doing any act which, either expressly or impliedly, amounts to a claim of such lands, he cannot be said to make an entry thereinto. 1 *Haw.* 144.

But it seems that if a person enter into another man's house or ground, either with apparent violence offered to the person of any other, or furnished with weapons, or company, which may excite fear, though it be but to cut or take away another man's corn, grass, or other goods, or to fell or crop wood, or do any other trespass, and though he do not put the party out of his

his poſſeſſion, yet it ſeems to be a forcible entry. *Dalt. Ch.* 126.

But if the entry were peaceable, and after ſuch entry made, they cut or take away any other man's corn, graſs, wood, or other goods, without apparent violence or force, though ſuch acts are counted a diſſeizing with force, yet they are not puniſhable as forcible entries. *Ibid.*

But if he enter peaceably, and there ſhall, by force or violence, cut or take away any corn, graſs, or wood, or ſhall forcibly or wrongfully carry away any other goods there being, it ſeemeth to be a forcible entry, puniſhable by theſe ſtatutes. *Ibid.*

So alſo ſhall thoſe be guilty of a forcible entry who, having an eſtate in land by a defeaſible title, continue with force in the poſſeſſion thereof, after a claim made by one who had a right of entry thereto. 1 *Haw.* 145.

But he who barely agrees to a forcible entry made to his uſe, without his knowledge or privity, ſhall not be adjudged to make an entry within the ſtatute. *Ibid.*

And, in general, it ſeems clear that to denominate the entry forcible, it ought to be accompanied with ſome circumſtances of actual *violence* or terror; and that an entry which hath no other force than ſuch as is implied by the law, in every treſpaſs whatſoever, is not within theſe ſtatutes. *Ibid.*

As to the matter of *violence*, it ſeems to be agreed that an entry may be forcible, not only in reſpect of a violence actually done to the perſon of a man, as by beating him if he refuſe to relinquiſh his poſſeſſion, but alſo in reſpect of any other kind of violence in the manner of the entry, as by breaking open the doors of a houſe, whether any perſon be in it or not, eſpecially if it be a dwelling houſe, and perhaps alſo by an act of outrage after the entry, as by carrying away the party's goods, but it ſeems that an entry is not forcible by a bare drawing up the latch, or pulling back the bolt of a door, there being no appearance therein of its being done by *ſtrong hand, or multitude of people.* And it hath been holden, that an entry into a houſe through a window, or by opening a door with a key is not forcible. 1 *Haw.* 145.

In reſpect of the circumſtances of *terror*, it is to be obſerved that wherever a man, either by his behaviour or ſpeech, at the time of his entry, give thoſe who are in poſſeſſion juſt cauſe to fear that he will do them ſome bodily hurt, if they will not give way to him, his entry is eſteemed forcible, whether he cauſe ſuch a terror, by carrying with him ſuch an unuſual number of attendants, or by arming himſelf in ſuch a manner as plainly intimates a deſign to back his pretenſions with violence, or by

actually

actually threatening to kill, maim, or beat, those who shall continue in possession, or by giving out such speeches as plainly imply a purpose of using force; as, if one say that he will keep his possession in spite of all men or the like. 1 *Hawk.* 145.

But it seems that no entry shall be adjudged forcible from any threatening to spoil anothers goods, or to destroy his cattle, or to do him any other such like damage, which is not personal. 1 *Hawk.* 146.

However, it is clear that it may be committed by a single person as well as by twenty. *Ibid.*

But, nevertheless all those who accompany a man when he makes a forcible entry, shall be adjudged to enter w th him, whether they actually come upon the lands or not. 1 *Hawk.* 144.

It seems certain that the same circumstances of violence or terror, which will make an entry forcible, will make a detainer forcible also, and a detainer may be forcible whether the entry were forcible or not. 1 *Hawk.* 146.

II. How they are punishable by action at law.

The statute of England of 8. *Hen.* 6. *c.* 9. *sect.* 6 gave to the party injured a recompence by treble damages; but as that remedy is not recognized by our laws, the party seems to be left to his action at common law.

III. How punishable by indictment.

This offence being also of a public nature, may be punished by indictment at the suit of the commonwealth. See *Dalt. c.* 129. 1 *Hawk.* 147.

And the tenement in which the force was made must be described with convenient certainty, and must set forth that the defendant actually entered and ousted the party grieved, and continueth his possession at the time of finding the indictment; otherwise he cannot have restitution, because it doth not appear that he needeth it. 1 *Hawk.* 147, 149. 150.

But if a man's wife, children, or servants, do continue in the house, or upon the land, he is not ousted of his possession; but his cattle being upon the land, do not preserve his possession. *Dalt. Ch.* 132.

An indictment for forcible entry was quashed for not setting forth that the party was seized or disseized, or what estate he had in the tenement; for if he had only a term of years, then the entry must be laid, into the freehold of A. in the possession of B. 3 *Salk.* 169.

By

By *V. l. p.* 160. § 8. Tenants for years and by *elegit*, shall have the same remedy as those holding estates of freehold or inheritance.

IV. How punishable by a justice, sheriff, mayor &c.

The same power which is given to *justices of the peace*, and *sheriffs*, in their counties, is also granted to *mayors*, *alde men*, and *serjeants*, within their cities. *V. l. p.* 160 § 6.

No warrant of forcible entry &c. shall be granted without the oath or affirmation of the party praying it. *Id.* § 2.

The names of the persons so charged shall be inserted in every such warrant; to which persons the sheriff or officer shall give 3 days notice of the time and place of taking the inquisition. Without such notice, no jury shall be sworn to enquire of a forcible entry &c. *Id.* § 3.

Whether the persons making such entries, be present or departed before the coming of the justices, they may proceed in some convenient place, at their discretion, to enquire of the forcible entry and detainer;—if a forcible entry &c. be found contrary to this act, the justices shall cause the party so put out, to be re-seized, or re-possessed. *Id.* § 4.

The justices &c. making such enquiries, shall direct their warrants &c. to the sheriff of the same county, to cause fit persons to come, to enquire of such entries: a sheriff failing to do his duty forfeits 80 dollars, recoverable before any court of record; as well by indictment or information to be taken only for the commonwealth, as by bill at the suit of the party grieved, as well for himself as the commonwealth. *Id.* § 5.

It is said that justices may proceed to enquire of forcible entries &c. altho' no complaint be made to them. *Lamb.* 147.

And the defendant if he is not present, ought to be called to answer for himself; for it is implied, by natural justice, in the construction of all laws, that no one ought to suffer any prejudice thereby, without having first an opportunity of defending himself. 1 *Haw.* 154.

And it seems to be settled, at this day, that if the defendant tender a traverse of the force, the justice ought not to make any restitution till the traverse be tried. *Ibid*

It seems to be agreed that no other justices of the peace, except those before whom the indictment shall be found, shall have any power to make any award of restitution. 1 *Haw.* 152.

And the justice may break open the house by force to reseize the same; and so may the sheriff do, having the justice's warrant. *Dalt. Ch.* 44.

That

That is, ſhall remove by force, by putting out all ſuch offenders as ſhall be found in the houſe, or upon the lands, that entered or held with force. *Dalt. Ch.* 130.

And this he may do in his own proper perſon, or he may make his warrant to the ſheriff to do it. *Dalt. Ch.* 44. 1 *Hawk.* 151. 2.

But by *V. l. p.* 160—§ 7. 'No reſtitution upon any indictment of forcible entry, or holding with force, ſhall be made to any, if the party indicted hath had the occupation, or hath been in quiet poſſeſſion, by the ſpace of three whole years together, next before the day of ſuch indictment ſo found, and his eſtate therein be not ended or determined; which the party indicted may alledge for ſtay of reſtitution, and reſtitution ſhall ſtay till that be tried, if the other will deny or traverſe the ſame; and if the ſame allegation be tried againſt the party ſo indicted, then the ſame party ſo indicted, ſhall pay ſuch coſts and damages to the other party, as ſhall be aſſeſſed by the judges or juſtices before whom the ſame ſhall be tried.'

And it hath been holden that the plea of ſuch poſſeſſion is good, without ſhewing under what title, or of what eſtate ſuch poſſeſſion was; becauſe it is not the title, but poſſeſſion only, which is material, in this caſe. 1 *Hawk.* 152.

It was holden in *Leighton's* caſe, that the party may alſo traverſe the entry and force. See 1 *Hawk.* 142.

And this traverſe muſt be tendered in writing, and not by a bare denial of the fact in words; for thereupon a *Venire Facias* muſt be awarded, a jury returned, the iſſue tried, a verdict found, and judgment given, and coſts and damages awarded; and there muſt be a record, which muſt be in writing, to do all this, and not a verbal plea. *Dalt. Ch.* 133. 1 *Hawk.* 154—See *title*, '*Traverſe.*'

Upon which traverſe tendered, the juſtice ſhall cauſe a new jury to be returned by the ſheriff, to try the traverſe; which may be done the next day, but not the ſame day. *Dalt. Ch.* 133.

V. How puniſhable on a certiorari.

Although, regularly, the juſtices only who were preſent at the inquiry, and when the indictment was found, ought to award reſtitution, yet if the record of the preſentment or indictment ſhall be certified by the juſtice or juſtices into a ſuperior court, or the ſame preſentment or indictment be removed and certified thither by *certiorari*, the juſtices of that court may award a writ of reſtitution, to the ſheriff to reſtore poſſeſſion to

the

the party expelled; for the juſtices of the ſaid court, have a ſupreme authority in all caſes of the commonwealth. *Dalt. Ch.* 44.

Alſo where, upon a removal of the proceedings into the ſuperior court, the conviction ſhall be quaſhed, the court will order reſtitution to the party injured. As in the caſe of *K. verſus Jones.* A conviction of forcible entry was quaſhed for the old exception of *meſſuage or tenement*, by reaſon of the uncertainty; but the reſtitution was oppoſed, on an affidavit that the party's title (which was by leaſe) was expired ſince the conviction. But the court ſaid, they had no diſcretionary power in this caſe, but were bound to award reſtitution on quaſhing the conviction. *Str.* 474.

On a motion for a *certiorari* in this caſe, no notice to the adverſe party is neceſſary. *V. l. p.* 87. § 45.

VI. How puniſhable as a riot.

If a forcible entry, or detainer, ſhall be made by three perſons, or more, it is alſo a riot, and may be proceeded againſt as ſuch, if no inquiry hath been before made of the forces. *Dalt. Ch.* 44.

VII. PRECEDENTS.

(A) Precept to the ſheriff to ſummon a jury.

to wit.

Whereas A J, *of* *in the county aforeſaid, hath this day complained upon oath before me* J P, *a juſtice of the peace for the ſaid county, that on the* *day of* *laſt paſt* A O, *of* *labourer, forcibly entered into one tenement containing* *acres of land, lying &c.* (here deſcribe the land particularly) *then and there being in the poſſeſſion of the ſaid* A J, *and the ſaid* A J, *did unlawfully and forcible expel from the ſame, and him ſo expelled as aforeſaid, did keep out and detain from the poſſeſſion of the ſaid lands and tenements: Theſe are therefore on behalf of the commonwealth to require you, to cauſe to come before me twenty-four good and lawful men of this county, at* *in the pariſh of* *in the county aforeſaid, on the* *day of* *next, to inquire upon their oaths, of ſuch things as ſhall then and there be enjoined them, on behalf of the commonwealth, touching the forcible entry and detainer aforeſaid. And this you ſhall in no wiſe omit under the penalty of eighty dollars, and have then there this warrant. Given under my hand and ſeal &c.*

Juror's Oath.

You ſhall true enquiry and preſentment make of ſuch things as ſhall come before you concerning a forcible entry (or detainer) *ſaid to have been lately committed in belonging to in this county, and a true verdict give, according to your evidence. So help you God.*

(B) THE INQUEST.

to wit.

An inquiſition for the commonwealth, indented and taken at in the pariſh of and county aforeſaid, the day of in the year of the commonwealth, before E P, &c. a juſtice of the peace for the ſaid county, and by the oath of F G, H J, &c. good and lawful men of the ſaid pariſh and county, who, being charged and ſworn, upon their oaths do ſay, that A J, of &c. was lawfully and peaceably ſeized in his demeſne as of fee (*if not ſeized in fee, then ſay poſſeſſed*) of and in one meſſuage, with the appurtenances, ſituate in the pariſh of and county aforeſaid, and his ſaid ſeizen (*or poſſeſſion*) ſo continued, until A B, C D, &c. and other malefactors to the jurors aforeſaid unknown, on the day of laſt paſt, with ſtrong hand and armed power, into the meſſuage aforeſaid, with the appurtenances, did enter, and him the ſaid A J, thereof diſſeized, and with ſtrong hand expelled, and him the ſaid A J, ſo diſſeized and expelled from the ſaid meſſuage, with the appurtenances aforeſaid, from the ſaid day of until the day of taking this inquiſition, with like ſtrong hand and armed power, did keep out, and do yet keep out, to the great diſturbance of the commonwealth, and againſt the form of the ſtatute in ſuch caſe made and provided. In witneſs whereof, the ſaid jurors to this inquiſition have ſeverally put their ſeals, the day, year, and place, firſt above mentioned.

(C) Warrant to the ſheriff for reſtitution.

county to wit.

E P, *one of the juſtices of the peace for the ſaid county, to the ſheriff thereof, greeting*:

Whereas, by an inquiſition taken before me, at in the pariſh of and county aforeſaid, the day of in the year of the commonwealth, upon the oaths of J B, B H, &c. and by virtue of the ſtatute made and provided in caſes of forcible entry and detainer, it is found that A B, C D, &c.

&c. on the day of now laſt paſt, into a certain meſſuage, with the appurtenances, of A J, of the pariſh and county aforeſaid, ſituate, lying, and being in the ſaid pariſh and county, with force and arms did enter, and him the ſaid A J, thereof did diſſeize, and with ſtrong hand drive out, and him the ſaid A J, thus driven out from the aforeſaid meſſuage, with the appurtenances, from the day of aforeſaid, to the day of the taking of the ſaid inquiſition, with ſtrong hand, and armed force, did keep out, and do yet keep out, as by the inquiſition aforeſaid more fully appeareth of record: Therefore, on behalf of the commonwealth; I charge and command you, that, taking with you the power of the county (*if needful*) you go to the ſaid meſſuage, and other the premiſes, and the ſame, with the appurtenances, you cauſe to be reſeized; and that you cauſe the ſaid A J, to be reſtored and put into his full poſſeſſion thereof, according as he before the entry aforeſaid was ſeized, according to the form of the ſaid ſtatute; and this you ſhall in no wiſe omit. Given under my hand and ſeal, at the county aforeſaid, the day of in the year of the commonwealth.

(D.) *Record of a forcible detainer upon view.*

Be it remembered, that on the day of in the year of the commonwealth, M B, complained to us E P, and W T, two of the juſtices of the commonwealth aſſigned to keep the peace in the ſaid county, that D T, of &c. W G, of &c. into the (*here deſcribe the place, lands, or tenement*) of him the ſaid M B, ſituate within the pariſh of and county aforeſaid, did enter, and him the ſaid M B, of the aforeſaid, whereof the ſaid M B, at the time of the entry aforeſaid was ſeized in fee, unlawfully diſſeized and ejected, and the ſaid from him the ſaid M B, unlawfully with ſtrong hand, and armed power, do yet hold, and from him detain, againſt the form of the ſtatute in ſuch caſe made and provided; whereupon the ſame M B, then, to wit, on the ſaid day of prayeth of us, ſo as aforeſaid being juſtices, to him in this behalf, that a due remedy be provided, according to the form of the ſtatute aforeſaid. Which complaint and prayer, by us therefore the ſaid juſtices, being heard, we the aforeſaid E P, and W T, juſtices aforeſaid, to the aforeſaid, perſonally have come and do then and there find and ſee the aforeſaid D T, W G, &c. the aforeſaid with force and arms, unlawfully, with ſtrong hand and armed power, detaining againſt the form of the ſtatute in ſuch caſe made and provided, according as he the ſaid M B,

M B, ſo as aforeſaid complained: Therefore it is conſidered by us, the aforeſaid juſtices, that the aforeſaid D F, W G, &c. of the detaining aforeſaid, with ſtrong hand by our own proper view, then and there as aforeſaid, are convicted, and each *(or every of them)* is convicted, according to the form of the ſtatute. In witneſs whereof we the ſaid E P, and W T, the juſtices aforeſaid, to this record our hands and ſeals do ſet, at the county aforeſaid, on the day of in the year of the commonwealth.

(E) Indictment for a forcible entry and detainer, at common law.

The jurors &c. upon their oath, preſent, that J G, of &c. T F, of &c. together with divers others, diſturbers of the peace of the commonwealth *(whoſe names to the jurors aforeſaid are yet unknown)* on the day of in the year of the commonwealth, with force and arms, at aforeſaid, in the county aforeſaid, unlawfully and injuriouſly did enter into *(here deſcribe the lands or tenements)* then and there being in the poſſeſſion of one A J, and that the ſaid J G, and T F, together with the ſaid other diſturbers of the peace, then and there, with force and arms, unlawfully and injuriouſly did expel, remove, and put out the ſaid A J, from the poſſeſſion of the ſaid and the ſaid A J, ſo as aforeſaid expelled, removed, and put out from the poſſeſſion of the ſaid then and there with force and arms, unlawfully and injuriouſly did keep out, to the great damage of him the ſaid A J, and againſt the peace and dignity of the commonwealth.

(F) On the ſtatute.

county to wit.

The jurors &c. upon their oath, preſent, that A J, late of the pariſh of in the county aforeſaid, on the day of in the year of the commonwealth, was poſſeſſed of a certain meſſuage, with the appurtenances, ſituate, lying, and being in the pariſh and county aforeſaid, for a certain term of years, then and ſtill to come and unexpired, and being ſo poſſeſſed thereof, one A O, of the ſaid county, afterwards, to wit, the ſaid day of in the year aforeſaid, into the ſame meſſuage, with the appurtenances aforeſaid, in the pariſh and county aforeſaid, with force and arms, and with ſtrong hand, unlawfully did enter, and the ſaid A J, from the peaceable

ble poſſeſſion of the ſaid meſſuage, with the appurtenances aforeſaid, then and there, with force and arms, and with ſtrong hand, unlawfully did expel and put out, and the ſaid A J, from the poſſeſſion thereof, ſo as aforeſaid, with force and arms, and with ſtrong hand, being unlawfully expelled and put out, the ſaid A O, him the ſaid A J, from the aforeſaid day of in the year aforeſaid, until the day of the taking this inquiſition, from the poſſeſſion of the ſaid meſſuage, with the appurtenances aforeſaid, with force and arms, and with ſtrong hand, unlawfully and injuriouſly then and there did keep out, and ſtill doth keep out, to the great damage of the ſaid A J, againſt the peace and dignity of the commonwealth, and againſt the form of the ſtatute in that caſe made and provided.

N. B. *If the perſon expelled has a freehold, then he muſt, inſtead of being* poſſeſſed, *be ſaid to be ſeized* in fee; *and of courſe inſtead of being* expelled, removed, &c. *as when held by leaſe, he muſt be ſaid to be* diſſeized.

FORFEITURE.

AMONG the many important changes made in our laws, ſince the American revolution, the abolition of the odious and inhuman law of forfeiture is not the leaſt to be admired.—While humanity ſhuddered at the idea of reducing to diſtreſs and poverty, an innocent and helpleſs wife and children, for the crimes of the huſband or father, experience taught that the example of ſuch cruel and unjuſt ſeverity, by no means, detered others from the commiſſion of ſimilar acts. From this conviction the legiſlature of this commonwealth, in the year 1789 firſt aboliſhed all the forfeitures which formerly accrued to the commonwealth, on the conviction or attainder of a perſon for treaſon, or felony;—which law is collected in the Reviſed Code *page* 113, and is inſerted under title '*Attainder*,' of this work.

There are however ſome forfeitures in caſes not criminal, which act immediately on the perſon of the offender, that deſerve to be noticed here:

As 'If a wife willingly leave her huſband and go away and 'continue with her adulterer, ſhe ſhall be barred forever of ac-'tion to demand her dower, that ſhe ought to have of her huſ-'band's lands, if ſhe be convict thereupon, except that her huſ-'band willingly and without coercion, reconcile her, and ſuffer 'her to dwell with him; in which caſe ſhe ſhall be reſtored to 'her action.' *V. l. p.* 180.'

So,

So, 'If any tenant by the curtesy, tenant in dower, or otherwise, for term of life or years, shall commit waste during their 'several estates or terms, of the houses, woods, or any other 'thing belonging to the tenements so held, without special licence in writing so to do, they shall be subject respectively to 'an action of waste, and shall moreover lose the thing wasted, 'and recompence the party injured, in three times the amount, 'at which the waste shall be assessed.' *V. l. p.* 287.

With respect to the forfeiture of slaves held in dower, see title '*Slaves.*'

FORGERY.

FORGERY is an offence both at common law, and by statute.

Forgery at the common law is an offence in falsely and fraudulently making or altering any manner of record, or any other authentic matter of a public nature; as a parish register, or any deed, will, privy seal, certificate of holy orders, and the like — 1 *Hawk* 182. 184.

As for writings of an inferior nature as private letters, and such like, the counterfeiting them is not properly forgery, therefore in some cases, it may be more safe to prosecute such offenders as for a misdemeanor as cheats. For by reason of the uncertainty of opinions, concerning proper forgeries at common law, indictments are more generally upon the statutes, and very few at the common law. *See* '*Cheat.*'

But if the indictment is at the common law, and the offender is convicted, he may be pillored, fined, and imprisoned.— *Wood. B.* 3. *Ch.* 3. 1 *Hawk.* 184.

By *V. l.* chap. 133. page 260. § 1 of the *Revised Code*, 'If 'any person shall counterfeit, aid, or abet in counterfeiting, 'any coin made current in this commonwealth, or shall make, 'or assist, aid, or abet in making base coin, or shall pass any 'such counterfeit or base coin in payment, knowing the same to 'be counterfeit, or base, every such person shall on legal con'viction, suffer death without benefit of clergy.'

§ 3. If any person shall forge or counterfeit, alter or erase, any certificate or warrant, issued by any person properly authorized either by *Congress* or the *legislature of this State*, for the payment of money,—or shall be aiding or assisting therein,—or shall demand payment thereof, knowing the same to be forged, counterfeited, altered or erased—or shall transfer any such certificate

ficate or warrant, knowing the ſame to be forged, or counterfeited, altered, or eraſed;—or ſhall forge or counterfeit alter or eraſe, any certificate whatever, for the purpoſe of obtaining a ſettlement of money from any perſon properly authoriſed, either by *Congreſs* or the *legiſlature of this State*,—or ſhall be aiding or aſſiſting therein,—or ſhall require ſettlement thereon,—or tranſfer the ſame, knowing it to be forged, counterfeited, altered or eraſed, the perſon ſo offending, and legally convicted, ſhall ſuffer death without benefit of clergy.

§ 4. If any perſon ſhall forge or counterfeit, alter or eraſe the ſtamp or receipt of any inſpector of flour or hemp,—or tender in payment any ſuch forged or counterfeited, altered or eraſed receipt, knowing it to be ſuch, and ſhall thereof be convicted, he ſhall ſuffer death without benefit of clergy.

§ 5. He ſhall be adjudged a felon, and not have the benefit of clergy, who ſhall forge or counterfeit, alter or eraſe the ſtamp or receipt of any inſpectors of tobacco,—or ſhall cauſe it to be ſo done,—or ſhall aſſiſt therein,—or ſhall paſs or tender, or cauſe to be paſſed or tendered, any ſuch in payment or exchange, knowing the ſame to be forged, counterfeited, altered or eraſed, or ſhall have in his poſſeſſion any inſpector's ſtamp or receipt, which hath been altered or eraſed, knowing the ſame; and ſhall not diſcover ſuch ſtamp or receipt to two juſtices, within five days after they ſhall have come to his poſſeſſion,—or ſhall export, or cauſe to be exported, any hogſhead or caſk of tobacco, ſtamped with a forged or counterfeited ſtamp,—or ſhall receive or demand tobacco of an inſpector, upon any forged or counterfeited, altered or eraſed ſtamp or receipt, knowing ſuch ſtamp or receipt to be forged or counterfeited, altered or eraſed.

§ 6. He ſhall be adjudged a felon, and not have the benefit of clergy, who ſhall ſteal, or by other means take from the poſſeſſion of another, any warrant from the regiſter of the land office, of this commonwealth, to authoriſe a ſurvey of waſte and unappropriated lands;—or who ſhall alter, eraſe, or aid, or aſſiſt in the alteration or eraſement of any ſuch warrant;—or forge or counterfeit, or aid abet, or aſſiſt, in forging or counterfeiting any written or printed paper, purporting to be ſuch warrant;—or who ſhall tranſfer to the uſe of another, or for his own uſe preſent or cauſe to be preſented to the regiſter for the exchange thereof, or to a ſurveyor, for the execution thereof, any ſuch warrant, or paper purporting to be ſuch warrant, knowing the ſame to be ſtolen, or altered, or eraſed, or forged or counterfeited: And he or ſhe ſhall be adjudged a felon, and not have the benefit of clergy, who ſhall falſely make or counterfeit, or aid, abet, or aſſiſt in ſafely keeping, or counterfeiting any inſtrument, ſtamp-

ing

ing an impreſſion in the figure and likeneſs of the ſeal, officially uſed by the regiſter of the land-office, or who ſhall have in his or her poſſeſſion or cuſtody, ſuch inſtrument, and ſhall wilfully conceal the ſame, knowing it to be falſely made or counterfeited.

The following adjudications on ſtatutes in many inſtances ſimilar in England, may not be improper under this title.

1. Making a ſecond deed and antedating it in order to make it take place of a former deed is forgery. 3 *Inſt.* 169.

2. If any perſon who writeth the will of a ſick man, inſerteth a clauſe therein, concerning the deviſe of lands without any direction of the deviſor, this is forgery, altho' he did not forge the whole will. 3 *Inſt.* 170.

3. With reſpect to incurring a penalty for publiſhing or paſſing counterfeits, knowing them to be counterfeits, this knowledge may be derived from two means, either of his own knowledge, or the information of others; for if another tell him that it is forged, and he publiſh it afterwards as true, and it proves to be forged indeed, he is in danger of the ſtatute. 1 *Hawk.* 187.

But lord *Hale* ſays that tho' ſuch a relation may be an evidence to prove his knowledge, yet it is not concluſive; for perhaps there might be circumſtances of fact that might make the perſon relating it, or his relation, not credible: So that the *knowing* muſt be upon the whole matter left to the jury, upon the circumſtances of the caſe. 1 *H. H.* 685.

By *V. l. p.* 333, of the *Reviſed Code*, 'If any perſon ſhall 'falſely make, forge, or counterfeit, or cauſe or procure to be 'falſely made, forged, or counterfeited, or wittingly act or aſſiſt 'in the falſe making, forging or counterfeiting any deed, will, 'teſtament, bond, writing-obligatory, bill of exchange, pro-'miſſory note for the payment of money or tobacco, or other 'valuable thing, or any acquittance or receipt, either for money 'or tobacco, or other valuable thing, or any endorſement or 'aſſignment of any bond, writing obligatory, bill of exchange, 'promiſſory note, for the payment of money or tobacco, or 'other valuable thing, with intention to defraud any perſon or 'perſons whatſoever, or any corporation, or ſhall utter or pub-'liſh as true any falſe, forged, or counterfeited deed, will, teſ-'tament, bond, writing obligatory, bill of exchange, promiſ-'ſory note, for the payment of money or tobacco, or other valua-'ble thing, acquittance or receipt for money, tobacco, or other 'valuable thing, with intention to defraud any perſon or perſons 'whatſoever, or any corporation, knowing the ſame to be falſe, 'forged or counterfeited, then every ſuch perſon being thereof 'legally convicted, ſhall be deemed guilty of felony, and ſhall 'ſuffer death as a felon, without benefit of clergy.'

Indictment

Indictment for forging and altering a bond, with intention to defraud two different persons.

county to wit.

The jurors for the commonwealth upon their oath preſent, that late of the pariſh of in the county of eſquire, on the day of in the year of the commonwealth, with force and arms, at the pariſh aforeſaid, in the county aforeſaid, feloniouſly did falſely make, forge, and counterfeit, and feloniouſly did cauſe and procure to be falſely made, forged and counterfeited, and feloniouſly did willingly act and aſſiſt in the falſe making, forging, and counterfeiting, a certain paper writing, partly printed and partly written, purporting to be a bond, and to be ſigned by one with the name of him the ſaid and to be ſealed and delivered by him the ſaid the tenor of which ſaid falſe, forged, and counterfeited paper writing, partly printed and partly written, purporting to be a bond, is as follows; that is to ſay, 'Know all men &c.' (*here ſet out the bond and condition as they may be*) with intention to defraud the ſaid againſt the form of the ſtatute in ſuch caſe made and provided, and againſt the peace and dignity of the commonwealth. And the jurors aforeſaid upon their oath aforeſaid, do further preſent, that the ſaid afterwards, to wit, on the day of in the year of the commonwealth aforeſaid, with force and arms, at the pariſh aforeſaid, in the county aforeſaid, feloniouſly did utter and publiſh as true a certain falſe, forged, and counterfeited paper writing, partly printed and partly written, purporting to be a bond, and to be ſigned by the ſaid with the name of him the ſaid and to be ſealed and delivered by the ſaid the tenor of which ſaid laſt mentioned, falſe, forged, and counterfeited paper writing, partly printed and partly written, purporting to be a bond, is as follows, that is to ſay, 'Know, &c.' (*as before*) with intention to defraud the ſaid (he the ſaid at the time of the uttering and publiſhing of the ſaid laſt mentioned, falſe, forged, and counterfeited paper writing, partly printed and partly written, purporting to be a bond, then and there well knowing the ſaid laſt mentioned falſe, forged, and counterfeited paper writing, partly printed and partly written, purporting to be a bond, to be falſe forged and counterfeited) againſt the form of the ſtatute, in ſuch caſe made and provided, and againſt the peace and dignity of the commonwealth. And the jurors aforeſaid upon their oath aforeſaid, do further preſent, that

that the ſaid afterwards, to wit, on the ſaid day of in the year of the commonwealth aforeſaid, with force and arms, at the pariſh aforeſaid, in the county aforeſaid, felonioufly did falſely make, forge and counterfeit, and feloniouſly did cauſe and procure to be falſely made, forged and counterfeited, and feloniouſly did willingly act and aſſiſt in the falſe making, forging, and counterfeiting, a certain paper writing, partly printed and partly written, purporting to be a bond, and to be ſigned by the ſaid with the name of him the ſaid and to be ſealed and delivered by the ſaid the tenor of which ſaid laſt mentioned falſe, forged, and counterfeited paper writing, partly printed and partly written, purporting to be a bond, is as follows, that is to ſay, 'Know &c.' (*as before*) with intention to defraud one doctor in phyſic, againſt the form of the ſtatute, in ſuch caſe made and provided, and againſt the peace and dignity of the commonwealth. And the jurors aforeſaid upon their oath aforeſaid, do further preſent, that the ſaid afterwards, to wit, on the ſaid day of in the year of the commonwealth aforeſaid, with force and arms, at the pariſh aforeſaid, in the county aforeſaid, feloniouſly did utter and publiſh as true, a certain falſe, forged, and counterfeited paper writing, partly printed and partly written, purporting to be a bond, and to be ſigned by the ſaid with the name of him the ſaid and to be ſealed and delivered by the ſaid which ſaid laſt mentioned falſe, forged, and counterfeited paper writing, partly printed and partly written, purporting to be a bond, is as follows, that is to ſay, 'Know &c.' (*as before*) with intention to defraud the ſaid (he the ſaid at the time of the uttering and publiſhing of the ſaid laſt mentioned falſe, forged, and counterfeited paper writing, partly printed and partly written, purporting to be a bond, then and there well knowing the ſaid laſt mentioned falſe, forged, and counterfeited, paper writing, partly printed and partly written, purporting to be a bond, to be falſe, forged, and counterfeited) againſt the form of the ſtatute in ſuch caſe made and provided, and againſt the peace and dignity of the commonwealth.

For more precedents of indictments under this title *See Cro. Cir. Comp.* title *Forgery*, and *Cro. Cir. Aſſiſtant* page 422 &c.

FORNICATION.

BY *Virginia laws* p. 287. § 6. of the *Reviſed Code*; 'Every 'perſon not being a ſervant or ſlave, committing *adultery*, or

'or *fornication*, and being thereof lawfully convicted by the 'oaths of two or more credible witneſſes, or confeſſion of the 'party, ſhall for every offence of *adultery*, forfeit and pay 20 'dollars, and for every offence of *fornication* 10 dollars; to be 'recovered by the ſuit or proſecution of the overſeers of the poor 'of the county or corporation, wherein ſuch offence ſhall be 'committed, by bill, plaint, or information, in any court of 'record within this commonwealth, wherein no eſſoin, protec-'tion, or wager of law ſhall be allowed; which ſaid fines and 'penalties ſhall accrue to the overſeers of the poor, for the uſe 'of the poor of the county or corporation, wherein the ſaid of-'fence ſhall be committed.'

FRAUD. (*See* CHEATS)

FRUIT TREES.

BY *Virginia laws* p. 284. § 4. of the *Reviſed Code*, 'All 'owners of horſes, mares, cattle, and other beaſts which 'they know to have barked fruit trees, ſhall keep the ſame with-'in their own fence ground; and if any perſon ſhall take up any 'horſe, mare, kine or other beaſt, known by the owner to have 'barked fruit trees, and ſhall deliver the ſame to ſuch owner, 'he or ſhe ſhall pay the taker up, two dollars for every ſuch 'beaſt ſo taken up and delivered; recoverable with coſts, before 'any juſtice of the peace of the county wherein ſuch beaſt was 'taken up, or the owner lives: Provided always, that the ta-'ker up, ſhall if required, make oath before the ſame juſtice, 'that he took up ſuch horſe, mare, or other beaſt, and that no 'means were uſed by himſelf or any other perſon to his know-'ledge, to ſet the ſame at large, otherwiſe he ſhall looſe the 'ſaid reward.'

WARRANT.

county to wit.

Complaint being this day made to me J P, *a juſtice of the peace for the county aforeſaid, by* T B, *that the ſaid* T B, *did on the day of laſt, take up a horſe* (or cow, as the caſe is) *at large, at in the ſaid county, belonging to* G P, *which the ſaid* G P, *knew to have barked fruit trees, and delivered the ſame to the ſaid* G P, *who refuſed to pay to the ſaid* T B, *two dollars for the ſame, according to the act of the General Aſſembly, in that caſe made and provided: Theſe are therefore in the name of the commonwealth to require you to bring the ſaid* G P, *before*

me,

me, or ſome other juſtice of the peace for the ſaid county, to anſwer the premiſes. Given &c.

To conſtable.

JUDGMENT.

On hearing the within complaint, it being proved before me, by the oath of that the within named T B, did take up the horſe (*or cow*) therein mentioned, belonging to the ſaid G P, and that no means were uſed by the ſaid T B, or others to his knowledge, as he hath declared upon oath before me to ſet the ſame at large. It is therefore conſidered that the ſaid T B, recover againſt the ſaid G P, two dollars, together with his coſts in this behalf expended. Given &c.

Coſts cents.

GAMING.

THERE being but few of the penalties inflicted, by law, on unlawful gaming, which fall under the cognizance of a ſingle magiſtrate, and thoſe ſeldom inforced, it will be ſufficient in this place to refer to the act of Aſſembly as it ſtands collected in the *Reviſed Code*, and add ſuch precedents, as will enable a magiſtrate with eaſe, to execute his office, in this inſtance.

See *Virginia laws*, page 183—186, of the *Reviſed Code*.

(A) Warrant on ſection 5.

county to wit.

Whereas information hath this day been made before me A B, *gentleman, one of the commonwealth's juſtices of the peace of the ſaid county, by* G H, *of &c. that* C D, *hath been guilty of unlawful gaming, by playing at in an ordinary, (race field, or publick place) in the pariſh of in the county aforeſaid: Theſe are therefore in the name of the commonwealth, to will and require you to ſummon the ſaid* C D, *to appear before me, or ſome other juſtice of the peace of this county, to ſhow cauſe why the penalty of twenty dollars ſhould not be levied upon him for his ſaid offence, according to the act of Aſſembly in this caſe made. Given &c.*

To J P, conſtable, or the ſheriff of the ſaid county.

JUDGMENT.

On hearing the within complaint, and it being proved that the within named C D, *is guilty* (or confeſſes himſelf guilty) *it is therefore*

therefore conſidered that the ſum of twenty dollars be levied upon him, for the uſe of the poor of the pariſh of Given &c.

Warrant of Diſtreſs.

county to wit.

A B, one of the juſtices of the peace of the ſaid county, to the ſheriff thereof, or any conſtable therein.

Whereas C D, *hath been duly convicted before me (or by my own view, or hath confeſſed himſelf guilty) of unlawful gaming, in the pariſh of , and county aforeſaid: Theſe are therefore, in the name of the commonwealth to require you to levy by diſtreſs and ſale, of the goods and chattels of the ſaid* C D, *the ſum of twenty dollars current money, for his offence aforeſaid; and that you pay the ſame to the overſeers of the poor of the ſaid pariſh, for the uſe of the poor thereof. Herein fail not, and make due return of this warrant, and how you have executed the ſame, to me, or ſome other juſtice of this county, on or before the day of next. Given &c.*

Mittimus.

county to wit.

To the ſheriff of the ſaid county of

I ſend you herewith the body of C D, *this day duly convicted before me* (or upon my view) *of having been guilty of unlawful gaming; and I hereby require you to receive the ſaid* C D, *into your jail and cuſtody, and him ſafely to keep until he ſhall enter into a recognizance, with two ſufficient ſecurities, himſelf in dollars, and each ſecurity in dollars, with condition for his being of good behaviour for twelve months from this day, or until he ſhall be thence diſcharged by due courſe of law.*

If an appeal to the county court is prayed by the defendant, the magiſtrate ſhould take his bond with ſecurity, in double the ſum recovered, payable to the plaintiff, and with condition as followeth.

The condition of this obligation is ſuch that whereas the above-named G H, *hath obtained judgment upon warrant before me* A B, *one of the commonwealth's juſtices of the peace for the county of againſt the above bound* C D, *for twenty dollars for the uſe of the poor of the diſtrict of in the county of from which judgment the ſaid* C D, *hath prayed an appeal to the next court to be held for the ſaid county of Now if the ſaid* C D, *ſhall try the ſaid appeal at the next court, and perform the judgment of the court thereupon, then this obligation to be void, elſe to remain in full force and virtue.*

Form

Form of a record to be made up and certified by the juſtice to the county court on ſuch appeal.

county to wit.

Be it remembered that on the day of laſt paſt, on information that C D, had been guilty of unlawful gaming, I iſſued my warrant to ſummon the ſaid C D, to anſwer for his ſaid offence, in the words following, to wit, (*here inſert the warrant verbatim*) which warrant being returned executed by E F, conſtable, the ſaid C D, appeared before me this day, and was fully heard on the ſubject matter of the ſaid information, when it was fully proved that he was guilty of the offence in the warrant mentioned: Therefore it is conſidered that the fine of twenty dollars be levied upon him for his ſaid offence, according to the act of the General Aſſembly aforeſaid.

From which judgment the ſaid C D, prayed an appeal to the next court to be held for this county, which is allowed, he having entered into bond, with ſecurity, for trying the ſame according to law; which bond is hereunto annexed. Certified under my hand and ſeal this day of &c.

(B) Warrant on ſection 7.

county to wit.

Whereas we have juſt cauſe to ſuſpect, that H H, of &c. is an idle perſon, having no viſible eſtate, profeſſion or calling, to maintain himſelf by, but doth for the moſt part ſupport himſelf by gaming, contrary to the act of the General Aſſembly, in that caſe made and provided: Therefore, we command you, that you forthwith cauſe the ſaid H H, to come before us, or ſome other juſtices of the peace of this county, to be examined concerning the premiſes. Herein fail not. Given under our hands and ſeals &c.

J. P.
K. P.

Condition of the recognizance.

The condition of this recognizance is ſuch, that whereas the above bound H H. was this day brought before J P, and K P, two of the commonwealth's juſtices of the peace of the county of upon their warrant, for the ſuſpicion of his being an idle perſon, having no viſible eſtate, profeſſion or calling, to maintain himſelf by, but for the moſt part ſupporting himſelf by gaming; and the ſaid H H, upon examination before the juſtices

juſtices aforeſaid, not making it appear to them, that a principal part of his expences was not maintained by gaming, and thereupon he was required to give ſufficient ſecurities for his good behaviour, purſuant to the act of the General Aſſembly, in that caſe made and provided: If therefore the ſaid H H, ſhall be of good behaviour towards the commonwealth, and all the citizens within the ſame, for and during the ſpace of twelve months next enſuing the date of theſe preſents, then this recognizance to be void, elſe to remain in full force.

MITTIMUS.

To the ſheriff or keeper of the jail of county.

county to wit.

We ſend you herewith the body of H H, late of &c. taken upon our warrant, and brought before us on ſuſpicion of his being an idle perſon, of no viſible eſtate, profeſſion or calling, to maintain himſelf by, but for the moſt part ſupporting himſelf by gaming; and the ſaid H H, on examination before us, failing to make it appear that the principal part of his expences is not maintained by gaming; and having refuſed to give ſecurity for his good behaviour for twelve months next enſuing, according to the act of the General Aſſembly, in ſuch caſe made and provided: We therefore charge you to receive the ſaid H H, into your jail and cuſtody, and him there ſafely to keep, till he ſhall enter into a recognizance, with two ſufficient ſecurities, himſelf in dollars, and each ſecurity in dollars, for his good behaviour as aforeſaid, or until he ſhall be thence diſcharged by due courſe of law. Given &c.

J. P.
K P.

(C) Warrant on ſection 11.

Corporation of to wit.

Whereas it appears to me J P, a magiſtrate for the corporation aforeſaid, from my own view, that A O, of doth keep and exhibit a gaming table, commonly called an A B C table, (*or if any other kind, deſcribe it*) at the houſe of within the corporation aforeſaid, contrary to the act of the General Aſſembly, in ſuch caſe made and provided: Theſe are therefore in the name of the commonwealth, to require you forthwith to ſeize the ſaid table, and publickly to burn or deſtroy the ſame; and for ſo doing this ſhall be your warrant. Given &c.

To A C, *conſtable.*

GOOD BEHAVIOUR, (*See* SURETY.)
GRAND LARCENY, (*See* LARCENY.)
GUARD, (*See* CRIMINALS.)

Habeas

AN *habeas corpus* (from the initial words of the writ, while all legal proceedings were in latin) is a writ for bringing the body of him, who is impriſoned, before the court, *with the cauſe of the detention.* 4. *Com. Dig.* 328.

This is called by judge *Blackſtone* the moſt celebrated writ in the Engliſh law, and is of various ſorts, as,

1. *Habeas corpus ad reſpondendum* (to anſwer) when a man hath cauſe of action againſt one who is confined by the proceſs of ſome inferior court, in order to remove the priſoner and charge him with this new action in the court above. 3 *Black's Com.* 129.

So it lies where a man is entitled to privilege in an inferior court where he is ſued; and if upon the return it appears that he was committed without cauſe, or by a court having no juriſdiction, he ſhall have his privilege. 2 *H. H.* 144. See 4. *Com. Dig.* 338.

If a defendant be in priſon at the ſuit of another, the ſpecial bail may have him brought up by *habeas corpus* in order to ſurrender. *Sellon's practice. K. B.*

2. *Habeas corpus, ad ſatisfaciendum,* when a priſoner hath had judgment againſt him in an action, and the plaintiff is deſirous to bring him up to ſome ſuperior court to charge him with execution. 3 *Black's Com.* 130.

3. *Habeas corpus, ad proſequendum, teſtificandum, deliberandum &c.* which iſſue when it is neceſſary to remove a priſoner, in order to bear teſtimony or proſecute in any court.

4. *Habeas corpus, ad faciendum, et recipiendum* (*to do and receive*) which iſſues from a ſuperior court, when a perſon is ſued in ſome inferior juriſdiction, and is deſirous to remove the action into the ſuperior court. This writ directs the body of the priſoner to be produced, together with the day and cauſe of his caption and detainer (whence it is frequently denominated an *habeas corpus cum cauſa*) It is grantable of common right, without any motion in court, and inſtantly ſuperſedes all proceedings in the court below. 3 *Black's Com.* 130.

5. The great and efficacious writ, in all manner of illegal confinement, is that of *habeas corpus ad ſubjiciendum*; directed to the perſon detaining another, and commanding him to produce the body of the priſoner, with the day and cauſe of his caption and detention, *ad faciendum, ſubjiciendum, et recipiendum*, to do, ſubmit to, and receive whatſoever the judge or court awarding, ſuch writ ſhall conſider in that behalf. 3 *Black's Com.* 131.

The mode of proceeding on writs of *habeas corpus* in this commonwealth, is pointed out by *Virginia laws, p.* 242. of the *Reviſed Code*, which ſee.

It

It will yet be neceſſary to inſert ſome points of information which apply to all writs of *habeas corpus*, and thoſe reſpect *the return*, and *proceedings thereon*, as to *diſcharging* or *remanding* the priſoner.

The officer muſt ſhew by his return, by whom the party was committed, and the cauſe of the commitment. 2 *Inſt.* 55.

And the return muſt anſwer to the taking as well as to the detention. 2 *Blacks Rep.* 1204.

And if he does not make a return after the delivery of the writ, an attachment lies againſt him. 2 *Jones.* 178—Even tho' his charges are refuſed. *Id.*

The return to *habeas corpus*, ought to ſhew the cauſe of commitment, ſpecially and certainly. 2. *Inſt.* 55. *Cro. Car.* 507. *Vau.* 137. *Pal.* 558.

See various inſtances. 4. *Com. Dig.* 332—334.

At the return of an *habeas corpus*, the court, generally, ought to diſcharge, or remand the party. 2 *Inſt.* 55. 2 *H. H.* 143.

And therefore if the return ſhew no cauſe, or no ſufficient cauſe, for the impriſonment and detainer, he ſhall be diſcharged. 2 *Inſt.* 55. 615. *Vau.* 156.

But if the return ſhews a ſufficient cauſe, he ſhall be remanded. 2 *Inſt.* 55.

Yet the ſuperior court may bail if they pleaſe, tho' the return be ſufficient. 2 *Inſt.* 55. *Vau.* 157. 1 *Sed.* 78.

See 4. *Com. Dig.* 335.

Upon an *habeas corpus* to remove a cauſe out of an inferior court, a *procedendo* ſhall be awarded, if it appears that the action is maintainable there only. *Carth.* 75.

After interlocutory judgment, it is too late to remove a cauſe, and *procedendo* ſhall be awarded. *Barnes*, 221.

So after iſſue joined. *Id.*

An *habeas corpus* for ſurrendering a man in diſcharge of his bail may be made returnable *immediately*. 4 *Com. Dig.* 340.

But generally an *habeas corpus* ſhall be returnable at a day certain. *Id.*

HIGH TREASON *(ſee Treaſon.)*

HIGH WAYS *(ſee Roads.)*

HIGHWAY-MEN, *(ſee Robbery.)*

HOGSTEALING.

The juriſdiction of a ſingle magiſtrate in offences of this kind relates chiefly to proceedings againſt ſlaves;—with reſpect to

others guilty of that offence, *see V. l. c.* 98 *p.* 186 *of the Revised Code.*

The proceedings againſt ſlaves, in this offence, are directed by *Virginia Laws*, chap. 98, p. 187, ſect. 4, 5 & 6, of the *Reviſed Code, which ſee.*

Warrant againſt a SLAVE, for HOGSTEALING.

county to wit.

To the Sheriff or any Conſtable of the ſaid County.

Whereas complaint is made to me that a negro man ſlave belonging to A. B. of this county, hath lately ſtolen hogs, the property of C D. You are therefore required to bring the ſaid together with ſuch witneſſes as the ſaid C. D. ſhall direct, before me, or ſome other juſtice of this county, to be examined concerning the premiſes. Given &c.

If on examination he is found guilty, then he ſhould be committed under the following

MITTIMUS.

county to wit.

To the Sheriff, or keeper of the jail of the ſaid county.

I ſend you herewith the body of a negro man ſlave belonging to A. B. of this county, who, upon his examination before me, appears to be guilty of hogſtealing; and I do hereby require you to receive the ſaid into your jail and cuſtody, and him ſafely to keep till ſufficient ſecurity be given for his appearance at the next court to be held for this county, then and there to anſwer an information to be exhibited againſt him for his offence aforeſaid, and to abide the judgment of the ſaid court, or until he be otherwiſe diſcharged by due courſe of law. Given &c.

HOMICIDE.

Homicide in law ſignifies the killing of a man by a man. 1 *Haw.* 66.

And it includes in it, not only petit treaſon, concerning which ſee title *Treaſon*; but alſo the ſeveral offences which are treated of in the following ſections.

There

There is alſo another kind of untimely death of a man, not properly homicide: when he is killed by a horſe, a cart, a tree or the like, and not by a man; which is called caſual death; for which ſee title *Deodand*

I. *Juſtifiable Homicide.*
II. *Homicide by miſadventure.*
III. *Homicide by ſelf defence.*
IV. *Manſlaughter.*
V. *Murder.*
VI. *Self Murder.*

I. Juſtifiable HOMICIDE.

To make homicide juſtifiable, it muſt be owing to ſome unavoidable neceſſity, to which the perſon who kills another muſt be reduced, without any manner of fault in himſelf. 1 *Haw.* 69.

And there muſt be no malice coloured under pretence of neceſſity; for wherever a perſon who kills another, acts in truth upon malice, and takes occaſion from the appearance of neceſſity to execute his own private revenge, he is guilty of murder.—1 *Haw.* 69.

It is ſaid in the old books, that one may ſet forth a fact, amounting to juſtifiable homicide on an indictment of murder; and that the ſame being found true, he ſhall be diſmiſſed without being arraigned, or enforced to plead *not guilty*. And indeed it ſeems extremely hard (ſays Mr. *Hawkins*) that a ſheriff or judge who condemn or execute a criminal, &c. ſhould be forced on a frivolous proſecution to hold up their hands at the bar for it, &c. 1 *Hawk.* (6 ed.) 105.

If rioters, or forcible enterers or detainers ſtand in oppoſition to the juſtices lawful warrant, and any of them is ſlain; it is no felony. *Hale's pl.* 37.

If a man comes to burn my houſe, and I ſhoot out of my houſe, or iſſue out of my houſe and kill him; it is no felony.—*Hale's pl* 39.

If a woman kill him that aſſaulteth to raviſh her; it is no felony. *Hale's pl.* 39.

If a perſon having actually committed a felony, will not ſuffer himſelf to be arreſted, but ſtand on his own defence, or fly, ſo that he cannot poſſibly be apprehended alive by thoſe who purſue him, whether private perſons or public officers, with or without a warrant from a magiſtrate; he may be lawfully ſlain by them. 1 *Haw.* 70.

So

So if a felony hath actually been committed, and an officer or miniſter of juſtice, having lawful warrant ſo to do, arreſt an innocent perſon, and ſuch perſon aſſault the officer or miniſter of juſtice; the officer is not bound by law to give back, but to carry him away; and if in execution of his office, he cannot otherwiſe avoid it, but in ſtriving, kill him, it is no felony. And in that caſe, the officer or miniſter of juſtice ſhall forfeit nothing; but the party ſo aſſaulting, or offering to fly away, and is killed, ſhall forfeit his goods. 3 *Inſt.* 56.

Alſo if a perſon arreſted for felony, break away from his conductors to jail, they may kill him, if they cannot otherwiſe take him. But in this caſe likewiſe, there muſt have been a felony actually committed, *Hale pl.* 36, 37.

Alſo if a criminal endeavouring to break the jail, aſſault his jailor, he may be lawfully killed by him in the affray. 1 *Haw.* 71.

In civil cauſes; although the ſheriff cannot kill a man who flies from the execution of a civil proceſs; yet if he reſiſt the arreſt; the ſheriff or his officer need not give back, but may kill the aſſailant. *Hale's pl.* 37.

So if in the arreſt and ſtriving together, the officer kill him, it is no felony. *Hale's pl.* 37.

In all theſe caſes the party upon arraignment having pleaded not guilty, the ſpecial matter muſt be found; whereupon the party ſhall be diſmiſſed, without any forfeiture, or pardon purchaſed, *Hale's pl.* 38.

Or, on *not guilty*, he may give the ſpecial matter in evidence; or the jury may find a fact ſpecially amounting to juſtifiable homicide. 1 *Hawk.* (6 ed.) 105.

II. *Homicide by miſadventure.*

I have purpoſely avoided the word *chancemedley* in this place, becauſe authors do not ſeem to be agreed whether it is to be applied to homicide *by miſadventure*, or to *manſlaughter*. Ld. *Coke* and Mr. *Hawkins* ſeems to underſtand it of *manſlaughter*; Lord *Hale*, and others of homicide *by miſadventure*. The original meaning of the word ſeems to favour the former opinion, as it ſignifies a ſudden or caſual medling or contention; whereas homicide by miſadventure ſuppoſes no previous medling or falling out. But the ſame author ſometimes in different places, applies it to both of them promiſcuouſly. 2 *Burn's Juſt.* 414.

Homicide by miſadventure is, where a man is doing a lawful act, without intent of hurt to another, and death caſually enſues. *Hale's pl.* 31.

As

As where a labourer being at work with a hatchet, the head flies off and kills one who ſtands by. 1 *Haw.* 73.

Or where a third perſon whips a horſe, on which a man is riding, whereupon he ſprings out and runs over a child, and kills him; in which caſe the rider is guilty of homicide by miſadventure, and he who gave the blow of manſlaughter. 1 *Haw.* 73.

But if a perſon riding in the ſtreet whip his horſe to put him into ſpeed, and run over a child and kill him, it is homicide and not by miſadventure; and if he ride ſo, in a preſs of people, with intent to do hurt, and the horſe killeth another, it is murder in the rider. 1 *H. H.* 476.

If a perſon drives his cart careleſsly, and it runs over a child in the ſtreet, if he have ſeen the child, and yet drives on upon him, it is murder; but if he ſaw not the child, yet it is manſlaughter; but if the child had run croſs the way, and the cart run over the child before it was poſſible for the carter to make a ſtop, it is by miſadventure. 1 *H. H.* 476.

So where workmen throw ſtones, rubbiſh, or other things, from an houſe, in the ordinary courſe of their buſineſs, by which a perſon underneath happens to be killed; if they look out and give timely warning to thoſe below, it will be homicide by miſadventure; if without ſuch caution, it will amount to manſlaughter at leaſt: It was a lawful act, but done in an improper manner. It is ſaid by ſome, that if this be done in the ſtreets of populous towns, it will be manſlaughter notwithſtanding the caution above mentioned: But this will admit of ſome limitation. If it be done early in the morning, when few or no people are ſtirring, and the ordinary caution is uſed, it ſeemeth that the party is excuſable. But when the ſtreets are full, that will not ſuffice; for in the hurry and noiſe of a crouded ſtreet, few people hear the warning, or ſufficiently attend to it. *Foſt.* 262, 263.

It is ſaid before, that this homicide is only when it happeneth upon a man's doing a lawful act; for if the act be unlawful, it is murder. As if a perſon, meaning to ſteal a deer, in another man's park, ſhooteth at the deer, and by the glance of the arrow killeth a boy, that is hidden in a buſh; this is murder, for that the act was unlawful, altho' he had no intent to hurt the boy, nor knew of him. But if the owner of the park had ſhot at his own deer, and without any ill intent had killed the boy by the glance of his arrow, this had been homicide by miſadventure and no felony. 3 *Inſt.* 56.

So if any one ſhoot at any wild fowl upon a tree, and the arrow kill any reaſonable creature afar off, without any evil intent,

in

in him, this is by misadventure; for if it was not unlawful to shoot at the wild fowl: But if he had shot at a cock or a hen, or any tame fowl of another man's, and the arrow by mischance had killed a man; if his intention was to steal the poulty (which must be collected from circumstances) it will be murder by reason of that felonious intent; but if it was done wantonly, and without that intention, it will be barely manslaughter. *Fost.* 258, 9.

The rule laid down supposeth, that the act from which death ensued, was *malum in se*. For if it was barely *malum prohibitum* as shooting at game by a person not qualified by statute law to keep or use a gun for that purpose; the case of a person so offending, will fall under the same rule as that of a qualified man. For the statutes prohibiting the destruction of the game, under certain penalties, will not in a question of this kind enhance the accident beyond its intrinsick moment. *Fost.* 259.

Further, if there be an evil intent, tho' that intent extendeth not to death, it is murder. Thus, if a man knowing that many people are in the street, throw a stone over the wall, intending only to fright them, or to give them a little hurt, and thereupon one is killed, this is murder; for he had an ill intent, tho' that intent extended not to death, and tho' he knew not the party slain. 3 *Inst.* 57.

And it is a general rule, in case of all felonies, that wherever a man intending to commit one felony, happens to commit another, he is as much guilty as if he had intended the felony which he actually commits. 1 *Haw.* 74.

But in all the cases above, if it doth only hurt a man, by such an accident, it is nevertheless a trespass; and the person hurt shall recover his damages; for tho' the chance excuse from felony, yet it excuseth not from trespass. 1 *H. H.* 472.

This homicide is not felony, because it is not accompanied with a felonious intent, which is necessary in every felony.—1 *Haw.* 75.

There can be no doubt but that a person apprehended for the commission of this act is bailable. *See* "Bail."

The forfeiture which ensued on homicide by misadventure is now abolished. *See* "Attainder."

The act of 22 *Geo.* II. *ch.* 31, sect. 23 which exempted from punishment any person for causing the death of a slave during his correction, is repealed by the act of 1788. ch. 23.

By *V. L.* (14 R. Cond. 1789, ch. 43) *page* 49. 'In case 'it be found by the country, that any man by misfortune, or in 'his own defence, or in other manner without felony, did kill 'another, he shall be acquitted.'

By

III *Homicide by ſelf defence.*

Homicide in a man's own defence ſeems to be, where one who hath no other poſſible means of preſerving his life from one who combats with him on a ſudden quarrel, kills the perſon by whom he is reduced to ſuch an inevitable neceſſity. 1 *Haw.* 75.

And not only he, who upon an aſſault retreats to a wall, or ſome ſuch ſtrait, beyond which he can go no farther, before he kills the other, is judged by the law to act upon unavoidable neceſſity; but alſo he, who being aſſaulted in ſuch a manner, and in ſuch a place, that he cannot go back without manifeſtly endangering his life, kills the other without retreating at all.—1 *Haw.* 75.

And notwithſtanding a perſon who retreats from an aſſault to the wall, give the other wounds in his retreat, yet if he give him no mortal one till he get thither, and then kill him, he is guilty of homicide *ſe defendendo* only. 1 *Haw.* 75.

But if the mortal wound was firſt given, then it is manſlaughter. *Hale's Pl.* 42.

And an officer who kills one that reſiſts him in the execution of his office, and even a private perſon that kills one who felonioufly aſſaults him in the high way, may juſtify the fact without giving back at all. 1 *Hawk.* 75.

But if a perſon upon malice *prepence* ſtrike another, and then fly to the wall, and there in his own defence kills the other, this is murder. *Hale's Pl.* 42.

Hereof there can be no acceſſaries, either before or after the act, becauſe it is not done with a felonious intent, but upon inevitable neceſſity. 3 *Inſt.* 56.

A perſon guilty hereof is not bailable by juſtices of the peace, but they muſt commit him till the aſſizes. 1 *Hawk.* 76. But it is now otherwiſe. *See* "*Bail.*"

But otherwiſe it is, if he is taken only on ſlight ſuſpicion. 2 *Hawk.* 105.

Lord *Coke* (2 *Inſt.* 316) ſays that the juſtices of the peace cannot take an indictment of killing a man *ſe defendendo*; becauſe their commiſſion is not general, as is that of the juſtices of jail delivery, but limited. But lord *Hale* (2 *H. H.* 46.) holds the contrary.

The forfeiture which formerly accrued on the commiſſion of this act is now aboliſhed. See "*Attainder.*"

If a man be indicted for Homicide *ſe defendendo*, and is found not guilty, yet if it be found that he fled for the ſame, he ſhall forfeit his goods for ſuch flight, in not ſtanding to the law of the land. 1 *H. H.* 493. *Quære*, if the forfeiture is not now aboliſhed. See "*Attainder.*"

IV. *MANSLAUGHTER.*

By manſlaughter is to be underſtood ſuch killing of a man as happened either on a ſudden quarrel, or in the commiſſion of an unlawful act, without any deliberate intention of doing any miſchief at all. 1 *Hawk.* 76.

There is no difference between murder and manſlaughter, but that murder is upon malice forethought, and manſlaughter upon a ſudden occaſion. As if two meet together, and ſtriving for the wall the one kill the other, this is manſlaughter and felony. And ſo it is, if they had upon that ſudden occaſion gone into the field and fought, and the one had killed the other, this had been but manſlaughter, and no murder; becauſe all that followed was but a continuance of the firſt ſudden occaſion, and the blood never was cooled, till the blow was given. 3 *Inſt.* 55.

He is guilty of *manſlaughter* only, who ſeeing a man in bed with his wife, or being actually ſtruck by him, or pulled by the noſe, or filliped upon the forehead immediately kills him; or who happens to kill another in a contention for the wall; or in the defence of his perſon from an unlawful arreſt; or in the defence of his houſe from thoſe, who claiming a title to it attempt forcibly to enter it, and to that purpoſe ſhoot at it &c. or in the defence of his poſſeſſion of a room in a public houſe, from thoſe who attempt to turn him out of it, and thereupon draw their ſwords upon him; in which caſe the killing the aſſailant hath in ſome caſes been holden juſtifiable; but it is certain that it can amount to no more than manſlaughter. 1 *Haw.* (6 ed.) 125.

There can be no acceſſaries *before* the fact in manſlaughter. 1 *Hawk* 76——But there may be acceſſaries after the fact. 3 *Inſt.* 55.

If a ſlight ſuſpicion of guilt only fall on the offender he is bailable. *See* 'Bail.'

But the forfeiture is now taken away, by *V. l.* (17 R. Cond. 1792, ch. 74) *p.* 113.

This offence is within the benefit of clergy. 2 *H. H.* 344.

A perſon found guilty of manſlaughter on a ſlave is not now exempted from puniſhment. *See acts of* 1788, *ch.* 23.

Upon an indictment of murder, the party offending may be acquitted of murder, and yet found guilty of manſlaughter, as daily experience witneſſeth, and they may not find him generally *not guilty*, if guilty of manſlaughter. 1 *H. H.* 449.

The reader is particularly requeſted to peruſe the caſe of *Rex v. Oneby*, (2 *Strange* 766) where the diſtinction between murder and manſlaughter is very accurately marked out and defined by chief juſtice *Raymond* in delivering the opinion of all the judges of England.

V. *MURDER.*

Is when a man of ſound memory, and of the age of diſcretion, unlawfully killeth any perſon under the commonwealth's peace, with malice forethought, either expreſſed by the party, or implied by law, ſo as the party wounded or hurt die of the wound or hurt, within a year and a day. 3 *Inſt.* 47.

By *malice expreſſed* is meant a deliberate intention of doing any bodily harm to another, whereunto by law a perſon is not authoriſed. 1 *H. H.* 154.

And the evidences of ſuch a malice muſt ariſe from external circumſtances diſcovering that inward intention, as lying in wait, menacing antecedent, former grudges, deliberate compaſſings, and the like; which are various according to variety of circumſtances. 1 *H. H.* 451.

Malice implied is in ſeveral caſes, as when one voluntarily kills another, without any provocation; for in this caſe the law preſumes it to be malicious, and that he is a public enemy of mankind. 1 *H. H.* 455, 456.

Poiſoning alſo implies malice, becauſe it is an act of deliberation. 1 *H. H.* 455.

Alſo when an officer is killed in the execution of his office, it is murder, and the law implies malice. 1 *H. H.* 457.

Alſo where a priſoner dieth by dureſs of the jailer, the law implies malice, by reaſon of the cruelty. 3 *Inſt.* 52.

And in general any formed deſign of doing miſchief may be called malice, and therefore not ſuch killing only as proceeds from premiditated hatred or revenge againſt the perſon killed, but alſo in many other caſes, ſuch as are accompanied with thoſe circumſtances that ſhew the heart to be perverſely wicked, is adjudged to be of malice *prepenſe*, and conſequently murder. 2 *Haw.* 89. *Strange* 766.

For when the law makes uſe of the term *malice aforethought*, as deſcriptive of the crime of murder, it is not to be underſtood in that narrow reſtrained ſenſe to which the modern ſenſe of the word *malice* is apt to lead one, *a principle of malevolence to particulars*; for the law by the term *malice* (*malitia*) in this inſtance meaneth that the fact has been attended with ſuch circumſtances as are the ordinary ſymptoms of a wicked heart, regardleſs of ſocial duty, and fatally bent upon miſchief. *Foſt.* 256, 7.

And wherever it appears that a man killeth another, it ſhall be intended *prima facie* that he did it maliciouſly, unleſs he can make out the contrary, by ſhewing that he did it on a ſudden provocation, or the like. 1 *Haw.* 82.

Alſo

Alſo wherever a perſon in cool blood, by way of revenge, beats another in ſuch a manner that he afterwards dies thereof, he is guilty of murder, however unwilling he might have been to have gone ſo far. 1 *Haw.* 83.

And it ſeems to be agreed, that no breach of a man's word or promiſe, no treſpaſs either to lands or goods, no affront by bare words or geſtures, however falſe or malicious it may be, and aggravated with the moſt provoking circumſtances, will excuſe him from being guilty of murder, who is ſo far tranſported thereby, as immediately to attack the perſon who offends him, in ſuch a manner as manifeſtly endangers his life, without giving him time to put himſelf upon his guard, if he kills him in purſuance of ſuch an aſſault, whether the perſon ſlain did at all fight or not. 1 *Haw.* 82.

But if the perſon provoked, beat the other, ſo as apparently not to deſign to kill him, or if he gives him time to be on his guard it is manſlaughter only. 1 *Haw.* (6 *ed.*) 125.

If a man by harſh and unkind uſage put another into ſuch a paſſion of grief or fear, that the party either die ſuddenly or contract ſome diſeaſe whereof he dies, though this be murder or manſlaughter in the ſight of God, yet in a humane judicature it cannot come under the judgment of felony, becauſe no external act of violence was offered, whereof the law can take notice. 1 *H. H.* 429.

If two fall out upon a ſudden occaſion, and agree to fight in ſuch a field, and each of them go and fetch their weapon, and go into the field and therein fight, and the one killeth the other, this is no malice prepenſe; for the fetching the weapon, and going into the field, is but a continuance of the falling out, and the blood was never cooled. But if there were deliberation, as that they meet the next day, nay though it were the ſame day, if there were ſuch a competent diſtance of time, that in common preſumption they had time of deliberation, then it is murder.—3 *Inſt.* 51. 1 *H. H.* 453.

And the law ſo far abhors duelling in cold blood, that not only the principal who actually kills the other, but alſo his ſeconds, are guilty of murder, whether they fought or not. And it is holden, that the ſeconds of the party ſlain are likewiſe guilty as acceſſaries. 1 *Haw.* 82.

If a phyſician or ſurgeon gives a perſon a potion, without any intent of doing him any bodily harm but with intent to cure or prevent a diſeaſe, and contrary to the phyſician or ſurgeon's expectation it kills him, this is no homicide. And lord *Hale* ſays, he holds their opinion, to be erroneous, who think that if he be no licenſed ſurgeon or phyſician, that occaſioneth this miſchance, that

that then it is felony. These opinions (he says) may caution ignorant people not to be too busy in this kind with tampering with physic, but are no safe rule for a judge or jury to go by.—1 *H. H.* 429.

But if a woman be with child, and any gives her a potion to destroy the child within her, and she take it, and it works so strongly that it kills her, this is murder; for it was not given her to cure her of a disease, but unlawfully to destroy the child within her; and therefore he that gives her a potion to this end must take the hazard, and if it kills the mother it is murder.—1 *H. H.* 430.

Also if a woman be quick with child, and by a potion or otherwise, killeth it in her womb; or if a man beat her, whereby the child dieth in her body, and she is delivered of a dead child, this is a great misprison, but no murder: But if the child be born alive, and dieth of the potion, battery, or other cause, this is murder. 3 *Inst.* 50.

Lord *Hale* says, that in this case it cannot legally be known, whether the child were killed or not; and that if the child die, after it is born and baptised, of the stroke given to the mother, yet it is not homicide. 1 *H. H.* 433. And Mr. *Dalton* says, whether it die within her body, or shortly after her delivery, it maketh no difference. *Dalt.* 332. But Mr. *Hawkins* says, that (in this latter case) it seems clearly to be murder, notwithstanding some opinions to the contrary. 1 *Haw.* 80.

Also it seems agreed, that where one counsels a woman to kill her child when it shall be born, who afterwards doth kill it in pursuance of such advice, he is an accessary to the murder. 1 *Haw.* 80.

Lord *Hale* says, if a man have a beast, as a bull, cow, horse, or dog, used to hurt people, and he hath notice thereof, and it doth any body hurt, he is chargeable with an action for it:

If he have no particular notice that it did any such thing before, yet if it is *ferae naturae*, as a lion, a bear, a wolf, yea an ape, or a monkey, if it get loose and do harm to any person, the owner is liable to an action for the damage:

If he have notice of the quality of any such his beast, and use all due diligence to keep him up yet he breaks loose and kills a man, this is no felony in the owner but the beast is a *deodand*:

But if he did not use that due diligence, but through negligence the beast goes abroad, after warning or notice of his condition, and kills a man, he thinks it is manslaughter in the owner.

But if he did purposely let him loose or wander abroad, with design to do mischief, nay though it were with design only to fright people and make sport, and it kills a man, it is murder in the owner. 1 *H. H.* 431.

They

They that are preſent when any man is ſlain, and do not their beſt endeavour to apprehend the murderer or manſlayer, ſhall be fined and impriſoned. 3. *Inſt.* 53.

The principal in murder, and the acceſſary before the fact is ouſted of clergy in all caſes, but not the acceſſary after. 2 *H. H.* 344.—*See* "*Clergy*" benefit of.

The forfeitures formerly accruing on this offence are expreſſly abolished by *V. l.* (17 R. Cond. 1792. ch. 74.) p. 113.

VI. *Self Murder.*

A felo de ſe, or felon of himſelf, is a perſon, who being of ſound mind, and of the age of diſcretion, voluntarily killeth himſelf. 3 *Inſt.* 54. 1 *H. H.* 411.

If a man give himſelf a wound, intending to be *felo de ſe*, and dieth not within the year and day after the wound, he is not *felo de ſe*. 3 *Inſt.* 54.

Mr. *Hawkins* ſpeaks with ſome warmth againſt an unaccountable notion (as he calls it) which hath prevailed of late, that every one who kills himſelf muſt be *non compos* of courſe; becauſe it is ſaid to be impoſſible, that a man in his ſenſes ſhould do a thing ſo contrary to nature, and all ſenſe and reaſon. But he argues, that if this doctrine were allowable, it might be applied in excuſe of many other crimes as well as this; as for inſtance that of a mother murdering her child, which is alſo againſt nature and reaſon: and this conſideration, inſtead of being the higheſt aggravation of a crime, would make it no crime at all; for it is certain a perſon *non compos mentis* can be guilty of no crime. 1 *Haw.* 67.

And Lord *Hale* ſays it is not every melancholy or hypocondriacal diſtemper, that denominates a man *non compos*, for there are few who commit this offence, but are under ſuch infirmities; but it muſt be ſuch an alienation of mind, as renders a perſon to be a madman or frantick, or deſtitute of the uſe of reaſon, which will denominate him *non compos* 1 *H. H.* 412.

The offender herein doth incur a forfeiture of goods and chattels but not of lands; for no man can forfeit his land, without an attainder by courſe of law. 3 *Inſt.* 54.

Nor ſhall his goods be forfeited, until it be lawfully found by the oath of 12 men, and this belongs to the coroner to inquire of, upon view of the body. And if the body cannot be viewed, the juſtices in ſeſſions may inquire thereof; for they have power by their commiſſion to inquire of all felonies; and a preſentment thereof found before them, intitles the commonwealth to the forfeiture. 3 *Inſt.* 54, 55. *Dalt. c.* 144.—See '*Coroner.*'

But

But nevertheleſs, the forfeiture ſhall relate to the time of the wound given, and not to the time of the death, or of the inquiſition. 3 *Inſt.* 55. *Dalt. c.* 144. 1 *Hale's Pl.* 29. 1 *Haw.* 68.

But lord *Hale* in his hiſtory of the pleas of the crown, ſeemeth to doubt, whether it ſhall not relate to the time of the death only, and not to the time of the wound given. 1 *H. H.* 414.

Nor doth the offence work any corruption of blood or loſs of dower. 1 *Haw.* 68.

The act of Aſſembly which aboliſhes the forfeitures formerly accruing on the attainder or conviction of a perſon, is thought not to extend to the caſe of a *felo de ſe*. *See* 3 *Inſt.* 54.

For precedents, ſee titles *Warrants*, *Commitment*, *Recognizance*, and *Criminals*.

(A) Indictment for murder by beating with fiſts and kicking on the ground, where no viſible mortal wound can be diſcovered.

county to wit.

The jurors &c. upon their oath preſent, that late of the pariſh of in the county of labourer, not having the fear of God before his eyes, but being moved and ſeduced by the inſtigation of the devil, on the day of in the year of the commonwealth, with force and arms, at the pariſh aforeſaid, in the county aforeſaid, in and upon one in the peace of God and the commonwealth, then and there being, feloniouſly, wilfully, and of his malice aforethought, did make an aſſault; and that the ſaid then and there feloniouſly, wilfully, and of his malace aforethought did ſtrike, beat, and kick the ſaid with his hands and feet, in and upon the head, breaſt, back, belly, ſides, and other parts of the body of him the ſaid and did there and then feloniouſly, wilfully, and of his malice aforethought caſt and throw the ſaid down unto and upon the ground, with great force and violence there, giving unto the ſaid then and there, as well by the beating, ſtriking, and kicking of him the ſaid in manner and form aforeſaid, as by the caſting and throwing of him the ſaid down as aforeſaid, ſeveral mortal ſtrokes, wounds, and bruiſes in and upon the head, breaſt, back, belly, ſides, and other parts of the body of him the ſaid of which ſaid mortal ſtrokes, wounds, and bruiſes, he the ſaid from the ſaid day of in the year aforeſaid, until the day of in the ſame year, as well at the pariſh aforeſaid in the county aforeſaid, as alſo at the pariſh of in the ſaid county of aid languiſh, and languiſhing did live; on which

ſaid

ſaid day of in the year of the commonwealth aforeſaid, the ſaid in the pariſh aforeſaid, in aforeſaid, in the county aforeſaid, of the ſeveral mortal ſtrokes, wounds, and bruiſes aforeſaid, died: And ſo the jurors aforeſaid, upon their oath aforeſaid, do ſay, that the ſaid him the ſaid in manner and form aforeſaid, feloniouſly, wilfully, and of his malice aforethought, did kill and murder, againſt the peace and dignity of the commonwealth.

(B) Indictment for murder by caſting a ſtone.

county to wit.

The jurors &c. upon their oath preſent, that C B, *late of the pariſh of in the county of labourer, not having the fear of God before his eyes, but being moved and ſeduced by the inſtigation of the devil, on the day of in the year of the commonwealth &c. with force and arms, at the pariſh aforeſaid, in the county aforeſaid, in and upon one* M, *the wife of* M H, *in the peace of God, and this commonwealth, then and there being, feloniouſly, wilfully, and of his malice aforethought, did make an aſſault; and that the ſaid* C B, *a certain ſtone of no value, which he the ſaid* C B, *in his right hand then and there had and held, in and upon the right ſide of the head, near the right temple of her the ſaid* M, *then and there feloniouſly, wilfully, and of his malice aforethought, did caſt and throw; and that the ſaid* C B, *with the ſtone aforeſaid, ſo as aforeſaid caſt and thrown, the aforeſaid* M, *in and upon the right ſide of the head, near the right temple of her the ſaid* M, *then and there feloniouſly, wilfully, and of his malice aforethought did ſtrike, penetrate and wound, giving to the ſaid* M, *by the caſting and throwing of the ſtone aforeſaid, in and upon the right ſide of the head, near the right temple, of her the ſaid* M, *one mortal wound, of the length of one inch, and of the depth of one inch, of which ſaid mortal wound ſhe the ſaid* M, *from the ſaid day of in the year aforeſaid, until the day of the ſame month of in the ſame year, at the pariſh aforeſaid, in the county aforeſaid, did languiſh, and languiſhing did live; on which ſaid day of in the year aforeſaid, the ſaid* M, *at the pariſh aforeſaid, in the county aforeſaid, of the mortal wound aforeſaid died; and ſo the jurors aforeſaid, upon their oath aforeſaid do ſay.—That the ſaid* C B, *her the ſaid* M H, *in manner and form aforeſaid, feloniouſly, wilfully, and of his malice aforethought, did kill and murder, againſt the peace and dignity of the commonwealth.*

(C)

(C) Indictment for murder and petit-treaſon, by ſhooting, viz. againſt the perſon who ſhot, and the widow of the deceaſed, for aiding and aſſiſting.

county to wit.

The jurors &c. upon their oath preſent, that M H, late of the pariſh of L C, in the county of yeoman, and late of the ſame, widow, (late the wife of late of the ſame place labourer) not having the fear of God before their eyes, but being moved and ſeduced by the inſtigation of the devil, on the day of in the year of the commonwealth, &c. with force and arms, at the pariſh aforeſaid, in the county aforeſaid, felonioufly, wilfully, and of their malice aforethought, and ſhe the ſaid alſo traiterouſly did make an aſſualt upon the ſaid the huſband of her the ſaid in the peace of God and this commonwealth, then and there being, and that the ſame a certain gun; of the value of five ſhillings, then and there charged and loaded with gun powder, and divers leaden ſhot, which gun he the ſaid in both his hands then and there had and held, to, againſt, and upon the ſaid then and there felonioufly, wilfully, and of his malice aforethought, did ſhoot and diſcharge, and that the ſaid with the leaden ſhot aforeſaid, out of the gun aforeſaid, then and there by force of the gun powder, ſhot, diſcharged, and ſent forth as aforeſaid, the aforeſaid in and upon the left ſide of the head of him the ſaid near the left ear of him the ſaid then and there, with the leaden ſhot aforeſaid, out of the gun aforeſaid, by the ſaid ſo as aforeſaid ſhot, diſcharged, and ſent forth, felonioufly, wilfully, and of his malice aforethought, did ſtrike penetrate, and wound, giving to the ſaid with the leaden ſhot aforeſaid, ſo as aforeſaid ſhot, diſcharged, and ſent forth, out of the gun aforeſaid, by the ſaid in and upon the left ſide of the head of him the ſaid near the left ear of him the ſaid one mortal wound, of the depth of four inches, and of the breadth of two inches, of which ſaid mortal wound the ſaid then and there inſtantly died; and that the ſaid the wife of him the ſaid then and there felonioufly, traiterouſly, wilfully, and of her malice aforethought, was preſent, aiding, helping, abetting, comforting, aſſiſting, and maintaining the ſaid the felony and murder aforeſaid, in manner and form aforeſaid, to do and commit: and ſo the jurors aforeſaid, upon their oath aforeſaid, do ſay, that the ſaid felonioufly, wilfully, and of his malice aforethought, and the

ſaid

ſaid feloniouſly, traiterouſly, wilfully, and of her malice aforethought, him the ſaid then and there, in manner and form aforeſaid, did kill and murder, againſt the peace and dignity of the commonwealth.

(D) Indictment againſt a man for confining and ſtarving his wife to death.

county to wit.

The jurors for the commonwealth, upon their oath preſent, that late of the pariſh of in the county of not having the fear of God before his eyes, but being moved and ſeduced by the inſtigation of the devil, and of his malice aforethought, contriving and intending his wife, feloniouſly, wilfully, and of his malice aforethought, to ſtarve, kill, and murder, on the day of in the year of the commonwealth, with force and arms, at the pariſh aforeſaid, in the county aforeſaid, in and upon the ſaid in the peace of God and of the commonwealth, then and there being, feloniouſly, wilfully, and of his malice aforethought, did make an aſſault, her the ſaid in a certain cloſet, in a certain lodging room, part and parcel of a certain meſſuage or dwelling-houſe, there ſituate, feloniouſly, wilfully, and of his malice aforethought, on the ſaid day of in the year aforeſaid, and continually from thence until the day of the ſame month, did confine and impriſon, and continually from the ſaid day of in the year aforeſaid, until the ſaid day of the ſame month, feloniouſly, wilfully, and of his malice aforethought, did neglect and refuſe to give and adminiſter, or permit to be given and adminiſtered, to her the ſaid being ſo confined and impriſoned as aforeſaid, ſufficient meat, drink, victuals, and other neceſſaries proper and requiſite for the ſuſtenance, ſupport, and maintenance of her body; by means of which ſaid confinement and impriſonment, and alſo for want of ſuch ſufficient meat, drink, victuals, and other neceſſaries as were proper and requiſite for the ſuſtenance, ſupport, and maintenance of the body of her the ſaid ſhe the ſaid from the ſaid day of in the year aforeſaid, until the ſaid day of the ſame month, in the ſaid cloſet, at the pariſh aforeſaid, in the county aforeſaid, did linger and pine, and became greatly emaciated, and conſumed in her body, and during all that time did languiſh, and languiſhing did live; on which ſaid day of in the year aforeſaid, ſhe the ſaid at the pariſh aforeſaid, in the county aforeſaid, of ſuch confinement

confinement and impriſonment, and for want of ſuch ſufficient meat, drink, victuals, and other neceſſaries as were proper and requiſite for the ſuſtenance, ſupport, and maintenance of her body, did miſerably periſh and die; and ſo the jurors aforeſaid, upon their oath aforeſaid, do ſay, that the ſaid her the ſaid in manner and form aforeſaid, felonioufly, wilfully, and of his malice aforethought, did kill and murder, againſt the peace and dignity of the commonwealth.

(E) Indictment againſt a widow for drowning her own child in a pond.

county to wit.

The jurors &c. upon their oath preſent, that late of the pariſh of in the county of widow, not having the fear of God before her eyes, but being moved and ſeduced by the inſtigation of the devil, on the day of in the year of the commonwealth, with force and arms, at the pariſh aforeſaid, in the county aforeſaid, in and upon one the daughter of her the ſaid (ſhe the ſaid then and there being an infant of tender years, to wit, about the age of two years, and in the peace of God and the commonwealth) felonioufly, wilfully, and of her malice aforethought, did make an aſſault; and that the ſaid then and there felonioufly, wilfully, and of her malice aforethought, did take the ſaid into both hands of her the ſaid and did then and there felonioufly, wilfully, and of her malice aforethought caſt, throw, and puſh the ſaid into a certain pond, there ſituate, wherein there then was a great quantity of water; by means of which ſaid caſting, throwing, and puſhing of the ſaid into the pond aforeſaid, by the ſaid in form aforeſaid, ſhe the ſaid in the pond aforeſaid, with the water aforeſaid, was then and there choaked, ſuffocated, and drowned, of which ſaid choaking, ſuffocating, and drowning, ſhe the ſaid then and there inſtantly died; and ſo the jurors aforeſaid, upon their oath aforeſaid, do ſay, that the ſaid her the ſaid in manner and form aforeſaid, felonioufly, wilfully, and of her malice aforethought, did kill and murder, againſt the peace and dignity of the commonwealth.

(F) Indictment for felony and murder, by ſtabing with a knife.

The jurors &c. upon their oath preſent, that A S, late of

the parish of in the county of labourer, not having the fear of God before his eyes, but being moved and seduced by the instigation of the devil, on the day of in the year of the commonwealth, with force and arms, at the parish aforesaid, in the county aforesaid, in and upon one J M, in the peace of God, and of the commonwealth, then and there being, feloniously, wilfully, and of his malice aforethought, did make an assault, and that the said A S, with a certain knife, of the value of six pence, which he the said A S, in his right hand then and there had and held, the said J M, in and upon the left side of the belly, between the short ribs, of him the said J M, then and there feloniously, wilfully, and of his malice aforethought, did strike and thrust, giving to the said J M, then and there with the knife aforesaid, in and upon the aforesaid left side of the belly, between the short ribs, of him the said J M, one mortal wound, of the breadth of three inches, and of the depth of six inches, of which said mortal wound the said J M, from the said day of in the year aforesaid, until the day of the same month of in the year aforesaid, at the parish aforesaid, in the county aforesaid, did languish, and languishing did live; on which said day of in the year aforesaid, the said J M, at the parish aforesaid, in the county aforesaid, of the said mortal wound died; and so the jurors aforesaid, upon their oath aforesaid, do say, that the said A S, the said J M, in manner and form aforesaid, feloniously, wilfully, and of his malice aforethought did kill and murder, against the peace and dignity of the commonwealth.

HORSE-STEALING.

BY *V. L.* (17 *R. Cond.* 1792. *ch.* 101) page 188. 'If any person do feloniously take, or steal any horse, mare or gelding, foal or filly, the person so offending, shall not be admitted to have or enjoy the benefit of clergy, but shall be utterly excluded thereof, and shall suffer death as in case of felony.'

For the punishment and proceedings against receivers of stolen horses, *see title accessary.*

By sections 4 and 5 of the above law, the reward for apprehending horse-stealers is prescribed, *which see.*

Certificate

Certificate by two Juſtices in order to entitle the repreſentatives of a perſon killed in apprehending a horſe-ſtealer, to the ſum of 170 dollars.

county, to wit:

We J. P. and K. P. two of the commonwealth's juſtices of the peace for the county of aforeſaid, do hereby certify to the auditor of public accounts, that it hath been fully proved to us that A. D. late of &c. was killed within this county, on the day of laſt, by endeavouring to apprehend G. H. a horſe-ſtealer. Given under our hands and ſeals, this day of in the year

J. P.
K. P.

Indictment for HORSE-STEALING.

county, to wit:

*The jurors for the commonwealth, &c. upon their oath preſent. That A. O. late of the pariſh of in the county of aforeſaid, labourer, on the day of in the year and in the year of the commonwealth, with force and arms, at the pariſh aforeſaid, in the county aforeſaid, one gelding of a bay colour, of the price of dollars, of the goods and chattels of one J. T. there and there found, feloniouſly did ſteal, take, and * lead away, againſt the peace and dignity of the commonwealth.*

* For ſtealing a horſe &c. (inſtead of *carry away*) ſay *lead away*: for oxen, cows, ſheep, &c. *drive away*.

HOUSE-BREAKING.

See BURGLARY and LARCENY.

HOUSE-BURNING.

See BURNING.

HUE AND CRY.

THIS method of purſuing felons being authoriſed by the common law, and recogniſed by ſome ſtatutes, it might be improper to omit it, tho' it is ſeldom uſed in this commonwealth.

Lord

Lord *Coke* ſaith that hue and cry (called in ancient records *huteſium et clamor* do mean the ſame thing; for that *huer* in *French* is to hoot or ſhout, in *Engliſh* to cry. 2 *Inſt.* 173.—3 *Inſt.* 116.

But ſince it appeareth by old books (of which alſo lord *Coke* maketh mention. 2 *Inſt.* 173) that hue and cry was anciently both by horn and by voice, it may ſeem that theſe two words are not ſynonimous, but that this *huteſium* or *hooting* is by the *horn*, and *crying* by the *voice*; with which alſo accordeth the *French* word *buchet*, which ſignifieth a huntſman's horn: So that hue and cry in this ſenſe will properly ſignify a purſuit by horn and by voice. Which kind of purſuit of robbers by blowing a horn, and by making an outcry, is ſaid to be practiſed alſo in Scotland.

And this blowing of a horn by way of notice or intelligence, in other caſe as well as in the purſuit of felons, ſeemeth to have been in uſe of very ancient time, for amongſt the laws of *Wibtred* king of *Kent*, in the year 696, this is one; that 'if a ſtranger go out of the road, and neither ſhout nor blow a horn, he 'ſhall be taken for a thief."

Hue and cry is the old common law proceſs after felons, and ſuch as have dangerouſly wounded any perſon: And this hath received great countenance and authority by ſeveral ſtatutes.—2 *H.* H. 98.

When any felony is committed, or any perſon is grievouſly and dangerouſly wounded, or any perſon aſſaulted and offered to be robbed, either in the day or night; the party grieved, or any other, may reſort to the conſtable of the vill; and, 1. Give him ſuch reaſonable aſſurance thereof, as the nature of the caſe will bear. 2. If he knows the name of him that did it he muſt tell the conſtable the ſame. 3. If he knows it not, but can deſcribe him, he muſt deſcribe his perſon, or his habit, or his horſe or ſuch circumſtances as he knows, which may conduce to his diſcovery. 4. If the thing be done in the night, ſo that he knows none of theſe circumſtances, he muſt mention the number of the perſons, or the way they took. 5. If none of all theſe can be diſcovered, as where a robbery, or burglary, or felony is committed in the night, yet they are to acquaint the conſtable with the fact, and deſire him to ſearch in his town for ſuſpected perſons, and to make hue and cry after ſuch as may be properly ſuſpected, as being perſons vagrant in the ſame night; for many circumſtances may *ex poſt facto* be uſeful for diſcovering a malefactor, which cannot be at firſt found. 2 *H. H.* 100. 101. 3 *Inſt.* 116.

For levying hue and cry, altho' it is a good courſe to have the warrant

warrant (A) of a juſtice of the peace, when time will permit, in order to prevent cauſeleſs hue and cry; yet by the frame of the ſtatutes, it is by no means neceſſary, nor is it always convenient; for the felon may eſcape before the warrant be obtained, and hue and cry was part of the law, before juſtices of the peace were firſt inſtituted. 2 *H. H.* 99.

And the duty of the conſtable is, to raiſe the power of the town, as well in the night as in the day, for the proſecution of the offender. 3 *Inſt.* 116.

And upon hue and cry levied againſt any perſon, or where any hue and cry comes to a conſtable, whether the perſon be certain or uncertain, the conſtable may ſearch ſuſpected places within his vill, for the apprehending of the felons. 2 *H. H.* 103.

But tho' he may ſearch ſuſpected places or houſes, yet his entry muſt be by the doors being open; for he cannot break open doors barely to ſearch, unleſs the perſon againſt whom the hue and cry is levied be there, and then it is true he may; therefore in caſe of ſuch a ſearch, the breaking open the door is at his peril, namely, juſtifiable if he be there; not juſtifiable, if he be not there: but it muſt be always remembered, that in caſe of breaking open a door, there muſt be firſt notice given to them within of his buſineſs, and a demand of entrance, and refuſal, before the doors can be broken. 2 *H. H.* 103. 2 Haw. 82.

If the perſon againſt whom the hue and cry is raiſed be not found in the conſtablewick, then the conſtable ſhall give notice to the next conſtable, and to the next, until the offender be found, or until they come to the ſea ſide. And this was the law before the conqueſt. 3 *Inſt.* 116.

And the officer of the town where the felony was done, as alſo every officer to whom the hue and cry ſhall afterwards come, ought to ſend to every other town round about him, and not to one town only. And in ſuch caſes it is needful to give notice in writing (to the purſuers) of the things ſtolen, and of the colour and marks thereof, as alſo to deſcribe the perſon of the felon, his apparel, horſe, and the like, and which way he is gone, if it may be. *Dalt.* c. 54.

But if the hue and cry be upon a robbery, burglary, manſlaughter, or other felony committed, but the perſon that did the fact is neither known nor deſcribable by perſon, clothes or the like, yet ſuch a hue and cry is good, as hath been ſaid, and muſt be purſued, tho' no perſon certain be named or deſcribed. 2 *H. H.* 103.

And therefore in this caſe, all that can be done is, for thoſe that purſue the hue and cry, to take ſuch perſons as they have probable

probable cauſe to ſuſpect; as for inſtance, ſuch perſons as are vagrants, or ſuch ſuſpicious perſons as come late into their inn or lodgings, and give no reaſonable account where they have been, and the like. *id.*

For thoſe caſes in which hue and cry is particularly directed by the laws of this commonwealth. See the 18th ſection of the act recited under title CORONER.

If the perſon purſued by hue and cry be in a houſe, and the doors are ſhut, and refuſe to be opened on demand of the conſtable, and notification of his buſineſs, he may break open the doors; and this he may do in any caſe where he may arreſt, though it be only a ſuſpicion of felony, for it is for the commonwealth, and therefore a virtual *non omittas* is in the caſe: and the ſame law is, upon a dangerous wound given, and a hue and cry levied upon the offender. 2 *H. H.* 102.

And it ſeems in this caſe, that if he cannot be otherwiſe taken, he may be killed; and the neceſſity excuſeth the conſtable. 2. *H. H.* 102.

If hue and cry be raiſed againſt a perſon certain for felony, tho' poſſibly he is innocent; yet the conſtables, and thoſe that follow the hue and cry, may arreſt and impriſon him in the common jail, or carry him to a juſtice of the peace, to be examined where he was at the time of the felony committed, and the like. 2 *H. H.* 102.

If the hue and cry be not againſt the perſon certain, but by deſcription of his ſtature, perſon, clothes, horſe, and the like; yet the hue and cry doth juſtify the conſtable or other perſon following it, in apprehending the perſon ſo deſcribed, whether innocent or guilty; for that is his warrant; it is a kind of proceſs that the law allows of, not uſual in other caſes, namely, to arreſt a perſon by deſcription. 2 *H. H.* 103.

In caſe of hue and cry once raiſed and levied, on ſuppoſal of a felony committed, though in truth there was no felony committed, yet thoſe that purſue hue and cry, may arreſt and proceed, as if ſo be a felony had been really committed.

And therefore the juſtification of an impriſonment by a perſon upon ſuſpicion, and by a perſon (eſpecially a conſtable) upon hue and cry levied, do extremely differ, for in the former caſe, there muſt be a felony averred, to be done, and it is iſſuable; but in the latter, to wit, upon hue and cry it need not be averred, but the hue and cry levied upon information of a felony is ſufficient, though perchance the information were falſe.

And the reaſons hereof are theſe: 1. Becauſe the conſtable cannot examine the truth or falſehood of the ſuggeſtion of him that firſt levied it, for he cannot adminiſter to him an oath; and

if

if he ſhould forbear his purſuit of the hue and cry till it be examined by a juſtice of the peace, the felon might eſcape, and the purſuit might be loſt and fruitleſs. 2. Becauſe the conſtable is compellable to purſue hue and cry, and he is puniſhable, and ſo are thoſe of the vill, if they do it not. 3. Becauſe he that firſt raiſed a hue and cry, where no felony is committed, that is, he who giveth the falſe information, is ſeverely puniſhable by fine and impriſonment, if the information be falſe.

And therefore if he raiſe hue and cry upon a perſon that is innocent, yet they that purſue the hue and cry may juſtify the impriſonment of that innocent perſon; and the raiſer is puniſhable: and by the ſame reaſon if he give notice of a felony committed, where there was in truth none.

And here the juſtification of the impriſonment is mixed, partly upon the hue and cry, and partly upon their own ſuſpicion; and therefore, 1. In reſpect that it is upon hue and cry there needs no averment, that the felony was done, if the arreſt be by that conſtable that firſt received the information, and ſo raiſed the hue and cry; or if the arreſt were made by that conſtable, or thoſe vills to whom the hue and cry came at the ſecond hand, it muſt be averred, that ſuch a hue and cry came to them, purporting ſuch a felony to be done. 2. But alſo inaſmuch as the hue and cry neither names nor deſcribes the perſon of the felon, but only the felony committed, and therefore the arreſt of this or that particular perſon is leſs to the ſuſpicion and diſcretion of the conſtable, or if the people of the ſecond or third vill, he that arreſts any perſon upon ſuch general hue and cry, muſt aver, that he ſuſpected and ſhew a reaſonable cauſe of ſuſpicion.

The moſt uſual, and indeed the ſafeſt method of proceeding, or raiſing *hue* and *cry*, is to go before a magiſtrate and to give him information of the felony upon oath,—who ſhould thereupon take the examination in writing, before he iſſues his warrant.

EXAMINATION.

county to wit:

The examination of of the ſaid county of taken upon oath before me J. P. a juſtice of the peace for the ſaid county, this day of in the year The ſaid ſaith, that &c. (here ſet forth the ſubſtance of the information)

Sworn to before me

(A) *Warrant to levy hue and cry on a Robbery having been committed.*

To all conſtables and other officers, as well in the ſaid county of as elſewhere, to whom the execution hereof doth belong.

Whereas A. I. of in the county of yeoman, hath this day made information upon oath, before me J. P. one of the juſtices of the peace in and for the ſaid county of that on this preſent day of in the year of the commonwealth, betwixt the hours of three and four in the afternoon of the ſame day, at a place called in the ſaid county of in the highway there, two malefactors and felons to him the ſaid A. I. unknown, in and upon him the ſaid A. I. then and there being in the peace of God and of the commonwealth, feloniouſly did make an aſſault, and him the ſaid A. I. then & there feloniouſly did put in great fear and danger of his life; and the ſum of of lawful money of the commonwealth, of the goods and chattels of him the ſaid A. I. from the perſon and againſt the will of him the ſaid A. I. then and there violently and feloniouſly did ſteal, take and carry away; and that one of the ſaid malefactors and felons, to him the ſaid A. I. unknown, is a tall ſtrong man, and ſeemeth to be about the age of years, is pitted in the face with the ſmall pox, and hath the ſcar of a wound under his left eye, and had then on a dark brown riding coat, &c. and did ride upon a bay gelding with a ſtar on his forehead; and the other, &c. and that after the ſaid felony and robbery committed, they the ſaid malefactors and felons to him the ſaid A. I. unknown, did fly, and withdraw themſelves to places unknown, and are not yet apprehended: Theſe therefore are to command you forthwith to raiſe the power of the county within your ſeveral precincts, and to make diligent ſearch therein, for the perſons above deſcribed, and to make freſh purſuit and hue and cry after them, from town to town, and from county to county, as well by horſemen as by footmen; and to give due notice hereof in writing, deſcribing in ſuch notice the perſons and the offence aforeſaid, unto every next conſtable on every ſide, until they ſhall come to the ſea ſhore; or until the ſaid malefactors and felons ſhall be apprehended; and all perſons whom you or any of you ſhall, as well upon ſuch ſearch and purſuit, as otherwiſe, apprehend or cauſe to be apprehended, as juſtly ſuſpected for having committed the ſaid robbery and felony, that you do carry forthwith to one of the juſtices of the peace in and for the county where he or they ſhall be apprehended, to be by ſuch juſtice examined, and dealt withal according to law. And hereof fail you not reſpectively, upon the peril that ſhall enſue thereon.—Given under my hand and ſeal, at in the ſaid county of the day of aforeſaid, in the year aforeſaid.

As

As this proceſs by *hue* and *cry* to apprehend an offender, is ſcarcely ever uſed in this commonwealth, in the mode preſcribed by the common law, it will be ſufficient to refer to titles FELONY, and CRIMINALS, where the neceſſary precedents may be found. It may, however, be proper to obſerve that ſhould an offender be brought before a magiſtrate, who was taken by *hue* and *cry*, he muſt proceed in all things as directed under title *Criminals*, obſerving to vary the ſtyle of his precedents, as in the following

MITTIMUS.

To the ſheriff or keeper, &c.

county to wit.

I ſend you herewith the body of A O, *late of taken by* hue and cry, *upon warrant of J P. a juſtice of the peace of the county of , and brought before me by* A C. *conſtable of the ſaid* A O, *being charged, &c.* (deſcribe the offence as in the warrant, and conclude as in other mittimus.)

HUNTING.

BY *V. l.* (17 *R. Cond.* 1792, ch. 88) *page* 160. If any perſon &c. (here inſert ſections 1 & 2 of the above law.)

And by *V. l.* (17 *R. Cond.* 1792, ch. 113) page 219.—Whoſoever ſhall hereafter uſe any fire-hunting, &c. (here inſert ſections 1 & 2 of the above law.

(A) *Warrant for hunting on the lands of another, without licence.*

county to wit.

Whereas information is made to be by A J, *that* A O, *did on the day of laſt, hunt and range upon the lands of* A M, *in this county, without the conſent or licence of the ſaid* A M, *contrary to the act of the General Aſſembly in that caſe made and provided. You are therefore hereby required, in the name of the commonwealth, to ſummon the ſaid* A O, *to appear before me or ſome other juſtice of the peace for this county, to anſwer the premiſes. Herein fail not.—Given &c.*

To A C, conſtable.

JUDGMENT.

On hearing, it being duly proved that the within named A O, *is guilty of the offence within mentioned, by which he hath incurred*

red the penalty of three dollars: It is therefore conſidered that the ſaid A J. *recover againſt him the ſaid penalty to his own uſe, together with his coſts, in this behalf expended.*

———Coſts,———Cents.

Where the owner of the land proſecutes, the warrant may be the ſame as before to lands of the ſaid A M, in this county, without his licenſe &c.

The judgment as before to, *penalty*,—to be paid to the overſeers of the poor of the diſtrict of for the uſe of the poor of the ſaid diſtrict.

On the firſt judgment, an execution may iſſue in favour of the informer as in other caſes.

But in the other caſe a warrant for diſtreſs and ſale ſeems the moſt proper.

To the ſheriff of county, or any conſtable therein.

county to wit.

Whereas A O, hath been duly convicted before me, by the oath of A M, of having unlawfully hunted and ranged upon the lands of the ſaid A M, in the pariſh of in this county, and was adjudged to pay the ſum of three dollars and the coſts, for the ſaid offence, amounting to cents: You are therefore hereby required to levy the ſaid ſum of three dollars, and cents, by diſtreſs and ſale of the goods and chattels of the ſaid A O, proceeding therein as the law directs; and that you pay the ſaid ſum of three dollars, when levied to the overſeers of the poor of the diſtrict of for the uſe of the poor of the ſaid diſtrict; and that you make return of this warrant, with an account of what you ſhall have done therein, to me, or ſome other juſtice of the peace for this county, on or before the day of next. Given &c.

The foregoing precedents may be eaſily altered to ſuit the offence of fire-hunting.

Huſband, (See 'WIFE.')

Ideots, (See LUNATICS.)

Impriſonment, (See ARREST, COMMITMENT.)

Inceſt, (See Marriage.)

INDICTMENT.

I. *Indictment, what.*

II. *What offences are indictable.*

III. *Within what time an indictment ſhould be brought.* IV.

IV. *How far several offenders or several offences may be joined in one indictment.*
V. *Whether the grand jury may examine witnesses against the commonwealth.*
VI. *How many witnesses are requisite to an indictment.*
VII. *Whether a grand jury may find an indictment specially.*
VIII. *Form of an indictment.*

I. Indictment, what.

INDICTMENT cometh of the *French* word *enditer*, and signifies in law, an accusation found by an inquest of twelve or more upon their oath, and as the *appeal* is ever the suit of the party, so the indictment is always the suit of the commonwealth, and as it were his declaration; and the party who prosecutes it, is a good witness to prove it. And when such accusation is found by a grand jury, without any bill brought before them, and afterwards reduced to a formed indictment it is called a *presentment*; and when it is found by jurors returned to enquire of that particular offence only which is indicted, it is properly called an *inquisition*. 1 *Inst.* 126. 2 Haw. 209.

II. *What offences are indictable.*

There can be no doubt, but that all capital crimes whatsoever, and also all kinds of inferior crimes of a public nature, as misprisions, contempts, disturbances of the peace, oppressions, and all other misdemeanors whatsoever of a public evil example against the *common law*, may be indicted; but no injuries of a private nature, unless they someway concern the commonwealth. 2 Haw. 210.

Also it seems to be a good general ground that wherever a *statute* prohibits a matter of a publick grievance to the liberties and security of a citizen, or commands a matter of publick convenience, as the repairing of the common streets of a town; an offender against such statute is punishable, not only at the suit of the party grieved, but also by way of indictment for his contempt of the statute, unless such method of proceeding do manifestly appear to be excluded by it. Yet if the party offending hath been fined to the commonwealth in the action brought by the party (as it is said that he may in every action for doing a thing

thing prohibited by ſtatute;) it ſeems queſtionable, whether he may afterwards be indicted, becauſe that would make him liable to a ſecond fine for the ſame offence. 2 Haw. 210.

But if a ſtatute extend only to *private* perſons, or if it extend to all perſons in general, but chiefly concern diſputes of a private nature, as thoſe relating to diſtreſſes made by lords on their tenants; it is ſaid that offences againſt ſuch ſtatute will hardly bear an indictment. 2 Haw. 211.

Alſo where a ſtatute makes a new offence, and appoints a particular method of proceeding, without mentioning an indictment, it ſeemeth to be ſettled at this day, that it will not maintain an indictment. 2 Haw. 211. Str. 679.

But lord *Hale* diſtinguiſhes upon this, and ſays, that if a ſtatute prohibit any act to be done, and by a ſubſtantive clauſe gives a recovery by action of debt, bill, plaint, or information, but mentions not an indictment; the party may be indicted upon the *prohibitory clauſe*, and thereupon fined, but not to recover the penalty; but then it ſeems the fine ought not to exceed the penalty; but if the act be not prohibitory, but only that if any perſon ſhall do ſuch a thing, he ſhall forfeit ſo much, to be recovered by action of debt, bill, plaint, or information; then he cannot be indicted for it, but the proceeding muſt be by action, bill, plaint, or information. 2 H. H. 171.

Alſo where a ſtatute adds a further penalty, to an offence prohibited by the common law. There can be no doubt but that the offender may be ſtill indicted, if the proſecutor thinks fit, at the common law; and if the indictment for ſuch offence conclude *againſt the form of the ſtatute*, and cannot be made good as an indictment upon the ſtatute, it ſeems to be now ſettled, that it may be maintained as an indictment at common law. 2 Haw. 211.

A fact amounting to a felony is not indictable as a treſpaſs. *L. Raym.* 712.

III. Within what time an indictment ſhould be brought.

By *V. L.* (17 *R. Cond.* 1792. *c.* 74. § 34) page 113. All actions, ſuits, bills, indictments, or informations, which ſhall be had, &c. upon any act of Aſſembly, not affecting life or limb, ſhall be brought within one year, next after the offence committed.

IV.

IV. How far several offenders may be joincd in one indictment.

1. If there be *one offender*, and *several offences* committed by him, as burglary and larceny, they may be contained in one indictment. 2 H. H. 173.

But in the case of K. and *Clendon*, T. 4 G. 2. There was an indictment setting forth that the defendant made an assault upon *Sarah Beatniff*, and *Elizabeth Cooper*; and did them beat, wound, and evil intreat. After verdict it was moved in arrest of judgment, that these were two distinct offences, and therefore could not be laid in the same indictment; and of that opinion was the court, and the judgment was arrested. *Stra.* 870.

2. If there be *several offenders* that commit the same *offence*, though in law they are several offences, in relation to the several offenders, yet they may be joined in one indictment; as if several commit a robbery, or burglary, or murder. 2 H. H. 173.

3. And so it is, though the offences are of *several degrees*, but dependant one upon another, as the principal in the first degree, and the principal in the second degree, to wit, present, aiding and abetting the principal, and accessary before or after. 2 H. H. 173.

4. Also several persons may be indicted in the same indictment for *several offences of the same nature*, as for keeping disorderly houses; but the indictment ought to set forth that they severally did so. 2 H. H. 173.

And this is only to be understood where the offences may be joint, as in extortion, maintenance, receiving stolen goods, and the like; and not where the offence is a separate act in each, as in the case of *K.* against *Philips* and others, *M.* 5. *G.* 2. Six were indicted in one indictment for *perjury*; and four of them pleading, were convicted, it was moved in arrest of judgment, that the crime of perjury, is in its nature several, and two cannot be indicted together. And by the court, there may be great inconveniences if this is allowed; one may be desirous to have *certiorari*, and the other not; the jury on the trial of all, may apply evidence to all that is but evidence against one: And they cited a case, *T.* 6 *An.* Q. against *Hodgson* and others, where two were indicted for being scolds, and compared to barratry, and it was held not to lie. And in the principal case judgment was arrested. *Str.* 921.

In like manner, E. H. G. K. against *Weston* and others. There was an indictment against six jointly and severally for

exercising

exercising a trade; and quashed, because there ought to be distinct indictments. *Str.* 623.

5. Larcenies committed of several things, though *at several times*, and *from several persons*, may be joined in one indictment. 2 H. H. 173.

V. Whether the grand jury may examine witnesses against the commonwealth.

Lord *Hale* says that the grand jury at the assizes or sessions ought only to hear the evidence for the commonwealth, and in case there be probable evidence, they ought to find the bill, because it is but an accusation, and the party is to be put on his trial afterwards. 2 H. H. 157.

Which doctrine is also laid down by chief justice *Pemberton*, in the case of the earl of *Shaftsbury*, St. tr. V. 3. p. 415.

But the learned editor of *Hales history*, observes upon this that sir *John Hawles*, in his remarks on the said case St. tr. V. 4. p. 183. unanswerably shews, that a grand jury ought to have the same persuasion of the truth of the indictment as a petty jury, or a coroner's inquest; for they are sworn to present the truth, and nothing but the truth.

And lord *Coke* says, that seeing indictments are the foundation of all, and are commonly found in the absence of the party accused, it is necessary there should be substantial proof. 3 Inst 25.

VI. How many witnesses are requisite to an indictment.

An indictment may be found upon the oath of one witness only, unless it be for high treason, which requires two witnesses. 2 Haw. 256. And unless in any instance it be otherwise specially directed by act of Assembly. See 'TREASON.'

VII. Whether the grand jury may find an indictment specially.

It seems to be generally agreed, that the grand jury may not find part of an indictment to be true, and part false; but must either find a true bill or *ignoramus* for the whole; and that if they take upon them to find it specially, or conditionally, or to be true for part only, and not for the rest, the whole is void, and the party cannot be tried upon it but ought to be indicted anew. 2 Haw. 210.

VIII.

VIII. Form of an indictment.

In order to underſtand this matter rightly, it is judged requiſite, firſt, to inſert the intire form of an indictment, and then to take it in pieces, and explain the ſeveral parts of it in their order.

The inſtance which is choſen is on the ſtatute of ſtabbing. 1 *F. c.* 8.

The *caption* of the indictment is no part of the indictment itſelf, but is the ſtyle or preamble, or return that is made from an inferior court to a ſuperior, from whence a certiorari iſſues to remove; or when the whole record is made up in form; 2 H. H. 166.

NOTE. The following indictment is founded on a ſtatute which is not in force in this country: It will, however, equally elucidate the doctrine of indictments, and is given merely for example.—It is humbly ſubmitted whether the words included thus [ ] may not now be omitted, on the authority of the laws adduced in ſupport of that opinion.—But I give it merely as an opinion, and would by no means wiſh the profeſſion to depart from precedents long ſettled and grown venerable by antiquity, without ſome further and better warrant for ſuch departure.

The caption of an indictment in the diſtrict courts, runs thus, county to wit.

The jurors for the diſtrict compoſed of the counties of upon their oath do preſent, That *John Armſtrong* late of *Appleby* in the county aforeſaid, yeoman, [not having God before his eyes, but being moved and ſeduced by the inſtigation of the devil] on the thirtieth day of March in the year of our Lord and in the year of the commonwealth, at the hour of nine in the afternoon of the ſame day, [with force and arms] at *Appleby* aforeſaid in the county aforeſaid, and within the juriſdiction of the diſtrict court aforeſaid, in and upon one *George Harriſon*, [in the peace of God and of the ſaid commonwealth] then and there being (the aforeſaid *George Harriſon* not having any weapon then drawn, nor the aforeſaid *George Harriſon* having firſt ſtricken the ſaid *John Armſtrong*) feloniouſly did make an aſſault and that the aforeſaid *John Armſtrong* with a certain drawn ſword [of the value of five ſhillings] which he the ſaid *John Armſtrong* in his right hand then and there had and held the ſaid *George Harriſon* in and upon the right ſide of the belly near the ſhort ribs of him the ſaid *George Harriſon* (the aforeſaid *George Harriſon* as is aforeſaid; then and there not having any weapon drawn nor the aforeſaid *George Harriſon* then and there having firſt ſtricken the ſaid *John Armſtrong*) then and there feloniouſly did ſtab and

and thruſt, giving unto the ſaid *George Harriſon* then and there with the ſword aforeſaid in form aforeſaid, in and upon the right ſide of the belly near the ſhort ribs of him the ſaid *George Harriſon*, one mortal wound of the breadth of one inch, and of the depth of nine inches; of which ſaid mortal wound, he the ſaid *Geo. Harriſon* then and there inſtantly died, and ſo the jurors aforeſaid upon their oath aforeſaid do ſay, that the ſaid *John Armſtrong* him the ſaid *George Harriſon* on the aforeſaid thirtieth day of March in the year aforeſaid, at *Appleby* aforeſaid, in the county aforeſaid, in manner and form aforeſaid, feloniouſly did kill; againſt the peace and dignity of the commonwealth and againſt the form of the ſtatute in ſuch caſe made and provided.

The following are the ſubſtantial parts of the body of an Indictment.

That late of [in the county aforeſaid yeoman.] The name of the party indicted regularly ought to be inſerted, and inſerted truly in every indictment. 2 H. H. 175.

But the inhabitants of a pariſh, may be indicted for not repairing the high way, although no perſon is particularly named. *Wood, b. 4. c. 5.*

It is ſaid that no perſon indicted can take any advantage of a miſtaken ſurname in the indictment, notwithſtanding ſuch ſurname has no manner of affinity with its true one, and he was never known by it. 2 *Haw.* 230, 1, 2, 3. 2 *H. H.* 176.

But the miſtake of the chriſtian name is pleadable, and the party ſhall be diſmiſſed from that indictment. 2 *H. H.* 176.

But the ſafeſt way is to allow his plea of *miſnomer*, both as to his ſurname and as to his chriſtian name, for he that pleads *miſnomer* of either, muſt in the ſame plea ſet forth what his true name is, and then he concludes himſelf, and if the grand jury be not diſcharged, the indictment may preſently be amended by the grand jury, and returned according to the name he gives himſelf. 2 H. H. 176.

Alſo an indictment naming the defendant by two chriſtian names is not good. *L. Raym.* 562.

If the *county* is in the margin, and the indictment ſets forth the fact to be done at ſuch a place *in the county aforeſaid*, it is good, for it refers to the county in the margin; but if there be two counties named, one in the margin, and another in the addition of any party, or in the recital of an act of parliament, the fact laid at ſuch a place in the county aforeſaid, vitiates the indictment, becauſe two counties are named before, and therefore it is uncertain to which it refers. *Crown. Cir.* 116. 115.

But

But altho' the defendant be indicted by a wrong name or addition, or with no addition, yet if he appear, and plead not guilty, without taking advantage of that defect, he ſhall never alledge the *miſnomer*, or want of addition to ſtop his trial or judgment; for by ſuch his appearance, and pleading to iſſue, the indictment is affirmed and the *miſnomer* or want of addition ſalved. 2 H. H. 176.

And if ſeveral perſons be indicted for one offence, *miſnomer* or want of addition of one, quaſhed the indictment only againſt him, and the reſt ſhall be put to anſwer; for they are in law as ſeveral indictments. 2 H. H. 177.

See title '*Addition.*'

Not having God before his eyes, but being moved and ſeduced by the inſtigation of the devil] I do not find it aſſerted by any authority, that theſe words are neceſſary in an indictment. *On the thirtieth day of March in the year of*] No indictment can be good, without preciſely ſhewing a certain *day* of the material facts alledged in it. 2 Haw. 235.

And if the offence be done in the night, before midnight, the indictment ſhall ſuppoſe it to be done in the day before; and if it happen after midnight, then it muſt ſay it was done that day after. *Lamb.* 492.

And altho' the day be inſerted, yet if the year is not inſerted, the indictment is inſufficient. 2 H. H. 177.

But where an indictment charges a man with a bare omiſſion, as the not ſcouring ſuch a ditch, it is ſaid, that it needs not ſhew any time. 2 Haw. 236.

And if it ſay, on ſuch a day laſt paſt, without ſhewing in what year, that is good enough; for the certainty may be found out by the ſtile of the ſeſſion. *Lamb.* 491.

But tho' the day of the year be miſtaken in the indictment, yet if the offence were committed in the ſame county, tho' at another time, the offender ought to be found guilty: but then it may be requiſite, if any eſcheat or forfeiture of land be conceived in the caſe, for the petit jury, to find the true time of the offence committed; and therefore it is beſt in the indictment to ſet down the time as truly as can be, tho' it be not of abſolute neceſſity to the defendants conviction. 2 H. H. 179.

And this they rather, becauſe the jury are to find the indictment upon their oaths. *Dalt. c.* 184.

Upon which ground, namely, becauſe the jury are ſworn to preſent the truth, it is beſt to lay all the facts in the indictment as near to the truth as may be.

At

At the hour of nine in the afternoon of the ſame day] It is not neceſſary to mention the *hour*, in an indictment—except for burglary. 2 Haw. 235.

With force and arms] Theſe words are not now neceſſary. See *V. l. p.* 112.

But yet where ſuch words are proper and pertinent, it is ſafe and adviſeable to inſert them, if it be to no other purpoſe than to aggravate the offence. 2 Haw. 242.

At Appleby *aforeſaid, in the county aforeſaid*] No indictment can be good without expreſsly ſhewing ſome *place* wherein the offence was committed, which muſt appear to have been within the juriſdiction of the court. 2 Haw. 236.

But a miſtake in the place will not be material upon the evidence, on not guilty pleaded, if the fact be proved at ſome other place in the ſame county. 2 Haw. 237.

And it is not ſufficient that the county be expreſſed in the margin, but the vill where the offence was committed, muſt be alledged to be in the county named in the margin, or, *in the county aforeſaid*, which ſeems to be ſufficient where but one county is named before, but to be uncertain where a county is named in the body of the indictment, different from that in the margin. 2 Haw. 220. 2 H. H. 180.—But the vill pariſh &c. need not now be named. See *V. l. p.* 112.

In and upon one George Harriſon] Wherever the perſon injured be known to the jurors, his name ought to be put in the indictment. 2 Haw. 232.

But if they know not his name, an indictment for the murder of a perſon unknown, or for ſtealing the goods of a perſon unknown, is good. 2 H. H. 181.

Alſo there is no need of an addition of the perſon upon whom the offence is committed, unleſs there be a plurality of perſons of the ſame name; neither is it eſſential to the indictment, tho' ſome times it may be convenient for diſtinction ſake to add it. 2 H. H. 182.

In the peace of God, and of the commonwealth then and there being] It is uſual to allege this, but not neceſſary, and poſſibly not true, for he might be breaking the peace at the time. 2 H. H. 186.

The aforeſaid George Harriſon *not having any weapon then drawn, nor the aforeſaid* George Harriſon *having firſt ſtriken the ſaid* John Armſtrong] An indictment grounded upon an offence, made by ſtatute, muſt by expreſs words bring the offence within the ſubſtantial deſcription made in the ſtatute; and thoſe circumſtances mentioned in the ſtatute to make up the offence, muſt not be ſupplied by the general concluſion *againſt the form of the ſtatute*. 2 H. H. 170.

And

And ſo it is, if an act of parliament ouſt clergy in certain caſes, as murder *of malice forethought*, robbery *in or near the highway*, though the offences themſelves were at common law, yet becauſe at common law within clergy, they ſhall not be ouſted of clergy, though convicted, unleſs the circumſtances, as *of malice forethought*, or *near the highway*, be expreſſed in the indictment. 2 H. H. 170.

But there is no neceſſity in an indictment on a public ſtatute, to recite ſuch ſtatute; for the judges are bound *ex officio* to take notice of all public ſtatutes. 2 Haw. 245.

Yet if the proſecutor take upon him to recite it, and materially vary from a ſubſtantial part of the purview of the ſtatute, and conclude *againſt the form of the ſtatute aforeſaid*, he vitiates the indictment. 2 Haw. 246.

So, the miſrecital of the title of a ſtatute is fatal. 2 Hawk. 247.

Feloniouſly did make an aſſault] There are ſeveral words of art which the law hath appropriated for the diſcription of the offence, which no circumlocution will ſupply; as *feloniouſly*, in the indictment of any felony; *burglariouſly*, in an indictment of burglary; and the like 2 H. H. 184.

And if a man be indicted that he *ſtole*, and it is not ſaid feloniouſly, this indictment imports but a treſpaſs. 2 H. H. 172.

With a certain drawn ſword] Yet if the party were killed with another weapon, it maintains the indictment; but if it were with another kind of death, as poiſoning, or ſtrangling, it doth not maintain the indictment upon evidence. 2 H. H. 185.

Of the value of five ſhillings] It was formerly neceſſary to ſet forth the value of the inſtrument, becauſe it was forfeited as a *deodand*. 2 H. H. 185.—But it is now grown obſolete. *See* 'Deodand.'

Which he the ſaid John Armſtrong *in his right hand then and there had and held*] It muſt ſhew in what hand he held his ſword. 2 H. H. 185.

In and upon the right ſide of the belly, near the ſhort ribs of the ſaid George Harriſon] There muſt be a certainty of the offence committed, and nothing material ſhall be taken by intendment or implication; but the ſpecial manner of the whole fact ought to be ſet forth with certainty 2 Haw. 225, 227.

And therefore in the caſe of murder, it ought to ſhew in what part of the body the perſon was wounded; and therefore if it be on his arm, or hand or ſide, without ſaying whether right or left, it is not good 2 H. H. 185.

If theft be alledged in any thing, the indictment muſt ſet forth the value of the thing ſtolen; that it may appear, whether it be grand or petit larceny. 2 H. H. 183.

In like manner, 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, is not good. 2 H. H. 182.

An indictment that the defendant is a common highwayman, a common defamer, a common diſturber of the peace, and the like, is not good; becauſe it is too general, and contains not the particular matter wherein the offence was committed. 2 H. H. 182.

In like manner an indictment for divers ſcandalous, threatnings, and contemptuous words, ſpoken of a juſtice of the peace, is not good, but ought to ſet forth the words in ſpecial. *Str.* 699.

An indictment for diſobeying an order of juſtices, muſt find poſitively, that ſuch an order was made, and not by way of recital, *that whereas*——L. Raym. 1363.

Then and there feloniouſly did ſtab and thruſt] In an indictment it is beſt, and often neceſſary, to repeat the time and place, to the ſeveral parts of the fact. 2 H. H. 178.

Thus in an indictment of murder or manſlaughter, as well the day and place of the ſtroke, or other act done as of the death, muſt be expreſſed; the former, becauſe the eſcheat or forfeiture of lands relates thereto; the latter becauſe it muſt appear that the death was within the year and day after the ſtroke. 2 H. H. 179.

One mortal wound of the breadth of one inch, and of the depth of nine inches] Regularly the length and depth of the wound is to be ſhewed; but this is not neceſſary in all caſes, as namely, where a limb is cut off; ſo it may be alſo a dry blow. 2 H. H. 186.

But though the manner and place of the hurt, and its nature be requiſite as to the formality of the indictment, and it is fit to be done as near the truth as may be, yet if upon evidence it appear to be another kind of wound, in another place; if the party died of it, it is ſufficient to maintain the indictment. 2 H. H. 186.

Againſt the peace &c.] The concluſion of all indictments in this commonwealth is—*Againſt the peace and dignity of the commonwealth.* (18 article of the conſtitution.

And againſt the form of the ſtatute in ſuch caſe made and provided] Regularly, if a ſtatute only make an offence, or alter an offence from one crime to another, as making a bare miſdemeanor to become a felony, the indictment for ſuch new made offence at common law, muſt conclude againſt the form of the ſtatute, or otherwiſe it is inſufficient. 2 H. H. 192.

But

But if a man be indicted for an offence, which was at common law, and concludes againſt the form of the ſtatute, but, in truth it is not brought by the indictment within the ſtatute, it ſhall be quaſhed and the party ſhall not be put to anſwer it as an offence at common law. 2 H. H. 171.

And if an offence were felony at common law, but a ſpecial act of Aſſembly ouſt the offender of ſome benefit that the common law allowed him, when certain circumſtances are in the fact; though the body of ſuch indictment muſt expreſs thoſe circumſtances, according as they are preſcribed in the ſtatute, yet the indictment need not conclude againſt the form of the ſtatute: Thus on the ſtatute of the 8. *El. c.* 4. in caſe of pick-pockets, the body of the indictment muſt bring them within the expreſs purview of the ſtatute, or otherwiſe they ſhall have the benefit of clergy; but it need not conclude againſt the form of the ſtatute, neither is it uſual in ſuch caſes, for it was felony before, and the ſtatute doth not give a new puniſhment, nor make it to be a crime of another nature, but only takes away clergy. But yet, if it ſhould conclude in ſuch caſe againſt the form of the ſtatute, it would not vitiate the indictment, but would be only ſurpluſage. 2 H. H. 190.

If an act of Aſſembly making an offence, be but temporary, and made perpetual by another ſtatute, the indictment concluding againſt the form of the *ſtatute* is good. 2 H. H. 173.

If the former ſtatute be diſcontinued, and revived by another ſtatute, the beſt way is to conclude againſt the form of the *ſtatutes*; though there is a good opinion, that it is good enough to conclude againſt the form of the firſt ſtatute. 2 H. H. 173.

If one ſtatute be relative to another, as where the former makes the offence, the latter adds a penalty; the indictment ought to conclude againſt the form of the ſtatutes. 2 H. H. 173.

Condition of a recognizance to prefer a bill of indictment.

The condition of this recognizance is ſuch, that if the above bound A J, *ſhall perſonally appear at the next court to be holden at for &c. and then and there prefer a bill of indictment againſt* A O, *late of yeoman, for the felonious taking and carrying away of the property of and ſhall then and there give evidence concerning the ſame, to the jurors who ſhall inquire thereof, on the part of the commonwealth: And in caſe the ſame be found a true bill, then if the ſaid* A J, *ſhall perſonally appear before the jurors, who ſhall paſs upon the trial of the ſaid*

A O,

A O, *and give evidence upon the ſame indictment, and not depart without leave of the court, then this recognizance to be void.*

Condition of a recognizance to answer to an indictment.

The condition of this recognizance is ſuch, that if the above bound A O, *ſhall perſonally appear at the next court to be holden at for &c. then and there to anſwer to an indictment to be prefered againſt him by* A J, *of yeoman, for aſſaulting and beating him the ſaid* A J, *and not depart without leave of the court, then this recognizance to be void.*

INFANTS.

1. BY an infant, or minor, is meant any one who is under the age of 21 years. 1 *Inſt.* 2.

2. It is ſaid generally, that thoſe who are under a natural diſability of diſtinguiſhing between good and evil, as infants under the age of 14 years, which is called the age of diſcretion, are not puniſhable by any criminal proſecution whatſoever. But this muſt be underſtood with ſome allowance; for if it appear by the circumſtances, that an infant under the age of diſcretion, could diſtinguiſh between good and evil, as if one of the age of nine or ten years kill another and hide the body, or make excuſes, or hide himſelf, he may be convicted and condemned, and forfeit as much as if he were of full age; but in ſuch caſe the judges will in prudence reſpite the execution, in order to get a pardon; and it is ſaid, that if an infant apparently wanting diſcretion, be indicted and found guilty of felony, the juſtices themſelves may diſmiſs him without a pardon. And in general it muſt be left to the diſcretion of the judge, upon the circumſtance of the caſe, how far an infant, under that age, is *capax doli*, or hath knowledge to diſcern betwixt good and evil. *Hale's P.* 43. 1 Haw. 2. 1 H. H. 18.

A remarkable inſtance of this kind we have in the caſe of *William York*, at Bury ſummer aſſizes, 1748, *William York*, a boy of ten years of age, was convicted before lord chief juſtice *Willis*, for the murder of a girl of about five years of age; and received ſentence of death. But the chief juſtice, out of regard to the tender years of the priſoner, reſpited execution, 'till he ſhould have an opportunity of taking the opinion of the reſt of the judges, whether it was proper to execute him or not, upon the ſpecial circumſtance of the caſe which he reported

reported to the judges as follows. The boy and girl were pariſh children, but under the care of a pariſhioner, at whoſe houſe they were lodged and maintained. On the day the murder happened, the man of the houſe and his wife went out to their work early in the morning, and left the children in bed together: When they returned from work the girl was miſſing; and the boy being aſked what was become of her, anſwered, that he had helped her up, and put on her cloaths, and that ſhe was gone he knew not whither. Upon this, ſtrict ſearch was made in the ditches, and pools of water near the houſe, from an apprehenſion that the child might have fallen into the water. During this ſearch, the man under whoſe care the children were, obſerved that a heap of dung near the houſe had been newly turned up. And upon removing the upper part of the heap he found the body of the child, about a foot's depth under the ſurface, cut and mangled in a moſt barbarous and horrid manner. Upon this diſcovery, the boy, who was the only perſon capable of committing the fact, that was left at home with the child, was charged with the fact, which he ſtiffly denied. When the coroner's jury met, the boy was again charged, but perſiſted ſtill to deny the fact. At length being cloſely interrogated, he fell to crying, and ſaid he would tell the whole truth. He then ſaid, that the child had been uſed to foul herſelf, in bed; that ſhe did ſo that morning (which was not true, for the bed was ſearched and found to be clean) that thereupon he took her out of the bed and carried her to the dung heap; and with a large knife, which he found about the houſe, cut her in the manner the body appeared to be mangled, and buried her in the dung heap; placing the dung and ſtraw that was bloody under the body, and covering it up with what was clean; and having ſo done, he got water and waſhed himſelf as clean as he could. The boy was the next morning carried before a neighbouring juſtice, before whom he repeated his confeſſion, with all the circumſtances he had related to the coroner and his jury. The juſtice very prudently deferred proceeding to a commitment, till the boy ſhould have an opportunity of recollecting himſelf. Accordingly he warned him of the danger he was in, if he ſhould be thought guilty of the fact he ſtood charged with, and admoniſhed him not to wrong himſelf; and then ordered him into a room where none of the crowd that attended ſhould have acceſs to him. When the boy had been ſome hours in this room, where victuals and drink were provided for him, he was brought a ſecond time before the juſtice, and then repeated his former confeſſion: Upon which he was committed to jail. On the trial evidence was given of the declarations before mentioned

oned to have been made before the coroner and his jury, and before the juſtice; and of many declarations to the ſame purpoſe which the boy made to other people after he came to jail, and even down to the day of his trial. For he conſtantly told the ſame ſtory in ſubſtance, commonly adding that the devil put him upon committing the fact. Upon this evidence, with ſome other circumſtances tending to corroborate the confeſſion, he was convicted. Upon this report of the chief juſtice, the judges having taken time to conſider of it, unanimouſly agreed, 1. That the declarations ſtated in the report were evidence proper to be left to the jury. 2. That ſuppoſing the boy to be guilty of this fact, there are ſo many circumſtances ſtated in the report which are undoubtedly tokens of what lord chief juſtice *Hale* ſome where calleth *miſchievous diſcretion*, that he is certainly a proper object for capital puniſhment, and ought to ſuffer. For it would be of very dangerous conſequence to have it thought that children may commit ſuch atrocious crimes with impunity.

There are many crimes of the moſt heinous nature, ſuch as in the preſent caſe, the murder of young children, poiſoning parents or maſters, burning houſes, and the like, which children are very capable of committing, and which they may in ſome circumſtances be under ſtrong temptations to commit; and therefore, tho' the taking away the life of a boy of ten years old, may ſavour of cruelty, yet as the example of this boy's puniſhment may be a means of deterring other children from the like offences, and as the ſparing this boy merely on account of his age, will probably have a quite contrary tendency,——in juſtice to the public, the law ought to take its courſe, unleſs there remaineth any doubt, touching his guilt. In this general principle all the judges concurred. But two or three of them, out of great tenderneſs and caution, adviſed the chief juſtice to ſend another reprieve for the priſoner; ſuggeſting that it might poſſibly appear to further enquiry, that the boy had taken this matter upon himſelf, at the inſtigation of ſome other perſon, who hoped by the artifice to ſcreen the real offender from juſtice. Accordingly, the chief juſtice did grant one or two more reprieves; and deſired the juſtice who took the boy's examination, and alſo ſome other perſons in whoſe prudence he could confide, to make the ſtricteſt enquiry they could into the affair, and make report to him. At length he receiving no further light, determined to ſend no more reprieves, and to leave the priſoner to the juſtice of the law, at the expiration of the laſt. But before the expiration of that reprieve, execution was reſpited till further order, by warrant from one of the ſecretaries of ſtate. And at the ſummer aſſizes 1757, he had the benefit

of

his majeſty's pardon, upon condition of his entering immediately into the ſea ſervice. *Foſt.* 70.

3. But within ſeven years of age, there can be no guilt whatſoever of any capital offence; the infant may be chaſtiſed by his parents or tutors, but cannot be capitally puniſhed, becauſe he cannot be guilty; and if he be indicted for ſuch an offence as is in its nature capital, he muſt be acquitted. 1 *H. H.* 19, 20.

4. An infant under 14, is preſumed by law unable to commit a rape, and therefore it ſeems cannot be guilty of it; and though in other *felonies malitia ſupplet ætatem* in ſome caſes, yet it ſeems as to this fact the law preſumes him impotent, as well as wanting diſcretion. 1 *H. H.* 630.

5. An infant may be guilty of forcible entry, in reſpect of perſonal actual violence. 1 *Haw.* 147. And the juſtices may fine him therefor: But yet it ſhall be good diſcretion in the juſtices of the peace, to forbear the impriſonment of ſuch infant. *Dalt. c.* 126.

Becauſe it is ſaid, that he ſhall not be ſubject to corporal puniſhment, by force of the general words of any ſtatute wherein he is not expreſsly named. 1 *Haw.* 147.

6. But if one who wants diſcretion, commit a treſpaſs, againſt the perſon or poſſeſſion of another, he ſhall nevertheleſs be compelled in a civil action to give ſatisfaction for the damages 1 *H.* 2. 1 *H. H.* 15, 16.

7. An infant may bring an appeal, although it take from the defendant the benefit of waging battle: but he muſt proſecute ſuch appeal by a guardian. 2 *Haw.* 161, 162.

An appeal likewiſe may be brought againſt him. 2 *Haw.* 168.

8. An infant under the age of diſcretion cannot be an approver; becauſe he cannot take the oath requiſite in that caſe. 2 *Haw.* 205.

9. In caſe a rape committed upon a child of 12 years old, ſuch child may be ſworn as evidence; yea if ſhe be under that age, if it appear to the court that ſhe knows and conſiders the obligation of an oath, ſhe may be ſworn. And in caſe of evidence againſt witches, an infant of nine years old was ſworn.—1 *H. H.* 634. *Dalt.* 378.

10. An infant before 21 years of age ſhall not be ſworn in an inqueſt. 1 *Inſt.* 78. *V. l. p.* 108.

11. A woman at nine years of age may have dower; at 12 may conſent to marriage; and at 14 is of age of diſcretion, and may chuſe a guardian. 1 *Inſt.* 78.

12. A man is of age at 12 years to take the oath of allegiance; and at 14 is of age of diſcretion, may conſent to marriage and chuſe his guardian. 1 *Inſt.* 171.

13. At 21, and not before, perſons may bind themſelves by any deed, and alien lands, goods and chattels. 1 *Inſt.* 171.

"No perſon under 18 years ſhall be capable of diſpoſing of his chattels by will. *V. l. p.* 169,"

14 Upon which ground infants may not enter into recognizance to keep the peace, or to be of the good behaviour, but their ſureties only.

15. But an infant may bind himſelf to pay for his neceſſary meat, drink, apparel, phyſic, and ſuch like; and alſo for his good teaching or inſtruction, whereby he may profit himſelf afterwards; but if he binds himſelf in an obligation or other writing, with a penalty for the payment of any of theſe, that obligation ſhall not bind him. 1 *Inſt.* 172.

And in Earl's caſe, 1 *Salk.* 387. it is ſaid, that an infant may buy neceſſaries, but cannot borrow money to buy; for he may miſapply the money, and therefore the law will not truſt him, but at the peril of the lender, who muſt lay it out for him, or ſee it laid out.

19. Alſo an infant hath, without conſent of any other, capacity to purchaſe, for it is intended for his benefit; and at his full age, he may either agree thereunto, and perfect it, or without any cauſe to be alledged, waive, or diſagree to the purchaſe: and ſo may his heirs after him, if he agree not thereunto after his full age. 1 *Inſt.* 2.

20. The common law ſeems not to have determined preciſely at what age one may make a teſtament of a perſonal eſtate: it is generally allowed, that it may be made at the age of 18, and ſome ſay under. 1 *Inſt.* 89. 1 *H. H.* 17.

21 A perſon is of age to be an executor at 17; and an adminiſtration of any one during the minority of an infant, ceaſeth when the infant comes to that age. 5 *co. Pigot's caſe.* 1 *H. H.* 17.

23. An infant cannot anſwer but by guardian; but he may ſue either by his next friend or by guardian. 3 *Salk.* 196.

24 If an infant of the age of 17 years releaſe a debt, this is void; but if an infant make the debtor his executor, this is a good releaſe in law of the action. 1 *Inſt.* 264.

But by *V. l. p.* 175. 'The appointment of a debtor an executor ſhall in no caſe be an extinguiſhment of the debt, unleſs it be ſo directed in the will.'

The guardianſhip of an infant may be deviſed, or transfered by deed by his father. See *V. l. p.* 181.

Infants ſeized of eſtates in truſt, or by way of mortgage, may make conveyances thereof, as the high court of chancery ſhall direct. *V. l. p.* 182.

And

And they may ſurrender leaſes by order of ſuch court, in order to renew the ſame. *V. l. p.* 183.

For more of *Infants* ſee titles 'Apprentices' and 'Evidence.'

INFORMATION.

INFORMATIONS are of two kinds: Firſt, ſuch as are merely at the ſuit of the commonwealth; and ſecondly, ſuch as are partly the ſuit of the commonwealth and partly the ſuit of the party, which are commonly called informations *qui tam*, from theſe words in the information, when the proceedings were in latin, *qui tam pro Domino Rege quam pro ſe ipſo.* 2 Haw. 259.

Of near affinity to an information *qui tam* is an action upon a ſtatute; which is either a *private* action, that is, when an action is given upon a ſtatute to the commonwealth, and to the *party grieved* only; or a *popular* action, that is, when the action is given to the commonwealth, or to any one who will ſue for the commonwealth and himſelf. *Wood. B.* 4. *ch.* 4.

But if the commonwealth commenceth ſuit before the informer, the commonwealth ſhall have the whole forfeiture, becauſe in ſuch caſe it alſo is the informer; and it may, before the informer begins his ſuit, releaſe the penalty to the offender, and bar all others. But if, after a popular action is brought by the informer, the commonwealth's attorney will enter *ulterius non vult proſequi*, the informer may proſecute for his part. *Ibid.*

Where a matter concerns the public government, and no particular perſon is entitled to an action, there an information will lie. 1 *Salk* 375.

An information lies, at the *common law* for a variety of crimes leſs than capital, as Batteries, Cheats, Perjuries, Riots, Extortions, Nuiſances, Contempts, and ſuch like; and alſo it lies in very many caſes by ſtatute, wherein the offender is liable to a fine, or other penalty. 2 *Hawk*, 260.

And in general, it ſeems that, of common right, an information at the ſuit of the commonwealth, or an action in the nature thereof, may be brought for offences againſt ſtatutes, whether they be mentioned by ſuch ſtatutes or not, unleſs other methods of proceeding be particularly appointed, by which all others are impliedly excluded. *Ibid.*

But an information or action *qui tam* will not lie on any ſtatute which prohibits a thing as being an immediate offence againſt the public good in general, under a certain penalty, unleſs the

whole

whole, or part, of ſuch penalty, be expreſsly given to him who will ſue for it; becauſe otherwiſe it goes to the commonwealth, and nothing can be demanded by the party. But where ſuch ſtatute gives any part of ſuch penalty to him who will ſue for it by action or information, any one may bring ſuch action or information, and lay his demand, as well for the commonwealth as for himſelf. 2 *Hawk.* 256.

Alſo where a ſtatute prohibits or commands a thing, the doing or omiſſion whereof is an immediate danger to the party, and alſo highly concerns the peace, ſafety, or good government of the public; it ſeems to be the general opinion that the party grieved, may bring his action *qui tam* on ſuch ſtatute. 2 *Hawk.* 265.

If an offence prohibited by a penal ſtatute be alſo an offence at common law, the proſecution of it as an offence at common law is no way reſtrained hereby. 2 *Hawk* 272.

If two informations be exhibited on the ſame day, for the ſame offence, they mutually abate one another. 2 *Hawk.* 275.

By *V. l.* (11 *R. Cond.* 1786. *ch.* 25) *p.* 35. Actions popular proſecuted by colluſion ſhall be no bar to thoſe that be proſecuted with good faith.

And compounding ſuch actions or diſmiſſing them without leave of the court ſubjects the proſecutor to half the penalty to which the defendant was liable. *Ibid.* § 2.

The court will not generally quaſh an information upon motion; but the party muſt either plead, demur, or move in arreſt of judgment. 1 *Salk* 372. *Str.* 185.

And ſeeing that an information differs from an indictment in little more than this, that the one is found by the oath of twelve men, and the other is not ſo found, but is only the allegation of the perſon who exhibits it, whatſoever certainty is required in an indictment, the ſame at leaſt is neceſſary, alſo in an information, and conſequently as all the material parts of the crime muſt be preciſely found in the one, ſo muſt they be preciſely alledged in the other, and not by way of argument or recital. 2 *Hawk,* 260. 1.

For this reaſon, the ſtatutes of Jeofails (from *J'ay faille,* I have failed) or the ſtatutes that do remedy overſights in pleading, extend not to informations. *Wood, B.* 4. *ch.* 4.

If an information contain ſeveral offences againſt a ſtatute, and be well laid as to ſome of them, but defective as to the reſt, the informer may have judgment for ſo much as is well laid.—2 *Hawk* 260.

For the rules in filing informations and the coſts accruing on the proſecution, as well as the mode of aſſeſſing the fine *See ſections* 24, 25 *and* 26 *of the act recited under title* Criminals.

Form

Form of an information qui tam.

county to wit:

Be it remembered that A I, *of in the county of gentleman, who as well for the commonwealth, as for himself doth profecute, cometh before the juſtices of the peace for the commonwealth, aſſigned to keep the peace in the ſaid county, and alſo to hear and determine divers felonies, treſpaſſes and other miſdemeanors in the ſaid county committed, at a court holden at in and for the ſaid county, the day of in the year of our Lord and in the year of the commonwealth in his proper perſon; and as well for the commonwealth, as for himſelf, giveth the court here to underſtand and be informed, That* A O, *late of in the county aforeſaid yeoman, on the day of in the year aforeſaid, at aforeſaid, in the county aforeſaid, not regarding the laws and ſtatutes of this commonwealth, but intending to &c. with force and arms* (here inſert the offence with the ſame preciſion as in an indictment) *againſt the form of the ſtatute in that caſe made and provided: Whereupon the aforeſaid* A I, *as well for the ſaid commonwealth, as for himſelf, prayeth the advice of this court in the premiſes; and that the aforeſaid* A O, *may forfeit the ſum of according to the form of the ſtatute aforeſaid; and that the ſame* A I, *may have one moiety thereof, according to the form of the ſtatute aforeſaid; and alſo that the aforeſaid* A O, *may come here into this court, to anſwer concerning the premiſes:*

If the information is filed by the attorney for the commonwealth, *ex officio*, and not at the inſtance of a common informer, as in the foregoing precedent, then the form may be thus:

Be it remembered, that attorney for the commonwealth, in the court of who for the ſaid commonwealth in this behalf proſecutes, in his own proper perſon comes here into the court of the ſaid commonwealth, on the day of and in the year and in the year of the commonwealth, and for the ſaid commonwealth gives the court here to underſtand and be informed, &c.

INNS INNKEEPERS, *(ſee Ordinaries.)*

INQUISITION *(ſee Preſentment.)*

INSOLVENTS.

FOR the relief of inſolvent debtors it is enacted by *V. l.* (18 *R. Cond. ch.* 151.) *p.* 314. That if any perſon ſhall hereafter

after be taken 'or charged &c.' [here insert Sects. 38, 39, 40, 41, 42, 43, 44, 45 and 46, of the above law.]
'Where any execution shall be delivered to the sheriff of any other county &c.' [here insert the 52d section.']

(A) Warrant by a single Judge or Justice to bring the prisoner before the court, while sitting.

county to wit:

To the keeper of the jail of the said county.

Whereas A J, *of &c. now a prisoner, upon execution for debt, in your custody, hath, by his petition to me* J P, *a justice of the peace for the county of aforesaid,* [*or before me* J J, *one of the judges of the general court,*] *prayed that he may be discharged out of custody pursuant to the act of the general assembly in that case made and provided. These are therefore, in the name of the commonwealth, to require you to bring immediately before the justices of the peace of this commonwealth now sitting in court, at the court-house of the said county of* [*or before* J J, *and* J J. *judges of the general court now sitting at the district court appointed by law to be holden at*] *the body of the said* A J, *together with a list of the several executions, with which he stands charged in the said jail; and have then there also this precept. Given under my hand and seal, &c.*

(B) Warrant by two Judges or Justices to bring the prisoner before them when the court is not sitting.

county (to wit:

To the keeper of the jail of the said county.

Whereas A J, *of &c. now a prisoner taken in execution of debt, and in your custody, hath, by his petition to us J. P. & K. P. two of the justices of the peace for the said county, or J. J. & J. J. two of the judges of the General Court prayed that he may be discharged out of custody, pursuant to the act of the General assembly in that case made and provided: These are therefore, in the name of the commonwealth, to require you to bring before us or any two justices of this county at the court-house of this county, on*

the

the day of next, or if confined in a diſtrict jail, before us or any two judges of the General Court on the day of next, at the houſe of &c. the body of the ſaid A. J. together with a liſt of the ſeveral executions wherewith he ſtands charged in your jail; and have then there this precept. Given under our hands and ſeals, &c.

The oath to be taken by the priſoner is already inſerted.

Warrant of Diſcharge.

county to wit:

A, B, C, D, E, F, &c. (all the members of the court,) *juſtices of the peace, and of the court of the ſaid county,* [or J J, and J J, two of the judges of the general court] [*or J P, and K P, two of the juſtices of the peace for the county of aforeſaid.*

To the ſheriff or keeper of the jail of the ſaid county.

We hereby command you, in the name of the commonwealth, forthwith to releaſe and ſet at liberty A J, a priſoner now in your cuſtody, by virtue of an execution againſt him at the ſuit of for the ſum of (if more executions, mention them all) *the ſaid A J, having complied with the directions of the act of the general aſſembly for relief of inſolvent debtors, if the ſaid A J, is detained in your cuſtody for no other cauſe than the execution (or executions) aforeſaid; and for your ſo doing this ſhall be your warrant. Given &c.*

INSPECTORS, *See (Tobacco.)*

JAIL AND JAILER.

For breaking jail, ſee title Priſon Breaking.

I. *Building and repairing jails.*

II. *Who ſhall have the keeping of jails.*

III. *Jailer ſhall receive priſoners.*

IV. *How they ſhall be maintained, and the fees allowed for maintainance.*

V.

V. *How prisoners shall be retained and kept.*

VI. *How they shall be delivered.*

VII. *Of jailers permitting escapes.*

I. *Building and repairing Jails.*

The power and duty of magistrates in building jails, &c.—also the penalty for neglect, and the remedy given the sheriff against the members of the court, for the insufficiency of the jail may be found in *V. l.* (17 *R. Cond*, 1792, *ch.* 67, § 13 *p.* 92.

II. *Who shall have the keeping of Jails.*

The jail itself is the commonwealth's, but the keeping thereof is incident to the office of sheriff, and inseparable from it. 2 *inst.* 589.

A jailer in fact is as much punishable for a misdemeanor as if he were a rightful jailer. 2 *Hawk*, 134.

Judge *Blackstone* says, jailers are the servants of the sheriff, and he must be responsible for their conduct. 1 *Blacks com.* 346.

III. *Joiler shall receive prisoners.*

All felons should be imprisoned in the common jail.

And if a jailer refuse to receive a felon, or take any thing for receiving him, he shall be punished. *Dalt. c.* 170.

IV. *How they shall be maintained.*

Lord *Coke* says the jailer cannot refuse the prisoner victuals, for he ought not to suffer him to die for want of sustenance. 1 *Inst.* 25.

But this is denied by others, see *Bacon's abr. jail and jailer.* F

The fee to the sheriff (and of course to the jailer) is 21 cents a day for the maintainance of a debtor. *V. l. p.* 228.—In what manner they are to be paid for the imprisonment of insolvent debtors, see *V. l. p.* 316.

For the maintainance of a criminal the fee is 17 cents a day.—*V. l. p.* 83.

The same for a runaway, and 25 cents for commitment, and the same for releasement. *V. l. p.* 257.

V.

V. *How priſoners ſhall be reſtrained and kept.*

The county jail is the priſon for malefactors; but priſoners for debt, where eſcape lies againſt the ſheriff for their eſcaping, may be kept in what place the ſheriff pleaſes. Ld. *Raym.* 136.

For removing priſoners from the county to the diſtrict jail, and by *Habeas Corpus*, *ſee titles* Criminals *and* Habeas Corpus.

It ſeemeth generally in all caſes where a man is committed to priſon, eſpecially if it be for felony, or upon an execution, or but for a treſpaſs or other offence, every jailer ought to keep ſuch priſoner in ſafe and cloſe cuſtody; ſafe, that he cannot eſcape; and cloſe without conference with others or intelligence of things abroad. *Dalt. c.* 170.

And therefore if the jailer ſhall licence his priſoner to go abroad for a time, and then to come again, or to go abroad with a keeper tho' he come again, yet theſe are eſcapes. *Dalt. c.* 170.

And hereupon it is lawful for the jailer to hamper a felon with irons to prevent his eſcape. 1 *H. H.* 601. *Dalt. c.* 170. and it is ſaid that a jailer is no way puniſhable for keeping even a debtor in irons. 2 *Haw.* 152.

But the learned editor of *Hale's Hiſtory* obſerves that this liberty even in the caſe of a felon (much more in the caſe of a priſoner for debt) can only be intended, where the officer has juſt reaſon to fear an eſcape, as where the priſoner is unruly, or makes any attempt to that purpoſe; but otherwiſe, notwithſtanding the common practice of jailors, it ſeems altogether unwarrantable, and contrary to the mildneſs and humanity of the laws of the commonwealth, by which jailers are forbidden to put their priſoners to any pain or torment. And lord *Coke*, 2 *Inſt.* 381. is expreſs, that by the common law it might not be done. 1 H. H. 601.

And if the jailer keep the priſoner more ſtrictly than he ought of right, whereof the priſoner dieth, this is felony in the jailer by the common law; and this is the cauſe, that if a priſoner die in jail, the Coroner ought to ſet upon him, and if the death was owing to cruel and oppreſſive uſage on the part of the jailer or any officer of his, it will be deemed wilful murder in the perſon guilty of ſuch dureſs, 3 *Inſt.* 91. *Foſt.* 321, 322.

But if a criminal, endeavouring to break the jail, aſſault his jailer, he may be lawfully killed by him in the affray. 1 *Haw.* 71. 1 *H. H.* 496. For jailers and their officers are under the ſame ſpecial protection, that other miniſters of juſtice are. And therefore if in the neceſſary diſcharge of their duty they meet with reſiſtance, whether from priſoners in civil or criminal ſuits, or

or from others in behalf of such prisoners, they are not obliged to retreat as far as they can with safety, but may freely and without retreating repel force with force. And if the party so resisting happeneth to be killed, this on the part of the jailer, or his officer or any person coming in aid of him will be justifiable homicide. On the other hand, if the jailer or his officer, or any person coming in aid of him, should fall in the conflict, this will amount to wilful murder in all persons joining in such resistance. It is homicide committed in defiance of the justice of the commonwealth. *Foſt.* 321.

But forasmuch as the jail is intended, in most cases for custody and not for punishment; and confinement itself, especially in such dismal abodes as it is to be feared many of the jails are, is sufficiently afflictive and disconsolate; human nature will plead for those miserable objects, that their condition be rendered as tolerable as the case will admit of; particularly with regard to cleanliness, which is the parent of health; and wholesome air, which is life itself. A remarkable effect of want of care in this respect, sir *Michael Foſter* takes notice of, in the case of one Mr. *Clarke* who was brought to his trial at the *Old Bailey* sessions in 1750. It being a case of great expectation, the court and all the passages to it were extremely crouded. The weather also was hotter than is usual at that time of the year. Many people who were in the court, were sensibly effected with a very noisome smell. And it appeared soon afterwards, upon an enquiry ordered by the court of aldermen, that the whole prison of *Newgate*, and all the passages leading thence into the court, were in a very filthy condition, and had been long so. What made these circumstances to be at all attended to was, that within a week or ten days at most after the sessions, many people who were present at Mr. *Clark's* were seized with a fever of the malignant kind, and few who were seized recovered. The symptoms were much alike in all the patients; and in less than in six weeks the distemper entirely ceased. At the time this disaster happened, there was no sickness in the jail, more than is common in such places. Which circumstance, that distinguisheth this from most of the cases of the like kind which we have heard of, suggests a very proper caution, not to presume too far upon the health of the jail, barely because the jail fever is not among the prisoners. For without doubt, if the points of cleanliness and free air have been greatly neglected, the putrid *effluvia* which the prisoners bring with them in their clothes or otherwise, especially where too many are brought into a crouded court together, may have fatal effects upon people who are accustomed to breathe better air; though the poor wretches, who are in some measure habituated to the fumes of a prison, may not always be sensible of any great inconvenience

inconvenience from them. The perſons of chief note who were in the court at this time, and died of the fever, were ſir *Samuel Pennant*, lord mayor for that year, ſir *Thomas Abney* one of the juſtices of the common pleas, *Charles Clark* eſquire one of the barons of the exchequer, and ſir *Daniel Lambert* one of the aldermen of London. Of leſs note, a gentleman of the bar, two or three ſtudents, one of the under ſheriffs, an officer of lord chief juſtice *Lee* who attended his lordſhip in court at that time, ſeveral of the jury on *Middleſex* ſide, and about forty other perſons whom buſineſs of curioſity had brought thither. *Foſt.* 74.

VI. *How they ſhall be delivered.*

The jailer being an officer whoſe attendance is always neceſſary on the court, and by ſome acts of aſſembly is made expreſſly ſo, (ſee *V. l. p.* 82) he ſhould always be careful to certify to the courts, to which the priſoner ſtands committed, the mittimus or warrant of commitment, in order that the perſon accuſed may receive his trial, and if found not guilty may be diſcharged.

And if a jailer detains a priſoner in jail after his acquital, unleſs it be for his fees (not for meat, drink or lodging) this is an unlawful impriſonment. 2 *Inſt.* 53.

And a jailer muſt not diſobey a writ of *habeas corpus*, for want of his fees; but the court will not turn the priſoner over till the jailer be paid all his fees. 2 *Haw.* 151.

VII. *Of Jailers permitting eſcapes.*

i. In criminal caſes.

ii. In civil caſes.

i. In Criminal Cases.

If the jailer *voluntarily* ſuffers a priſoner to eſcape, he ſhall be puniſhed in the ſame manner as the priſoner ought to have been who eſcaped; and if he *negligently* ſuffered him to eſcape, he ſhall be puniſhed by fine and impriſonment. And the ſheriff ſhall anſwer for him. 2 *Hawk* 134, 5, 6.

But the principal jailer is only fineable for the *voluntary* eſcape of a felon ſuffered by his deputy; for no man ſhall ſuffer capitally for any crime, but he who is actually guilty of it. 2 *Hawk*, 135.

But

But for a negligent eſcape ſuffered by his bailiff the ſheriff is as much liable to anſwer, as if he had actually ſuffered it himſelf; and the court may charge either the ſheriff, or bailiff for it: And if a deputy jailer be not ſufficient to anſwer a negligent eſcape, his principal muſt anſwer for him. 2 *Hawk.* 135.

But it will not be felony if the priſoner be permitted to eſcape, when no felony was committed. 2 *Inſt.* 592.

ii. In Civil Cases.

I. *What ſhall be an Eſcape.*

An eſcape from the bounds of the priſon without the jailer's knowledge is not a voluntary eſcape. 2 *Term. Rep* 126.

An action lies for an eſcape, if he permits his priſoner to go at large, tho' he afterwards returns. *D.* 3. *Co.* 44 *a.* 1 *Rol.* 806 *l.* 13.

Tho' he returns the ſame day, and afterwards plaintiff proceeds to final judgment. *Ravenſcroft*, v. *Eyles*, 2 *Wils.* 294.

If the defendant being taken in execution be afterwards ſeen at large for any the ſhorteſt time, even before the return of the writ. 2 *Bl. Rep.* 1048.

Tho' he does not go out of the ſame county. 1 *Rol.* 806. *l.* 15.

Or, out of the town where the jail is. 1 Rol. 806. *l.* 24. *Hob.* 202.

Tho' he has a keeper with him. *D* 3. *Co.* 44. *a.* 1. *Rol.* 806 *l.* 17, 20. *R. Pl. Com.* 37. *Hob* 202.

Or, upon any *habeas corpus* be permitted to go at large in the country. *Semb. Cro. Car.* 14, 3 *Co.* 44 *a. Mo.* 257. 299.—*Per Hale.* 1 *Mod* 116. *Hard.* 476.

Or, if upon a *habeas corpus ad teſtificand*; he goes before and ſtays a long time after the aſſizes. *Semb.* 1. *Mod.* 116.

If after judgment, and before any charge in execution, a priſoner is reſcued when brought out on a *habeas corpus*; it is not a good excuſe for the ſheriff, in an action of eſcape, and he ſhall anſwer it to the plaintiff. *Crampton*, v. *Ward. Str.* 429.

If a priſoner is removed by *habeas corpus* from B R, to C B, and eſcapes, plaintiff in an action of eſcape need not ſet out the proceſs in C B, againſt the priſoner. *Gambier*, v. *Wright*, I. 6 G. 2. *Str.* 951.

So eſcape lies, tho' taken upon an eſcape warrant; by the *ſt.* 1 *An.* 6.

If the recaption is after the action brought, it is ſtill an eſcape. R. on *Demurrer*. *Stonehouſe*, v. *Mullins.* J 4. G. 2. *Str.* 873.

So

So an action lies for an eſcape, where the priſoner was arreſted by proceſs out of an inferior court.

Tho' it be pleaded that the cauſe of action aroſe out of the juriſdiction and that the officer had notice of it before the return of the writ: for the officer cannot examine that matter. *R.* 7. *An. inter Higgiſon* and *Sheaf* (*Comyns's Rep.* 153. &c. by the name of *Higgiſon* v. *Sheriff.*)

Tho the judgment was erroneous, or for one who ſued without colour. *R.* 3 *Mod.* 324. *Carth.* 148. *Adm.* 5. *Mod.* 413. *R.* 8. *Co.* 142. 2 *Bul.* 63. *R. Cro. El.* 164, 576. *Tel.* 42. *cont.*

So an action lies for an eſcape, tho' he was convicted for felony, before judgment and execution againſt him, and continued in priſon for the felony; for until he be executed for felony, he is chargeable to the party. *R. Sav.* 63. 1 *Leo.* 276. 2 *Lev.* 84.

2. *What ſhall not be an eſcape.*

But it will not be an eſcape, if the party never was in his cuſtody: As if the old ſheriff does not deliver him over upon ſuch execution. *R.* 3. *Co.* 72. *Adm.* 2 *Cro.* 588. *Poph.* 85. *Lev.* 54.

If he be arreſted, but not actually committed to jail, the jailer ſhall not be charged for an eſcape. *R.* 1. *Rol.* 806. *l.* 30.

So, if a *committitur* be entered upon the roll, but the party is not taken. 1 *Sid.* 220.

So if a man bailed renders himſelf in diſcharge of his bail, and a *reddidit ſe* is entered in the judges book, and a *committitur* entered with the proper officer; yet if a *committitur* be not entered with the marſhal of B R, or a rule ſerved upon him he ſhall not be charged for an eſcape, tho' the bail be diſcharged. *R.* 1 *Sal.* 272, 3.

So, if the entry be, that *virtute* of an *habeas corpus* to a judge of B R, *debito modo commiſſus fuit mar*; for that cannot be by virtue of the *habeas corpus*. *R* 2 *Sho.* 17, 8.

It muſt appear that the commitment is of record; therefore, if it is laid that the priſoner was committed to the cuſtody of the marſhal, at the ſuit of plaintiff, by it, one of the juſtices of the commonwealth, it is ill. *Wightman*, v. *Mullins. Str.* 1226.

If he be at the houſe of the jailer, but not within the priſon. *R Cro. Car.* 210.

So it will not be an eſcape, where the priſoner was not in cuſtody at the ſuit of the plaintiff: As, if he was taken by a *capias utligatum*, or a *capias pro fine*; where a *capias* does not lie in ſuch ſuit. 1 *Rol.* 810, l. 30.

Or,

Or, when he was not charged at the prayer of the plaintiff: 1 *Rol.* 810 *l.* 30. *R* 1. *Leo* 263.

Or, was arreſted and ſuffered to go at large before the writ of execution was delivered to the ſheriff. 1 *Rol.* 809, *l.* 30.

Or, upon a *capeas*, where no *capeas* was awarded by the court. 1 Rol. 809. *l.* 35.

So it will not be an eſcape, if he goes out of priſon, by reaſon of a ſudden fire in the jail. 1 *Rol.* 808, *l.* 7.

Or, the jail be broke by the commonwealth's enemies. *Bro: Eſcape* 10. 1 *Rol* 808, *l.* 5.

Or, the defendant be reſcued upon a *meſne* proceſs, before he was in jail. *Mar:* 1. 1 *Rol:* 807, *l:* 35. *R.* 2 *Cro:* 419. 2 *Liv:* 144. 1 *Rol:* 389, 440.

Tho' the *reſcous* be not returned. *R.* 2, *Lev:* 144.—Or if it be. *R:* 1 *Rol:* 140.

So, if the defendant be retaken upon freſh ſuit, before the action commenced for the eſcape. *R:* 1 *Rol:* 808, *l:* 50. *R:* 3 *Co:* 52. *R:* 13. *H:* 7, 2. *Godb:* 434. *Gol:* 182. *F N B.* 130. *L.*

Tho' the freſh ſuit was not begun 'till a day and a night after the eſcape. *R.* 1. *Rol.* 809, *l.* 10. 2 *Rol.* 681, *l.* 50. 3 *Co.* 52. *Mo.* 660. *Poph.* 41.

Tho' he did not retake him 'till he fled into another county. *Bro. Eſcape.* 4. *R.* 3 *Co.* 52.

Tho' he was out of ſight. *R. Poph.* 41: 3 *Co.* 52, 14. *H.* 7, 1, *a.*

Tho' he did not retake him 'till ſeven years after, if it was upon freſh purſuit. 13 *Ed.* 4, 9. *a. Semb. Godb.* 177.

So a voluntary return of a priſoner, after an eſcape, before act on brought, is equivalent to a re-taking on a freſh purſuit: but it muſt be pleaded. 2 *Term. Rep.* 126.

But freſh ſuit is no plea, where the eſcape was voluntary in the ſheriff. *R.* 2 *Rol.* 283.

Or, after an action brought, tho' before plea. *Semb.* 2. *Rol.* 283. *R. cont. Lat.* 200.

So the ſheriff ſhall not be charged for an eſcape, if the priſoner goes out of priſon with the aſſent of his creditor. 2 *Inſt.* 382.

Tho' the aſſent be only by *parol*, it ſhall be a bar. 2 *Inſt.* 382. *Dy.* 275. *a.*

But an aſſent by *parol* after an eſcape does not diſcharge the ſheriff. *Dy.* 275. *a in may.*

So it will not be an eſcape, if the ſheriff, upon a *habeas corpus*, brings his priſoner to the ſuperior court, tho' he goes out of the direct way. *R.* 3 *Co.* 44. *Mo.* 299.

So

So if he goes with a keeper to counſel, &c. when he is in execution for the commonwealth's debt, tho' not in the caſe of a common perſon, becauſe the jailer may retake him. *R. Sav.* 29.

So, if diſcharged upon an *audita querela*, tho' the writ be afterwards vacated. *R. Mo.* 354.

So, if a priſoner, brought by *habeas corpus*, goes out of the cuſtody of the ſheriff, and returns the next morning, and appears at the return of the writ. *R. Mo.* 257.

So, if a priſoner goes out of the rules of the priſon, with the conſent of the plaintiff, without a keeper or rule of court, upon an intent to agree with the plaintiff, and no agreement is made; yet the priſoner ſhall be diſcharged upon an *audita querela*. *R. Str.* 117. *Semb. cont.* If the plaintiff aſſents upon condition that it ſhall not prejudice his execution. *Dy.* 275. *a.*

3 *When he ſhall be retaken, &c. after an eſcape.*

If the priſoner eſcapes by negligence of the ſheriff the ſheriff may retake him, and he ſhall not have an *audita querela*. *R.* 3 *Co.* 32. *b. R.* 1. *Sid.* 330. *Mo.* 660. *Dub. Sho.* 90. *Adm. Sho.* 177.

Or he may have an action on the caſe againſt the priſoner for his eſcape; whereby he becomes ſubject to the action of the party. *D.* 3. *Co.* 52, *b. Mo.* 660. *R. Mo.* 404, 597. *R. Cro. El.* 53, 237. 1 *Leo.* 237. *Lut.* 64.

And this, before an action or recovery againſt the ſheriff, as well as after. *Mo.* 660. *R. Godb.* 125. *Cro. El.* 53.

Tho' the party afterwards acknowledges ſatisfaction upon record; for that goes only in mitigation of damages. R. 1 *Leo.* 237. *Semb. cont.* if he does not ſhew ſpecially, how ſatisfied, *Cro. El.* 237.

So, if a priſoner eſcapes, and afterwards returns to the priſon, the plaintiff may admit him in execution tho' he has a remedy againſt the ſheriff. *Cont. Hob.* 202. *R. acc.* 1 *Vent.* 269, 2. *Lev.* 109, 132.

Or may retake him by a new *capias ad ſatisfaciendum*, if the firſt be not returned and filed. *R.* 3. *Co.* 52, *b.*

So he may retake him in all caſes upon a negligent eſcape; for the ſheriff may be inſufficient. *R. cont. Hob.* 202. *R. acc.* 1. *Sid.* 330. 1 *Vent.* 4, 269.

So, tho' the eſcape was voluntary by the jailer, and without his conſent. *R.* 1 *Sid.* 330. 1 *Vent.* 4. 1 *Lev.* 211. 2 *Mod.* 136. *R.* 2. *Jon.* 21. *Adm. Sho.* 177. *Semb. cont. Hob.* 202.

See title "Eſcape," of this work, where the mode of proceeding on an eſcape is fully pointed out.

So,

So if a priſoner be diſmiſſed upon a wrongful *audita querela*, he may be retaken, and ſhall be in execution. *R. Mo.* 354.

So after an eſcape, the plaintiff may have debt or a *ſcire facias* againſt the defendant upon the former judgment. *R.* 1 *Vent.* 269. *Cart.* 212. 2 *Jon.* 21. *R. Lut.* 1266. *Sho.* 174, 249 Tho it was with his conſent ſubſequent. 1 *Sal.* 271. Tho he paid the money to the jailer. *R.* 2. *Jon.* 97.

So if a man taken in execution be reſcued, he may be retaken, or a *ſcire facias* lies againſt him. *R. Cro. Car.* 240.

But, if the ſheriff ſuffers a voluntary eſcape, he will not have an action upon the caſe againſt the priſoner. *R. Mo.* 597.

Or, if he retakes him, the priſoner ſhall have an *audita querela*. 3 *Co.* 52 *b. R.* 1. *Sid.* 330.

After voluntary eſcape jailor cannot retake priſoner; after involuntary he may, without warrant, and upon a *Sunday*, *Barne's* 373.

So if the ſheriff permits a voluntary eſcape with conſent of the plaintiff, he never can be retaken by the ſheriff, or the plaintiff. *R. Sho.* 174. *D.* 2. *Leo.* 119.

If the conſent of the plaintiff be precedent to the eſcape; otherwiſe if ſubſequent. *R.* 1 *Sal.* 271

Yet if A. permits a voluntary eſcape, and quits his office to B, to whom the priſoner returns; B ought to retain him: otherwiſe it will be an eſcape in him. 1 *Vent.* 269. 2 *Lev.* 109. *Semb. Mod. Ca.* 183. *Sæmb. cont. Hob.* 202.

Or, if the office deſcends to B. *R.* 2 *Levs.* 109.

And an action for the eſcape lies againſt A or B. if he alſo permitted an eſcape, at the election of the plaintiff. *R.* 2 *Lev.* 132.

But if the party be not taken by lawful authority upon an eſcape warrant, if this appears upon the return of the warrant, he ſhall not be committed to the county jail, but to the former priſon: As, if brought, not by a conſtable or other officer, but by perſons not known. *Mod. Ca.* 154.

A, reſiſts the ſervice of an order of chancery, is committed for the contempt, goes at large, retaken on an eſcape warrant, and committed to *Newgate*; eſcape warrant ſuperſeded; the contempt not being for not obeying a decree, and A ſent to the former priſon. *Hincheliff* v. *Payne*. *Str.* 423.

If a man eſcapes and returns again, and then commits a ſecond eſcape, he cannot be taken up for the firſt eſcape, it being purged by his return. *Str.* 423.

So, if he be diſcharged by agreement, after commitment upon an eſcape warrant, he ſhall not be afterwards retaken. *Mod. Ca.* 254.

If

If the defendant was intitled to his diſcharge at the time of his eſcape, and would be intitled to it as ſoon as taken on the eſcape warrant, the court will ſuperſede the warrant. *Web* v. *Thompſon*. *Str*. 401.

A man taken upon an eſcape warrant of a judge, after his patent is determined, ſhall be diſcharged, *Carter* v. *Jewel*. *Ld. Raym*. 1513.

If a priſoner eſcapes, and plaintiff ſends an order for his diſcharge, the jailer cannot retake him for his fees, *Willing* v *Goad*, *Str*. 909.

4. *What remedy by action for an eſcape.*

By the common law, the ſheriff, and every jailer, ought to keep perſons in execution in *ſalva cuſtodia*. 3 *Co*. 44.

And if ſuch a priſoner eſcapes, an action upon the caſe lies againſt him. 2 *Inſt*. 382. *R*. 1. *Rol*. 99. *l*. 10, 15. 2 *Cro*. 289. 2 *Lev*. 159.

And debt lies in all caſes, for an eſcape, againſt a jailer, 2 *Inſt*. 382. R. *Pl. Com*. 36 *b*. *Arlm*. 2 *Lev*. 159. 15 *Ed*. 4, 20.

And may be ſued by writ or by bill of debt. 2 *Inſt*. 382. *Dub. Pl*. Com. 38. *a*. 42 *Ed*. 3. 13, *a*.—*V. L. p*. 127.

So, if two are in execution and one of them eſcapes. 1 Rol. 295.

Caſe (but not debt) lies for the eſcape of an outlaw on *meſne proceſs*. Cooke *v*. Champneys. *Str*. 901.

An adminiſtratrix may maintain an action in her own name againſt the marſhal for the eſcape of a priſoner in execution on a judgment obtained by her as adminiſtratrix. 2 *Term. Rep*. 126.

Under a count for a *voluntary* eſcape, the plaintiff may give evidence of a negligent eſcape, and the defendant may plead a re taking on a freſh purſuit to ſuch a county without traverſing the voluntary eſcape. *Id. Ibid.*

In debt for an eſcape againſt the ſheriff, the indorſement of *non eſt inventus* on the *ca. ſa*. is ſufficient evidence of its having been delivered to him. *Cowp*. 63.

A legal arreſt muſt be proved in ſuch action. *Id. Ibid.*

In debt againſt the ſheriff or jailer for an eſcape, the jury cannot give a leſs ſum than a creditor would have recovered againſt the priſoner, viz. the ſum indorſed on the writ, and the legal fees of execution. 2 *Term Rep*. 126.

5. *Againſt whom the action ſhall be brought.*

The action for eſcape ſhall be brought againſt him who has the cuſtody of the jail.

Tho' he has it *de facto* only, and not *de jure*. 2 *Inſt.* 381, 2.

As, it ſhall be againſt the ſheriff, not againſt his deputy. As, the jailer who takes care of the priſon in the county. 2 *Inſt.* 382. R. 1. *Rol.* 94. *l.* 30. *Semb. Hard.* 34.

As the ſerjeant, who makes the arreſt. R. 1. *Rol.* 806. *l.* 45.

So it lies againſt the old ſheriff, if he omits to deliver any priſoner by indenture to the new. R. 2. *Leo.* 54.

But an action for an eſcape ſhall not be againſt the ſuperior, if the inferior be ſufficient. 2 *Inſt.* 382.

But in all caſes where the inferior is inſufficient, debt lies againſt the ſuperior for the eſcape. *Semb.* 2. *Jon* 60. 1 *Vent.* 314. 2 *Lev.* 158. 9 *Co.* 98. *a.*

If he be inſufficient at the time of the action brought, tho' he was ſufficient, at the time of the commitment or eſcape; for that is the time moſt regarded. 2 *Jon.* 61. 2 *Lev.* 160.

And therefore a verdict is not ſufficient, if it does not find the inſufficiency when the action was brought, tho' it finds him inſufficient when he was keeper, or at the time of the commitment or eſcape. R. 2 *Jon.* 61. 1 *Vent.* 314. 2 *Lev.* 160.

So it lies againſt the ſuperior, tho' the inferior was admitted by the court. *Adm.* 2. *Jon.* 61.

Tho' the ſuperior had no notice of the inſufficiency. *Adm.* 2. *Jon.* 61.

The ſuperior againſt whom the action ought to be brought, is he, who by his eſtate in his office, or by his authority without eſtate, has the power of putting in the inferior officer.—2 *Jon.* 61.

So debt does not lie againſt the ſuperior upon a general declaration for an eſcape; but he ought to be ſpecially charged for the inſufficiency of the inferior. R. 2. *Lev.* 160.

Indictment againſt a jailer for negligently permitting a priſoner committed to his cuſtody by virtue of a juſtices warrant, to eſcape.

The jurors for the commonwealth upon their oath preſent, that on the day of in the year of the commonwealth, I D, eſquire, then being one of the juſtices of the commonwealth, aſſigned to

to keep the peace of the ſaid commonwealth, in and for the ſaid county of and alſo to hear and determine divers felonies, treſpaſſes, and other miſdemeanors committed in the ſame county, in due form of law did make his warrant of commitment under his hand and ſeal, to wit: at the pariſh of S, *in the ſaid county of bearing date the ſame day and year aforeſaid, directed to the keeper of the common jail in and for the ſaid county of by which ſaid warrant of commitment the ſaid keeper was required to receive into his cuſtody the body of* W M, *who was therewith ſent to him the ſaid keeper (the ſaid* W M *having been brought before the ſaid I D, the juſtice aforeſaid, and charged upon the oath* I S, *with aſſaulting and robbing him of his watch and money, to wit, one ſhilling and ſome half-pence, in a certain place near the commonwealth's highway, in the pariſh of* S, *in the ſaid county of) and him ſafely to keep until the then next court &c. for the ſaid county, as by the ſame warrant more fully appears; by virtue of which ſaid warrant of commitment, afterwards to wit, on the ſaid day of in the year aforeſaid, at the pariſh of in the ſaid county of* A B *then being the keeper of the common jail of the ſaid county of did receive the ſaid* W M *into his cuſtody in the ſaid common jail there ſituate. And the jurors aforeſaid, upon their oath aforeſaid, do further preſent, That the ſaid* A B, *late of the pariſh of in the ſaid county of yeoman, ſo being keeper of the ſaid common jail, and having the ſaid* W M *in his cuſtody in the ſaid jail on that occaſion, afterwards to wit, on the day of in the year aforeſaid, at the pariſh aforeſaid, in the county aforeſaid, unlawfully and negligently did permit, and ſuffer the ſaid* W M *(ſo being a priſoner committed to the ſaid jail as aforeſaid) to eſcape and go at large from and out of the cuſtody of him the ſaid* A B *out of the ſaid priſon, whereſoever he would, to the great hindrance and obſtruction of juſtice, in contempt of the laws of this commonwealth, to the evil example of all others in the like caſe offending, and againſt the peace and dignity of the commonwealth.*

JUDGMENT.

OF judgments, ſome are fixed and ſtated; as in caſes of treaſon, felony, and miſpriſons: the particular form of which may be ſeen under their reſpective titles.

Others are diſcretionary and variable, according to the particular circumſtance of each caſe: Thus for crimes of an infamous

natu e

nature, ſuch as petit larceny, perjury, or forgery at common law, groſs cheats, conſpiracy not requiring a villainous judgment, keeping a bawdy houſe, bribing witneſſes to ſtifle their evidence, and other offences of the like nature: It ſeems to be in a great meaſure left to the prudence of the court to inflict ſuch corporal puniſhment and alſo ſuch fine, and binding to the good behaviour for a certain time, as ſhall ſeem moſt proper and adequate to the offence. 2 *Haw.* 445.

The court may aſſeſs a fine, but cannot award any corporal puniſhment againſt a defendant, unleſs he be actually preſent in court. *id.* 446.

Where there are ſeveral defendants, a joint award of one fine againſt them all is erroneous; for it ought to be ſeverally againſt each defendant for otherwiſe one who hath paid his proportionate part, might be continued in priſon till all the others have alſo paid theirs, which would be in effect to puniſh him for the offence of another. *id.*

A fine is under the power of the court, during the term in which it is ſet; and may be mitigated as ſhall be thought proper; but after the term it admits of no alteration. *id.*

A judgment contrary to the verdict is void. *Read Judgm.*

By many ſtatutes, peculiar puniſhments are appointed for ſeveral offences, as pillory, ſtocks, impriſonment and the like: and in all theſe caſes, no room is left for the juſtices diſcretion, for they ought to give judgment, and to inflict the puniſhment in all the circumſtances thereof, as ſuch ſtatute doth direct.—*Dalt. c.* 180.

And by many acts of aſſembly the fine impoſed on the offender in the caſes therein mentioned, is to be aſſeſſed by a jury, and conſequently not diſcretionary with the court.

JURIES AND JURORS.

THE trial by jury has long been the ſubject of encomium amongſt the moſt celebrated writers on the Engliſh law. Its original has been traced up as far back as the Saxons themſelves, and its uſe has continued thro' the various revolutions ſuſtained by our Britiſh anceſtors. But while we admire the theory of this inſtitution as delineated by its enthuſiaſtic advocates, we have to lament, that, both in England and America, it is, in practice, too ſuſceptible of abuſe.

But becaſe an inſtitution may be abuſed it does not neceſſarily follow that it ſhould be wholly rejected. It is the fate of all human

man productions; and we ought rather to submit to it in this inſtance than loſe the many invaluable advantages peculiar to the trial by jury. Its utility in preſerving the liberty of the people has been fully proved by its long duration in England; and from that nations having retained its liberties longer than any other part of Europe, where the trial by jury was either not known, or entirely laid aſide. And ſo ſenſible of this important truth have the people of America been, that it is made an expreſs article in moſt of the conſtitutions of the ſeveral United States, and was ſtrongly inſiſted on, and at length obtained as an amendment to the fœderal conſtitution, *that the ancient trial by jury ſhould be held ſacred.* It ſhould therefore be our ſtudy to preſerve this palladium of our liberties from thoſe abuſes and encroachments which can alone endanger the inſtitution itſelf, and with it the rights of the people. *See* 3 *Blacks com. ch.* 23.

In elucidating this ſubject I ſhall conſider,

I. Who may or may not be jurors.

II. How and by whom ſummoned.

III. Of the challenge of jurors.

IV. Of the demeanor of jurors in giving their verdict.

V. Of the indemnity and puniſhment of jurors.

I. *Who may, or may not be jurors.*

By *V. l.* 17 R. *Cond.* 1792, *ch*, 73, § 12) page 108. "No perſon ſhall be capable, &c. [here inſert the 12th ſection of the above law.]

By ſect. 13 of the ſame law, "Juries *de medietate linguæ* may be directed by the courts reſpectively."

II. *How, and by whom ſummoned.*

By *V. L.* (17 R. *Cond.* 1792, *ch.* 73, ſect. 1, 2, 4, 10,) page 106. "The ſheriff of each county, where a diſtrict court "&c. [here inſert ſect. 1, 2, 4, 10 of the above law.] For the "oaths of grand jurors, *ſee title Oaths.*"

And by ſection 11 of the ſame law, 'for the trial of all cauſes &c. [here inſert the 11 ſect. of the above law']

By ſect. 17. 'If any ſheriff ſhall fail to ſummon a grand-'jury, and return a pannel of their names as herein directed, he ſhall

'shall forfeit and pay twenty dollars for the use of the common-'wealth.'

Concerning a *venire facias* for the trial of a criminal. *See title* 'Criminals.'

III. Of the challenge of jurors.

And herein,

i. *Of the several kinds of challenge.*
ii. *When the challenge is to be taken.*
iii. *How the challenge shall be tried.*

i. Of the several kinds of challenge.

There are two kinds of challenge, either to the *array*, by which is meant the whole jury as it stands *arrayed* in *panel*, or little square pane of paper, on which the jurors names are written, or to the *polls*, by which are meant the several particular persons or *heads* in the array. 1 *Inst.* 156. 158.

Challenge to the *array*, is in respect of the partiality or default of the sheriff, coroner or other officer that made the return; and this is two fold.

1 Principal challenge to the array; which if it is made good, is a sufficient cause of exception, without leaving any thing to the judgment of the triers.

Causes of challenge of this sort, are such as these: If the sheriff or other officer, be of kindred or affinity to the plaintiff or defendant, if the affinity continue. If any one, or more of the jury be returned at the denomination of the party plaintiff or defendant, the whole array shall be quashed. If the plaintiff, or defendant have an action of battery against the sheriff, or the sheriff against either party, this is a good cause of challenge. So if the plaintiff or defendant have an action of debt against the sheriff; but otherwise it is, if the sheriff have an action of debt against either party. Or if the sheriff have a parcel of the land depending upon the same title. Or if the sheriff or his under sheriff which returned the jury, be under the distress of either party. Or if the sheriff or his under sheriff, be either of counsel, attorney, officer, or servant of either party; or arbitrator in the same matter, and treated thereof. 1 *Inst.* 156.

And the citizen may challenge the array against the commonwealth; as in traverse of an office, he that traverseth may challenge the array: And so it is in case of life. 1 *Inst.* 150.

And

And where a citizen may challenge the array, for unindifferency, there the commonwealth, being a party, may alſo challenge for the ſame cauſe. 1 *Inſt.* 156.

The array challenged on both ſides ſhall be quaſhed. 1 *Inſt.* 156.

2. Challenge to the array, for favor: He that taketh this muſt ſhew in certain the name of him that made it, and in whoſe time, and all in certainty. This kind of challenge, being no principal challenge, muſt be left to the diſcretion and conſcience of the triers. As if the plaintiff or defendant be tenant to the ſheriff, this is no principal challenge, but he may challenge for favor, and leave it to trial. So affinity between the ſon of the ſheriff, and the daughter of the party, or the like, is no principal challenge, but to the favor; but if the ſheriff marry the daughter of either party, or the like, this (as hath been ſaid) is a principal challenge 1 *Inſt.* 156.

But where the commonwealth is party, one ſhall not challenge the array for favor, becauſe in reſpect of his allegiance, he ought to favor the commonwealth more: 1 *Inſt.* 156.

By which ſeems to be meant that ſuch challenge is not good, without ſhewing ſome actual partiality in the ſheriff. 2 *Haw.* 419.

But the commonwealth may challenge the array for favor.—1 *Inſt.* 156.

Challenge to the polls is threefold:

1. Peremptorily. This is ſo called, becauſe a perſon may challenge peremptorily, upon his own diſlike, without ſhewing of any cauſe.

But challenges for the commonwealth ſhall not be peremptory, but the proſecutor for the commonwealth ſhall aſſign a certain cauſe which ſhall be judged of by the court. *See ſect.* 6 *of the act recited under title* CRIMINALS.

And this peremptory challenge is not allowable to the *party* againſt the commonwealth, except only in caſes of treaſon or felony, in favor of life. 1 *Inſt.* 156.

By the common law a perſon for treaſon or felony might peremptorily challenge. 35. 1 *Inſt.* 156.—But by the 8th ſection of the above law, the number is reſtrained to 24 in treaſon; and 20 in murder or felony.

And if a perſon ſtand mute on his arraignment, or perſiſt after being admoniſhed by the court, in not anſwering to the indictment, or in peremptorily challenging above the number of jurors which by law he may be allowed to challenge peremptorily, or ſhall be outlawed, he ſhall be conſidered as convicted, and receive the ſame judgment, &c. as on verdict or confeſſion. *See the*

18*th*

18*th section of the above law.*

2. Principal challenge to the poll; where cauſe is ſhewn, but which, if found true, ſtand ſufficient of itſelf, without leaving any thing to the triers.

Cauſes of principal challenge to the polls, are ſuch as theſe.

Want of freehold, is a good cauſe of challenge. 1 *Inſt.* 156.

Alſo if a perſon is an alien. 1 *Inſt.* 156.

If the juror be of blood or kindred to either party, this is a principal challenge; for that the law preſumeth that one kinſman doth favor another, before a ſtranger; and how far remote ſoever he is of kindred, yet the challenge is good. 1 *Inſt.* 157

Affinity or alliance by marriage, is a pricipal challenge, if the ſame continues, or iſſue be had: otherwiſe, it is but to the favor. 1 *Inſt.* 157.

If the juror be godfather to the child of the plaintiff, or defendant, or they to his child, this is allowed to be a good challenge in our books. 1 *Inſt.* 157.

If the juror have part of the land that dependeth upon the ſame title, it is a principal challenge. 1 *Inſt.* 157.

It hath been allowed a good cauſe of challenge, on the part of the priſoner, that the juror hath declared his opinion beforehand, that the party is guilty, or will be hanged, or the like. 2 *Haw.* 418.

Likewiſe if the juror gave a verdict before, for the ſame cauſe, or upon the ſame title or matter, though between other perſons. 1 *Inſt.* 157.

So likewiſe one may be challenged, that he was indictor of the plaintiff or defendant in the ſame cauſe; for ſuch a one it may be thought, will not falſify his former oath. *Lamb.* 554. And if a grand juryman who was one of the indictors of the ſame cauſe, be returned upon the petit jury, and do not challenge himſelf, he ſhall be fined. 2 *H. H* 309.

If a juror hath been an arbitrator, choſen by the plaintiff or defendant in the ſame cauſe; and hath been informed thereof, or treated of the matter, this is a principal challenge, otherwiſe, if he were choſen indifferently by either of the parties. 1 *Inſt.* 157.

If he be of counſel, ſervant, or of fee, of either party, it is a principal challenge. 1 *Inſt.* 157.

Alſo, if a juryman, before he be ſworn, take information of the caſe, this is cauſe of challenge. 2 *H. H.* 306.

If any, after he be returned, do eat or drink at the charge of either party, it is a principal cauſe of challenge. 1 *Inſt.* 157.

But it is not a principle challenge to a juror, but only to the favor, that the profecutor was lately entertained at his houſe.—3 *Salk.* 81.

Actions brought either by the juror againſt either of the parties or by either of the parties againſt him, which imply malice or diſpleaſure, are cauſes of principal challenge; other actions which do not imply malice or diſpleaſure, are but to her favor. 1 *Inſt.* 157.

If either party do labour the juror, and give him any thing to give his verdict, this is a principal challenge; but if either party labour the juror to appear, and to do his conſcience, this is no challenge at all, but lawful for him to do it. 1 *Inſt.* 157.—See the penalty on a juror taking any thing for giving his verdict, in title MAINTENANCE.

That the juror is a fellow ſervant with either party, is no principal challenge, but to the favor. 1 *Inſt.* 157.

If the juror be attainted or convicted of treaſon or felony, or to any offence to life or member, or in attaint for a falſe verdict, or for perjury as a witneſs, or in a conſpiracy at the ſuit of the commonwealth, or in any ſuit (either for the commonwealth or for any citizen) be adjudged to the pillory, tumbrel, or the like, or to be branded or ſtigmatized, or to have any other corporal puniſhment, whereby he becometh infamous; theſe and the like, are principal cauſes of challenge. 1 *Inſt.* 158.

So it is if a man be outlawed in treſpaſs, debt, or any other action, for he is *ex lex*, and therefore not a lawful man. 1 *Inſt.* 158.

Challenge to the polls for favour. This is, when either party cannot take any principal challenge, but ſheweth cauſes of favour, which muſt be left to the conſcience and diſcretion of the triers, upon hearing their evidence, to find him favourable or not favourable. And the cauſes of favour are infinite. For all which the rule of law is, that he muſt ſtand indifferent, as he ſtands unſworn. 1 Inſt. 157.

ii. When the challenge is to be taken.

No challenge is to be taken either to the array, or to the polls, till a full jury have appeared. 2 *Haw.* 412.

He that hath divers challenges, muſt take them all at once. 1 *Inſt.* 158.

If a juror be challenged by one party, and after be tried indifferent, it is time enough for the other party to challenge him. 1 *Inſt.* 158.

After challenge to the array, and trial duly returned, if the ſame party take a challenge to the polls, he muſt ſhew cauſe preſently. 1 *Inſt.* 158.

When

When the commonwealth is party, the defendant that challengeth for cauſe, muſt ſhew his cauſe preſently, 1 *Inſt.* 158.

But if a juror be challenged between party and party, and there be enough of the panel beſides; the cauſe of challenge needeth not to be ſhewed unleſs the other ſide challenges *touts peremptory.* Tr. p. *pais.* 143.

If a man, in caſe of treaſon or felony, challenge for cauſe, and he be tried indifferent, yet he may challenge him peremptorily. 1 *Inſt.* 158.

The priſoner muſt take all peremptory challenges himſelf, even in caſes wherein he may have counſel. 2 *Haw.* 413.

The challenge to the array, muſt be in writing, but where the challenge is to the polls, it is a ſhort way by a verbal challenge. *Tr. p. pais.* 172.

iii. How the challenges ſhall be tried.

The challenge of him who firſt challenged ſhall be firſt tried. *Tr. p. pais.* 144.

If the array be challenged, it lies in the diſcretion of the court how it ſhall be tried; ſome times it is done by two coroners, and ſome times by two of the jury, with this difference, that if the challenge be for kindred in the ſheriff, it is moſt fit to be tried by two of the jurors returned; if the challenge found in favour of partiality, then by any other two aſſigned thereunto by the court. 2 *H. H.* 275.

When any challenge is made to the polls, if it be before any jurors are ſworn, the court ſhall chuſe the triers; if two are ſworn they ſhall try; and if they try one indifferent, and he be ſworn, then he and the two triers ſhall try another; and if another be tried indifferent, and he be ſworn, then the two triers ceaſe, and the two that be ſworn on the jury ſhall try the reſt: If the plaintiff challenge ten, and the defendant one, and the twelfth is ſworn, becauſe one cannot try alone, then ſhall be added to him one challenged by the plaintiff, and another by the defendant. *Finch.* 112. 1 *Inſt.* 158.

The triers oath is, *You ſhall well and truly try whether* A B, *(the juryman challenged) ſtand indifferent between the parties to this iſſue; ſo help you God.* 1 *Salk* 152.

If the cauſe of challenge touch the diſhonour or diſcredit of the juror, he ſhall not be examined on his oath; but in other caſes, he ſhall be examined on his oath, to inform the triers. 1 *Inſt.* 158. 1 *Salk.* 153.

If the array be quaſhed againſt the ſheriff, the proceſs of *venire facias juratores* ſhall be directed to the coroners: if againſt any

any of the coroners, then proceſs ſhall be awarded to the reſt; if againſt all of them, then the court ſhall appoint certain eliſors (ſo named *ab eligendo*) againſt whoſe return no challenge ſhall be taken to the array, becauſe they were appointed by the court, but he may have his challenge to the polls. 1 Inſt. 158.

V. Of the demeanor of jurors giving in their verdict.

By the common law, the jury after hearing the evidence, ought to be kept together in ſome convenient place, without meat or drink, fire or candle, and without ſpeech with any unleſs it be the ſheriff, and with him only except they be agreed. 1 Inſt. 227.

But by *V. l. p.* 108, 'No ſheriff ſhall converſe with a juror 'but by order of court, after the jury have retired from the bar.'

And if the jury after their evidence given to them at the bar, do at their own charges eat or drink, either before or after they be agreed on their verdict, it is fineable, but it ſhall not avoid the verdict; but if before they be agreed on their virdict they eat or drink at the charge of the plaintiff, if the verdict be given for him, it ſhall void the verdict, but if it be given for the defendant it ſhall not void it, and ſo on the contrary. But if after they be agreed on their verdict, they eat or drink at the charge of him for whom they do paſs, it ſhall not void the virdict. 1 Inſt. 227.

But with the aſſent of the juſtices they may both eat and drink; as if any of the jurors fall ſick before they be agreed on their verdict, then by the aſſent of the juſtices he may have meat and drink, and alſo ſuch other things as be neceſſary for him and his fellows alſo, at their own coſts, or at the indifferent coſts of the parties, if they ſo agree; and if they cannot agree, the juſtices may in ſuch caſe ſuffer the jury to have both meat and drink for a time, to ſee whether they will agree. *Dr. & St.* 158.

After their departure they may deſire to hear one of the witneſſes again, and it ſhall be granted, ſo he deliver his teſtimony in open court: and alſo they may deſire to propound queſtions to the court for their ſatisfaction, and it ſhall be granted, ſo it be in open court. 2 *H. H.* 296.

But if the plaintiff after evidence given, and the jury departed from the bar, or any for him, do deliver any letter from the plaintiff to any of the jury concerning the matter in iſſue, or any evidence, or any writing touching the matter in iſſue, which was not given in evidence, it ſhall avoid the verdict if found for the plaintiff, but not if it be found for the defendant, and ſo on the

the contrary.—But if the jury carry away any writing unsealed, which was given in evidence in open court, this shall not avoid their verdict, albeit they should not have carried it with them. 1 Inst. 227.

A jury sworn and charged in a capital case, cannot be discharged (without the prisoner's consent) till they have given a verdict. 2 *Haw.* 439.

If a jury say they are agreed, and it being asked who shall say for them, they say their foreman, but upon further inquiry they are not agreed, they may be fined. 2 *H. H.* 309.

If a jury cast lots for their verdict, it shall be set aside and they shall be fined for their contempt. 3 *Keb.* 805. 2 *Lev.* 140. 205.

But the court will refuse to hear the affidavits of any of the jurors themselves, to establish the fact of such conduct. 1 *Term. Rep.* 11.

M. 12 G. *Hale & Cove.* The jury having sat up all night, agreed in the morning to put two papers into a hat, mark plaintiff and defendant, and so drew lots; plaintiff came out, and they found for the plaintiff, which happened to be according to the evidence, and the opinion of the judge. Upon motion for a new trial, it was agreed that the verdict be set aside; but the question was, whether the defendant should pay costs; the court inclined to give the plaintiff costs, comparing it to the case of a verdict against evidence; but at last it was agreed, that the costs should wait the event of the trial. *Str.* 642.

The jury may give a verdict without testimony, when they themselves have cognisance of the fact. *Tr. p. pais.* 279. 1 *Ventr.* 97.

But if they give a verdict on their own knowledge, they ought to tell the court so; but they may be sworn as witnesses; and the fair way is to tell the court before they are sworn that they have evidence to give. 1 *Salk.* 405.

For certainly it is of dangerous consequence, to receive a verdict against evidence given, on supposal that some of the jury knew otherwise, or on private information given by any juryman to the rest, where he cannot be cross examined. *Tr. p. pais* 209.—By *V. L. p.* 108. 'Jurors knowing any thing relative to the point in issue, shall disclose the same in open court.'

After they be agreed, they may in cases between party and party, if the court be risen, give a private verdict, before any of the judges of the court; and then they may eat and drink; and the next morning in open court, they may either affirm or alter their private verdict; and that which is given in court shall stand. 1 Inst. 227.

But

But in criminal caſes of life or member, the jury can give no private verdict, but they muſt give it openly in court. 1 Inſt. 227.

In all cauſes, and in all actions, the jury may give either a general or ſpecial verdict, as well in cauſes criminal as civil, and the court ought to receive a ſpecial verdict, if pertinent to the point in iſſue. 3 *Salk.* 373.

Thus if one be indicted for grand larceny, that is, for ſtealing goods above the value of 12d. yet the jury may find ſpecially, that he is guilty, but that the goods are not above the value of 12d. In which caſe he ſhall only have judgment of petit larceny. 1 *Haw.* 95.

Jurors are to try the fact, and the judges ought to judge according to the law that ariſeth upon the fact. 1 Inſt. 226.

But if they will take upon them the knowledge of the law upon the matter, they may, yet it is dangerous, for if they miſtake the law, they run into the danger of an attaint; therefore to find the ſpecial matter is the ſafeſt way, where the caſe is doubtful. 1 Inſt. 228.

But if the jury find according to the direction of the judge, in matter of law, altho' the judge be miſtaken, yet the jury ſhall not be liable to attaint. *L. Raym.* 470.

It hath been adjudged, that if the jury acquit a priſoner of an indictment of felony againſt manifeſt evidence, the court may, before the verdict is recorded, but not after, order them to go out again, and re conſider the matter; but this by many is thought hard, and ſeems not of late years to have been ſo frequently practiſed as formerly. However it is ſettled, that the court cannot ſet aſide a verdict which acquits a defendant, of a proſecution properly criminal, as it ſeems that they may a verdict that convicts him for having been given contrary to evidence and the direction of the judge, or any verdict whatſoever for a miſtrial. 2 *Haw.* 442.

After the verdict recorded, the jury cannot vary from it; but before it be recorded, they may vary from the firſt offer of their verdict, and that verdict which is recorded ſhall ſtand. 1 Inſt. 227.

A verdict finding an impoſſible matter ſhall not be void, if at the ſame time it find the ſubſtance of the indictment; but the ſurplus ſhall be rejected. 1 *Haw.* 77.

Verdicts ſhall not be taken ſo ſtrictly as pleading; but the ſubſtance of the thing in iſſue ought to be always found. 3 *Salk.* 373.

It is ſaid, that if the jurors agree not, before the departure of the juſtices of jail delivery into another county, the ſheriff muſt

ſend

ſend them along in carts, and the judge may take and record their verdicts in a foreign county. 2 *H. H.* 297. *Tr. p. pais.* 271. 285. 1 *Vent.* 97.

But if the caſe ſo happen, that the jury can in no wiſe agree, as if one of the jurors knoweth in his own conſcience, the thing to be falſe, which the other jurors affirm to be true, and ſo he will not agree with them in giving a falſe verdict, and this appeareth to the juſtices by examination; the juſtices (as it ſeemeth) in ſuch caſe may take ſuch order in the matter, as ſhall ſeem to them by their diſcretion to ſtand with reaſon and conſcience, by awarding a new inqueſt, or otherwiſe, as they ſhall think beſt by their diſcretion, like as they may do, if one of the jury die before the verdict. *Dr. & Stud.* 158.

Grand jurors ſhall preſent freeholders for not voting at elections. *V. l. p.* 23. § 6.—And the act to be given in charge.

VI. Of the indemnity and puniſhment of jurors.

If a man aſſault, or threaten a juror, for giving a verdict againſt him, he is highly puniſhable by fine and impriſonment; and if he ſtrikes him in the court, in the preſence of the judge of aſſize, he ſhall loſe his hand, and his goods, and profits of his lands during life, and ſuffer perpetual impriſonment. 1 *Haw.* 57, 58.

Where more than one of the perſons returned upon a jury do appear, but not a ſufficient number to take an inqueſt, and ſome of the others come within view of the court, or into the ſame town in which the court is holden, but refuſe to come into the court to be ſworn; upon proof of ſuch matter, the court may, at the prayer of the parties, order the jurors who appeared, to enquire what is the yearly value of ſuch defaulter's lands, and after ſuch inquiry made, either ſummon them to appear, on pain of forfeiting ſuch ſums as their lands have been found to be worth by the year or ſome leſſer ſum, or impoſe a fine of the like ſum upon them, without any farther proceeding. But it ſeems, that ſuch juror ſhall be liable to loſe his iſſues only for ſuch default, and not the yearly value of his lands, unleſs the party pray it: But a juror who hath actually appeared, and after makes default, is ſaid to be ſubject to ſuch forfeiture of the yearly value of his lands, whether the party pray it or not; becauſe his contempt appears to the court by its own record; yet even in this caſe, the court in diſcretion will ſometimes only impoſe a ſmall fine. Alſo it ſeems, that a juror who makes default without ever coming into the town wherein the court is holden, is

liable

liable only to loſe his iſſues, or to be amerced, but not to be fined. 2 *Haw.* 146.

If the grand jury at the aſſizes or ſeſſions will not find a bill, the court may impannel another inqueſt (by the 3 *H.* 7. *c.* 1.) to inquire of their concealments, and thereupon ſet fines upon them: But it ſeemeth that fines ſet upon grand inqueſts in any other manner, are not warrantable by law; for the privilege of a citizen of the commonwealth is, that his life ſhall not be drawn in danger without due preſentment or indictment, and this would be but a ſlander ſcreen or ſafe guard, if every juſtice of the peace, or judge of aſſize, may make the grand jury preſent what he pleaſes, or otherwiſe fine them. 2 *H. H.* 160, 1.—But the above ſtatute is not now in force in this country. See *V. l. p.* 302.

It ſeems to be certain, that no one is liable to any proſecution whatſoever, in reſpect of any verdict given by him in a *criminal* matter, either upon a grand or petit jury; for ſince the ſafety of the innocent, and puniſhment of the guilty, both ſo much depend upon the fair and upright proceedings of jurors, it is of the utmoſt conſequence, that they ſhould be as little as poſſible under the influence of any paſſion whatſoever. And therefore, leſt they ſhould be biaſed with the fear of being harraſſed by a vexatious ſuit, for acting according to their conſcience, the law will not leave any poſſibility for a proſecution of this kind. And as to the objection, that an attaint lie againſt a jury for a falſe verdict in civil cauſe, and that there is as much reaſon to allow of it in a criminal one; it may be anſwered, that in an attaint in a civil cauſe, a man's property is only brought into queſtion a ſecond time, and not his liberty or life. 1 *Haw.* 191. *L. Raym.* 469.

But where the jurors give a falſe verdict upon an iſſue joined in any court of record, and judgment thereupon, the party grieved may bring his writ of attaint. Upon which 24 of the beſt men of the county are to be jurors, who are to hear the ſame evidence which was given to the petit jury, and as much, as can be brought in affirmance of the verdict, but no other againſt it. And if theſe 24 who are called the grand jury, find it a falſe verdict, then followeth this terrible judgment at the common law upon the petit jury; that the party ſhall be infamous, ſo as never to be received to be a witneſs, or a juror; ſhall forfeit his goods and chattels; and his lands and tenements ſhall be taken into the commonwealth's hands, his wife and children caſt out of doors; his houſes proſtrated; his trees rooted up; his meadows ploughed up; and his body impriſoned. And ſeeing all trials of real, perſonal, and mixt actions depend

upon

upon the oath of 12 men, prudent antiquity inflicted a ſevere and ſtrange puniſhment upon them, if they were attainted of perjury. 1 *Inſt.* 294. *Read. Jur.*

But this proceeding ſeems to be entirely diſuſed at this day, and in the place of attaint, motions are now uſually made for new trials, when a verdict is againſt evidence. *Wood. b. c.* 4. *Read. Jur.*

It ſeems to be the current opinion of the old books, that jurors are not ſubject to any proſecution for a falſe verdict, except by way of attaint; and there ſeems to be very few ancient precedents for the puniſhment either for grand or petit juries, merely for giving a verdict againſt evidence, or the direction of the court, either in a capital or civil matter. 2 *Haw.* 147.

And the fining and impriſoning of jurors for giving their verdict, hath ſeveral times been declared in parliament an illegal and arbitrary innevation, and of dangerous conſequence to the government, and the lives and liberties of the citizens. 2 *Keb.* 180. *Read. Jur.*

And in Buſhel's caſe, it was reſolved by all the judges, upon a full conference together, that a jury is not fineable for going againſt their evidence, where an attaint lies. And where an attaint doth dot lie. L Vaughn ſays thus; 'That the court 'could not fine a juryman at the common law, where attaint 'did not lie, I think to be the cleareſt poſition that ever I con-'ſidered, either for authority or reaſon of law.' And one reaſon for this is, becauſe the judge cannot fully know upon what evidence the jury give their verdict; for they may have other evidence, than what is ſhewed in court; they are of the vicinage, the judge is a ſtranger; they may have evidence from their own perſonal knowledge that the witneſs ſpeak falſe, which the judge knows not of; they may know the witneſſes to be ſtigmatized and infamous, which may be unknown to the partie's or court. And if the jury knew no more than what they heard in court, and and ſo the judge knew as much as they, yet they might make different concluſions, as often times two judges do; and therefore as it would be a ſtrange and abſurd thing, to puniſh the judge for differing with another in opinion or judgment, ſo it would be worſe for the jury, who are judges of the fact, to be puniſhed for finding againſt the direction of him who is not judge of the fact. *Tr. per. pais* 224. *L Vaugh.* 135.

And to ſay the truth ſays lord Hale, it would be the moſt unhappy caſe that could be to the judge, if he at his peril muſt take upon him the guilt or innocence of the priſoner; and if the judge's opinion muſt rule the matter of fact, the trial by jury would be uſeleſs. 2 *H. H.* 315.

But

But what if a jury gave a verdict againſt all reaſon, convicting or acquiting a perſon indicted of felony, what ſhall be done? If the jury *convict* a man, againſt or without evidence, and againſt the direction of the court, the court may reprieve him before judgment, and acquaint the executive, and certify for his pardon; if the jury *acquit* him in like manner, the court may ſend them back, again (and ſo in the former caſe) to conſider better of it, before they record the verdict; but if they are peremptory in it, and ſtand to their verdict, the court muſt take their verdict and record it. 2 H. H. 309, 310.

By *V. l. p.* 108. 'Any juror guilty of a contempt to the 'court, may be fined by ſuch court in any ſum not exceeding 'thirty dollars.'

A grand juror failing to attend, on being ſummoned, may be fined not exceeding eight dollars. *V. l. p.* 107.

'Grand jurors ſhall be privileged from arreſt in all caſes, ex'cept treaſon, felony and breaches of the peace, during their at'tendance at court, coming to and returning from thence, al'lowing one day for every twenty miles from their places of 'abode, and all ſuch arreſts ſhall be void.' *V. l. p.* 107.

'No grand jury ſhall make preſentment of their own know'ledge, upon information of fewer than two of their own body, 'nor in the diſtrict courts, where the penalty inflicted by law, 'is leſs than five dollars, or two hundred pounds of tobacco.' *V. l. p.* 107.

Challenge to the array, because the ſheriff is of kindred to one of the parties; from Coke's entries.

And now at this day to wit——came the aforeſaid A, the plaintiff, and B, the defendant, by their attorneys, and the jurors were impanelled and demanded, and came, and thereupon the aforeſaid B, challengeth the array of the panel aforeſaid, becauſe he ſaid that that panel was arrayed by one John Zouch, now and at the time of making the array aforeſaid, ſheriff of the county of Derby, which ſaid ſheriff is a kinſman of the aforeſaid John Manners (the plaintiff) to wit, the ſon of George Zouch eſquire, the ſon of John Zouch, knight, the ſon of John Zouch eſquire, the ſon of William Lord Zouch, the ſon of Alan Lord Zouch, the ſon of William Lord Zouch, the ſon of Elizabeth daughter of William Lord Roos, the father of William Lord Roos, the father of Thomas Lord Roos, the father of Elener, mother of George Manners, knight, the father of Thomas Earl of Rutland, the father of the aforeſaid John Manners. And this

this he is ready to verify, whereupon he prayeth judgment, that the ſaid panel may be quaſhed.—Which ſaid challenge by and by triers, to this ſworn and choſen, is found true. And therefore let the panel aforeſaid be quaſhed and amoved, &c. *Tr. per. pais.* 160.

Challenge because the panel was returned at the inſtance of the party.

And upon this, the ſaid challenges the array of the ſaid panel, becauſe he ſays, that that panel was arrayed by one J S, eſq. late ſheriff of the county of aforeſaid, at the nomination of the ſaid and in his favour; which ſaid challenge by triers thereof ſworn, is found true.

For other forms of challenges, and proceedings thereupon, ſee *Tr. per. pais.* 159—184.

Juſtifiable Homicide. (*See* HOMICIDE.)
Landlord & Tenants. (*See* RENTS.)
Land-Office. Counterfeiting the ſeal of the regiſter of, (*See* FELONY.)
Land-Warrants. Stealing them. (*See* FELONY.)

L A R C E N Y.

LARCENY, or *theft*, by contraction for latrociny, *latrocenium*, is diſtinguiſhed by the law into two ſorts; the one called *ſimple* larceny, or plain theft unaccompanied with any other atrocious circumſtance; and *mixed* or *compound* larceny, which alſo includes in it the aggravation of a taking from one's houſe or perſon. 4 *Blacks Com.* 229.

Simple larceny is alſo generally divided into two kinds,—*grand* larceny, when the thing ſtolen exceeds the value of 12d. and *petit* larceny, when it is of that value or under.——It may, however be well doubted, how far this diviſion of ſimple larceny into *grand*, and *petit* is now to be conſidered as obligatory on us; as it was ſo declared by the ſtatute of 3 *Edw.* 1. (*ſee* 2 *Inſt.* 189, 190.) which has no force or authority in this commonwealth, *See V. l.* (17 *R. Cond.* 1792. *c.* 147. § 3.) *page* 302.——This muſt, however, be obſerved upon all larcenies, that now by *V. l.* (14 *R. Cond.* 1789. *c.* 47. § 4.) *page* 51. the benefit of clergy ſhall be allowed in all offences, which would

would otherwiſe be without clergy, whether the ſame be newly created by any act of Aſſembly, or exiſt under the common law, unleſs it be taken away by the expreſs words of ſome act of Aſſembly. *See title* 'CLERGY.'

Under theſe reſtrictions, I ſhall treat of larceny as it is uſually divided,

I. Grand Larceny.
II. Petit Larceny.
III. Larceny from the perſon.
IV. Larceny from the houſe.

I. Grand Larceny.

Grand Larceny, is, a felonious and fraudulent taking and carrying away, by any perſon, of the mere perſonal goods of another, above the value of 12d. 1 *Haw.* 89.

Felonious and fraudulent] Felony is always accompanied with an evil intention, and therefore ſhall not be imputed to miſtake or miſanimadverſion; as where perſons break open a door, in order to execute a warrant, which will not juſtify ſuch a proceeding; for in ſuch caſe there is no felonious intention. 1 *Haw.* 65.

For it is the mind that makes the taking of another's good to be felony, or a bare treſpaſs only; but becauſe the variety of circumſtances is ſo great, and the complications thereof ſo mingled, that it is impoſſible to preſcribe all the circumſtances evidencing a felonious intent, or the contrary; the ſame muſt be left to the due and attentive conſideration of the judge and jury, wherein the beſt rule is, in doubtful matters rather to incline to acquittal than conviction. Only in general it may be obſerved, that the ordinary diſcovery of a felonious intent is, if the party doth it ſecretly or being charged with the goods denies it. 1 H. H. 509.

But nevertheleſs, doing it openly and avowedly, doth not excuſe from felony. So where a man came to *Smithfield* market to ſell a horſe, and a jockey coming thither to buy a horſe, the owner delivered his horſe to the jockey to ride up and down the market to try his paces, but inſtead of that, the jockey rode away with the horſe, which was adjudged felony. *Kel.* 82.

So where a perſon came into a ſempſtreſs's ſhop, and cheapened goods, and ran away with the goods out of the ſhop, openly, in her ſight, this was adjudged to be felony. *Raym.* 276.

So

So where a man comes into a houſe, by colour of a writ of execution. and carries away the goods; or ſues out a replevin to get another man's horſe, and then runs away with him; that is felony under colour of law. 2 *Ventr.* 94. *Kel.* 83.

Taking] All felony includes treſpaſs, and every indictment muſt have the words *feloniouſly took*, as well as *carried away*; from whence it follows, that if the party be guilty of no treſpaſs in taking the goods, he cannot be guilty in felony in carrying them away. 1 *Haw.* 89.

And from this ground it hath been holden, that one who finds the goods which I have loſt and converts them to his own uſe, with intent to ſteal them, is no felon; and a *fortiori* therefore it muſt follow, that one who has the actual poſſeſſion of my goods by my delivery, for a ſpecial purpoſe, as a carrier who receives them in order to carry them to a certain place: or a taylor who has them in order to make me a ſuit of cloaths; or a friend who is intruſted to keep them for my uſe, cannot be ſaid to ſteal them, by embezzling of them afterwards. 1 *Haw.* 89.

But yet it hath been reſolved that if a carrier opens a pack, and takes out part of the goods; or a weaver, who has received ſilk to work, or a miller who has corn to grind, take out part thereof, with intent to ſteal it—it is felony. 1 *Haw.* 90.—*See* 1 *Hawk.* (6 *ed.*) 135. *note* (1)

So where a man's goods is in ſuch a place, where ordinarily they are or may be lawfully placed, and a perſon take them, with intent to ſteal them, it is felony; and the pretence of finding muſt not excuſe. 1 H. H. 506.

So if a man's horſe be going upon a common where he has a right to put him, and another take the horſe with intent to ſteal him, it is no finding, but a felony.—1 H. H. 506.

So alſo if the horſe ſtray into a neighbour's ground or common, it is felony in him that ſo takes him. But if the owner of the ground takes him doing damage or ſeize him as a ſtray, though perchance he hath no title ſo to do Yet there is not a felonious intention, and therefore cannot be felony. 1 H. H. 506.

If one man's ſheep ſtray into another man's flock, and that other perſon drives it along with his flock, or by bare miſtake ſhears it, this taking is not a felony; but if he knows it to be another's and marks it with his mark, this is an evidence of felony. 1 H. H. 507.

Lord Hale ſays, If one man takes another man's hay or corn, and mingle it with his own heap or ſtock; or take another man's cloth and embroider it with ſilk or gold; ſuch other perſons may retake

retake the whole heap of corn, or ſtock of hay, or garment, and embroidery alſo; and this retaking is no felony, nor ſo much as a treſpaſs. 1 H. H. 513.

It ſeems generally agreed, that one who has the bare charge, or the ſpecial uſe of goods, but not the poſſeſſion of them; as a ſhepherd who looks after my ſheep, or a butler who takes care of my plate, or a ſervant who keeps a key of my chamber, or a gueſt who has a piece of plate ſet before him in an inn, may be guilty of felony in fraudulently taking away the ſame. 1 *Haw.* 90.

And carrying away] To make it come within this diſcription, it ſeemeth that any the leaſt removing of the thing taken from the place where it was before, is ſufficient for this purpoſe, though it be not quite carried off: and upon this ground, the gueſt, who having taken off the ſheets from his bed, with an intent to ſteal them, carried them into the hall, and was apprehended before he could get out of the houſe was adjudged guilty of larceny: So alſo was he, who having taken an horſe in a cloſe, with an intent to ſteal him, was apprehended before he could get him out of the cloſe. 1 *Haw.* 93.

By any perſon] A wife may be guilty thereof, by ſtealing the goods of a ſtranger; but not by ſtealing the goods of her huſband 1 *Haw.* 93.

It is ſaid by *Mr. Dalton* and others that it is no felony for one reduced to extreme neceſſity, to take ſo much of another's victuals, as will ſave him from ſtarving; but lord *Hale* ſays, that this rule by the law of *England* is falſe; and therefore that if a perſon being under neceſſity for want of victuals or clothes, ſteals another man's goods, it is felony. 1 H. H. 54.

If one ſtealeth another man's goods, and afterwards another ſtealeth the ſame from him; the owner may charge the firſt or ſecond felon at his choice. *Dalt. c.* 162.

An alien, whoſe ſovereign is in amity with the United States, reſiding here, and receiving the protection of the law, oweth a local allegiance to the government during the time of his reſidence, and if, during that time, he committeth an offence, he ſhall be liable to be puniſhed for the ſame, even as a natural born citizen, for his perſon and perſonal eſtate are as much under the protection of the law, as the natural born citizen, and if he is injured in either, he hath the ſame remedy at law for ſuch injury. *Foſt.* 185.

So alſo, an alien whoſe ſovereign is at enmity with us, living here under the commonwealth's protection, committing offences, may be proceeded againſt in like manner; for he oweth a temporary local allegiance, founded on that ſhare of protection he receiveth. *id.*

So

So alſo a priſoner of war, although he is not properly ſubject to the municipal laws of this country. Yet if he commits any offence againſt the law of nations, or the light of nature and the fundemental laws of all ſociety, he is liable to anſwer in the ordinary courſe of juſtice, as another perſon's offending in like manner are. As in the caſe of *Peter Molieres*, a French priſoner, who was indicted at the jail delivery for the city of *Briſtol*, in *Auguſt* 1758, before *Sir Michael Foſter*, for privately ſtealing in the ſhop of a goldſmith and jeweller, a diamond ring, valued at 20l Sir *Michael* ſays, he thought it highly improper to proceed capitally upon a local ſtatute, againſt a priſoner of war; and therefore adviſed the jury to acquit him of the circumſtance of ſtealing in the ſhop as by the ſtatute, and find him guilty of ſimple larceny to the value laid in the indictment. Accordly, he was burnt in the hand, and ſent to the priſon appointed for French priſoners. *id.* 188.

Of the mere perſonal goods] *Mere*; for if the perſonal goods ſavour any thing of the reality it cannot be larceny. And therefore they ought to be no way annexed to the freehold, therefore it is no larceny but, a bare treſpaſs, to ſteal corn or graſs growing, or apples on a tree; but it is larceny to take them, being ſevered from the freehold, as wood cut, graſs in cocks, ſtones digged out of the quarry; and this, whether they are ſevered by the owner, or even by the thief himſelf, if he ſever them at one time, and then come again at another time and take them. 1 *Haw.* 93. 1 H. H. 510.

Alſo the goods ought to have ſome worth in themſelves, and not to derive their whole value from the relation they bear to ſome other thing, which cannot be ſtolen; as paper or parchment, on which are written aſſurances concerning lands, or obligations, or covenants, or other ſecurities for a debt, or other *choſe* in action. 1 *Haw.* 93.

But by *V. l.* (14 *R. Cond.* 1789. *c* 46) *p.* 50. it is enacted, 'That if any record, or parcel of the ſame, writ, return, panel, 'proceſs, or warrant of attorney, in any court within this com-'monwealth; be willingly ſtolen, taken away, withdrawn, or 'avoided by any clerk, or by any other perſon, becauſe whereof, 'any judgment ſhall be reverſed, ſuch ſtealer, taker away, with-'drawer, or avoider, their procurers, counſellors and abettors, 'being thereof indicted, and duly convicted, by their own con-'feſſion, or by inqueſt to be taken of lawful men, ſhall be judged 'for felons, and ſhall incur the pain of felony.'

And by *V. l.* (17 *R. Cond.* 1792. *c.* 133. § 6) *p.* 261. 'He 'or ſhe ſhall be adjudged a felon, and not have the benefit of 'clergy, who ſhall ſteal, or by other means take from the poſ-

'ſeſſion

'ſeſſion or cuſtody of another, any warrant from the regiſter of 'the land-office of this commonwealth, to authoriſe a ſurvey of 'waſte and unappropriated lands.'

Alſo, by *V. l.* (17 R. *Cond.* 1792. *c.* 133. § 7) *p.* 261. 'He 'or ſhe ſhall be adjudged a felon and not have the benefit of 'clergy, who ſhall ſteal, or by robbery take from the poſſeſſion 'or cuſtody of another any *loan-office certificate of the United 'States*, or any of them, or any *warrant of the governor* or other 'perſon exerciſing that function, or any *certificate of the auditor* 'for public accounts to the treaſurer, authoriſing the payment of 'money, or ſhall *preſent, or cauſe to be preſented*, ſuch loan-of- 'fice certificate at a loan-office of the United States, or any of 'them, for the diſcharge of the whole, or any part thereof, or 'ſuch warrant or auditor's certificate at the public treaſury, for 'the payment thereof, knowing ſuch loan-office certificate, 'or warrant, or auditors certificate to have been ſtolen, or by 'robbery to have been taken from the poſſeſſion or cuſtody of 'another.'

The goods ought alſo not to be things of a baſe nature, as dogs, cats, bears, foxes, monkeys, ferrets, and the like, which howſoever they may be valued by the owner, ſhall never be ſo highly regarded by the law, that for their ſakes a man ſhall die: but yet the ſtealing of an hawk, knowing it to be reclaimed, is felony by the common law, and by ſtatute, in reſpect of that very high value which was formerly ſet upon that bird. 1 *Haw.* 93.

Of another] It ſeems agreed, that the taking of good, whereof no one had a property at the time, cannot be felony; and therefore that he who takes any treaſure trove, or a wreck, waif, or ſtray, before they have been ſeized by the perſon who have a right thereto, is not guilty of felony, but ſhall be puniſhed by fine. 1 *Haw.* 94.

But yet the taking of theſe muſt be, where the party that takes them, really believes them to be ſuch, and colours not a felonious taking under ſuch a pretence; for then every felon would cover his felony under that pretence. 1 H. H. 506.

Neither ſhall he who takes fiſh in a river or other great water, wherein they are at their natural liberty, be guilty of felony; as he may be, who takes them out of a trunk or pond. 1 *Haw.* 94.

Upon the like ground it ſeems clear that a man cannot commit felony, by taking hares or conies in a warren, or old pigeons being out of the houſe; but it is agreed, that one may commit larceny, by taking ſuch or any other creatures *feræ naturæ*,

if

if they be fit for food, and reduced to tameneſs, and known by him to be ſo. 1 *Haw.* 94.

Alſo it is ſaid, that there may be felony in taking goods, the owner whereof is unknown; in which caſe the commonwealth ſhall have the goods, and the offender ſhall be indicted for taking the goods of a perſon unknown; and it ſeems, that in ſome caſes the law will rather feign a property, where in ſtrictneſs there is none, than ſuffer an offender to eſcape. 1 *Haw.* 94.

He who ſteals goods belonging to a pariſh church, may be indicted for ſtealing the goods of the pariſhioners. 1 *Haw.* 94.

And it hath been adjudged, that he who takes off a ſhroud from a dead corps, may be indicted as having ſtolen it from him, who was the owner thereof when it was put on; for a dead man can have no property. 1 *Haw.* 94.

Above the value of 12*d.*] The learned editor of *Hale's* hiſtory of the pleas of the crown obſerves, that in former times, though the puniſhment of theft was capital, yet the criminal was permitted to redeem his life by a pecuniary ranſom, but in the 9 H. 1. it was enacted that whoſoever was convicted of theft ſhould be hanged, and the liberty of redemption was entirely taken away; which law continues to this day, but conſidering the alteration in the value of money, the ſeverity is much greater now than it was then, for 12*d.* would then purchaſe as much as 40*s.* will now. And yet a theft above the value of 12*d.* is ſtill liable to the ſame puniſhment. Upon which Sir *H. Spelman* juſtly obſerves, that while all things elſe have riſen in their value, and grown dearer, the life of man is become much cheaper; and from thence take occaſion to wiſh, that the ancient tenderneſs of life were again reſtored. 1 H. H. 12.

And lord *Coke*, obſerving that when the ſtatute of the 3 *Ed.* 1. was made, which makes ſtealing of goods above the value of 12*d.* to be grand larceny, the ounce of ſilver was the value of 20*d.* and now it is of the value of 5*s.* and above, draws the concluſion, that the things ſtolen ought to be reaſonably valued, that is, having reſpect to the great alteration in the value of money. 2 *Inſt.* 189. 190. For 20*s.* were then a real pound weight; which name we ſtill retain, altho' the weight is much diminiſhed.

If two perſons or more, together, ſteal goods above the value of 12*d.* every one of them is guilty of grand larceny; for each perſon is as much an offender as if he had been alone. 1 *Haw.* 95.

Alſo it ſeems the current opinion of all the old books, that if one at ſeveral times ſteal ſeveral parcels of goods, each under the value of 12*d.* but amounting in the whole to more, from the ſame perſon, and be found guilty thereof on the ſame indictment, he ſhall have judgment of death as for grand larceny; but this ſeverity is ſeldom practiſed. 1 *Haw.* 95.

II.

II. Petit larceny.

Petit larceny agrees with grand larceny in ſeveral particulars above mentioned, except only the value of the goods (and except as hereafter followeth) ſo that where-ever an offence would amount to grand larceny, if the things ſtolen were above the value of 12d. it is petit larceny, if it be but of that value or under. 1 *Haw.* 95.

And if one be indicted for ſtealing goods to the value of 10s. and the jury find ſpecially, as they may, that he is guilty, but that the goods are worth but 10d. he ſhall not have judgment of death, but only as for petit larceny. 1 *Haw.* 95.

In petit larceny there can be no acceſſaries, neither before nor after. 1 H. H. 530.

For a juſtice of the peace, before whom an offender ſhall be brought for petit larceny out of ſeſſions, may not puniſh the ſaid offender by his diſcretion, and ſo let him go; but muſt have him committed or bailed, to the intent he may come to his trial, as in caſes of other felonies: and if upon his trial, the jury ſhall find the goods ſtolen to exceed 12d. in value, the offender ſhall have judgment to die for the fault. *Dalt. c.* 154.

It ſeemeth, that all petit larceny is felony, and conſequently requires the word *feloniouſly* in an indictment for it; yet it is certain, that it is not puniſhable with the loſs of life or lands but only with the forfeiture of goods, and whipping, or other corporal puniſhment. 1 *Haw.* 95.—See '*Forfeiture.*'

III. Larceny from the perſon.

Larceny from the perſon of a man either puts him in fear, and then it is called *robbery*; or does not put him in fear, and then it is called barely *larceny from the perſon.* 1 *Hawk.* 147. *See title* '*Robbery.*'

IV. Larceny from the houſe.

This is to be underſtood where the offence falls ſhort of, '*Burglary,*' *which ſee.*

Some of the offences in ſtealing from a houſe have already been noticed, among the ſeveral caſes enumerated under title '*Clergy,*' [benefit of] *which ſee.*

By *V. l.* (17 *R. Cond.* 1792. *c* 109. § 2) *p.* 216. 'All and 'every perſon and perſons, that ſhall at any time, either in the

'night

'night or the day, feloniouſly break any warehouſe or ſtore-'houſe, and ſhall take therefrom any money, goods, or chattels, 'wares or merchandizes, of the value of four dollars or more, 'altho' the owner of ſuch goods, or any other perſon or perſons, 'be, or be not in ſuch warehouſe, or ſtorehouſe, or ſhall aid, 'aſſiſt, counſel, hire, or command any perſon or perſons ſo to 'break and rob any ſuch warehouſe or ſtorehouſe, and ſhall be 'thereof convicted or attainted; or being thereof indicted, ſhall 'ſtand mute, or will not anſwer directly to the indictment, or 'ſhall peremptorily challenge above the number of twenty per-'ſons returned to be of the jury, ſhall, by virtue of this act, be 'abſolutely debarred of, and from the benefit of clergy'

The offence of *receiving ſtolen goods*, is conſidered under title '*Acceſſory*,' *which ſee.*

(A) Warrant for Larceny.

county to wit.

To the conſtable of the ſaid county.

Whereas A J, *of in the county of yeoman, hath this day made information and complaint upon oath before me one of the commonwealth's juſtices of the peace for the ſaid county, that this preſent day divers goods of him the ſaid* A J, *to wit have feloniouſly been ſtolen, taken and carried away from the houſe of him the ſaid* A J, *at aforeſaid in the county aforeſaid, and that he hath juſt cauſe to ſuſpect, and doth ſuſpect, that* A O, *late of yeoman, feloniouſly did ſteal, take, and carry away the ſame: Theſe are therefore to command you forthwith to apprehend him the ſaid* A O, *and to bring him before me to anſwer unto the ſaid information and complaint, and to be further dealt with according to law: Herein fail you not. Given under my hand and ſeal the day of in the year*

Note;—The form of a warrant to ſearch for ſtolen goods is inſerted under the title *Search warrant.*

(B) Indictment for grand or petit larceny in general.

county to wit.

The jurors &c. upon their oath preſent, That A O, *late of in the county of labourer, on the day of in the year of the commonwealth, with force and arms at in the county aforeſaid, one linen ſheet of the value of of the goods and chattels of one* A J, *then and there being, feloniouſly did ſteal, take and carry away, againſt the peace and dignity of the commonwealth.*

(C)

(C) *Indictment for breaking a house in the day time, some person being therein.*

county to wit.

The jurors &c. upon their oath present, That A O, *late of in the county of labourer, on the day of in the year of the commonwealth at the hour of in the afternoon of the same day, with force and arms at in the county of the dwelling house of one* A J, *there situate (one* B J, *wife of the said* A J, *in the same house, in the peace of God, and of the commonwealth then being) feloniously did break and enter, and one silver spoon of the value of of the goods and chattels of him the said* A J, *then and there feloniously did steal, take, and carry away, and her the said* B J, *then and there in bodily fear and danger of her life, feloniously did put; against the peace and dignity of the commonwealth.*

(D) Indictment for breaking a house in the day time, (no person being therein)

county to wit.

The jurors &c. upon their oath present, that A O, *late of on the day of in the year of the commonwealth at the hour of in the afternoon of the same day, with force and arms at in the county aforesaid, the dwelling house of one* A J, *there situate, feloniously did break and enter, and one silver spoon of the value of of the goods and chattels of him the said* A J, *then and there feloniously did steal, take and carry away; against the peace and dignity of the commonwealth.*

(E) Indictment for breaking a warehouse or storehouse, and stealing thereout above the value of 4 dollars.

county to wit.

The jurors for the commonwealth upon their oath do present, That A O, *late of in the county of aforesaid, labourer, on the day of in the year and in the year of the commonwealth, with force and arms, at in the county aforesaid, the storehouse of one* A J, *there situate, feloniously did break and enter, and one piece of cloth (commonly called cloth) of a black colour, of the value of* twenty *dollars, of the goods and chattles of him the said* A J, *in the storehouse*

houſe of him the ſaid A J, *then and there being found, then and there privately and feloniouſly did ſteal, take and carry away; againſt the peace and dignity of the commonwealth.*

LEWDNESS.

ALTHOUGH Lewdneſs be properly puniſhable by the eccleſiaſtical law, yet the offence of keeping a bawdy houſe cometh under the cognizance of the law temporal, as a common nuiſance, not only in reſpect of its endangering the public peace, by drawing together diſſolute and debauched perſons, but alſo in reſpect of its apparent tendency to corrupt the manners of both ſexes. 3 *Inſt.* 205. 1 *Haw.* 96.

And, in general, all open lewdneſs groſsly ſcandalous, is puniſhable upon indictment at common law. 1 *Hawk* 7.

Offenders of this kind are puniſhable not only with fine and impriſonment, but alſo with ſuch infamous puniſhment as to the court, in diſcretion, ſhall ſeem proper. 1 *Hawk.* 96.

And upon information given to a conſtable that a man and woman are in adultery, or fornication, together, or that a man and woman of evil report are gone to a ſuſpected houſe together, in the night, the officer may take company with him, and if he find them ſo he may carry them before a juſtice to find ſureties of the good behaviour. *Dal. Ch.* 124. 2 *Haw* 61.

For it ſeems always to have been the better opinion that a man may be bound to his good behaviour for haunting bawdy houſes with women of bad fame, as alſo for keeping bad women in his own houſe. 1 *Hawk.* 132.

And a wife may be indicted together with her huſband, and condemned to the pillory with him, for keeping a bawdy houſe; for this is an offence as to the government of the houſe in which the wife has a principal ſhare, and alſo ſuch an offence as may generally be preſumed to be managed by the intrigues of her ſex. 1 *Hawk.* 2.

If a wife go away, and remain with an adulterer without being reconciled to her huſband, ſhe ſhall looſe her dower. 1 *Inſt.* 435.

But if a perſon is indicted for frequenting a bawdy houſe, it muſt appear that he knew it to be ſuch a houſe; and it muſt be expreſsly alledged that it is a bawdy houſe, and not that it is ſuſpected to be ſo. *Wood. B.* 3. *Ch.* 3.

On an indictment for keeping a diſorderly houſe, a female witneſs ſwore that ſhe was a ſailor's wife, and during her huſband's abſence out of the commonwealth ſhe had often proſti-

tuted

tuted herſelf there. Lord Raymond ſaid it was an odious piece of evidence, and ought not to be heard. *Barl.*

But it is ſaid a woman cannot be indicted for being a bawd generally, for that the bare ſolicitation of chaſtity is not indictable. 1 *Hawk.* 196. 1 *Salk.* 382.

It is an indictable offence to frequent houſes of ill fame, or to be guilty of groſsly ſcandalous and public indecency, for which the puniſhment is by fine and impriſonment.—But the temporal courts take no notice of the crime of adultery, otherwiſe than as a private injury. 4 *Blacks Com.* 65. *But ſee V. l. p.* 287. *where adultery is puniſhable by fine of twenty dollars.*

Indictment for keeping a diſorderly houſe.

The jurors for the commonwealth upon their oath preſent, that A O, *late of in the ſaid county, labourer, on the day of in the year and in the year of the commonwealth, and at divers other times, as well before as after, with force and arms at aforeſaid, in the county aforeſaid, did keep and maintain, and yet doth keep and maintain, a certain common, ill governed and diſorderly houſe, and in the ſaid houſe, for his own lucre and gain, certain evil and ill diſpoſed perſons, as well men as woman, of evil name and fame, and of diſhoneſt converſation, to frequent and come together there, and the ſaid divers other times, there unlawfully and wilfully did cauſe and procure; and the ſaid men and women, in the ſaid houſe at unlawful times, as well in the night as in the day, then and the ſaid other times, there to be and remain, drinking, tipling, whoring, and miſbehaving themſelves, unlawfully and wilfully did permit, and yet doth permit, to the great damage and common nuiſance of all the citizens of this commonwealth, and againſt the peace and dignity of the commonwealth.*

LIBEL.

A LIBEL *is a malicious defamation of any perſon, expreſſed either in printing or writing, ſigns or pictures, to aſperſe the reputation of one that is alive, or the memory of one that is dead.* Wood. B. 3. Ch. 3.

A malicious defamation] And the ſcandal which is expreſſed in a ſcoffing and ironical manner, is as properly a malicious defamation as that which is expreſſed in direct terms: as where a perſon propoſes one to be imitated for his courage, who is known

to

to be a great ſtatesman, but no ſoldier; and another to be imitated for his learning, who is known to be a great general, but no ſcholar; and the like, which kind of writing is as well underſtood to mean only to upbraid the parties with the want of thoſe qualities as if it had directly and expreſsly done ſo. 1 *Hawk.* 194.

And from the ſame foundation, it hath alſo been reſolved that a defamatory writing, expreſſing one or two letters, of a name, in ſuch a manner that from what goes before, and follows after, it muſt needs be underſtood to ſignify ſuch a particular perſon, in the plain, obvious, and natural conſtruction of the whole, and would be perfect nonſenſe if reſtrained to any other meaning, is as properly a libel, as if it had expreſſed the whole name at large; for it brings the utmoſt contempt upon the law to ſuffer its juſtice to be eluded by ſuch trifling evaſions, and it is a ridiculous abſurdity to ſay that a writing which is underſtood by every the meaneſt capacity cannot poſſibly be underſtood by a judge and jury. 1 *Hawk.* 194.

And it matters not whether the libel be true, or whether the party againſt whom it is made be of good or bad fame; for in a ſettled ſtate of government, the party grieved ought to complain for any injury done to him in the ordinary courſe of law, and not by any means to revenge himſelf, either by the odious courſe of libelling, or otherwiſe. 5 *Co.* 125. But this is to be underſtood when the proſecution is by information or indictment; for in an action on the caſe, one may juſtify that it is true. *Wood. B.* 3. *Ch.* 3—3 *Blacks Com.* 126.

Of any perſon] Where a writing inveighs againſt mankind in general, or againſt a particular order of men, as for inſtance, men of the gown, this is no libel; but it muſt deſcend to particulars and individuals to make it a libel. 3 *Salk.* 224.

Expreſſed either in printing or writing, ſigns or pictures] A libel is either in writing, or without writing: In writing when an epigram, rhyme, or other writing is publiſhed to the contumely of another, by which his fame or dignity may be prejudiced: Without writing, may be by pictures, as to paint the party in any ſhameful and ignominious manner; or by ſigns; as to fix a gallows, or other reproachful and ignominious ſigns at a man's door. 5 *Co.* 125.

E. 7 G. mayor of *Northampton's* caſe. He ſent lord Halifax a licence to keep a public houſe, which the court ſaid was a libel in the caſe of a perſon of his quality, and granted an information for it. *Str.* 422.

Or the memory of one that is dead] For the offence is the ſame, whether the perſon libelled be alive or dead. 5 *Co.* 125.

Who

Who are punishable for it.

It is certain that not only he who compoſes a libel, or procures another to compoſe it, but alſo he who publiſhes or procures another to publiſh it, are in danger of being puniſhed for it; and it is ſaid not to be material whether he who diſperſes a libel knew any think of the contents or effect of it or not, for nothing would be more eaſy than to publiſh the moſt virulent papers, with the greateſt ſecurity, if the concealing the purport of them from an illiterate publiſher, would make him ſafe in diſperſing them. 1 *Hawk.* 195.

Alſo it hath been ſaid that if he who hath either read a libel himſelf, or hath heard it read by another, do afterwards maliciouſly read or repeat any part of it in the preſence of others, or lend or ſhow it to another, he is guilty of an unlawful publication of it. *Ibid.*

Alſo it hath been holden that the copying of a libel ſhall be a concluſive evidence of the publication of it, unleſs the party can prove that he delivered it to a magiſtrate to examine it. *Ibid.*

And it hath been ruled that the finding a libel on a bookſeller's ſhelf, is a publication of it by the bookſeller, and that it is no excuſe to ſay that the ſervant took it into the ſhop without the maſter's knowledge, for the law preſumes the maſter is to be acquainted with what the ſervant does. 1 *Seſs.* 633. *K. vs. Dodd.*

And it ſeems to be the better opinion, that he who firſt writes a libel, dictated by another, is thereby guilty of making it, and conſequently puniſhable for the bare writing, for it was no libel till it was reduced to writing; for the eſſence of a libel conſiſteth in the writing of it; ſince, if a man ſpeaks ſuch words, unleſs the words be put in writing, it is not a libel. 1 *Salk.* 419.

Alſo it hath been reſolved that the ſending of a letter full of provoking language to another, without publiſhing it, is highly puniſhable, as manifeſtly tending to a diſturbance of the peace. 1 *Hawk.* 195.

But it hath been reſolved that he who barely reads a libel in the preſence of another, without knowing it before to be a libel, or who is only proved to have had a libel in his cuſtody, ſhall not, in reſpect of any ſuch act, be adjudged the publiſher of it. But the having in one's cuſtody a written copy of a libel publickly known is an evidence of the publication of it. 1 *Hawk.* 196.

The way for a man to keep himſelf out of danger in ſuch caſe is, if he find a libel, and it be compoſed againſt a private perſon, he either may burn it or forthwith deliver it to a magiſtrate; but if it concerns a magiſtrate, or other public perſon, he ought immediately

immediately to deliver it to a magiſtrate, to the intent, that by examination and inquiry, the author may be found and puniſhed. 5. *Co.* 125.

How puniſhable.

There ſeemeth to be no doubt but that the offenders may be condemned to pay ſuch fine, and alſo to ſuffer ſuch corporal puniſhment as to the court in diſcretion ſhall ſeem proper, according to the heinouſneſs of the crime and the circumſtances of the offender. 1 *Hawk.* 196.

And it hath been adjudged that libels, as having a direct and immediate tendency to a breach of the peace, are indictable before juſtices of the peace. 2 *Hawk.* 40.

An indictment ſetting forth the offence to the *effect following* had been naught, being vague and uſeleſs words, for the court muſt judge of the words themſelves; but the words *according to the tenour* do correct the defect, for they import the very words themſelves, for the *tenour* of a thing is the tranſcript and true copy of it, to which it may be compared, and therefore of words ſpoken there can be no tenour, becauſe there is no written original. 2 *Salk.* 417. 3 *Salk.* 225.

And it muſt be proved to be written or publiſhed in the county, laid in the indictment, all matters of crime being local: *St. T. V.* 3. 774, 775.

Indictment for publiſhing a ſcandalous and libellous letter, imputing the crime of theft to the proſecutor.

County to wit.

The jurors for the commonwealth upon their oath preſent, That late of the pariſh of in the county of gentleman, being a perſon of an envious, evil, and wicked mind, and of a moſt malicious diſpoſition, and wickedly, maliciouſly, and unlawfully minding, contriving, and intending, as much as in him lay, to injure, oppreſs, aggrieve, and vilify the good name, fame, credit, and reputation of one gentleman, a good, peaceable, and worthy citizen of this commonwealth, and to bring him into great contempt, hatred, infamy, and diſgrace, on the day of in the year of the commonwealth, with force and arms, at the pariſh aforeſaid, in the county aforeſaid, a certain falſe, ſcandalous, and libellous writing againſt the ſaid falſely, maliciouſly, and ſcandalouſly did frame and make, and in the name of him the ſaid then and there did cauſe to be written and publiſhed

published, in the form of a letter, directed to him the said the tenor of which said writing is as follows, to wit, To These scoundrel *(meaning the said)* it may not be amiss to acquaint you *(meaning him the said)* as the time draws near, you *(meaning the said)* may be preparing yourself *(again meaning the said)* for a trial, for stealing the turkies out of my *(meaning his the said)* yard when I hope to see you *(meaning the said)* sing a neck psalm, and perish according to law, you hell-hound *(meaning the said)* subscribed *(meaning himself the said) and that the said with intention to scandalize the said and to bring him into contempt, hatred, infamy, and disgrace, the said false, malicious, and scandalous libellous writing, so as aforesaid framed, written, and made, afterwards, to wit, on the said day of in the year aforesaid, and on divers other days and times, as well before as afterwards, at the parish aforesaid, in the county aforesaid, to divers citizens of this commonwealth, then and there present, falsely, maliciously, and scandalously did openly deliver, and cause to be delivered, to the great scandal, infamy, and damage of the said to the evil example of all others in the like case offending, and against the peace and dignity of the commonwealth.*

Lord's day, *(See* SABBATH.)

LUNATICS.

I. Of lunatics or non compos mentis *by the common law.*

II. How they shall be restrained and kept, by the act of Assembly.

I. Of lunatics or *non compos mentis* by the common law.

NON *compos mentis* is of four kinds. First, *Ideots*, who are of *non sane memory* from their nativity, by a perpetual infirmity.

Secondly, Those that lose their memory and understanding by the visitation of God, as by sickness, or other accident.

Thirdly, Lunatics who have sometimes their understanding and sometimes not.

Fourthly, Drunkards, who by their own vicious act, for a time deprive themselves of their memory and understanding. 1 *Inst.* 247.

He who incites a madman to commit murder, or other crime, is a principal offender, and as much puniſhable as if he had done it himſelf. 1 *Hawk.* 2.

But ideots, and lunatics who are under a natural diſability of diſtinguiſhing between good and evil, are not puniſhable by any criminal proſecution. *Ibid.*

Yet drunkards ſhall have no privilege by their want of ſound mind, but ſhall have the ſame judgment as if they were in their right ſenſes. 1 *Inſt.* 247. 1 H. H. 32.

But if a perſon who wants diſcretion commits a treſpaſs againſt the perſon or poſſeſſion of another, he ſhall be compelled in a civil action to give ſatisfaction for the damage. 1 *Haw.* 2.

If one who hath committed a capital offence become *non compos* before conviction, he ſhall not be arraigned; and if after conviction, he ſhall not be executed. *Hales Pls.* 10.

By the common law, if it be doubtful whether a criminal who at his trial in appearance is a lunatic, be ſuch in truth or not, it ſhall be tried by an inqueſt of office, to be returned by the ſheriff; and if it be found by them that the party only feigns himſelf mad, and he ſtill refuſe to anſwer, he ſhall be dealt with as one that ſtands mute. 1 *Hawk.* 2.

Any perſon may juſtify confining and beating his friend being mad, in ſuch manner as is proper in ſuch circumſtances. 1 *Hawk.* 130.

A perſon of *non-ſane* memory ſhall not avoid his own act by reaſon of this defect, but his heir or executor may. 4 *Co. Beverley's caſe.*

If an ideot takes a wife, they are huſband and wife in law, and their iſſue legitimate, for he is allowed to be capable of conſenting to marriage. 1 *Kel.* 112.

To make a will it is not ſufficient that the teſtator have memory to anſwer to familiar and uſual queſtions, but he ought to have a diſpoſing memory, ſo as to be able to make a diſpoſition of his eſtate, with underſtanding and reaſon, 6 *Co.* 32.

II. How they ſhall be reſtrained and kept by the act of Aſſembly.

The moſt material parts of the act of Aſſembly on this ſubject, are the *third*, *ſixth*, *eighth* and *fifteenth* ſections of the act (17 *R. Cond.* 1792. *ch.* 120) page 244, of the Reviſed Code, (here inſert the above ſections.

Warrant

Warrant for the examination of a person supposed to be of unsound mind.

county to wit,

Whereas I have received due information that A L, *is a perſon of inſane or diſordered mind, and is going at large in this county to the great danger of the citizens of the commonwealth: You are therefore hereby required to bring the ſaid* A L, *before me, or ſome other juſtice of the peace for the commonwealth, and two other juſtices of this county, on the day of next, at in this county, to be examined concerning his ſtate of mind, and the cauſes of his inſanity, according to the act of Aſſembly in that caſe made. Herein fail not; and then and there make due return of this warrant. Given &c.*

If found to be of inſane mind.

Purſuant to the within warrant, we have diligently examined, as well the ſaid A L, *as* C D, E F, *and* G H, *witneſſes to the conduct and behaviour of him the ſaid* A L, *whereupon it appears expedient to us that the ſaid* A L, *ſhould be removed to the public hoſpital for the maintenance and cure of perſons of unſound mind, in the city of Williamſburg: We have therefore taken the depoſitions of the ſaid witneſſes, in order to be tranſmitted with ſaid lunatic, to the keeper of the ſaid hoſpital according to law.*

J. K.
L. M.
N. O.

Warrant for removal.

county to wit.

J K, L M, *and* N O, *three of the juſtices of the peace of the county of to the ſheriff of the ſaid county, and to the keeper of the public hoſpital in the city of Williamſburg, for the maintenance and cure of perſons of unſound mind.*

Whereas, upon due examination before us, A L, *of this county, hath been adjudged a perſon of inſane or diſordered mind, and we have thought it expedient he ſhould be removed to the public hoſpital for the maintenance and cure of perſons of unſound mind, in the city of Williamſburg: You are therefore hereby authoriſed and required forthwith to remove the ſaid* A L, *to the ſaid hoſpital in the city of Williamſburg, and deliver him, together with the warrant and order, the depoſitions of the witneſſes, a certificate of the ſaid*

A L.

A L's *eſtate, and the probable annual profits thereof, and this precept, to the keeper of the ſaid hoſpital, and for ſo doing this ſhall be your warrant: And you the ſaid keeper are hereby required to receive the ſaid* A L, *into your cuſtody, and him there ſafely to keep, till he ſhall be diſcharged by due courſe of law; and the ſeveral papers herewith ſent, to deliver to the directors of the ſaid hoſpital. Given &c.*

If the juſtices think a guard neceſſary, then after *forthwith* inſert 'to impreſs a guard of one man (or two men) to aſſiſt 'you,' &c.

If friends offer ſecurity, then in the order at the end, add, 'but P Q, of the ſaid county, appearing before us, and giving 'ſufficient ſecurity that proper care ſhall be taken of the ſaid A 'L, and that he ſhall be ſecured and reſtrained from going at 'large till he is reſtored to his ſenſes, we have delivered the ſaid 'A L, to the ſaid P Q.'

Recognizance to be taken.

Be it remembered, that on the day of in the year before J K, L M, and N O, three of the juſtices of the peace of the county of perſonally appeared P Q, R S, and T W, of the ſaid county, and ſeverally acknowledged themſelves indebted to A G, governor or chief magiſtrate of this commonwealth, and his ſucceſſors, in the ſum of each to be levied of their ſeveral and reſpective lands and tenements, goods, and chattels, and to the uſe of the ſaid commonwealth, rendered.

Upon this condition, that whereas A L hath, upon examination before the juſtices aforeſaid, been adjudged to be of infane or diſordered mind, and it was thought expedient that he ſhould be removed to the public hoſpital for the maintenance and cure of perſons of unſound mind in the city of Williamſburg, but at the requeſt of the ſaid P Q, hath been delivered to him; if therefore the ſaid P Q, ſhall take proper care of the ſaid A L, and cauſe him to be kept ſecure, and reſtrained from going at large, until he be reſtored to his ſenſes, then the above recognizance to be void, or elſe to remain in full force.

Taken and acknowledged before us, J. K.
L. M.
N. O.

Certificate of removal, and of the lunatic's eſtate, to be made to the next court of the county after removal.

county to wit.

We

We JK, LM, & NO, *three of the juſtices of the peace for the county aforeſaid, having upon due examination before us had, of* AL, *of this county, been of opinion that he was a perſon of unſound mind, and that it was expedient he ſhould be removed to the public hoſpital for the maintenance and cure of perſons of unſound mind in the city of Williamſburg, and having accordingly directed him to be ſo removed by our order bearing date the day of laſt paſt; we do therefore, hereby certify the ſame to the court of this county, together with the annexed certificate of the eſtate of the ſaid* AL, *which is all that has yet come to our knowledge. Given &c.*

J. K.
L. M.
N. O.

To the above warrant ſhould be annexed an inventory of all the inſane's eſtate, both real and perſonal.

MAIM.

MAIM in ſuch a hurt of any part of a man's body, whereby he is rendered leſs able in fighting, either to defend himſelf, or annoy his adverſary. 1 *Haw.* 111.

For the members of every citizen are under the ſafe-guard and protection of the law, to the end a man may ſerve the commonwealth, when occaſion ſhall be offered; and therefore a perſon who maims himſelf, that he may have the more colour to beg, may be indicted and fined. 1 *Inſt.* 127.

The cutting off, or diſabling, or weakening a man's hand or finger, or ſtriking out his eye, or foretooth, or caſtrating him, are ſaid to be maims, but the cutting off his ear, or noſe, were not eſteemed maims at the common law, becauſe they do not weaken but only diſfigure him. 1 *Haw.* 111, 112.

It is ſaid, that anciently caſtration was puniſhed with death; and other maims with the loſs of member for member; but afterwards no maim was puniſhed in any caſe with the loſs of life or member, but only with fine and impriſonment. 1 *Haw.* 111, 112.

If a man attack another with intent to murder him, and he does not murder, but only maim him, the offence is nevertheleſs within the ſtatute. 1 *Haw.* 112.

The caſe was, one Mr. *Coke*, a gentleman of Suffolk, and one *Woodburn* a labourer, were indicted, in 1722, *Coke* for hiring and abetting *Woodburn*, and *Woodburn* for the actual fact

fact of ſlitting the noſe of Mr. *Criſpe*. The murder of *Criſpe* was intended, and he was left for dead, being terribly hacked and diſfigured with a hedge bill; but he recovered. Now the bare intent to murder is no felony; but to diſfigure, with an intent to diſfigure, is made ſo by this ſtatute, on which they were therefore indicted. And *Coke* reſted his defence upon this point, that the aſſault was not committed with an intent to diſfigure, but with an intent to murder, and therefore not within the ſtatute. But the court held, that if a man attack another to murder him with ſuch an inſtrument as a hedge bill, which cannot but endanger the diſfiguring him; and in ſuch attack happens not to kill, but only to diſfigure him; he may be indicted on this ſtatute; and it ſhall be left to the jury whether it was not a deſign to murder by diſfiguring, and conſequently a malicious intent to diſfigure as well as to murder. Accordingly the jury found them guilty of ſuch previous intent to diſfigure, in order to effect their principal intent to murder. And they were both condemned and executed. 4 *Black.* 207.

If the maim come not within any of the deſcriptions in the act, yet it is indictable at the common law, and may be puniſhed by fine and impriſonment: Or an appeal may be brought for it at the common law; in which the party injured ſhall recover his damages; or he may bring an action of treſpaſs; which kind of action hath now generally ſucceeded into the place of appeals in ſmaller offences not capital. 2 *Haw.* 157. 160.

It doth not ſeem, that in maiming there may be acceſſaries after the fact. 2 *Haw.* 311.

By *V. l.* (17 *R. Cond.* 1792. *ch.* 99. § 1, 2) *p.* 188. 'If any 'perſon or perſons &c. (here inſert ſections 1 & 2, of the above law.)

Indictment of felony by ſlitting the noſe, and againſt the aider and abettor.

county to wit.

The jurors for the commonwealth, upon their oath preſent, That J W, late of the pariſh of in the county of labourer, and A C, late of the pariſh aforeſaid, in the county aforeſaid, eſquire, on the day of in the year and in the year of the commonwealth; contriving and intending one E C, then and yet being a citizen of the ſaid commonwealth, to maim and diſfigure, at the pariſh aforeſaid, in the county aforeſaid, with force and arms, in and upon the ſaid E C, in the peace of God and of the ſaid commonwealth, then and there being, on purpoſe, and on malice aforethought, and by

lying

lying in wait, unlawfully and feloniouſly did make an aſſault, and the ſaid J W, with a certain iron bill, of the value of one penny, which he the ſaid J W, in his right hand then and there had and held, the noſe of the ſaid E C, on purpoſe, and of his malice *aforethought*, and by the lying in wait, then and there unlawfully and feloniouſly did ſlit, with intention the ſaid E C, in ſo doing, in manner aforeſaid, to maim and diſfigure; and that the aforeſaid A C, at the time the aforeſaid felony, by the ſaid J W, in manner and form aforeſaid, was done and committed; to wit, on the ſaid day of in the year of our Lord aforeſaid, and in the year of the commonwealth aforeſaid, with force and arms, on purpoſe, and of his malice *aforethought*, and by lying in wait, unlawfully and feloniouſly was preſent, aiding and abetting the ſaid J W, in the felony aforeſaid, in manner and form aforeſaid, done and committed: and ſo the jurors aforeſaid, upon their oath aforeſaid, do ſay, That the ſaid J W, and A C, on the ſaid day of in the year of the commonwealth aforeſaid, at the pariſh aforeſaid, in the county aforeſaid, with force and arms, on purpoſe, and of their malice *aforethought*, and by lying in wait, the felony aforeſaid, in form aforeſaid, unlawfully and feloniouſly did do and commit, and each of them did do and commit, againſt the peace and dignity of the commonwealth, and againſt the form of the ſtatute in ſuch caſe made and provided.

Mainprize, (*See* BAIL.)

MAINTENANCE.

BUYING *of titles* belongeth not to this place, but is treated of under a title of its own.

I. Of maintenance in general;
II. Of champerty in particular.
III. Of embracery in particular.

I. Of maintenance in general.

Concerning which I will ſhew,

i. What it is.
ii. How puniſhible by the common law.

i. What it is.

I.

I. Maintenance (*manu tenere*) *is an unlawful taking in hand or upholding of quarrels or ſuits, to the diſturbance or hindrance of common right.* 1 Haw. 249.

2. And it is twofold;

One in the *country*; as where one aſſiſts another in his pretenſions to certain lands, by taking or holding the poſſeſſion of them for him by force or ſubtilty; as where one ſtirs up quarrels, and ſuits in the country, in relation to matters wherein he is no-ways concerned: and this kind of maintenance is puniſhable at the commonwealth's ſuit by fine and impriſonment, whether the matter in diſpute any way depended in plea or not; but it is ſaid not to be actionable. 1 *Haw.* 249.

Another in the courts *of juſtice*; where one officiouſly intermeddles in a ſuit depending in any ſuch court, which no ways belongs to him by aſſiſting either party with money or otherwiſe, in the proſecution or defence of any ſuch ſuit. 1 *Haw.* 249.

3. Of this ſecond kind of maintenance, there are three ſpecies;

Firſt, Where one maintains another, without any contract to have part of the thing in ſuit; which generally goes under the common name of *maintenance.*

Secondly, Where one maintains one ſide to have part of the thing in ſuit; which is called *champerty.*

Thirdly, Where one laboureth a jury; which is called *embracery.* 1 Haw. 249.

4. But it ſeemeth to be agreed, that wherever any perſons claim a common intereſt in the ſame thing, as in a way, churchyard, or common, by the ſame title, they may maintain one another in a ſuit relating to the ſame. 1 Haw. 252.

5. Alſo, that whoever is any way of kin or affinity to the party, may counſel and aſſiſt him, but that he cannot juſtify the laying out of his own money in the cauſe unleſs he be either father, or ſon, or heir apparent. 1 Haw. 252.

6. Alſo, that any one in charity may lawfully give money to a poor man, to enable him to carry on his ſuit 1 Haw. 253.

ii. How puniſhable by the common law.

It ſeemeth that all maintenance is not only *malum prohibitum* by ſtatute, but is alſo *malum in ſe*; and ſtrictly prohibited by the common law, as having a manifeſt tendency to oppreſſion; and therefore it is ſaid, that all offenders of this kind are not only liable to an action of maintenance at the ſuit of the party grieved wherein they ſhall render ſuch damages as ſhall be anſwerable to the injury done to the plaintiff; but alſo that they may be indicted

dicted as offenders againſt public juſtice, and adjudged thereupon to ſuch fine and impriſonment as ſhall be agreeable to the circumſtance of the offence.

Alſo it ſeemeth, that a court of record may commit a man for an act of maintenance done in the face of the court. 2 *Inſt.* 212. 1 *Haw.* 255.

☞ *The ſtatute of England concerning maintenance has not been adopted by our laws.*

II. Of champarty in particular.

i. What it is.
ii. How puniſhable by the common law.
iii. How by ſtatute.

i. What it is.

Champerty (*from campi parti*) is the *unlawful maintenance of a ſuit, in conſideration of ſome bargain to have part of the lands or things in diſpute, or part of the gains.* 1 Haw. 156. 33. Ed. 1 St. 2.

Every champerty is maintenance, but every maintenance is not champerty: for champerty is but a *ſpecies* of maintenance which is the *genus*. 2 *Inſt.* 208.

ii. How puniſhable by the common law.

Champerty was an offence at the common law, and as ſuch is puniſhable in like manner as hath been expreſſed in treating of maintenance in general. 2 *Inſt.* 208.

iii. How by ſtatute.

By *V. l.* (17 *R. Cmd.* 1792. *ch.* 97.) *t.* 186. it is declared, That champerters be they &c. (here inſert the above law.)

III. Of embracery in particular.

i. What it is.
ii. How puniſhable by the common law.
iii. How by ſtatute.

i. What it is.

It ſeems clear, *that any attempt whatſoever to corrupt, or*

influence or inſtruct a jury, or any way to incline them to be more favourable to the one ſide than the other, by money, promiſes, letters, threats, or perſuaſions, is a proper act of embracery, whether the jury to whom ſuch attempt is made give any verdict or not, or whether the verdict given be true or falſe. 1 *Haw.* 259.

2. And the law ſo far abhors all corruption of this kind, that it prohibits every thing which has the leaſt tendency to it, what ſpecious pretence ſoever it may be covered with, and therefore it will not ſuffer a mere ſtranger ſo much as to labour a juror to appear and act according to his conſcience. 1 *Haw.* 259.

3. But any perſon who may juſtify any other act of maintenance, may ſafely labour a juror to appear and give a verdict according to his conſcience; but no one whatſoever can juſtify the labouring a juror not to appear. 1 *Haw.* 260.

ii. How puniſhable by the common law.

There is no doubt, but that offences of this kind do ſubject the offender either to an indictment or action, in the ſame manner as all other kinds of unlawful maintenance do by the common law. *Haw.* 260.

iii. How by ſtatute.

By *V. l.* (17 *R. Cond.* 1789. *ch.* 48. § 3, 4.) *p.* 52. 'If any 'juror &c. (here inſert ſections 3 & 4 of the above law.)

Indictment for maintenance.

The jurors for the commonwealth upon their oath preſent, That A O, late of in the county aforeſaid, yeoman, on the day of in the year of with force and arms at aforeſaid, in the county aforeſaid, did unjuſtly and unlawfully maintain and uphold a certain ſuit which was then depending in the court of the commonwealth, between A P plantiff, and A D defendant, in a plea of debt, on the behalf of the ſaid A P, againſt the ſaid A D, contrary to the form of the ſtatute in ſuch caſe made and provided, and to the manifeſt hindrance, and the diſturbance of juſtice, and in contempt of the ſaid commonwealth, and the laws thereof, and to the great damage of the ſaid A D, and againſt the peace and dignity of the commonwealth.

MANDAMUS.

A WRIT of *mandamus* is, in general, a command iſſuing from a ſuperior court, having competent authority for that

that purpoſe, and directed to any perſon, corporation, or inferior court of judicature, requiring them to do ſome *particular* thing therein ſpecified, which appertains to their office and duty, and which the ſuperior court has previouſly determined, or at leaſt ſuppoſes, to be conſonant to right and juſtice. 3 *Blacks Com.* 110.

Applications for *mandamus* ſhould always be ſupported by affidavits, that the court may judge of the propriety of granting them; and this is the conſtant practice. *See Buller's N. P. under this head.*

And therefore, if it does not appear to the court what the office is, to which the party wiſhes admittance, the court will refuſe a *mandamus*. 2 *Mod.* 316.

Where the *mandamus* is purſued as a remedy to inforce obedience to the laws of the commonwealth, it is grantable of common right; but where the right is of a private nature, as to an office &c. it is diſcretionary in the court to grant or refuſe it. 11 *Co. Bagg's caſe. B. N. P.* '*Mandamus.*'

It is a writ, of a moſt extenſive remedial nature; and may be iſſued in ſome caſes where the party injured hath alſo another more tedious method of redreſs, as in the caſe of admiſſion or reſtitution to an office; but it iſſues in all caſes, where the party hath a right to have any thing done, and hath no other ſpecific means of compelling its performance. 3 *Blacks Com.* 110.

But it ought not to be granted (except in very particular caſes) where the party applying for it has a ſpecific legal remedy. 3 *Burr.* 1265. 4 *Burr.* 2186. *Cowp.* 378. 1 *Term. Rep.* 396.

This writ lies as well to reſtore one who has been unjuſtly removed, as to admit one who has a right. *Onſlow's N. P.* 191.

It lies to admit a perſon to academical degrees; to the uſe of a meeting houſe &c. for the production, inſpection, or delivery, of public books and papers; for the ſurrender of the *regalia* of a corporation; to oblige bodies corporate to affix their common ſeal; to compel the holding of a court; and for an infinite number of other purpoſes, which it is impoſſible to recite minutely. But at preſent, we are more particularly to remark, that it iſſues to the judges of any inferior court, commanding them to do juſtice according to the powers of their office, whenever the ſame is delayed. 3 *Blacks Com.* 110. *See* 1 *Wils.* 12, 21, 76, 125, 133, 138, 206, 283, 305.

This writ is grounded on a ſuggeſtion, by the party injured of his own right, and the denial of juſtice below: whereupon, in order to ſatisfy the court more fully that there is a probable ground for ſuch interpoſition, a rule is made, (except in ſome general caſes, where the probable ground is manifeſt) directing the party complained of to ſhew cauſe why a writ of *mandamus* ſhould not iſſue. 3 *Blacks Com.* 111.

But

But where the *mandamus* is to ſwear or admit, the court will, in caſe the right appear plain, grant the writ upon the firſt motion; but where it is to reſtore one who has been removed, they would firſt grant a rule to ſhew cauſe, why ſuch a writ ſhould not iſſue. *Onſl. N. P.* 191.

And note the rule to ſhew cauſe muſt always be to the ſame perſons to whom the writ is to be directed. *Onſl. N. P.* 191.

Where the court grants a rule to ſhew cauſe, though upon ſhewing cauſe it appears doubtful, whether the party have a right or not, yet the court will iſſue the *mandamus*, in order that the matter may be tried upon the return. *Onſl. N. P* 192.

If on the rule to ſhew cauſe no ſufficient cauſe is ſhewn, the writ itſelf iſſues. 3 *Blacks Com.* 111.

The firſt writ of mandamus always concludes with commanding obedience, or cauſe to be ſhewn to the contrary; but if a return be made to it, which upon the face of it is inſufficient, the court will grant a *peremptory mandamus*, to do the thing abſolutely; to which no other return will be admitted, but a due execution of the writ; and if that be diſobeyed an attachment will iſſue againſt the perſons diſobeying it. *Onſl. N. P.* 193. 3 *Blacks Com.* 111.

So if no return be made, the court will grant an attachment againſt the perſons to whom the *mandamus* was directed; with this difference, however, that where a *mandamus* is directed to a corporation to do a corporate act, and no return is made, the attachment is granted only againſt thoſe particular perſons who refuſe to pay obedience to the *mandamus*; but where it is directed to ſeveral perſons in their natural capacity, the attachment for diſobedience muſt iſſue againſt all, tho' when they are before the court, the puniſhment will be proportioned to their offence. *Onſl. N. P.* 193.

But if the return upon the face of it be good, tho' the matter of it be falſe, the court will not try the truth of the facts upon affidavits, but will for the preſent believe it, and proceed no further upon the *mandamus*. But then the *party* injured may have an action againſt him for his falſe return, and (if found to be falſe by the jury) ſhall recover damages equivalent to the injury ſuſtained; together with a *peremptory mandamus* to the defendant to do his duty. 3 *Blacks Com.* 111. *Onſl. N. P.* 194.

An action will lie for ſuppreſſing the truth in a return as well as for returning a falſehood, and that if the return be true in words, but falſe in ſubſtance. *Doug.* 15.

Where the return is made by ſeveral, the actions may be either joint or ſeveral, it being founded upon a tort; but if it appear upon evidence that the defendant noted againſt the return, but,

but was over-ruled by a majority, the plaintiff ſhall be non-ſuited; and tho' the return be made in the name of the corporation, yet an action will lie againſt the particular perſons who cauſed the return to be made; or if the matter concern the public government, and no particular perſon be ſo intereſted as to maintain an action, the court will grant an information againſt the perſons making the return. *Onſl. N. P.* 194.

Note:—Where ſeveral join in an application for a *mandamus*, they muſt all join in an action for a falſe return. *Ibid.*

What have been held ſufficient returns and what not, may be ſeen in *Buller's*, *or Onſlow's Niſi Prius*, under the head of '*Mandamus*,' and the ſeveral books of reports where that ſubject has come before the court.

Form of a return to a mandamus.

(On the back of the writ the following indorſement is made.)

The execution of this writ appears in a certain ſchedule to this writ annexed. A B, &c.

Then on a piece of paper annexed to the writ make the following return.

The anſwer &c. to the writ to this ſchedule annexed, according to the command of the ſaid writ.

We certify &c. (*here inſert the cauſe &c.*) *See* 11. *Co. Bagg's caſe.* 3. *L. Raym.* (*pleadings*) 203. *Ibid.* 1.

Manſlaughter, *See* 'HOMICIDE.')

MARRIAGES.

THE publication of banns (the only inſtance under this head which contains any matter, within the juriſdiction of a ſingle magiſtrate) having now become nearly obſolete; it will be ſufficient here, to refer to the act itſelf for ſuch other information as does not particularly relate to the duties of a juſtice of the peace. *See V. l.* (17 *R Cond.* 1792. *ch.* 104) page 202 of the Reviſed Code.

Maſters (*See* APPRENTICES. SERVANTS.)

Meaſures (*See* WEIGHTS.)

MILLS AND MILLER.

THE proceedings on erecting mills containing nothing peculiarly relative to the duty of a ſingle magiſtrate, I ſhall confine

confine myself to such part of the act of Assembly, as more immediately fall within the jurisdiction of a justice of the peace.

By *V. l.* (17 *R. Cond.* 1792 *c.* 105. § 9, 10, 11.) *p.* 208. 'All millers shall well and sufficiently &c. (here insert sects. 9, '10, & 11, of the above law.')

Warrant against a miller.

county to wit.

Complaint being this day made to me one of the justices of the peace for the said, by that a miller at mill, in the said county, did, on the day of last, refuse to grind a bag of corn (or wheat) belonging to according to his turn; [or did not sufficiently grind a bag of corn, or wheat, belonging to the said and carried to the said mill to be ground; or did take more than one eighth part of a bag of wheat or corn belonging to the said and carried to the said mill to be ground, for the toll thereof] *contrary to the act of Assembly in that case made: these are therefore, in the name of the commonwealth to will and require you to bring the said before me or some other of the commonwealth's justices of the peace for the said county, to answer the premises. Given under my hand the day of*

To constable.

JUDGMENT.

On hearing the within complaint, it being duly proved before me that the within named is guilty (*as in the warrant according to the case*) by which he hath forfeited fifteen shillings current money: it is therefore considered that the within named recover against the said the said fifteen shillings current money, together with his costs by him in this behalf expended. Given &c.

Costs.

N. B. If the miller is an indented servant or slave, it should be mentioned in the warrant; as in such case he is to be whipped for the first and second offences, and afterwards the owner is made liable.

Warrant against the owner of a mill.

county to wit.

Complaint &c. as in the first, that owner of mill, in the said county, does not keep in the said mill a bushel, half bushel, peck,

peck, or tole diſh, ſealed according to act of aſſembly: theſe are &c. as in the firſt.

If the owner lives out of the county, and has a known attorney in it; after *aſſembly*, add, ' *and that the ſaid lives out of this county, but that the ſaid is the ſaid attorney;*' and then the warrant is to inforce the attorney's appearance. But if the owner has no known attorney in the county, then after *aſſembly*, add, ' *and that the ſaid* G H, *lives out of this county, and has no known attorney therein, but the ſaid mill is kept by a ſervant, or ſlave belonging to the ſaid* ;' and then the warrant is to inforce the appearance of the ſervant or ſlave.

JUDGMENT.

As the firſt, only taking notice whether the attorney, ſervant, or ſlave appears; the fine is fifteen ſhillings, with coſts to the informer.

Trin. 16 Geo. 11 K. and Wood. The defendant being a miller, was indicted for changing corn delivered to him to be ground, and giving bad corn inſtead of it. It was moved to quaſh it, becauſe only a private cheat, and not of a public nature; but it was anſwered, that being a cheat in the way of trade, it concerned the public, and therefore was indictable. And the court was unanimous not to quaſh it. *Seſs. Cas. V.* 1. 217.

Although every larceny implies a treſpaſs, and a felonious taking of the thing ſtolen, yet it hath been reſolved that even thoſe who have the poſſeſſion of goods by the delivery of the party as a carrier who hath goods to carry, and conſequently a miller who hath corn delivered to him to grind, may be guilty of felony by taking away part thereof, with an intent to ſteal it. *See title* ' *Carriers.*'

Miſadventure. (*See* HOMICIDE.

MISDEMEANOR.

A CRIME or miſdemeanor, is an act committed or omitted in violation of a public law, either forbidding or commanding it. This general definition comprehends both crimes and miſdemeanors, which properly ſpeaking, are ſynonymous terms; tho' in common uſage, the word *crime* is made to denote ſuch offences as are of a deeper and more atrocious die; while ſmaller faults and omiſſions of leſs conſequence are compriſed under the gentler name of *miſdemeanor* only. 4 *Black. Com.* 5.

To

To enumerate the various acts which have been determined to be misdemeanors, would be a work of immense labour. Suffice it to say that the word is generally applied to all those offences for which the law has not provided a particular name; and they may be punished according to the degrees of the offence, by fine or imprisonment or both. *Barl.*

Wherever an offence is declared by law to be a felony, it ceases to be a misdemeanor, unless it is otherwise provided. 1 *L. Raym.* 712.

The offence of receiving stolen goods, knowing them to be stolen, which is punishable as a misdemeanor by our laws, is treated of under title '*Accessory.*'

Misprision of felony. (*See* FELONY.)
Misprision of treason. (*See* TREASON.)
Mittimus. (*See* COMMITMENT.)
Murder. (*See* HOMICIDE.)

M U T E.

THE punishment formerly inflicted by the common law on persons standing mute on an arraignment for felony, is inserted here rather as matter of curiosity than because the law is ever put in force, especially since the statutes were made, which subjected the party to the same sentence, as if he was found guilty on verdict or confession.

Heretofore, says lord *Coke*, a person standing mute upon an arraignment of felony, (that is, without speaking any thing at all, or without putting himself upon God and his country,) was liable to a strange and cruel kind of punishment; the judgment in this case was, that the man or woman should be remanded to prison, and laid there in some low dark room, where they should lie naked on the bare earth, without any litter, rushes, or other cloathing, and without any garment about them, but some thing to cover their naked parts; and that they should lie upon their backs, their heads uncovered and their feet, and one arm to be drawn to one quarter of the room with a cord, and the other arm to another quarter, and in the same manner to be done with their legs; and there should be laid upon their bodies iron and stone, so much as they might bear and more; and the next day following to have three morsels of barley bread, without any drink, and the next day to drink thereof the water next to the house of the prison (except running water) without any bread, and this to be their diet till they were dead. So as upon the matter,

matter, they ſhould die three manner of ways, by weight by famine and by cold. And the reaſon of this terrible judgment was, becauſe they refuſed to ſtand to the common law of the land. 2 *Inſt.* 178, 179. This puniſhment was called *pière forte et dure*, and is not to be inflicted until a jury is impanelled to try whether he ſtands mute *from the viſitation of God.* 2 *Hawk.* 330. But this is to be underſtood of ſuch felony for which he is not to have his clergy; otherwiſe, if he ſtands mute he ſhall have his clergy. *Moor.* 550.

See under title *Criminals*, the conſequence of ſtanding mute.

NUISANCE.

I. What it is.
II. How it may be removed.
III. How puniſhed.

I. What it is.

A COMMON nuiſance ſeems to be, an offence againſt the publie, either by doing a thing which tends to the annoyance of all the commonwealth's citizens, or by neglecting to do a thing which the common good requires. 1 *Haw.* 197.

Annoyances to the prejudice of particular perſons, are not puniſhable by a public proſecution as common nuiſances, but are left to be redreſſed by the private actions of the parties aggrieved by them. 1 *Haw.* 197.

Where note a diverſity between a *private* and a *public* nuiſance: If it is a *private* nuiſance, he ſhall have his action upon his caſe, and recover his damages; but if it is a *public* nuiſance, he ſhall not have his action upon his caſe, and this the law hath provided for avoiding of multiplicity of ſuits, for if any one might have an action, all men might have the like; but the law for this common nuiſance hath provided an apt remedy, by preſentment or indictment at the ſuit of the commonwealth, in the behalf of all its citizens; unleſs any man hath a particular damage, as if he and his horſe fall into a ditch made acroſs a highway, whereby he received hurt and loſs, there for this ſpecial damage which is not common to others, he ſhall have an action upon his caſe. 1 *Inſt.* 56.

And from hence it clearly follows, that an indictment, for a nuiſance can be good, which lays it to the damage of private perſons

perſons only: as where it accuſes a man of ſurcharging ſuch a common; or of incloſing ſuch a piece of ground, wherein the inhabitants of ſuch a town have a right of common, to the nuiſance of all the inhabitants of ſuch a town or of diſturbing a watercourſe runing to ſuch a mill, to the damage of ſuch a perſon and his tenants, without ſaying of all citizens of the commonwealth. 1 H. 197.

Yet it hath been ſaid, that an indictment of a common ſcold is good, altho' it conclude to the common nuiſance of *divers*, inſtead of all the commonwealth's citizens; perhaps for this reaſon (ſays Mr. Hawkins) becauſe a common ſcold cannot but be a common nuiſance. 1 *Haw.* 198.

And if the law be ſo in this caſe, why ſhould not an indictment ſetting forth a nuiſance to a way, and expreſsly and unexceptionably ſhewing it to be a high way, be good, notwithſtanding it conclude to the nuiſance of *divers*, without ſaying the commonwealth's citizens. And perhaps the authorities which ſeem to contradict this opinion, might go upon this reaſon, that in the body of the indictment, it did not appear with ſufficient certainty, whether the way wherein the nuiſance was alledged, were a highway, or only a private way, and therefore that it ſhall be intended from the concluſion of the indictment, that it was a private way. 1 *Haw.* 198.

There is no doubt, but that common bawdy houſes are indictable as common nuiſances; and it hath been ſaid that all common ſtages for rope dancers, and alſo all common gaming houſes, are nuiſances in the eye of the law, not only becauſe they are great temptations to idleneſs, but alſo they are apt to draw great numbers of diſorderly perſons. 1 *Haw.* 198.

Alſo it hath been holden, that a common play houſe may be a nuiſance, if it draw together ſuch a number of coaches or people, as prove generally inconvenient to the places adjacent. 1 *Haw.* 198.

Erecting a ſhed ſo near a man's houſe that it ſtops up his lights, is not a nuiſance for which an action will lie, unleſs the houſe is an ancient houſe, and the lights ancient lights. 2 *Salk.* 459.

Alſo ſtoping a proſpect is not a nuiſance. 3 *Salk.* 247.

A gate erected in a highway, where none had been before, is a common nuiſance. 1 *Haw.* 199.

A perſon was indicted for making great noiſe in the night with a ſpeaking trumpet, to the diſturbance of the neighborhood; and it was held by the court to be a nuiſance. T. 12 G. K. and *Smith. Str.* 704.

The

Two perſon were indicted for making great quantities of *nuiſance*, *offenſive* and *ſtinking liquors*, called acid ſpirit of ſulphur, oil of vitriol, and oil of aqua fortis; whereby the air was impregnated with noiſome and offenſive ſmells; and it was held by the court to be a nuiſance. The word *noiſome* comes in the place of the Latin *nocivus*; and means not only diſagreeable, but hurtful. And lord *Mansfield* ſaid, it is not neceſſary, to conſtitute the offence, that the ſmell ſhould be unwholeſome: it is enough if it renders the enjoyment of life and property uncomfortable. *Bun. Mansfield.* 333. *Rex. v. White and Wood.*

A *glaſs houſe*, or *ſwine yard* may be indicted as a nuiſance: And, according to Mr. *Hawkins*, a *brew houſe*, and *the making candles* in a town, ſo as to make it offenſive to the neighbourhood. 1 *Hawk.* 199.

If a man has a *dog* that kills ſheep, that is not a public nuiſance, but the owner of the dog (knowing thereof) is liable to an action; but if he is ignorant of ſuch quality, he ſhall not be puniſhed for this killing: and in an action on the caſe for ſuch killing, the plaintiff ſhall be required to prove in evidence, that the dog had uſed to kill ſheep. *Dyer.* 25. *Het.* 171.

If a man hath an unruly *horſe* in his ſtable, and leaves open the door, whereby the horſe gets forth and doth miſchief, an action lies againſt the maſter. 1 *Vent.* 295.

In the caſe of *Buxenden and Sharp.* The plaintiff declared, that the defendant kept a *bull*, that uſed to run at men, but did not ſay that the defendant knew of his quality; it was adjudged that an action did not lie, unleſs it did appear that the owner knew of this quality. 2 *Salk.* 662.

II. How it may be removed.

It ſeemeth to be certain, that any one may pull down or otherwiſe deſtroy a common nuiſance, as a new gate, or even a new houſe erected in a highway, or the like, for if one whoſe eſtate is or may be prejudiced by a private nuiſance actually erected, as a houſe hanging over his ground, or ſtoping his lights, may juſtify the entering into another's ground, and pulling down and deſtroying ſuch a nuiſance, whether it were erected before or ſince he came to the eſtate, it cannot but follow a *fortiori*, that any one may lawfully deſtroy a common nuiſance: And as the law is now holden, it ſeems that in a plea, juſtifying the removal of the nuiſance, a man need not ſhew that he did as little damage as need be. 1 *Haw.* 199. 1 *Bun.* 267.

But although he may remove the nuiſance, yet he cannot re-

move

move the materials, or convert them to his own uſe. *Dalt. c.* 50.

III. How puniſhed.

It is ſaid that a common ſcold is puniſhable after conviction, upon indictment by being put into the cucking ſtool. 1 *Haw.* 200—Or, *vulgarly* the ducking ſtool.

Note: *cuck* or *guck* in the Saxon tongue (according to lord Coke) ſignifieth to ſcold or brawl; taken from the bird *cuckow* or *guckhaw*: and *ing* in that language ſignifieth water; becauſe a ſcolding woman was for her puniſhment ſowſed in the water. 3 *Inſt.* 219. The common people in the northern parts of England amongſt whom the greateſt remains of the ancient Saxon are to be found, pronounce it *ducking ſtool*; which perhaps may have ſprung from the *Belgic* or *Teutonic ducken*, to dive under water; from whence alſo probably, we denominate our *duck* the water fowl; or rather, it is more agreeable to the analogy and progreſſion of languages, to aſſert, that the ſubſtantive *duck* is the original, and the verb made from thence; as much as to ſay, that to *duck* is to do as that fowl does.

And ſhe may be convicted without ſetting forth the particulars in the indictment. 2 *Haw.* 227.

Nevertheleſs, the offence muſt be ſet forth with convenient certainty; and the indictment muſt conclude not only againſt the peace, but *to the common nuiſance of divers of the commonwealth's citizens.* As in the caſe of K. and *Margaret Cooper*, H. 19. G. 2. She was convicted on an indictment, for being a common and turbulent brawler, and ſower of diſcord amongſt her honeſt and quiet neighbors, ſo that ſhe hath ſtirred, moved, and incited divers ſtriſes, controverſies, quarrels and diſputes amongſt his majeſties lege people, againſt the peace, &c. It was moved in arreſt of judgment, that the charge was too general, and did not amount to being either a barrator or common ſcold, which are the only inſtances in which a general charge will be ſufficient. It was likewiſe objected, that if the words did amount to a diſcription of a ſcold, yet it ſhould be laid to be to the common nuiſance of her neighbors, for every degree of ſcolding is not indictable. And the court was of opinion, that the judgment ought to be arreſted, on both exceptions: for none of the words here uſed are the technical words, and it muſt be laid to be to the common nuiſance. *Str.* 1246.

There is no doubt; but whoever is convicted of another nuiſance, may be fined and impriſoned; and it is ſaid, that one convicted of a nuiſance done to the commonwealth, may be commanded

commanded by the judgment to remove the nuiſance at his own coſts; and it ſeemeth to be reaſonable, that thoſe who are convicted of any other common nuiſance, ſhall alſo have the like judgment. 1 *Haw.* 200. *Str.* 686.

And the defendant ſhall not be allowed to make any objections againſt the indictment, until he hath pleaded to it. *Dalt. c.* 66.

And the court never admits a perſon convicted of a nuiſance to a ſmall fine, until proof is made of the nuiſance being removed. *Dalt. c.* 66.

A maſter is indictable for a nuiſance done by his ſervant. L *Raym.* 264.

There are alſo many other offences declared to be nuiſances by particular ſtatutes, which are treated of under the titles to which they reſpectively belong.

General Indictment for a nuiſance.

county to wit.

The jurors &c. upon their oath preſent, That A O, *late of in the county of yeoman, on the day of in the year of the independance of and on divers other days and times, as well before as afterwards, with force and arms at in the ſaid county,* (here ſet forth the nuiſance) *and the ſame* (nuiſance) *ſo as aforeſaid done, doth yet continue and ſuffer to remain; to the common nuiſance of all the citizens of the ſaid commonwealth, to the evil example of all others in the like caſe offending, and againſt the peace and dignity of the commonwealth.*

Indictment againſt a butcher for uſing his ſhop as a ſlaughter-houſe in a public market.

county to wit.

The jurors for the commonwealth upon their oath preſent, That H H, *late of butcher, on the day of in the year of the commonwealth, and on divers other days and times then before, at to wit, in the pariſh of in aforeſaid, in a certain ſhop of him the ſaid* H H, *ſituate and being in a common market there called market, (the ſaid market being a common paſſage for all the citizens of the ſaid commonwealth, with their goods, chattels, and merchandizes to go, return, paſs, and repaſs at their free will and pleaſure,) did unlawfully and injuriouſly kill and ſlay, and cauſe to be killed and ſlain, ten lambs, and the excrement, blood, entrails, and other filth coming from the ſaid lambs,*

did

did then, and on the ſaid other days and times reſpectively, there cauſe and permit to lie and remain in the ſaid ſhop for a long time, to wit, for the ſpace of five hours, on each of thoſe days, whereby divers filthy and unwholeſome ſmells, and ſtenches from the excrement, blood, entrails, and other filth coming from the lambs aforeſaid, then, and on the ſaid other days and times reſpectively, there did ariſe, and the air there was thereby greatly corrupted and infected, to the great damage and common nuiſance not only of all the lawful citizens of the ſaid commonwealth near their inhabiting and dwelling, but alſo of all other the citizens of the ſaid commonwealth, in, by, and through the ſaid common market and paſſage going, returning, paſſing, repaſſing and laboring, to the evil example of all others in the like caſe offending, and againſt the peace and dignity of the commonwealth.

For an indictment for a nuiſance in obſtructing a public road, See title '*Roads.*'

See other forms of indictments for nuiſances in *Cro. Cer. Comp.* title '*Nuiſance*,'—and *Cro. Cer.* Aſſiſtant, page 362—404.

OATHS.

I. Of oaths in general.
II. Oaths prescribed by the laws of this commonwealth.
III. What solemnities may be used inſtead of oaths.
IV. Oaths of infidels.

I. Of oaths in general.

OATH is a corruption of the *Saxon* word *eoth.* 3 *Inſt.* 165. It is called a corporal oath, becauſe the perſon lays his hand upon ſome part of the ſcriptures when he takes it. 3 *Inſt.* 165.

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 this oath. 2 *Keb.* 314.

The words, *ſo help me God*, in the common form of an oath, perhaps may have been firſt uſed in the very ancient manner of trial by battle in England, or at leaſt are delivered with a peculiar emphaſis in that ſolemnity; wherein the appellee lays his right hand on the book, and with his left hand takes the appellant

lant by the right, and ſwears to this effect. *Hear this, thou who calleſt thyſelf* John *by the name of baptiſm; whom I hold by the hand, that falſly upon me thou haſt lied; and for this thou lieſt, that I who call myſelf* Thomas *by the name of baptiſm, did not felonioufly murder thy father* W. *by name So help me God;*——(and then he kiſſes the book and ſays) *and that I will defend againſt the by my body, as this court ſhall award.* And ſo the appellant is ſworn in like manner.

[Where we obſerve alſo the genuine foundation, as it ſeemeth, of the word *lie* being ſtill eſteemed ſo great an affront above all others, as whenever it is pronounced, to cauſe an immediate affray and bloodſhed.]

Where an oath is adminiſtered by a perſon that hath lawful authority to tender the ſame, and it be afterwards broken, yet if it be not in a judicial proceeding, it is no perjury, nor puniſhable by the common law. 3 *Inſt.* 166.

Therefore if one call another a *perjured* man, he may have an action upon the caſe, becauſe it ſhall be intended to be contrary to his oath in a judicial proceeding; but for calling one a *forſworn* man, no action lies; becauſe the forſwearing may be extrajudicial, and conſequently no perjury in law. 3 *Inſt.* 166.

II. Oaths prescribed by the laws of this commonwealth.

Theſe are very numerous, and vary as much as the ſeveral caſes in which they are directed to be taken. But as few perſons are authoriſed to adminiſter them, who are not furniſhed with the body of the laws, I ſhall only refer to the ſeveral laws which have made them neceſſary, and where the forms are either preſcribed by the legiſlature itſelf, or can very readily be compoſed by the perſon who is to adminiſter them.

Note: The references are to the Reviſed Code printed in 1794, and to the *pages* and *ſections*, without regard to the chapter or year of the commonwealth.

Adminiſtrator.—Oath of adminiſtrator. *V. l. p.* 172. § 31. In what caſes their oaths ſhall be varied. *See* § 14 & 24.

Aliens.—To take an oath of fidelity before any court of record, a certificate of which is to be tranſmitted by the clerk to the executor. *V. l. p.* 216. § 2.

Allegiance, or Fidelity. Oath of. *V. l. p.* 61. § 1.

Appraiſers,
- *of a decedants eſtate.* To take an oath. *V. l. p.* 174. § 38.
- *of property taken in execution.* To take an oath. *V. l. p.* 312. § 28.

Attornies.—Form of their oath. *V. l. p.* 62. §7.

Ballaſt

Ballaſt-maſters.—To take an oath. *V. l. p.* 214.

Cattle.—Driver to produce a manifeſt on oath. *V. l. p.* 285. § 7.

Certiorări.—A perſon petitioning for a *certiorari* to make oath of the truth of the allegations. *V. l. p.* 88. § 49.

Commiſſioner of taxable property. Form of his oath. *V. l. p.* 136. §. v.

Councillor.—The form of the oath of a privy councillor. *V. l. p.* 61. § 5.

Coroner.—Form of his oath. *V. l. p.* 132. § 5.

Debtors inſolvent.—The form of their oath. (*See Inſolvents.*)

Elections.—Commiſſioners to take depoſitions on conteſted elections, to take an oath. *V. l. p.* 46. § 2.

———Clerk of the polls to take an oath. *V. l. p.* 23, § 8.

Electors, for delegates and ſenators. Form of their oath. *V. l. p.* 24. § 10.

Flour.—Inſpectors of flour, the form of their oath. (*See Flour*)

Governor.—Form of his oath. *V. l. p.* 61. § 3.

Jurors.—The form of the oath of the grand jury. *V. l. p.* 107. § 3.

Pork, beef, pitch, tar, & turpentine.—Seller or exporter of thoſe articles filled in this commonwealth, to make oath before a juſtice of the peace, at the time of delivery, that they are the ſame barrels that were inſpected and paſſed, and that they do contain the full quantity, without alteration, to his knowledge. *V. l. p.* 254. § 6.

IV. Oaths of infidels.

A Jew is to be ſworn on the old teſtament, and perjury upon the ſtatute may be aſſigned upon this oath. 2 *Keb.* 314.

H. 2 G. 2. *Gomez Seua* and *Munez.* Upon error in debt upon a bond, the bail being both Jews were ſuffered to put on their hats while they took the oath. *Str.* 821.

At the council, *Dec.* 9. 1738. Preſent the two chief juſtices. On a complaint of *Jacob Fachina* againſt general *Sabine* as governor of *Gibraltar*, *alderman Ben Monſo*, a Moor, was produced as a witneſs, and ſworn upon the *Koran.* *Str.* 1104.

So in the caſe of *Omichund* againſt *Barker*, H. 18. G. 2. in the court of chancery, the depoſitions of ſeveral perſons who were heathens of the *Gentou* religion, ſworn after their own country manner, were admitted to be read. 2 *Eq. Cas. Abr.* 397. 1 *Atk.* 21.

Concerning the offences of profane curſing and ſwearing, ſee title *Swearing.*

III.

III. *What solemnities may be used instead of oaths.*

By *V. l.* (17 *R. Cond.* 1792. *ch.* 57. § 8) *p.* 62. 'Any per-'son refusing to take an oath,' &c. (here insert the above section)

ORDINARIES.

THE mode of licensing, the qualifications, and regulations of Ordinary-keepers are pointed out by *V. l.*)17 *R. Cond.* 1792. *ch.* 107)) page 211, of the Revised Code.—But as the several persons interested in a knowledge of that law, can easily refer to the act itself. I shall only add precedents, for the cases under it which are cognizable by a single justice of the peace.

Warrant for taking more than the legal rates, on sect. 3.

county to wit.

Whereas complaint is this day made to me J P, *a justice of the peace for this county, by* A J, *that on the day of last past,* A O, *of an ordinary keeper in this county did demand and take from him the said* A J, *a greater price for drink, diet &c.* (as the case may be) *than is allowed by the rates established by the court of this county: These are therefore to require you to summon the said* A O, *to appear before me, or some other justice of the peace for this county, to shew cause why the penalty of twelve dollars should not be levied upon him for the said offence according to law. Given &c.*

By the 7th section of the above recited law, 'Every justice 'of the peace is required and strictly enjoined to cause this act 'to be put in strict execution within his county.'

'And if any justice either from information, his own 'knowledge, or other just cause, shall suspect any person of 'keeping a tipling house, or retailing liquors, as aforesaid, he 'is hereby empowered, and, required to summon such person to 'appear before him, together with such witnesses as he may 'judge necessary; and upon the persons appearing, or failing to 'appear, if the justice, upon examining the witnesses upon oath, 'shall find sufficient cause, he may, and is hereby required to 'direct the attorney for the commonwealth in such county to in-'stitute a prosecution against such person on the public behalf, 'which such attorney is hereby required to institute accordingly.

And

'And such justice may also cause the person so suspected, to give 'bond with two sufficient securities, for his or her good behavi-'our, for the term of one year, the principal in the sum of one 'hundred and fifty dollars, and the securities in the sum of se-'venty five dollars each; and upon failing to give such 'bond and security within three days, after being thereto re-'quired, such person may be committed to the jail of the county, 'there to remain until he or she shall give bond and security ac-'cordingly, and if such person shall afterwards during the said 'term, keep a tipling house, or retail liquors as aforesaid, the 'same shall be, and is hereby declared a breach of good behavi-'our, and of the condition of such bond.'

(A) Summons to bring a person, suspected of keeping a tipling house, or retailing spirituous liquors without license, before a magistrate.

to wit.

Whereas I have just cause to suspect, from my own knowledge (or from the information of A J,) *that* A O, *of this county doth keep a tipling house (or doth retail spirituous liquors without license, first had and obtained, as required by law:) These are therefore to require you, in the name of the commonwealth, to summon the said* A O, *to appear before me at on the day of next, to answer the premises, and further to be dealt with according to law. And summon also* A W, B W, *&c. to appear as witnesses, on behalf of the commonwealth in this case, at the time and place above mentioned. Given under my hand and seal &c.*

To constable.

(B) Recognizance.

(The recognizance may be in the form (*A*) under title 'Recognizance,' the principal in 150 dollars, and the securities in 75 dollars each) with the following condition.

The condition of this recognizance is such, that whereas the above bound A O, *hath been duly convicted before* J P, *one of the commonwealth's justices of the peace for the county of for keeping a tipling house (or retailing spirituous liquors without license) within the said county, within months last past, contrary to the act of the General Assembly in that case made and provided. Now if the said* A O, *shall be of good behaviour for and during the term of one year, next ensuing the date hereof, then the above recognizance to be void, else to remain in full force.*

(C)

(C) Mittimus for want of ſureties.

to wit.

To constable, and to the keeper of the jail in the said county.

Whereas on the day of last past, A O, *of this county labourer, was duly convicted before me* J P, *one of the commonwealth's juſtices of the peace for the ſaid county, by the oaths of* A W, B W, *&c. of keeping a tipling houſe (or retailing ſpirituous liquors without licenſe) within the county aforeſaid, within months laſt paſt, contrary to the act of the General Aſſembly in that caſe made and provided; and the ſaid* A O, *having failed, within three days after the date of the conviction aforeſaid, to enter into a recognizance with two ſufficient ſecurities, himſelf in the ſum of one hundred and fifty dollars, and his ſecurities in the ſum of ſeventy-five dollars each, for the ſaid* A O, *being of the good behaviour for the term of one year, thence next enſuing; and the ſaid* A O, *now before me having refuſed to find ſuch ſecurities: Theſe are therefore, in the name of the commonwealth to command you the ſaid conſtable forthwith to convey the ſaid* A O, *to the jail of this county, and to deliver him to the keeper there together with this precept: And I do, in the name of the ſaid commonwealth, hereby command you the ſaid keeper to receive the ſaid* A O, *into your cuſtody, in the ſaid jail, and him there ſafely to keep, until he ſhall find ſuch ſecurities as aforeſaid. Given under my hand and ſeal &c.*

(D) Directions to the attorney for the commonwealth, to inſtitute a proſecution, againſt the keeper of a tipling houſe, or a retailer of liquors without licenſe.

to wit.

Whereas upon the examination of A W, B W, *&c. this day taken upon oath before me* J P, *one of the commonwealth's juſtices of the peace for this county, it appears to me that* A O, *of the county of aforeſaid, is guilty of keeping a tipling houſe (or of retailing ſpirituous liquors without licenſe:) Theſe are therefore in the name of the commonwealth, and by virtue of the powers to me given, by the ſeventh ſection of the act of the General Aſſembly entitled, 'An act for regulating ordinaries, and reſtraint of tipling 'houſes,' to require you to inſtitute a proſecution againſt the ſaid* A O, *on the public behalf. Given &c.*

To A A, Eſq. attorney for the commonwealth, in the county of

Orphans. (*See* APPRENTICES.)
Overſeers of the poor. (*See* POOR.)

A PARDON is a work of mercy, whereby the executive either before the attainder, ſentence, or conviction, or after, forgiveth any crime, offence, puniſhment, execution, right, title, debt, or duty, temporal or eccleſiaſtical. 3 *Inſt.* 233.

Pardons are either *general* or *ſpecial*: General, are by act of Aſſembly; of which, if they are without exceptions the court muſt take notice *ex officio*; but if there are exceptions therein, the party muſt aver that he is none of the perſons excepted. 3 *Inſt.* 233. *Hale's Pl.* 252.

Special pardons, are either *of courſe*, as to perſons convicted of manſlaughter, or *ſe defendendo*, and by divers ſtatutes to thoſe who ſhall diſcover their accomplices in ſeveral felonies; or, of grace, which are by the executive's charter, of which the court cannot take notice *ex officio*, but they muſt be pleaded. 3 *Inſt.* 233.

The executive cannot pardon an offence before it is committed; but ſuch pardon is void. 2 *Haw.* 389.

As the releaſe of the party will not bar an indictment at the ſuit of the commonwealth; ſo neither will a pardon by the executive be any bar to an appeal at the ſuit of the party. 2 *Haw.* 392.

And in ſome caſes even where the commonwealth is ſole party, ſome things there are which it cannot pardon; as for example, for all common nuiſances, as for not repairing of bridges or highways, the ſuit (for avoiding multiplicity of ſuits) is given to the commonwealth only, for redreſs and reformation thereof; but the executive cannot pardon or diſcharge either the nuiſance, or the ſuit for the ſame, becauſe ſuch pardon would take away the only means of compelling a redreſs of it. But it hath been holden by ſome, that a pardon of ſuch an offence will ſave the party from any fine, for the time precedent to the crime. 3 *Inſt.* 237. 2 *Haw.* 391.

Thus alſo, if one be bound by recognizance to the governor, to keep the peace againſt another by name, and generally all other citizens of the commonwealth; in this caſe, before the peace be broken, the governor cannot diſcharge or releaſe the recognizance, altho' it be made only to him, becauſe it is for the benefit and ſafety of the citizens generally. 3 *Inſt.* 238.

Likewiſe, after an action popular is brought, *as well for the commonwealth as for the informer*, according to any ſtatute; the commonwealth can but diſcharge its own part, and cannot diſcharge the informer's part; becauſe by bringing of the action, the informer hath an intereſt therein: but before the action brought, the executive may diſcharge the whole (unleſs it be provided to the contrary by the act) becauſe the informer cannot bring an action or information originally for his part only, but

muſt

muſt purſue the ſtatute. And if the action be given to the *party grieved*, the executive cannot diſcharge the ſame. 3 *Inſt.* 231.

It ſeems to be ſettled at this day, that the pardon of treaſon or felony, even after a conviction or attainder, doth ſo far clear the party from the infamy and all other conſequences of his crime, that he may not only have an action for a ſcandal, in calling him traitor or felon, after the time of the pardon, but may alſo be a good witneſs, notwithſtanding the attainder or conviction, becauſe the pardon as it were makes him a new man, and gives him a new capacity and credit. 2 *Haw.* 395. 4 *Blacks Com.* 395.

But it ſeems to be the better opinion, that the pardon of a conviction of *perjury*, doth not ſo reſtore the party to his credit, as to make him a good witneſs; becauſe it would be an injury to the people in general, to make them ſubject to ſuch a perſons teſtimony. 1 *Vent.* 349.

And by the laws of this commonwealth, a perſon convicted of perjury is forever diſabled from being a witneſs. *See title 'Evidence.'*

After a criminal has been burnt in the hand, the puniſhment operates as a pardon, and he becomes a good witneſs. *Raym.* 370. *See V. 1. p.* 288.

A pardon may be conditional, on the performance of which, the validity of the pardon will depend. 4 *Blacks Com.* 394.

Every pardon ought to mention the offence particularly. 2 *Hawk.* 383.

No pardon of felony ſhall be carried further than the expreſs purport of it. 2 *Hawk.* 383.

No pardon can operate ſo as to bar any right, whether of entry or action, or any legal intereſt, benefit, or advantage whatſoever, before veſted in the citizen. 2 *Hawk.* 392.

PARTITION.

By *V. 1.* (11 *R. Cond.* 1786. *ch.* 24. § 7.) *p.* 35, *of the Reviſed Code.* 'The under ſheriff, when the high-ſheriff cannot conveniently attend, may in preſence of two juſtices of the peace, proceed to the execution of a judgment in partition, by inquiſition in due form of law, and the high ſheriff ſhall make the ſame return, as if he had acted in perſon.'

For other matters reſpecting partitions, and joint rights and obligations, ſee the above law.

Peace. (*See* SURETY FOR THE PEACE)

Perjury

I. Of perjury and subornation by the common law.
II. Of perjury and subornation by the act of assembly.
III. Of matters common to them both.

I. Of perjury and subornation by the common law.

PERJURY by the common law seemeth to be *a wilful false oath by one who being lawfully required to depose the truth in any judicial proceeding, swears absolutely, in a matter material to the point in question, whether he be believed or not.* 1 *Haw.* 172. 3 *Inst.* 164.

Wilful] The false oath alledged against him should be proved to be taken with some degree of deliberation; for if upon the whole circumstances of the case it shall appear probable that it was owing rather to the weakness than perverseness of the party, as where it was occasioned by surprize, or inadvertency, or a mistake of the true state of the question, it cannot but be hard to make it amount to voluntary and corrupt perjury. 1 *Haw.* 172.

False] It is said not to be material, whether the fact which was sworn, be in itself true or false; for however the thing sworn may happen to prove agreeable to the truth, yet if it were not known to be so by him who swears to it, his offence is altogether as great as if it had been false, inasmuch as he wilfully swears that he knows a thing to be true, which at the same time he knows nothing of, and impudently endeavours to induce those before whom he swears, to proceed upon the credit of a deposition, which any stranger might make as well as he. 1 *Haw.* 175.

Being lawfully required] It seemeth clear, that no oaths whatsoever, taken before persons acting merely in a private capacity; or before those who take upon them to administer oaths of a public nature, without legal authority; or before those who are legally authorized to administer some kinds of oaths, but not those which happen to be taken before them; or even before those who take upon them to administer justice by virtue of an authority seemingly colourable, but in truth unwarranted and merely void, can amount to perjuries, but are altogether idle and of no force. 1 *Haw.* 174.

In any judicial proceeding] For tho' an oath be given by him who hath lawful authority, and the same is broken, yet if it be not in a judicial proceeding, it is not perjury, because such oaths are general and extrajudicial; but it serves for aggravation of the offence. Such are, general oaths given to officers and ministers of justice, the oath of fealty and allegiance, and such like.

Thus

Thus if an officer commit extortion, it is againſt his general oath, but yet not perjury, becauſe not in a judicial proceeding, but when he is charged with extortion, the breach of his oath may ſerve for aggravation. 3 *Inſt.* 166.

If a perſon calleth another *perjured* man, he may have his action upon his caſe, becauſe it muſt be intended contrary to his oath in a judicial proceeding, but for calling him a forſworn man, no action doth lie, becauſe the forſwearing may be extra-judicial. 3 *Inſt.* 166.

Swears abſolutely] For the depoſition muſt be direct and abſolute; and not, as he thinketh, or remembereth, or believeth, or the like. 3 *Inſt.* 166.

In a matter material to the point in queſtion] For if it be not material, then tho' it be falſe, yet it is no perjury, becauſe it concerneth not the point in iſſue, and therefore in effect it is extrajudicial. 3 *Inſt.* 167.

But it is not neceſſary that it appear to *what degree*, the point in which a man is perjured, was material to the iſſue; for if it is but circumſtantially material, it will be perjury. *L. Raym.* 258.

Much leſs is it neceſſary that the evidence for the plaintiff to recover upon, for in the nature of the thing, an evidence may be very material, and yet it may not be full enough to prove directly the point in queſtion. *L. Laym.* 889.

Whether he be believed or not] It hath been holden, not to be material upon an indictment of perjury at common law, whether the falſe oath were at all credited, or whether the party in whoſe prejudice it was intended, were in the event any way aggrieved by it or not; inſomuch as this is not a proſecution grounded on the damage of the party, but on the abuſe of public juſtice. 1 *Haw.* 177.

Subornation of perjury, by the common law, ſeems to be *an offence, in procuring a man to take a falſe oath, amounting to perjury, who actually taketh ſuch oath.* 1 *Haw.* 177.

But it ſeemeth clear, that if the perſon incited to take ſuch an oath, do not actually take it, the perſon by whom he was incited is not guilty of ſubornation of perjury; yet it is certain, that he is liable to be puniſhed, not only by fine but alſo by infamous corporal puniſhment. *id.*

Mr. *Hawkins* ſays, it hath been of late ſettled, that juſtices of the peace have no juriſdiction over perjury at the common law; the principal reaſon of which reſolution, he ſays, as he apprehended, was, that inaſmuch as the chief end of the inſtitution of the office of theſe juſtices was, for the preſervation of the peace againſt perſonal wrongs and open violence, and the word *treſpaſs* (in the commiſſion) in its moſt proper and natural ſenſe,

is taken for ſuch kind of injuries, it ſhall be underſtood in that ſenſe only, or at the moſt to extend to ſuch other offences only, as have a direct and immediate tendency to cauſe ſuch breaches of the peace: as libels and ſuch like, which on this account have been adjudged indictable before juſtices of the peace. 2 *Haw.* 40.

And in the caſe of K. and *Bainton.* E. 11 G. 2. An indictment at the quarter ſeſſions for perjury at the common law, was quaſhed for want of juriſdiction; and was ſaid to have been done ſo about three years before, in the caſe of K, and *Weſtineſs. Str.* 1088.

II. Of perjury and ſubornation by the act of Aſſembly.

By *V. l.* (14 *R. Cond.* 1789. *ch.* 48. § 1, 2.) *p.* 51. it is enacted, 'That all and every perſon or perſons &c.'
(here inſert ſections 1 & 2 of the above law.

The following determinations have been made on ſtatutes of England nearly ſimilar to our act of Aſſembly.

Any witneſs] If the defendant perjureth himſelf in his anſwer, in the chancery, or the like, he is not puniſhable by this ſtatute; for it extendeth but to witneſſes. 3 *Inſt.* 166.

But he is puniſhable for the ſame by indictment at the common law. *Bur. Mansf.* 1189.

By any writ, action, bill, complaint, or information] It hath been reſolved, that theſe words are to be extended to the latter clauſe concerning perjury, as well as to this concerning ſubornation; becauſe it cannot well be intended, that the makers of the act, who inflict a greater penalty on ſubornation of perjury, than on the perjury itſelf, ſhould mean to extend the purview of the law in relation to what they eſteemed the leſſer crime, farther than in relation to that which they eſteemed the greater. 1 *Haw.* 179. 5 *Co.* 99.

It hath been ſaid, that he who ſwears a thing which is true, but not known by him to be ſo, is not within this ſtatute; becauſe howſoever heinous his offence may be in its own nature, yet when it proves in the event to be in maintenance of the truth, it cannot be ſaid to give him a juſt cauſe of complaint, who would take advantage againſt another from his want of legal evidence to make out the juſtice of his cauſe. Alſo from the ſame ground it ſeemeth clearly to follow, that no falſe oath can be within the ſtatute, unleſs the party againſt whom it was ſworn ſuffered ſome kind of diſadvantage by it; for otherwiſe it cannot be ſaid, that any one was grieved by it. And therefore that in every proſecution upon this ſtatute, it muſt appear upon the trial,

that there was ſuch a ſuit depending, wherein the party might be prejudiced in the manner ſuppoſed. 1 *Haw.* 181.

Either by ſubornation or otherwiſe] It is not neceſſary to ſet forth in the indictment, whether the party took the falſe oath thro' the ſubornation of another, or without any ſuch ſubornation, theſe words being only ſuperfluity. 1 *Haw.* 179.

Wilfully and corruptly] Theſe words are neceſſary in an indictment or action on this ſtatute, and cannot be ſupplied by adding *againſt the form of the ſtatute*, or by concluding *and ſo a wilful and corrupt perjury did commit.* 1 *Haw.* 178.

But becauſe the proſecution upon this ſtatute is more difficult than by indictment at the common law, offenders are ſeldom proſecuted upon this ſtatute, eſpecially at the ſeſſions; and it ſeems generally the ſafer way to proceed by indictment at the common law.

A perſon may commit perjury in giving falſe teſtimony before commiſſioners for taking depoſitions on a conteſted election. *V. l. p.* 24.

III. Of matters common to them both.

The court generally will not quaſh an indictment for a crime of ſo enormous a nature as perjury, for inſufficiency in the caption or body of it, but will oblige the defendant either to plead or demur to it. 2 *Haw.* 258.

To convict a man of perjury, a probable evidence is not enough; but it muſt be a ſtrong and clear evidence, and the witneſſes muſt be more numerous than thoſe on the ſide of the defendant, for otherwiſe it is only oath againſt oath. 10 *Mod.* 194.

And the party prejudiced by the perjury, ſhall not be admitted to prove the perjury. *L. Raym.* 396.

It ſeems that the court will not ordinarily at the prayer of the defendant grant a certiorari for the removal of an indictment of perjury; for ſuch a crime deſerves all poſſible diſcountenance, and the certiorari might delay, if not wholly diſcourage the proſecution. 2 *Haw.* 287.

The puniſhment of ſlaves &c. for perjury may be ſeen under title '*Slaves.*'

Indictment for perjury by a woman before a juſtice in ſwearing a baſtard child to an innocent perſon.

county to wit.

The jurors for the commonwealth upon their oath preſent,

That *Sarah*, the wife of J C, late of the parish of in the said county of yeoman, being a wicked and evil disposed person, on the day of in the year of the commonwealth, at the parish aforesaid, in the county aforesaid, came in her own proper person before J H, esq. then being one of the justices of the peace of the said commonwealth, assigned to keep the peace of the said commonwealth, within the said county of and also to hear and determine divers felonies, trespasses and other misdemeanors in the said county committed; and did then, and there, before the said justice, charge one P L, of the parish aforesaid, grocer, with having lately before that time, and whilst she the said S, was sole and unmarried, begotten upon the body of her the said S, a certain male child, which was afterwards born alive of the body of her the said S, a bastard. And the jurors aforesaid upon their oath aforesaid, do further present, That the said child, by the laws of this commonwealth, was born a bastard, and that she the said S, was then and there before the said justice duly sworn, and did take her corporal oath upon the holy gospel of God concerning the said premises (the said justice, then and there having sufficient and competent power and authority to administer the said oath to the said S;) and that the said S, being so sworn as aforesaid, not having the fear of God before her eyes, but being moved and seduced by the instigation of the devil, and wickedly and maliciously devising and intending falsely and unjustly to charge and burthen the said P L, with the maintenance and support of the said bastard child, and not only to draw him into great charges and expence of his monies, but also to bring him into great scandal, infamy, and disgrace as a lewd and unchaste person, then and there, upon her oath aforesaid, in a certain examination before the said justice, taken in writing in that behalf, did falsely, maliciously, wilfully, wickedly, and corruptly say, depose, and swear (amongst other things) in substance, and to the effect following, that is to say, that on the day of last (meaning the day of in the year aforesaid,) when she (meaning herself the said S,) was a single woman, P L, (meaning the said) had &c. (*here set out so much of the examination as can be proved to be false*;) and so the jurors aforesaid, upon their oath aforesaid do say, That the said S, on the said day of in the year aforesaid, at the parish aforesaid, in the county aforesaid, before the said J K, the justice aforesaid (so as aforesaid having sufficient and competent power and authority to administer the said oath to the said S) falsely, maliciously, wickedly, wilfully, and corruptly, in manner and form aforesaid, did commit wilful and corrupt perjury, to the great displeasure of Al-

mighty

mighty God, to the great damage of the ſaid P L, to the evil and pernicious example of all others in the like caſe offending, and againſt the peace and dignity of the commonwealth.

PILLORY.

PILLORY is derived from *pilatere* a pillar; becauſe it is a wooden pillar wherein the neck of the offender is put and preſſed; a puniſhment inflicted on perſons guilty of forgery, perjury, cheating by means of ſome artful device, and by ſeveral acts of Aſſembly on other offenders therein particularly mentioned. 3 *Inſt.* 88.

This kind of puniſhment is very ancient, having been in uſe among the *Saxons*, and is held ſo infamous, that lord *Coke* ſays, thoſe who have been adjudged to ſuffer it are not to be received as witneſſes, or jurors; for which reaſon he adviſes juſtices of the peace to be well adviſed before they adjudge any perſon to the pillory, and to have good warrant for their judgment. Fine and impriſonment, for offences finable by them he recommends as a fair and ſure way. 3 *Inſt.* 219.

Pitch (*See* PITCH, &c.

Plague. (*See* QUARANTINE)

Polygamy. (*See* BIGAMY.)

Poiſon. (*See* HOMICIDE.)

POOR.

THE act making proviſion for the ſupport of the poor, being now collected in the Reviſed Code, and of conſiderable length, I ſhall refer to the law itſelf for ſuch particular information, as any perſon intereſted may wiſh to derive;—and inſert ſuch precedents ariſing out of it as may be neceſſary for the ſeveral perſons concerned in its execution. *See V. L.* (17 *R. Cond.* 1792. *ch.* 102) page 189 of the *Reviſed Code.*

(A) Warrant of a juſtice to bring a perſon before him to be examined concerning his ſettlement on ſection 7.

To the conſtable of in the county of

county to wit.

Whereas complaint hath been made before me J P, *one of the commonwealth's*

commonwealth's juſtices of the peace for the ſaid county, by A O, *one of the overſeers of the poor of the county of aforeſaid, that* A P, *hath come to inhabit in the ſaid county, not having gained a legal ſettlement therein, and is likely to become chargeable to the ſaid county: Theſe are therefore to require you to bring the ſaid* A P, *before me to be examined concerning the place of his laſt legal ſettlement, and to be farther dealt with according to law. Given under my hand and ſeal the day of in the year and in the year of the commonwealth.*

It has been the conſtant practice in *England*, where the power of removal from one county to another is given, in caſe of the illegal ſettlement of a pauper, to ſummon the overſeers of the poor of the county, (to which it is propoſed to remove him) to appear, (or ſome of them) at a certain time and place, to conteſt the propriety of the order.

This is not only conſonant to the principles of natural juſtice, which will not ſuffer any party to be condemned unheard, but if ſtrictly attended to might prevent an application to the county court, who are now authoriſed to determine on the legality of the pauper's reſidence. *See Burn's Juſt.* 3 *Vol. p.* 530.

Summons to ſhew cauſe againſt an order of removal.

county to wit.

To the overſeers of the poor of diſtrict, in the county of and to every of them.

This is to ſummon you, or ſome of you to appear (if you ſhall think proper) before or ſome other juſtice of the peace for the ſaid county of at the houſe of in the ſaid county of on the day of at the hour of in the afternoon of the ſame day, to ſhew cauſe why A P, ſhould not be removed from diſtrict in the county of to your diſtrict in the ſaid county of Given under my hand and ſeal, this day of in the year .

(B) Form of an order of removal.

county to wit.

To the overſeers of the poor of diſtrict in the ſaid county, and to the overſeers of the poor of diſtrict in the county of and to each and every of them.

Whereas complaint hath been made by A O, *one of the overſeers of the poor of diſtrict in the county of aforeſaid, before me* J P, *a juſtice of the peace, in and for the ſaid county of that* A P,

A P, *a poor perſon hath come to inhabit in diſtrict in the ſaid county of not having gained a legal ſettlement there, and that the ſaid* A P, *is likely to become chargeable to the ſaid county of : and forasmuch as, upon due proof made thereof, as well upon the examination of the ſaid* A P, *upon oath, as otherwiſe, and likewiſe upon due conſideration had of the premiſes, I do adjudge the ſaid complaint to be true, and do likewiſe adjudge that the laſt legal ſettlement of the ſaid* A P, *was in diſtrict, in the ſaid county of Therefore, I hereby require you, the ſaid overſeers of the poor of this ſaid county of or ſome, or one of you, to convey the ſaid* A P, *from and out of the ſaid diſtrict, in this ſaid county of to the ſaid diſtrict, in the ſaid county of and him to deliver to the overſeers of the poor there, or to ſome or one of them together with this order, or elſe a true copy thereof, ſhewing to them at the ſame time the original: And I do alſo hereby require you the ſaid overſeers of the poor, of the ſaid diſtrict, in the ſaid county of to receive and provide for him as an inhabitant of your ſaid county. Given under my hand and ſeal &c.*

See the form of an order of removal in 3 *Burn's Juſtice* page 531 *&c.* where the form is ſettled from various adjudications made on exceptions taken to the different parts of orders.

(C) Warrant againſt an overſeer of the poor for failing to attend at an annual meeting on § 20.

county to wit.

Whereas complaint hath been made to me J P, *a juſtice of the peace for the ſaid county, by* A J, *that* A O, *an overſeer of the poor for diſtrict in the county aforeſaid, did fail to attend at an annual meeting of the overſeers of the poor for the ſaid county of held at in and for the ſaid county of on the day of laſt paſt, having no reaſonable excuſe for the ſame: Theſe are therefore to require you to ſummon the ſaid* A O, *to appear before me or ſome other juſtice of the peace for the ſaid county of to ſhew cauſe why the penalty of two dollars for each day he ſo failed to attend, ſhould not be levied upon him for his ſaid offence, according to law. Given &c.*

To conſtable.

(D) Order of two magiſtrates of a corporate town, for the removal of a poor perſon into the county, *on ſection* 27.

Corporation of to wit. *Upon*

Upon complaint this day made to us J P, & K P, *two of the magiſtrates for the corporation aforeſaid, by* A J, *of the ſaid corporation, that* A P, *a poor perſon, hath come to inhabit in the ſaid corporation, not having gained a legal ſettlement there, nor been reſident within the limits of the ſaid town, for one year laſt paſt, and that the ſaid* A P, *is likely to become chargeable to the ſaid corporation; We the ſaid magiſtrates upon due proof made thereof, as well upon the examination of the ſaid* A P, *upon oath, as otherwiſe, and likewiſe upon due conſideration had of the premiſes, do adjudge the ſame to be true; and we do likewiſe adjudge, that the lawful ſettlement of him the ſaid* A P, *is in the diſtrict of in the county of : We do therefore require you, to convey the ſaid* A P, *from and out of the ſaid corporation of to the ſaid diſtrict in the ſaid county of and him to deliver to the overſeers of the poor there, or to ſome or one of them, together with this our order, or a true copy thereof, at the ſame time ſhewing to them the original: And we do alſo hereby require you the ſaid overſeers of the poor of the ſaid diſtrict in the ſaid county of to receive and provide for him as an inhabitant of your diſtrict in the ſaid county of . Given under our hands and ſeals &c.*

To to execute.—And to the overſeers of the poor of diſtrict in the county of and to each and every of them.

(E) Order of two overſeers of the poor, to remove a poor perſon, from the country into a corporate town.

county to wit.

Whereas complaint hath this day been made to us A O, & B O, *two of the overſeers of the poor in and for the county aforeſaid, by* A J, *that* A P, *a poor perſon hath come to inhabit in the ſaid county of not having gained a legal ſettlement there, and that the ſaid* A P, *is likely to become chargeable to the diſtrict of in the ſaid county of : We the ſaid overſeers of the poor upon due proof made thereof, as well upon the examination of the ſaid* A P, *upon oath, as otherwiſe, and likewiſe upon due conſideration had of the premiſes, do adjudge the ſame to be true; and we do likewiſe adjudge that the lawful ſettlement of the ſaid* A P, *is within the corporation of it appearing to us from due proof, that the reſidence of the ſaid* A P, *for one year laſt paſt, was within the limits of the ſaid corporation of : We do therefore require you, to convey the ſaid* A P, *from and out of the ſaid diſtrict, in the ſaid county of to the ſaid corporation of and him to deliver to the magiſtrates of the ſaid corporation of there, or*

to

to ſome or one of them, together with this our order, or a true copy thereof, at the ſame time ſhewing to them the original: And we do alſo hereby require you the magiſtrates of the ſaid corporation to receive and provide for him as an inhabitant of your ſaid corporation. Given under our hands and ſeals the day of in the year and in the year of the commonwealth.

To to execute. And to the magiſtrates of the corporation of .

Note;—in all caſes where a man, his wife, and children are removed; or wherever a parent, and a child or children are removed, the age, and ſexes of the children, muſt be particularly mentioned, as well as the *names* of the parents and children, if known; if not, *deſcribe them as perſons of ſuch ages, and ſexes, whoſe names are unknown.* See various inſtances in 3 *Burn's Juſtice* 536 &c. where orders have been quaſhed for ſuch omiſſions.

The acts which will conſtitute a legal ſettlement in this ſtate being but few indeed in compariſon to thoſe of England, much of the doctrine relating to the poor laws which has employed the attention of ſo many writers in that country, is uſeleſs in this commonwealth. For by *V. l.* (17 *R. Cond.* 1792. *ch.* 102. § 35) page 195. 'No perſon ſhall be accounted an inhabitant ſo 'as to have gained a legal ſettlement, until ſuch perſon ſhall 'have been actually reſident, in the county wherein he ſhall 'claim a legal ſettlement for the ſpace of one whole year.'

Mr. Starke (*Virginia Juſtice p.* 278) ſeems to think that a ſettlement may alſo be acquired by birth and marriage, altho' not mentioned in the act of Aſſembly.—*See* 3 *Burn. Juſt.* 360. 455.

By the 8th ſection of the above law. 'Where any diſpute 'ſhall ariſe reſpecting the reſidence of any poor perſons, the 'court of any county adjacent, is authoriſed to take cognizance 'thereof, and to determine the ſame.'

The eaſe with which all the neceſſaries of life may be acquired in this ſtate, the high price of labour, together with the native independence of its citizens, prevents an application to the overſeers of the poor for relief, while there is a poſſibility of ſupporting human nature without it. Our proportion of poor then, to be provided for by the county, is ſmall; and conſequently few, or perhaps no adjudications have yet been made on the ſubject of removals. But ſhould the increaſe of the poor at ſome future day, when our country becomes more populous, be ſo great as to make it an object with the ſeveral counties charged with their ſupport, to compel them to remain in their proper ſettlements, it will be found neceſſary to recur to the various

adjudications

adjudications which have been made in England on similar points. These will be found very judiciously arranged in doctor *Burn's Justice*, title 'Poor,' to which I must at present refer.

Other matters relating to poor children will be found under titles '*Apprentices*,' & '*Bastards*.'

PORK, BEEF, TAR, PITCH AND TURPENTINE.

SEE *Virginia laws*, *chap.* 128. *page* 252. of the *Revised Code*; where all the acts of Assembly on this subject are collected.

(A) Warrant against an inspector on sect. 1.

county to wit.

To *constable of the said county.*

Whereas complaint and information hath this day been made to me J P, a justice of the peace for this county, by A J, upon oath, that L J, inspector of pork, beef, tar &c. within the said county, did on the day of last (*or of this instant*) stamp, or brand barrels of pork, the property of A M, of with the letter L, denoting large, which said barrels did contain small pork, (*or barrels of pork or beef, containing less than two hundred and four pounds nett*,—or of *dirty unsound meat* &c. as the case may be)—*or if for breach of duty against any other part of the said act, describe the offence*) contrary to the act of the General Assembly in that case made and provided: These are therefore in the name of the commonwealth to require you to cause the said L J, to come before me or some other justice of the peace for this county, to answer the said complaint. And have then there this warrant, with your return of the execution of the same. Given &c.

JUDGMENT.

Upon hearing the within complaint, it being duly proved before me that the within named L I, is guilty, and did &c. (*according to the warrant*) whereby he hath incurred the forfeiture of (*four dollars for each barrel so stamped, or branded &c.*) *if for tar, pitch or turpentine, the penalty is one dollar for each barrel marked &c. contrary to law*) it is therefore considered that the within named A I, recover against the said L I, dollars, being

being the amount of the forfeiture for barrels, together with his coſts in this behalf expended. Given under my hand at &c.

Coſts cents.

Note;—That where the penalties on ſeveral barrels amount to more than five dollars, (the extent of a ſingle magiſtrate's juriſdiction) the ſame may, nevertheleſs, be recovered before a ſingle magiſtrate, and execution awarded for the amount. *See* § 4.

Execution for the penalty.

county to wit.

To conſtable, for the ſaid county.

Whereas it was this day duly proved before me J P, one of the commonwealth's juſtices of the peace for the ſaid county, upon the complaint of A J, that L J, inſpector of pork &c. within the ſaid county, did &c. (*according to the complaint*) contrary to the act of the General Aſſembly in that caſe made and provided, whereby he hath forfeited the ſum of together with cents for his coſts, to the ſaid A J, for his own uſe: Therefore I command you forthwith to levy the ſame by diſtreſs and ſale of the ſaid L J's, goods and chattels, rendering him the overplus if any; and that you pay the ſaid ſum of together with the coſts aforeſaid, to the ſaid A J, and make return how you have executed this warrant. Given under my hand and ſeal &c.

Inſpector's Certificate.

(Under the brand &c. of the ſeveral caſks, on the ſame piece of paper, write,)

county to wit.

I do hereby certify that barrels of &c. (*deſcribe the kind*) marked and branded as above, is &c. (*give then the qualities required by the act*) Given under my hand &c. at on the day &c.

(B) Warrant againſt the ſeller of pork, tar &c. on ſection 4.

Whereas &c (*as in the firſt warrant*) that A M, of in the county of on the day of did ſell to (*or barter with*) N J, of , barrels of pork, (*beef tar &c. as the caſe may be*) containing only pounds (*or gallons*) each, (*or not branded or inſpected, as the caſe may be*) contrary to the a t of

of the General Aſſembly in that caſe made and provided: Theſe are &c.

The judgment and proceedings as under the firſt warrant.

If the defendant prays an appeal, the juſtice ſhould take his bond, with ſecurity, in double the ſum recovered, payable to the plaintiff, and with the following condition:

The condition of the above obligation is ſuch, that whereas the above named A J, hath obtained judgment, upon warrant, before me J P, one of the commonwealth's juſtices of the peace for the county of againſt the above bound L J, for being the amount of the forfeiture, for barrels of pork &c. ſold to or bartered with N J, of the ſaid county, (*or not inſpected according to law, as the caſe may be*) from which judgment the ſaid L J, hath prayed an appeal to the next court to be held for the ſaid county of : Now if the ſaid L J, ſhall proſecute the ſaid appeal with effect, and perform the court's order and judgment therein, then this obligation to be void, elſe to remain in full force and virtue.

The form of making up a record may be ſeen under title '*Gaming*.'

(C) The oath of a ſeller or exporter of pork, beef, tar, pitch or turpentine.

You ſhall ſwear, that the pork &c. contained in barrels marked and numbered as above, and by you ſold and delivered to A M, of (*or by you delivered out to be exported to*) is the identical pork &c. which was inſpected and paſſed by the inſpector legally appointed, who marked and branded the ſame as above; and that each barrel doth contain the full quantity, without embezzlement, or alteration to your knowledge. So help you God.

The warrant againſt a cooper for making his barrels contrary to the direction of the 7th ſection of the law, as well as for neglecting to ſtamp or brand his name, at full length, on each barrel, may eaſily be formed from the firſt warrant under this title.

Poſſe Comitatus. (*See* ARREST.)

Preſentment

A PRESENTMENT, *generally* taken, is a very comprehenſive term; including not only preſentments properly ſo called but alſo inquiſitions of office and indictments by a grand jury. A preſentment *properly* ſpeaking, is the notice taken by the grand jury, of any offence from their own knowledge or obſervation, without any bill of indictment laid before them at the ſuit of the commonwealth. As, the preſentment of a nuiſance, a libel and the like; upon which the officer of the court muſt afterwards frame an indictment before the party preſented can be put to anſwer it. An *inquiſition* of office is the act of a jury ſummoned by the proper officer to inquire of matters relating to the commonwealth, upon evidence laid before them. Some of theſe are in themſelves convictions, and cannot afterwards be traverſed or denied; and therefore the inqueſt, or jury ought to hear all that can be alledged on both ſides. Of this nature are all inquiſitions of *felo de ſe*, of flights of perſons accuſed of felony &c. Other inquiſitions may be afterwards traverſed and examined; as particularly the coroner's inquiſition of the death of a man, when it finds any one guilty of homicide; for in ſuch caſes the offender ſo preſented muſt be arraigned upon this inquiſition, and may diſpute the truth of it; which brings it to a kind of indictment, the moſt uſual and effectual means of proſecution. 4 *Blacks Com.* 301.

PRISON BREAKING.

IT ſeemeth that at the common law all priſon breaches were felonies, if the party were lawfully, in cuſtody for any cauſe whatſoever. 2 *Haw.* 123.

But by the act of Aſſembly of 1794. ch. 7. § 2, it is declared, 'That none from henceforth who being in actual jail, 'breaketh priſon, ſhall have judgment of life or member for 'breaking of priſon only, except the cauſe for which he was ta-'ken and impriſoned, did require ſuch judgment, if he had been 'convicted thereupon according to the law of the land.'

If the priſon be broken by a ſtranger, and not by the priſoner, or by his procurement, this is no felony in the priſoner. *Hale's Pl.* 108.

It ſeems clear, that any place whatſoever, wherein a perſon under a lawful arreſt for a ſuppoſed crime is reſtrained of his liberty, whether in the ſtocks, or ſtreet, or in the common jail, or the houſe of a conſtable, or private perſon, is properly a priſon, for impriſonment is nothing elſe but a reſtraint of liberty. 2 *Haw.* 124.

And

And therefore this extendeth as well to a prison in law, as to a prison in deed. 2 *Inst.* 589.

But there must be an actual *breaking*; for if the door be open, and he goes out, it is not felony, but a misdemeanor only. 2 *Inst.* 589. 2 *Haw.* 125.

But if the prison be fired without the privity of the prisoner, he may lawfully break it to save his life. *Hale's Pl.* 108.

Also it seems that no breach of prison will amount to felony, unless the prisoner escape. 2 *Haw.* 125.

False imprisonment is not within this act. 2 *Inst.* 590.

Imprisonment is a restraint of a man's liberty under the custody of another, by lawful warrant, in deed, or in law. Lawful warrant is, either when the offence appeareth by matter of record, as when the party is taken upon an indictment, or when it doth not appear by matter of record, as when a felony is done, and the offender by a lawful *mittimus* is commi ted to a jail for the same: But between these two cases there is a great diver lity; for in the first case, whether any felony were committed or no, if the offender be taken by force of a *capias*, the warrant is lawful, and if he breaks prison it is felony, altho' no felony were committed; but in the other case, if no felony be done at all, and yet he is committed to prison for a supposed felony, and break prison, this is no felony, for there is no *cause*. 2 *Inst.* 590.

So, that the cause must be just and not feigned, for things feigned require no judgment: Thus if a man give another a mortal wound, for which he is committed to prison, and breaketh prison, and the other dieth of the wound within the year, this death hath relation to the stroke; but because relations are but fictions in law, and fictions are not here intended, this prison breaking is not felony. 2 *Inst.* 591.

So that the offence for which the party was imprisoned must be a capital one at the time of the offence, and not become such by a matter subsequent. 2 *Haw.* 126

And the cause must be expressed in the *mittimus*, altho' not so certainly as in an indictment, yet with such convenient certainty as it may appear judicially that the offence requireth such judgment; as, not for felony generally, but for felony in stealing such a horse, and the like. 2 *Inst.* 591.

But if the offence for which the party is committed be supposed in the *mittimus* to be of such a nature as requres a capital judgment, yet if in the event it be found to be of an inferior nature, and not to require such a judgment, it seems difficult to maintain, that the breaking of the prison, on a commitment for it, can be felony. 2 *Haw.* 126.

But

But if a man be committed by lawful warrant, for *ſuſpicion* of felony done, if he break priſon he may be indicted for that eſcape, albeit the commitment be for ſuſpicion of felony, and yet no judgment can be given againſt him for ſuſpicion, but for the felony itſelf, whereof he is ſuſpected. 2 *Inſt.* 592.

And an indictment that ſuch a perſon *feloniouſly broke the priſon* generally, is not good; but it ought to rehearſe the ſpecialty of the matter, that he being impriſoned for ſuch or ſuch a felony, broke the priſon. 2 *Inſt.* 591.

But if the party be only arreſted for, and in his *mittimus* charged with a crime which doth not require judgment of life or member, as petit larceny, or homicide by ſelf defence or by miſadventure, and the offence be in truth no greater than the *mittimus* doth ſuppoſe it to be, it is clear from the expreſs words of the ſtatute, that the breaking of the priſon cannot amount to felony. 2 *Haw.* 126.

But if a felony be made by a ſubſequent ſtatute, and an offender is committed thereupon; if he breaks priſon, it is felony. For ſince all breaches of priſon were felonies by the common law, which is reſtrained by this ſtatute in reſpect only of impriſonment for offences not capital: when an offence becomes capital, it is as much out of the benefit of the ſtatute, as if it had always been ſo. *Hale's Pl.* 108. 2 *Haw.* 126.

Alſo it is ſaid, that the party may be arraigned for priſon breaking, before he be convicted of the crime for which he was impriſoned: for that it is not material whether he were guilty of ſuch crime or not. 2 *Haw.* 127.

But if he is firſt indicted and acquitted of the principal felony, he ſhall not be indicted for the breach of priſon afterwards; for it being cleared that he was not guilty of the felony, he is in law as a perſon never committed for felony, and ſo his breach of priſon is no felony. 1 H. H. 612.

But the jailer ſhall not be puniſhed as a felon for the party's breach of priſon, unleſs he voluntarily conſented to it; but it ſeems to be a negligent eſcape in the jailer, by which he may be puniſhed by fine and impriſonment, becauſe there wanted either that due ſtrength in the jail, or that due vigilance in the jailer or his officers, that ſhould have prevented it; and if jailors might not be puniſhed for this as a negligent eſcape, they would be careleſs either to ſecure their priſoners or to retake them that eſcape. 1 H. H. 601.

And therefore if a criminal endeavouring to break the jail, aſſault his jailor, he may be lawfully killed by him in the affray. 1 *Haw.* 71.

Indictment

Indictment for breaking out of jail.

county to wit.

The jurors for the commonwealth upon their oath preſent, That A O, *late of in the county aforeſaid labourer, on the day of in the year of the commonwealth, at aforeſaid, in the county aforeſaid, was arreſted, impriſoned, and detained, in the jail of the commonwealth, for a certain felony by him committed, that is to ſay, for the felonious taking and carrying away one black gelding, the property of of the value of and that he the ſaid* A O, *on the day of in the year aforeſaid, with force and arms, the aforeſaid jail of the commonwealth, at aforeſaid, in the county aforeſaid, feloniouſly did break, and thereby did eſcape from and out of the ſaid jail, againſt the peace and dignity of the commonwealth.*

So much of priſon breaking as falls under the legal notion of an eſcape, both in *criminal* and *civil* caſes, will be found under title '*Eſcapes.*' It will therefore be ſufficient, in this place to refer to that title for precedents. See the act of Aſſembly in the *Reviſed Code*, chapter 79. as to eſcapes in *civil* caſes.

The magiſtrate ſhould always be particular in expreſſing the cauſe of commitment, prior to the eſcape.

Profaneneſs. (*See* SWEARING.)

Quakers. (*See* OATHS.)

QUARANTINE.

QUARANTINE is a ſpace of forty days: thus where the law ſays a widow ſhall remain in her huſband's capital manſion houſe forty days after his death, during which time her dower ſhall be aſſigned her, theſe forty days are called the widow's *quarantine*. So where perſon's coming from infected countries, are obliged to wait forty days, before they are permitted to land; this is called performing quarantine. 2 *Blacks Com.* 135.

The regulations preſcribed by the laws of this commonwealth for performing quarantine, containing nothing which relates particularly to the office of a ſingle magiſtrate, it will be ſufficient in this place to refer to the law itſelf. *See V. l.* (17 *R. Cond.* 1792. *ch.* 129.) *p.* 254, *of the Reviſed Code.*

I. *What it is.*
II. *Evidence on an indictment of rape.*
III. *Puniſhment of rape.*
IV. *Principal and acceſſary.*

I. What it is.

RAPE is an offence in having unlawful and carnal knowledge of a woman by force and againſt her will. But it is ſaid that no aſſault upon a woman in order to raviſh her, however ſhameleſs and outrageous it may be, if it proceed not to ſome degree of penetration, and alſo of emiſſion, can amount to a rape; however it is ſaid that emiſſion is *prima facie*, an evidence of penetration. 1 *Hawk.* 169.

The offence of rape is no way mitigated by ſhewing that the woman at laſt yielded to the violence, if ſuch her conſent was forced for fear of death, or of dureſs. 1 *Haw.* 108.

Alſo, it is not a ſufficient excuſe in the raviſher, to prove that the woman is a common ſtrumpet; for ſhe is ſtill under the protection of the law, and may not be forced. 1 *Haw.* 108.

Nor is it any excuſe that ſhe conſented after the fact. 1 *Haw.* 108.

It is ſaid by Mr. Dalton, that if a woman at the time of the ſuppoſed rape do conceive with child by the ſuppoſed raviſher, this is no rape, for (he ſays) a woman cannot conceive except ſhe doth conſent, and this he hath from Stamford and Britton, and Finch. *Dalt. c.* 160.

But Mr. Hawkins obſerves, that this opinion ſeems very queſtionable; not only becauſe the previous violence is no way extenuated by ſuch a ſubſequent conſent, but alſo becauſe if it were neceſſary to ſhew, that the woman did not conceive, the offender could not be tried till ſuch time as it might appear whether ſhe did or not, and likewiſe becauſe the philoſophy of this notion may be very well doubted of. 1 *Haw.* 108.

And L. Hale ſays, this opinion in Dalton ſeems to be no law. 1 H. H. 731.

II. Evidence on an indictment of rape.

The party raviſhed may give evidence on oath and is in law a competent witneſs; but the credibility of her teſtimony, and how far forth ſhe is to be believed muſt be left to the jury, and is more or leſs credible according to the circumſtances of fact that concur in that teſtimony. 1 H. H. 633. For

For inſtance, if the witneſs be of good fame; if ſhe preſently diſcovered the offence, and made purſuit after the offender; ſhewed circumſtances and ſigns of the injury, whereof many are of that nature, that only women are the moſt proper examiners and inſpectors; if the place, wherein the fact was done, was remote from people, inhabitants, or paſſengers; if the offender fled for it: theſe, and the like, are concuring evidences to give greater probability to her teſtimony, when proved by others as well as herſelf. 1 H. H. 633.

But on the other ſide, if ſhe concealed the injury for any conſiderable time, after ſhe had opportunity to complain; if the place where the fact was ſuppoſed to be committed, were near to inhabitants or common recourſe or paſſage of paſſengers, and ſhe make no outcry when the fact was ſuppoſed to be done, when and where it is probable ſhe might be heard by others; or if a man prove himſelf to be in another place, or in other company, at the time ſhe charges him with the fact; or if ſhe is wrong in the deſcription of the place, or ſwears the fact was done in a place where it was impoſſible the man could have acceſs to her at that time, as if the room was locked up, and the key in the cuſtody of another perſon: theſe and the like circumſtances carry a ſtrong preſumption that her teſtimony is falſe or feigned 1 H. H. 633.

Sir Matthew Hale ſays, if the rape be charged to be committed on an infant under twelve years of age, ſhe may ſtill be competent witneſs, if ſhe hath ſenſe and underſtanding to know the nature and obligation of an oath; and even if ſhe hath not he thinks that ſhe ought to be heard without oath, to give the court information; tho' that alone will not be ſufficient to convict the offender. And he is of this opinion, firſt, becauſe the nature of the offence being ſecret, there may be no other poſſible proof of the actual fact; tho' afterwards there may be concurrent circumſtances to corroborate it, proved by other witneſſes; and ſecondly, becauſe the law allows what the child told her mother or other relations to be given in evidence, ſince the nature of the caſe admits frequently of no better proof; and there is much more reaſon for the court to hear the narration of the child herſelf, than to receive it at ſecond hand from thoſe who ſwear they heard her ſay ſo. 1 H. H. 634.

And Sir William Blackſtone ſays, it ſeems now to be ſettled that in ſuch caſes infants of any age are to be heard; and if they have any idea of an oath, to be alſo ſworn: it being found by experience, that infants of very tender years often give the cleareſt and cleareſt teſtimony. But, whether the child be ſworn or not, it is to be wiſhed, in order to render her evidence credible

that there ſhould be ſome concurrent teſtimony, of time, place, and circumſtances, in order to make out the fact; and that the conviction ſhould not be grounded ſingly on the unſupported accuſation of an infant under years of diſcretion. 4 *Black.* 214.

In the caſe of *Omichund* and *Barker*, in 1744, in chancery, before the lord chancellor *Hardwicke*, aſſiſted by the lord chief juſtice *Lee*, lord chief juſtice *Willes*, and lord chief baron *Parker*, the lord chief juſtice *Lee* interrupted the attorney general *Sir Dudly Ryder*, aſſerting on the authority of lord Hale, that a child may be examined without oath; and ſaid, it had been determined at the *Old Bailey*, on mature conſideration, that a child ſhall not be admitted as an evidence without oath. And the lord chief baron *Parker* ſaid, it was ſo ruled at *Kingſton* aſſizes before lord *Raymond*, where, upon an indictment for a rape, he refuſed the evidence of a child without oath. 1 *Atk.* 29.

Which caſe at *Kingſton* aſſizes was as follows: The defendant at the ſummer aſſizes 1725, was indicted for a rape on the body of a child, then little more than ſix years old. And becauſe the lord chief baron *Gilbert*, then judge of aſſize, refuſed to admit the child as an evidence againſt him, he was acquitted. But at the ſame aſſizes an indictment was found againſt him for an *aſſault with an intent to raviſh* the ſaid child. And this indictment coming to be tried at the next aſſizes before the lord chief juſtice *Raymond*, the ſame objection was taken, that the girl being now but ſeven years of age, could not be a witneſs: It was inſiſted, that it had formerly been held, that none under twelve years of age, could be admitted to be a witneſs, and that a child of ſix or ſeven years of age, in point of reaſon and underſtanding is incompetent. On the other ſide, it was ſaid, that in capital caſes, which concerned life, this objection might be allowed; but in caſes of miſdemeanor only, as this was, ſuch a witneſs might be admitted: they inſiſted, that the objection only went to the credit of the witneſs, and *Hale* ſays, that the examination of one of the age of nine years has been admitted; and a caſe at the *Old Bailey* 1698, was cited; where upon ſuch an indictment as this, *Ward* chief baron admitted one to be a witneſs who was under the age of ten years, as the child had been examined about the nature of an oath, and had given a reaſonable account of it.—But *Raymond* chief juſtice held, that there was no difference between offences capital and leſſer offences in this reſpect; and that a perſon who could not be a witneſs in the one caſe, could not in the other. The reaſon why the law prohibits the evidence of a child ſo young is, becauſe the child cannot be preſumed to diſtinguiſh between right and wrong;

wrong; no perſon has ever been admitted as a witneſs under the age of nine years, and very ſeldom under ten. At the *Old Bailey* in 1704, this point was thoroughly debated in the caſe of one *Steward*, who was indicted on two indictments for rapes upon children. The firſt was a child of ten years and ten months, and yet that child was not admitted as a witneſs, before other evidence was given in of ſtrong circumſtances, as to the guilt of the defendant, and before the child had given a good account of the nature of an oath. The ſecond indictment againſt *Steward* was attempted to be maintained by the evidence of a child of between ſix and ſeven years of age: but it was unanimouſly agreed, that a child ſo young could not be admitted to be an evidence, and the child's teſtimony was rejected, without enquiring into any circumſtances to give it credit. And it was merely upon the authority of *Hale* where it is ſaid that a child of ten years of age may be a witneſs, that the other child of that age was admitted to be a witneſs in the firſt indictment. And in the preſent caſe, the child was refuſed to be a witneſs And there not being evidence ſufficient without her, the defendant was acquitted. *Str.* 700.

But after all, it is ſaid to have been determined lately by all the judges upon conference, that in no caſe ſhall the teſtimony of an infant be admitted without oath.

Upon the whole; rape, it is true, is a moſt deteſtable crime, and therefore ought ſeverely and impartially to be puniſhed with death; but it muſt be remembered, that it is an accuſation eaſily to be made, and hard to be proved, and harder to be defended by the party accuſed, tho' never ſo innocent: Therefore a wiſe jury will be cautious upon trials of offences of this nature, that they be not ſo much tranſported with indignation at the heinouſneſs of the offence, as to be over haſtily carried to the conviction of the perſon accuſed thereof, by the confident teſtimony ſometimes of malicious and falſe witneſſes. 1 H. H. 635, 636.

III. Puniſhment of rape.

Of old time rape was felony, for which the offender was to ſuffer death: afterwards the offence was made leſſer, and the puniſhment changed from death to the loſs of thoſe members whereby he offended; that is to ſay, it was changed to caſtration and loſs of his eyes, unleſs ſhe that was raviſhed, before judgment, demanded him for her huſband. 2 *Inſt.* 180.

But by *Virginia laws* page 256. 'If any man do 'raviſh a woman married, maid, or other, where ſhe did 'not conſent before nor after; or ſhall raviſh a woman married, maid,

'maid, or other, with force, altho' ſhe conſent after, the per-
'ſon ſo offending ſhall be adjudged a felon, and ſhall ſuffer death
'as in caſe of felony, without the benefit of clergy.'

'If any perſon ſhall unlawfully and carnally know and abuſe
'any woman child, under the age of ten years, every ſuch un-
'lawful, and carnal knowledge, ſhall be felony, and the offen-
'der being duly convicted thereof, ſhall ſuffer as a felon, with-
'out benefit of clergy.' § 2.

IV. Principal and acceſſary.

Mr. Hawkins ſays, all who are preſent and actually aſſiſt a man to commit a rape, may be indicted as principal offenders, whether they be men or women. 1 *Haw.* 108.

And, ſo one woman may be a principal to the raviſhment of another.

So alſo may a man be guilty of a rape on his own wife; as was the caſe of lord *Audley*, who held his wife while his ſervant, by his command, raviſhed her. See *State trials, lord Audley's caſe.*

Indictment for raviſhing a woman.

county to wit.

The jurors &c. upon their oath preſent, That A B, *late of the pariſh of in the county of gentleman, not having the fear of God before his eyes, but being moved and ſeduced by the inſtigation of the devil, on the day of in the year and in the year of the commonwealth, with force and arms, at the pariſh of in the county of aforeſaid, in and upon one* A P, *ſpinſter, in the peace of God, and of the commonwealth, then and there being, violently and feloniouſly did make an aſſault, and her the ſaid* A P, *againſt the will of her the ſaid* A P, *then and there feloniouſly did raviſh and carnally know againſt the form of the ſtatute in ſuch caſe made and provided, and againſt the peace and dignity of the commonwealth.*

Indictment for carnally knowing and abuſing a female child under the age of ten years.

county to wit.

The jurors &c. upon their oath preſent, That G D, *late of the pariſh of in the county of labourer, not having the fear of God before his eyes, but being moved and ſeduced by the inſtigation*

ſtigation of the devil, on the day of in the year and in the year of the commonwealth, with force and arms, at the pariſh aforeſaid, in the county aforeſaid, in and upon one E P, *ſpinſter, an infant under the age of ten years, to wit, of the age of nine years and upwards, in the peace of God and of the commonwealth, then and there being, feloniouſly did make an aſſault, and her the ſaid* E, *then and there wickedly, unlawfully, and feloniouſly did carnally know and abuſe, againſt the form of the ſtatute in ſuch caſe made and provided, and againſt the peace and dignity of the commonwealth.*

RECOGNIZANCE.

A RECOGNIZANCE is a bond of record, teſtifying the recognizor to owe a certain ſum of money to ſome other; and the acknowledging of the ſame is to remain of record; and none can take it only a judge or officer of record. *Dalt. c.* 186.

And theſe recognizances, in ſome caſes, the juſtices of the peace are enabled to take by the expreſs words of certain ſtatutes: but in other caſes (as for the peace, and behaviour, and the like) it is rather in congruity, and by reaſonable intendment of law, than by any expreſs authority given them, either by their commiſſion, or by the ſtatute law. *Crom.* 125 *Dalt. c.* 168.

But whereſoever any ſtatute giveth them power to take a bond of any man, or to bind over any man to appear at the aſſizes or ſeſſions, or take ſureties for any matter or cauſe, they may take a recognizance. Yea, whereſoever they have authority given them to cauſe a man to do a thing, there it ſeemeth they have in congruity power given them to bind the party by recognizance to do it: and if the party ſhall refuſe to be bound, the juſtice may ſend him to jail. *Dalt. c.* 168.

But he can take no recognizance but only of ſuch matter as concern his office: and if he doth, it ſeemeth to be void. *Dalt. c.* 168.

Every recognizance taken by juſtices of the peace ſhall be made payable to the perſon having the executive power.—And all bonds to be entered into by ſheriffs or other public officers, muſt be made payable to the juſtices of the court taking ſuch bond. *See ordinance of Convention* (interregno) 1776. *ch.* 5. *p.* 37. § 7, 8. of the edition of the laws in 1785.

It muſt alſo contain the name, place of abode, and trade or calling, both of principal and ſureties, and the ſums in which they are bound. *Barl. Recog.*

And

And it is moſt commonly ſubject to a condition, which is either endorſed or underwritten, or contained within the body of it, upon the performance of which the recognizance ſhall be void. *id.*

When the parties are to enter into a recognizance, it is uſual to call their names thus: *You* A B, *acknowledge to owe to governor of this commonwealth, and his ſucceſſors, the ſum of And you* C D, *acknowledge to owe to governor of this commonwealth, and his ſucceſſors the ſum of To be levied of your reſpective goods and chattels, lands and tenements, for the uſe of the commonwealth, if default ſhall be made in the condition following; that is to ſay, if you the ſaid* A B, *ſhall make default in appearing &c.*—It is ſaid that the parties need not ſign it. *id.*—But the better practice ſeems to be for the parties to ſign it.

It is alſo ſaid to be uſual for the juſtices to mark at the foot of the examination A B, in dollars to appear &c. and from ſuch ſhort note to make out a record afterwards. *id.*—But this is not uſual in this ſtate.

The recognizance is a matter of record preſently, ſo ſoon as it is taken and acknowledged, altho' it be not made up. *Dalt. c.* 168.

And when it is made up, if the juſtice ſhall only ſubſcribe his name, without his ſeal to it, this is well enough; and that may be in either of theſe ſorts, *acknowledged before me,* J P. or only to ſubſcribe his name thus, J P. *Dalt. c.* 176.

The juſtices ſhould always certify or tranſmit their recognizances to the next court; or, to the court of examination, if they ſhall be of opinion that the offence is triable in the diſtrict court, and conſequently order a court of examination to be ſummoned.

The conditions of recognizances, in all the variety of caſes, are interſperſed under their proper titles.

Recognizance with ſureties.

county to wit.

Be it remembered, that on the day of in the year of the commonwealth, A O, *of in the county aforeſaid, yeoman, and* A S, *of in the county aforeſaid, taylor, and* B S, *of in the county aforeſaid, labourer, perſonally came before me* J P, *one of the commonwealth's juſtices of the peace, for the ſaid county, and acknowledged themſelves to owe* A G, *governor or chief magiſtrate of the commonwealth of Virginia, and his ſucceſſors, that is to ſay, the ſaid* A O, *the ſum of and the ſaid* A S, *and* B S, *each the ſum of*

separately, of good and lawful money of this commonwealth, to be made and levied of their goods and chattels, lands and tenements respectively, to the use of the said commonwealth, if the said A O, *shall make default in the condition hereon endorsed, (or hereunder written.*

Acknowledged before me, J P.

Recognizance without sureties.

county to wit.

Be it remembered that on the day of in the year A O, *of in the said county yeoman, personally came before me* J P, *one of the justices of the peace for the said county, and acknowledged himself to owe to* A G, *governor &c. and his successors dollars, of lawful money of this commonwealth, to be made and levied of his goods and chattels, lands and tenements, to the use of the said commonwealth, if the said* A O, *shall fail in the condition underwritten,* [or indorsed]

The condition of the above written [or, within written] *recognizance is such, that if the above bound* A O, *shall &c.* [here insert the cause for the performance of which the party is bound] *Then the said recognizance to be void, else to remain in its force.*

R E N T S.

THE word rent or render, *reditus*, signifies a compensation or return, it being in the nature of an acknowledgment given for the possession of some corporeal inheritance. It is defined to be a certain profit issuing yearly out of lands and tenements corporeal. It must be a *profit*; yet there is no occasion for it to be, as it usually is, a sum of money.—This profit must also be *certain*; or that which may be reduced to a certainty by either party. It must also issue *yearly*; though there is no occasion for it to issue every successive year—Yet, as it is to be produced out of the profits of lands and tenements, as a recompence for being permitted to hold or enjoy them, it ought to be reserved yearly, because those profits do annually arise and are annually renewed. It must *issue out* of the thing granted, and not be part of the land or thing itself; wherein it differs from an exception in the grant, which is always of part of the thing granted. It must lastly issue out of *lands and tenements* corporeal; that is, from some inheritance whereunto the owner or grantor of the rent may have recourse to distrain. Therefore a rent cannot be reserved out of an advowson, a common, an office, a franchise,

or

or the like. But a grant of such annuity or sum may operate as a personal contract, and oblige the grantor to pay the money reserved, or subject him to an action of debt: though it doth not affect the inheritance, and is no legal rent in contemplation of law. 2 *Blacks Com.* 41.

It is impossible to form a sufficient idea of the doctrine of *rents* as received in this country from England, (particularly that class which goes under the denomination of *Rent-service*) without possessing some knowledge of the Feodal Tenures, from which the law and practice of rents are immediately derived.—But as it would far exceed the limits proposed in this publication, to enter at large into an historical account of the origin of feuds; I shall only mention so much of that subject as will be necessary to illustrate this title, and refer the curious and learned reader to such authors as have treated of the matter more in detail. *See* 2 *Blacks Com. ch.* 4, 5. *Wright's Tenures. Dalrymple on Feodal property. Stuart's view of society in Europe &c. And an excellent note to Hargrave's Coke on Littleton folio* 64. *a.*

The introduction of the feodal (feudal or military) tenures in England seems to have been intended by *William the Conqueror*, with whom they first originated, as a mean to protect his newly acquired dominions against the frequent invasions of his northern neighbours. Under this tenure the king was considered the supreme lord of the whole territory of England, by whom the lands were divided among the lesser lords or barons, and by them among the common people or vassals, upon condition, generally, to render their lord certain services in the wars;—on failure of which services the land became forfeited to the lord of the fee of whom it was holden. 2 *Blacks Com. ch.* 4, 5. The evidences of the vassal's title, were an open and public delivery of possession by the lord; who in return received the vassal's declaration of *homage* and *fealty*. 2 *Blacks Com.* 53. *Lit.* § 85. 91.

The *services* incident to this investiture were either *military*, as attending the lord in his wars, or *ministerial*, as attending him at his courts, &c. 2 *Blacks Com.* 56. *Gilb. Dist.* 1.

The *qualities* annexed to those feuds, do not require any particular notice in this place;—It is sufficient to observe that the feudatories being unable to attend to the cultivation of the soil, from their liability to be called out at any season of the year by their superior lord, it was found necessary to commit the management of their lands to other inferior vassals, requiring in return a compensation in certain parts of its produce, as in corn, cattle, money &c.—which is the origin of *Rents*.

Under this title, I shall consider,

I.

I. The ſeveral kinds of rent.
II. The remedy by diſtreſs.

And herein,

i. *For what cauſes a diſtreſs may be made, and in what other manner rent may be recovered.*
ii. *What goods may be diſtrained and what not.*
iii. *At what time and place the diſtreſs ſhall be taken.*
iv. *That reasonable diſtreſs ſhall be taken.*
v. *Manner of making a diſtreſs.*
vi. *Diſtreſs how to be demeaned.*
vii. *Of rescous and pound breach.*
viii. *Replevying the diſtreſs.*
ix. *Sale of the diſtreſs.*
x. *Irregularity in the proceedings.*
xi. *Land-lord re-entering on non-payment.*
xii. *Attorning to ſtrangers.*
xiii. *Rent in case of an execution.*
xiv. *Rent how far recoverable by executors or adminiſtrators.*
xv. *Attachments for rent.*
xvi. *Practical directions as to the making of a diſtreſs for rent.*
xvii. *Precedents of replevy bonds &c.*

III. Of the action of replevin.

I. The ſeveral kinds of rent.

The uſual diviſion of rents, by the common law, is into rent-ſervice, rent-charge, and rent-ſeck. *Litt.* § 213.

Rent-ſervice is ſo called becauſe it hath ſome corporal ſervice incident to it, as at the leaſt fealty, or the feodal oath of fidelity. For if a tenant holds his land by fealty, and ten ſhillings rent, or by the ſervice of ploughing the lord's land, and five ſhillings rent; theſe pecuniary ſervices being connected with perſonal ſervices,

vices, are therefore called rent ſervice. And for theſe, in caſe they be behind or arrear, at the day appointed, the lord may diſtrain of common right, without reſerving any ſpecial power of diſtreſs; provided he hath in himſelf the reverſion or future eſtate of the lands and tenements, after the leaſe or particular eſtate of the leſſee or grantee is expired. 2 *Blacks Com.* 52. *Co. Litt.* 142. *Litt.* § 215.—In the ſame manner it is, if a leaſe be made to a man for life or the life of another, rendering to the leſſor certain rent, or for term of years rendering rent. *Litt.* § 214.—For theſe are rent ſervices becauſe fealty is incident to theſe rents. *Co. Litt.* 142. *Litt.* § 131, 132.

A *rent-charge*, is where the owner of the rent hath no future intereſt or reverſion expectant in the land; as where a man by deed maketh over to others his *whole* eſtate in fee ſimple, with a certain rent payable thereout, and adds to the deed a covenant or clauſe of diſtreſs, that if the rent be arrear, or behind, it ſhall be lawful to diſtrain for the ſame. In this caſe the land is liable to the diſtreſs, not of common right, but by virtue of the clauſe in the deed: and therefore it is called rent-*charge*, becauſe in this manner the land is charged with a diſtreſs for the payment of it. 2 *Blacks Com.* 42. *Co. Lit.* 143.

Rent-ſeck reditus ſiccus, or barren rent, is in effect nothing more than a rent reſerved by deed, but without any clauſe of diſtreſs. 2 *Blacks Com.* 42.

II. The remedy by diſtreſs.

This is one of thoſe few caſes in which the law permits a man to be his own avenger, or to miniſter redreſs to himſelf, viz. to diſtrain cattle or other goods for non-payment of rent or other duties, or to diſtrain another's cattle *damage-feaſant*, that is doing damage, or treſpaſſing upon his land. The former intended for the benefit of landlords, to prevent tenants from ſecreting or withdrawing their effects to his prejudice; the latter ariſing from the neceſſity of the thing itſelf, as it might otherwiſe be impoſſible at a future time to aſcertain, whoſe cattle they were that committed the treſpaſs or damage. 3 *Blacks Com.* 6.

A diſtreſs is defined by *Judge Blackſtone* to be '*the taking of a perſonal chattel out of the poſſeſſion of the wrong-doer into the cuſtody of the party injured, to produce a ſatisfaction for the wrong committed;—and the moſt uſual injury for which a diſtreſs may be taken is the non-payment of rent.* 3 Blacks Com. 6.

It has been already ſeen that diſtreſs was incident by the common law to every *rent-ſervice*, and by particular reſervation to rent

rent-charges alſo.—Theſe diſtreſſes were ſubſtituted in lieu of the forfeiture of the feud or eſtate by the old feodal law, on the non-performance of the ſervices ſtipulated to be done by the tenant; and were in their origin nothing more than a pledge in the hands of the lord, by retaining which in his poſſeſſion (for he could not ſell the property taken by diſtreſs) he might compel a performance; and the detention was no longer lawful than while the tenant refuſed to do the ſervices reſerved by the feodal contract. *Gill. Diſt.* 2—4.

But when the military ſervices ceaſed to be neceſſary, and the diſtreſs was conſidered merely as a remedy to compel the payment of the money or other thing reſerved, it would have defeated the very object of the diſtreſs, to ſuffer the property to remain in the hands of the lord, as a pledge, and thereby deprive the party of the means of paying the rent. 4 *Burr.* 589.—For theſe reaſons, by various ſtatutes in England, (the ſubſtance of many of which we have adopted in this ſtate) the mode of proceeding *after making the diſtreſs*, particularly as to the ſale of it, has been pointed out,—leaving the *right* of diſtraining as it ſtood at the common law. The neceſſity then of recurring to the origin of diſtreſſes by the common law, is ſufficiently obvious; as without it, the moſt familiar caſe, would be perfectly unintelligible. *See* 2 *Blacks Com.* 42. *Litt.* § 213.—*Co. Litt.* 142. *a. Litt.* § 131, 132. *Co. Litt.* 142. *b.*

i. For what causes a diſtreſs may be made. and in what other manner rent may be recovered.

Diſtreſs for rent muſt be, for rent in arrear, therefore it may not be made on the ſame day on which the rent becomes due; for if the rent is paid in any part of that day, whilſt a man can ſee to count money, the payment is good.

It muſt not be after tender of payment; for if the land-lord come to diſtrain the goods of his tenant for rent behind, before the diſtreſs the tenant may upon the land tender the arrearages, and if after that a diſtreſs be taken it is wrongful: and if the landlord have diſtrained, if the tenant, before the impounding thereof, tender the arrearages, the landlord ought to deliver the diſtreſs, and if he doth not, the detainer is unlawful. Even ſo it is, in caſe of a diſtreſs for damage feaſant (or damage done by cattle treſpaſſing) the tender of amends before the diſtreſs, maketh the diſtreſs unlawful; and after the diſtreſs, and before the impounding, the detainer unlawful. 2 *Inſt.* 107. 8 *Co.* 147.

By *V. l. page* 163. § 11. of the *Reviſed Code*. 'Any per-'ſon or perſons having rent in arrear, or due upon any leaſe or 'demiſe

'demiſe for life or lives, may bring an action or actions of debt 'for ſuch arrears of rent, in the ſame manner as if ſuch rent 'were due and reſerved upon a leaſe for years.'

And by ſect. 12. The power of diſtreſs is given to a perſon having rent in arrear, upon any leaſe for *life or lives*, or for *years*, or *at will*, after the determination of the reſpective leaſes. (*ſect.* 12) *provided*, that the diſtreſs be made within ſix months after the determination of the leaſe, and during the continuance of the land-lord's title or intereſt, and during the poſſeſſion of the tenant. No diſtreſs ſhall be made after the expiration of 5 years after the rent became due.

Sect. 14. Not to affect any debts &c. due to the commonwealth.

By the common law, two diſtreſſes cannot be taken for one rent, if there were ſufficient goods when the firſt diſtreſs was made, unleſs too little was taken by miſtake. Otherwiſe it is, if there was not ſufficient. 2 *Lutw.* 1532. *Mo.* 7. *Comb.* 546. *Burrow.* 589.

By *V. l, p.* 162. § 4. *of the Reviſed Code.* If diſtreſs and ſale is made for rent pretended to be in arrear, where in truth no rent is in arrear, the owner of the goods diſtrained and ſold, his executors &c. ſhall have remedy by action of treſpaſs, or upon the caſe againſt the perſon ſo wrongfully diſtraining his executors &c. and ſhall recover double the value of the goods diſtrained and ſold, and full coſts of ſuit.

By ſect. 22. (*page* 164). Where rent accrues on lands &c. held in right of the wife, during her life, the huſband may recover the ſame after her death, either by action of debt, or by diſtreſs.

If the diſtreſs be taken of goods without cauſe, the owner may make *reſcous*; but if they be diſtrained without cauſe, and impounded, the owner cannot break the pound and take them out, becauſe they are in the cuſtody of law. 1 *Inſt.* 47. 3 *Blacks Com.* 12.

In the caſe of a houſe being burnt before the expiration of the tenant's intereſt, it has generally been held, that the tenant was bound to pay the rent, annually, during the time for which he was to hold it, notwithſtanding he covenanted to repair, *accidents by fire excepted.* And to this point are the caſes of *Paradine* v. *Jane. Allen.* 27.—and *Monk & Cooper.* 2 *Stra.* 763.—But in the caſe of *Brown* v. *Quilter*, (*Ambler*, 619) it was held on a caſe exactly ſimilar, that it was good ground for relief, by injunction in chancery; and the chancellor expreſſed his ſurprize that a defence was not allowed at law to ſuch action.

ii. What goods may be diſtrained; and what not.

Diſtreſs for rent muſt be of ſuch things whereof a valuable property is in ſome body, and therefore dogs, bucks, does, conies and the like, that are *feræ naturæ*, cannot be diſtrained. 1 *Inſt.* 47.

Altho' it be of valuable property, as a horſe, yet when a man or woman is riding upon him, or an axe in a man's hand cutting of wood, and the like, they are for that time privileged, and cannot be diſtrained. 1 *Inſt.* 47.

But it is ſaid, that if one be riding upon a horſe *damage feaſant*, the horſe may be led to the pound with the rider upon him: 1 *Sid.* 440. 442.

And it hath been held, that horſes joined to a cart, with a man upon it, cannot be diſtrained for rent, (altho' they may for damage feaſant) but both cart and horſes may, if the man be not upon the cart. 1 *Vent.* 36.

Valuable things ſhall not be diſtrained for rent, for benefit and maintenance of trades, which by conſequence are for the commonwealth, and are there by authority of law; as a horſe in a ſmith's ſhop ſhall not be diſtrained for the rent iſſuing out of the ſhop, nor an horſe in an hoſtry, nor the materials in a weaver's ſhop for making of cloth, nor cloth nor garments in a taylor's ſhop, nor ſacks of corn or meal in a mill, nor any thing diſtrained for damage feaſant, for it is in cuſtody of the law; and the like. 1 *Inſt.* 47.

But it ſeems that a chariot in a common livery ſtable is diſtrainable, becauſe the owner of the ſtable is not bound to receive it, as in the caſe of an inn-keeper &c. *See Burrow.* 1498. *Bl. Rep.* 483. *Francis* v. *Wyatt.*

Beaſts belonging to the plough ſhall not be diſtrained, (which is the ancient common law of *England*, for no man ſhall be diſtrained by the utenſils or inſtruments of his trade or profeſſion, as the axe of the carpenter, or the book of the ſcholar) while goods or other beaſts may be diſtrained. 1 *Inſt.* 47.

But this rule holds only in diſtreſſes for rent arrear, amercements, and the like; but doth not extend to caſes, where a diſtreſs is given, in the nature of an execution, by any particular ſtatute, as for poor rates, and the like. 3 *Salk* 136.

So beaſts of the plough and cart may be diſtrained for the poor rate. *See Bur.* 579. *Hutchins* v. *Chambers.*

Furnaces, cauldrons, or other things fixed to the freehold, or the doors or windows of a houſe, or the like, cannot be diſtrained. 1 *Inſt.* 47.

Things for which a replevin will not lie, ſo as to be known again

again, as money out of a bag, cannot be diſtrained. 2 *Bac. abr.* 109.

But money in a bag ſealed may be diſtrained; for that the bag ſealed may be known again.

Generally, whatever goods and chattels the landlord finds upon the premiſes, whether they in fact belong to the tenant or a ſtranger, are diſtrainable by him for rent; for otherwiſe a door would be opened to infinite frauds upon the landlord; and the ſtranger hath his remedy over by action on the caſe againſt the tenant, if by the tenants default the goods are diſtrained, ſo that he cannot render them when called upon. 3 *Blacks.* 8.

But on particular circumſtances perhaps a court of equity may relieve. As in the caſe of *Fowkes* and *Joyce*, in the common pleas, a perſon driving ſheep to London to ſell, by agreement with the maſter of an inn, put them into the field at ſo much a ſcore for the night. The landlord ſeeing them, aſked whoſe they were, but conſented to their ſtaying there, and afterwards diſtrained them for rent due to him from the maſter of the inn, and it was adjudged for the landlord. 3 *Lev.* 260. 2 *Ventr.* 50. But in the ſame caſe, upon a bill for relief in equity, the lords commiſſioners ſeemed to think, that the grounds lying to the inn, and uſed therewith, ought to have the ſame privilege as the inn hath, and that paſſenger's cattle ought not to be diſtrainable there. 2 *Vern.* 129. And it appeared in this caſe, that on the landlord's coming and ſeeing the ſheep, he pretended to be angry. Upon which the owner offered to take out the ſheep, at which time they were not diſtrainable for the rent, having not been *levant and couchant* (that is, not having ſo long remained upon the ground, as to have laid down and riſen up again to feed,) ſo that the court looked upon the conſent as a fraud, to get them to be left all night, by which they became liable to the diſtreſs. And it was decreed, that the landlord ſhould anſwer for the value of the ſheep, and pay coſts both in law and equity. *Prec. Chan.* 7.

Where a ſtranger's beaſts eſcape into the land, they may be diſtrained for rent, tho' they have not been levant and couchant, provided they are treſpaſſers; but if the tenant of the land is in default, in not repairing his fences, whereby the beaſts came into the land, the landlord cannot diſtrain ſuch beaſt, tho' they have been levant and couchant, unleſs he has cauſed notice to be given to the owner, and the owner ſuffers them to remain there afterwards. *Lutw.* 364.

In caſe of rent reſerved upon a leaſe for years, the landlord cannot diſtrain cattle eſcaping into his lands until they be levant and couchant; for if the landlord had had the lands in his own hands, he ought to have repaired the fences; and when he puts

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in a leſſee, he ought by covenant to oblige him to repair: and therefore in that caſe, if the law would allow the landlord to diſtrain the cattle of a ſtranger which came in by eſcape, before that they be levant and couchant, it would be in effect to allow a man to take advantage of his own wrong. Therefore if the cattle come in by default of the owner of the cattle, then they may be diſtrained before they be levant and couchant; and if in default of the tenant of the land, there they cannot be diſtrained until they have been levant and couchant, that is to ſay, for rent upon leaſes for years. And in ſuch caſe the landlord ſhall not take the cattle before that he has given notice to the owner, that they are upon the land liable to his diſtreſs; and if he doth not come to take them away, then they become diſtrainable. And by *Treby* chief juſtice; where the cattle eſcape accidentally, there they are not diſtrainable, until they have been levant and couchant; but if they eſcape by default of their owner, they are diſtrainable the firſt minute. *L. Raym.* 168, 9.

In the caſe of *Broden* and *Pierce*, where a rent charge was arrear for 20 years, and cattle eſcaped out of the next ground, and were diſtrained; lord *Nottingham* (in equity) relieved againſt it. 2 *Vern.* 231.

If ten head of cattle were doing damage, a man cannot take one of them and keep it till he be ſatisfied for the whole damage; but he may bring an action of treſpaſs for the reſt. 12 *Mod.* 660.

If a man come to diſtrain damage feaſant, and ſee the beaſts in his ground, and the owner chaſe them out, of purpoſe before the diſtreſs taken; yet the owner of the ſoil cannot diſtrain them, and if he doth, the owner of the cattle may reſcue them; for the beaſts muſt be damage feaſant at the time of the diſtreſs. 1 *Inſt.* 161.

For diſtreſs damage feaſant is the ſtricteſt diſtreſs that is; and the things diſtrained muſt be taken in the very act; for if the goods are once off, tho' on freſh purſuit, the owner of the ground cannot take them. 12 *Mod.* 661.

iii. At what time and place the diſtreſs ſhall be taken.

For a rent or ſervice the lord cannot diſtrain in the night, but in the day time; and ſo it is of a rent charge; but for damage feaſant, one may diſtrain in the night; otherwiſe, it may be, the beaſts may be gone before he can take them. 1 *Inſt.* 142.

For before ſun riſing, or after ſun ſet, no man may diſtrain but for damage feaſant. *Mirrour. c.* 2. *ſ.* 26.

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By the common law, if the leſſor did not find ſufficient diſtreſs on the premiſes, he could reſort no where elſe, and therefore tenants, who were knaviſh, made a practice to convey away their goods and ſtock fraudulently from the houſe or lands demiſed, in order to cheat their landlords. 3 *Blacks Com.* 11.

But by Virginia laws page 163. § 9. *of the Reviſed Code.* Where goods and chattels are fraudulently or clandeſtinely carried off from the premiſes, on which rent is in arrear, the landlord may diſtrain them, within ten days, in the ſame manner as if they had remained on the land.

Sect. 10.—*Provided*, that goods ſo carried off and *bona fide* ſold for a valuable conſideration ſhall not be liable to be ſeized.

iv. That reasonable diſtreſs ſhall be taken.

By *V. l.* page 164. § 24. 'Diſtreſſes ſhall be reaſonable, 'and not too great, and he that taketh great and unreaſonable 'diſtreſſes, ſhall be amerced for the exceſs of ſuch diſtreſſes.'

For example, if the lord diſtrain two or three oxen for 12d. or the like ſmall ſum, and the owner bring a replevy of the oxen, and the lord avow the taking of them for the 12d. of his own ſhewing, he ſhall make fine; or the party may have his action upon this ſtatute. 2 *Inſt.* 207.

If the lord diſtrain an ox, or horſe, for a penny; if there were no other diſtreſs upon the land holden, the diſtreſs is not exceſſive: but if there were a ſheep, or a ſwine, or the like, then the taking of the ox or horſe is exceſſive, becauſe he might have taken a beaſt of leſs value. 2 *Inſt.* 107.

v. Manner of making a diſtreſs.

Gates or incloſures may not be broken open, nor thrown down, to make a diſtreſs. 1 *Inſt.* 161.

Nor may the leſſor enter into the tenant's houſe, unleſs the doors are open. 2 *Bac. Abr.* 111.

Upon a queſtion about taking a diſtreſs, it was held by the lord chief juſtice *Hardwicke*, that a padlock put on a barn door could not be opened by force, to take the corn by way of diſtreſs. 9 *Viner.* 128.

But if the outer door of an houſe is open, one may break an inner door to take a diſtreſs. *Caſes in the time of lord Hardwicke.* 168.

If a landlord comes into a houſe, and ſeizes upon ſome goods for a diſtreſs, in the name of all the goods of the houſe; that will be a good ſeizure of all. 6 *Mod.* 215.

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vi. Diſtreſs how to be demeaned.

V. l. page 164. § 24 'It ſhall not be lawful for any perſon 'driving any diſtreſs to drive or remove the ſame out of the 'county where ſuch diſtreſs was taken: And whoſoever doth 'ſo, ſhall be amerced at the diſcretion of a jury.'

Cattle diſtrained may not be worked or uſed, unleſs for the owner's benefit, as a cow milked, or the like; much leſs may they be abuſed or hurt. *Cro. Jac.* 148.

If the diſtreſs be loſt by the act of God; as if the diſtreſs dies in the pound, without any default in the diſtrainer; in ſuch caſe, he who made the diſtreſs may diſtrain again. 1 *Salk.* 248.

vii. Of reſcous and pound breach.

Pound breach by the common law is a great offence, for which the party is to be purſued by hue and cry. *Mir. c.* 2. § 26. And the diſtrainer may take the goods again. 1 *Inſt.* 47.

And by *V. l.* page 162. § 5. 'Upon any pound breach or reſcous, the party injured ſhall recover treble damages.'

When a man hath taken diſtreſs, and the cattle diſtrained, as he is driving them to the pound, go into the houſe of the owner; if he that took the diſtreſs demand them of the owner, and he deliver them not, this is reſcous in law. 1 *Inſt.* 161.

If the tenant tender the rent to the lord when he is to take the diſtreſs, if notwithſtanding, the lord will diſtrain, the tenant may make reſcous.—And if the lord will diſtrain *beaſts of the plough*, where there is ſufficient diſtreſs to be taken beſides, or if the lord diſtrain any thing that is not diſtrainable, either by the common law or by any ſtatute, the tenant may make reſcous. *Co. Lit.* 161. *a.*—The ſame law, if no rent is due. *Co. Lit.* 47. *b.*

viii. Replevying the diſtreſs.

The replevy of which we ſhall here ſpeak, is an indulgence granted, by the laws of this commonwealth, to the tenant, who is thereby permitted at any time within ten days after the diſtreſs made, to enter into bond with ſufficient ſecurity for the payment of the money or tobacco with intereſt and coſts at the end of three months. And we muſt alſo obſerve that this kind of replevy is materially different from that regulated by the ſtatute of 1 & 2. P & M. and ſo often ſpoken of by the writers on the laws of England;—*that* being a mere ſecurity to try the right of the diſtreſs, and to reſtore the property to the diſtrainer if the right

right be determined against the tenant, (3 *Blacks Com.* 13)—but *this* being an indulgence to the tenant in extending the time of the payment of his rent three months; without destroying his remedy by action of replevin to determine on the *right* of the distress, if he thinks proper to pursue it.

Having said thus much of the *replevy*, as regulated by our laws, it will be sufficient to refer to the act itself, in which the true distinction between a *replevy* for three months and the *action of replevin* will be discovered, and where the proceedings on a distress for rent are also pointed out. *See Virginia laws chap.* 89. page 161. of the Revised Code, *sect.* 1, 2, 3. as to *replevying* for three months; and sections 15, 16 17, 18, page 163 of the *Revised Code*, as to the action of *replevin*.

ix. Sale of the distress.

The power of selling the distress has already been seen under the preceding division of this title. A difficulty, however, occurs under the present laws, with respect to the conduct of the officers making the distress, where the tenant does not replevy for three months, or sue out a writ of replevin, and the officer is to proceed to sell the goods on three months credit.—The act of 1748. *ch.* 10 § 1. directed the goods to be sold *in the like manner as goods or chattels taken in execution.* These words are omitted in the act in the revised code, page 161, and the distress for rent has always been excepted out of the new execution laws. *See p.* 313 *of the revised code.*—The question then is, how is the officer to advertise the property? Under the act of 1748, no difficulty arose, because by a reference to the execution law, the mode was there pointed out.—But at present it seems difficult to maintain that the officer is bound, at all, to advertise,—and if he is, the mode which he shall pursue, seems equally difficult to ascertain.

x. Irregularity in the proceedings.

By the common law, if a distress was made for rent in arrear, and any irregularity was committed the whole proceedings were void and the distrainer a trespasser *ab initio*. To remedy this the act of 11. Geo. 2. ch. 19. was passed:—but as that statute is not in force here and no provision is made by our laws, *quære*, if it does not remain as at common law. *See* 3 *Blacks Com.* 14.

xi.

xi. Landlord re-entering on non-payment.

By *Virginia laws* page 164. § 19. of the *Reviſed Code.*—Grantees, or aſſignees of lands &c. ſhall have the ſame advantages againſt the leſſees, by entry for non-payment of the rent, or for waſte, or other forfeiture &c. as the leſſors themſelves.

By ſect. 20. Leſſees ſhall have the ſame benefit of contract againſt the grantee of the land &c. as they could have had againſt the grantor.

xii. Attorning to ſtrangers.

By *V. l. page* 167. § 18. 'The attornment of a tenant to 'any ſtranger ſhall be void, unleſs it be with conſent of the 'landlord of ſuch tenant, or purſuant to, or in conſequence of, 'the judgment of a court of law, or the order or decree of a 'court of equity.'

And by ſect. 17. 'Grants of rents, or of reverſions or re-'mainders, ſhall be good and effectual without the attornments of the tenants, but no tenant, who, before notice of the grant, 'ſhall have paid the rent to the grantor, ſhall ſuffer any damage 'thereby.'

xiii. Rent in case of an execution.

By *Virginia laws* page 162. § 5, 6, of the *Reviſed Code.* Upon an execution againſt the tenant, no goods or chattels ſhall be removed till the plaintiff pays or tenders to the landlord the whole rent due.—(ſect. 6) provided, that it ſhall not extend to more than one year's rent.

And the landlord muſt demand the years rent, or the ſheriff will not be bound to ſecure it for him. 1 *Strange.* 97.

And in caſe of two executions, there ſhall not be two years rent paid to the landlord; for the intent of the act was to reſerve to the landlord only the rent for one year, it is his own fault if he let more run in arrear. Therefore one year's rent to the landlord being paid to him on the firſt execution, the ſheriff is not to levy for him again any thing on a ſubſequent execution. *Str.* 1024.

xiv. Rent how far recoverable by executors or adminiſtrators.

By *Virginia laws* page 164. § 21 & 23. of the *Reviſed Code.* The ſame remedy is given to executors or adminiſtrators for the recovery

recovery of rent due to the teſtator, or inteſtate, as he himſelf might have had.—*See the act of Aſſembly above cited.*

xv. Attachments for rent.

Theſe attachments are founded on *Virginia laws*, page 162, ſect. 8 of the *Reviſed Code.*—They are grantable by a juſtice of the peace, on a well grounded apprehenſion of the landlord's ſupported by oath, that the tenant will remove out of the county or corporation before the expiration of his term, ſo as no diſtreſs can be made for the ſame.—*See the act.*

Oath to be adminiſtered to the landlord.

You ſhall ſwear that A T, agreed to pay you the ſum of for the tenement (*deſcribe the kind*) he now occupies; that will be due for the ſame, on the day of next; and that you have ſufficient grounds to ſuſpect that the ſaid A T, will remove his effects out of this county (or corporation) before the expiration of his term. So help you God.

Warrant of Attachment.

To the ſheriff of the county of

county to wit.

Whereas E D, *hath this day made oath before me* J P, *a juſtice of the peace for the county aforeſaid, that* A B, *his tenant, hath agreed to pay him, for the rent of a plantation the ſaid* A B, *now occupies, the ſum of on the day of next, of which he has received no part, and that the deponant hath ſufficient grounds to ſuſpect, and verily believes, the ſaid* A B, *will remove his effects out of the county before the ſaid rent will become due: therefore in the name of the commonwealth I require you to attach ſo much of the eſtate of the ſaid* A B, *as will be ſufficient to ſatisfy the ſaid* C D, *the rent aforeſaid, and coſts; and if thereupon the ſaid* A B, *ſhall not enter into recognizance, with one or more ſufficient ſecurities, for the payment of the ſaid rent, on the ſaid day of next, and the coſts, then that you ſecure the eſtate ſo attached in your hands, or ſo provide that the ſame may be liable to further proceedings herein, at the next court to be held for this county, when you are to make return of this warrant, with an account what you ſhall have done thereupon. Given &c.*

Bond in the uſual form payable to the ſheriff, or his aſſigns, with this condition.

The

The condition of the above obligation is such, that whereas the said E F, *sheriff, hath this day attached sundry goods and chattels of the said* A B, *upon an attachment issued from* G H, *a justice of the peace of the said county, to secure the payment of which will be due to* C D, *for rent, on the day of next, now if the said* A B, *shall well and truly pay to the said* E F, *or his assigns, the sum of and all costs, on the said day of next, then &c.*

This bond is to be assigned by the sheriff to the landlord and annexed to the attachment on which should be this return.

By virtue of this warrant, I did attach sundry goods of the within named A B, *which I restored to him on his and his security's executing the annexed bond, by me assigned to the within named* C D, *according to law.*

E F, Sheriff.

xvi. *Practical directions as to the making of a distress for rent.*

It is said that the landlord himself may make the distress or authorize any other person to do it. *See Gilbert's distresses.*—But it seems most proper, if not the only legal mode, in this state, to employ the sheriff or constable, the words '*sheriff or officer,*' being the terms used by our laws. *See V. l. page* 161. *sect.* 1, *of the Revised Code.*

Warrant of Distress.

To Mr. A B. *Distrain the goods and chattels of* C D, (the tenant) *in the house he now dwells in,* (or, on the premises in his possession) *situate in in the county of for pounds, being years rent,* (or as the case is) *due to me for the same at the day of last past* (or, any other) *and for your so doing, this shall be your sufficient warrant and authority. Dated the day of in the year*

W T.

If the goods are removed from the premises, the landlord may distrain them, without ten days thereafter; in that case the authority to distrain must vary in its expression to suit the case.

Being legally authorized to distrain, you enter on the premises, and make a seizure of the distress. If the distress be made in a house, you seize a chair or other piece of furniture, and say, I seize this chair (or whatever it be) in the name of all the goods in this house, for the sum of pounds, being years rent

rent (or, as the caſe is) due to me (or to W T, your landlord) on the day of laſt paſt (or any other) (and if the diſtreſs be made by any other than the landlord, you add) by virtue of an authority from the ſaid W T, for that purpoſe.

You then proceed to take an inventory of ſo many goods, as you judge will be ſufficient to cover the rent diſtrained for, and alſo the charges of the diſtreſs. Having done this, you make a copy of the inventory, according to the following form.

An inventory of the ſeveral goods and chattels diſtrained by me A B, (*the diſtrainer*) *the day of in the year of our lord in the houſes, out houſes, and lands* (*according to the caſe*) *of* C D, (*the tenant*) *ſituate in of the county of* (*and if the diſtreſs be made by any other than the landlord, ſay,*) (*by the authority and on the behalf of* W T, *your landlord*) *for the ſum of pounds, being years rent,* (*or as the caſe is*) *due to me* (*or to the ſaid* W T) *on the day of laſt paſt*——*In the dwelling houſe,* one table, ſix chairs &c.—

In the cow houſe, ſix cows, two calves &c.—

At the bottom of the inventory you ſubſcribe the following notice to the tenant.

Mr. C D. *Take notice, that I have this day diſtrained on the premiſes above mentioned, the ſeveral goods and chattels ſpecified in the above inventory, for the ſum of pounds, being years rent* (*or, as the caſe is*) *due to me* (*or, to the ſaid* W T,) *on the day of laſt paſt,* (*or, any other*) *for the ſaid premiſes; and that unleſs you pay the ſaid rent with the charges of diſtraining for the ſame, within ten days from the date hereof, the ſaid goods and chattels will be ſold according to law. Given under my hand the day of in the year of our lord*

A B, ſheriff, (or conſtable)

A true copy of the above inventory and notice muſt either be given to the tenant himſelf, or left at his houſe; or, if there be no houſe, on the moſt notorious place on the premiſes. And it is proper to have a perſon with you when you make the diſtreſs, and alſo when you ſerve the inventory and notice, to examine the inventory, and to atteſt, if there be occaſion, the regularity of the proceedings.

The ſafeſt way is to remove the goods immediately, and in your notice to acquaint the tenant where they are removed: but it is now moſt uſual to let them remain on the premiſes, leaving a man in poſſeſſion till you are entitled by law to ſell them.

xvii. Precedents of replevy bonds &c.

Replevy bond to pay the rent at the end of 3 months, on sect. 1 of Revised Code p. 161.

Know all men by these presents that we C D, *of &c. and* D S, *of &c. are held and firmly bound unto* A B, (the landlord) *in the full and just sum of* (double the rent) *current money of Virginia; to be paid to the said* A B, *his certain attorney, his executors, administrators or assigns; for the true payment whereof we bind ourselves, our heirs, executors and administrators firmly by these presents, sealed with our seals; dated this day of in the year*

The condition of the above obligation is such, that whereas divers goods of the said A B, (*here express the kind*) have been distrained by E F, sheriff (*or constable*) to satisfy the sum of due to C D, for arrears of rent, the costs of which distress amount to which said goods have been restored to the said A B, on his entering into bond with sufficient security to pay the said rent and costs of distress, amounting to at the end of three months, now if the said A B, his executors, or administrators, shall, at the end of three months next following the date hereof, pay to the said C D, his executors, administrators, or assigns, the sum of (*the amount of the rent and costs*) with lawful interest thereon, then the above obligation to be void, or else to remain in full force.

If sold upon three months credit.

The bond and condition to be the same as for goods sold by execution; only, in the recital, say, the goods were seized for rent.

III. Of the action of replevin.

An action of replevin, the regular way of contesting the validity of the transaction, is founded, upon a distress taken wrongfully and without sufficient cause: being a re-delivery of the pledge, or thing taken in distress, to the owner; upon his giving security to try the right of distress, and to restore it if the right be adjudged against him. 3 *Blacks Com.* 147.

It is impossible on the limited plan of the present publication to go fully into the law and practice of replevins; I must therefore refer to a very valuable treatise on that subject, written by

lord

lord chief baron Gilbert; and conclude this title *by* a reference to the act of Aſſembly for regulating the ſuing out writs of replevin; with the addition of ſome ſpecial pleadings.

See *Virginia laws* page 163. ſections 15, 16, & 18, of the *Reviſed Code.*

Pleadings in replevin.

DECLARATION.

county to wit.

B D, *was ſummoned to anſwer* A P, *of a plea, why he took the goods and chattels of him the ſaid* A P, *and unjuſtly detained them, againſt ſurety and pledges, until &c. And whereupon the ſame* A P, *by* C A, *his attorney complains, that the ſaid* B D, *on the day of in the year and in the year of the commonwealth, at the county aforeſaid, in a certain place there called* (deſcribe the place) *took the goods and chattels following, to wit,* (deſcribe the goods very particularly) *of the ſaid* A P, *and unjuſtly detained them againſt ſurety and pledges, until &c. whereby the ſame* A P, *ſays, that he is prejudiced and hath damage to the value of And therefore he brings ſuit &c.*

Avowry for rent in arrear.

B D
at the ſuit of
A P
} In replevin.

And the ſaid B D, *by* F A, *his attorney, comes and defends the force and injury, when &c. and well avows the taking the goods and chattels aforeſaid, in the ſaid place where &c. and juſtly &c. becauſe he ſays, that the ſame place where the taking of the goods and chattels aforeſaid, is ſuppoſed to be, did contain in itſelf a certain piece or parcel of land, with the appurtenances, in a place called in the county aforeſaid; of which ſaid piece or parcel of land, with the appurtenances, the ſaid* B D, *before the ſaid time when &c. was ſeized in his demeſne as of fee, and being ſo thereof ſeized, the ſaid* B D, *before the ſaid time when &c. to wit, on the day of in the year and in the year of the commonwealth, at the county aforeſaid, demiſed the ſame piece or parcel of land, with the appurtenances, to the ſaid* A P, *to hold to the ſame* A P, *and his aſſigns, from the day of then laſt paſt, before the date of the ſame demiſe, for the term of years from thence next enſuing, and fully to be complete and end, yielding and paying therefor yearly, and every year, to the ſaid* B D, *or his aſſigns, the rent of of lawful money: by*

virtue

virtue of which ſaid demiſe the ſaid A P, *entered and was poſſeſſed of the ſame piece or parcel of land with the appurtenances, and the ſame piece or parcel of land with the appurtenances for year occupied; and becauſe the ſum of of the rent aforeſaid, after the demiſe ſo made, for the ſaid year, on the day of laſt paſt, and before the taking of the goods and chattels aforeſaid, were to the ſame* B D, *in arrear and unpaid, the ſame* B D, *well avows the taking of the goods and chattels aforeſaid in the ſaid place where &c. and juſtly &c. for the ſaid ſum of to the ſame* B D, *in form aforeſaid, being in arrear, as in the piece or parcel of land with the appurtenances aforeſaid, charged and bound: and this he is ready to verify; wherefore he prays judgment and a return of the goods and chattels aforeſaid, to be adjudged to him.*

Replication that the rent was not in arrear.

A P
v
B D } In replevin.

And the ſaid A P, *ſays, that the ſaid* B D, *for the reaſons before alleged ought not to avow the taking of the goods and chattels aforeſaid, in the ſaid place where &c. juſt, becauſe he ſays, that the ſaid ſum of of the rent aforeſaid, at the ſaid time when &c. were not in arrear and unpaid to the ſaid* B D, *nor was any part thereof at the ſaid time when &c. in arrear to the ſaid* B D, *as the ſaid* B D, *in his avowry aforeſaid hath above alleged; and this he prays may be enquired of by the country: and the ſaid* B D, *likewiſe &c.*

Where the action of replevin is againſt the bailiff or perſon taking the diſtreſs, inſtead of an avowry, he makes conuſance as bailiff &c.—the forms of the pleadings differ but little from the above, and may be found in almoſt every practical book.

RESCUE.

RESCOUS is an ancient French word, coming from *reſcourer*, that is *recuperare*, to recover; and ſignifies a forcible ſetting at liberty againſt law, a perſon arreſted by the proceſs or courſe of law. 1 *Inſt.* 160.

If the party reſcued be arreſted for felony, and in the cuſtody of a private perſon, the reſcuer muſt have notice of the arreſt: otherwiſe, if in cuſtody of an officer. 2 H. H. 606.

It is not felony to reſcue a perſon taken on a general warrant. 1 H. H. 578.—Nor unleſs a felony hath been actually committed. *Hale's Pl.* 116. Altho'

Altho' a *priſon breaker* may be arraigned for that offence, before he be arraigned of the crime for which he was impriſoned; yet he who reſcues one impriſoned for felony, cannot, according to the better opinion, be arraigned, for ſuch offence, as for a felony, till the principal offender be attainted; but he may be immediately proceeded againſt for a miſpriſion. 2 *Haw.* 140.

And therefore if the principal die before the attainder, he ſhall be fined and impriſoned. *Hale's Pl.* 116.

Alſo, if the principal be found not guilty, or guilty of a crime not capital, the reſcuer ought to be diſcharged of felony; but he may be fined for the miſdemeanor. 1 H. H. 598, 599.

An indictment of reſcous, muſt ſet forth the nature and cauſe of the impriſonment, and the ſpecial circumſtances of the fact in queſtion. 2 *Haw.* 240.

A hindrance of a perſon to be arreſted, that has commited felony, is a miſdemeanor, but no felony; but if the party be arreſted, and then reſcued, if the arreſt was for felony, the reſcuer is a felon; if for treſpaſs, fineable. *Hale's Pl.* 116. 2 *Haw.* 140.

Altho' the felony for which a man is arreſted, be not within clergy; yet the reſcuing him is within clergy. 1 H. H. 599. 607.

For the doctrine of *reſcues* in civil caſes, ſee title '*Sheriff.*'

RESTITUTION OF STOLEN GOODS,

BY *Virginia laws* page 114 of the *Reviſed Code*, 'If any felon or felons do rob or take away any money, goods, or 'chattels, from any perſon within this commonwealth, whether 'from their perſon or otherwiſe, and thereof the ſaid felon or felons be afterwards convicted or attainted, then the party ſo 'robbed, ſhall be reſtored to his ſaid money, goods, or chattels; 'and the court before whom ſuch felon ſhall be convicted or attainted, ſhall have power to award, from time to time, writs 'of reſtitution accordingly.'

On a ſimilar law in England, the following determinations have been made.

If the owner prefers a bill of indictment, which is found, and the felon flies, and is outlawed, the owner ſhall have reſtitution; for he gave evidence upon the indictment, which tho' it be not a conviction, is the ground of the outlawry, which is an attainder. 1 H. H. 545.

So, if the offender is convicted on the evidence of the ſervant, the maſter ſhall have reſtitution. 1 H. H. 545.

If the testator is robbed and the thief is convict upon the procurement of the executor; such executor shall have restitution. 3 *Inst.* 242.

A man stole cattle, and sold them in open market; the sheriff seized the thief and the money, and he was convicted and hanged at the prosecution of the owner of the cattle, and he had restitution of the money; for tho' the statute gives power to the justices to award restitution of the money or goods stolen, and though the money in this case was not stolen, yet because it did arise by stealing, it shall be within the equity, though not in the very words of the statute. *Noy.* 128.—*See Lofft's Reports* 88, where it was held that the proceeds of a bank note stolen, might be recovered by the party robbed, in an action of *trover*.—*See also* 1 H. H. 542, 3, 4.—2 *Hawk.* 170. *Kely.* 48. *Cro. Eliz.* 661.

If the offender be convict upon the evidence of the party robbed, or owner, he shall have restitution, though there were no fresh suit, or any enquiry by inquest touching the same; and this is the constant practice. 1 H. H. 545.

Yet if it shall appear to the court, that the party hath been guilty of gross neglect in prosecuting; it seemeth that in such case he shall not be intitled to restitution. 2 *Haw.* 171.

If the owner takes his goods again of the offender, to the intent to favour him, or maintain him, this is unlawful, and punishable by fine and imprisonment; but if he take them again without any such intent, it is no offence. 1 H. H. 546.

But after the felon is convicted, it can be no colour of crime to take his goods again, where he finds them. 1 H. H. 546.

RIOT, ROUT, AND UNLAWFUL ASSEMBLY.

I. What is a riot, rout, or unlawful assembly.
II. How restrained by a private person.
III. How by a constable, or other peace officer.
IV. How by the act of Assembly.

I. What is a riot, rout, or unlawful assembly.

WHEN *three persons* or more shall assemble themselves together, with an intent mutually to assist one another, against any who shall oppose them, in the execution of some enterprize of a private nature, with force or violence, against the peace,

peace, or to the manifest terror of the people, whether the act intended were of itself lawful or unlawful; if they only meet to such a purpose or intent, although they shall after depart of their own accord, without doing any thing, this is an *unlawful assembly*.

If after their first meeting they shall move forward towards the execution of any such act, whether they put their intended purpose in execution or not; this according to the general opinion, is a *rout*.

And if they execute such a thing in deed, then it is a *riot*. 1 *Haw.* 155. *Dalt. c.* 136.

If the jury acquit all but two, and find them guilty, the verdict is void, unless they be indicted *together with other rioters unknown*, because it finds them guilty of an offence, whereof it is impossible they can be guilty; for there can be no riot where there are no more persons than two. 2 *Haw.* 441.

But if there are several defendants, and two are found guilty, and the others die untried, it shall be intended a riot. *Burrow.* 1262.

Infants under the age of discretion are not punishable as rioters. 1 *Haw.* 159.

If a number of persons being met together at a fair, or market, or on any other lawful and innocent occasion, happen on a sudden quarrel to fall together by the ears, they are not guilty of a riot, but of a sudden affray only, of which none are guilty but those who actually engage in it; because the design of their meeting was innocent and lawful, and the subsequent breach of the peace happened unexpectedly, without any previous intention concerning it. Yet it is said, that if persons innocently assembled together, do afterwards upon a dispute happening to arise among them, form themselves into parties, with promises of mutual assistance, and then make an affray, they are guilty of a riot; because upon their confederating together with an intention to break the peace, they may as properly be said to be assembled together for that purpose from the time of such confederacy, as if their first coming together had been on such a design. 1 *Haw.* 156.

In every riot there must be some such circumstances, either of actual force or violence, or at least of an apparent tendency thereto, as are naturally apt to strike a terror into the people; as the shew of armour, threatening speeches, or turbulent gestures; for every such offence must be laid to be done *to the terror of the people*: And from hence it clearly follows, that assemblies at wakes, or other festival times, or meetings for exercise or common sports or diversions, as bull baiting, wrestling, and such like, are not riotous. 1 *Haw.* 157.

It

It is not material whether the thing intended to be done be lawful or unlawful in itſelf: Thus if in removing a nuiſance, entering into land &c. to which one of the party have a right of entry, any violence or tumult is offered, it is a riot. 1 *Haw.* 158.

II. How reſtrained by a private perſon.

By the common law, any private perſon may lawfully endeavour to ſuppreſs a riot, by ſtaying thoſe whom he ſhall ſee engaged therein, from executing their purpoſe, and alſo by ſtopping others whom he ſhall ſee coming to join them. 1 *Haw.* 159.

III. How by a conſtable or other peace officer.

By the common law, the ſheriff, conſtable, and other peace officers, may and ought to do all that in them lies, towards the ſuppreſſing of a riot, and may command all other perſons to aſſiſt therein. 1 *Haw.* 159.

IV. How by the act of Aſſembly.

In order to ſuppreſs a riot, rout &c. power is given to three, or two juſtices of the peace, at leaſt, and the ſheriff, or under-ſheriff of the county, by *Virginia laws*, page 38. *ſect.* 1. of the *Reviſed Code*,—which ſee.

It is ſaid that this power may be exerciſed by the juſtices, upon credible information, as well as upon their own view;—and that if they meet perſons, coming from the place where they have heard a riot was committed, arrayed in a riotous manner, they may arreſt them. *See* 1 *Hawk.* 161.

By *Virginia laws* page 38. ſect 2. of the *Reviſed Code*, power is given to the juſtices within one month after the riot &c. to ſummon 24 fit perſons, 12 of which ſhall conſtitute a jury to enquire of the ſaid riot &c.

The juſtices may record the riot whether the offenders be in cuſtody at the ſame time or have eſcaped. 1 *Hawk.* 161.

The record of a riot taken on view of the juſtices is not traverſable. But if it find the parties guilty of any other offence, as felony, maim &c. it may be traverſed as to thoſe offences:—And as the parties can only avail themſelves of the inſufficiency of the record, too much certainty cannot be obſerved. *See* 1 *Hawk.* 162.

By *Virginia laws* page 38, ſect. 3, 4, 5, 6, of the *Reviſed Code*. If the riot &c. is not found by reaſon of partiality in the jury

jury, the juſtices &c. ſhall certify the ſame to the general court; and on failure of the juſtices &c. a commiſſion ſhall go from the general court at the inſtance of the party grieved;—no perſon to be impriſoned for a riot, for a longer ſpace of time than one year. *See the above recited act.*

(A) Record of a riot on view.

county to wit.

Be it remembered, that on the day of in the year We J P, *and* K P, *two of the juſtices of the peace for the commonwealth, aſſigned to keep the peace in the ſaid county, and* A S, *ſheriff of the ſaid county, at the complaint and requeſt of* A J, *of in the county aforeſaid, yeoman, in our proper perſons have come to the manſion houſe of him the ſaid* A J, *in aforeſaid, and then and there do find* A O, *of yeoman,* B O, *of yeoman,* C O, *of yeoman, and other malefactors and diſturbers of the peace of the ſaid commonwealth, to us unknown, in a warlike manner arrayed, to wit, with clubs, ſwords, and guns, unlawfully, riotouſly, and routouſly aſſembled, and the ſame houſe beſetting, many evils againſt him the ſaid* A J, *threatning, to the great diſturbance of the peace of the ſaid commonwealth, and terror of the people, and againſt the form of the ſtatute in that caſe made and provided. And therefore we the aforeſaid* J P, K P, *and* A S, *the aforeſaid* A O, B O, *and* C O, *do then and there cauſe to be arreſted, and to the next jail of the ſaid commonwealth, in the county aforeſaid, to be conveyed, by our view and record of the unlawful aſſembly, riot, and rout aforeſaid convicted, there to remain every and each of them reſpectively, until they ſhall be diſcharged by due courſe of law. In witneſs whereof, to this our preſent record we do put our ſeals. Dated at aforeſaid, the day and year aforeſaid.*

(B) Commitment of the rioters upon view.

county to wit.

J P, *and* K P, *two of the juſtices of the peace of the commonwealth, aſſigned to keep the peace within the ſaid county, and* A S, *ſheriff of the ſaid county; to the keeper of the jail of the ſaid county.*

Whereas upon complaint made unto us by A J, *of yeoman, we did this preſent day of go to the houſe of the ſaid* A J, *at aforeſaid, and there did ſee* A O, *of yeoman,* B O, *of yeoman,* C O, *of yeoman, and other malefactors to us unknown, aſſembled together in an unlawful, routous, and riotous manner, to the terror of the people, and againſt the peace*

and

and dignity of the commonwealth, and againſt the form of the ſtatute in that caſe made and provided: We do therefore ſend you, by the bringers hereof the bodies of the ſaid A O, B O, *and* C O, *convicted of the ſaid riot, rout, and unlawful aſſembly, by our own view, teſtimony, and record; commanding you in the name of the commonwealth, to receive them into the ſaid jail, and them and every of them reſpectively, there ſafely to keep, until they be diſcharged by due courſe of law: Given under our hands and ſeals at aforeſaid, in the county aforeſaid, the day and year aforeſaid.*

(C) Precept to ſummon a jury.

county to wit.

J P, and K P, *two of the juſtices of the peace of the commonwealth, for the county aforeſaid, To the ſheriff of the ſaid county, greeting: On the behalf of the commonwealth, we command you, that you cauſe to come before us at in the county aforeſaid, on the day of next enſuing, twenty four honeſt and lawful men of the county aforeſaid, to enquire for the commonwealth, and for our indemnity in this behalf, upon their oath, of certain riots, routs, and unlawful aſſemblies at in the county aforeſaid, lately committed, as it is ſaid. And this you ſhall in no wiſe omit on pain of twenty pounds. Given under our hands and ſeals at aforeſaid, in the county aforeſaid, the day of in the year of the commonwealth.*

JURORS OATH.

You ſhall true inquiry and preſentment make of all ſuch things as ſhall come before you, concerning a riot, rout, and unlawful aſſembly ſaid to have been lately committed at in this county; you ſhall ſpare no one for favour or affection, nor grieve any one for hatred or ill will, but proceed herein according to the beſt of your knowledge, and according to the evidence which ſhall be given to you. So help you God

The oath which your foreman hath taken on his part, you and every of you ſhall well and truly obſerve and keep on your parts: So help you God.

(D) *The inquiſition, indictment or preſentment of the jury.*

county to wit.

An inquiſition for the commonwealth, indented and taken at in the county aforeſaid, the day of in the year of

of the commonwealth, by the oath of (*inſert all the juror's names*) honeſt and lawful men of the county aforeſaid, before J P, and K P, juſtices of the peace for the county aforeſaid, who ſay upon their oath aforeſaid, that A O, of yeoman, B O, of yeoman, C O, of yeoman, together with other malefactors and diſturbers of the peace of the ſaid commonwealth, to the jurors aforeſaid, as yet unknown, on the day of now laſt paſt, at aforeſaid, in the county aforeſaid, with force and arms, to wit, with clubs, ſwords and guns, unlawfully, routouſly, and riotouſly, did aſſemble, to diſturb the peace of the ſaid commonwealth, and ſo being then and there aſſembled and gathered together, the manſion houſe of A J, yeoman, at aforeſaid, unlawfully, routouſly, and riotouſly did enter, and in and upon him the ſaid A J, then and there unlawfully, routouſly, and riotouſly did make an aſſault, and him the ſaid A J, then and there unlawfully, routouſly, and riotouſly did beat, wound, and ill treat, in diſturbance of the peace of the ſaid commonwealth, and to the terror of its citizens, againſt the form of the ſtatute in ſuch caſe made and provided, and againſt the peace and dignity of the commonwealth.'

A B.
C D.
E F, &c.

(F) *Certificate to the general court.*

We J P, and K P, two of the commonwealth's juſtices of the peace for the county of and J S, ſheriff of the ſaid county, do hereby certify, that on the day of we received credible information, that a great riot, and unlawful aſſembly, had been committed by divers perſons at in the ſaid county, who had diſperſed themſelves, whereupon we made our precept to the ſheriff, to ſummon a jury of twenty-four fit perſons to meet us at the place aforeſaid, on this day, to enquire of and concerning the ſaid riot; and the ſheriff having returned a jury of twenty-four fit perſons, twelve whereof appeared, and were ſworn to enquire of the ſaid riot: Whereupon it was fully proved that A O, &c. of &c. labourer, did on the day of laſt paſt unlawfully aſſemble, armed in a hoſtile manner, to wit, with guns &c. (*here deſcribe their armour and actions particularly*) nevertheleſs the jurors aforeſaid did not find the ſaid riot, by reaſon that C O, D O, &c. were then and there preſent, and did labour with the ſaid jurors, by embracery and maintenance, not to find the ſame as appeared to us.—Certifie, &c.

To the hon. the judges of the general court. Rivers

FEW parts of the act of Assembly respecting obstructions of rivers, or other water courses, fall under the jurisdiction of a justice of the peace.—The following sections of the act in the *Revised Code*, chap. 105. page 208, are all that will be noticed.

By sect. 14. A person fixing in any water course, any dam, hedge, weir, seine, drag, or other stoppage, whereby navigation or the passage of fish may be obstructed, except for the purpose of working some machine or engine of public utility, shall be guilty of a nuisance.

Sect. 15. The county courts may contract for the clearing of rivers within their county;—provided that it shall not extend to clearing such obstructions as require the use of gun powder; nor to the rivers *Meherrin*, *Nottoway*, *Roanoke*, *and Rappahannock*, above the falls.

Sect. 16. To fall a tree across any run on which there is a public bridge, without removing it in 48 hours, subjects the offender to a forfeiture of two dollars for each tree.

Warrant against a person for falling a tree into a river &c.

county to wit.

Whereas information has this day been made to me by A J, that A O, of the said county, did on the day of last past, fell a tree into the river, (*or creek, or run, as the case may be*) across which several public bridges are built; and did not cut and carry away the same within forty-eight hours thereafter: Therefore I require you &c.

To A C, Constable.

ROADS.

IT has been usual in treatises of this kind, to consider the law respecting *Roads*, under the title of *highways*: but as the term '*Roads*,' is adopted by the legislature, and is generally better understood than *highways*, I have thought it most proper to use this title;—inserting so much of the act of Assembly only as falls under the notice of a single magistrate.— See *V. l.* page 29. of the *Revised Code*.

By sect. 4, of the above law, All male labouring persons of the age of 16 years or upwards, except those owning two or more slaves of that age, are required to work on some public road;—on failure, after notice by the surveyor, to attend with proper tools

tools, each perſon forfeits ſeven ſhillings and ſix pence, to be paid by himſelf, if a freeman of full age,—if an infant, by his parent or guardian,—and if a ſlave, by his overſeer or maſter.

By ſect. 5. The clerk of the court within 10 days after the appointment of a ſurveyor of a road is to deliver a copy of the order to the ſheriff, under the penalty of 15 ſhillings;—the ſheriff within 15 days after the receipt of the order ſhall deliver it to the ſurveyor, under the penalty of 15 ſhillings.—And each clerk ſhall once in every year fix up in the court-houſe, a liſt of the names and precincts of all the ſurveyors of public roads in his county, under the penalty of 15 ſhillings.

By ſect. 6. Every ſurveyor of a road ſhall keep it well cleared and ſmoothed, and 30 feet wide;—at every fork, or croſs road a ſign-poſt, or ſtone ſhall be erected, and conſtantly kept in repair, directing in large letters, to the moſt noted place to which the road leads, and may take ſtone or wood for that purpoſe from any adjoining land, for the expence of which, the court ſhall reimburſe the ſurveyor in their next county levy;—all neceſſary bridges and cauſeys to be made by the ſurveyor, 12 feet wide, and ſafe, and for that purpoſe may take timber, ſtone, or earth from any adjoining land, the ſame being firſt valued by two honeſt houſe-keepers appointed and ſworn by a juſtice; but not to take any earth &c. from a lot in a town, without permiſſion of the owner;—where wheel carriages are neceſſary, a juſtice of peace may empower the ſurveyor, to impreſs them from perſons whoſe hands are liable to work on his road, and appoint two honeſt houſe keepers, who, being ſworn, ſhall value by the day, the uſe of ſuch carriage and horſes, upon a certificate of which valuation, and of the ſurveyor, of the number of days, the owner ſhall be entitled to an allowance in the next county levy. In like manner ſhall the owner of timber &c. be entitled, on a certificate of the houſe-keepers.—Every ſurveyor failing to do his duty herein forfeits 15 ſhillings for each offence.

By ſect. 9. If any perſon ſhall fell a tree into a public road, or into any ſtream of water whereon there is a public bridge, and ſhall not remove it within 48 hours,—or kill a tree within the diſtance of 50 feet from the public road,—or deſtroy or deface, a ſign poſt, it ſhall be deemed a nuiſance.—The penalty is 10 pounds.—Where any fence ſhall be made acroſs any public road the owner or tenant of the land ſhall pay 10 ſhillings for every 24 hours it ſhall be continued.

By ſect. 10. The owner or occupier of a dam over which a public road paſſes, ſhall keep it in repair 12 feet wide, and ſhall make a bridge of like breadth, with ſtrong rails on each ſide,

over

over the pier-head, flood-gates &c. under penalty of 10 ſhillings for every 24 hours failure.—But where the mill has been deſtroyed by accident, the penalty ſhall not be recovered until one month after ſhe has been repaired ſo as to have ground one buſhel of grain.

By ſect. 11. All the penalties in this act, not otherwiſe directed ſhall be one moiety to the informer, and the other to the uſe of the county, recoverable with coſts, on warrant, petition, or action as the caſe may be. Any juſtice, who, upon his own view, ſhall diſcover a road, bridge, cauſey, or mill-dam, out of repair, ſhall iſſue a warrant againſt the delinquent, and if no reaſonable excuſe be made for ſuch default, may give judgment for the penalty and coſts, not exceeding 25 ſhillings, or the offenders may be preſented by the grand juries;—and in all convictions, on view of a juſtice, preſentment, or private information to juſtices, where there ſhall be no evidence to convict the offender but the informer's own oath, the whole penalty ſhall be to the county, to be collected and accounted for by the ſheriff, as county levies;—and every juſtice on making a conviction ſhall certify the ſame to the clerk of the county, who ſhall yearly, before the firſt day of March, deliver to the ſheriff a liſt of all the offenders ſo certified, and of all others convicted in court, within one year preceding, of any offence againſt this act.

By ſect. 12. Proſecutions for offences againſt this act are to be commenced within 6 months after the offence, and not after.

(A) Warrant for failing to send, or attend to keep the road in repair, on ſect. 4.

county to wit.

Complaint being this day made to me J P, a juſtice of the peace for the county aforeſaid, by A J, that F O, did on the day of laſt, fail to go and aſſiſt with proper tools, on the requeſt of W S, ſurveyor of the road from to in the ſaid county, to clear and repair the ſaid road (*or to ſend* W S, *a ſervant, or male labouring ſlaves above the age of ſixteen years, belonging to the ſaid* F O) contrary to the act of the General Aſſembly: Theſe are therefore to require you to ſummon the ſaid F O, to appear before me, or ſome other juſtice of the peace for the ſaid county, to anſwer the premiſes. Given &c.

To A C, Conſtable.

JUDGMENT.

On hearing the within complaint, it being duly proved before

fore me that the within named F O, did fail to attend with proper tools (*or to ſend male labouring ſlaves belonging to him the ſaid* F O, *above the age of ſixteen years*) to aſſiſt in repairing the ſaid road, by which he hath forfeited *ſeven ſhillings and ſix pence*: It is therefore conſidered that the within named F O, pay the ſaid ſum of *ſeven ſhillings and ſix pence*, the one half thereof to the uſe of the ſaid A J, the informer, and the other to the uſe of the ſaid county towards leſſening the levy thereof, together with the coſts.

Coſts Cents.

(B) Warrant againſt the clerk, on ſect. 5.

to wit.

Complaint having been this day made to me by A B, that C D, was, at a court held for this county, on the day of appointed ſurveyor of a public road in the ſaid county, and that E F, clerk of the ſaid county court, hath failed to deliver to the ſheriff a copy of the order of the ſaid appointment within ten days after the ſame was made, as the law directs: You are therefore required to ſummon the ſaid E F, to appear before me, or ſome other juſtice of the peace, of this county, to ſhew cauſe why the penalty of fifteen ſhillings ſhould not be levied on him for his ſaid neglect. Given &c.

(C) Againſt the ſheriff.

to wit.

Complaint being made by A B, that C D, was, at a court held for this county, on the day of appointed ſurveyor of a road in the ſaid county, and a copy of the order for his appointment was in due time, by the clerk of the court, delivered to E F, deputy ſheriff of this county, and that he the ſaid E F, failed to ſerve the ſaid C D, with a copy of the ſaid order within fifteen days from the receipt thereof, as the law directs: You are therefore &c. *as in the former.*

(D) Warrant, on ſect. 6.

to wit.

Whereas A B, ſurveyor of the road from to hath given me information that the aſſiſtance of wheel carriages is neceſſary for making (or repairing) a cauſey in the ſaid road; I therefore empower the ſaid A B, to impreſs ſuch neceſſary wheel carriages,

carriages, draught horſes, or oxen, with their gear and driver, belonging to any perſon who, or their ſervants or ſlaves, are appointed to work on the ſaid road; he the ſaid A B, having procured a valuation by the day to be made thereof, by C D, and E F, two honeſt houſe keepers hereby appointed for that purpoſe, who being ſworn before me, or ſome other juſtice of the peace of this county, are to make ſuch valuation, and give the owner or owners a certificate thereof to entitle him or them to an allowance for the ſame in the next county levy. Given under my hand and ſeal &c.

(E) Certificate of the valuation.

We the ſubſcribers, being firſt ſworn, purſuant to a warrant from J P, have this day viewed a cart and two horſes, (*or oxen*) with their driver, belonging to J K, and impreſſed by A B, to aſſiſt in making a cauſey in the road, whereof he is ſurveyor, and do value the uſe of the ſaid cart, horſes (*or oxen*) and driver, to by the day. Certified the day of in the year

C D.
E F.

Certificate thereon by the ſurveyor.

I do certify that the cart, horſes (*or oxen*) and driver above mentioned, were employed days in the ſervice for which they were impreſſed.

A B.

The ſame proceedings are had for timber &c.

(F) Warrant againſt a ſurveyor, for not keeping the road in repair.

to wit.

Complaint &c. (*as in the firſt*) that S L, ſurveyor of the road from to in the ſaid county, has failed to clear and keep the ſaid road in repair, contrary to the act of aſſembly in that caſe made. Theſe are therefore, &c.

The *judgment the ſame as the firſt, except as to the fine, which in this inſtance is fifteen ſhillings with coſts.*

(G) Warrant againſt a ſurveyor for not ſetting up a ſign poſt.

to wit.

Complaint &c. (*as in the former*) that C D, ſurveyor of a road in this county, at a fork or croſſing thereof, hath failed, to keep,

keep, ſet up, or renew, a ſtone or poſt where the ſaid roads join, with inſcriptions thereon, directing to the moſt noted place to which each of the ſaid joining roads lead, as the act of Aſſembly directs: You are therefore &c. (*as in the firſt.*)

Judgment the ſame as on warrant (A) *changing the ſum to fifteen ſhillings, with coſts.*

The penalty for running a fence acroſs a public road, on ſect. 9. ſeems more properly recoverable by indictment.

(H) *Warrant on ſect.* 10.

To the ſheriff of county, or any conſtable therein.
to wit.

Complaint being made to me by A B, that C D, the owner (*or occupier*) of a mill over the dam of which a public road leads, in this county, hath failed to keep the ſaid dam in repair, of the breadth of twelve feet at top for twenty four hours laſt paſt, (*or hath failed to keep a good and ſufficient bridge twelve feet wide at top, and well railed on each ſide, over the pier head, or waſte, in the ſaid mill dam, as the caſe ſhall be*) according to the act of aſſembly in that caſe made: You are therefore required to ſummon the ſaid C D, to appear before me, or ſome other juſtice of the peace of this county, to ſhew cauſe why the penalty of ten ſhillings ſhould not be levied on him for his ſaid failure, according to the ſaid act of aſſembly; and then make return of this warrant. Given &c.

(I) JUDGMENT.

On hearing the within complaint, the defendant is proved to be guilty: Therefore it is conſidered that he pay the ſum of ten ſhillings for his ſaid neglect, one half to the ſaid A B, and the other to the uſe of the ſaid county, and that he alſo pay the coſts. Given under my hand &c.

Coſts.

(K) *Warrant againſt the ſurveyor on ſect.* 11.

to wit.

Whereas upon my own view, I have found a public road in this county, whereof A B, is ſurveyor, not kept in good repair, as the act of Aſſembly directs. You are therefore required to ſummon the ſaid A B, to appear before me, or ſome other juſtice of the peace of this county, to ſhew cauſe why the penalty of fifteen ſhillings ſhould not be levied on him for his neglect, according to the ſaid act. Given &c.

(L)

(L) *Judgment on hearing.*

On hearing, the defendant not ſhewing any reaſonable cauſe to the contrary, it is conſidered that he pay the ſum of fifteen ſhillings for his neglect, for the uſe of this county, to be applied towards leſſening the levy thereof, and that he pay the coſts. Given &c.

(M) *Judgment by default.*

The within named A B, being ſummoned, and failing to appear and ſhew any reaſonable cauſe to the contrary, it is conſidered &c. *as in the laſt.*

(N) *Warrant againſt the owner of a mill.*

to wit.

Whereas, upon my own view, I have found a mill dam *(or bridge over the pier head or flood gates of a mill dam)* belonging to A B, of this county (*or acroſs the boundary between this and the county of*) over which a public road leads, not kept in good repair, as the act of Aſſembly directs: You are therefore &c. *as in the former.*

The judgment is the ſame as in the former, changing the penalty to ten ſhillings.

Indictment for a nuiſance on ſect. 9.

county to wit.

The jurors &c. upon their oath preſent, That A O, late of in the county aforeſaid yeoman, on the day of in the year and on divers other days and times, as well before as afterwards, with force and arms, at in the ſaid county, in and upon the common highway, and public road there, leading from , unto the town of did fall a tree, and the ſame tree ſo as aforeſaid fell, from the aforeſaid day of in the year aforeſaid, until the day of exhibiting this information, in and upon the common highway aforeſaid, to lie and remain, hath permitted, and doth ſtill permit, to the grievous and common nuiſance of all the citizens of the ſaid commonwealth, upon and thro' the common highway aforeſaid going, paſſing, riding and travelling, againſt the form of the ſtatute in that caſe made and provided, and againſt the peace and dignity of the commonwealth.

For other offences againſt the 9th ſection, vary the diſcription of the offence ſo as to ſuit the act of Aſſembly, and conclude as in the above precedent, to the *common nuiſance* &c.

Robbery

ROBBERY (from the French *de la robe*, according to lord *Coke*, or the Saxon *reofere*, according to doctor Burn) is, *a felonious and violent taking away from the perſon of another, goods or money to any value putting him in fear.* 1 *Hawk.* 147.

There are two kinds of robbery; from the *perſon*, and from the *houſe*. Robbery from the *perſon* will be treated of under this title; robbery from the *houſe* has already been conſidered under the titles of *Burglary*, and *Larceny*.

In the explication of this ſubject, I ſhall conſider,

I. *What taking away will be ſufficient to conſtitute* robbery.

II. *What ſhall be ſaid to be a taking from the perſon.*

III. *What kind of taking ſhall be ſaid to be violent.*

IV. *In what reſpects robbery differs from other larcenies, in the crime and puniſhment.*

I. What taking away will be ſufficient to conſtitute robbery.

It ſeems clear that he who receives my money by my delivery, either while I am under the terror of his aſſault, or afterwards, whilſt I think myſelf bound in conſcience to give it to him by an oath to that purpoſe, which in my fear I was compelled by him to take, may in the eye of the law, as properly be ſaid to take it from me, as he who actually takes it out of my pocket with his own hands. 1 *Hawk.* 147.

Neither can he who has once actually compleated the offence, by taking my goods in ſuch a manner into his poſſeſſion, afterwards purge it by any re-delivery. The outrage offered to the rights of ſociety doth not vary in its nature, becauſe ineffectual in its conſequences. Therefore where a robber, having taken a purſe, returned it again, ſaying, 'If you value your purſe, 'take it and give me the contents;' but was ſeized before the money was re-delivered, he was found guilty; for the continuance of the property in the poſſeſſion of the robber is not required by law. 1 *Hawk.* 147.

But he who only attacks me in order to rob me, but does not take my goods into his poſſeſſion, though he go ſo far as to cut off the girdle of my purſe, by reaſon whereof it falls to the ground, is not guilty of robbery; but highly puniſhable at the common law by fine and impriſonment, &c. for, ſo enormous a breach of the peace. 1 *Hawk.* 147, 148.

Yet

Yet in some cases a man may be said to rob me, where in truth he never actually had any of my goods in his possession; as where I am robbed by several of one gang, and one of them only takes my money, in which case, in judgment of law, every one of the company shall be said to take it, in respect of that encouragement which they give to another, through the hopes of mutual assistance in their enterprize: Nay though they miss of the first intended prize, and one of them afterwards ride from the rest and rob a third person in the same highway, without their knowledge, out of their view, and then return to them, all are guilty of robbery, for they came together with an intent to rob, and to assist one another in so doing. 1 *Hawk.* 148.

II. What shall be said to be a taking from the person.

Not only the taking away a horse from a man whereon he is actually riding, or money out of his pocket, but also the taking any thing from him openly and before his face; which is under his immediate and personal care and protection, may properly enough be said to be a taking from the person. And therefore he who having first assaulted me takes away my horse standing by me, or having put me in fear, drives my cattle in my presence out of my pasture, or takes my purse which in my fright I cast into a bush, or my hat which fell from my head, or robs my servant of my money before my face, may be indicted as having taken such things from my person. 1 *Hawk.* 148.

Fear is the distinguishing ingredient between robbery and other larcenies. 3 *Inst.* 68. Therefore where a thief clandestinely stole a purse, and on its being discovered in his custody, denounced vengeance against the party if he spoke of it, and then rode away; it was held to be simple larceny only, and not robbery; because the fear, excited by the menaces of the thief, was subsequent to the act of taking the purse. 2 *Roll.* 154. 1 *Hale* 535.

III. What kind of taking shall be said to be violent.

Wherever a person assaults another with such circumstances of terror as put him into fear, and causes him by reason of such fear to part with his money, the taking thereof is adjudged robbery, whether there were any weapon drawn or not, or whether the person assaulted delivered his money upon the other's command, or afterwards gave it him upon his ceasing to use force, and begging an alms, for he was put into fear by his assault, and gives him his money to get rid of him. 1 *Hawk.* 149.

But

But it is not neceſſary that the fact of actual fear ſhould either be laid in the indictment or be proved upon the trial. It is ſufficient if the offence be charged to be done *violently and againſt his will.* And if it appear upon the evidence to have been attended with thoſe circumſtances of violence or terror, which in common experience are likely to induce a man to part with his property againſt his conſent, either for the ſafety of his perſon, or for the preſervation of his character and good name, it will amount to a robbery. *Foſter.* 128

It is certain, that the claim of property, in the thing taken away, without any colour, is no manner of excuſe. 1 *Hawk.* 149.

IV. In what reſpects robbery differs from other larcenies in the crime and puniſhment.

Firſt, No other larceny ſhall have judgment of death, unleſs the thing ſtolen be above the value of twelve pence; but robbery ſhall have ſuch judgment, how ſmall ſoever the value may be of the thing taken away. 1 *Hawk.* 149.

Secondly, Other larcenies whether from the perſon or not, ſhall not be ſuppoſed to be done with violence or terror, but robbery is always laid as done on an aſſault with violence, and putting the party in fear.

Thirdly, But they all agree in this, that the offenders had the benefit of clergy at the common law. 1 *Hawk.* 150.

Robbery is excluded from clergy by *V. l. p.* 50. *See* 'Clergy,' [Benefit of]

Indictment of felony for robbery from the perſon on the highway.

county to wit.

The jurors &c. upon their oath preſent, That E H, *late of the pariſh of in the county of labourer, on the day of in the year with force and arms, at the pariſh aforeſaid, in the county aforeſaid, in the commonwealth's highway there, in and upon one* W T, *in the peace of God and of the ſaid commonwealth, then and there being, feloniouſly, did make an aſſault, and him the ſaid* W T, *in bodily fear and danger of his life, in the highway aforeſaid, then and there feloniouſly did put, and of the value of dollars,* (recite all the goods taken) *of the goods and chattels of the ſaid* W T, *from the perſon, and againſt the will, of the ſaid* W T, *in the highway aforeſaid, then and there feloniouſly and violently did ſteal, take, and carry away againſt the peace and dignity of the commonwealth.*

BY *Virginia laws, chap.* 131. *page* 257 of the *Reviſed Code*, Any perſon may apprehend a ſervant or ſlave, ſuſpected to be a runaway, and carry him before a juſtice who, if to him the ſervant or ſlave appear, by the oath of the apprehender, to be a runaway, ſhall give a certificate of ſuch oath, and the diſtance in his opinion, between the place where the runaway was apprehended, and that from whence he fled; and the apprehender ſhall convey the runaway to the laſt mentioned place, or deliver him to the owner, or ſome other authorized to receive him (which the apprehender *muſt* do, if the owner or overſeer reſides in the county where the runaway is taken up) or deliver him to the jailer of the county or corporation, in which he was apprehended, and ſhall be entitled to 1 dollar and 67 cents, and 10 cents for every mile he ſhall convey him, to be paid by the owner; the jailer ſhall cauſe a deſcription of the runaway's perſon and wearing apparel to be ſet up at the door of his court-houſe.

Sect. 2. If the owner claim not within 2 months thereafter, the ſheriff or ſerjeant ſhall publiſh a like advertiſement for 3 months in the *Virginia Gazette*, and ſhall hire the runaway under the direction of the court, having put an iron collar, ſtamped with the letter F. round his neck, and out of his wages pay the reward for apprehending, and the expences incured on his account; but he ſhall deliver the runaway even before the time expire, and pay the balance of the wages, if any, to him who ſhall claim, and who having proved before the court of ſome county or corporation, or a juſtice of the peace of the county or corporation, in which ſuch runaway is confined, that he had loſt ſuch a one as was deſcribed in the advertiſement, and having there given ſecurity to indemnify the ſheriff or ſerjeant, ſhall produce the clerk's or the juſtice's certificate, of ſuch proof made, and ſecurity given, proved by his own or another's oath, the runaway when ſhewn to him to be the ſame that was ſo loſt, and pay ſo much as the expences aforeſaid ſhall exceed the wages.

Sect. 3 If the runaway is a ſlave, after the end of one year from the laſt advertiſement, he ſhall be ſold, and the proceeds of the ſale, with the balance of the wages paid to the public treaſurer, for the uſe of the owner, proving his property at any future time, or otherwiſe for the uſe of the commonwealth.

Sect. 4. If the runaway die in jail the expences ſhall be defrayed by the public.

Sect. 5. If the runaway has croſſed the bay of *Cheſapeake*, he ſhall be delivered to the ſheriff of ſome county bounded thereby, who ſhall tranſport him to the other ſide, and cauſe him to be put into the hands of a conſtable, to be by conſtable to conſtable conveyed to the owner, who ſhall pay the ſheriff 20 dollars, and the conſtable 10 cents a mile.

Sect.

Sect. 6. The rewards may be recovered by *warrant*, *petition*, or *action*, as the case may require.

Sect. 7. The jailor's fees are 25 cents for the commitment, and the same for releasement; for every 24 hours keeping 17 cents;—a sheriff, serjeant or jailor taking more than legal fees, forfeits 4 dollars for each offence, besides what he had received, recoverable before a justice of the peace.

Magistrate's Certificate.

county to wit.

I J P, *being a justice of the peace for the aforesaid county, do hereby certify, that* B T, *of the county of hath this day made oath before me, that a negro slave whom he hath now brought before me is a runaway, that he has just grounds to believe the said slave is the property of* C M, *of the county of that he was taken up, on the day of in the year in the county of at the house of and the distance, in my opinion, between the said place, where the said slave was apprehended and the residence of the said* C M, (or if he fled from a plantation or quarter of the owner, then the distance to such place) *is miles. Given under my hand and seal this day of in the year*

The fees are 1 dollar and 67 cents, for taking up and 10 cents for every mile of conveyance.—And if the runaway is carried to prison, and not to the owner, it seems necessary that the magistrate should certify the distance between the place where the slave was apprehended and the jail of the county.

Warrant against a sheriff, jailor &c. for taking more than legal fees.

county to wit.—*To constable.*

Whereas complaint hath this day been made before me, J P, *a justice of the peace for the county aforesaid by* A J, *of that* B J, *jailor of the said county, did on the day of last past demand and take from him the said* A J, *dollars, as prison fees for the commitment, releasement, and days maintenance of a negro slave, belonging to the said* A J, *committed to the jail of his said county as a runaway: being more than the fees allowed by law. These are therefore to require you to summon the said* B J, *to appear before me or some other justice of the peace for this county, to shew cause, why the penalty of four dollars should not be levied upon him for his said offence, and moreover refund all monies which he may have received from the said* A J, *over and above the legal fees. Given under my hand and seal this day of in the year*

The

The form of judgments, executions &c. may be found under titles *Gaming*, *Pork*, *Warrants &c.*

SABBATH.

BY *V. I.* page 287. § 5. 'If any perſon on a ſabbath day 'ſhall himſelf be found labouring at his own, or any other 'trade, or calling, or ſhall employ his apprentices, ſervants, or 'ſlaves in labour, or other buſineſs, except it be in the ordinary 'houſehold offices of daily neceſſity, or other work of neceſſity 'or charity, he ſhall forfeit the ſum of one dollar and ſixty ſe-'ven cents for every ſuch offence, deeming every apprentice, 'ſervant, or ſlave, ſo employed, and every day he ſhall be ſo 'employed, as conſtituting a diſtinct offence.'

Warrant againſt a perſon for labouring on a ſabbath day.

county to wit.

Whereas complaint and information on oath, hath this day been made to me J P, *a juſtice of the peace for the county aforeſaid, by* A J, *that* A O, *of the ſaid county ſhoemaker, was found labouring at his trade, to wit, in making ſhoes, on the day of laſt paſt, on the day commonly called* ſabbath day, *at the county aforeſaid, contrary to the act of Aſſembly in that caſe made and provided, whereby the ſaid* A O, *hath forfeited the ſum of one dollar and ſixty-ſeven cents, for his ſaid offence: Theſe are therefore &c.*

The form of the judgment execution &c. may be found under titles 'Gaming,' 'Pork,' 'Warrant,' &c.

Sacrilege, (*See* LARCENY)

SCIRE FACIAS.

IF a judgment is recovered, and no execution iſſued thereon within a year and a day, the law preſumes *prima facie*, that it is extinct, and no execution can iſſue on ſuch judgment, till it is revived by *ſcire facias*.—Or an action of debt may be commenced on the judgment, which is now ſeldom done. 3 *Blacks Com.* 421. *Co. Lit.* 290. *b.*

But if an execution iſſues within the year, and is continued down ſeveral years, a new execution may iſſue without a *ſcire facias*, *Str.* 109.

So,

So, if judgment be entered with *ſtay of execution*, by agreement, 'till ſuch a time; there needs no *ſcire facias* 'till a year and day after the time agreed. 4 *Com. Dig.* 143.

The defendant may plead to a *ſcire facias*, as on an original ſuit.

Scire facias to revive a judgment obtained before a ſingle magiſtrate.

county to wit.

Whereas on the day of before me J P, *a juſtice of the peace for the county aforeſaid,* A C, *recovered a judgment for dollars for debt, and cents, for his coſts againſt* A D, *whereof he is convict as appears to me; and forasmuch as the ſaid* A C, *hath complained to me that he hath not received any ſatisfaction for his ſaid debt and coſts; therefore, in the name of the commonwealth, I command you to ſummon the ſaid* A D, *to appear before me at in the county aforeſaid, on the day of to ſhew cauſe why execution ſhould not be made of the debt and coſts aforeſaid; and that you be then there to ſhew how you have executed this warrant. Given &c.*

Scold, (*See* NUISANCE.)

SEAMEN.

THE Congreſs of the United States having paſſed a law for the regulation of ſeamen, we muſt refer to the *Appendix* (No. 2.) of this work, where the ſubject will be treated of under '*the duties of a juſtice of the peace ariſing under the laws of the United States.*'

If the keeper of a tavern ſell any liquor to a ſailor in actual pay, on credit, he ſhall not be entitled to recover the price thereof; and in any warrant &c. brought for the ſame, it ſhall be diſmiſſed, and the defendant recover double coſts. *V. l.* page 213. § 11. of the *Reviſed Code.*

For the above offence, or entertaining any ſailor without conſent of his captain, the ordinary keeper forfeits two dollars to the captain for every offence. *Id.* § 12. (*For the form of the warrant, ſee title 'Seamen,' in Appendix No. 2. of this work.*)

The maſter of any veſſel putting on ſhore any diſabled ſeaman or ſervant, before his contract for ſervice is expired, without providing for his maintenance and cure, forfeits 60 dollars to the overſeers of the poor of the county, recoverable by action of debt or information,—and moreover ſhall be liable to their action for

all

all expences incurred in the maintenance and cure of ſuch perſon,—and ſhall be ruled to give ſpecial bail,—on the overſeers making affidavit of the cauſe of action. *V. l. p.* 215.

See title '*Slaves*,' § 50, 51, as to the penalty on maſters of veſſels for carrying a ſervant or ſlave out of the ſtate.

SEARCH WARRANTS.

THE importance of this ſubject, as well from the frequent applications made to magiſtrates to grant theſe warrants, as from the great caution neceſſary to be obſerved in the uſe of them, will juſtify my giving them a ſeparate title. Under which I ſhall ſhew,

I. In what manner they ſhall be granted.
II. How they ſhould be executed.
III. Proceedings after the return.
IV. Form of a ſearch warrant.

I. In what manner they ſhall be granted,

The power of granting ſearch warrants, ſeems now to be univerſally admitted, altho' ſo great an authority as lord *Coke* once denied their legality. *See* 4 *Inſt. chap.* 31. *p.* 176.

Lord *Hale* in his pleas of the crown, (*vol.* 2. *p.* 150.) after controverting the opinion of lord *Coke*, as to the power of magiſtrates in granting thoſe warrants, lays down the following rules reſpecting the uſe of them.

1. They are not to be granted without oath made before the juſtice of a felony committed, and that the party complaining hath probable cauſe to ſuſpect they are in ſuch a houſe or place, and doth ſhew his reaſons of ſuch ſuſpicions. 2 H. H. 150.

And therefore, a general warrant to ſearch in all ſuſpected places is not good, but only to ſearch in ſuch particular places, where the party aſſigns before the juſtice his ſuſpicion and the probable cauſe thereof, for theſe warrants are judicial acts and muſt be granted upon the examination of the fact. 2 H. H. 150.

2. It is fit that ſuch warrants to ſearch do expreſs, that ſearch be made in the day time, and tho' they may not be unlawful without ſuch reſtriction, yet they are very inconvenient without it, for many times under pretence of ſearches made in the night, robberies and burglaries have been committed, and at beſt it creates great diſturbance. 2 H. H. 150.

3. They ought to be directed to conſtables, and other public officers, whereof the law takes notice, and not to private perſons, tho' it is fit the party complaining ſhould be preſent and aſſiſtant, becauſe he knows his goods. *Id.*

4. It ought to command that the goods found together with the party in whoſe cuſtody they are found, be brought before ſome juſtice of the peace, to the end, that upon farther examination of the fact the goods and party in whoſe cuſtody they are found, may be diſpoſed as to law ſhall appertain. *Id.* *See* 2 *Hawk.* 135.

II. How they ſhould be executed.

1. Whether the ſtolen goods are in the ſuſpected houſe or not, the officer and his aſſiſtants in the day time, may enter, the doors being open, to make ſearch, and it is juſtifiable by this warrant. 2 H. H. 151.

2. If the door be ſhut, and upon demand it be refuſed to be opened by them within, if the ſtolen goods be in the houſe, the officer may break open the door. 2 H. H. 151.

3. If the goods be not in the houſe, yet it ſeems the officer is excuſed that breaks open the door to ſearch, becauſe he ſearched by warrant, and could not know whether the goods were there till ſearch made: but it ſeems that the party that made the ſuggeſtion is puniſhable in ſuch caſes; for as to him the breaking the door is *in the event* lawful or unlawful, to wit, lawful if the goods are there, unlawful, if not there. *Id.*

III. Proceedings after the return.

1. With reſpect to the goods brought before the magiſtrate, if it appears they are not ſtolen, they are to be reſtored to the poſſeſſor; if it appears they were ſtolen, they are not to be delivered to the proprietor, but depoſited in the hands of the ſheriff or conſtable, to the end the party robbed may proceed by indicting and convicting the offender to have reſtitution. 2 H. H. 151.

2. With reſpect to the party that had the cuſtody of the goods: if they were not ſtolen then he is to be diſcharged: if ſtolen, but not by him, but by another that ſold or delivered them to him, if it appear that he was ignorant that they were ſtolen, he may be diſcharged as an offender, and bound over to give evidence as a witneſs againſt him that ſold them; if it appears that he was knowing they were ſtolen, it is fit to bind him over to anſwer the felony, for there is a probable cauſe of ſuſpicion, at leaſt that he was acceſſory *after*. 2 H. H. 152.

The

The foregoing observations of lord *Hale* have been fully recognized by very important determinations made since he wrote. In the case of *John Entick*, who with his papers, were seized, by a warrant issued by the earl of *Halifax* as secretary of state; 'for being the author or one concerned in writing the *Monitor*.' On trespass, the jurors found a special verdict; and lord *Camden*, in delivering the resolution of the court, observed, 'That a warrant to seize and carry away papers in the case of a seditious libel 'was illegal and void.—He said that warrants to search for stolen 'goods had crept into the law by imperceptible practice, that it 'is the only case of the kind to be met with, and that the law 'proceeds in it with great caution.—For, 1st, There must be a 'full charge upon oath of a theft committed.'

2d. 'The owner must swear that the goods are lodged in 'such a place.'

3d. 'He must attend at the execution of the warrant to shew 'them to the officer, who must see that they answer the description.

'And lastly, the owner must abide the event at his peril; for 'if the goods are not found, *he* is a trespasser, and the officer be-'ing an innocent person will be always a ready and convenient 'witness against him.'—11 *State trials*, 321.

Under this head we must not omit the case of *John Wilkes, Esq.* in which the doctrine of *general warrants*, was fully investigated.—On a supposition that Mr. *Wilkes* was author of No. 45 of a periodical paper, entitled the '*North Briton*;' lord *Halifax* then secretary of state, issued a general warrant for the seizure of Mr. *Wilkes*' papers. This warrant was executed by a constable and four of the king's messengers, attended by Mr. *Wood*, private secretary to lord *Egremont*.

Mr. *Wilkes* brought an action of trespass against Mr. *Wood*, who, it was proved on the trial, barely superintended the execution of the warrant. And the question was, whether those general warrants, tho' supported by precedents ever since the revolution, were *legal*; and if they should be considered *illegal*, whether an action would lie against Mr. *Wood*.—The chief justice *Pratt*, before whom the cause was tried, told the jury that if they viewed Mr. *Wood* as *party* in the affair, they must find a verdict against him; provided they should conceive the warrant illegal;—which he himself strongly enforced.—The jury, after retiring about half an hour, returned a verdict for *one thousand pounds damages*.—*See the case at large, with the whole of the evidence prefixed to Loffts Reports.*

IV.

IV. Form of a Search Warrant.

county to wit.

Whereas I have received information upon oath from A J, *that the following property, to wit,* (here describe the kind) *has within* days *last past, been feloniously taken stolen and carried away, out of the possession of the said* A J, *in the county aforesaid, and that the said* A J, *hath probable cause to suspect, and doth suspect, that the said* are *concealed in* (mention the place in which the party suspects the property is concealed) *of* A O, *of the said county labourer: These are therefore in the name of the commonwealth, to authorize and require you, with necessary and proper assistants, to enter, in the day time, into the* (place suspected) *of the said* A O, *and there diligently to search for the said* and *if the said* or *any part thereof, shall be found upon such search, that you bring the same, and also the body of the said* A O, *before me, or some other justice of the peace for this county, to be disposed of and dealt with according to law. Given under my hand and seal &c.*

To constable. J P.

Self defence, (*See* HOMICIDE.)
Self murder, (*See* HOMICIDE.)

SERVANTS.

PERSONS contemplated by the act of the General Assembly, under the denomination of servants, are neither *Slaves*, *Hirelings*, who are citizens of this commonwealth, or *Convicts*; the importation of which last, indeed, is expresly prohibited by law.

As all the acts concerning servants, are now reduced into one, it will be sufficient, under this title, barely to refer to the law, and to give such an abstract of the several sections, as will enable the magistrate to apply the precedents to their proper places.

See *Virginia laws*, page 258, of the *Revised Code*.

§ 1. All white persons not being citizens of any of the confederated states of *America*, who shall come into this commonwealth, under contract, to serve another in any trade or occupation, shall be compellable to perform such contract, specifically during the term thereof, or during so much of the same as shall not exceed seven years Infants under the age of fourteen years brought in under the like contract, entered into with the consent of their father or guardian, shall serve till their age of twenty-one years only, or for such shorter term as the said contract shall have fixed.

§ 2. Prescribes the master's duty, in furnishing them in sufficient food, cloathing &c.—and giving them a full suit of cloaths at the expiration of their service.

§ 3. The contract may be assigned, by consent of the servant, in presence of a justice of the peace, attesting the same in writing—and shall pass to executors, administrators, and legatees.

§ 4. For disorderly behaviour &c. a servant may be corrected by stripes, by order of a justice; or refusing to work, may be compelled thereto in like manner, and to serve two days for one lost. Expences for bringing home a runaway servant, shall be compensated by further service, by order of court, after expiration of his time, or security to pay within six months.

§ 5. A master failing in the duties prescribed by this act, or guilty of injurious demeanor to his servant, is liable to have the servant discharged by order of court.

§ 6. Contracts between master and servant, during service, are void.

§ 7. Complaints of servants against masters, and of masters against servants, may be redressed in a summary way, by the court of the county, wherein the servant &c. resides.

§ 8. Servants may acquire property. If sick or disabled shall not be put away by their master, under penalty of 30 dollars, recoverable by the overseers of the poor, to whose action the master shall be also liable.

§ 9. White servants, on being purchased by a negro, mulatto, or indian, shall become free.

§ 10. Persons dealing with a servant, without consent of his owner, forfeits four times the value of the thing bought &c. recoverable by action on the case, and 20 dollars recoverable by petition—and in default of payment to receive 39 lashes.

§ 11. Where free persons are punishable by fine, servants are punishable by whipping, at the rate 20 lashes for every eight dollars,—but shall not receive more than 40 lashes at one time.

§ 12. Servants when free, shall have their freedom recorded, and a certificate thereof from the clerk. If it is lost, the clerk may renew it. Persons entertaining a servant without a certificate shall pay the owner a dollar a day, recoverable by action of debt in any court. A servant making use of a forged certificate, shall stand in the pillory two hours on a court day, and make reparation for loss of time, and the person forging shall forfeit 30 dollars, one moiety to the owner of the servant, and the other to the informer, recoverable in any court, and on failure of payment, or security to pay within six months shall receive 39 lashes.

On a conviction of a servant for hog-stealing, the master is liable to pay eight dollars, to be recompenced by further service. *Virginia laws* page 186. (*A*)

(A) Assignment of a servant's indentures, under § 2.

(After the master makes the assignment which may be in the usual form, the justice may make the following attestation)

county to wit.

I J P, *a justice of the peace for the county aforesaid, do hereby certify that the above assignment was made in my presence, and in the presence of the within named* A S, *who did freely consent to the same.*

J P.

SHERIFFS.

THE word *Sheriff*, is derived from the *Saxons*, in whose language it signified the reeve or officer of the shire; so called, because on the division of *England* into counties or shires, the custody whereof was committed to the earl or *comes*, the business devolved on the sheriff as his deputy; whence he is called in latin *vice-comes*. 1 *Blacks Com.* 339.

Many parts of the duty of sheriffs having been already noticed under the several heads to which the subject properly belongs, I shall confine this title to an abstract of the act of Assembly relating to the appointment and duties of sheriffs, and such points of useful information arising under the common law, as it is essential for every sheriff to know.

By *Virginia laws*, chap. 80, page 127 of the *Revised Code*, § 1. The courts of each county, annually, in the month of *June*, or *July* shall nominate three persons in the commission of the peace, to the governor, one of which shall be commissioned by the governor to act as sheriff in such county.

§ 2. Every justice failing to nominate at the time above prescribed forfeits 200 dollars.

§ 3. If a person is appointed sheriff and fails within 2 months to enter into sufficient bonds, the clerk of the court, within one month thereafter shall transmit to the governor a certificate of such failure, under the penalty 300 dollars.

§ 4. The person first commissioned failing to give bond in two months, or first nominated failing to apply for a commission in one month, the governor &c. may issue a commission to some other person nominated; and if the person thereafter commissioned or nominated shall be guilty of a like neglect, the governor may commission some other person nominated.

§ 5. If a sheriff dies, the vacancy may be supplied by the governor &c. out of some other in the nomination.

6.

§ 6. Every ſheriff commiſſioned and qualified as above, ſhall continue in office for one year, and may with his own conſent and the approbation of the executive be continued for two years, and no longer;—unleſs from ſome accident a ſucceſſor ſhall have been prevented from qualifying.

§ 7. When by the death of any ſheriff, another ſhall be appointed at any other time than in the months of *June* or *July*, the governor &c. may continue ſuch ſucceſſor in office, until the court held in the month of *June* or *July*, next after his two years continuance therein ſhall expire.

§ 8. Every perſon accepting the commiſſion of ſheriff ſhall enter into bond with good ſecurity in the penalty of 30,000 dollars, payable to the governor, and his ſucceſſors, for the true and faithful collecting, accounting for, and paying the taxes impoſed by law in his county; the bond is to be taken, acknowledged in open court, and recorded; an atteſted copy is to be tranſmitted, by the clerk, to the auditor, which is to be admitted as evidence in any ſuit, motion &c. thereon.

§ 9. Upon the refuſal to act, or diſability of any ſheriff the executive may appoint a collector, who ſhall, as to the collection of taxes, fully repreſent the ſheriff.

§ 10. Every perſon accepting the commiſſion of ſheriff, ſhall likewiſe enter into another bond with two good and ſufficient ſecurities at the leaſt, in the ſum of ... ... with a condition in the following form, to wit:

The condition of the above obligation is ſuch, that whereas the above bound A B, *is conſtituted and appointed ſheriff of the county of by a commiſſion from the governor, under the ſeal of the commonwealth, dated the ... day of laſt paſt, if therefore the ſaid* A B, *ſhall well and truly collect all levies, and account for and pay the ſame in ſuch manner as is by law directed, and alſo all fines, forfeitures, and amercements, accruing or becoming due to the commonwealth in the ſaid county, and ſhall duly account for and pay the ſame to the treaſurer of this commonwealth for the time being, for the uſe of the commonwealth, in like manner as is or ſhall be directed in caſe of public taxes, and ſhall in all other things truly and faithfully execute the ſaid office of ſheriff, during his continuance therein, then the above obligation to be void, otherwiſe to remain in full force and virtue.*

And ſhall alſo enter into one other bond before ſuch court, with the like ſecurities, in the ſum of with a condition, in the following form, to wit.

The condition of the above obligation is ſuch, that whereas the above bound A B, *is conſtituted and appointed ſheriff of the county of by commiſſion from the governor under the ſeal of the commonwealth,*

monwealth, dated the day of laſt paſt, if therefore the ſaid A B, *ſhall well and truly collect and receive all officers fees and dues put into his hands to collect, and duly account for and pay the ſame to the officers to whom ſuch fees are due reſpectively, at ſuch times as are preſcribed and limited by law, and ſhall well and truly execute, and due return make of all proceſs and precepts to him directed, and pay and ſatisfy all ſums of money and tobacco by him received by virtue of any ſuch proceſs, to the perſon or perſons to whom the ſame are due, his or their executors, adminiſtrators or aſſigns; and in all other things ſhall truly and faithfully execute and perform the ſaid office of ſheriff, during the time of his continuance therein, then the above obligation to be void, otherwiſe to remain in full force and virtue.*

§ 11. Which bonds ſhall be made payable to the governor and his ſucceſſors, and entered of record in the county court. And in the name of the governor, or his ſucceſſors, any party injured may proſecute a ſuit on the laſt mentioned bond, and recover damages; and which bond ſhall not become void upon the firſt recovery, or judgment againſt the plaintiff; but may be put in ſuit at any time by any party injured. *Provided*, that on a verdict for the defendant he ſhall recover coſts.

§ 12. No perſon to act as deputy ſheriff more than two years in any period of four years, unleſs he ſatiſfies the court that he has collected and accounted for the taxes aſſigned to him by his former principal.

§ 13. Every ſheriff or collector receiving any taxes, fees &c. ſhall deliver to the perſon paying a diſtinct account, and alſo a receipt for the ſame;—under the penalty of 4 dollars, recoverable before a magiſtrate of his county;—and ſhall alſo be liable to the party grieved for receiving more than was really due; to be recovered by action on the caſe, in which the plaintiff ſhall recover full coſts.

§ 14. Every ſheriff, or his deputy ſhall execute all proceſs legally iſſued and directed, within his county, and make due return, under penalty of 20 dollars each failure; one moiety to the governor for the uſe of the commonwealth, the other to the party grieved; recoverable with coſts, by action of debt or information in any county court; and ſhall be liable to the party injured for damages at common law; and for every falſe return the ſheriff ſhall forfeit 60 dollars recoverable and to be divided as above.

§ 15. No ſheriff ſhall return that the defendant is not found, unleſs he hath been at his dwelling houſe or place of abode, and not finding him, ſhall have left there an atteſted copy of the writ; and where the defendant is a known inhabitant of another county,

county, the ſheriff ſhall return the truth of the caſe, but not that the party is not found, and the ſuit, if iſſued from a county court, ſhall abate.

§ 16. The perſons who may not be arreſted, may be ſeen under title '*Arreſt*'

§ 17 Bonds taken by ſheriffs other than to himſelf, and diſchargable upon the priſoners appearance at the day mentioned in the writ, except in ſpecial caſes directed by law, ſhall be void.

§ 18. Sheriffs ſhall not take any other or greater fees than thoſe directed by law; all other ſervices ſhall be done *ex officio*.

§ 19. Sheriffs ſhall collect all taxes, poor rates &c. and account for them as directed by law.

§ 20. No ſheriff &c. ſhall diſtrain ſlaves for taxes &c. if other ſufficient diſtreſs can be had, nor take unreaſonable diſtreſſes, under penalty of being liable to the action of the party injured, grounded upon this act, in which the plaintiff ſhall recover full coſts.

§ 21. Sheriffs may impreſs guards for ſecuring criminals in jail, who ſhall be paid by the public 50 cents each man *per* day.

§ 22. The delivery of priſoners by indenture, between the old ſheriff and the new, or the entering upon record in the county court, the names of the ſeveral priſoners and cauſes of their commitment, delivered over to the new ſheriff, ſhall be ſufficient to diſcharge the late ſheriff from all ſuits or actions for any eſcape that ſhall happen afterwards.

§ 23. Sheriff's commiſſion for collecting taxes &c. and all officer's fees, except clerk's and ſurveyors, ſhall be five *per centum*.

§ 24 No ſheriff ſhall be obliged to go out of his county to pay money levied by execution, or to give notice to creditors at whoſe ſuit any perſon may be in cuſtody of ſuch ſheriff.

§ 25. The high ſheriff ſhall have the ſame remedy and judgment againſt his deputy and ſecurities, for failing to pay money received by execution, or for an eſcape, as the creditor has againſt the high ſheriff.

§ 26. Deputy ſheriff's are to endorſe on proceſs, the day they ſerved it, and ſubſcribe their name as well as their principal's to the return, under the penalty of the ſame forfeiture as for a falſe return.

§ 27. The high ſheriff may recover judgment againſt his deputy &c. for failing to pay the taxes to be collected by him to the high ſheriff or the treaſurer, and five *per centum*, intereſt, and five *per centum* damages: *Provided*, that no execution ſhall iſſue againſt the deputy &c. for the five *per centum* damages, till judgment is obtained againſt the principal.

§ 28. The ſecurities of ſheriff's may recover judgment and have execution againſt the lands of their principals, in the ſame manner as the commonwealth might.

Of Arrests or executing process, see title '*Arrests.*'
Of Bail, see title '*Bail.*'

Bail-bond to the sheriff.

Know all men by these presents that we A D, *of &c. and* B S, *of &c. are held and firmly bound to* J S, *sheriff of the county of in the sum of of lawful money of* Virginia, *to be paid to the said* J S, *or his certain attorney, his executors, administrators or assigns; for the true payment whereof we bind ourselves, our heirs, executors, and administrators, firmly by these presents, sealed with our seals; dated this day of in the year .*

The condition of the above obligation is such, that whereas B P, hath sued out of the court of a writ of *capias ad respondendum*, against the body of the above bound A D, in an action of which writ hath been duly executed; now if the said A D, do appear before on the (*the day to which the writ is returnable*) then and there to answer to the said action, then the above obligation to be void, else to remain in full force.

Of Escapes, see title '*Jail & Jailor.*'

Of Executions.

1. *Fieri Facias*] This is an execution against the goods and chattels of a man, as, leases for *years*, or moveable goods &c.

Goods pawned, shall not be taken in execution for the debt of him who pawned them, during the time they are pawned. *Kitchin.* 226.

Things fixed to the freehold cannot be taken in execution. 37 *Eliz.* B. C. *Day & Austin.*

The sale of goods *bona fide*, by the defendant, pending the action shall be valid; but if done fraudulently, they are liable to the plaintiff's execution. See *Cro. Eliz.* 974. *Coke's Reports. Twyne's case.*

Property of goods is not bound till the delivery of the execution to the officer. *Virginia laws*, p. 309.

If the defendant dies, after the execution is in the hands of the sheriff and before it is served, the execution may be levied on the property in the hands of the executors. *Cro. Eliz.* 181.

If after seizure of the goods, the defendant regains the possession of them, the sheriff may recover them in his own name, in an action of trover. 2 *Sand.* 47.

If on a *fieri facias* against A, the goods of B, are taken, an action of trespass will lie against the sheriff. *Keb.* 693.

The

The ſheriff cannot deliver the goods to the plaintiff in ſatisfaction of his debt. *Cro. Eliz.* 504.

In the caſe of *Clerk v. Withers*, (1 *Salk.* 323) the following points were reſolved,

(1) A *Fieri facias* does not abate by the plaintiff's death, and the ſheriff may proceed in it; becauſe an execution is an entire thing.—(2) That the ſheriff who begins an execution ſhall end it, notwithſtanding his office expires; and a *diſtringas nuper vicecomitem* lies, of which there are two ſorts; the one to diſtrain the old ſheriff to ſell and bring in the money; the other to ſell and deliver the money to the new ſheriff.—(3) That by the ſeizure of goods the property was diveſted out of the defendant, and in abeyance, and that the only remedy lay againſt the ſheriff.

2. *Capias ad ſatisfaciendum*] This writ lies againſt the body of the defendant, and by the common law the body was to be taken and detained in cuſtody 'till the debt was paid;—but by the laws of *Virginia*, page 313. *ſect.* 29, of the *Reviſed Code*, the defendant may tender to the officer ſufficient perſonal property in diſcharge of the debt, which property ſhall be proceeded upon in the ſame manner as if it had been taken on a writ of *fieri facias*.

3. *Elegits*] An *elegit* is a judicial writ, firſt given by the ſtatute of W. 2. chap. 18. either upon a recovery for debt or damage, or upon a recognizance in any court. By this writ the ſheriff ſhall deliver to the plaintiff, *all the chattels of the debtor (except his oxen and beaſts of the plough) and the half of his lands*, and this muſt be done by inqueſt taken by the ſheriff, for the valuation of the goods and lands, ought to be firſt found by the inquiſition of a jury. 4 *Rep.* 47.

4. *Writs of poſſeſſion*] Theſe writs are the uſual proceſs of execution after a recovery in ejectment; in which the ſheriff is to deliver full poſſeſſion of the lands and tenements according to the command of the writ; the formalities to be obſerved in which, according to lord *Coke*, are, to deliver poſſeſſion of *lands* by a twig and clod given by the ſheriff to the plaintiff on the land; where there are *houſes*, by delivery of the key of the door; or of *rents*, by corn or graſs growing on the land. 6 *Rep.* 52.

5. *Reſcues*] It ſeems to be generally agreed that no action will lie againſt a ſheriff for a reſcue on meſne proceſs, for the ſheriff cannot always be preſumed to have the *poſſe comitatus* about him; but on execution, it is ſaid, by great authorities, that the ſheriff is liable for a reſcue. See *Cro. Car.* Myn & Coughton's caſe. *Ibid. Sly & Finche's* caſe.

For the proceedings in executions generally, as regulated by the laws of Virginia, ſee c. 151, p. 306—313, of the *Reviſed Code*.

An

An under-ſheriff has implicitly power to execute all ordinary offices of the high ſheriff himſelf: But where the words of the writ are *that the ſheriff ſhall go in his own perſon*, then the under ſheriff cannot do it. *Cro. Eliz. Clay's* caſe. *Hob.* 13.

SLAVES.

THE introduction of ſlavery among us during our ſubjection to the government of *Great-Britain*, has made it neceſſary to paſs many ſevere laws for the regulation and reſtraint of that ſpecies, whether we conſider them as *men* or as *property*. And tho' very early in the revolution, the further importation of ſlaves was prohibited, and by ſeveral ſucceſſive acts of the legiſlature, the condition of thoſe among us greatly meliorated, yet it has been thought prudent to continue many of the reſtraints formerly impoſed, as will appear by peruſing the following act of Aſſembly, in which the ſeveral laws concerning ſlaves, free negroes and mulattoes, are reduced into one.

Under this head I ſhall purſue the ſame method obſerved under title 'Servants,' for the reaſons there expreſſed.

By *Virginia laws* chap. 103. *ſect.* 1. page 195, of the *Revised Code*, No perſons ſhall hence-forth be ſlaves within this commonwealth, except ſuch as were ſo on the 17th day of *October*, in the year 1785, and the deſcendants of the females of them.

Sect. 2. Slaves hereafter brought into this ſtate, and continuing therein a year, or ſo long at different times as will amount to a year ſhall be free.

Sect. 3. Perſons hereafter importing ſlaves contrary to this act forfeits 200 dollars each; perſons buying or ſelling ſuch 100 dollars each; recoverable by action of debt or information in any court of record, one half to the informer, the other to the commonwealth.

Sect. 4. This prohibition not to extend to any perſon removing from any of the United States, into this ſtate, in order to become a citizen thereof, if within 60 days after his removal he ſhall take the following oath before ſome juſtice of the peace of this commonwealth.

I A B, *do ſwear, that my removal into the ſtate of* Virginia, *was with no intent of evading the laws for preventing the further importation of ſlaves, nor have I brought with me any ſlaves, with an intention of ſelling them, nor have any of the ſlaves which I have brought with me, been imported from* Africa, *or any of the* Weſt-India

India *Iſlands, ſince the firſt day of November, one thouſand ſeven hundred and ſeventy eight.*

So help me God.

Not to extend to perſons claiming ſlaves by deſcent, marriage or deviſe; nor to any citizens of this commonwealth, being now the actual owners of ſlaves within any of the United States, and removing ſuch hither; nor to travellers and others making a tranſient ſtay, and bringing ſlaves for neceſſary attendance, and carrying them out again.

Sect. 5. No negro or mulatto ſhall be a witneſs, except in pleas of the commonwealth againſt negroes or mulattoes, or in civil pleas, where negroes or mulattoes alone ſhall be parties.

Sect. 6. No ſlave to go from the tenements of his owner without a paſs, or letter or token, by which it may appear that he is proceeding on his maſter's buſineſs,—under pain of being carried before a juſtice, and by his order receiving correction or not, at the diſcretion of ſuch juſtice.

Sect. 7. A ſlave found on the plantation of another without lawful buſineſs, may receive ten laſhes from the owner or overſeer of ſuch plantation.

Sect. 8. Gun, powder, ſhot, or other weapon found in poſſeſſion of a negro or mulatto, may be ſeized by any perſon, and on proof before a juſtice ſhall be forfeited to the ſeizor; (*A*) and the offender may receive by order of the juſtice any number of laſhes not exceeding 39.

Sect. 9. Not to extend to free negroes or mulattoes, being houſe keepers, who may keep one gun, powder &c.—Nor to other negroes inhabitants of frontier plantations, who may by licence (*B*) from a juſtice keep a gun &c.

Sect. 10. Every perſon other than a negro, of whoſe grandfathers or grand-mothers, any one is, or ſhall have been a negro, altho' all his other progenitors, except that deſcended from the negro, ſhall have been white perſons, ſhall be deemed a mulatto; and ſo every ſuch perſon who ſhall have one fourth part or more of negro blood, ſhall in like manner be deemed a mulatto.

Sect. 11. Riots, routs, unlawful aſſemblies, treſpaſſes and ſeditious ſpeeches by a ſlave or ſlaves, ſhall be puniſhed with ſtripes, at the diſcretion of a juſtice, and any perſon may apprehend them, and carry them before a juſtice.

Sect. 12. Perſon permitting ſlaves to remain on his plantation 4 hours at a time, without leave from their maſter or overſeer, forfeits 3 dollars; permitting more than 5 negroes ſo to remain forfeits one dollar for each negro over that number; the above forfeitures to the uſe of the informer, recoverable before any juſtice &c. (*C*) (*D*)

Sect.

Sect. 13. Not to extend to negroes belonging to the ſame perſon ſeated on different plantations, meeting at one of the plantations, with their owners leave—nor their meeting at any public mill, not being in the night, nor on *Sunday*, with leave of their owner.—nor any other lawful occaſion, by leave of their owner.—nor attending divine ſervice on a *Sunday*, or other day of public worſhip.

Sect. 14. White perſon, free negro, mulatto, or *Indian*, found in company with ſlaves at any unlawful meeting, or harbouring, or entertaining ſuch; without the conſent of the owner, forfeits *three* dollars, recoverable with coſts before a juſtice, (*E*) to the uſe of the informer.

Sect. 15. Every juſtice upon his own knowledge, or information within ten days after ſuch unlawful meeting, ſhall iſſue his warrant (*E*) to apprehend the offenders &c.—Juſtice failing forfeits 8 dollars; ſheriff, or other officer, failing upon knowledge or information of ſuch meeting, to endeavour to ſuppreſs it, and to bring the offenders before ſome juſtice, forfeits likewiſe 8 dollars, both penalties recoverable by action of debt in any county, or corporation court;—and every under-ſheriff, ſerjeant, or conſtable, who upon knowledge, or information of ſuch meeting, ſhall fail to perform his duty in ſuppreſſing the ſame, and apprehending the perſons ſo aſſembled, forfeits 4 dollars to the informer, recoverable with coſts before any juſtice &c. (*F*)

Sect. 16. Perſons dealing with a ſlave for any commodity whatſoever, without leave of his owner, forfeits *four* times the value of the article, recoverable by action on the caſe in any court; alſo the further ſum of 20 dollars, recoverable by ſummons and petition &c.—or receive 39 laſhes,—but ſhall nevertheleſs pay the coſts of ſuch petition.

Sect. 17. Negro or mulatto lifting his hand in oppoſition to a perſon other than a negro or mulatto, ſhall for every ſuch offence proved by the oath of the party before a juſtice, receive puniſhment not exceeding 30 laſhes—except where ſuch negro or mulatto was wantonly aſſaulted and lifted his hand in his own defence.

Sect. 18. Caſtration of a ſlave may not be directed, except for an attempt to raviſh a white woman.

Sect. 19. Owner not barred of his action where his ſlave is killed by any other perſon, or dies thro' the negligence of a ſurgeon undertaking the diſmembering and cure of a ſlave ſo diſmembered by order of court.

Sect. 20. Any two juſtices may by warrant (*G*) direct the ſheriff of the county to take ſufficient force and go in ſearch of two or more out-lying ſlaves, and to apprehend them and carry them to jail,

Sect.

Sect. 21. If any negro or other slave shall consult, advise, or conspire to rebel, or make insurrection, or shall plot or conspire the murder of any person, the same shall be felony without benefit of clergy.

Sect. 22. If any negro or other slave shall prepare, exhibit, or administer any medicine, the offender shall suffer death without benefit of clergy.

Sect. 23. But if it appear to the court, that such medicine was not exhibited with an ill intent, or attended with ill consequences, he shall be acquitted.

Sect. 24. Nor shall the prohibition extend to a negroe's administering medicine in the family of the owner, or of any other, with the mutual consent of the owner and the person employing him.

Sect. 25. Owner of a slave licensing him to go at large and trade as a free man, forfeits 30 dollars, recoverable by the overseers of the poor by action of debt in any court; and the same for every offence.

Sect. 26. Slaves suffered to go at large and hire themselves out, may be apprehended by any person and carried before a justice; and if it appears to him that the slave comes within the meaning of this act, he shall order him to the jail of the county, *(H)* there to remain till the next court; who, if it appear to them that the slave comes within the perview of this act, shall order the sheriff to sell him, at the next court, giving 20 days notice thereof at the court-house door.

Sect. 27. Twenty five per cent on such sale shall be applied by the court for lessening the county levy;—the balance to be paid by the sheriff, to the owner, deducting five *per cent* for his trouble, and the jailor's fees.

Sect. 28. Persons stealing or selling any free person for a slave, knowing the person so sold to be free, shall suffer death without benefit of clergy.

Sect. 29. Stealing any negro or mulatto out of the possession of the owner or overseer of such slave,—felony without benefit of clergy.

Sect. 30. The justices of every county and corporation, shall be justices of *oyer* and *terminer*, for the trial of slaves, which trials shall be by five at least, without juries upon legal evidence, at such times as the sheriffs, or other officers shall appoint, being not less than five, nor more than ten days after commitment to prison. No slave shall be condemned, unless all the justices sitting shall agree in opinion that the prisoner is guilty, *after allowing him counsel in his defence, whose fee amounting to five dollars, shall be paid by the owner*:—When judgment of death shall

be

be paſſed, there ſhall be 30 days at leaſt between ſentence and execution, except in caſes of conſpiracy, inſurrection or rebellion.

Sect. 31. The value of a ſlave condemned, who ſhall ſuffer accordingly, or die before execution, to be aſcertained by the juſtices triers, ſhall be paid by the public to the owner.—One detained in ſlavery, who has commenced an action to recover his freedom, ſhall be proſecuted as a free man.

Sect. 32. No perſon having intereſt in a ſlave ſhall ſit upon the trial of ſuch ſlave.

Sect. 33. On the trial of a ſlave the court may take for evidence the confeſſion of the offender, the oath of one or more credible witneſſes, or ſuch teſtimony of negroes or mulattoes bond or free, with pregnant circumſtances, as to them ſhall ſeem convincing.

Sect. 34. In caſes within the benefit of clergy, negroes or mulattoes ſhall not have judgment of death,—but ſhall be burnt in the hand, *with ſuch other corporal puniſhment*, as the court ſhall think fit to inflict;—except the party had once had the benefit of this act, and then he ſhall ſuffer death.

Sect. 35. Negroes or mulattoes being convicted by due proof of giving falſe teſtimony, ſhall, without further trial, be ordered by the court to have one ear nailed to the pillory, and there to ſtand for one hour, and the ear to be cut off, and the other ear in like manner; and ſhall receive 39 laſhes, or ſuch other puniſhment as the court ſhall think fit, not extending to life or limb; and at every trial of ſlaves for capital offences, the perſon firſt named in the commiſſion then ſitting, ſhall before the examination of any negro or mulatto, *not being a chriſtian*, charge ſuch evidence to declare the truth; which charge ſhall be in the words following, to wit:

You are brought hither as a witneſs, and by the direction of the law I am to tell you, before you give your evidence, that you muſt tell the truth, the whole truth, and nothing but the truth; and that if it be found hereafter that you tell a lie, and give falſe teſtimony in this matter, you muſt for ſo doing have both your ears nailed to the pillory and cut off, and receive thirty-nine laſhes on your bare back, well laid on, at the common whipping poſt.

Sect. 36. Any perſon by laſt will and teſtament, or by inſtrument in writing under hand and ſeal, atteſted and proved in court, by two witneſſes, or acknowledged by the party, may emancipate and ſet free his ſlaves, who ſhall thereby enjoy perfect freedom.

Sect. 37. But they may be taken in execution to ſatisfy any debt due by the perſon emancipating before ſuch emancipation.

Sect.

Sect. 38. All slaves so set free, and in the judgment of the court not found in mind and body, being above the age of 45 years, or males under 21, or females under 18, shall be supported by the person so liberating, or out of his estate; and upon neglect or refusal, the court of the county or corporation where the neglect shall be, shall, upon application, order the sheriff to distrain and sell so much of the person's estate, as shall be sufficient for that purpose.

Sect. 39. Persons in their life time, or executors of those deceased, by whom any slave shall be emancipated, shall deliver to such slave a copy of the instrument of emancipation, attested by the clerk of the court, of the county or corporation, who shall be paid by the person emancipating 83 cents. Every person neglecting to give such copy, forfeits 30 dollars, recoverable with costs in any court of record, one half to the person suing, and the other to the person liberated.

Sect. 40. Any justice may commit to the jail of his county (*I*) any emancipated slave travelling out of his county without such copy, there to remain till such copy is produced, and the jailor's fees paid.

Sect. 41. Saves so liberated and neglecting to pay their taxes and levies, may be by order of the court, hired out by the sheriff till such taxes are paid.

Sect. 42. Saving to all persons &c. other than those emancipating, all right &c. to such slaves.

Sect. 43. All negross and mulattoes in all courts of judicature within this commonwealth, shall be held, taken and adjudged to be personal estate.

Sect. 44. A widow possessed of slaves, as of the dower of her husband, and removing or voluntarily permitting them to be carried out of this commonwealth, without the consent of him or her in reversion, forfeits to the reversionor all such slaves, and all other dower of her husband's estate.

Sect. 45. The same law of the husband of a widow, in like cases, who forfeits to the person in reversion during the husband's life.

Sect. 46. A slave or slaves descending from an intestate, where an equal division cannot be made in kind, may by direction of the high court of chancery, or of the county or corporation where administration was granted, be sold and distribution of the money be made.—Provided that each claimant shall be summoned to shew cause against such sale.

Sect. 47. No gift of any slave shall be good, unless the same be made by will duly proved and recorded, or by deed in writing, to be proved by two witnesses at least, in the district court,

or

or court of the county or corporation where one of the parties lives, within eight months after the date of such deed.

Sect. 48. This act shall be construed to extend only to such gifts where the donors have, notwithstanding such gifts, remained in the possession, and not to gifts of such slaves as have at any time come into the actual possession of, and have remained with the donee, or some person claiming under such donee.

Sect. 49. This act is not to alter any adjudication heretofore made, nor to affect the interest of any *bona fide* purchaser, for a valuable consideration, or creditor of the donor, before the donee hath been at least three years in possession of the slave or slaves, under such gift, nor in any manner to restrain the operation of the act of limitation.

Sect. 50. The master of a vessel carrying out of this state a servant or slave without the consent of the owner, forfeits 150 dollars for every servant, and 300 dollars for every slave; one moiety to the commonwealth, and the other to the owner, recoverable by action of debt or information in any court; and moreover shall be liable to the suit of the party grieved, at common law, for damages.

Sect. 51. In any action against such master, under this act, he may be ruled to special bail, and shall not be allowed to plead in bar, or give in evidence any act of limitation.

By *Virginia laws*, chap. 164, page 328 of the *Revised Code*, § 1. No free negro or mulatto shall migrate into this commonwealth, and such as do come, contrary to this act, may be apprehended by any citizen and carried before a justice of the county where he is taken; which justice is authorized to examine send and remove every such out of this commonwealth, into that state or island, from whence he came; and for this purpose the sheriff or other officer, and other persons, may be employed by the justice in the same manner as for the removal of criminals from one county to another, (*M*) And every free negro or mulatto imported into this state by water, shall be exported to the place from whence he came, at the charge of the importer; recoverable on motion in the name of the commonwealth, on ten days notice in any court.

§ 2. The penalty for bringing any free negro or mulatto into this commonwealth is 100 pounds each; one half to the commonwealth, and the other to the informer, recoverable in any court, and the defendant shall be ruled to give special bail.

§ 3. Not to extend to masters of vessels bringing a free negro or mulatto into this state, employed on board a vessel, who shall depart therewith, nor to any person travelling into this state, with any such free negro or mulatto as a servant.

Sect.

§ 4. If any ſlave ſhall be brought or come into this ſtate from *Africa* or the *Weſt-India* iſlands, directly or indirectly, it ſhall be the duty of a juſtice to cauſe ſuch ſlave to be apprehended (*N*) immediately, and tranſported out of this commonwealth, and the expence attending the ſame, ſhall be paid by the perſon importing ſuch ſlave, recoverable in the name of the juſtice, directing ſuch ſlave to be tranſported, by warrant (O) before a ſingle magiſtrate.

(*A*) *Certificate of the ſeizure of a gun &c. on* § 8.

county to wit.

Whereas A J, of the county aforeſaid labourer, hath this day brought before me J P, a juſtice of the peace for the ſaid county, one gun, with powder and ſhot by him found and ſeized in the hands and poſſeſſion of a certain free mulatto man, known by the name of (*or* negro man ſlave belonging to *as the caſe may be*) who is not by law qualified to keep the ſame; and the ſaid A J, having alſo before me, made due proof of ſuch ſeizure as aforeſaid: By virtue of an act of the General Aſſembly, in that caſe made and provided, I do hereby order and direct, that the ſaid A J, ſhall and may retain the ſaid gun, powder and ſhot to his own uſe; and that the ſaid mulatto man ſhall receive *thirty* laſhes upon his bare back, well laid on, which laſt ſentence A C, a conſtable in this county is ordered to execute Given under my hand and ſeal &c.

(*B*) *Licence to keep arms on ſect.* 9.

county to wit.

I J P, *one of the commonwealth's juſtices of the peace for the ſaid county, do according to an act of the General Aſſembly in that caſe made and provided, upon application made to me by* A M, *of county, licence and allow guns, powder, ſhot, and other weapons, offenſive and defenſive, to be kept and uſed by any ſlave or ſlaves, living at a frontier plantation within this county, and belonging to the ſaid* A M. *Given under my hand &c.*

(*C*) Warrant for permitting a ſlave to remain more than four hours on offender's plantation, without leave of the owner or overſeer of ſuch ſlave, on ſection 12.

county to wit.

Whereas.

Whereas information hath this day been given to me J P, *a juſtice of the peace for the county aforeſaid, by* A J, *that* A M, *a maſter of a family in this county, did on the day of laſt paſt, knowingly permit, one negro man ſlave the property of* B F, *to remain on the plantation of him the ſaid* A M, *for more than four hours at one time, without the leave of the ſaid* B F, *or his overſeer, contrary to the act of the General Aſſembly in ſuch caſe made and provided: Theſe are therefore in the name of the commonwealth to require you, to ſummon the ſaid* A M, *to appear before me, at in this county, on the day of next, to anſwer the premiſes. Given under my hand &c.*

To conſtable.

JUDGMENT.

The within warrant being returned executed, and it appearing to me from ſufficient teſtimony, that the ſaid A M, is guilty of the offence within charged againſt him, it is conſidered that the ſaid A J, recover againſt him the ſum of three dollars, beſides his coſts. Given under my hand &c.

Coſts Cents.

(*D*) Warrant, for permitting more than five ſlaves to continue on a plantation, as above, alſo on ſection 12.

county to wit.

Whereas &c. (as in (*C*) to the words '*laſt paſt,*' *knowingly permitted more than five negroes, not being his own,* (*viz.*) *ten negroes to remain at the plantation of him the ſaid* A M, *for more than four hours at one time, without the leave of the owner or overſeer of the ſaid negroes, contrary &c.* conclude as in form (*C*)

The form of the judgment may be the ſame as in form (*C*) except varying the ſum, and adapting it to the number of negroes, at one dollar for each above five.

(*E*) Warrant for being at an unlawful meeting of ſlaves, or harbouring them, on ſect. 14.

county to wit.

Whereas information hath this day been made to me by A J, *that within ten days laſt paſt,* A O, B O, *and* C O, (deſcribe them whether white, free-negroes, mulattoes or indians) *of the*

county aforeſaid, were found in company with ſlaves, at an unlawful meeting of the ſaid ſlaves, held at in the county aforeſaid, on the day of laſt paſt, (or did harbour *or entertain a ſlave belonging to without the conſent of the ſaid* as the caſe may be) *contrary to the act of the General Aſſembly in that caſe made and provided: Theſe are therefore, in the name of the commonwealth to require you to apprehend the ſaid* A O, B O, *and* C O, *and to bring them before me or ſome other juſtice of the peace for this county, to be dealt with according to law. Given under my hand &c.*

To Conſtable.

The fine is three dollars for each offence, and the form of the judgment may be the ſame as in precedent (*C*)

(*F*) Warrant againſt an under ſheriff, ſerjeant, or conſtable, failing to do his duty in ſuppreſſing unlawful meetings, and apprehending the offenders, on ſect. 15.

county to wit.

Whereas it appears to me J P, *a juſtice of the peace for the county aforeſaid, from the teſtimony of* A J, *that on the day of laſt paſt,* A C, *a conſtable of this county, had information of an unlawful aſſembly of ſlaves then met at in the county aforeſaid, at which unlawful meeting were preſent* A O, B O, *and* C O, (deſcribe them as above) *contrary to the act of the General Aſſembly in ſuch caſe made and provided; and that the ſaid* A C, *did then and there fail to do the duty required of him by law, in ſuppreſſing the ſaid unlawful meeting, and apprehending the perſons ſo aſſembled: Theſe are therefore to require you to ſummon the ſaid* A C, *to appear &c. Given &c.*

To Conſtable.

(*G*) Warrant to ſearch for out-lying ſlaves, on ſection 20.

county to wit.

J P, *and* J P, *two of the commonwealth's juſtices of the peace for the aforeſaid county, to the ſheriff of the ſaid county, and to the keeper of the jail of the ſaid county, greeting:*

Whereas we have received information from A J, *that two or more ſlaves, viz.* A, *a ſlave belonging to and* B, *a ſlave belonging to and others unknown, have run away from their ſaid*

ſaid maſters, and are lying hid and lurking in this county, killing hogs, and committing other injuries to the inhabitants of this commonwealth: Theſe are therefore to command and require you the ſheriff of the ſaid county, to take ſuch power with you, as you ſhall think fit and neceſſary, for the effectual apprehending ſuch out lying ſlave or ſlaves, and to go in ſearch of the ſaid ſlaves, and upon their being apprehended to commit them to the jail of this county for further trial; and you the keeper of the ſaid jail, are hereby required to receive the body of the ſaid ſlave or ſlaves, and the ſame ſafely to keep within your jail, till he, or they ſhall be thence diſcharged by due courſe of law. Given under our hands and ſeals &c.

(H) Order of a juſtice for committing a ſlave to jail, who is ſuffered to go at large and hire himſelf out, on ſection 26.

county to wit.

Whereas A, *a ſlave belonging to of the county of hath been apprehended in this county, and this day brought before me* J P, *a juſtice of the peace for the ſaid county, by* A J, *for having been permitted by the ſaid to go at large, and hire himſelf out, contrary to the act of the General Aſſembly in ſuch caſe made and provided; and it appearing to me that the ſaid* A, *comes within the perview of the ſaid act: Theſe are therefore to require you to receive the body of the ſaid* A, *and him ſafely to keep in the jail of the ſaid county, until the next court to be held for the ſaid county, or until he ſhall thence be diſcharged by due courſe of law. Given under my hand &c.*

To the keeper of the jail of county.

(I) Warrant to commit an emancipated ſlave to jail, found out of the county in which he reſides, without a certificate of his emancipation, on ſect. 40.

county to wit.

To the keeper of the jail of the ſaid county.

I ſend you herewith the body of an emancipated ſlave, and a reſident of the county of who hath been found travelling in this county without a certificate of his emancipation, under the act of the General Aſſembly, in ſuch caſe made and provided: And you are hereby commanded to receive the body of the ſaid and him ſafely to keep until ſuch certificate of emancipation ſhall be produced,

duced, and your legal fees as jailor paid, or until he shall otherwise be discharged by due course of law. Given under my hand and seal &c.

Formerly the magistrate who committed a slave for felony, was directed to issue his warrant to the sheriff, requiring him to summon a court to meet at a certain day, not less than five nor more than ten days from the time of the commitment. As the law now stands, the magistrate is not directed to issue any warrant for convening a court, but the sheriff is to do it within the time before limited. How is the sheriff to know that a court is necessary without some information from a magistrate? Is he bound *ex officio* to take notice that a slave is committed to jail for further trial? when perhaps such slave is conveyed to prison by a constable, and put into the custody of the jailor? It seems therefore *necessary*, tho' not *expressly directed by law*, that the magistrate should on the commitment of a slave for further trial give information thereof to the sheriff. On this supposition I have added the following,

(J) Warrant to convene a court for the trial of a slave.

county to wit.

To the sheriff of the said county.

Whereas A, *a negro man slave belonging to of this county hath been this day committed by me to the jail of the said county, for* (describe the offence) *in order to undergo a further trial for the said offence: These are therefore to require you to summon a court consisting of five justices of the peace of this county at the least, none of whom have an interest in the said slave, to meet at the court house of this county, on some day to be appointed by you, not less than five, nor more than ten days from the date hereof, to hold a court for the trial of the said slave according to law, at which time and place you are to attend. Given under my hand and seal &c.*

The act of 1788, *c* 23, having repealed the former law exempting a person from prosecution of any kind for the death of a slave during his correction; and from any punishment for manslaughter committed on the person of a slave;—The material distinctions which formerly existed between them and the whites, in capital cases, are in a great measure done away. Nor will any difference be found in the mode of proceeding and punishment for similar offences, except what has already been remarked in the foregoing law, and what will appear in the following precedents.

The

The *Warrant* for apprehending a ſlave charged with felony, is the ſame as that for a white perſon for a like offence; the ſame may be ſaid of the *Mittimus*, but the Indictment being made before a court, inſtead of a jury, muſt neceſſarily vary in ſome of its formal parts.

(K) Indictment againſt a ſlave for felony.

county to wit.

Be it remembered that on this day of in the year and in the year of our foundation, A A, *attorney for the commonwealth in the county aforeſaid, who proſecutes for the ſaid commonwealth, in this behalf, comes into court here, in his proper perſon, and for the ſaid commonwealth, gives the court here, viz.* (J P, &c. here name the juſtices ſitting) *to underſtand and be informed, that* B, *a negro man ſlave the property of on the day of in the year and in the year of our foundation at the county of aforeſaid, did feloniouſly &c.* (here deſcribe the offence particularly, as in indictments for ſimilar offences againſt white perſons; the forms of which adapted to each particular crime, may be found interſperſed under their proper titles throughout this book:) *Conclude as in other indictments,* 'againſt the peace and dignity of the commonwealth,' *and then add,* Wherefore the ſaid attorney for the commonwealth prays that judgment of the law may be paſſed on the ſaid B, for the ſaid offence:

(L) Indictment for the murder of a negro man, by beating him to death with a ſtick.

to wit.

The jurors for the diſtrict compoſed of the counties of upon their oath do preſent, that A O, *late of the county of labourer, not having the fear of God before his eyes, but being moved and ſeduced by the inſtigation of the devil, on the day of in the year and in the year of our foundation, with force and arms, at the county of aforeſaid, and within the juriſdiction of the diſtrict court aforeſaid, in and upon a certain negro man ſlave, named* B, *the property of* (or if the negro is not known ſay 'ſlave,' to the jurors aforeſaid unknown) *then and there being in the peace of God and of the ſaid commonwealth, feloniouſly, wilfully, and of his malice aforethought, did make an aſſault; and that the ſaid* A O, *with a certain large ſtick of no value, which he the ſaid* A O, *in his right hand then and there had and held, him the ſaid negro man ſlave,* (if known, deſcribe him as above,

if

if not, *say* to the jurors aforesaid unknown) *in and upon the* head *and in and upon the* left side of the breast *of him the said negro man slave, then and there, at the county of aforesaid, and within the jurisdiction aforesaid, feloniously, wilfully, and of his malice aforethought, divers times did strike and beat, giving unto him the said negro man* (describe him as above) *then and there at the county of aforesaid, within the jurisdiction aforesaid, by striking and beating with the stick aforesaid, in and upon the head of him the said negro man* (describe him as above) *one mortal wound of the breadth of inches, and of the depth of inches; and then and there also, at the county of aforesaid, and within the jurisdiction aforesaid, giving with the said stick, to him the said negro man slave* (describe him as above) *in and upon the* left side of the breast *of him the said negro man slave* (describe him as above) *one other mortal wound of the breadth of inches, and of the depth of inches; of which said mortal wounds he the said negro man slave* (describe him as above) *then and there at the county of aforesaid, and within the jurisdiction aforesaid, instantly died: and so the jurors aforesaid upon their oath aforesaid, do say, That the said* A O, *him the said negro man slave* (describe him as above) *at the county aforesaid, and within the jurisdiction aforesaid, in manner and form aforesaid, feloniously, wilfully, and of his malice aforethought, did kill and murder, against the peace and dignity of the commonwealth.*

The great variety of modes in which the act of murder may be committed, and the very particular description of the offence which is necessary in the indictment, has induced me to insert under title '*Homicide*,' precedents for almost every case that can possibly occur. It would therefore be an useless repetition to give any more of them here.——*See title* 'Homicide.'

(M) Warrant for the removal of a free negro or mulatto, out of this state, on sect. 1. *of chap.* 164, *of the* Revised Code.

county to wit.——To sheriff.

Whereas, upon the examination of A F, a free negro, as well as from the information upon oath of B W, &c. it appears to me J P, a justice of the peace for &c. that the said A F, did last reside in the state of and that he hath migrated into this commonwealth, contrary to the act of the General Assembly, in that case made and provided: These are therefore to require you to convey the said A F, into the said state of and there to leave him; and in the execution of this warrant, you are authorized

rized to take ſuch horſes, and aſſiſtants as may be neceſſary for the purpoſe aforeſaid, proceeding therein as is directed by law, for the removal of a criminal from one county to another. Given under my hand and ſeal &c.

See title 'Criminals.'

(N) Warrant to transport a ſlave out of the ſtate.

See at the end of *Appendix*, No. 2. of this work.

(O) Warrant to recover the expences of tranſporting a ſlave out of the ſtate.

county to wit.—— To ſheriff.

Whereas I have received information from J P, a juſtice of the peace for &c. that he the ſaid J P, did by his warrant, cauſe T, a ſlave brought into this commonwealth by A M, to be tranſported out of the ſame agreeably to law, the expences of which tranſportation amount to theſe are therefore to require you to ſummon the ſaid A M, to appear before me or ſome other juſtice of the peace for this county, to ſhew cauſe why judgmenr ſhould not be granted againſt him for the ſaid ſum, and execution iſſue thereon. Given &c.

Sodomy, (*See* BUGGERY)
Stolen Goods, (*See* SEARCH WARRANT, reſtitution)
Stray, (*See* ESTRAY)

SUMMONS.

IT being a principle of juſtice that no perſon ſhall be condemned unheard;—whenever a complaint is lodged againſt an offender the magiſtrate ſhould cauſe him to be brought before him, either by warrant or ſummons. Where a ſtatute directs a particular mode of convening the party, that mode ſhould be ſtrictly purſued: But where it is left diſcretionary with the magiſtrate, a ſummons ſeems the moſt proper proceſs. Yet in caſes of ſurety for the peace, petty larcenies, and other felonies, and generally where the commonwealth is party, and alſo in caſes between party and party, where the body of the offender is liable, a warrant is the regular proceſs, and not a ſummons.

In a ſummons it is uſual, and upon many accounts convenient, to fix not only a day, but a particular time of the day, for the party's appearing, but if he ſhall appear at the time, and the

juſtice

juſtice ſhall not attend, he is not to go away, but muſt wait the remaining part of the day, for many things may happen to prevent the juſtice's immediate attendance. So in the caſe of the execution of a writ of enquiry, where the plaintiff having attended at the hour appointed, and the ſheriff not then attending went away, and the writ was executed afterwards on the ſame day, in his abſence, the court held that the execution was regular, and he ought to have waited; for the ſheriff might have prior buſineſs to attend, which may laſt beyond the hour: And it is never underſtood that the time on theſe occaſions is to be ſcrupulouſly adhered to. *Doug.* 188.

General form of a ſummons.

county to wit.

Whereas information and complaint, hath been made before me J P, one of the commonwealth's juſtices of the peace for the county aforeſaid, that A O, of in the county aforeſaid, labourer, on the day of now laſt paſt, at in the county aforeſaid, did, (*here recite the offence*) Theſe are therefore to require you forthwith to ſummon the ſaid A O, to appear before me at in the ſaid county, on the day of at the hour of in the noon of the ſame day, to anſwer the ſaid information and complaint, and to be further dealt with according to law. And be you then there, to certify what you ſhall have done in the premiſes. Herein fail not. Given under my hand and ſeal the day of in the year of our lord .

To the conſtable of .

Summons for a witneſs.

county to wit.——To the conſtable of

Whereas information hath been made before me J P, one of the commonwealth's juſtices of the peace for the ſaid county, that, (*here recite the offence*) and that A W, of in the ſaid county, is a material witneſs to be examined concerning the ſame: Theſe are therefore to require you to ſummon the ſaid A W, to appear before me at in the ſaid county, on the day of at the hour of in the noon of the ſame day, to teſtify his knowledge concerning the premiſes. Herein fail not. Given under my hand and ſeal the day of in the year of our Lord .

Sunday, (*See* SABBATH.)

Surety

SURETY for the peace is one of the branches of preventive juſtice, and conſiſts in obliging thoſe perſons whom there is probable ground to ſuſpect of future miſbehaviour to ſtipulate with, and give full aſſurances to the public that ſuch offence as is apprehended ſhall not happen, by finding pledges or ſecurities for keeping the peace. 4 *Blacks Com.* 248.

Under this head I ſhall ſhew,

I. *In what caſes ſurety of the peace ought to be taken* ex officio
II. *For, and againſt whom it ought to be granted.*
III. *For what cauſe it may be granted.*
IV. *In what manner it ſhall be granted.*
V. *How a peace warrant ſhould be executed.*
VI. *Form of a recognizance of the peace.*
VII. *How ſuch recognizance may be forfeited.*
VIII. *How ſuch recognizance may be diſcharged.*
IX. *Various precedents.*

I. In what caſes ſurety for the peace ought to be taken *ex officio*.

Any juſtice of the peace may, according to his diſcretion, bind all thoſe to the peace, who in his preſence ſhall make any affray, or ſhall threaten to kill or beat any perſon, or ſhall contend together with hot words, or ſhall go about with unuſual weapons or attendants, to the terror of the people; and alſo all ſuch perſons as ſhall be known to him to be common barrators; and alſo all thoſe who ſhall be brought before him by a conſtable for a breach of the peace in preſence of ſuch conſtable; and all ſuch perſons, who having been before bound to keep the peace, ſhall be convicted of having forfeited their recognizance. 1 *Hawk.* 126.

II. For and againſt whom it ought to be granted.

1. It ſeems agreed at this day, that all perſons whatſoever under the protection of the commonwealth, being of *ſane memory*, whether they be natural and good citizens, or *aliens*, or attainted of *treaſon* &c. have a right to demand ſurety of the peace. 1 *Hawk.* 126.

It is certain that a wife may demand it againſt her huſband threatening to beat her outrageouſly, and that a huſband may alſo have it againſt his wife. *Ibid.*

According to Mr. *Dalton*, an infant under the age of 14 years is entitled to this ſurety.—But a perſon of *non ſane memory*, ſhall neither have it granted for him nor againſt him upon his own requeſt; but the juſtice ought to provide for his ſafety. *D. c.* 117.

2. There ſeems to be no doubt, but that it ought, upon juſt cauſe of complaint to be granted by any juſtice of the peace, againſt any perſon whatſoever, being of ſane memory, whether he be a magiſtrate or private perſon, and whether he be of full age, or under age &c. 1 *Hawk.* 127.

But feme coverts, and infants under age, ought to find ſurety by their friends only, and not to be bound themſelves; for they are incapable of anſwering any debt, which is the nature of theſe recognizances or acknowledgments. 4 *Blacks Com.* 248.

III. For what cauſe it may be granted.

Wherever a perſon has juſt cauſe to fear, that another will burn his houſe, or do him a corporal hurt, as by killing or beating him, or that he will procure others to do him ſuch miſchief, he may demand the ſurety of the peace againſt ſuch perſon, and that every juſtice of the peace is bound to grant it, upon the party's giving him ſatisfaction upon oath, that he is actually under ſuch fear, and that he has juſt cauſe to be ſo, by reaſon of the others having threatened to beat him, or laid in wait for that purpoſe; and that he doth not require it out of malice, or for vexation. 1 *Hawk.* 127.

Alſo it ſeems the better opinion that he who is threatened to be impriſoned by another, has a right to demand the ſurety of the peace; for every unlawful impriſonment is an aſſault, and wrong to the perſon of a man. And the objection that one wrongfully impriſoned may recover damages in an action, and therefore needs not the ſurety of the peace, is as ſtrong in the caſe of battery as impriſonment; and yet there is no doubt, but that one threatened to be beaten, may demand the ſurety of the peace. 1 *Hawk.* 127.

Mr. *Dalton* recommends great caution in granting ſurety for the peace, eſpecially where the application ſeems to ariſe from malice.—He alſo ſays that ſurety for the peace ſhall not be granted merely becauſe the applicant is at variance, or in ſuit with another,—and both *Lambard and Dalton* think it is not grantable for fear of danger to the complainant's ſervants or cattle. *See Lamb.* 83. *Dalt. c.* 116.

Mr.

Mr. *Dalton* thinks that if a man threatens to beat the wife or child of another, he may demand ſurety of the peace againſt him, *Dalt. c.* 116.

But ſurety for the peace is grantable only on an apprehenſion of preſent or future danger, not for a battery &c. that is paſt; in this laſt caſe the offender may be indicted. See *Dalt. c.* 116.

Surety of the peace may be granted to a perſon, for dread of damage to him, and his men, by ſuch as have diſcord with him, 4 *Com. Dig.* 215.

IV. In what manner it ſhall be granted.

It ſeemeth certain that if the perſon to be bound, be in the preſence of the juſtice, he may be immediately committed, unleſs he offer ſureties; and from hence it follows *a fortiori*, that he may be commanded by word of mouth to find ſureties, and committed for his diſobedience; but it is ſaid that if he be abſent, he cannot be committed without a warrant from ſome juſtice of the peace, in order to find ſureties, and that ſuch warrant ought to be under ſeal, and to ſhew the cauſe for which it is granted, and at whoſe ſuit, and that it may be directed to any indifferent perſon. 1 *Hawk.* 128.

The warrant may direct the party to be brought either before the juſtice himſelf, who granted it, or before any other juſtice; but it is moſt uſual to direct the party to be brought before him only; for it is preſumed he has the beſt knowledge of the fact. 5 *Co.* 59.

The iſſuing the writ of *ſupplicavit*, not being among the powers of a juſtice of the peace (for whoſe information this work is intended) nothing need here be ſaid of it.—*See* 4 *Com Dig.* 215.

V. How a peace warrant ſhould be executed.

1. It can only be executed by ſome one of the officers, or perſons to whom it is directed 1 *Hawk.* 128.

2. It ſeems generally agreed that where a perſon authorized by warrant of a juſtice of the peace, to compel a man, who is ſheltered in an houſe, to find ſureties for the peace, or good behaviour, is denied quietly to enter into it, he may juſtify breaking open the doors, in order to take him; but he muſt firſt ſignify to thoſe in the houſe the cauſe of his coming, and requeſt them to give him admittance. 2 *Hawk.* 86. *Foſt.* 321.

3. If the warrant ſpecially direct that the party be brought before the juſtice who made it, the officer ought not to carry him before any other; but if the warrant be general, to bring him

him before any juſtice of ſuch place, the officer has his election to bring him before what juſtice he pleaſeth. 1 *Hawk.* 128.

4. It is ſaid by *Hawkins*, *Dalton*, and *Hale*, that if the party refuſe to go before a juſtice, or to find ſureties, the conſtable may commit him to jail. *See* 1 *Hawk.* 128. *Dalt. c.* 118. 2 H. H. 112.

But with due ſubmiſſion to thoſe great authorities, I apprehend, that no ſuch power as that contemplated by this kind of warrant, is given to conſtables, either in England or America. For, if it be admitted that he may commit the offender to priſon for a refuſal to find ſufficient ſureties, we muſt alſo grant him the power of judging what acts will conſtitute ſuch refuſal, as well as to adminiſter an oath to the ſecurities, in order to judge of their ſufficiency, or inſufficiency;—the former might be made an engine of oppreſſion,—the latter would evidently be illegal.

5. If the officer do arreſt the party, and do not carry him before the juſtice to find ſureties; or if he neglect any part of his duty ariſing under the warrant, he is puniſhable by indictment and fine, by the court, and alſo liable to the action of the party for falſe impriſonment; for where an officer doth not purſue the effect of his warrant, his warrant will not excuſe him for what he hath done. *Dalt. c.* 118.

6. When the party cometh before the juſtice, he muſt offer ſureties, or elſe the juſtice may commit him: for the juſtice needeth not demand ſurety of him. *Dalt. c.* 118. 169. But it is ſaid by *Pratt*, in the caſe of the King *v. Wilks.* E. 3 G. 3. that a juſtice cannot commit for not finding ſecurity, until the party has been required, and has refuſed ſo to do. 1 *Leach's Hawk.* 255. *in notes.*

7. If the juſtice was deceived in the ſufficiency of the ſecurities, he or any other juſtice may afterwards compel the party to find and put in other ſufficient ſecurities, and may take a new recognizance for the ſame. Dalt. c. 116.—119.

8. But if the ſureties die, the party principal, ſhall not be compelled to find new ſureties, *Dalt. c.* 119.

9. Alſo if a man that was bound to keep the peace hath broken his bond, the juſtices ought of diſcretion to bind him anew *Lamb.* 78.

But not until he be thereof convicted by due courſe of law; for before conviction, he ſtandeth indifferent whether he hath forfeited his recognizance or not. *Crompt.* 125.

VI. Form of a recognizance of the peace.

It ſeems that a recognizance of the peace, may be regulated by

by the diſcretion of the juſtice, both as to the number and ſufficiency of the ſureties, and the largeneſs of the ſum, and the continuance of the time, for which the party ſhall be bound And it hath been ſaid, That a recognizance to keep the peace, as to a perſon for a year, or for life, or without expreſſing any certain time (in which caſe it ſhall be intended for life) or without fixing any time or place for the party's appearance, or without binding him to keep the peace againſt all the citizens of the commonwealth in general, is good. 1 *Hawk.* 129. *Dalt. c.* 119. 120.

However it ſeems to be the ſafeſt way to bind the party to appear at the next ſeſſions of the peace, and in the mean time to keep the peace as well towards all the citizens of the commonwealth, as particularly to the party praying it, according to the common form of precedents. 1 *Hawk.* 129.

VII. How such recognizance may be forfeited.

1. The recognizance is forfeited if the party make default of appearance, and the ſame default ſhall be recorded. 3 *H.* 7. *c* 1.

If the party have any excuſe for not appearing, it ſeems the court is not bound peremptorily to record his default, but may equitably conſider of the reaſonableneſs of ſuch excuſe. 1 *H.* 130.

And Mr. *Dalton* ſays, in caſe of the ſickneſs of the party, ſo that he cannot appear, he has known that the juſtices upon due proof thereof, have forborne to certify or record, ſuch forfeiture, or default; and that they have taken ſureties of the peace, from ſome friend of his preſent in court, until the next court, for that the principal intent of the recognizance was but the preſervation of the peace. *Dalt c.* 120.

2. Alſo there is no doubt but that it may be forfeited by any actual violence to the perſon of another, whether it be done by the party himſelf, or by others thro' his procurement; as manſlaughter, rape, robbery, unlawful impriſonment and the like. 1 *Hawk.* 130.

3. Alſo it hath been holden, that it may be forfeited by any treaſon againſt the commonwealth, and alſo by any unlawful aſſembly in terror of the people, and even by words tending directly to a breach of the peace, as by challenging one to fight, or in his preſence, threatening to beat him. 1 *Hawk.* 130.

Otherwiſe it is if the party be abſent; and yet if the party ſo bound ſhall threaten to kill or beat another who is abſent, and after ſhall lie in wait for him to kill or beat him, this is a forfeiture of his recognizance. *Dalt. c.* 121.

4.

4. However it ſeems that it ſhall not be forfeited by bare words of heat and choler, as the calling a man a knave, teller of lies, raſcal, or drunkard; for tho' ſuch words may provoke a choleric man to break the peace, yet they do not directly challenge him to do it, nor does it appear that the ſpeaker intended to carry his reſentment any further. And it is ſaid that even a recognizance for the good behaviour ſhall not be forfeited for ſuch words; from whence it follows *a fortiori*, that a recognizance for the peace ſhall not. 1 *Hawk.* 130.

5. Alſo there are ſome actual [juſtifiable] aſſaults on the perſon of another, which do not amount to a forfeiture of a recognizance for the peace: As if an officer, having a warrant againſt one, who will not ſuffer himſelf to be arreſted, beat or wound him in the attempt to take him; or if a parent, in a reaſonable manner chaſtiſe his child, or a maſter his ſervant, being actually in his ſervice at the time; or a ſchoolmaſter his ſcholar; or a jailor his priſoner; or even a huſband his wife as ſome ſay; or if one confined a friend who is mad, and bind and beat him &c. in ſuch a manner as is proper in his circumſtances; or if a man force a ſword from one who offers to kill another therewith; or if a man gently lay his hands on another, and thereby ſtay him from exciting a dog againſt a third perſon; or if I beat one (without wounding him, or throwing at him a dangerous weapon) who wrongfully endeavours with violence to diſpoſſeſs me of my land, or goods; or the goods of another delivered to me to be kept for him, and will not deſiſt upon my laying my hands gently upon him, and diſturbing him; or if a man beat, or as ſome ſay, wound, or main one who makes an aſſault upon his perſon, or that of his wife, parent, child, or maſter, eſpecially if it appear that he did all he could to avoid fighting before he gave the wound; or if a man fight with, or beat one who attempts to kill any ſtranger; or if a man even threaten to kill one who puts him in fear of death in ſuch a place where he cannot ſafely fly from him; or if one impriſon thoſe whom he ſees fighting, till the heat is over. 1 *Hawk.* 130.

6. But it ſeems agreed, that no one ſhall forfeit ſuch a recognizance, by a bare treſpaſs of another's lands, or goods, unleſs it be accompanied with ſome violence to the perſon. 1 *Hawk.* 130—260.

7. Nor in the exerciſe of lawful ſports. 4 *Com. Dig.* 221.

But it is ſaid, that he who wounds another in fighting with naked ſwords does in ſtrictneſs forfeit ſuch a recognizance, becauſe no conſent can make ſo dangerous a diverſion lawful. 1 *Hawk.* 130.

8. Nor will ſcolding words, be a forfeiture; for an act muſt be done. 4 *Inſt.* 180.

9.

9. Nor will a hurt arising from negligence or mischance; tho' the party would be bound to answer for it in a civil action. 1 *Hawk.* 131.

VIII. How such recognizances may be discharged.

1. He who is bound to keep the peace and to appear at a certain day, must appear at that day and record his appearance, altho' he who craved the peace cometh not to desire that it may be continued; otherwise the recognizance cannot be discharged. *Dalt. c.* 120.

2. It may be discharged by the death of the principal party bound thereby, if it was not forfeited before. 1 *Hawk.* 129.

3. Mr. *Hawkins* doubts whether the party complaining can discharge a recognizance for the peace. 1 *Hawk.* 129.

4. But it is sometimes discharged by the release of the prosecutor, on motion, by producing his consent verified by affidavit:—or consenting by counsel. 4 *Com. Dig.* 222.

5. And if a man be bound to keep the peace, towards the commonwealth, and all its citizens, but not towards any particular person, and to appear at such a sessions, the court at that sessions may make proclamation, that if any one can shew cause, why the peace granted against such a one shall be continued, he shall speak; and if no person cometh to demand the peace against him, or to shew cause why it should be continued, then the court may discharge him. But if a man be bound as aforesaid, and, *especially to keep the peace towards a certain person*, there though such person cometh not to desire the peace, may be continued, yet the court by their discretion may bind him over to the next sessions, and that may be to keep the peace against that person only, if they shall think good. *Dalt. chap.* 120.

And it is said that the sureties are not discharged by their death, but that their executors or administrators, continue bound, as their testators, or intestates were. 1 *Hawk.* 129.

6. Likewise if the party be imprisoned for default of sureties, and after he that demanded the peace against him happen to die; it seemeth the justice may make his *liberate* or warrant for the delivery of such prisoner, for after such death, there seemeth no cause to continue the other in prison. *Dalt. c.* 118.

Also any justice may upon the offer of such prisoner, take surety of him for the peace, and may thereupon deliver him. *Dalt. c.* 118.

There is yet another mode, (and by far the most usual, in this state) in which a recognizance for the peace may be discharged; which is, by the act of the court itself to which such recognizance

recognizance is returnable, on a full examination of the evidence as well on behalf of the complainant, as the party accuſed. For altho' it is ſtrongly holden, in the books, 'That the court will 'not permit the truth of the allegations to be controverted by 'the defendant, but will order ſecurity to be taken immediately, 'if no objections ariſe upon the face of the articles themſelves.' (1. *L. Hawk.* 255.—*Str.* 1202.) Yet it is the conſtant practice, in the courts of this commonwealth, to go into a full enquiry of the facts, and to releaſe or bind the party, as they may judge moſt proper from the nature and circumſtances of the caſe.

IX. Various Precedents.

(A) Form of the oath to be adminiſtered to the perſon demanding ſurety of the peace.

You ſhall ſwear that the ſurety for the peace which you now require againſt A O, proceeds from a well grounded fear that the ſaid A O, will burn your houſe, or do you ſome corporal hurt, or that he will procure ſome other perſon, or perſons to do you ſuch injury; and that you have juſt cauſe to be afraid in conſequence of the ſaid A O's, threats; and that you do not require ſuch ſurety out of malice, or for vexation. So help you God.

(B) Warrant for the peace.

county to wit.

Whereas A J, of in the ſaid county, yeoman, hath perſonally come before me J P, one of the commonwealth's juſtices, aſſigned to keep the peace in the ſaid county, and hath taken a corporal oath, that he the ſaid A J, is afraid the ſaid A O, of in the ſaid county, labourer, will beat him (wound, maim, kill, or do him ſome bodily hurt) and hath therefore prayed ſurety of the peace againſt him the ſaid A O: Theſe are therefore on the behalf and in the name of the commonwealth to command you jointly and ſeverally, that immediately upon the receipt hereof you bring the ſaid A O, before me to find ſurety as well for his perſonal appearance at the next court to be holden for the ſaid county as alſo for his keeping the peace, in the mean time towards the citizens of this commonwealth, and chiefly towards the ſaid B J. Given under my hand and ſeal at in the ſaid county, the day of in the year .

J P. §Seal.§

Note,

Note,—This warrant may be directed to the ſheriff, conſtable, or to any private perſon by name, who is no officer; for the juſtice may authorize any one to be his officer whom he pleaſes to make ſuch; but it is moſt adviſeable to direct it to the conſtable of the precinct wherein it is to be executed; for that no other conſtable, and *a fortiori*, no private perſon is compellable to ſerve it.—2 *Hawk.* 86.

(C) Warrant for the good behaviour, from Lambard & Dalton.

county to wit.

A P, and B P, juſtices of the commonwealth, aſſigned to keep the peace within the ſaid county, to the ſheriff of the ſaid county, and to all and ſingular the conſtables, and other officers in the ſaid county, greeting:

Forasmuch as we are given to underſtand from the information, teſtimony and complaint of many credible perſons, that A O, of in the ſaid county, gentleman, and B O, of in the ſame county, yeoman, are not of good name and fame, nor of honeſt converſation, but evil doers, rioters, barrators, and diſturbers of the peace of the commonwealth, ſo that murder, homicide, ſtrifes, diſcords, and other greivances and damages, amongſt the citizens of the ſaid commonwealth, concerning their bodies, are likely to ariſe thereby: Therefore on behalf of the ſaid commonwealth, we command you and every of you, that you omit not by reaſon of any liberty within the county aforeſaid, but that you attach, or one of you do attach the aforeſaid A O, and B O, ſo that you have them before us, or others our fellows, juſtices of the ſaid commonwealth, aſſigned to keep the peace within the county aforeſaid, as ſoon as they can be taken, [or before the juſtices of the ſaid commonwealth, aſſigned to keep the peace with the county aforeſaid, and alſo to hear and determine divers felonies, treſpaſſes, and other miſdemeanors in the ſaid county committed, at the next court to be holden in and for the ſaid county] to find then before us (*or* the ſaid juſtices) ſufficient ſurety and mainprize for their good behaviour towards the ſaid commonwealth, and all its citizens, according to the form of the ſtatute in ſuch caſe made and provided. And this you ſhall in no wiſe omit on the peril that ſhall enſue thereon. And have you before us, [*or*, before the ſaid juſtices, at the ſeſſions aforeſaid] this precept. Given under our ſeals at in the county aforeſaid, this day of in the year .

(*D*)

(D) *Recognizance for the peace or good behaviour.*

county to wit.

Be it remembered that on the day of in the year A O, of in the county aforeſaid, yeoman, A S, of the ſame place, yeoman, and B S, of the ſame place, yeoman, came before me one of the commonwealth's juſtices of the peace for the county aforeſaid, and acknowledged themſelves to owe to C M, eſquire, governor or chief magiſtrate of the commonwealth of Virginia, and his ſucceſſors, to wit, the ſaid A O, the ſum of dollars, and the ſaid A S, the ſum of dollars, and the ſaid B S, the ſum of dollars, current money of Virginia, to be reſpectively levied and made of their ſeveral goods and chattels, lands and tenements, to the uſe of the commonwealth aforeſaid, if he the ſaid A O, ſhall fail in performing the condition underwritten.

The condition of this recognizance is ſuch, that if the above bound A O, ſhall perſonally appear at the next court, to be holden, in and for the county of aforeſaid, to do and receive what ſhall then and there be enjoined him by the ſaid court, and in the mean time ſhall keep the peace [*or*, be of the good behaviour; *or*, ſhall keep the peace, and be of the good behaviour] towards the commonwealth and all its citizens, and eſpecially towards A J, of in the ſaid county, yeoman: Then the ſaid recognizance ſhall be void, or elſe remain in full force.

(E) *Mittimus* for want of ſureties.

county to wit.

To the conſtable of and to the keeper of the jail in the ſaid county.

Whereas A O, of in the ſaid county, yeoman, is now brought before me J P, one of the commonwealth's juſtices, aſſigned to keep the peace, in the ſaid county, requiring him to find ſufficient ſureties to be bound with him in a recognizance, for his perſonal appearance at the next court to be holden in and for the ſaid county, and in the mean time to keep the peace [*or*, be of the good behaviour] towards the ſaid commonwealth, and all its citizens, and eſpecially towards A J, of in the ſaid county, yeoman; and whereas he the ſaid A O, hath refuſed, and doth now refuſe before me to find ſuch ſureties: Theſe are therefore, in the name of the commonwealth, to command you the ſaid conſtable, forthwith to convey the ſaid A O, to the common jail of the ſaid county, and to deliver him to the keeper thereof

thereof there, together with this precept: And I do, in the name of the said commonwealth, hereby command you the said keeper to receive the said A O, into your custody, in the said jail, and him there safely keep, until he shall find such sureties as aforesaid, [*or, be otherwise discharged by due course of law*] Given under my hand and seal at in the said county, this day of in the year

(F) *Liberate, or warrant to the jailor to discharge one committed for want of sureties.*

county to wit.

J P, one of the commonwealth's justices, assigned to keep the peace within the said county, to the keeper of the jail in the said county, greeting:

Forasmuch as A O, in the public jail in your custody now being, at the suit of A J, of in the said county, yeoman, for the want of his finding sufficient sureties for his personal appearance at the next court, to be holden in and for the said county, and for his keeping the peace [*or*, being of the good behaviour] in the mean time; towards the said commonwealth of Virginia, and all its citizens, and especially towards the said A J, hath found before me sufficient sureties, to wit, A S, of yeoman, and B S, of yeoman, either of which hath undertaken for the said A O, under the pain of dollars, and he the said A O, hath undertaken for himself under the pain of dollars, that he the said A O, shall and will personally appear at the next court, to be holden in and for the said county, and shall well and truly keep the peace [*or*, be of the good behaviour] in the mean time, towards the said commonwealth and all the citizens thereof, and especially towards the said A J. Therefore on behalf of the said commonwealth, I do command you, that if the said A O, do remain in the said jail, for the said cause, and for none other, then you forbear to grieve or detain him any longer, but that you deliver him thence, and suffer him to go at large, and that upon the pain that will fall thereon. Given under my hand and seal at in the said county, this day of in the year .

Surety for the Good Behaviour.

SURETY for the good behaviour resembles in so many instances surety for the peace, both as to the manner in which it

it is to be taken, ſuperſeded and diſcharged, that it will not require a particular conſideration, except as to the following points;

I. For what miſbehaviour it is to be required.
II. For what it ſhall be forfeited.

I. For what miſbehaviour it is to be required.

This ſpecies of recognizance, with ſureties, which includes ſurety for the peace and ſomething more, may be required by the judges of the court of appeals, high court of chancery, and general court, and the juſtices of the peace in each county and corporation, of *ſuch perſons who are not of good fame*, by virtue of the act of the General Aſſembly, *c.* 69. *p.* 100—of the *Reviſed Code*.

Under the act of 34 *Edw.* 3. *c.* 1. which uſes the ſame general mode of expreſſion, it hath been holden, that a man may be bound to his good behaviour for cauſes of ſcandal *againſt good morals*, as well as *againſt the peace*; as for haunting bawdy houſes with women of bad fame, or for keeping ſuch women in his houſe. Thus alſo, night-walkers; eaves-droppers; ſuch as keep ſuſpicious company or are reported to be pilferers or robbers; ſuch as ſleep in the day, and walk in the night, common drunkards; whoremaſters; the putative fathers of baſtards; cheats; idle vagabonds; and other perſons whoſe miſbehaviour may reaſonably bring them within the general words of the ſtatute, as perſons not of good fame; an expreſſion it muſt be owned of ſo great a latitude, as leaves much to be determined by the diſcretion of the magiſtrate himſelf. But if he commits a man for want of ſureties, he muſt expreſs the cauſe thereof with convenient certainty, and take care that ſuch cauſe be a good one. 4 *Blacks. Com.* 256. 1 *Hawk.* 132.

II. For what it ſhall be forfeited.

A recognizance for the good behaviour may be forfeited by all the ſame means, as one for the ſecurity for the peace may be; and alſo by ſome others. As, by going armed with unuſual attendance to the terror of the people; by ſpeaking words tending to ſedition; or by committing any of thoſe acts of miſbehaviour, which the recognizance was intended to prevent. But not by barely giving freſh cauſe of ſuſpicion, of that which perhaps may never happen: for tho' it is juſt to compel ſuſpected perſons to give ſecurity to the public againſt miſbehaviour that is apprehended;

hended; yet it would be hard upon such suspicion, without the proof of any actual crime, to punish them by a forfeiture of their recognizance. 4 *Blacks. Com.* 257. 1 *Hawk.* 133.

The precedents for this title may be found among those under the preceding head '*Surety for the peace.*'

There are also several other offences, for which surety for the good behaviour is required by law.

As, by *Virginia laws.* p. 19. 'It shall not be lawful for any 'person to offer in payment, a private bank bill or note for mo-'ney, payable to bearer; and whosoever shall offend herein, 'shall not only forfeit to the informer ten times the value of the 'sum mentioned in such bill or note, but may be apprehended 'by warrant of a justice, and upon due proof of the fact made to 'him, or upon his own acknowledgement thereof, be bound to 'the good behaviour, or if he afterwards offend in the like man-'ner, it shall be deemed a breach of the condition of the recog-'nizance.'

A person convicted of unlawful gaming shall find surety for his good behaviour, for twelve months. *V. l.* p. 184.

So, for keeping a tipling house &c. see '*Ordinaries.*'

A person convicted a third time of unlawful hunting. See '*Hunting.*'

SWEARING.

THE penalties for profane swearing, cursing, or getting drunk, are 83 cents for each offence, on conviction by the oath of one or more witnesses, the confession of the party, or the offence being committed in presence of a magistrate. See *Virginia laws.* p. 286. of the *Revised Code.*

SUMMONS.

county to wit.——To constable.

Whereas information hath this day been made before me J P, *one of the commonwealth's justices of the peace for the said county, upon the oath of* A J, *of yeoman, that on the day of in the year he heard* A O, *of in the said county, yeoman, at in the said county, swear one profane oath* (or, *curse one profane curse,*—or, *saw the said* A O, *drunk*) *These are therefore to command you to cause the said* A O, *forthwith to appear before me, to answer the premises, and to be further dealt with according to law. Given under my hand and seal at in the said county, the day of in the year*

if

If the conviction be for the offence committed in presence of a justice it may be in the following form.

Be it remembered that on the day of in the year A O, *was convicted before me* J P, *one of the commonwealth's justices of the peace for the county of of swearing one (or more) profane oaths, (or cursing) one (or more) profane curses,* or *(of being drunk) Given under my hand and seal, the day and year aforesaid.*

The form of the warrant for distress may be found under title '*Gaming &c*'

Tenant, (*See* RENTS.)
Theft, (*See* LARCENY.)
Theftbote, (*See* FELONY.)
Tipling houses, (*See* ORDINARIES.)

TOBACCO.

THIS having long been a staple commodity in this country, many useful regulations have been made, to render it a profitable object of exportation.—But as few of them come under the cognizance of a justice of the peace out of court, I shall only refer to the act of Assembly as it is printed in the Revised Code, and insert such precedents as are particularly useful for magistrates in those cases, which properly belong to the jurisdiction of one or two justices. See *Virginia laws.* chap. 135. page 264, of the *Revised Code.*

(A) Warrant against inspectors for failing to burn tobacco, refused by them, on sect. 17.

county to wit.——To constable.

Whereas information hath this day been made to me J P, a justice of the peace for the said county, by A J, that on the day of last past, hogshead of tobacco was refused by and inspectors at warehouse, in the county aforesaid, as unfit to pass, and the said inspectors failed to burn the same, in the brick funnel erected for that purpose, whereby they have forfeited the sum of seven dollars: These are therefore to require you to summon the said and to appear before me, or some other justice of the peace for the said county, to answer the premises. Herein fail not. Given under my hand and seal &c.

(B) Warrant against a picker of tobacco, on sect. 17. *for refusing to pick refused tobacco.*

Whereas &c. (*as before*) that A P, one of the pickers of tobacco

tobacco at warehouſe, in the county aforeſaid, on the day of laſt paſt, did refuſe to pick, and ſeparate the good tobacco from the bad, of hogſhead, of tobacco refuſed by the inſpectors of the ſaid warehouſe, being required by the ſaid inſpectors, whereby he hath forfeited the ſum of four dollars. Theſe are &c.

(C) Warrant againſt a picker of tobacco for acting without being qualified, on sect. 18.

Whereas &c. (*as in the firſt*) did undertake the opening, ſorting, picking, and ſeparating tobacco brought to the ſaid warehouſe, for hire and reward, without having been qualified agreeable to law, whereby he hath forfeited the ſum of four dollars: Theſe are &c.

(D) Warrant againſt an inſpector for refuſing to deliver tobacco when demanded, on sect. 20.

Whereas &c. (*as in the firſt*) that and inſpectors &c. did refuſe to deliver 999 pounds of tobacco agreeable to their recept given for the ſame, whereby they have forfeited double the amount of the ſaid tobacco: Theſe are &c.

(E) Warrant to go on board a veſſel to ſearch for uninſpected tobacco, on sect. 27.

Whereas &c. *as in the firſt*) on oath, that there is good cauſe to ſuſpect that there is a quantity of tobacco uninſpected in caſk, bulk, or parcels, on board the *Schooner* now riding at near this county. I do therefore authoriſe and require you to go on board the ſaid *Schooner*, and ſearch for, and ſeize ſuch tobacco, and the ſame being ſeized, to bring on ſhore before me, or ſome other juſtice of the peace for this county, to be diſpoſed of according to law. Given &c.

To the ſheriff (or conſtable) of county.

The warrant of diſtreſs, where the penalty recovered is under five dollars, may be formed from thoſe given under titles, '*Gaming*,' '*Pork, &c.*'

(F) Form of a certificate to be given to the perſon who has loſt a tobacco note, on sect. 41.

county to wit. I

I do hereby certify that on this day of in the year A L, of the county of perſonally appeared before me J P, one of the commonwealth's juſtices of the peace for the county of (*the county where the tobacco is payable*) and made oath that on or about the day of laſt paſt, he caſually loſt, (*miſlaid*, or *deſtroyed, as the caſe may be*) a receipt for *one* hogſhead of tobacco, granted by and inſpectors of tobacco at warehouſe, in the county of aforeſaid, marked, &c. (*here inſert the marks, numbers, weights, to whom and where payable*) and that at the time the ſaid receipt was loſt (miſlaid, or deſtroyed) he the ſaid A L, was lawfully entitled to receive the tobacco therein mentioned. Given &c.

(G) *Form of the bond to the inſpectors, on ſect.* 41.

The penalty may be in the uſual form, in double the amount of the tobacco loſt, payable to the inſpectors, with the following condition.

The condition of the above obligation is ſuch, that whereas the above bound A L, hath this day produced to us the above named and inſpectors of tobacco at warehouſe aforeſaid, a certificate from under the hand of J P, a juſtice of the peace for the county of dated the day of in the year certifying that the ſaid A L, had made oath before him to the loſs of a hogſhead of tobacco, marked &c. (*here inſert the marks, weights &c. as deſcribed in the certificate*) for which ſaid hogſhead of tobacco the ſaid A L, hath required a duplicate of a receipt, which we the ſaid and have accordingly granted. Now if the ſaid A L, and (*his ſecurity*) ſhall well and truly indemnify the perſon who may hereafter produce the original receipt for the ſaid hogſhead of tobacco, within twelve months from the date of the notice publiſhed of the loſs of the ſame by the ſaid A L, the value paid by the ſaid holder of the original receipt for the ſame, then the above obligation to be void, elſe to remain in full force.

(H) *Warrant by two juſtices againſt the maſter of a veſſel for taking in tobacco in bulk or parcels, on ſect.* 46.

Whereas &c. (*as in the firſt*) that A O, of did take in his veſſel, now lying at near this county, ſundry parcels of tobacco, contrary to the act of the General Aſſembly in that caſe made and provided, whereby he hath not only forfeited the ſaid tobacco, but fifty cents for every pound thereof. Theſe are &c.

Treaſon

TREASON, according to lord Coke, is derived from *trahir*, to betray; and *trahiſon*, by contraction *treaſon*, is the betraying itſelf. 3 *Inſt.* 4.

'If a man do levy war againſt this commonwealth in the ſame, 'or be adherent to the enemies of the commonwealth within the 'ſame, giving to them aid and comfort in the commonwealth or 'elſewhere, and thereof be legally convicted of open deed by the 'evidence of two ſufficient and lawful witneſſes, or their own 'voluntary confeſſion, the caſes above rehearſed, ſhall be judged 'treaſon, which extendeth to the commonwealth; and the per-'ſon ſo convicted, ſhall ſuffer death without benefit of clergy.' *Virginia laws*, chap. 136. page 282 of the *Reviſed Code*.

So to erect a government within the limits of this commonwealth, independant of it &c. *See Virginia laws*, page 282. ſect. 2. of the *Reviſed Code*.

High treaſon, &c. is triable in the general court. *See the above law*. ſect. 7.

The judgment for treaſon, by the common law, is, that the perſon be dragged to the place of execution, there hanged by the neck, cut down alive, his entrails taken out and burnt before his face, his head cut off, his body divided into four quarters &c. *See* 2 *Hawk.* 443.

The judgment againſt a woman, is, that ſhe be drawn and burnt. 3 *Inſt.* 211.

Theſe were the ſeverities of the common law, when to imagine the death of the king, queen, or their eldeſt ſon or daughter; or to have carnal knowledge of the king's wife or eldeſt daughter &c. conſtituted high treaſon.—But it may well be doubted how far ſuch judgments could now be given in this ſtate, ſince by the declaration of rights (Art. 9.) '*cruel or unuſual puniſhments ſhall not be inflicted.*'

PETIT TREASON.

Treaſon has uſually been diſtinguiſhed into *High*, and *Petit*. High treaſon is that which we have already mentioned, and is defined by our laws.—Petit treaſon is declared by the ſtatute of 25 *Edw.* 3. *ſt.* 5. *ch.* 21. and is when a ſervant ſlayeth his maſter, or wife her huſband &c.

Miſpriſion of Treaſon.

Miſpriſion cometh of the French word *mepris*, which properly ſignifieth neglect or contempt: And miſpriſion of treaſon, in legal underſtanding, ſignifieth, when one knoweth of any treaſon, tho'

tho' no party or conſenter to it, yet conceals it, and doth not reveal it in convenient time. 3 *Inſt.* 36. 1 H. H. 371.

The judgment of miſpriſion of treaſon is, to be impriſoned during life &c. 3 *Inſt.* 36.—the forfeiture, by the common law, is taken away by our laws. *See* ' *Attainder.*'

Treſpaſs, (*See* FENCES, FRUIT TREES.)

VAGRANTS.

BY *Virginia laws*, page 194. ſect. 26. of the *Reviſed Code*, The overſeers of the poor or any one of them, are empowered upon diſcovering any vagrant within their reſpective diſtricts, to make information thereof to any juſtice of the county, and to require a warrant for apprehending ſuch vagrant, to be brought before him or any other juſtice; and if upon examination it ſhall appear to the juſtice that the perſon is within the deſcription of a vagrant, as hereafter mentioned, ſuch juſtice ſhall, by warrant under his hand, order ſuch vagrant to be delivered to ſome one of the overſeers of the poor of the diſtrict in which ſuch vagrant ſhall have been apprehended, to be employed in labor for any term not exceeding 3 months, and by the ſaid overſeer of the poor, hired out for the beſt wages that can be procured, to be applied to the uſe of the poor. If ſuch vagrant ſhall run away during the time of his ſervice, he ſhall be dealt with in the ſame manner as other runaway ſervants.

Sect. 26. Any able bodied man, who, not having wherewithal to maintain himſelf, ſhall be found loitering, and ſhall have a wife or children, without means for their ſubſiſtance, whereby they may become burthenſome to their county or town, and any able bodied man without a wife or child, who, not having wherewithal to maintain himſelf, ſhall wander abroad, or be found loitering without betaking himſelf to ſome honeſt employment, or ſhall go about begging, ſhall be deemed and treated as a vagrant.

(A) Warrant to apprehend a vagrant.

county to wit.

Whereas information hath this day been made to me J P, a juſtice of the peace for this county, by B O, one of the overſeers of the poor for diſtrict, in the county aforeſaid, that A V, an able bodied man, who, not having wherewithal to ſupport himſelf, is found loitering, and has a wife and children, without means for their ſubſiſtance (*if any other deſcription of a vagrant mention*

mention it) These are to require you to bring the said A V, before me, or some other justice of the peace for this county, to dealt with according to law. Given under my hand &c.

To constable.

(B) Warrant for hiring out a vagrant.

county to wit.

Whereas from the information of B O. one of the overseers of the poor for district in this county, A V, who, was described by him as a vagrant within the meaning of the act of the General Assembly, was this day brought before me J P, a justice of the peace for the said county, and upon due examination before me, it appearing to me, that the said A V, comes within the description of a vagrant, viz. that the said A V, is an able bodied man, who, not having wherewithal to maintain himself is found loitering, and has a wife and children, without means for their subsistance: These are therefore to require you to deliver the said A V, to some one of the overseers of the poor for district in this county; and you the said overseer are hereby required to receive the said A V, and him to hire out for the best wages that can be procured, to be employed in labour for the space of days, and the monies arising therefrom to apply to the uses of the poor of this county. Given &c.

To constable.—And to some one of the overseers of the poor for district in the county of

Verdict, (*See* JURIES & JURORS.)

Waifs, (*See* ESTRAYS.)

WARRANTS.

I. Of warrants for debt, granted by a single magistrate.

II. Of warrants in criminal cases.

I. Of warrants for debt granted by a single magistrate.

BY *Virginia laws*, chap. 67. § 6. page 91, of the *Revised Code*, 'When the cause of action shall not exceed five dollars, or two hundred pounds of tobacco, the same is declared 'to be cognizable, and finally determinable by any one justice 'of the peace, who may give judgment, and thereupon award execution

'execution againſt the goods and chattels of the debtor, or party 'againſt whom ſuch judgment ſhall be given, which ſhall be 'executed and returned, by the ſheriff or conſtable to whom 'directed, in the ſame manner, as other writs of *fieri facias*, 'are to be executed and returned, but no execution ſhall be by 'him granted againſt the body of the defendant.'

In exerciſing the juriſdiction granted by the above act, much muſt depend upon the diſcretion of the magiſtrate. He ſhould, however, always have it impreſſed upon his mind, that as his diciſion is final, too much circumſpection cannot be obſerved in producing a fair and impartial trial.—Sufficient notice of the time and place appointed for the hearing of the parties ſhould always be given, and proceſs awarded to ſummon any witneſſes which might be required.—And above all things, the magiſtrates ſhould diſcountenance a practice which now too frequently prevails of harraſſing the defendant by appointing the place of trial in ſome remote part of the county, and thereby reducing him to the alternative of either ſubmitting to an unjuſt judgment, or of defending himſelf at a greater expence than the object in controverſy is worth.

Warrant for debt.

To the ſheriff of county, or to any conſtable therein.

Summon A B, to appear before me or ſome other juſtice of this county, to anſwer the complaint of C D, for the non payment of due by account (*or note as the caſe may be*) and then make return how you have executed this warrant. Given under my hand &c.

Summon A W, &c. *witneſſes for the plaintiff.*

Special Warrant.

As *before* to appear; (*then ſay*) before me at on the day of next, by o'clock in the noon, to anſwer &c.

The officers fees which may be taxed in the coſts, are,

	Cents.
For ſerving a warrant	21
Summoning a witneſs	10
Serving an execution, or attachment	21

The forms of judgments are ſo eaſily drawn that it ſeems unneceſſary to inſert any.

Execution for the plaintiff.

The commonwealth of Virginia to conſtable of county, greeting: You are hereby commanded that of the goods

goods and chattels of A D, late in your precinct, you cauſe to be made the ſum of which B C, lately before one of the commonwealth's juſtices of the peace for the ſaid county, hath recovered againſt him for debt; alſo cents, which to the ſaid B C, before the ſame juſtice, were adjudged for his coſts, in that ſuit expended, whereof he is convict; and that you have the ſaid debt and coſts, before the ſaid juſtice, the day of next, to render unto the ſaid B C, of the debt and coſts aforeſaid; and have then there this writ. Witneſs the ſaid the day of in the year and in the year of the commonwealth.

For the defendant.

As *before to* the ſum of cents, which to A D, lately before one of the commonwealth's juſtices of the peace for the ſaid county, were adjudged for his coſts about his defence, in a certain complaint at the ſuit of B C, expended, whereof he is convicted, as appears of record, and that you have &c. (*as before*) to render unto the ſaid A D, of his coſts aforeſaid; and that you have &c.

Note—By the execution law (page 312. § 25) of the *Reviſed Code*, it is declared, 'That nothing in that act contained ſhall 'be conſtrued to extend the right of giving ſecurity for payment 'of the money or tobacco mentioned in ſuch execution at a fu-'ture day, or to have the goods forthcoming at the day of ſale, 'to the defendant or defendants, in any judgment or execution 'not exceeding five dollars.'

II. Of warrants in criminal cases.

The execution of a warrant may be ſeen under title '*Arreſt.*'

For a warrant to ſearch for ſtolen goods, See *Search Warrant.*

If a juſtice of the peace *ſee* a felony or other breach of the peace committed in his preſence, he may in his own perſon apprehend the felon; and ſo he may by word command any perſon to apprehend him, and ſuch command is a good warrant without writing: but if the ſame be done in his *abſence*, then he muſt iſſue his warrant in writing: of which I ſhall ſhew,

i. *For what cauſes it may be granted.*
ii. *What is to be done previous to the granting of it.*
iii. *How far it it is grantable on ſuſpicion.*
iv. *The form of it.*

I.

i. For what cauſes it may be granted.

There ſeems to be no doubt, but that a warrant may be lawfully granted by any juſtice, for treaſon, felony, or any other offence againſt the peace: Alſo it ſeems clear that wherever a ſtatute gives to any one juſtice a juriſdiction over any offence, or a power to require any perſon to do a certain thing ordained by ſuch ſtatute, it impliedly gives a power to every ſuch juſtice to make out a warrant to bring before him any perſon accuſed of ſuch offence, or compellable to do the thing ordained by ſuch ſtatute, for it cannot but be intended, that a ſtatute giving a perſon juriſdiction over an offence, doth mean alſo to give him the power incident to all courts of compelling the party to come before him. 2 *Haw.* 84.

But in caſes where the commonwealth is no party, or where no corporal puniſhment is appointed, it ſeemeth that a *ſummons* is the more proper proceſs; and for default of appearance the juſtice may proceed.

ii. What is to be done previous to the granting of it.

It is convenient, though not always neceſſary, that the party who demands the warrant be firſt examined on oath, touching the whole matter whereupon the warrant is demanded, and that examination put in writing. 1 H. H. 582. 2 H. H. 111.

Or at leaſt it is ſafe to bind him over to give evidence, leſt afterwards when the offender ſhall be apprehended, or ſhall ſurrender himſelf, the party that procured the warrant be gone. *Dalt. c.* 169.

iii. How far it is grantable on ſuſpicion.

It is the opinion of *Hale* and *Hawkins*, contrary to lord *Coke* (4 *Inſt.* 177) that warrants for felony, may be granted by a juſtice of the peace on probable grounds of ſuſpicion:—Yet that they ſhould be well ſatisfied of the reaſonableneſs of the accuſation. *See* 2 H. H. 107—110. 1 H. H. 597. 2 *Hawk.* 85.

But a general warrant, upon a complaint of robbery, to apprehend *all perſons ſuſpected*, and to bring them before a juſtice, hath been ruled void; and falſe impriſonment lies againſt him that iſſues ſuch a warrant. 1 H. H. 580. 2 H. H. 112.

iv. The form of it.

It ſeems agreed that the *place* at which the warrant is made, need not be expreſſed in it, tho' it muſt be alleged in pleading, and

and the county muſt be ſet forth in the margin. *See Dalt.* chap. 169. 2 H. H. 111. 2 *Hawk.* 85.

It may be directed to the ſheriff, conſtable, or to any indifferent perſon by name who is no officer; for the juſtice may authorize any one to be his officer, whom he pleaſes to make ſuch; yet it is moſt adviſeable to direct it to the conſtable of the precinct wherein it is to be executed, for that no other conſtable, and a *fortiori* no private perſon is compellable to ſerve it. 2 *Haw.* 85. *Dalt. c.* 169. 2 H. H. 110.

But in the caſe of an act of Aſſembly, it is ſaid, that if the act directeth that a juſtice ſhall grant a warrant, and doth not ſay to whom it ſhall be directed, by conſequence of law it muſt be directed to the conſtable, and it cannot be directed to the ſheriff, unleſs ſuch power is given in the act. *L. Raym.* 1192. 2 *Salk.* 381.

Warrants may be variouſly ſtiled, as, 1, In the name of the commonwealth, under the teſte of the juſtice; 2. In the name of the juſtice himſelf, or, 3; without any ſtile, but only under the hand and ſeal of the juſtice.

1. *In the name of the commonwealth.*

county to wit.

The commonwealth of Virginia, To the ſheriff of the ſaid county, to the conſtable of in the ſaid county, and to all and ſingular the commonwealth's officers of juſtice in the ſaid county, greeting:

Whereas A J, *of hath this day come before me* J P, *a juſtice of the peace for the county aforeſaid, and hath made oath that* A O, *of &c.* [here ſet forth the ſubſtance of the accuſation] *Theſe are therefore to require you to apprehend the ſaid* A O, *and bring him before me, or ſome other juſtice of the peace for the ſaid county of to anſwer the premiſes, and further to be dealt with according to law. Given under my hand and ſeal &c.*

Warrants are ſeldom iſſued, in this State, either in the name of the commonwealth or of the juſtice, but only under the hand and ſeal of the juſtice, as in that part of the above form printed in *Italics.*

Regularly the warrant, eſpecially if it be for the peace or good behaviour, or the like, where ſureties are to be found or required, ought to contain the ſpecial cauſe and matter whereupon it is granted, to the intent that the party upon whom it is to be ſerved may provide his ſureties ready, and take them with him to the juſtice to be bound for him; but if the warrant be for treaſon, murder, or felony, or other capital offence, or for great conſpiracies, rebellious aſſemblies, or the like, it hath been ſaid, that it needeth not to contain any ſpecial cauſe, but the warrant

of

of the juſtice may be to bring the party before him, to make anſwer to ſuch things or matters generally, as ſhall be objected againſt him on the commonwealth's behalf. *Dalt. c.* 169. 2 *Haw.* 85. 2 H. H. 111.

But Mr: *Lambard* ſays, every warrant made by a juſtice of the peace ought to comprehend the ſpecial matter upon which it proceedeth, even as all the commonwealth's writs do bear their proper cauſe in their mouth with them; and as for the form that is commonly uſed, *to anſwer to ſuch things as ſhall be objected*, and ſuch like, they are not fetched out of the old learned precedents, but lately brought in by ſuch as either knew not, or cared not, what they writ. *Lamb.* 87.

The warrant ought regularly to mention the name of the party to be attached, and muſt not be left in general, or with blanks to be filled up by the party afterwards. 2 H. 114. *Dalt. c.* 169.

The warrant may iſſue to bring the party before the juſtice who granted the warrant ſpecially, and then the officer is bound to bring him before the ſame juſtice; but if the warrant be to bring him before any juſtice, then it is in the election of the officer to bring him before what juſtice of the county he thinks fit, and not in the election of the priſoner. 1 H. H. 582. 2 H. H. 112.

It ought to ſet forth the year and day in which it is made, that in an action brought upon an arreſt by virtue of it, it may appear to have been prior to ſuch arreſt; and alſo, in caſe where a ſtatute directeth the proſecution to be within ſuch a time, that it may appear that the proſecution is commenced within ſuch time limited: Likewiſe, where a penalty is given to the poor of the pariſh where the offence ſhall be committed, or the like, it ought to ſpecify the place where the offence was committed. 2 *Haw.* 85.

Finally, it ought to be under the hand and ſeal of the juſtice, who makes it out. 2 *Haw.* 85.

But it ſeems that this muſt be underſtood of warrants iſſued for offences at common law.—For where a ſtatute directs that a magiſtrate ſhall bring the party before him by warrant under his *hand*, it does not appear neceſſary that it ſhould be under ſeal.

WEIGHTS AND MEASURES.

THE regulation of the ſtandard of weights and meaſures, being among the powers granted to Congreſs, the legiſlature of this commonwealth in the year 1792, paſſed a temporary act, continuing the act of 1734, for the regulation of weights and meaſures, till Congreſs ſhall have made proviſion on the ſubject. See *V. l.* p. 288, of the *Reviſed Code.*

HUSBAND and wife being conſidered as one perſon in law, there are many points of uſeful information ariſing from that principle, which deſerve to be noticed.

Generally huſband and wife cannot be witneſſes either for or againſt one another. *See title* '*Evidence.*'

But in ſome caſes where the wife is the *party grieved* ſhe may be a witneſs againſt her huſband; as in demanding ſurety of the peace; in the caſe of a forcible abduction and marriage; where the huſband was acceſſory to a rape on his wife, &c. *See titles* '*Evidence,*' '*Surety for the peace,*' and '*Rape.*'

After appearance and judgment againſt a woman as a ſeme ſole, ſhe ſhall not bring a writ of error and plead that ſhe was married at the time of her appearance. *See Stra* 811.

A married woman may be indicted alone, for a felony committed by her. See 1 *Hawk.* 2, 3. 1 H. H. 47. *Dalt. c.* 157. 1 H. H. 516.

A wife may be indicted together with her huſband for keeping a bawdy houſe. 1 *Hawk.* 2.

Where a married woman buys things neceſſary for her apparel, diet &c. without her huſband's conſent, it ſhall bind him. *See* 1 *Sid.* 120. *Alleyn* 61. 1 *Blacks.* 442.

If the huſband forbid particular perſons to truſt her he ſhall not be chargeable; but a general prohibition not to truſt her, as by putting her in a gazette, or the like, doth not amount to legal notice. 1 *Vent.* 42. *Wood's Inſt.* 61.

If the wife voluntarily leave her huſband and live with an adulterer, the huſband is not chargeable with her contracts, even tho' the perſon who truſted her had no notice of the elopement. *See Stra.* 647. *Ibid.* 706. *Ibid.* 875.

But if, after the elopement, the wife returns and lives with her huſband, and he turns her away without further provocation, he is liable for her debts. *Stra.* 1214.

On a judgment againſt huſband and wife, both may be taken in execution. *See Stra.* 1167. *Ibid.* 1237. 1 *Wils.* 149.

WITNESSES.

FOR matters in general relating to witneſſes, ſee title '*Evidence.*'—*See alſo Virginia laws*, chap. 141. page 288 of the *Reviſed Code.*

The only clauſes of the above act of Aſſembly which particularly fall under the notice of a magiſtrate are *ſections* 12 & 14, which authorize the clerk of the court in which a ſuit is depending

ing to iſſue a commiſſion to take the depoſitions of witneſſes *about to depart the country, or by age, ſickneſs or otherwiſe unable to attend the court,—or where the claim or defence or a material point depends on a ſingle witneſs, upon affidavit thereof, or on a certificate that an affidavit has been made to that effect.*

Certificate of a magiſtrate.

County to wit.——To the clerk of

This day A B, *of perſonally appeared before me* J P, *a juſtice of the peace for the county of aforeſaid, and made oath that* B W, *who is a witneſs for him in a ſuit now depending in the cout of between the ſaid* A L, *plaintiff, and* C D, *defendant, is about to depart this country,* [*or by age, ſickneſs or otherwiſe, will be unable to attend the ſaid court,* (as the caſe may be) *Given &c.*

Certificate for obtaining the depoſition of a ſingle material witneſs.

As before *to* made *oath that he verily believes his claim* (*or defence*) *or a material point thereof in a ſuit depending in between the ſaid* A S, *and* C D, *depends on the teſtimony of* A W, *who, is a ſingle witneſs to that fact. Given &c.*

Notice to take depoſitions.

To Mr. C D.

Pleaſe to take notice that on the day of next, between the hours of in the morning, and in the evening of the ſame day, at the houſe of in the county of I ſhall proceed to take the depoſition of B W, *who is a witneſs for me in a cauſe now depending in the court of in which I am plaintiff, and you are defendant.*

A B.

WOMEN.

OF women conſidered as *wives* or *feme coverts*; ſee title '*Wife*,'—having two huſbands, or men two wives; ſee title '*Bigamy*,'—benefit of clergy, ſee title '*Clergy*.'—the raviſhment of women, ſee title '*Rape*.'

By

By *Virginia laws*, chap. 104. page 206. ſect. 19. of the *Reviſed Code*, it is made felony to take away againſt her will and marry or defile any woman, having ſubſtances in goods moveable, or lands and tenements &c.

Sect. 20. If any perſon above the age of 14 years take away any maiden or woman child unmarried, being within the age of 16 years, from the poſſeſſion of, and againſt the will of the perſon lawfully having the poſſeſſion of her, he ſhall be impriſoned for any term not exceeding two years.

Sect. 21. To take away and deflower any ſuch maiden as laſt aforeſaid, ſubjects the offender to 5 years impriſonment, without bail or mainprize.

Upon the ſtatute of 3. H. 7. from which our act of Aſſembly is taken, the following obſervations have been made: 1. That the maid, wife, or widow, have lands, or tenements, or moveable goods, or be an heir apparent. 2. That ſhe be taken away againſt her will. 3. That the taking was for lucre. And 4. That ſhe be married to the miſdoer, or to ſome other by his conſent; or be defiled (that is carnally known) For if theſe concur not, and be ſo laid in the indictment, the miſdoer is not a felon within the ſtatute, but otherwiſe to be puniſhed. 3 *Inſt.* 61. 1 *Haw.* 110.

It is no manner of excuſe, that the woman at firſt was taken away with her own conſent; becauſe if ſhe afterwards refuſe to continue with the offender, and be forced againſt her will, ſhe may from that time as properly be ſaid to be taken againſt her will, as if ſhe had never given any conſent at all; for till the force was put upon her, ſhe was in her own power. 1 *Haw.* 110.

Alſo it is not material, whether a woman ſo taken contrary to her will, be at laſt married or defiled with her own conſent or not; if ſhe were under the force at the time. 1 *Haw.* 110.

In *Fulwood's* caſe, M. 13. C. it was reſolved, that the woman taken away and married, may be ſworn and give evidence againſt the offender, who ſo took and married her, tho' ſhe be his wife *de facto*. 1 H. H. 661.

And this ſtatute has been held to extend to a *natural* daughter. *Str.* 1162.

A woman quick with child, and condemned for treaſon or felony, ſhall have execution reſpited till her delivery; and to aſcertain the fact, the ſheriff ſhall be commanded to impannel a jury of matrons to try and examine her; but ſhe ſhall have this privilege but once. 2 *Hawk.* 464.

WRECK of the ſea in legal underſtanding is applied to ſuch goods, as after ſhipwreck at ſea, are by the ſea caſt upon the land, and therefore the juriſdiction thereof pertaineth not to the admiralty, but to the common law. 2 *Inſt.* 167.

None of thoſe goods which are called *jetſam*, (from being caſt into the ſea, while the ſhip is in danger, and which there ſink and remain under water) or thoſe called *flotſam*, (from floating on the ſurface of the water) or thoſe called *ligan* (which *lie* in the bottom of the ſea, but tied to a cork or buoy, in order to be found again) are to be eſteemed wreck, ſo long as they remain in or upon the ſea, and are not caſt upon the land by the ſea; but if any of them are caſt upon the land by the ſea, they are wreck. 1 *Blacks. Com.* 292.

See *Virginia laws*, chap. 6, page 14, of the *Reviſed Code*, *for appointing commiſſioners of wreck &c.*

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APPENDIX No. I.

TO THE

New Virginia Juſtice, &c.

CONTAINING

FORMS of CONVEYANCING.

☞ *IT may be neceſſary to apprize the ſeveral Gentlemen into whoſe Hands this Book may fall, that it never was my Intention, by publiſhing the following Precedents, to ſuperſede the Uſe of Counſel, in Caſes of Importance or Difficulty. Theſe are calculated principally for ſuch of our Citizens, as have it not in their Power to obtain the Aid of profeſſional Gentlemen. To thoſe, I flatter myſelf it will be found a valuable Collection.—But in Conveyances, where the Title to the laſt Purchaſer is to be traced back, through various intermediate Purchaſers, and in many other inſtances, it would be unſafe to truſt to theſe Precedents,—which are adapted to the moſt ſimple transfers of Property: For it muſt always be recollected, that to copy a Precedent in a fair hand, does not neceſſarily conſtitute a Conveyancer;—but to be a proficient in that Line, a Knowledge of the Laws which regulate Real Property is indiſpenſably neceſſary.*

RICHMOND: PRINTED BY JOHN DIXON.

AGREEMENTS.

THE various objects which may be comprehended under this title, make it impoſſible to inſert every form applicable to it;—I ſhall however, obſerve the requiſites to moſt agreements by our laws, (which is copied from the ſtatute of England of 29 Car. ii.) in the words of the law itſelf.—"No action ſhall be brought whereby to charge any "executor or adminiſtrator upon any ſpecial promiſe to anſwer any "debt or damages out of his own eſtate—or whereby to charge the "defendant upon any ſpecial promiſe to anſwer for the debt, default, "or miſcarriage of another perſon,—or to charge any perſon upon any "agreement made upon conſideration of marriage,—or upon any con-"tract for the ſale of lands, tenements, or hereditaments, or the mak-"ing any leaſe thereof for a longer term than one year,—or upon any "agreement which is not to be performed within the ſpace of one "year from the making thereof,—unleſs the promiſe or agreement, "upon which ſuch action ſhall be brought, or ſome memorandum, "or note thereof ſhall be in writing, and ſigned by the party to be "charged therewith, or ſome other perſon by him thereunto lawfully "authorized."—*See Virginia Laws, ch.* 10, *p.* 18, *of the reviſed code.*

Articles of Agreement for the Purchaſe of a Tract of Land.

ARTICLES of agreement made and entered into this —— day of —— in the year —— between A. B. of &c. of the one part, and C. D. of &c. of the other part WITNESSETH, That the ſaid A. B. for and in conſideration of the ſum of —— to be paid by the ſaid C. D. purſuant to the covenant and agreement of the ſaid C. D. herein after mentioned, doth for himſelf and his heirs covenant and agree with the ſaid C. D. as follows, viz. that the ſaid A. B. or his heirs ſhall and will before the —— day of —— next enſuing, make out a complete title in fee-ſimple to, and (by ſuch ſufficient conveyances, as the ſaid C. D or his counſel ſhall approve) convey and aſſure, in poſſeſſion to the ſaid C. D. and his heirs forever, free from all manner of incumberances, all that tract or parcel of land lying &c. *(here deſcribe the land particularly.)*

AND the ſaid C. D. in conſideration of the covenant and agreement herein before contained on the part of the ſaid A. B. doth hereby for himſelf, his heirs, executors and adminiſtrators, covenant and agree with the ſaid A. B. that he the ſaid C. D. his heirs, excutors, or adminiſtrators, ſhall and will upon making and executing ſuch conveyances and aſſurances as aforeſaid, pay or cauſe to be paid to the ſaid A. B his heirs, executors or adminiſtrators, the ſum of —— as and for, and in full conſideration for the abſolute purchaſe of the ſaid tract or parcel of land.

IN WITNESS, &c.

See Marriage Articles, Mortgages, &c.

Articles. See Agreements.

AT-

ATTORNEY. Powers or Letters of

1. *A Power of Attorney, to receive and recover the Rents of an Eſtate, and to give diſcharges.*

KNOW all men by theſe preſents that I A. B. of &c. have made ordained, conſtituted and appointed, and by theſe preſents do make, ordain, conſtitute and appoint A. B. of &c. my true and lawful attorney, for me, and in my name, but to my uſe, to aſk, demand, ſue for, recover and receive, all and every ſuch rents and arrears of rent, as are now due and owing to me by or from C. D. as tenant or occupier of a certain *(here deſcribe the property;)* and for non-payment of the ſame rents, and arrears of rent, or any part thereof, to enter and diſtrain, and the diſtreſſes ſo taken to cauſe to be diſpoſed of according to law. And upon payment of the ſaid rents, or arrears of rent, or any part thereof, for me and in my name to give acquittances and diſcharges for the ſame; and the monies ſo by him received, immediately thereupon to pay over to me, or my repreſentatives, or to my order; and further to do and execute all and every other lawful act and acts, needful for recovering, receiving and obtaining of the ſaid rents, and arrears of rent now due, or to grow due for the premiſes, or any part thereof, but to my uſe as aforeſaid, as fully and effectually, to all intents and purpoſes, as if I were perſonally preſent; hereby ratifying and confirming whatſoever my ſaid attorney ſhall lawfully do, or cauſe to be done in or about the premiſes.
In Witneſs, &c.

By obſerving the conſtituent parts of the above Form, it may be adapted to other purpoſes.

2. *Form of a Power of Attorney to transfer Stock of the United States.*

KNOW all men by theſe preſents that —— do make, conſtitute, and appoint —— true and lawful attorney, for —— and in —— name to ſell, aſſign and transfer —— the —— ſtock, ſtanding in —— name in the books of —— with power alſo an attorney or attornies under —— for that purpoſe to make and ſubſtitute, and to do all lawful acts requiſite for effecting the premiſes: hereby ratifying and confirming all that —— ſaid attorney, or —— ſubſtitute or ſubſtitutes ſhall do therein by virtue hereof. In Witneſs whereof —— have hereunto ſet —— hand and ſeal, the —— day of —— in the year ——.

Sealed and delivered in preſence of] (Seal.)

—— —— { *Witneſſes, with their names, additions, and reſidence.*
—— ——

☞ See the mode of atteſtation at the end of the next form (3)

The

ATTORNEY. Powers or Letters of

The following directions reſpecting the atteſtations, muſt not be omitted.

THE acknowledgment may be taken before any judge of the court of the United States, or of a ſuperior court of law or equity in any ſtate, or of a county court, or before the mayor or other chief magiſtrate of any place, or before a notary public.

IF there be no public or official ſeal to the acknowledgment, proof of the execution of the power, muſt be made by oath or affirmation of one of the witneſſes to be taken before ſome perſon duly authorized at the place where the transfer is made.

3. *Form of a Power of Attorney to receive Intereſt—executed before a Magiſtrate.*

KNOW all men by theſe preſents that I —— of the county of —— do make, conſtitute and appoint —— my true and lawful attorney for me, and in my name to receive the intereſt now due to quarter ending the —— day of —— in the year —— upon all the ſtock ſtanding in my name in the books of —— commiſſioner of loans for the ſtate of ——, with power alſo an attorney or attornies under him for that purpoſe to make and ſubſtitute, and to do all lawful acts requiſite for effecting the premiſes; hereby ratifying and confirming all that my ſaid attorney, or his ſubſtitute ſhall do therein by virtue hereof. In witneſs whereof I have hereunto ſet my hand and ſeal, this —— day of —— in the year of our Lord ——

Sealed and delivered in the preſence of us (seal.)

—— ——
—— ——

Witneſſes, who muſt annex their addition, as merchant, farmer, attorney, &c. and alſo their place of reſidence.

BE IT KNOWN, That on the —— day of —— in the year ——, before me came —— above named —— and acknowledged the above letter of attorney to be his act and deed. In teſtimony whereof I have hereunto ſet my hand and ſeal the day and year laſt aforeſaid. (Seal.)

—— COUNTY, to wit:

I —— clerk of the county aforeſaid, do hereby certify that —— Eſquire, whoſe hand and ſeal is affixed to the foregoing certificate of acknowledgment is a magiſtrate of the county of ——, and that due faith and credit ought to be paid to all his acts and deeds as ſuch.

(*Official Seal.*)

IN TESTIMONY whereof I have hereunto ſet my hand and cauſed the ſeal of my office to be hereunto affixed, this —— day of —— in the year —— and of our independence the ——

—— ——.

4. *Form*

ATTORNEY. Powers or Letters of

4. *Form of a Power of Attorney to receive an Invalid's Penſion.*

I A. B. of —— county, ſtate of —— do hereby conſtitute and appoint C. D. of —— my lawful attorney to receive in my behalf of —— my penſion for ſix months, as an invalid of the United States, from the —— day of —— one thouſand &c. and ending the —— day of —— of the ſame year. —— ——.

Signed & ſealed in preſence of

—— —— } *Witneſſes.*

—— —— }

Acknowledged before me —— ——.

BESIDES the letter of attorney aforeſaid the attorney muſt produce the original certificate given to the penſioner by the ſtate, and an affidavit made by him agreeable to the following form.

A. B. came before me, one of the juſtices of the county of ——, in the ſtate of —— and made oath that he is the ſame A. B. to whom the original certificate in his poſſeſſion was given, of which the following is a copy *(the certificate given by the ſtate to be recited,)* That he ſerved —— *(regiment corps or veſſel)* at the time he was diſabled, and that he now reſides in the —— and county of —— and has reſided there for the laſt —— years, previous to which he reſided in ——.

AWARD.

An Award upon an order of reference.

WHEREAS at a court held for &c. the —— day of —— laſt, a cauſe in the ſaid court depending, between A. B. plaintiff and C. D. defendant, by conſent of parties, was refered to E. F. G. H. and I. K. or any two of them to hear and determine all the ſaid differences. NOW WE the ſaid E. F. G. H. and I. K. in purſuance of the ſaid order or rule of reference, having heard both the ſaid parties, their allegations and anſwers touching the matters in difference between them, and having thoroughly conſidered of the ſame, DO AWARD, order and adjudge of and upon the premiſes, in manner and form following, viz. FIRST we do award that the ſaid C.D. ſhall pay or cauſe to be paid unto the ſaid A.B. the ſum of —— on the —— day of —— next, at the houſe of —— ſituate in —— commonly called —— between the hours of —— and —— of the ſame day: AND we do alſo award and order, that the ſaid A.B. ſhall upon payment of the ſaid ſum of —— execute unto the ſaid C.D a general releaſe of the matters to us refered, and that the ſaid C. D. ſhall at the ſame time execute unto the ſaid A. B. the like releaſe. In witneſs, &c.

☞ *FOR other matters relating to awards, ſee that title in the body of the work.*

BAR-

BARGAIN and SALE.

A Deed of Bargain and Sale from Husband and Wife to the Purchaser.

THIS INDENTURE made the —— day of —— in the year —— [and in the —— year of the Commonwealth,] between A. B. and C. his wife of &c. of the one part, and D. E. of &c. of the other part, witneſſeth: That the ſaid A. B. and C. his wife, in conſideration of —— of lawful money of this commonwealth, to them in hand paid, by the ſaid D.E. at or before the enſealing and delivery of theſe preſents (the receipt whereof is hereby acknowledged) HAVE bargained and ſold, and by theſe preſents do, and each of them doth, bargain and ſell unto the ſaid D. E. his heirs and aſſigns, a certain &c. *(here deſcribe the land particularly;)* together with all [the ſingular houſes, dove-houſes, barns, buildings, ſtables, yards, gardens, orchards, lands, tenements, meadows, paſtures, feedings, commons, woods, underwoods, ways, waters, water courſes, fiſhings, privileges, profits eaſements, commodities, advantages, emoluments, hereditaments, and appurtenances whatſoever to the ſaid —— belonging or appertaining, or with the ſame uſed or enjoyed, or accepted, reputed, taken, or known, as part, parcel, or member thereof, or as belonging to the ſame or any part thereof;] and the reverſion and reverſions, remainder and remainders, yearly and other rents, iſſues and profits thereof, and of every part and parcel thereof: TO HAVE AND TO HOLD the ſaid —— land with the tenements, hereditaments and all and ſingular other the premiſes herein before mentioned or intended to be bargained and ſold, and every part and parcel thereof, with every of their rights, members and appurtenances unto the ſaid D.E. his heirs and aſſigns for ever, [to and for the only proper uſe and behoof of him the ſaid D.E. his heirs and aſſigns forever.] AND the ſaid A.B. and C. his wife for themſelves and their heirs the ſaid —— with all and ſingular the premiſſes and appurtenances before mentioned, unto the ſaid D.E. his heirs and aſſigns, free from the claim or claims of them the ſaid A. B. and C. his wife, or either of them, their or either of their heirs, and of all and every perſon or perſons whatſoever, ſhall, will, and do warrant and for ever defend by theſe preſents. In witneſs whereof the ſaid A.B. and C. his wife have hereunto ſet their hands and ſeals the day and year firſt above written.

Signed, ſealed and delivered]
in the preſence of]

IF the conveyance is made by an unmarried man, whatever relates to a wife in the foregoing precedent muſt be omitted. For the ſake of brevity, the words included thus [ ] in the ſecond place, have of late been omitted, and inſtead thereof, after a deſcription of the land, the words *with all and ſingular the appurtenances, &c.* have been ſubſtituted. It muſt be admitted, that in conveyances in this country

BARGAIN and SALE.

country where it is usual to describe the land by *metes and bounds* and not merely by *name*, as in England, many of those words are unnecessary; as by a grant of the land itself those things by operation of law pass with it, (See Co. Lit. 4. a.)—But it must also be recollected that the term *appurtenances* in its legal signification is much too limitted to comprehend the various rights and privileges often intended to be granted. (See Co. Lit. 121. b.)—For the mode of proceeding on examining a *feme covert*, or married woman, as prescribed by our laws. See Virg. Laws, ch. 90, § 6, p. 166 of the *Revised Code*.

In modern practice in England, instead of the clause of warranty their deeds are concluded with covenants *which bind both the heir and executor or administrator so far as there are assets.—Those who prefer this mode may find a precedent under title* Releases, *included thus* [ ] *which see. See also in* 2 *Blacks. Com.* 304, *the reasons for giving the* covenants *a preference to a warranty.*

BILLS of EXCHANGE.

The following examples of an Inland *and* Foreign *Bill of Exchange, drawn in conformity to the precautions recommended by* Beawes (Lex Mercatoria *page* 451) *it is presumed will suffice.*

An Inland BILL of EXCHANGE.

Richmond, February 8th, 1795.

Exchange for 10,000 Dollars.

AT sight, (*or at* —— *days sight, or* —— *days after date*) pay to Mr. A.B. or order, *Ten Thousand Dollars*, value received of him, and place the same to account, as per advice, (*or without further advice*) from C. D.

To Mr. E. F. *Merchant in Alexandria.*

A FOREIGN BILL.

Fredericksburg, February 8th, 1795.

Exchange for £. 10,000 sterling.

AT —— days after date (or at —— days after sight) of this my first bill of exchange, (second and third of the same tenor and date not paid) pay to Mess'rs A.B. & Co. or order, *Ten Thousand Pounds sterling*, value received of them, and place the same to account, as per advice.

C. D.

To Mr. E. F. *Merchant, London.*

To

BILLS of EXCHANGE.

If current money is paid for a Foreign Bill, then after the word "*ſterling*" add *for —— Virginia currency value here received.*

By the laws of *Virginia*, "In all bills of exchange due in current "money of this Commonwealth, or for current money advanced and "paid for ſuch bills, the ſum in current money that was paid, or al-"lowed for the ſame, ſhall be mentioned and expreſſed in ſuch bill, "and in default thereof, in caſe ſuch bill ſhall be proteſted, and a ſuit "brought for the recovery of the money due thereby, the ſum of mo-"ney expreſſed in ſuch bill ſhall be held and taken as current money, "and judgment ſhall be entered accordingly." See *Virginia Laws*, ch. 77 § 4 page 121.

By *Virginia Laws*, chap. 29. page 39. of the *Reviſed Code*, ſect. 1. "If a bill of exchange, for the ſum of five pounds, or upwards, "dated at any place in *Virginia*, drawn upon a perſon at any other "place therein, expreſſed to be for value received, and payable at a "certain number of days, weeks, or months after date, being preſented "to the perſon, upon whom it ſhall be drawn, ſhall not be accepted "by ſubſcribing his name, with his proper hand to the acceptance, "written at the foot or on the back of the bill, or being accepted in "that manner, and not otherwiſe, ſhall not be paid before the ex-"piration of three days after it ſhall become due, the perſon to "whom it ſhall be payable, or his agent, or aſſigns, may cauſe the "bill to be proteſted by a notary public, or if there be no ſuch, by "any other perſon in preſence of two or more credible witneſſes, "for non-acceptance, in the form or to the effect following, written "under a fair copy of the bill.

KNOW all Men, that I ——, on the —— day of ——, at the uſual place of abode of the above-named ——, preſented to him the bill, of which the above is a copy, and which the ſaid —— did not accept, wherefore I the ſaid ——, do hereby proteſt the ſaid bill. Dated at ——, this —— day of —— ;

"Or for non-payment, after acceptance, in the ſame form or to "the ſame effect, except that the words "*preſented to him the bill, "of which the above is a copy, and which the ſaid —— did not "accept*" ſhall be left out, and inſtead of them the words "*demand-"ed payment of the bill, of which the above is a copy, and which the "ſaid —— did not pay*" be inſerted: And the drawer, ſuch pro-"teſt being ſent to him, or notice thereof in writing being given to "him, or left at the place of his uſual abode, within fourteen days "thereafter, ſhall pay the money mentioned in the bill to the per-"ſon entitled to receive it, with intereſt, at the rate of five *per cen-"tum* by the year, from the day of the proteſt; and he to whom "the bill ſhall be payable, neglecting to procure the proteſt to be "made, or due notice thereof to be given, ſhall be liable for all "coſts and damages accruing thereby."

Sect. 2.—"If the bill ſhall be loſt, or ſhall miſcarry, the drawer "ſhall ſign and deliver another of the ſame tenor, ſufficient ſecu-"rity being given to indemnify him againſt all perſons who may "claim under the former."

B O N D.

KNOW all men by theſe preſents that I A. B. of &c. am held and firmly bound unto C. D. of &c. in the ſum of ——— of lawful money of this commonwealth, to be paid to the ſaid C. D. or his certain attorney, executors, adminiſtrators or aſſigns; for the true payment whereof, I bind myſelf, my heirs, executors and adminiſtrators, firmly by theſe preſents, ſealed with my ſeal. Dated the ——— day of ——— in the year ———.

The CONDITION of the above obligation is ſuch, that if the above-bounden A. B. his heirs, executors, or adminiſtrators, do and ſhall well and truly pay, or cauſe to be paid, unto the above-named C. D. his executors, adminiſtrators, or aſſigns, the full ſum of ——— on the ——— day of ——— next enſuing the date of the above written obligation, then the above obligation to be void, or elſe ſhall remain in full force.

Signed, ſealed and delivered]
in preſence of]

Where the condition of the bond is for the payment of money, the ſum expreſſed in the condition is uſually half that of the penalty.

Bonds are alſo frequently entered into, conditioned for the performance of covenants, &c.

C O V E N A N T S.

IT will not be neceſſary to inſert any precedents under this head, as no ſet form of words are neceſſary to be made uſe of in creating a covenant.

Any form of expreſſion amounting to an agreement, if under ſeal is ſufficient. Doug. 737.

G I F T. Deed of

A Deed of Gift of Perſonal Eſtate.

KNOW all men by theſe preſents, that I A. B. of &c. for and in conſideration of the natural love and affection which I bear to C. D. of &c. as well as for the further conſideration of one dollar to me in hand paid by the ſaid C. D. at or before the enſealing and delivery of theſe preſents (the receipt whereof is hereby acknowledged) HAVE given and granted, and by theſe preſents do give and grant unto the ſaid C. D. his executors, adminiſtrators and aſſigns (*here deſcribe the property particularly*) TO HAVE and TO HOLD the ſaid ——— unto him the ſaid C. D. his executors, adminiſtrators and aſſigns forever. AND the ſaid A. B. for himſelf, his executors and adminiſtrators, the ſaid ——— unto the ſaid C. D. his executors, adminiſtrators and aſſigns, againſt the claim of him the ſaid A. B. his executors and adminiſtrators, and againſt the claim or claims of all and every perſon or perſons whatſoever, ſhall and will warrant and forever defend by theſe preſents. In witneſs, &c.

LEASES

LEASES.

A Leaſe of houſe and lands for a term of years.

THIS INDENTURE made this —— day of —— in the year —— &c. between A. B of &c of the one part, and C. D. of &c. of the other part, witneſſeth, That for and in conſideration of the rents, covenants and agreements herein after reſerved and contained, and which by and on the part of the ſaid C. D. his executors, adminiſtrators and aſſigns, are to be paid, done, and performed, he the ſaid A. B. hath leaſed, demiſed, granted and to farm let, and by theſe preſents, doth leaſe, demiſe, grant, and to farm let, unto the ſaid C. D. his executors, adminiſtrators and aſſigns, ALL that &c, [*here deſcribe the property*] with the appurtenances, now in the tenure of &c. [*if there are any exceptions of parts of the demiſed premiſes, as of trees, pigeon-houſes, &c. they ſhould be here mentioned, with a reſervation of free liberty of ingreſs, egreſs and regreſs, &c.*]

TO HAVE AND TO HOLD the ſaid —— (except as before excepted) unto the ſaid C. D. his executors, adminiſtrators and aſſigns from the —— day of —— next enſuing the date hereof, for and during and unto the full end and term of —— years from thence next enſuing, and fully to be complete and ended; YIELDING and paying therefor yearly and every year, during the ſaid term, unto the ſaid A. B. the yearly rent or ſum of —— on the —— day of —— in each year, by even and equal portions; the firſt payment thereof to commence on the —— day of —— next enſuing; [*if there are any additional rents, here inſert them*] [PROVIDED always and upon condition nevertheleſs, that if it ſhall happen that the ſaid yearly rents hereby reſerved, or either of them, or any part of them, or other the occaſional payments [*if any there are*] ſhall be behind and unpaid by the ſpace of —— days next over or after either of the days of payment, whereon the ſame ought to be paid as aforeſaid, being lawfully demanded; or if no ſufficient diſtreſs can be found on the premiſes hereby demiſed, whereof to make the ſaid rent, at the time when the ſame ſhall be payable; or if the ſaid C. D. his executors, or adminiſtrators, or any of them ſhall aſſign over, or otherwiſe part with this indenture, or the premiſes hereby leaſed, or any part thereof without the conſent of the ſaid A. B. his heirs or aſſigns, firſt had and obtained in writing under his or their hands and ſeals for that purpoſe, then and in either of the ſaid caſes, it ſhall and may be lawful to and for, the ſaid A. B. his heirs or aſſigns, into the premiſes hereby leaſed, or any part thereof, in the name of the whole, to re-enter, and the ſame to have again, repoſſeſs and enjoy, as in his and their firſt and former eſtate, any thing herein to the contrary contained notwithſtanding.] And the ſaid C. D. doth hereby for himſelf, his heirs, executors &c. covenant and agree to and with the ſaid A. B. his heirs and aſſigns, that he the ſaid C. D. his heirs, executors &c. ſhall and will well and truly pay, or cauſe to be paid unto the ſaid A. B. his heirs or aſſigns, the ſaid yearly rent of —— [*and other additional rents*] at the days, times and place, and in ſuch manner as are herein before appointed for payment thereof

LEASES.

thereof, according to the reſpective reſervations thereof afore-mentioned, and the true intent and meaning of theſe preſents. And that the ſaid C. D. his executors, adminiſtrators and aſſigns, ſhall and will at their own proper coſts and charges, well and ſufficiently repair, amend, preſerve and keep in repair the ſaid tenement, with all houſes, fences, &c. thereto belonging during this preſent leaſe (accidents by fire, or the act of God excepted). And alſo that it ſhall be lawful for the ſaid A. B. his heirs and aſſigns, with workmen and others, in his company, or without, at any time in the day-time to enter peaceably on the demiſed premiſes, during the ſaid term, to view the ſtate of the reparations thereof; and of all ſuch decays, and want of reparations then and there found, to give notice to the ſaid C. D. in writing, or to leave the ſame on the demiſed premiſes, at the moſt conſpicuous place thereon, to repair the ſame within the ſpace of ——— then next enſuing; within which time the ſaid C. D. for himſelf, his executors, adminiſtrators and aſſigns, doth covenant and agree to repair and amend the ſame accordingly, (except as before excepted) [*here may follow other covenants, as that the landlord ſhall furniſh timber, &c.—that the tenant ſhall plant and preſerve fruit-trees—ſhall cultivate the land in ſuch a particular manner—that the ſtraw, &c. made upon the land ſhall be fed upon it, and the manure carried out and ploughed in—that the tenant ſhall preſerve the pigeons in the dove-houſes—not to cut wood but of a particular kind, &c*] And laſtly, that it ſhall and may be lawful for the ſaid C. D. his executors, adminiſtrators and aſſigns (paying the rents herein before reſerved, and performing the covenants and agreements herein before mentioned or contained, and which on his and their parts and behalfs are or ought to be paid, done, and performed) peaceably and quietly to have, hold, occupy, poſſeſs and enjoy, the ſaid premiſes hereby leaſed, with the appurtenances, during the ſaid term of ——— years hereby granted, without any moleſtation, or interruption whatſoever, of or by him the ſaid A. B. his heirs or aſſigns, or of or by any perſon or perſons, lawfully or equitably claiming or to claim, from, by or under him, them, or any of them.

IN WITNESS, &c.

NOTE.—Leaſes for lives may be drawn after the above form, except in the *habendum*, the grant is to the leſſee or tenant, *his heirs and aſſigns, from the day of the date hereof, for and during the natural lives of* ——— *ſuch perſons as may be agreed on between the parties.*

NOTE ALSO—The words included thus [ ] in the foregoing precedent, are not always inſerted.

For a Conveyance by Leaſe and Releaſe, ſee Releaſes.

MARRIAGE

MARRIAGE ARTICLES.

An agreement before marriage, that the intended husband and wife shall each enjoy their own separate estates. An assignment of hers (being personal estate) to the uses in the deed expressed.

THIS INDENTURE tripartite, made the ——— day of —— in the year ——— between A. A. of ——— of the first part, B. B. widow and relict of C. B. late of —— deceased, of the second part, and D. D. of —— and E. E. of —— of the third part. WHEREAS a marriage is shortly intended to be had and solemnized, by the permission of God, by and between the said A. A. and the said B. B. and whereas the said B. B. is possessed of a considerable personal estate, consisting of [*here particularize the property*;] and whereas it hath been agreed that the said A. A. should after the said intended marriage had, receive and enjoy, during the joint lives of them the said A A and B B the interest, and occupation of the said personal estate, and also that the same, and the interest and profits thereof, from and after the decease of such of them the said A A and B B as should first happen to die, should be at the sole and only disposal of the said B B notwithstanding her coverture; and whereas it hath been also agreed, that in case the said B B should after the said intended marriage had, happen to survive the said A A that she should not have or claim any part of the real or personal estate whereof the said A A should be seized or possessed, or entitled unto at any time during the coverture between them, by virtue of her dower or title of dower at common law, or by virtue of her being administratrix, or entitled to administration of the goods and chattels, rights and credits of the said A A or otherwise however. Now this indenture witnesseth, that in pursuance of the before recited agreement, and in consideration of the sum of 10*l.* of lawful money of this commonwealth, to the said B B in hand paid by the said D. D. and E. E. at and before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, she the said B B by and with the privity, consent and agreement of the said A A testified by his being made a party to, and his sealing and delivery of these presents, hath granted, bargained, sold, assigned, transfered and set over, and by these presents doth grant, bargain, sell, assign, transfer and set over unto the said D D and E E their executors, administrators and assigns, all the said [*here mention the property again.*] TO HAVE AND TO HOLD the said property hereby conveyed unto the said D. D. and E. E. their executors, administrators and assigns; upon such TRUSTS nevertheless, and to and for such intents and purposes, and under such provisoes and agreements as are herein after mentioned; that is to say, in trust for the said B. B. and her assigns, until the solemnization of the said intended marriage; and from and after the solemnization of the said intended marriage, then upon trust that they the said D. D. and E E their executors, administrators and assigns, shall and do permit the said

MARRIAGE ARTICLES.

ſaid A A during the joint lives of the ſaid A A and B. his intended wife, to have, receive, take and enjoy, all the intereſt and profits of the ſaid property hereby aſſigned, to and for his own uſe and benefit, and from and after the deceaſe of ſuch of them the ſaid A. A. and B. B. as ſhall firſt happen to die, then upon truſt that they the ſaid D. D. and E. E. their executors, adminiſtrators and aſſigns, ſhall and do aſſign, transfer and pay over all the ſaid property to the ſaid B. in caſe ſhe ſurvive the ſaid A. A. but if ſhe die before him, then unto ſuch perſon and perſons, and at the time and times, and in ſuch parts and proportions, manner and form, as ſhe the ſaid B. B. ſhall from time to time, notwithſtanding her coverture, by any writing or writings under her hand and ſeal, atteſted by three or more credible witneſſes, or by her laſt will and teſtament in writing, to be by her ſigned, ſealed, publiſhed and declared in the preſence of the like number of witneſſes, direct limit or appoint, to the intent that the ſame may not be at the diſpoſal of, or ſubject to the controul, debts, forfeitures or engagements of the ſaid A. A. her intended huſband; and in default of ſuch direction, limitation or appointment, then to &c. [*whatever perſons the parties agree upon*]

PROVIDED always, and it is hereby declared and agreed by and between all the ſaid parties to theſe preſents, that in caſe the ſaid B B. (ſurviving the ſaid A. A. her intended huſband) ſhall at any time hereafter claim and recover any part or parcel of the real or perſonal eſtate whereof the ſaid A. A. or any other perſon or perſons in truſt for him, ſhall be ſeized or poſſeſſed or entitled unto at any time during the coverture between them, by virtue of her dower or title of dower at common law, or by virtue of her being adminiſtratrix or entitled to adminiſtration of the goods, chattels, rights and credits of the ſaid A. A. as aforeſaid, then and in that caſe, they the ſaid D. D. and E. E. their executors, adminiſtrators and aſſigns, ſhall from time to time and at all times from thenceforth ſtand and be poſſeſſed of the ſaid property hereby conveyed in truſt for the only benefit of the ſaid A. A. his executors, adminiſtrators and aſſigns, any thing in theſe preſents contained to the contrary thereof in any wiſe notwithſtanding.

IN WITNESS, &c.

MORTGAGES.

No. 1.—*A Mortgage of Land in Fee.* *

[THIS may purſue the form of a deed of bargain and ſale, to the end of the *habendum*, or that part of the deed which aſcertains the quality

* *See on the doctrine of mortgages generally, an excellent treatiſe publiſhed by* John Joſeph Powell, Eſq.—*See alſo a very valuable note* (1) *to Mr* Hargrave's *edition of* Coke on Littleton 105. *a.—in which Mr.* Hargrave *gives the preference to a mortgage for a term of years, to a mortgage in fee, with his reaſons for ſuch preference.*

MORTGAGES.

quality of the eſtate granted, by the words TO HAVE AND TO HOLD, &c. then proceed.] *PROVIDED always*, and upon condition that if the ſaid A. B. his heirs, executors or adminiſtrators ſhall well and truly pay or cauſe to be paid, unto the ſaid C. D. his heirs, executors, adminiſtrators or aſſigns, the full and juſt ſum of ——— on the ——— day of ——— next enſuing the date of theſe preſents, at ——— in the county of ———, then and in ſuch caſe, and at all times from thenceforth, theſe preſents and all the eſtate hereby granted and every clauſe and ſentence herein contained ſhall ceaſe, determine, and be utterly void to all intents and purpoſes, any thing herein contained to the contrary notwithſtanding. [*here may follow ſuch covenants as thoſe contained in the next precedent, with ſuch variations only as the difference of the two eſtates granted make neceſſary.*]

IN WITNESS, &c.

No. 2.—A Mortgage, by a Demiſe of Houſe, &c. for a term of years.

THIS INDENTURE made the —— day of —— in the year ———, between A. A. of &c. of the one part, and B. B. of &c. of the other part, witneſſeth, That for and in conſideration of the ſum of ——— of lawful money of this commonwealth to the ſaid A. A. in hand paid by the ſaid B. B. at or before the enſealing and delivery of theſe preſents, the receipt whereof he the ſaid A. A. doth hereby acknowledge, He the ſaid A. A. hath granted, bargained, ſold and demiſed, and by theſe preſents doth grant, bargain, ſell and demiſe unto the ſaid B. B. his executors, adminiſtrators and aſſigns, all thoſe ſeveral meſſuages, tenements, &c. [*here particularize the houſe &c.*] with all and ſingular their appurtenances, and the reverſion and reverſions, remainder and remainders, rents, iſſues and profits thereof and of every part and parcel thereof: To have and to hold the ſaid meſſuages, tenements, &c. buildings, ground, hereditaments, and all and ſingular other the premiſes, with their and every of their appurtenances, unto the ſaid B. B. his executors, adminiſtrators and aſſigns from the day next before the day of the date hereof, for and during the full time and term, and unto the full end and term of *one thouſand years* from thence next enſuing and fully to be complete and ended: Yielding and paying therefor, the rent of a pepper-corn, on the —— day of —— in every year, if the ſame be lawfully demanded. *PROVIDED always*, and upon condition, that if the ſaid A. A. his heirs, executors, or adminiſtrators, ſhall and do well and truly pay, or cauſe to be paid, unto the ſaid B. B. his executors, adminiſtrators or aſſigns, at ——— in the county of —— the full and juſt ſum of ——— of lawful money of this commonwealth, upon the —— day of —— next enſuing the date hereof, then and in ſuch caſe, theſe preſents and the term and eſtate hereby granted, and every clauſe and ſentence herein contained ſhall ceaſe, determine, and be utterly void to all intents and purpoſes, any thing herein contained to the contrary notwithſtanding. And the ſaid A. A. doth hereby

for

MORTGAGES.

for himself, his heirs, executors and administrators, covenant and agree with the said B. B. his executors, administrators and assigns, that the said A. A. his heirs, executors or administrators, shall and will well and truly pay, or cause to be paid unto the said B. B. his executors, administrators or assigns, the said sum of ——— at such time and place, as are herein before mentioned. And further, that it shall and may be lawful to and for the said B. B. his executors, administrators and assigns, from time to time, and at all times from and after default shall happen to be made in the payment of the said sum of ——— or any part thereof, contrary to the form and effect of the aforesaid proviso and covenant of the same, peaceably and quietly to enter into, have, hold, occupy, possess and enjoy the said messuages or dwelling houses, buildings, hereditaments and premises, and to receive and take the rents and profits thereof, for and during all the residue which shall be then to come and unexpired of the said term of one thousand years, without the lawful let, suit, trouble, denial, eviction or interruption of or by the said A. A. his heirs or assigns, or of or by any other person or persons whomsoever. And it is hereby declared and agreed by and between the said parties to these presents, that in the mean time, and until default shall happen to be made of or in payment of the said sum of ——— contrary to the form and effect of the aforesaid proviso and covenant for payment of the same, it shall and may be lawful to and for the said A. A. and his heirs peaceably and quietly to have, hold and enjoy all and singular the said messuages or dwelling houses, buildings, hereditaments and premises, and to receive and take the rents and profits thereof, and of every part thereof, to and for his and their own use and benefit, without the lawful let, suit, trouble or interruption of the said B. B. his executors, administrators or assigns, or of any other person or persons lawfully claiming or to claim from, by or under him or them, or any of them. IN WITNESS, &c.

PENAL BILL.

No particular form seems to be appropriated to those instruments.—Any engagement to pay money under a penalty, will amount to a penal bill—as in the following example.

I PROMISE to pay to C. D. or order, One Hundred Dollars, on or before the —— day of —— next ensuing, for the true payment whereof I bind myself, my heirs, executors and administrators firmly by these persents, in the penal sum of Two Hundred Dollars Witness my hand and seal this — day of — in the year —.

Teste

A single bill is an engagement under *hand and seal*, to pay a sum of money, but without a penalty.——A promissory note is an engagement to pay under *hand* only. without either seal or penalty.

RELEASES.

RELEASES.

A Conveyance by Leaſe and Releaſe.

1.—Leaſe or Bargain and Sale for a Year.

THIS INDENTURE made this —— day of —— in the year —— &c. between A. B and C his wife of —— of the one part, and D. E. of —— of the other part, witneſſeth, That the ſaid A. B. and C. his wife, in conſideration of one dollar to them in hand paid by D E. at or before the enſealing and delivery of theſe preſents, (the receipt whereof is hereby acknowledged) and for other good cauſes and conſiderations, them the ſaid A. B. and C. his wife thereto ſpecially moving, HAVE bargained and ſold, and by theſe preſents do and each of them doth, bargain and ſell unto the ſaid D. E. his executors, adminiſtrators and aſſigns, ALL that &c. [*here deſcribe the land as in Bargain and Sale, which ſee.*] TO HAVE AND TO HOLD the ſaid tract or parcel of land, tenements, hereditaments, and all and ſingular other the premiſes herein before mentioned or intended to be bargained and ſold, and every part and parcel thereof, with their and every of their rights, members and appurtenances unto the ſaid D. E. his executors, adminiſtrators and aſſigns from the day next before the day of the date of theſe preſents, for and during and unto the full end and term of one whole year from thence next enſuing and fully to be completed and ended.

YIELDING and paying therefor unto the ſaid A. B. and C. his wife, and their heirs and aſſigns the yearly rent of one pepper-corn at the expiration of the ſaid term, if the ſame ſhall be lawfully demanded: TO THE INTENT and purpoſe that by virtue of theſe preſents and of the ſtatute for transfering uſes into poſſeſſion the ſaid D. E. may be in actual poſſeſſion of the premiſes and be thereby enabled to take and accept a grant and releaſe of the freehold, reverſion, and inheritance of the ſame premiſes, and of every part and parcel thereof, to them their heirs and aſſigns for ever, as declared by another indenture intended to bear date the next day after the day of the date hereof. In Witneſs whereof the parties to theſe preſents their hands and ſeals have ſubſcribed and ſet, the day and year firſt above written.

Sealed and delivered] A. B (L.S.)
in preſence of] C. B. (L S.)
A. B. &c. D. E. (L.S.)

2.—*The Deed of Releaſe.*

[*Which muſt always bear date the day after the former leaſe.*]

THIS INDENTURE made the —— day of —— in the year ——, &c. between A. B. and C. his wife of —— of the one part, and D. E. of the other part, witneſſeth, That in conſideration of the ſum of —— of lawful money of this commonwealth to the ſaid A. B. and C. his wife, in hand paid by the ſaid D. E. at or before the enſealing and delivery of theſe preſents, (the receipt whereof is hereby acknowledged, They the ſaid A. B. and C. his wife, have,

RELEASES.

and each of them hath granted, bargained, and ſold, releaſed and confirmed, and by theſe preſents do, and each of them doth grant, bargain, and ſell releaſe and confirm unto the ſaid D. E. his heirs and aſſigns, all that &c. [*here deſcribe the land particularly, as in the leaſe next above, and as in Bargain and Sale, which ſee.*] (All which ſaid premiſes are now in the actual poſſeſſion of the ſaid D. E. by virtue of a bargain and ſale to him thereof made by the ſaid A. B. and C. his wife for one whole year, in conſideration of one dollar to them in hand paid, by the ſaid indenture bearing date the day next before the day of the date hereof, and by force of the ſtatute for transfering uſes into poſſeſſion) and the reverſion &c. [*as in the deed of bargain and ſale.*] TO HAVE AND TO HOLD the ſaid tract or parcel of land, with the ſaid tenements, hereditaments, and all and ſingular other the premiſes herein before mentioned to be hereby granted and releaſed, with their and every of their appurtenances, unto the ſaid D. E. his heirs and aſſigns for ever, to and for the only proper uſe and behoof of him the ſaid D. E. his heirs and aſſigns for ever, and to and for no other uſe, intent or purpoſe whatſoever.

AND the ſaid A. B. and C. his wife, for themſelves, their heirs and aſſigns, the ſaid tract or parcel of land with all and ſingular the premiſes and appurtenances thereto belonging, unto the ſaid D. E. his heirs and aſſigns, againſt the claim of them the ſaid A. B. and C. his wife, their heirs and aſſigns, and againſt the claim or claims of all and every perſon or perſons whatſoever, ſhall, will and do warrant and forever defend by theſe preſents. [And the ſaid A. B. and C. his wife for themſelves, their heirs, executors and adminiſtrators do, and each of them doth covenant, promiſe and grant, to and with the ſaid D. E. his heirs and aſſigns, in manner and form following, that is to ſay; that notwithſtand any act, matter or thing whatſoever by the ſaid A. B. and C. his wife, or either of them, or any anceſtor through or from whom they or either of them claim, or by any perſon or perſons claiming or to claim from, by or under them, or any of them, done, committed or wittingly or willingly ſuffered to the contrary, they the ſaid A. B. and C. his wife now are and ſtand lawfully, rightfully and abſolutely ſeized in their demeſne as of fee of and in the ſaid tract or parcel of land, of a good, ſure, lawful, abſolute and indefeaſible eſtate of inheritance in fee-ſimple to them and their heirs, without any reverſion, remainder, truſt limitation, power of revocation, uſe or uſes, or any other matter, reſtraint or thing whatſoever, to alter, change, charge, revoke, make void, leſſen, incumber or determine the ſame: And that notwithſtanding any ſuch act, matter or thing as aforeſaid, they the ſaid A. B. and C. his wife now and at the time of enſealing and delivery of theſe preſents, have in themſelves good right, full power and abſolute authority, to grant and convey the ſaid tract or parcel of land with its appurtenances unto the ſaid D. E. his heirs and aſſigns for ever, in manner aforeſaid. And alſo that it ſhall and may be lawful to and for the ſaid D. E. his heirs and aſſigns from time to time and at all times hereafter, peaceably and quietly to enter into, have, hold, occupy, poſſeſs and enjoy the

ſaid

RELEASES.

said tract or parcel of land, and to take the rents, issues and profits thereof, from and after the day of the date of these presents, to and for his own use and benefit without the lawful let, suit, trouble, denial, eviction or interruption of or by the said A. B. and C his wife, their heirs or assigns, or of or by any other person or persons whatsoever, lawfully claiming or to claim any estate, right, title, trust or interest of, in, to or out of the said tract or parcel of land, or any part thereof, from, by or under, or in trust for him, them or any of them, or of any of the ancestors of the said A. B. and C. his wife, from or under whom they claim; and that free and clear, and freely and clearly acquitted, exonerated and discharged, or otherwise by the said A. B. and C. his wife, their heirs, executors or administrators, well and sufficiently saved, defended, kept harmless and indemnified, of, from and against all manner of former and other gifts, grants, bargains, sales, leases, mortgages, jointures, dowers, titles of dowers, uses, trusts, wills, recognizances, judgments, extents, executions, annuities, rents, arrears of rent, and of and from and against all and singular other estates, titles, troubles, charges and incumberances whatsoever, had, made, done, committed, occasioned or suffered by the said A. B. and C. his wife, or by any other person or persons, lawfully claiming, from, by or under, or in trust from them or either of them, or their or either of their act, means, assent, consent, privity or procurement. And moreover, that the said A. B. and C his wife, and their heirs, shall and will from time to time and at all times hereafter during the space of ——— next ensuing the date hereof, upon every reasonable request, and at the proper costs and charges of the said D. E. his heirs and assigns, make, do and execute, or cause to be made, done and executed, all and every such other lawful and reasonable acts, conveyances and assurances in the law, for the further, better, more perfect, and absolute granting, conveying and assuring of the said tract or parcel of land, with its appurtenances unto the said D. E. his heirs and assigns for ever, as by the said D. E. his heirs or assigns, or by his or their counsel, learned in the law, shall be reasonably advised, or devised or required: So as such further assurances contain in them no further or other warranty, or covenants, than against the person or persons, his or their heirs who shall make or do the same, and so as the party, who shall be requested to make such further assurances be not compelled or compellable, for making or doing thereof, to travel above ——— miles from his or their respective dwellings or places of abode.] In Witness, &c.

NOTE.—That part of the foregoing precedent included thus [ ] has become the modern practice in England, instead of the clause of *warranty*.—It is however, seldom used in this country. *See* 2 *Blackf. Com.* 304.

The above form may be applied to a conveyance by *release alone*. When it is thus used, the second part only must be attended to, and the recitals must bring the case within the description of some one of those, to which such a conveyance is proper,—and must also omit whatever relates to the deed of bargain and sale for a year. *See those cases in which a release is the proper conveyance, in Blackf. Com.* 2 *vol. p.* 324—*and Co. Litt. under* "*Releases.*"

TRUST

TRUST. Deed of

A Deed of Truſt to ſecure the payment of Debts.

THIS INDENTURE made the ——— day of ——— in the year &c. between A. D. of &c. of the one part, and B. T. of &c. of the other part Witneſſeth, That the ſaid A. D. in order to ſecure the payment of the following debts, [*here mention them particularly*] and in conſideration of the ſum of one dollar to him in hand paid by the ſaid B. T. at or before the enſealing and delivery of theſe preſents, the receipt whereof is hereby acknowledged, HE the ſaid A. D. hath granted, bargained and ſold, and by theſe preſents doth grant, bargain and ſell unto the ſaid B. T. all that &c. [*here deſcribe the property*] and the reverſion and reverſions, remainder and remainders, yearly and other rents, iſſues and profits thereof, and of every part and parcel thereof, and alſo all the eſtate, right, title, intereſt, truſt, property, claim and demand whatſoever, both at law and in equity, of him the ſaid A. D. in, to, or out of the ſaid lands, tenements, hereditaments, and premiſes; TO HAVE AND TO HOLD the ſaid [*here deſcribe the property*] herein before mentioned to be hereby granted, with their and every of their appurtenances unto the ſaid B. T. his heirs, executors, adminiſtrators and aſſigns for ever; UPON TRUST nevertheleſs that the ſaid B. T. ſhall as ſoon as conveniently he can (after having advertiſed the time and place of the ſale of the property before-mentioned, in ſome public newſpaper publiſhed neareſt to the reſidence of the ſaid A. D.) proceed to ſell the ſame to the higheſt bidder for the beſt price that can be obtained, and out of the monies ariſing from the ſale, in the firſt place to pay and ſatisfy all reaſonable charges attending ſuch ſale, and then the debts above-mentioned, and the reſidue of the monies ariſing from ſuch ſale as aforeſaid, to the uſe of the ſaid A. D. his executors, adminiſtrators or aſſigns, or to ſuch perſon or perſons as he by writing under his hand ſhall appoint, and in default of ſuch appointment to ſuch perſon or perſons as would be thereto entitled by virtue of the ſtatute for diſtribution of inteſtate's eſtates. [*Here may follow covenants, if the parties think proper, that the truſts hereby declared ſhall ceaſe on the payment of the ſeveral debts to ſecure which the property was conveyed* ——*For quiet enjoyment;—free from incumberances;—and for further aſſurances*—(*See Releaſes No.* 2.)

IN WITNESS WHEREOF, &c.

WILLS.

A Will of Real and Perſonal Eſtate.

I A. B. of ——— do hereby make my laſt will and teſtament in manner and form following, that is to ſay:

1ſt —I DESIRE that all the periſhable part of my eſtate be immediately ſold, after my deceaſe, and out of the monies ariſing therefrom

WILLS.

therefrom, all my juſt debts and funeral expences be paid. Should the periſhable part of my property prove inſufficient for the above purpoſes, then I deſire that my executors * hereafter named may ſell my houſes and lots lying on —— ſtreet in the town of —— and out of the monies ariſing therefrom pay and ſatisfy ſuch of my juſt debts as ſhall remain unpaid out of the ſales of the periſhable part of my eſtate.

2dly—AFTER the payment of my debts and funeral expences, I give to my wife C. B. one third part of my eſtate both real and perſonal for and during the term of her natural life, and after her deceaſe, I give the ſame to my children herein after mentioned, equally to be divided among them; and to be enjoyed by them forever.

3dly.—I GIVE to my ſon D. B. all my lands in —— to him and his heirs forever.

4thly—I GIVE to my ſon E B. all my eſtate † in the county of——

5thly—I GIVE to my daughter F. B. her executors and adminiſtrators Ten Thouſand Dollars, being part of my *ſix per cent* ſtock now ſtanding in my name in the books of —— commiſſioner of loans for the ſtate of Virginia.

6thly.—I GIVE to my daughter G. B. all the reſidue of my ſix per cent ſtock, alſo all other my funded debt of the United States, ſtanding in my name on the books of —— commiſſioner of loans for the ſtate of Virginia.

7thly.—All the reſt of my eſtate both real and perſonal, of what nature or kind ſoever it may be, not herein before particularly diſpoſed of, I deſire may be equally divided among my ſeveral children herein before named, which I give to them, their heirs, executors, adminiſtrators and aſſigns forever.

AND LASTLY—I do hereby conſtitute and appoint my friends H. B. and J. B. executors of this my laſt will and teſtament, hereby

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* *See Co. Litt* 113, *a. as to the operation of law on a deviſe* to executors to ſell, *and a direction* that executors ſhall ſell.——*See alſo in the ſame folio, Note* (2) *a very valuable note by Mr.* Hargrave *on that diſtinction.*

† *See as to what paſſes by the words* "eſtate" *or* "eſtates" 3 *Mod. Rep* (5 ed. by Mr. Leach) 45 *and the caſes there cited. alſo* 3 *Com. Dig* 422—426—*As to the word* "eſtates" *ſee* 2 *Term. Rep.* 656.—"All my eſtate" *paſſes every thing a man has, Dict. per Ld.* Mansfield *in the caſe of* Rogan *and* Jackſon. *Cowp.* 306. *See alſo* 2 *Burr.* 880 ——*See where a fee paſſes without uſing the word* eſtate. 1 *Wills.* 133 ——*I have introduced the above clauſe merely to ſhew what conſtructions have been put on ſimilar deviſes; not that I think it would be ſafe to copy it as a precedent:—it being a fixed principle, that an heir at law ſhall not be diſinherited by the cleareſt intention appearing on the face of the will, unleſs the eſtate is completely diſpoſed of to ſomebody elſe.*——*See as to this point* Cowp. 657 Doun *ex dem* Galkin *v.* Galkin.

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hereby revoking all other or former wills or teſtaments, by me heretofore made.

In Witness whereof I have hercunto ſet my hand and affixed my ſeal this —— day of —— in the year —— &c.

A. B. (*Seal.*)

Signed, ſealed, publiſhed and declared as and for the laſt will and teſtament of the above named A. B in preſence of us

To be atteſted by *two* or more credible witneſſes, in the teſtator's preſence and by his directions, by *Virginia Laws* (chap. 92. § 1) page 169 of the reviſed code.

As our act of Aſſembly differs in nothing from the ſtatute of 29 Char. 2. chap. iii. § 5. except in the *number* of witneſſes neceſſary to atteſt a will, (that ſtatute requiring *three*) the following determinations founded on that act will not be improper in this place.

If the will be atteſted by an inſufficient number of witneſſes, and afterwards a codicil is made, which is alſo atteſted by an inſufficient number, but the two together would make the number required by the ſtatute, yet it is not a ſufficient atteſtation within the law. But if a man publiſh his will in the preſence of an inſufficient number of witneſſes, and a month after he ſend for others making in the whole the number required by law, it will be good. Carth. 35. 2, Atk. 106.

It is not neceſſary that the teſtator ſhould *ſign* the will in the preſence of the witneſſes, it is ſufficient if he *acknowledge* the ſignature to them, though at different times, the ſtatute requires atteſting in the teſtator's preſence, to prevent obtruding another will in the place of the true one. But it is enough that the teſtator *might* ſee, it is not neceſſary that he ſhould *actually ſee* them ſign, therefore where the teſtator had deſired the witneſſes to go into another room ſeven yards diſtance to atteſt the will, in which there was a window broken, through which the teſtator might ſee them, it was held good; ſo if the teſtator being ſick ſhould be in bed and the curtains drawn. 3 *P. Williams*, 254 2 Vez 454. Salk. 688.

So where the teſtatrix went to her attorney's office to execute her will, but being aſthmatical, and the office very hot, retired to her carriage to execute it, the witneſſes attending her; after having ſeen the execution they retired into the office to atteſt it, and the carriage was put back to the window of the office through which it was ſworn by a perſon in the carriage, that the teſtatrix might ſee what paſſed.—Immediately after the execution the witneſſes took the will to her, which ſhe folded up and put in her pocket, the will was held to be well atteſted. 1 *Browne's Cha. Ca.* 99 *Caſſon v. Dyde.*

But if the witneſſes ſubſcribe their names to the will in a room adjoining to that where the teſtator is, but out of his ſight, it is not a good atteſtation. Gilb. Dev 93.

If the teſtator is in a ſtate of inſenſibility when his will is atteſted, the will is not duly atteſted according to the meaning of the ſtatute, although he is corporeally preſent. *Doug.* 229.

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It is not neceſſary that the witneſſes ſhould atteſt in the preſence of each other, or that the teſtator ſhould declare the inſtrument he executed to be his will, or that the witneſſes ſhould atteſt every page, folio or ſheet, or that they ſhould know the contents; or that each folio, page or ſheet ſhould be particularly ſhewn to them, and if the teſtator never executed the firſt ſheet, if it was in the room at the time of the execution of the ſecond, it is ſufficient. 3 Burr. 1775.

Signing need not be by writing the name at the bottom, it is enough if the will be of the teſtator's hand writing, and begin with I J B &c 3 Lev 1.

With reſpect to the revocation of a will the following determinations have been made.

A will revoked by a ſubſequent will, but not cancelled, is re eſtabliſhed by cancelling the ſubſequent will, 4 *Burr.* 214. *Doug.* 41.

Where there are duplicates of a will, one in the teſtator's cuſtody, the other not; the cancelling the one in his cuſtody is an effectual cancelling of both. *Cowp.* 49, *Doug.* 41.

If the teſtator ſlightly tears his will, and throws it on the fire with a deliberate intention to conſume it, and it falls off and is preſerved without the teſtator's knowledge or conſent, it is revoked, 2 *Blackſ. Rep* 1043. ——— Any implied revocation of a will may be rebutted by parol evidence. *Doug.* 38.

Marriage and the birth of a child amount to a revocation of a man's will, if it is of all his lands; and a woman's marriage is alone a revocation of her will. 4 *Burr.* 217. *Doug* 38. 2 *Term. Rep.* 684.

Any alteration or new modelling of the eſtates deviſed, is a revocation. 3 Atk. 803.

AS it is uſual to begin the preamble or introductory part of a will with more ſolemnity, than is obſerved in the foregoing precedent; —for the gratification of thoſe who wiſh to indulge themſelves in this kind of devotion, I have added the following:

IN the name of God. Amen. I J. S. of the county of ——, being ſick and weak in body, but of ſound mind and diſpoſing memory (for which I thank God) and calling to mind the uncertainty of human life, and being deſirous to diſpoſe of all ſuch worldly eſtate * as it hath pleaſed God to bleſs me with—I give and bequeath the ſame in manner following, that is to ſay. I give &c.—*Item.* I give &c. *(here inſert the ſeveral legacies agreeable to the intention of the teſtator)*

Before I diſmiſs a ſubject ſo generally uſeful to the community, as the doctrine of deviſes, particularly of lands; I think it neceſſary to caution the public againſt a practice which too frequently prevails of intruſting the diſpoſition of their property, by will, to perſons wholly

* *See as to the uſe which is made of the introductory words of a will in explaining the intention of the teſtator, in Cowp.* 299. *Hogan, &c. v. Jackſon, and the caſes there cited —Cowp.* 352. *Loveacres ex dem, Mudge v Blight & ux.—Cowp.* 657. *Denn. ex dem, Gaſkin v. Gaſkin.*

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wholly unacquainted with the legal operation of the words made uſe of in ſuch diſpoſition. For although the courts will reſort to every mode of conſtruction to carry into effect the intentions of the teſtator, as appears by the caſes before referred to under this title, and many others which might be enumerated;—yet, if it cannot be collected from the whole of the will taken together, or from ſome expreſſions made uſe of in it, that the eſtate is *completely* diſpoſed of to ſome other perſon, the heir at law will inherit, notwithſtanding the teſtator evidently meant to exclude him by giving ſome ſmall pecuniary legacy.—A remarkable inſtance of this kind we have in the caſe of *Denn* ex dem. *Gaſkin v Gaſkin*, reported in *Cowper* p. 657—where the teſtator deviſes thus: "*As to all ſuch worldly eſtate as God* "*has endued me with*, I give and bequeath as follows.——I give "and deviſe *All that my freehold meſſuage and tenement lying in G*, "together with all houſes &c. and appurtenances whatſoever be"longing to the ſame, to M R, G R, and T R, *equally*. And "among other pecuniary legacies, he bequeaths *ten* ſhillings to his "heir at law." Here though it is apparent the teſtator intended to diſinherit his heir at law (having no other land except that deviſed, and giving but *ten* ſhillings,) yet, as no limitation of the eſtate to the deviſees M R, G R, and T R, was either added to the deviſe, or could be collected from the will——it was held they took an eſtate for *life* only, and the heir at law recovered.———

In the firſt precedent under this title I have endeavored, by introducing various modes of expreſſion, to ſhew how far the law has diſpenſed with technical words in favor of the intention of the teſtator. ——But I would, by no means, recommend a reliance on the indulgence of a court, whoſe deciſions may vary, (even after extending the utmoſt latitude allowed by the law in favor of the deviſe) materially from the real intention of the teſtator.——It ſhould, therefore, always be a fixed rule to aſcertain by ſome mode of expreſſion the *quantity* and *quality* of the eſtate deviſed. *Technical* words it is true, are not neceſſary in a will; but where they are not uſed, ſome words of limitation muſt be added, otherwiſe the law preſumes the teſtator meant to convey an eſtate for life only, and the heir at law will inherit.

☞ *See the caſe in* Cowper 657—*Alſo* Cowp. 238.

APPENDIX No. II.

TO THE

New Virginia Juſtice, &c.

CONTAINING

The DUTIES of a JUSTICE of the PEACE

ARISING UNDER THE

LAWS of the UNITED STATES.

THE juriſdiction of a Juſtice of the Peace in offences committed againſt the United States, is authoriſed by an act of the *1ſt ſeſſion of the 1ſt Congreſs, chap.* 20. § 33, which enacts, "That for any crime "or offence againſt the United States, the offender may, by any Juſ- "tice or Judge of the United States, or by any Juſtice of the Peace, "or other magiſtrate of any of the United States where he "may be found agreeably to the uſual mode of progreſs againſt offen- "ders in ſuch ſtate, and at the expence of the United States, be ar- "reſted, and impriſoned or bailed, as the caſe may be, for trial before "ſuch court of the United States as by this act has cognizance of "the offence: And copies of the proceſs ſhall be returned as ſpeedily "as may be into the clerk's office of ſuch court, together with the "recognizances of the witneſſes for their appearance to teſtify in the "caſe; which recognizances the magiſtrate before whom the examin- "nation ſhall be, may require on pain of impriſonment: And if "ſuch commitment of the offender, or the witneſſes ſhall be in a "diſtrict other than that in which the offence is to be tried, it ſhall "be the duty of the judge of that diſtrict where the delinquent is im- "priſoned, reaſonably to iſſue, and of the marſhall of the ſame diſ- "trict to execute, a warrant for the removal of the offender, and the "witneſſes, or either of them, as the caſe may be, to the diſtrict in "which the trial is to be had. And upon all arreſts in criminal "cases, bail ſhall be admitted, except where the puniſhment may be "death, in which caſes it ſhall not be admitted but by the ſupreme or "a circuit court, or by a juſtice of the ſupreme court, or a judge of "a diſtrict court, who ſhall exerciſe their diſcretion therein, regarding "the nature and circumſtances of the offence, and of the evidence, "and the uſages of law. And if a perſon committed by a juſtice of "the ſupreme or a judge of a diſtrict court for an offence not puniſh- "able with death, ſhall afterwards procure bail, and there be no "judge of the United States in the diſtrict to take the ſame, it may be "taken by any judge of the ſupreme, or ſuperior court of law of "ſuch ſtate."

BY the ninth ſection of the above recited law, the diſtrict courts of the United States, have, "exclusively of the courts of the ſeveral "ſtates, cognizance of all crimes and offences that ſhall be cogniza- "ble under the authority of the United States, committed within "their reſpective diſtricts, or upon the high ſeas; where no other "puniſhment than whipping, not exceeding thirty ſtripes, a fine not "exceeding one hundred dollars, or a term of impriſonment not ex- "ceeding ſix months is to be inflicted."

BY the 11th ſection, the circuit courts of the United States have "excluſive cognizance of all crimes and offences cognizable under "the authority of the United States, (except where it is otherwiſe "directed by the ſaid act or the laws of the United States otherwiſe "provide) and concurrent juriſdiction with the diſtrict courts of the "crimes and offences cognizable therein."

Acceſſaries. *See* "*Piracy.*"

AMBASSADORS.

BY *the laws of the United States, 1ſt Congreſs, 2d ſeſſion, ſect. 25.* "If any writ or proceſs ſhall at any time hereafter be ſued forth or "proſecuted by any perſon or perſons, in any of the courts of the "United States, or in any of the courts of a particular ſtate, or by "any judge or juſtice therein reſpectively, whereby the perſon of any "ambaſſador or other public miniſter of any foreign prince or ſtate, "authoriſed and received as ſuch by the Preſident of the United "States, or any domeſtic or domeſtic ſervant of any ſuch ambaſſador "or other public miniſter, may be arreſted or impriſoned, or his or "their goods or chattels be diſtrained, ſeized or attached, ſuch writ "or proceſs ſhall be deemed and adjudged to be utterly null and void "to all intents, conſtruction and purpoſes whatſoever."

Sect. 26. "In caſe any perſon or perſons ſhall ſue forth or pro- "ſecute any ſuch writ or proceſs, ſuch perſon or perſons, and all at- "torniés or ſolicitors proſecuting or ſoliciting in ſuch caſe, and all "officers executing any ſuch writ or proceſs, being thereof convicted, "ſhall be deemed violaters of the laws of nations, and diſturbers of "the public repoſe, and impriſoned not exceeding three years, and "fined at the diſcretion of the court: *Provided*, That no citizen or "inhabitant of the United States, who ſhall have contracted debts "prior to his entering into the ſervice of any ambaſſador or other public "miniſter, which debts ſhall be ſtill due and unpaid, ſhall have, take "or receive any benefit of this act; nor ſhall any perſon be proceeded "againſt by virtue of this act, for having arreſted or ſued any other "domeſtic ſervant of any ambaſſador, unleſs the name of ſuch ſervant "be firſt regiſtered in the office of the ſecretary of ſtate, and by ſuch "ſecretary tranſmitted to the marſhall of the diſtrict in which Con- "greſs ſhall reſide, who ſhall upon receipt thereof affix the ſame in "ſome public place in his office, whereto all perſons may reſort and "take copies without fee or reward."

Sect. 27. "If any perſon ſhall violate any ſafe conduct or paſſ- "port duly obtained and iſſued under the authority of the United

States

AMBASSADORS.

"States, or shall assault, strike, wound, imprison, or in any other "manner infract the law of nations, by offering violence to the per-"son of an ambassador or other public minister, such person so "offending, on conviction shall be imprisoned not exceeding three "years, and fined at the discretion of the court."

BAIL. See the first page of this Appendix.

BRIBERY.

BY the *laws of the United States, 1st Congress, 1st session, chap. 20 sect. 21.* "If any person shall, directly or indirectly, give any "sum or sums of money, or any other bribe, present or reward, or "any promise, contract, obligation or security, for the payment or "delivery of any money, present or reward, or any other thing to obtain "or procure the opinion, judgment or decree of any judge or judges "of the United States, in any suit, controversy, matter or cause de-"pending before him or them, and shall be thereof convicted, such "person or persons so giving, promising, contracting or securing to "be given, paid or delivered, any sum or sums of money, present, "reward or other bribe as aforesaid, and the judge or judges who "shall in any wise accept or receive the same, on conviction thereof "shall be fined and imprisoned at the direction of the court, and shall "forever be disqualified to hold any office of honor, trust or profit "under the United States."

THE penalty for bribery in an officer of the customs is a fine not less than two hundred dollars, or more than two thousand, and the same in the person giving the bribe. *See laws of the United States, 1 Cong. chap 35 sect 66.*

COIN.

THE following table of coins as established by act of Congress, is selected from the laws of the United States, 2 *Congress, 1 session chap* 16. § 9.—The penalty for counterfeiting coins may be seen under '*coin*' in the body of this work.

Denominations.		*Value*	*Weight in standard money*
Gold	Eagle	10 dollars	270 Grains
	Half Eagle	5	135
	Quarter Eagle	2½	67 4-8
Silver	Dollar or Unit	A Spanish milled dol	416
	Half Dollar	Half a dollar	208
	Quarter Dolar	one fourth a dollar	104
	Dismes	one tenth a dollar	41 3-5
	Half Dismes	one twentieth of dol.	20 4 5
copper	Cents	one hundredth of dol	208
	Half Cents	Half a Cent	104

Propotional Value of Gold to Silver, is, 15 to 1.

Sandard of Gold coin, is 11 parts fine to 1 alloy.

Standard of Silver, is 1485 parts fine to 179 alloy.

TABLE OF COINS.

10 mills make 1 Cent—10 Cents 1 Disme—10 Dismes 1 Dollar

CLERGY. Benefit of

BY the *laws of the United States*, 1 *Cong.* 1 *sess. chap.* 20. *sec* 30. "The benefit of clergy shall not be used or allowed upon conviction "of any crime, for which, by any statute of the United States, the "punishment is or shall be declared to be death."

Dissection of dead bodies, See Murder.

DUTIES

BY the *laws of the United States*, 1 *Cong* 1 *sess. chap.* 35 *sec.* 48 (after giving to every collector, naval-officer, and surveyor, power to enter on board any vessel, in which it is suspected dutiable goods are concealed) it is enacted, that "if they shall have cause to suspect a "concealment thereof in any particular dwelling house, store, building "or other place, they or either of them shall upon application on oath "to any justice of the peace, be entitled to a warrant (*a*) to enter such "house, store or other place (in the day time only) and there to "search for such goods, and if any shall be found, to seize and secure "the same for trial; and all such goods, wares and merchandize, on "which the duties shall not have been paid or secured, shall be forfeited."

(*a*) *Warrant to search for concealed goods, subject to duty.*

State of —— *to wit:*

WHEREAS A. S. surveyor of the revenue at ——, hath this day made oath before me J. P. a justice of the peace for —— in the state aforesaid, that he hath cause to suspect sundry goods, wares and merchandizes, subject to a duty under the laws of the United States, are concealed in the store &c. of —— &c. These are therefore to authorise the said A. S. to enter into the said store, &c. in the day time only, to search for the said goods, wares and merchandizes, and if any shall be found therein, to seize and secure the same for trial. Given under my hand and seal at the county aforesaid, the —— day of —— in the year ——, and of the independence of the United States the ——.

EVIDENCE.

BY the *laws of the United States*, 1 *Cong.* 1 *sess. chap.* 20, *sect.* 30 "The mode of proof by oral testimony and examination of witnesses, "in open court shall be the same in all the courts of the United States "as well in the trial of causes in equity and of admiralty and mari-"time jurisdiction, as of actions at common law. And when the "testimony of any person shall be necessary in any civil cause depend-"ing in any district court of the United States, who shall live at "a greater distance from the place of trial than one hundred miles, or "is bound on a voyage to sea, or is about to go out of the United

"States

EVIDENCE.

"States, or out of such district, and to a greater distance from the "place of trial than as aforesaid, before the time of trial, or is an- "cient or very infirm, the deposition of such person may be taken "*de bene esse* before any justice or judge of any of the courts of the "United States, or before any chancellor, justice or judge of a su- "preme or superior court, mayor or chief magistrate of a city, or "judge of a county court, or court of common pleas of any of the "United States, not being of counsel or attorney to either of the "parties, or interested in the event of the cause; provided that a "notification (*a*) from the magistrate before whom the deposition is "to be taken to the adverse party, to be present at the taking of the "same, and to put interrogatories, if he think fit, be first made out "and served on the adverse party or his attorney as either may be "nearest, if either is within one hundred miles of the place of such "caption, allowing time for their attendance after notified, not less "than at the rate of one day, sundays exclusive, for every twenty "miles travel. And in causes of admiralty and maritime jurisdiction "or other cases of seizure when a libel shall be filed, in which an "adverse party is not named, and depositions of persons circum- "stanced as aforesaid shall be taken before a claim be put in, the like "notification as aforesaid, shall be given to the person having the "agency or possession of the property libelled at the time of the capture "or seizure of the same, if known to the libellant. And every per- "son deposing as aforesaid, shall be carefully examined and cauti- "oned, and sworn or affirmed to testify the whole truth, and shall "subscribe the testimony by him or her given, after the same be done "only by the magistrate taking the deposition, or by the deponent in "his presence. And the depositions so taken shall be retained by "such magistrate until he deliver the same with his own hand into "the court for which they are taken, or shall together with a certi- "ficate (*b*) of the reasons as aforesaid of their being taken, and of "the notice if any given to the adverse party, be by him the said ma- "gistrate sealed up and directed to such court, and remain under his "seal until opened in court. And any person may be compelled to ap- "pear and depose as aforesaid (*c*) in the same manner as to appear "and testify in court. And in the trial of any cause of admiralty or "maritime jurisdiction in a district court, the decree in which may "be appealed from, if either party shall suggest to and satisfy the "court that probably it will not be in his power to produce the wit- "nesses there testifying before the circuit court, should an appeal be "had, and shall move that their testimony be taken down in writing, "it shall be so done by the clerk of the court: And if an appeal be "had, such testimony may be used on the trial of the same, if it shall "appear to the satisfaction of the court which shall try the appeal, "that the witnesses are dead or gone out of the United States, or to "a greater distance than as aforesaid from the place where the court "is sitting, or that by reason of age, sickness, bodily infirmity or im- "prisonment they are unable to travel and appear at court, but not "otherwise: And unless the same shall be made to appear on the

"trial

EVIDENCE.

" trial of any cauſe, with reſpect to witneſſes where depoſitions may " have been taken therein, ſuch depoſitions ſhall not be admitted or " uſed in the cauſe: *Provided*, That nothing herein ſhall be con- " ſtrued to prevent any court of the United States from granting a " *dedimus poteſtatem* to take depoſitions according to common uſage, " when it may be neceſſary to prevent a failure or delay of juſtice; " which power they ſhall ſeverally poſſeſs; nor to extend to depoſi- " ons taken in *perpetuam rei memoriam*, which if they relate to mat- " ters that may be cognizable in any court of the United States, a " circuit court on application thereto made as a court of equity, may, " according to the uſages in chancery direct to be taken."

(a) Notification of the Magiſtrate before whom a depoſition is to be taken.

State of ——, —— *County to wit:*

WHEREAS A. P. of &c. hath this day given information to me J. P. a judge of the county court of —— [*or if any other office, name it,*] that B. W. of &c. is a material witneſs for him in a ſuit now depending in —— court of the United States for the diſtrict of ——, [*mention the court whether diſtrict or circuit*] in which the ſaid A. P. is plaintiff and C. D. of &c. is defendant, and that the ſaid B. W. reſides at a greater diſtance from the place of trial, than one hundred miles; [*or, if the witneſs is in any other manner circumſtanced which will authoriſe the taking of his depoſition under the above recited law, mention it*] and the ſaid A. P. having made application to me to take the depoſition of the ſaid B. W. *de bene eſſe*, purſuant to the act of the Congreſs of the United States, in that caſe made and provided; theſe are to give you notice that I ſhall proceed to take the depoſition of the ſaid B. W. on the —— day of —— next, at the houſe of —— in the town (or county) of ——, between the hours of ten in the morning and ſix in the evening of the ſame day, when and where you may be preſent, to put interrogatories, if you think fit. Given under my hand this —— day of —— in the year —— and of the independence of the United States of America the ——. * J. P.

To C. D. of &c.

(b) Cer-

* *A copy of this notice ſhould be ſerved on the adverſe party, within the time limitted by the above recited act, and on the back of the notice itſelf, a certificate ſhould be made by a magiſtrate, to the following effect, viz:*

" —— *to wit, This day* —— *perſonally appeared before me J. P. a juſtice of the peace for the county of* —— *in the ſtate of* ——, *and made oath that on the* —— *day of* —— *laſt, he delivered to the within named C. D. a true copy of the within notice. Given &c.*

J. P.

EVIDENCE.

(b) Certificate of the Magistrate to be inclosed to the Court together with the deposition.

State of ——, —— *County to wit,*

I J. P a judge of the county court of —— in the state aforesaid [*or other office, as the case may be*] do hereby certify that the deposition of B. W. of &c. herewith sent, was taken by me according to law, at the request of A. P. of &c. who alledged that the said B. W. was a material witness for him, in a cause now depending in the —— court of the United States for the district of —— wherein the said A. P. is plaintiff and C. D. is defendant, and that the said B. W. lived at a greater distance from the place of trial than one hundred miles; [*or, if for any other reason, mention it,*] and I do moreover certify that I directed a copy of the within notice to be served on the said C. D. which appears to have been done from a certificate on the back of the notice now inclosed. Given under my hand this —— day of —— in the year ——, and of the independence of the United States of America the ——.* J. P.

To —— court of the United States]
for the district of ——.]

(c) Summons for the Witness to appear before the Magistrate to be examined.

Between A. P. Plaintiff, } In the —— court of the United
and C. D. Defendant, } States for the district of ——.

WHEREAS, in pursuance of the act of Congress of the United States, in that case made and provided, A. P. of &c hath made application to me J. P. a judge of the county court of —— [*or other office*] to take depositions of the witnesses, whose names are hereunto subjoined, he the said A. P. having given me information that their testimony was material in a cause now depending in the —— court of the United States for the district of —— [*name the court*] in which the said A. P. is plaintiff, and C. D. is defendant, and that the said witnesses live at a greater distance from the place of trial than one hundred miles, [*or if for any other reason name it*;] these are to will and require you, personally to be and appear before me on the —— day of —— next, at the house of —— in the town (or county) of ——, between the hours of ten in the morning and six in the evening of the same day, then and there to be examined, and to testify your knowledge for and on behalf of the plaintiff; and you are then and

* *It seems to be necessary for the magistrate to return to court, the notice, with a certificate of the oath of some person thereon, that a true copy was delivered to the adverse party.*

EVIDENCE.

and there to attend, and not to depart until you have been examined on the part of the ſaid plaintiff: And herein you are not to fail. Given &c. J. P.

To B. W. C. W. &c.

TO preſcribe the mode in which the public acts, records and judicial proceedings in each ſtate, ſhall be authenticated ſo as to take effect in every other ſtate, it is enacted by the *laws of the United States* 1 *Cong.* 2 *ſeſſ. chap.* 11. "That the acts of the legiſlatures of the "ſeveral ſtates ſhall be authenticated by having the ſeal of their reſpective ſtates affixed thereto: That the records and judicial proceedings of the courts of any ſtate, ſhall be proved or admitted in "any other court within the United States, by the atteſtation of the "clerk, and the ſeal of the court annexed, if there be a ſeal, together with a certificate of the judge, chief juſtice, or preſiding magiſtrate, as the caſe may be, that the ſaid atteſtation is in due "form: And the ſaid records and judicial proceedings authenticated as aforeſaid, ſhall have ſuch faith and credit given to them in "every court within the United States, as they have by law or uſage "in the courts of the ſtate from whence the ſaid records are, or "ſhall be taken."

UNDER the atteſtation of the clerk with the ſeal of the court annexed, the certificate may be written in this form, viz:

State of ——, —— *County to wit:*

I J. P. preſiding magiſtrate of the court of —— county, in the ſtate aforeſaid, do hereby certify that the atteſtation hereto annexed, made by J. C. clerk of the ſaid court of —— is in due form, and that full faith and credit is due thereto in every court within the United States. Given under my hand this —— day of —— in the year ——, and of the independence of the United States the ——. J. P.

Exciſe. See Spirits.

Forfeiture. See the latter part of this Appendix.

FORGERY.

BY the *laws of the United States* 1 *Cong.* 2 *ſeſſ. chap.* 9. *ſect.* 14. "If any perſon or perſons ſhall falſely make, alter, forge or counterfeit, or cauſe or procure to be falſely made, altered, forged, or "counterfeited, or willingly act or aſſiſt in the falſe making, altering "forging or counterfeiting any certificate, indent, or other public "ſecurity of the United States, or ſhall utter, put off, or cauſe to be "uttered, put off or offered for payment or for ſale any ſuch falſe, "forged, altered or counterfeited certificate, indent or other public "ſecurity, with intention to defraud any perſon, knowing the ſame "to be falſe, altered, forged or counterfeited, and ſhall be thereof convicted, every ſuch perſon ſhall ſuffer death." (a) *War-*

FORGERY.

(a) Warrant for Forgery.

State of ——, —— *County to wit:*

WHEREAS A. I. of &c. hath this day given information to me J. P. a juſtice of the peace for the county of —— in the ſtate aforeſaid, that on the —— day of —— laſt paſt, at —— in the county of —— aforeſaid, in the ſtate aforeſaid, A. O. of &c. labourer, did offer for ſale to ——, a forged certificate, of the United States, [*or, if for any other offence againſt the above recited act, mention it,*] with intention to defraud the ſaid ——, he the ſaid A. O. knowing the ſaid certificate to be forged: Theſe are therefore to require you to apprehend the ſaid A. O. and bring him before me or ſome other juſtice of the peace for the county of —— aforeſaid, to be dealt with in the premiſſes according to law. Given under my hand and ſeal at the county of —— aforeſaid, this —— day of —— in the year —— and in the —— year of the independence of the United States of America.

To —— to execute.

NOTE.—*It is uſual either to endorſe on the warrant the names of the witneſſes, or to annex their names to the foot of it: The following ſummons is, however, the moſt regular mode.*

(b) Summons for a Witneſs.

State of ——, —— *County, to wit:*

WHEREAS A. O. of &c. labourer, hath been arreſted by my warrant, and is now brought before me for ſuſpicion of having offered for ſale a forged certificate of the United States, [*or other fact, as ſtated in the warrant*] and being informed that A. W. of &c. is a material witneſs to be examined concerning the ſame: Theſe are to require you to ſummon the ſaid A. W. to appear before me, at ——, in the ſaid county of —— on the —— day of —— at —— o'clock of the ſame day, to teſtify concerning the ſame. Given under my hand and ſeal this —— day of —— in the year ——, and of the independence of the United States the ——.

To —— to execute.

(c) Recognizance of the Witneſſes,

State of ——, —— *County, to wit:*

BE it remembered, that on the —— day of —— in the year —— and in the —— year of the independence of the United States of America, A. W. of &c. B. W. of &c. perſonally came before me J. P. a juſtice of the peace for the county of ——, in the ſtate aforeſaid, and acknowledged themſelves ſeverally to owe to the United States of America, —— dollars of good and lawful money of the ſaid United States, to be made and levied of their, and each of their goods and

FORGERY.

chattels, lands and hereditaments, reſpectively, if the ſaid A. W. and B. W. ſhall make default in performance of the condition hereunderwritten. Acknowledged before me. J. P.

THE condition of the above recognizance is ſuch, that if the above bound A. W. and B. W. do and ſhall perſonally appear before the judges (or juſtices) of the United States, on the firſt day of the next court, to be held at —— circuit, * and ſhall then and there give ſuch teſtimony as they ſeverally know, concerning the offence, wherewith A. O. of &c. ſtands charged, on behalf of the United States, and do not depart without leave of the court, then the above recognizance to be void, elſe to remain in full force.

(d) Recognizance of Bail.

State of ——, —— County to wit:

BE it remembered that on the —— day of —— in the year ——, and in the —— year of the independence of the United States of America A. O. of &c. labourer, A B of &c. and B B of &c. came before me J P a juſtice of the peace † for the county of —— aforeſaid, in the ſtate aforeſaid, and ſeverally acknowledged themſelves indebted to the United States of America, that is to ſay, the ſaid A O in the ſum of —— dollars, and the ſaid A B and B B in the ſum of —— dollars each, to be reſpectively levied of their lands and tenements, goods and chattels, yet upon this condition, that if the ſaid A O ſhall make default in performance of the condition underwritten.

THE condition of this recognizance is ſuch, that if the above bound A O ſhall perſonally appear before the United States judges (or juſtices) on the firſt day of the next court, to be holden at —— for the diſtrict of —— [or for the —— circuit] then and there to anſwer to the ſaid United States of America for and concerning [*here recite the offence*] with which the ſaid A O ſtands charged before me, and to do and receive what ſhall by the court be then and there ordered and adjudged, and ſhall not depart thence without the leave of the ſaid court, then this recognizance ſhall be void, or elſe remain in full force and virtue. Acknowledged before me.

(c) *Mittimus*

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* *In thoſe caſes where the crime is ſuch as falls under the juriſdiction of the diſtrict court of the United States, the precedents ſhould be drawn to ſuit the caſe* ——*See the formation and juriſdiction of the courts of the United States, in the acts of Congreſs*, 1 Cong. 1 ſeſſ. chap. 20.

† *It muſt be obſerved that where the puniſhment for the offence is death, bail cannot be admitted by a juſtice of the peace, but only by a judge of a ſuperior court.*—See the firſt page of this appendix.

FORGERY.

(e) *Mittimus.*

State of ——, —— *County to wit:*
To the Keeper of the jail * of ——

I SEND you herewith the body of A. O. of &c. labourer, apprehended by my warrant and brought before me for felony, that is to say, [*here recite the offence particularly*:] and you the said keeper of the said jail are hereby required to receive the said A O into your jail and custody, and him there safely to keep till he shall be thence discharged by due course of the law of the United States. Given under my hand and seal this —— day of —— in the year —— and in the —— year of the independence of the United States of America.

I HAVE purposely inserted under this title such precedents as will serve in other cases, although some of them may not be necessary for a *justice of the peace* in the particular instance of *forgery*.

FUGITIVES.

UNDER this head I shall only consider fugitives from *labour*. The proceedings in the case of fugitives from *justice*, do not fall under the cognizance of a justice of the peace. *See laws of the United States* 2 *Congress* 2 *sess. chap.* 51, *sect.* 1, 2.

BY the 3d section of the above recited law, "When a person "held to labour in any of the United States, or in either of the territories on the north-west or south-west of the river Ohio, under the "laws thereof, shall escape into any other of the said states or territory, the person to whom such labour or service may be due, his "agent or attorney, is hereby empowered to seize or arrest such fugitive from labour, and to take him or her before any judge of the "circuit

* *In consequence of the resolution of Congress of the* 23*d of September* 1789, *recommending it to the legislatures of the several states to pass laws, making it the duty of the keepers of their jails to receive and keep prisoners committed under the authority of the United States, the legislature of Virginia, at their session next after the passing of the resolution of Congress passed such laws. This, I presume, was done by the other states. The mittimus then must conform to the nature and circumstances of the case, arising as well from the acts of the legislature of the several states as from those of Congress.—Thus, in offences falling within the jurisdiction of the district court of the United States, it seems, that the mittimus should be directed to the keeper of the jail where the court is held: the same observation will apply to the circuit courts of the United States.* [See their jurisdiction in the first part of this appendix.] *If the trial is to be had before a special* circuit court *of the United States, then the proceedings must all be forwarded to such court.* See laws of the United States, 2 Cong. 2 sess. chap. 66, sect. 3.

FUGITIVES.

"circuit or district courts of the United States, residing or being "within the state, or before any magistrate of a county, city or town "corporate, wherein such seizure or arrest shall be made, and "upon proof to the satisfaction of such judge or magistrate, either "by oral testimony or affidavit taken before and certified by a magis-"trate of any such state or territory, that the person so seized or ar-"rested, doth, under the laws of the state or territory, from which "he or she fled, owe service or labour to the person claiming him "or her, it shall be the duty of such judge or magistrate, to give a "certificate thereof to such claimant, his agent or attorney, which "shall be sufficient warrant for removing the said fugitive from la-"bour, to the state or territory from which he or she fled."

"ANY person who shall knowingly and willingly obstruct or "hinder such claimant, his agent or attorney in so seizing or arresting "such fugitive from labour, or shall rescue such fugitive from such "claimant, his agent or attorney when so arrested pursuant to the "authority herein given or declared; or shall harbour or conceal "such person, after notice, that he or she was a fugitive from labour, "as aforesaid, shall, for either of the said offences, forfeit and pay "the sum of five hundred dollars. Which penalty may be recovered "by and for the benefit of such claimant, by action of debt, in any "court proper to try the same, saving moreover to the person claim-"ing such labour or service, his right of action for or on account of "the said injuries or either of them."

IF the owner of such fugitive doth not produce oral testimony in support of his claim, an affidavit to the following effect, taken in the state of which he is an inhabitant, will be necessary.

State of ——, —— *County to wit:*

I J. P. a justice of the peace for the county of —— in the state of —— do hereby certify that this day A W, B W, &c. of &c. personally came before me, and made oath that they knew —— [*here mention the name of the fugitive, and describe him as a servant, apprentice, or slave, as the case may be:*] that the said —— is a person about —— years old &c. [*here describe his age, stature, &c.*] and that the said —— under the laws of the said state of —— is a [*servant, apprentice or slave, as the case may be*] and oweth service [*or labour*] to A M of &c. in the state of —— aforesaid, Given under my hand and seal at the county of —— in the state of —— aforesaid, this —— day of —— in the year —— and in the —— year of the independence of the United States.

Warrant of a Magistrate to convey the fugitive to the state from which he fled.

State of ——, —— *County, to wit:*

WHEREAS A M of —— in the state of ——, hath produced satisfactory proof to me J P a justice of the peace for the county of ——

in

FUGITIVES.

in the state of ——, that —— [*here mention the name of the fugitive*] who hath been arrested in this state and brought before me, is a fugitive from the said A. M. in the state of ——, and that the said A. M. under the laws of the said state of —— is entitled to the services [*or labour*] of the said ——. These are therefore to authorize the said A. M. to remove the said —— to the said state of ——, and for so doing this shall be his sufficient warrant. Given under my hand and seal this —— day of —— in the year —— and in the —— year of the independence of the United States of America.

HIGH SEAS.—For the trial and punishment of offences committed on the *high seas*, see title "PIRACY."

LARCENY.

BY *the laws of the United States* 1 *Cong.* 2 *sess. chap.* 9. *sect.* 16. "If any person within any of the places under the sole and exclusive jurisdiction of the United States, or upon the high seas, shall take and carry away, with intent to steal or purloin the personal goods of another; or if any person or persons, having at any time hereafter, the charge or custody of any arms, ordnance, munition, shot, powder, or habiliments of war, belonging to the United States, or of any victuals, provided for the victualling of any soldiers, gunners, marines or pioneers, shall for any lucre or gain, wittingly, advisedly and of purpose to hinder or impede the service of the United States, embezzle, purloin or convey away any of the said arms, ordnance, munition, shot or powder, habiliments of war, or victuals, that then and in every of the cases aforesaid, the person or persons so offending, their counsellors, aiders and abettors (knowing of and privy to the offences aforesaid) shall on conviction be fined not exceeding the four fold value of the property so stolen, embezzled or purloined; the one moiety to be paid to the owner of the goods, or the United States, as the case may be, and the other moiety to the informer and prosecutor; and be publicly whipped, not exceeding thirty nine stripes."

Sect. 17. "If any person or persons within any part of the jurisdiction of the United States aforesaid, shall receive or buy any goods or chattels that shall be feloniously taken or stolen from any other person, knowing the same to be stolen, or shall receive, harbour or conceal any felons or thieves, knowing them to be so, he or they being of either of the said offences legally convicted, shall be liable to the like punishments as in the case of larceny before are prescribed."

For Precedents, see title Forgery; observing in the description of the offence to state it to have been committed, in a place "under the sole and exclusive jurisdiction of the United States, or upon the

LARCENY.

"high seas: or by a person having charge of the arms, &c. of the "United States," *as the case may be.*

LETTERS, see MAIL.

Limitation of Criminal Prosecutions, See the latter part of this Appendix.

MAIL.

BY *the laws of the United States* 3 *Cong.* 1 *sess. chap* 23. *sect.* 16. "If any person employed in any of the departments of the general "post office, shall unlawfully detain, delay, or open, any letter, "packet, bag or mail of letters, with which he shall be entrusted, or "which shall have come to his possession, and which are intended to be "conveyed by post: Or if any such person shall secrete, embezzle or "destroy any letter or packet, entrusted to him, as aforesaid, and "which shall not contain any security for, or assurance relating to "money, as herein after described, any such offender being thereof "duly convicted, shall for every such offence, be fined not exceed-"ing three hundred dollars, or imprisoned not exceeding six months, "or both, according to the circumstances and aggravations of the "offence. And if any person employed as aforesaid, shall secrete, "embezzle or destroy, any letter, packet, bag, or mail of letters, "with which he shall be entrusted, or which shall have come to his "possession, and are intended to be conveyed by post, containing any "bank note, or bank post bill, bill of exchange, warrant of the trea-"sury of the United States, note of assignment of stock in the funds, "letters of attorney for receiving annuities or dividends, or for sel-"ling stock in the funds, or for receiving the interest thereof or any "letter of credit, or note for, or relating to the payment of money, "or other bond or warrant, draft, bill or promissary note, what-"soever, for the payment of money; or if any such person employed "as aforesaid, shall steal or take any of the same out of any letter, "packet, bag, or mail of letters, that shall come to his possession, "he shall on conviction, for any such offence, suffer death. And if "any person who shall have taken charge of the mail of the United "States, shall quit or desert the same, before his arrival at the next "post office, every such person so offending, shall forfeit and pay a "sum, not exceeding five hundred dollars, for every such offence. "And if any person, concerned in carrying the mail of the United "States, shall collect, receive or carry any letter or packet, or shall "cause or procure the same to be done contrary to this act, every "such offender shall forfeit and pay, for every such offence, a sum "not exceeding fifty dollars."

Sect. 17. "If any person or persons shall rob any carrier of "the mail of the United States, of such mail, or any part thereof, such "offender or offenders shall, on conviction thereof, suffer death. And "if any person shall steal the mail, or shall steal and take from or out "of the mail, or from or out of any post office, any letter or packet,

such

MAIL.

"such perſon ſhall, upon conviction for every ſuch offence, be fined "not exceeding three hundred dollars, or impriſoned, not exceeding "ſix months, or both, according to the circumſtances and aggra- "vations of the offence."

The precedents under title "Forgery" may be adopted here, with ſuch variations in the deſcription of the offence as will bring the caſe under the above recited law.

MAIMING.

BY *the laws of the United States* 1 *Cong.* 2 *ſeſſ. chap.* 9. *ſect.* 13. "If any perſon or perſons, within any of the places upon the land "under the ſole and excluſive juriſdiction of the United States, or "upon the high ſeas, in any veſſel belonging to the United States, "to any citizen or citizens thereof, on purpoſe and of malice afo- "thought, ſhall unlawfully cut off the ear or ears, or cut out or di- "able the tongue, put out an eye, ſlit the noſe, cut off the noſe or a "lip, or cut off or diſable any limb or member of any perſon, with "intention in ſo doing to maim or diſfigure ſuch perſon in any the "manners before mentioned, then and in every ſuch caſe the perſon "or perſons ſo offending, their counſellors, aiders and abettors "(knowing of and privy to the offence aforeſaid) ſhall on conviction "be impriſoned not exceeding ſeven years, and fined not exceeding "one thouſand dollars."

For precedents, ſee title "Forgery," obſerving to vary the deſcription of the offence.

MANSLAUGHTER.

BY *the laws of the United States*, 1 *Cong.* 2 *ſeſſ. chap.* 9 *ſect.* 7. "If any perſon or perſons ſhall within any fort, arſenal, dock yard, "magazine, or other place or diſtrict of country, under the ſole and "excluſive juriſdiction of the United States, commit the crime of "manſlaughter, and ſhall be thereof convicted, ſuch perſon or per- "ſons ſhall be impriſoned not exceeding three years, and fined not "exceeding one thouſand dollars."

For the diſinition of *manſlaughter*, ſee title "*Homicide*" in the body of this work.

For precedents, ſee title "Forgery" in this Appendix.

Mariners, ſee Seamen."

Miſpriſonment of felony, ſee "Murder."

MURDER

MURDER.

By *the laws of the United States, 1 Cong. 2 sess. chap. 9. sect. 8.* "If any person or persons shall, within any fort, arsenal, dock yard, magazine, or in any other place or district of country, under the sole and exclusive jurisdiction of the United States, commit the crime of wilful murder, such person or persons on being thereof convicted shall suffer death."

Sect. 3. "The court before whom any person shall be convicted of the crime of murder, for which he or she shall be sentenced to suffer death, may at their discretion, add to the judgment, that the body of such offender shall be delivered to a surgeon for dissection and the marshall who is to cause such sentence to be executed, shall accordingly deliver the body of such offender, after execution done, to such surgeon as the court shall direct, for the purpose aforesaid: *Provided*, that such surgeon or some other person by him appointed for the purpose, shall attend to receive and take away the dead body at the time of the execution of such offender."

Sect. 5. "If any person or persons shall, after such execution had, by force, rescue, or attempt to rescue the body of such offender out of the custody of the marshall or his officers, during the conveyance of such body to any place for dissection as aforesaid, or shall by force rescue or attempt to rescue such body from the house of any surgeon, where the same shall have been deposited, in pursuance of this act; every person so offending, shall be liable to a fine not exceeding one hundred dollars, and an imprisonment not exceeding twelve months."

Sect. 6. "If any person or persons having knowledge of the actual commission of the crime of wilful murder or other felony, upon the high seas, or within any fort, arsenal, dock yard, magazine, or other place or district of country, under the sole and exclusive jurisdiction of the United States, shall conceal, and not as soon as may be disclose and make known the same to some one of the judges, or other persons in civil or military authority under the United States, on conviction thereof, such person or persons shall be adjudged guilty of misprison of felony, and shall be imprisoned not exceeding three years, and fined not exceeding five hundred dollars."

For precedents, see title Forgery in this Appendix, observing to vary the description of the offence, so as to bring it under the above recited law.

For murder committed on the high seas, see title Piracy.

MUTE

MUTE.

BY *the laws of the United States*, 1 *Cong.* 2 *ſeſſ. chap.* 9. *ſect.* 20. "If any perſon or perſons be indicted of treaſon againſt the United States, and ſhall ſtand mute or refuſe to plead, or ſhall challenge peremptorily above the number of thirty five of the jury; or if any perſon or perſons be indicted of any other of the offences herein before ſet forth, (viz. thoſe enumerated in the above law of the United States) for which the puniſhment is declared to be death, if he or they ſhall alſo ſtand mute, or will not anſwer directly to the indictment, or challenge peremptorily above the number of twenty five perſons of the jury, the court in any of the caſes aforeſaid, ſhall notwithſtanding proceed to the trial of the perſon or perſons ſo ſtanding mute challenging, as if he or they had pleaded not guilty, and render judgment thereon accordingly."

PERJURY.

BY *the laws of the United States* 1 *Cong.* 2 *ſeſſ. chap.* 9. *ſect.* 18. "If any perſon ſhall wilfully and corruptly commit perjury, or ſhall by any means procure any perſon to commit corrupt and wilful perjury, on his or her oath or affirmation in any ſuit, controverſy, matter or cauſe depending in any of the courts of the United States, or in any depoſition taken purſuant to the laws of the United States, every perſon ſo offending, and being thereof convicted, ſhall be impriſoned not exceeding three years, and fined not exceeding eight hundred dollars, and ſhall ſtand in the pillory for one hour, and be thereafter rendered incapable of giving teſtimony in any of the courts of the United States, until ſuch time as the judgment ſo given againſt the ſaid offender ſhall be reverſed."

Sect. 19. "In every preſentment or indictment to be proſecuted againſt any perſon for wilful and corrupt perjury, it ſhall be ſufficient to ſet forth the ſubſtance of the offence charged upon the defendant, and by what court, or before whom the oath or affirmation was taken, (avering ſuch court, or perſon or perſons, to have a competent authority to adminiſter the ſame) together with the proper averment or averments to falſify the matter or matters wherein the perjury or perjuries is or are aſſigned; without ſetting forth the bill, anſwer, information, indictment, declaration, or any part of any record or proceeding, either in law or equity other than as aforeſaid, and without ſetting forth the commiſſion or authority of the court, or perſon or perſons before whom the perjury was committed."

Sect. 20. "In every preſentment or indictment for ſubordination of perjury, or for corrupt bargaining or contracting with others to commit wilful and corrupt perjury, it ſhall be ſufficient to ſet forth the ſubſtance of the offence charged upon the defendant, without ſetting forth the bill, anſwer, information, indictment, declaration or any part of any record or proceeding, either in law or equity, and without ſetting forth the commiſſion or authority of the court,

PERJURY.

" or perſon or perſons before whom the perjury was committed, or " was agreed or promiſed to be committed."

For precedents ſee thoſe under title "Forgery" in this Appendix, the formal parts of which will equally ſerve for other caſes.

PIRACY.

BY *the laws of the United States, 1 Cong. 2 ſeſſ. chap. 9. ſect. 8.* " If any perſon or perſons ſhall commit upon the high ſeas, or in any " river, haven, baſon or bay, out of the juriſdiction of any particular " ſtate, murder or robbery, or any other offence which if committed " within the body of a county, would by the laws of the United " States be puniſhable with death; or if any captain or mariner of " any ſhip or other veſſel, ſhall piratically and feloniouſly run away " with ſuch ſhip or veſſel, or any goods or merchandize to the value " of fifty dollars, or yield up ſuch ſhip or veſſel voluntarily to any " pirate; or if any ſeaman ſhall lay violent hands upon his comman- " der, thereby to hinder and prevent his fighting in defence of his " ſhip or goods committed to his truſt, or ſhall make a revolt in the " ſhip;—every ſuch offender ſhall be deemed, taken and adjudged to " be a pirate and felon, and being thereof convicted, ſhall ſuffer " death; and the trial of crimes committed on the high ſeas, or in any " place out of the juriſdiction of any particular ſtate, ſhall be in the " diſtrict where the offender is apprehended, or into which he may " firſt be brought.

Sect. 9. " If any citizen ſhall commit any piracy or robbery aforeſaid, or any act of hoſtility againſt the United States, or any citizen " thereof, upon the high ſeas, under colour of any commiſſion from " any foreign prince or ſtate, or on pretence of authority from any " perſon, ſuch offender, ſhall, notwithſtanding the pretence of any " ſuch authority, be deemed, adjudged, and taken to be a pirate, fe- " lon and robber, and on being thereof convicted, ſhall ſuffer death."

Sect. 10. " Every perſon who ſhall, either upon the land or the " ſeas, knowingly and wittingly aid and aſſiſt, procure command, " counſel or adviſe any perſon or perſons to do or commit any murder " or robbery, or other piracy as aforeſaid, upon the ſeas, which ſhall " affect the life of ſuch perſon, and ſuch perſon or perſons ſhall there- " upon do or commit any ſuch piracy or robbery, then all and every " ſuch perſon ſo as aforeſaid aiding, aſſiſting, procuring, command- " ing, counſelling or adviſing the ſame, either upon the land or the " ſea, ſhall be, and they are hereby declared, deemed, and adjudged " to be acceſſary to ſuch piracies before the fact, and every ſuch per- " ſon being thereof convicted ſhall ſuffer death."

Sect. 11. " After any murder, felony, robbery, or other piracy " whatſoever aforeſaid, is or ſhall be committed by any pirate or " robber, every perſon who knowing that ſuch pirate or robber has " done or committed any ſuch piracy or robbery, ſhall on the land " or at ſea receive, entertain or conceal any ſuch pirate or robber, or

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"receive or take into his cuſtody any ſhip, veſſel, goods or chattels, "which have been by any ſuch pirate or robber piratically and felo-"niouſly taken, ſhall be, and are hereby declared, deemed and ad-"judged to be acceſſary to ſuch piracy or robbery, after the fact; "and on conviction thereof, ſhall be impriſoned not exceeding three "years, and fined not exceeding five hundred dollars."

Sect. 12. "If any ſeaman or other perſon ſhall commit man-"ſlaughter upon the high ſeas, or confederate, or attempt or endea-"vour to corrupt any commander, maſter, officer or mariner, to yield "up or to run away with any ſhip or veſſel, or with any goods, wares "or merchandize, or to turn pirate, or to go over to or confederate "with pirates, or in any wiſe trade with any pirate knowing him to "be ſuch, or ſhall furniſh ſuch pirate with any ammunition, ſtores "or proviſions of any kind, or ſhall fit out any veſſel knowingly and "with a deſign to trade with or ſupply or correſpond with any pirate "or robber upon the ſeas; or if any perſon or perſons ſhall any way "conſult, combine, confederate or correſpond with any pirate or "robber on the ſeas, knowing him to be guilty of any ſuch piracy or "robbery; or if any ſeaman ſhall confine the maſter of any ſhip or "other veſſel, or endeavor to make a revolt in ſuch ſhip;—ſuch per-"ſon or perſons ſo offending; and being thereof convicted, ſhall be "impriſoned not exceeding three years, and fined not exceeding one "thouſand dollars."

For precedents, ſee title "Forgery" in this Appendix, deſcribing the offence ſo as to bring it under the above law.

PROCESS.

BY *the laws of the United States*, 1 *Cong.* 2 *ſeſſ. chap.* 9. *ſect.* 22. "If any perſon or perſons ſhall knowingly and wilfully obſtruct, re-"ſiſt or oppoſe any officer of the United States, in ſerving or attempt-"ing to ſerve or execute any meſne proceſs, or warrant, or any rule "or order of any of the courts of the United States, or any other le-"gal or judicial writ or proceſs whatſoever, or ſhall aſſault, beat or "wound any officer, or other perſon duly authoriſed, in ſerving or "executing any writ, rule, order, proceſs or warrant aforeſaid, every "perſon ſo knowingly and wilfully offending in the premiſes, ſhall, "on conviction thereof, be impriſoned not exceeding twelve months, "and fined not exceeding three hundred dollars."

Receivers of ſtolen Goods, ſee "Larceny."

RECORDS.

BY *the laws of the United States* 1 *Cong.* 2 *ſeſſ. chap.* 9. *ſect.* 15. "If any perſon ſhall feloniouſly ſteal, take away, alter, falſify, or "otherwiſe avoid any record, writ, proceſs, or other proceedings in

any

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"any of the courts of the United States, by means whereof any judgment shall be reversed, made void, or not take effect, or if any person shall acknowledge or procure to be acknowledged in any of the courts aforesaid, any recognizance, bail or judgment, in the name or names of any other person or persons not privy or consenting to the same, every such person or persons on conviction thereof, shall be fined not exceeding five thousand dollars, or be imprisoned not exceeding seven years, and whipped not exceeding thirty-nine stripes. *Provided*, That this act shall not extend to the acknowledgment of any judgment or judgments, by any attorney or attornies, duly admitted for any person or persons against whom any judgment or judgments shall be had or given."

RESCUE.

BY *the laws of the United States* 1 *Cong.* 2 *sess. chap.* 9. *sect.* 23. "If any person or persons, shall by force set at liberty, or rescue any person who shall be found guilty of treason, murder or any other capital crime, or rescue any person convicted of any of the said crimes, going to execution, or during execution, every person so offending, and being thereof convicted, shall suffer death: And if any shall by force set at liberty, or rescue any person who before conviction shall stand committed for any of the capital offences aforesaid; or if any person or persons shall by force set at liberty, or rescue any person committed for or convicted of any other offence against the United States, every person so offending, shall, on conviction, be fined not exceeding five hundred dollars, and imprisoned not exceeding one year."

For precedents of warrants, &c. see title "Forgery," of this appendix. In every instance observe to describe the offence as nearly as may be, in the words of the law itself.

Robbery, see "Piracy."

Robbing the Mail, see "Mail."

SEAMEN.

The act of Congress of July 20th, 1790, intitled "*An act for the government and regulation of seamen in the merchants service*," comprising a variety of subjects which fall within the jurisdiction of a Justice of the Peace, and being of considerable importance to merchants and others, engaged in maritime affairs, it is presumed that a recital of the whole act, will be acceptable to many into whose hands this book will fall.

Section

SEAMEN.

Section 1. BE *it enacted by the Senate and Houſe of Repreſentatives of the United States of America in Congreſs aſſembled,* "That from and after the firſt day of December next, every maſter "or commander of any ſhip or veſſel bound from a port in the United "States to any foreign port, or of any ſhip or veſſel of the burthen "of fifty tons or upwards, bound from a port in one ſtate to a port in "any other than an adjoining ſtate, ſhall, before he proceed on ſuch "voyage, make an agreement in writing, or in print, with every ſea- "man or mariner on board ſuch ſhip or veſſel (except ſuch as ſhall "be apprentice or ſervant to himſelf or owners) declaring the voyage "or voyages, term or terms of time, for which ſuch ſeamen or mari- "ner ſhall be ſhipped. And if any maſter or commander of ſuch ſhip "or veſſel ſhall carry out any ſeamen or mariner (except apprentices "or ſervants as aforeſaid) without ſuch contract or agreement being "firſt made and ſigned by the ſeamen and mariners, ſuch maſter or "commander ſhall pay to every ſuch ſeaman or mariner, the higheſt "price or wages, which ſhall have been given at the port or place "where ſuch ſeaman or mariner ſhall have been ſhipped, for a ſimilar "voyage, within three months next before the time of ſuch ſhipping; "*Provided* ſuch ſeaman or mariner ſhall perform ſuch voyage: or if "not, then for ſuch time as he ſhall continue to do duty on board ſuch "ſhip or veſſel; and ſhall moreover forfeit twenty dollars for every "ſuch ſeeman or mariner, one half to the uſe of the perſon proſecut- "ing for the ſame, the other half to the uſe of the United States: And "ſuch ſeaman or mariner, not having ſigned ſuch contract, ſhall not "be bound by the regulations, nor ſubject to the penalties and for- "feitures contained in this act.

Sect. 2. "At the foot of every ſuch contract, there ſhall be a memo- "randum in writing, of the day and the hour, on which ſuch ſeaman "or mariner, who ſhall ſo ſhip and ſubſcribe, ſhall render themſelves "on board to begin the voyage agreed upon. And if any ſuch ſea- "man or mariner ſhall neglect to render himſelf on board the ſhip "or veſſel, for which he has ſhipped, at the time mentioned in ſuch "memorandum, and if the maſter, commander, or other officer of the "ſhip or veſſel, ſhall, on the day on which ſuch neglect happened, "make an entry in the log book of ſuch ſhip or veſſel, of the name of "ſuch ſeaman or mariner, and ſhall in like manner note the time "that he ſo neglected to render himſelf (after the time appointed); "every ſuch ſeaman or mariner ſhall forfeit for every hour which he "ſhall ſo neglect to render himſelf, one day's pay according to the "rate of wages agreed upon, to be deducted out of his wages. And "if any ſuch ſeaman or mariner ſhall wholly neglect to render him- "ſelf on board of ſuch ſhip or veſſel, or having rendered himſelf on "board, ſhall afterwards deſert and eſcape, ſo that the ſhip or veſſel "proceed to ſea without him, every ſuch ſeaman or mariner ſhall for- "feit and pay to the maſter, owner or conſignee, of the ſaid ſhip or "veſſel, a ſum equal to that which ſhall have been paid to him by ad- "vance at the time of ſigning the contract, over and beſides the ſum "ſo advanced, both which ſums ſhall be recoverable in any court, or

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" before any justice or justices of any state, city, town or county with-
" in the United States, which by the laws thereof, have cognizance
" of debts of equal value, against such seaman or mariner, or his surety
" or sureties in case he shall have given surety to proceed the voyage.

Sect. 3. " If the mate or first officer under the master, and a majo-
" rity of the crew of any ship or vessel, bound on a voyage to any
" foreign port, shall, after the voyage is begun (and before the ship
" or vessel shall have left the land) discover that the said ship or vessel
" is too leaky, or is otherwise unfit in her crew, body, tackle, appa-
" rel, furniture, provisions or stores, to proceed on the intended
" voyage, and shall require such unfitness to be enquired into, the
" master or commander shall upon the request of the said mate (or
" other officer) and such majority, forthwith proceed to or stop at the
" nearest or most convenient port or place where such enquiry can be
" made, and shall there apply to the judge of the district court, if he
" shall there reside, or if not, to some justice of the peace of the city,
" town or place, taking with him two or more of the said crew who
" shall have made such request; and thereupon such judge or justice
" is hereby authorised and required to issue his precept directed to
" three persons in the neighbourhood the most skilful in maritime
" affairs that can be procured, requiring them to repair on board such
" ship or vessel, and to examine the same in respect to the defects and
" insufficiencies complained of, and to make report to him the said
" judge or justice, in writing under their hands, or the hands of two
" of them, whether in any, or in what respect the said ship or vessel is
" unfit to proceed on the intended voyage, and what addition of men,
" provisions or stores, or what repairs or alterations in the body,
" tackle or apparel will be necessary; and upon such report the said
" judge or justice shall adjudge and determine, and shall endorse on
" the said report his judgment, whether the said ship or vessel is fit to
" proceed on the intended voyage, and if not, whether such repairs
" can be made or deficiencies supplied where the ship or vessel then
" lays, or whether it be necessary for the said ship or vessel to return
" to the port from whence she first sailed, to be there refitted; and the
" master and crew shall in all things conform to the said judgment;
" and the master or commander shall, in the first instance pay all the
" costs of such view, report and judgment, to be taxed and allowed on
" a fair copy thereof certified by the said judge or justice, But if the
" complaint of the said crew shall appear upon the said report and
" judgment, to have been without foundation, then the said master, or
" the owner or consignee of such ship or vessel, shall deduct the amount
" thereof, and of reasonable damages for the detention (to be ascer-
" tained by the said judge or justice) out of the wages growing due
" to the complaining seamen or mariners. And if after such judg-
" ment, such ship or vessel is fit to proceed on her intended voyage,
" or after procuring such men, provisions, stores, repair, or alterati-
" ons as may be directed, the said seamen or mariners, or either of
" them, shall refuse to proceed on the voyage, it shall and may be law-
" ful for any justice of the peace to commit by warrant under his

hand

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" hand and seal, every such seamen or mariner (who shall so refuse) " to the common gaol of the county, there to remain without bail or " mainprize, until he shall have paid double the sum advanced to " him at the time of subscribing the contract for the voyage, together " with such reasonable costs as shall be allowed by the said justice, " and inserted in the said warrant, and the surety or sureties of such " seaman or mariner (in case he or they shall have given any) shall " remain liable for such payment; nor shall any such seaman or " mariner be discharged upon any writ of habeas corpus or otherwise " until such sum be paid by him or them, or his or their surety or " sureties, for want of any form of commitment, or other previous " proceedings: *Provided*, That sufficient matter shall be made to " appear, upon the return of such habeas corpus, and an examination " then to be had, to detain him for the causes herein before assigned.

Sect. 4 " If any person shall harbour or secrete any seaman or mariner belonging to any ship or vessel, knowing them to belong thereto, every such person, on conviction thereof before any court in the city, town or county where he, she or they may reside, shall forfeit and pay ten dollars for every day which he, she or they shall continue so to harbour or secrete such seaman or mariner, one half to the use of the person prosecuting for the same, the other half to the use of the United States; and no sum exceeding one dollar, shall be recoverable from any seaman or mariner by any one person, for any debt, contracted during the time such seaman or mariner shall actually belong to any ship or vessel, until the voyage for which such seaman or mariner engaged, shall be ended.

Sect. 5 " If any seaman or mariner, who shall have subscribed such contract as is hereinbefore described, shall absent himself from on board the ship or vessel in which he shall so have shipped, without leave of the master, or officer commanding on board; and the mate or other officer having charge of the log book, shall make an entry therein of the name of such seaman or mariner, on the day on which he shall so absent himself, and if such seaman or mariner shall return to his duty within forty eight hours, such seaman or mariner shall forfeit three days pay, for every day which he shall so absent himself, to be deducted out of his wages; but if any seaman or mariner shall absent himself for more than forty eight hours at one time, he shall forfeit all the wages due to him, and all his goods and chattels which were on board the said ship or vessel, or in any store where they may have been lodged at the time of his desertion, to the use of the owners of the ship or vessel, and moreover shall be liable to pay to him or them, all damages which he or they may sustain by being obliged to hire other seamen or mariners in his or their place, and such damages shall be recovered with costs in any court or before any justice or justices having jurisdiction of the recovery of debts to the value of ten dollars or upwards.

Sect. 6. Every seaman or mariner shall be entitled to demand and " receive from the master or commander of the ship or vessel to which

they

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"they belong, one third part of the wages which ſhall be due to him "at every port where ſuch ſhip or veſſel ſhall unlade and deliver her "cargo before the voyage be ended, unleſs the contrary be expreſsly "ſtipulated in the contract; and as ſoon as the voyage is ended, and "the cargo or ballaſt be fully diſcharged at the laſt port of delivery, "every ſeaman or mariner ſhall be entitled to the wages which ſhall "be then due, according to his contract; and if ſuch wages ſhall "not be paid within ten days after ſuch diſcharge, or if any diſpute "ſhall ariſe between the maſter and ſeamen or mariners touching the "ſaid wages, it ſhall be lawful for the judge of the diſtrict where the "ſaid ſhip or veſſel ſhall be, or in caſe his reſidence be more than three "miles from the place, or of his abſence from the place of his reſi- "dence, then, for any judge or juſtice of the peace, to ſummon the "maſter of ſuch ſhip or veſſel to appear before him, to ſhew cauſe why "proceſs ſhould not iſſue againſt ſuch ſhip or veſſel, her tackle, fur- "niture and apparel, according to the courſe of admiralty courts, to "anſwer for the ſaid wages; and if the maſter ſhall neglect to appear "or appearing ſhall not ſhew that the wages are paid, or otherwiſe "ſatisfied or forfeited, and if the matter in diſpute ſhall not be forth- "with ſettled, in ſuch caſe the judge or juſtice ſhall certify to the "clerk of the court of the diſtrict, that there is ſufficient cauſe of "complaint whereon to found admiralty proceſs, and thereupon the "clerk of ſuch court ſhall iſſue proceſs againſt the ſaid ſhip or veſſel, "and the ſuit ſhall be proceeded on in the ſaid court, and final judg- "ment be given according to the courſe of admiralty courts in ſuch "caſes uſed, and in ſuch ſuit all the ſeamen or mariners (having cauſe "of complaint of the like kind againſt the ſame ſhip or veſſel) ſhall "be joined as complainants, and it ſhall be incumbent on the maſter "or commander to produce the contract and log book, if required, to "aſcertain any matters in diſpute, otherwiſe the complainants ſhall "be permitted to ſtate the contents thereof, and the proof of the con- "trary ſhall lie on the maſter or commander: but nothing herein "contained ſhall prevent any ſeaman or mariner from having or main- "taining any action at common law for the recovery of his wages, "or from immediate proceſs out of any court having admiralty ju- "riſdiction, wherever any ſhip or veſſel may be found, in caſe ſhe "ſhall have left the port of delivery where her voyage ended before "payment of the wages, or in caſe ſhe ſhall be about to proceed to "ſea before the end of the ten days next after the delivery of her "cargo or ballaſt.

Sect. 7. "If any ſeaman or mariner, who ſhall have ſigned a con- "tract to perform a voyage, ſhall at any port or place, deſert or ſhall "abſent himſelf from ſuch ſhip or veſſel without leave of the maſter "or officer commanding in the abſence of the maſter, it ſhall be law- "ful for any juſtice of peace within the United States (upon the "complaint of the maſter) to iſſue his warrant to apprehend ſuch "deſerter, and bring him before ſuch juſtice; and if it ſhall then "appear by due proof, that he has ſigned a contract within the intent "and meaning of this act, and that the voyage agreed for is not

finiſhed

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"finiſhed, altered, or the contract otherwiſe diſſolved, and that ſuch "ſeaman or mariner has deſerted the ſhip or veſſel, or abſented him- "ſelf without leave, the ſaid juſtice ſhall commit him to the houſe of "correction or common gaol of the city, town or place, there to re- "main until the ſaid ſhip or veſſel ſhall be ready to proceed on her "voyage, or till the maſter ſhall require his diſcharge, and then to "be delivered to the ſaid maſter, he paying all the coſt of ſuch com- "mitment, and deducting the ſame out of the wages due to ſuch "ſeaman or mariner.

Sect. 8. "Every ſhip or veſſel belonging to a citizen or citizens of "the United States, of the burthen of one hundred and fifty tons or "upwards, navigated by ten or more perſons in the whole, and bound "on a voyage without the limits of the United States, ſhall be pro- "vided with a cheſt of medicines, put up by ſome apothecary of "known reputation, and accompanied by directions for adminiſter- "ing the ſame; and the ſaid medicines ſhall be examined by the ſame "or ſome other apothecary, once at leaſt in every year, and ſupplied "with freſh medicines in the place of ſuch as ſhall have been uſed or "ſpoiled; and in default of having ſuch medicine cheſt ſo provided, "and kept fit for uſe, the maſter or commander of ſuch ſhip or veſſel "ſhall provide and pay for all ſuch advice, medicine, or attendance "of phyſicians, as any of the crew ſhall ſtand in need of in caſe of "ſickneſs, at every port or place where the ſhip or veſſel may touch "or trade at during the voyage, without any deduction from the "wages of ſuch ſick ſeaman or mariner.

Sect. 9. "Every ſhip or veſſel belonging as aforeſaid, bound on a "voyage acroſs the Atlantic ocean, ſhall at the time of leaving the "laſt port from whence ſhe ſails, have on board, well ſecured under "deck, at leaſt ſixty gallons of water, one hundred pounds of ſalted "fleſh meat, and one hundred pounds of wholeſome ſhip-bread, for "every perſon on board ſuch ſhip or veſſel, over and beſides ſuch "other proviſions, ſtores and live ſtock as ſhall by the maſter or paſ- "ſengers be put on board, and in like proportion for ſhorter or longer "voyages; and in caſe the crew of any ſhip or veſſel which ſhall not "have been ſo provided, ſhall be put upon ſhort allowance in water, "fleſh or bread, during the voyage, the maſter or owner of ſuch ſhip "or veſſel ſhall pay to each of the crew, one day's wages beyond the "wages agreed on, for every day they ſhall be ſo put to ſhort allowance "to be recovered in the ſame manner as their ſtipulated wages."

(*a*) *Warrant againſt a ſeaman or mariner for neglecting to render himſelf on board a veſſel, or for deſerting after having ſigned a contract to perform a voyage;—on ſect.* 2.

State of ——, —— *to wit:*

WHEREAS A. C. commander of the —— [*deſcribe the veſſel by her kind and name, as ſhip, ſloop, &c.*] of ——, hath this day made complaint to me J. P. a juſtice of the peace for —— in the ſtate afore-

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ſaid, that B. S. who was bound by contract to perform a voyage in the ſaid (*ſhip —— or ſloop —— &c as the caſe may be*) from the port of —— to the port of ——, did altogether neglect to render himſelf on board the ſaid ſhip —— (*or other veſſel as the caſe may be*) [or having rendered himſelf on board the ſaid ſhip &c. did deſert therefrom ſo that the ſaid ſhip &c. did proceed to ſea without him:] Theſe are therefore to require you to ſummon the ſaid B. S. to appear before me at —— on the —— day of —— next, to ſhew cauſe why the ſaid B. S. ſhall not forfeit and pay to the maſter, (*owner or conſignee, as the caſe may be*) of the ſaid *ſhip* &c. a ſum equal to that which was paid by the ſaid A. C. to the ſaid B. S. at the time of ſigning the ſaid contract, over and beſides the ſum ſo advanced and paid. Given under my hand, &c

To —— to execute.

For the forms of judgments and executions, ſee title warrants, in the body of this work.

(b) Warrant to three perſons to view the condition of a veſſel bound to a foreign port, which is complained of as unfit for the voyage:— on ſect 3.

To A. N. B. N. and C. N.

State of ——, —— to wit:

WHEREAS A. M. commander of the ſhip ——, and B. S. and C. S. two of the crew of the ſaid ſhip now lying at —— and bound on a voyage to the port of —— did this day appear before me J. P. a juſtice of the peace for —— in the ſtate of ——, and gave me information that in the opinion of A. M. mate of the ſaid ſhip and a majority of the crew of the ſame, the ſaid ſhip is too leaky [*or if unfit in her crew, tackle &c. mention it.*] to proceed on her intended voyage, and hath alſo made application to me to have the ſame viewed, according to the directions of the act of the Congreſs of the United States in that caſe made and provided: Theſe are therefore to require you forthwith to repair on board the ſaid ſhip ——, and to examine the ſame in reſpect to the defects and inſufficiencies complained of, and to make report to me in writing under your hands, or the hands of two of you, whether in any and what reſpect the ſaid ſhip ——, is unfit to proceed on the intended voyage, and what addition of men, proviſions or ſtores, or what repairs or alterations in the body, tackle or apparel will be neceſſary. Given under my hand this — day of — in the year — and in the — year of the independence of the United States

(c) REPORT of the VIEWERS.

State of ——, —— to wit:

IN purſuance of a warrant to us directed by J. P. a juſtice of the peace

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peace for —— in the ſtate aforeſaid, we have this day repaired on board the ſhip —— now lying at —— and bound on a voyage to the port of ——, and having carefully examined into the ſeveral defects & inſufficiencies complained of by the mate and a majority of the crew of the ſaid ſhip ——, do report as follows, viz. [*here make the report ſpecially, and of ſuch things as are required in the magiſtrates warrant*]

On this report the magiſtrate is to endorſe his judgment, and of ſuch objects as are preſcribed by the above ſection.

The coſts and damages attending the view are to be taxed by the magiſtrate, on a fair copy of the proceedings.

(d) *Warrant to commit a ſeaman to priſon who refuſes to proceed on the intended voyage after the ſhip is fit for ſea.—on ſect* 3.

State of ——, —— *to wit:*

To the Keeper of the Jail for ——

WHEREAS A. M. commander of the ſhip —— now lying at ——, and bound on a voyage to the port of ——, did make application to me J. P. a juſtice of the peace for the county of —— to iſſue my warrant directed to three men in the neighbourhood the moſt ſkilful in maritime affairs that could be procured, in order to have the condition of the ſaid ſhip viewed, according to the act of the Congreſs of the United States, in that caſe made and provided, he the ſaid A. M. accompanyed by two of the crew of the ſaid ſhip, having given me information, that in the opinion of the mate and a majority of the crew of the ſaid ſhip, ſhe was unfit to proceed on her intended voyage; and whereas in conſequence of the ſaid application, I did accordingly iſſue my warrant directed to A. N. B. N. and C. N. requiring them to report to me the defects and inſufficiencies complained of in the ſaid ſhip, by the mate and a majority of the crew of the ſame; and it being my judgment upon the report of the ſaid A. N. B. N. and C. N. that the ſaid ſhip —— was fit to proceed on her intended voyage, I did endorſe ſuch judgment on the ſaid report, and direct the maſter and mariners of the ſaid ſhip, in all things to conform thereto; but A. S. B. S. &c. crew of the ſaid ſhip do altogether refuſe to proceed on the intended voyage: Theſe are therefore to require you to receive the bodies of the ſaid A. S. B. S. &c. into your jail and cuſtody, and them therein ſafely to keep without bail or mainprize until they ſhall have ſeverally paid to the ſaid A. M. double the ſum advanced to them reſpectively, at the time of ſigning the ſaid original contract for the aforeſaid intended voyage, to wit, until they ſhall pay the ſum of ——, alſo the ſum of ——, being the reaſonable coſts attending this warrant. Given under my hand and ſeal this —— day of —— in the year —— and in the —— year of the independence of the United States of America.

NOTE.—If the ſeamen are not already in cuſtody this laſt precept ſhould be preceded by a warrant to bring the accuſed party before a juſtice of the peace —— This warrant may eaſily be drawn by obſerving the formal parts of the laſt precedent.

(e) *Warrant*

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(e) Warrant againſt a Seaman for abſenting himſelf from on board a veſſel.

State of ——, —— *to wit:*

COMPLAINT being this day made to me J. P. a juſtice of the peace for —— in the ſtate of —— by A. M. maſter of the ſhip —— now lying at —— that B. S. one of the ſeamen of the ſaid ſhip, who had ſigned a contract for a voyage in the ſaid ſhip from the port of —— to the port of —— did abſent himſelf from on board the ſaid ſhip for the ſpace of ——, as appears by an entry in the log book of the ſaid ſhip. Theſe are therefore to require you to ſummon the ſaid B. S. to appear before me at —— on the —— day of —— next, to ſhew cauſe why he ſhould not forfeit and pay [*as the forfeiture depends on the length of time the ſeaman is abſent, the warrant muſt vary accordingly*] and moreover all ſuch damages as the ſaid A. M. ſhall have ſuſtained in conſequence of being obliged to hire other ſeamen in the place of the ſaid B. S. and do you then and there make return how you have executed this warrant. Given, &c.

To —— to execute.

JUDGMENT.

On hearing the matter of the within complaint it is conſidered, that the ſaid B. S. forfeit and pay unto the ſaid A. M. the ſum of —— [*according to the nature of the caſe*] as ſo the ſum of —— for damages and the further ſum of —— for the coſts of this warrant. J. P.

(f) Warrant for a Seaman's wages—on ſect. 6.

State of ——, —— *to wit:*

WHEREAS P. S. one of the ſeamen of the —— now lying at —— commanded by A. M. hath this day made complaint to me J. P. a juſtice of the peace for —— in the ſtate aforeſaid, (the reſidence of the judge of the diſtrict of the United States, being more than three miles from the place where the ſaid veſſel lies,) that the ſaid (veſſel) —— hath performed the voyage for which the ſaid B. S. contracted, and the cargo and ballaſt of the ſaid (veſſel) —— hath been fully diſcharged at the laſt port of delivery, more than ten days paſt, and that there is now due to the ſaid B. S. the ſum of —— for his wages in performing the ſaid voyage, agreeable to contract which the commander of the ſaid (veſſel) —— doth refuſe to pay: there are therefore to require you to ſummon the ſaid A. M. to appear before me, at —— on the —— day of &c. to ſhew cauſe why proceſs ſhould not iſſue againſt the ſaid (veſſel) her tackle, furniture and apparel, according to the courſe of admiralty-courts, to anſwer for the ſaid wages; and then and there to make return how you have executed this precept. Given under my hand, at —— &c.

To —— to execute.

NOTE

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NOTE—If the application is for one third of the wages, to which the ſeamen are entitled on their touching at a port and delivering the veſſel's cargo, before the voyage is ended, the ſame proceedings are to be had as in the laſt caſe—The above warrant may alſo be adopted with ſuch variations as will ſuit the caſe.

(g) *Certificate of the Magiſtrate.*

I J P. a juſtice of the peace for —— in the ſtate of ——, do hereby certify that on the application of B. S. one of the ſeamen of the ſhip, (ſloop &c) —— of —— commanded by A. M. now lying at ——, for wages due from the ſaid commander to the ſaid B S. I iſſued my warrant requiring the ſaid A. M. to appear before me, and ſhew cauſe why proceſs, according to the courſe of admiralty courts ſhould not iſſue againſt the ſhip (ſloop &c) —— her tackle, furniture and apparel, to anſwer for the ſaid wages; but the ſaid A M failing to appear [*or appearing*, failing to ſhew that the wages are paid, or otherwiſe ſatisfied or forfeited,] it is therefore my opinion that there is ſufficient cauſe of complaint whereon to found admiralty proceſs. Certified this —— day of —— in the year —— and in the —— year of the independence of the United States of America.

To A C Clerk of the Court of the United States for the diſtrict of ——

(h) *Warrant to apprehend a ſeaman abſenting himſelf from his veſſel.*

State of ——, —— to wit:

COMPLAINT this day being made to me J P a juſtice of the peace for ——, by A M maſter of the ſhip —— now lying at the port of ——, that B S one of the ſeamen belonging to the ſaid ſhip ——, who is bound by contract in writing to perform a voyage in the ſaid ſhip, hath deſerted from the ſaid ſhip, without the leave of the ſaid A M: theſe are therefore to require you to apprehend the ſaid B S and to bring him before me at —— on the —— day &c. to anſwer the premiſes and to be dealt with according to law; and do you then and there make return how you have executed this warrant. Given &c.

To —— to execute.

(i) *Commitment of a ſeaman who had deſerted.*

State of ——, —— to wit:

To the Keeper of the Gaol of ——

WHEREAS B S one of the ſeamen belonging to the ſhip (ſloop &c.) —— of —— commanded by A M, hath been arreſted by my warrant, and brought before me for deſerting from the ſaid ſhip, with

out

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out the leave of the ſaid A M; and it appearing to me from due proof that the ſaid B. S. hath ſigned a contract for performing a voyage, in the ſaid ſhip within the intent and meaning of the act of the congreſs of the United States, entitled, "An act for the government and regulation of ſeamen in the merchants ſervice," and that the voyage agreed for is not finiſhed, altered, or the contract otherwiſe diſſolved, and that the ſaid B. S. hath deſerted from the ſaid ſhip (ſloop, &c.) —— without the leave of the owner thereof: theſe are therefore to require you to receive the body of the ſaid B. S. into your gaol and cuſtody, and him therein ſafely to keep, until the ſaid ſhip —— ſhall be ready to proceed on her voyage, or until the ſaid A M ſhall require his diſcharge, and until the ſaid A M ſhall pay the coſts of this commitment. Given under my hand and ſeal this —— day of —— in the year —— and in the —— year of the independence of the United States of America.

SPIRITS.

BY *the laws of the United States, 1 Cong. 3 ſeſſ. chap. 15. ſect* 32. "In caſe any ſpirits ſhall be fraudulently depoſited, hid or concealed "in any place whatſoever, with intent to evade the duties thereby "impoſed upon them, they ſhall be forfeited. And for the better "diſcovery of any ſuch ſpirits ſo fraudulently depoſited, hid or con"cealed, it ſhall be lawful for any judge of any court of the United "States, or either of them, or for any juſtice of the peace, upon rea"ſonable cauſe of ſuſpicion, to be made out to the ſatisfaction of "ſuch judge or juſtice, by the oath or affirmation of any perſon or "perſons, by ſpecial warrant or warrants under their reſpective "hands and ſeals, to authoriſe any of the officers of inſpection, by "day, in preſence of a conſtable or other officer of the peace, to enter "into all and every ſuch place or places in which any of the ſaid ſpi"rits ſhall be ſuſpected to be ſo fraudulently depoſited, hid or con"cealed, and to ſeize and convey away any of the ſaid ſpirits which "ſhall be there found ſo fraudulently depoſited, hid or concealed, as "aforeſaid."

Warrant of a Magiſtrate to ſearch for concealed Spirits.

State of ——, —— *County, to wit*:

WHEREAS I have reaſonable cauſe to ſuſpect, from the oath of —— of &c. that certain ſpirits are concealed in the houſe of —— of &c. with intent to evade the duties impoſed upon them by the laws of the United States: Theſe are therefore to authoriſe *A. S.* an officer of inſpection of &c. [*here mention the juriſd. &c. of the officer*] by day and in the preſence of a conſtable or other peace officer, to enter in the ſaid houſe of the ſaid —— of &c. and to ſeize and carry away any of the ſaid ſpirits which ſhall be there found ſo fraudulently concealed

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cealed, that the ſame may be proceeded with as directed by the laws of the United States in that caſe made and provided. Given under my hand and ſeal, this —— day of —— in the year —— and in the —— year of the independence of the United States of America.

TREASON.

BY *the laws of the United States*, 1 *Cong.* 1 *ſeſſ. chap.* 9. *ſect.* 1. "If any perſon or perſons owing allegiance to the United States of "America, ſhall levy war againſt them, or ſhall adhere to their ene- "mies, giving them aid and comfort within the United States or "elſewhere, and ſhall be thereof convicted, on confeſſion in open "court, or on the teſtimony of two witneſſes to the ſame overt act of "the treaſon whereof he or they ſhall ſtand indicted, ſuch perſon or "perſons ſhall be adjudged guilty of treaſon againſt the United States "and ſhall ſuffer death."

Sect. 2. "If any perſon or perſons, having knowledge of the "commiſſion of any of the treaſons aforeſaid, ſhall conceal and not "ſo ſoon as may be, make known the ſame to the Preſident of the "United States, or ſome one of the judges thereof, or to the Preſi- "dent or Governor of a particular ſtate, or ſome one of the judges "or juſtices thereof, ſuch perſon or perſons on conviction ſhall be "guilty of miſpriſion of treaſon, and ſhall be impriſoned not exceed- "ing ſeven years, and fined not exceeding one thouſand dollars."

By the above recited law, ſect. 28. "Any perſon who ſhall be "accuſed and indicted of treaſon, ſhall have a copy of the indict- "ment, and a liſt of the jury and witneſſes to be produced on the trial "for proving the ſaid indictment, mentioning the names and places "of abode of ſuch witneſſes and jurors, delivered unto him at leaſt "three entire days before he ſhall be tried for the ſame; and in other "capital offences, ſhall have ſuch copy of the indictment and liſt of "the jury two entire days at leaſt before the trial: And every perſon "ſo accuſed and indicted for any of the crimes aforeſaid, ſhall be "allowed and admitted to make his full defence by counſel learned "in the law, and the court before whom ſuch perſon ſhall be tried, "or ſome judge thereof, ſhall, and they are hereby authoriſed and "required immediately upon his requeſt to aſſign to ſuch perſon ſuch "counſel, not exceeding two, as ſuch perſon ſhall deſire, to whom "ſuch counſel ſhall have free acceſs at all reaſonable hours; and every "ſuch perſon or perſons accuſed or indicted, of the crimes aforeſaid, "ſhall be allowed and admitted in his ſaid defence to make any "proof that he or they can produce, by lawful witneſs or witneſſes, "and ſhall have the like proceſs of the court where he or they ſhall "be tried, to compel his or their witneſſes to appear at his or their "trial, as is uſually granted to compel witneſſes to appear on the "proſecution againſt them."

The precedents under title "*Forgery*" in this Appendix may be adopted here, with ſuch variations as will expreſs the crime of *Treaſon*.

The

THE following points reſpecting criminal proſecutions under the laws of the United States, not falling under any particular head, were reſerved for the concluſion of this Appendix.

BY the laws of the United States 1 *Cong.* 2 *ſeſſ. chap.* 2. *ſect.* 31. "No perſon or perſons ſhall be proſecuted, tried or puniſhed for treaſon or other capital offence, wilful murder or forgery excepted, unleſs the indictment for the ſame ſhall be found by the grand jury within three years next after the treaſon or capital offence aforeſaid ſhall be done or committed; nor ſhall any perſon be proſecuted, tried or puniſhed for any offence not capital, nor for any fine or forfeiture under any penal ſtatute, unleſs the indictment or information for the ſame ſhall be found or inſtituted within two years from the time of committing the offence, or incurring the fine or forfeiture aforeſaid: *Provided*, That nothing herein contained ſhall extend to any perſon or perſons fleeing from juſtice."

Sect 32. "The manner of inflicting the puniſhment of death, ſhall be by hanging the perſon convicted, by the neck, until dead.

Sect. 24. "No conviction or judgment for any of the offences aforeſaid, ſhall work corruption of blood, or any forfeiture of eſtate."