

*Historia Placitorum Coronæ.*

THE  
HISTORY  
OF THE

PLEAS OF THE CROWN.

BY SIR MATTHEW HALE,

LORD CHIEF JUSTICE OF THE COURT OF KING'S BENCH.

PUBLISHED FROM THE ORIGINAL MANUSCRIPTS

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WITH

ADDITIONAL NOTES AND REFERENCES TO MODERN CASES CONCERNING THE PLEAS OF THE CROWN.

By GEORGE WILSON, SERJEANT AT LAW.

A NEW EDITION.

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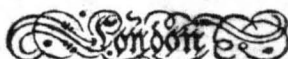
AN ARRANGEMENT OF THE STATUTES RELATING TO FELONIES  
CONTINUED TO THE PRESENT TIME, WITH NOTES  
AND REFERENCES,

By THOMAS DOGHERTY, Esq.

OF CLIFFORD'S-INN.

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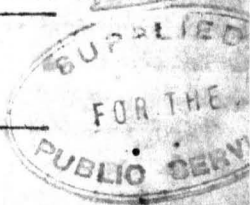
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# HISTORIA PLACITORUM CORONÆ.



## PART II.

### CHAP. I.



*Touching the king's bench.*

HAVING gone through the several kinds of capital offenses, I should now, according to my first proposed method, proceed to the enumerating and considering of offenses that are not capital; but I shall reserve that for the third part of this tractate.

1. Because the subject thereof is very large, numerous and various, and would exhaust too much of that time I have or can spend from other employments.

2. Because the method, order and rules of proceeding in capital causes, is different from any other course of proceeding in other criminal causes, and hath an appropriate method of proceeding by law consigned to it, and therefore they are fittest to be handled together.

And in this business I shall proceed in things as they arise in the order of proceeding in capital causes: *First*, I shall take a very brief account of the courts and jurisdictions wherein [2] they are to be decided; and this I shall not do at large, but so far forth only as it relates to proceedings in capital causes: and when I have briefly passed over that, then, *secondly*, I shall proceed with the whole tract of proceeding in criminal causes, from the first pursuit of the offender to his execution; as, namely, arrest, process, out-

lawry, arraignment, pleading, challenge, trial, clergy, sanctuary, judgment, reprieve, execution, &c. in the very same order as a course of proceeding in capital causes lies.

I. I begin with the jurisdictions, wherein causes of this nature are handled.

And altho the court of parliament is the highest court in this kingdom, and a court wherein proceedings capital have been often heard and determined, yet I shall decline that business, 1. Because the course of proceeding in parliament is in a different method and order, than what is used in other ordinary courts. 2. Because the instances are many and various, and will take up a volume to give an account of them. 3. Because I have elsewhere gathered up some observations of that kind already.

The highest ordinary court of justice next to the court of parliament. is the court of king's bench; I shall not at large pursue the jurisdiction of this court, for it hath been done to my hands amply already (a).

But I shall only consider it with relation to capital proceedings, namely, treasons and felonies, and that very briefly; and therein, 1. Concerning the jurisdiction of the court in this particular. 2 Concerning the power of the judges of this court out of court, in relation to matters of crime or misdemeanor.

The court of king's bench consists of two kinds of jurisdictions, viz. the civil jurisdiction or the plea-side, and the criminal jurisdiction or the crown-side.

Till the time of Edward II. the matters of both kinds were entered promiscuously in the rolls; but then the rolls were discriminated, and those of the crown-side, entitled *Rex*, tho both were filed up together in the same bundles.

And thus it continued very long, but of later times the records of the pleas are bound up by themselves, and the records of the pleas of the crown bound up by themselves, and kept in the crown-office, under the immediate custody of the coroner of the king's bench, who is also the king's attorney in that court, and clerk of the crown.

In cases criminal, the court of king's bench have a different kind of proceeding touching offenses arising in the same county where they fit, and offenses in other counties, and removed before them by *Certiorari*.

(a) By lord Coke, 4 *Instit. Reg.* 7.

In the county where the court sits, there is every term a grand inquest, who are to present all matters criminal arising within that county, and then the same court proceeds upon indictment so taken; or if in the vacation-time there be any indictment of felony before the justices of the peace, *oyer and terminer*, or gaol-delivery there sitting, it may be removed by *Certiorari* into the king's bench, and they may proceed *de die in diem*, and there need not be fifteen days between the *Teste* and return of the *Venire facias*, because the offense ariseth in the same county.

But if an indictment of felony be removed out of another county than where the king's bench sits, and the prisoner comes in either *gratis*, or by *Habéas Corpus*, or process, there must be fifteen days between the *Teste* and the return of the *Venire facias*. 9 Co. Rep. 118. *b.* lord Sanchar's case.

At common law, if a record of an indictment, or other thing come into the court before the filing thereof, the court may remand it; for 'till it be filed it is no record of the court; but if it be once filed, it is not to be remanded.

But if the issue be joined, the transcript may be sent down to be tried by *Nisi prius*; but the original record remains in the king's bench. 5 Martine, B. Coron. 231.

But by the statute of 6 H. 8. cap. 6. in cases of indictments of murder, or other felony removed into that court, the court may remand the indictments, and the bodies of the prisoners to the justices of the peace, gaol-delivery, and other justices, where the felony was committed, commanding them to proceed there- [ 4 ] upon, as if the prisoner or indictment had never been removed.

The court of king's bench is in the county where it sits, a court in *eye* and more, 27 Affiz. 1. and also the sovereign court of gaol-delivery and *oyer and terminer*. 9 Co. Rep. 118. *a.* lord Sanchar's case.

And therefore when the court of king's bench comes into any county, there can be no session of the commission of gaol-delivery, or *oyer and terminer*, or peace during the term-time, while the court sits: it doth not determine the commission, but suspends their session during the term; for in the vacation-time, they may proceed again upon their former commission, and so it is not like a new commission, which after publication supercedes the former, *de quo infra*, lord Sanchar's case, *ubi supra*.

But if an indictment be found before commissioners of *oyer and terminer* in the vacation-time in the county where the king's bench sits, or in any other county in term or vacation, there may issue a special commission to determine that indictment, with a writ to the former commissioners to deliver it to the new commissioners; and these special commissioners may sit in the term-time in the county where the king's bench sits; but then the king's bench must adjourn during that session of this special commission: ruled in Sir *Walter Raleigh's* case, *M. 1 Jac. Co. P. C. cap. 2. p. 27. Dyer 286. b. Plowd. Com. 390.* earl of *Leicester's* case, wherein is the whole order of such commission. *4 Co. Instit. p. 73.*

The court of king's bench is the sovereign court of *oyer and terminer*, therefore tho some acts limit proceedings in some criminal causes to the justices of *oyer and terminer*, yet the king's bench may proceed upon them; but justices of peace cannot, as upon *5 Eliz. cap. 14.* for forgery, *8 H. 6. cap. 12.* stealing records, &c.

If a person attainted in the country be removed by *Habeas Corpus*, and the record removed also by *Certiorari*, this court may award execution. *M. 5 Car. 1. B. R. Cox's* case (*b*).

[ 5 ] This court is also the sovereign coroner of *England*, and therefore may take appeals of death, &c. by bill. *4 Co. Instit. p. 73.*

Where judgment of death is given in the king's bench, the execution is to be made by the marshal of the court; for the prisoner is supposed to be in *custodiâ marescalli*; and the entry is always, *Et præceptum est marescallo, &c. quòd faciat executionem periculo incumbente; quod vide Co. Entries* in title *Indictment, per totum*; but there may be a mandate to the sheriff of the county wherein execution is to be made, to be assisting; and thus it was done in *H. 24 Car. 2.* in the case of *Brown*, who had judgment of death in the king's bench for a felony committed in *Middlesex*, and executed by the marshal in *Surrey*, because the prison was there; but he might have done it in *Middlesex*, for he is a minister of the king's bench in each county; and so it might be, tho the felony had been done in any foreign county removed by *Certiorari* (*c*).

By the statute of *33 H. 8. cap. 12.* felonies, &c. within the king's palace are made triable before the lord steward, and a special order

(*b*) *Cro. Car. 176.*

(*c*) Thus it was done in *Althoe's* case

before mentiond, *Part I. p. 464.*



of trial directed by that statute, namely, by the king's servants in his chequer-roll; yet for a felony within the king's palace, if the king's bench be sitting in the same county, the proceeding may be in the king's bench; for the statute of 33 H. 8. being in the affirmative is not exclusive of the king's bench for felonies that were before that, 10 Co. Rep. 73. b. But indeed where a felony is *de novo* created, and with it a new special form of proceeding, as by the statute of 3 H. 7. cap. 14. for conspiring the death of the king, &c. it is not triable in the king's bench, nor in any other form than is limited by that act. M. 20 Jac. B. R. *Castle's case* (d).

Now concerning the justices of the king's bench.

They are in their persons conservators of the peace throughout England without any other commission; and any of them may issue out their warrants for apprehending of a malefactor, or for surety of the peace in any county of England, namely, to [ 6 ] apprehend and bring him before a justice of peace in the county where he is apprehended; and this warrant is directed under their hand and seal to sheriffs, constables, and other officers. Each judge of that court hath a tipstaff attending him, being a deputy to the marshal for the execution of his office in that special service; and the chief justice, or any one of the other judges of that court, may by the custom of that court, *ore tenus*, command the tipstaff to apprehend any person for matters of misdemeanors relating to the court, or other misdemeanors, and bring him before him, and such arrest is justifiable without any other warrant, and without shewing the cause. T. 11 Car. B. R. 2 Rol. Abr. p. 558. *Throgmorton and Allen*.

The chief justice of the king's bench is not that *Justiciarius Angliæ* which was antiently in use; for that *Justiciarius Angliæ* had, in effect, all the jurisdiction both civil and criminal, that is in the king's bench, chancery, common pleas, and exchequer, and might and did sit in any of those courts as the chief judge of them, as appears by many evident instances.

But the chief justice of the king's bench hath in the court of king's bench, as one of the judges thereof, that part of the jurisdiction of the *Justiciarius Angliæ*, which concerns criminal causes, and the inspection and reformation of the judgments of other courts.

It is true he is frequently called chief justice of England, because he presides in that court where the *Justiciarius Angliæ* did most fre-

(d) Cro. Jac. 463.



quently and naturally fit as the king's deputy in administration of justice; but it is a misconception that therefore he is *that Magnus Justiciarius Angliæ*, which was in use before the time of Henry III.

He is created by writ, and always was; but the *Justiciarius Angliæ* by patent.

3 Blackf. Com. ch. 4. p. 41. 4 Blackf. Com. ch. 19. p. 265. 2 Hawk. P. C. ch. 3.

## [ 7 ]

## C H A P. II.

*Concerning the courts before the lord high steward, and the steward of his majesty's household.*

**T**OUCHING the *former* of these, it is instituted for the trial of peers of the realm: more cannot be said touching it, than is already said by my lord Coke, 4 *Inst. cap. 4. Co. P. C. cap. 2. p. 28. & sequentibus*, and because it doth not concern the usual and common proceedings against common persons, I shall dismiss it.

Touching the *second*, namely, the proceeding before the lord steward of the household, &c. for treasons, and murder, and manslaughter, and larciny done within the king's palace.

This court is established, and the method of proceeding therein punctually delivered by the statute of 33 *H. 8. cap. 12.* which will not need much explanation, only these things are considerable therein.

1. As to their power of hearing and determining treasons in that court, it seems to be wholly abrogated and repealed by the statute of 1 & 2 *P. & M. cap. 10.*

2. Whereas by that act, clergy is taken away in cases of manslaughter, felonious stealing of goods in the king's house of the value of twelve-pence; it seems to me clergy is restored in these cases by the act of 1 *E. 6. cap. 12.* tho the party be convicted according to the statute of 33 *H. 8.*

3. Whereas breaking of the king's house with intent to steal, is made felony by that statute without benefit of clergy, *that* breaking of the king's house is become no felony by the statute of 1 *E. 6. cap. 12.* and 1 *Mar. cap. 1.* tho he be arraigned before the steward of the *Marshalsea* according to that act.

4. The

4. The offense of felonious stealing of the king's goods of the value of twelve-pence, or breaking the king's house to steal the goods, is limited by that act to be tried before the steward of the *Marshalsea*, and others associated to him by the statute, but not before the lord steward, or treasurer, or comptroller of the household, as manslaughter or murder is directed to be tried or determined by that statute, nor by the king's servants.

5. It seems to me, that by the direction of that act the proceeding of the lord steward, or steward of the *Marshalsea*, is to be by a session within the king's house or palace where the felony is committed; and that statute limits the precinct of the king's palace for that purpose, *viz. within any edifices, places, courts, gardens, orchards, privy-walks, tilt-yards, wood yards, tennis-plays, cock-fights, bowling alleys, near adjoining to any of the houses aforesaid, and being part of the same, or within 200 foot of the standard of any outward gate, or gates of any of the houses above rehearsed, commonly used for any passage out of, or from any of the houses above rehearsed.*

And therefore if it is considerable, whether as to this purpose, *viz.* for trial of felonies within the king's palace, the extent of the king's palace of *Whitehall* limited, or rather extended by the act of 28 H. 8. cap. 12. be not restrained; for by that statute that new palace of *Whitehall*, the old palace of *Westminster*, *St. James's park*, and the street leading from *Charing-Cross* to the sanctuary-gate of *Westminster*, and all the houses and buildings on both sides of the street from the *Cross* to *Westminster-hall*, and between the water of *Thames* on the east and the park-wall on the west, and all the soil of the old palace are made parcel of the new palace.

Upon this doubt I did advise, that the lord steward upon a late occasion upon this act should not sit in *Westminster-hall*, but in *White-hall*, according to the restriction of the statute of 33 H. 8. which was after the statute of 28 H. 8. and seems as to this purpose to restrain it; but this advice was not followed, for he sat in *Westminster-hall*.

Altho this act erects a new kind of jurisdiction, and that without any commission, yet it being an act in the affirmative, it doth not exclude the jurisdiction of the king's bench, nor of commissioners of *oyer and terminer* to hear and determine these offenses, tho committed in the king's palace, especially that commission

of *oyer* and *terminer*, which hath been usually granted to determine felonies and treasons within the verge, and particularly within the king's palaces; and therefore, tho this act of 33 *H. 8. cap. 12.* hath been long since made, and is a commission of itself to the lord steward, and in his absence to the treasurer and comptroller of the household, yet till this year I never knew nor heard of any session upon this statute: but the whole business of this nature was transacted in the king's bench, or by *that* antient and special commission of *oyer* and *terminer* for offenses within the verge, which commonly also had in it a commission of gaol-delivery, and was usually directed to the lord steward, lord chancellor, treasurer, justices, &c. whereof we may see the precedent, 4 *Co. Rep. Holcroft's case (a)*, the record whereof is at large, *New Entries, fol. 54. (b)* in an appeal, where it appears by the indictment, that the manslaughter was committed *infra hospitium domini regis de Hampton-Court*, yet the inquisition was found by the coroner, and the party tried before the commissioners of *oyer* and *terminer* and gaol-delivery for the verge, and not before the lord steward, by force of the act of 33 *H. 8.* and adjudged good.

And there it is also resolved 4 *Co. Rep. Wrot's case (c)* and *Swift's case (d)*, that as the commissioners of gaol-delivery and *oyer* and *terminer* for the verge, have power to hear and determine felonies done in the king's palace, so the king's bench or general commissioners of *oyer* and *terminer* or gaol-delivery, and justices of peace for the county, have power to hear and determine any felony committed within the verge, so that they have all a concurrent jurisdiction, namely, the

[ 10 ] lord steward, commissioners of *oyer* and *terminer* and gaol-delivery for the verge, commissioners of *oyer* and *terminer*, gaol-delivery and peace for the county at large, tho the offense were committed in the king's palace.

(a) 4 *Co. 45. b.* (b) This is *Co. Entries. 53. b.* (c) 4 *Co. 46. b.* (d) *Ibid.*

4 *Blackf. Com. ch. 19. p. 261. 276.* 2 *Hawk. P. C. 5. 7.*

## CHAP. III.

*Touching special commissions of oyer and terminer, and their kinds and power.*

COMMISSIONS of *oyer and terminer* are of two kinds, special, or general for a whole county.

Special commissions are of several kinds. 1. Commissions of *oyer and terminer* for the verge. 2. For crimes done upon the sea by the statute of 28 *H. 8. cap. 15.* 3. Commissions for particular places, that are not counties. 4. Commissions to hear and determine particular facts. 5. Commissions to hear or enquire, and not determine. 6. Commissions to determine, and not enquire.

1. Touching commissions of *oyer and terminer* for the verge, *viz.* within twelve miles of the king's court, somewhat hath been before said; I shall add farther,

1. That by virtue of that commission they have power to inquire and determine felonies and murders done within the king's house. 2. And these they are to proceed upon, not according to the direction given to the lord steward, *viz.* by the king's yeomen officers, tho there is a grand inquest of them also; but by the good men of the county, wherein the offense was committed, whether it be committed in the palace, or elsewhere within the verge. 3. Tho the commission extend into several counties; namely, any that are within twelve miles of the tenet of the king's hall, yet they are to hold their sessions in any county within the verge, and a precept issues to the knight marshal to impanel a grand inquest out of every county within the verge, of the men of those counties to appear where they sit, and there to inquire and try the offenses committed in that county. 4. That they can only proceed upon indictments taken before themselves, and therefore cannot proceed upon a coroner's inquest; and to remedy that inconvenience, they have always, or at least should have in the same commission, a commission of gaol-delivery; and by virtue of that part of their commission they may proceed upon the coroner's inquest; *vide Co. Entries* 34. in *Holcroft's* case. 5. It seems to me, that if a special commission for the verge issue, which possibly may extend to *Middlesex, Surry, and Hertford*, if a general commission of *oyer and terminer* in the county of *Middlesex* issue after

after *that*, with notice to the commissioners for the verge, it determines their commission of *oyer* and *terminer* as to *Middlesex*, but not as to the other counties; and so for a general commission of gaol-delivery; for this is not aided by the statute of 2 & 3 P. & M. cap. 18. for that preserves only the commissions granted to cities and boroughs. 6. And *converso*, if a general commission of *oyer* and *terminer*, or gaol delivery for the county issue, and then afterwards a like commission issue for the verge, notice thereof, or session by the commission for the verge determines the general commission as to so much of the county, as is within the precinct of the verge; see the whole procedure, *Coke's Entries* p. 54, 55.

Tho commissions for the verge have often issued, I do not remember any session since about 8 Car. 1. for the businesses that fall within their cognizance, are as well and effectually dispatched in the king's bench, or by general commission of gaol-delivery, and *oyer* and *terminer* in the several counties at large; *quod vide* 10 Co. Rep. 73. b. the case of the *Marshalsea*, 4 Co. Rep. *Wroth* and *Wigg's* case, and *Holcroft's* case there cited; only indeed the coroner of the verge is a necessary officer; *de quo postea*.

But the original power of the steward and marshal touching felonies within the verge, tho I know nothing that hath expressly [ 12 ] taken it away, yet by *disuser* is in effect vanished, and that jurisdiction is wholly exercised by this special commission of *oyer* and *terminer*, or in the king's bench, or general justices of *oyer* and *terminer* or gaol-delivery at large, who have jurisdiction of such felonies, tho committed within the verge; *vide Coke super statut. Articuli super Cartas*, cap. 3 & 10 Co. Rep. *le case de Marshalsea*.

II. The second kind of special commission of *oyer* and *terminer*, is, that which is founded upon the statute of 28 H. 8. cap. 15. for offenses upon the sea, or in great rivers below the bridges.

I shall not enter into a large description of the admiral's jurisdiction, but only set down briefly some observations in relation to capital offenses, because I have elsewhere more at large examined it.

As to criminal causes, that are capital, as treasons, felonies, &c. there is a threefold jurisdiction relative to the admiral and court of admiralty.

1. Its primitive and original jurisdiction, and this was of treasons, felonies, or piracies done upon the high sea, which was sometimes held before the admiral, or his lieutenant as such without relation to any



any other commission; and sometimes by special commission under the great seal, even whether there was an admiral in being or not.

The rule of their proceeding was *secundum legem maritimam*, their trial by proofs; and therefore, though they did proceed oftentimes to sentence of death, and executed it, yet in as much as the proceeding was according to the course of the civil and marine laws, and not according to the common law, it worked no corruption of blood.

Tho their jurisdiction was of things done upon the high sea, yet they might hold their session in any place upon land.

And altho at this day it is commonly received, that the courts of the common law have no jurisdiction of felonies committed upon the high sea, yet most certainly the king's bench had usually cognizance of felonies and treasons done upon the narrow seas, tho out of the bodies of counties, and it was presented and tried by men of the adjacent counties. *T. 18 E. 2. Rot. 18. Rex. Glouc. [13] & Somers'. M. 26 E. 3. Rot. 51. Norfolk. T. 34 E. 1. coram Rege. Rot. 34. Norfolk. T. 8 E. 2. ibidem Rot. 111. M. 18 E. 2. Rot. 15. M. 19 E. 2. Rot. 17. Rex. T. 25 E. 3. Rot. 22. Linc. M. 27 E. 3. Rot. 29. Rex. (a). 8 E. 2. Coron. 399. 40 Affix. 25.* So that the

COURT

(a) The cases referred to here by lord Hale, as proofs of the ancient jurisdiction of the king's bench in offenses done upon the seas, were as follow:

*Trin. 18 E. 2. Rot. 18 Rex.* Several persons of *Bristol* had been indicted before the admiral of the king's flota, "per inquisitionem de mandato regis inde factam, per sacramentum marinariorum, quod vi & armis, & felonice deprædati fuerunt navem de *Placentiâ* in alto mari, inter *Le Ras sancti Martini, & Odyern*, de bonis & mercimoniis, &c." The indictment was returned into chancery, and a writ issued to the sheriff of *Gloucestershire* to attach the said persons, and bring them *coram seipso* and the mayor of *Bristol* *audita querela*, to do justice to the merchants, "super recuperatione bonorum secundum legem mercatoriam, & nihilominus malefactorum, prædictos in prisonâ facere custodiri facere," till they should be delivered by course of law. The sheriff neglecting to execute effectually what was enjoined him by the said writ, a second writ was directed to the mayor of *Bristol*, "Quod præmissa omnia & singula diligenter & efficaciter faceret, &c." Afterwards *processus totius negotii prædicti* was brought *coram rege*, by which it appears, that one *Clement Turtle* had been impleaded before

the said mayor, by the master of the ship, &c. "Quod habuit ad partem suam de bonis deprædati ad valentiam 25. in iuste, &c. Et hoc parati sunt verificare per mercatores & marinarios villæ prædictæ." *Turtle* pleaded not guilty, and was acquitted by a jury of merchants and mariners; the which jury *ex officio* again indicted the same persons, who had before been indicted "coram admirallo flotæ, quod navem prædictam de bonis, &c. felonice deprædarunt," and thereupon a *capias* issued to the sheriff to bring them *coram Rege ubicunque*, &c. to answer for the said crime, &c.

*Mitch. 26 E. 3. Rot. 51. in dorso. coram Rege. Norfolk.* *John Selondere* impleaded several persons, de placito transgressionis per billam, for entering his ship *super costerum maris de North'leyn*, beating and wounding him, and plundering the ship, quam in mari prædicta reliquerunt in desperatam, per quod navis prædicta perijt omnino; and recover'd 360 marks against them, for the damages sustained thereby.

*Trin. 34 E. 1. Rot. 34. coram Rege. Norfolk.* Several merchants of *Lincoln* put on board a ship wool and other commodities for *Brabant*, to the value of 896l. 10s. The ship in its passage was entered in a hostile manner in the port of *Gersiet* in *Zealand*,

and

court of king's bench had certainly a concurrent jurisdiction with the admiralty, in cases of felonies done upon the nar-

row

and plundered by the subjects of the earl of Hainault: satisfaction had been demanded of the earl for this depredation in vain; and thereupon, at the suit of the said merchants of Lincoln, a writ was directed to the bailiffs of Lynn to seize *omnia bona, &c.* of the merchants of Hainault, and keep them till the Lincoln merchants had received satisfaction, or till farther order should be taken therein. To this writ the bailiffs returned, that the Hainault merchants had *nulla bona infra balliviam suam*: upon this a Lincoln merchant came into chancery, and alleged, that seizure had been made of goods to the value of 31*l.* 17*s.* by the said bailiffs, which they had redelivered to the Hainault merchants without warrant, and thereupon a second writ issued to the said bailiffs, ordering them to pay *inailatè* the said 31*l.* 17*s.* to the Lincoln merchants in part of their loss, or else to appear *coram Rege in ostibus Trin. ubicunque, & interim* to seize *omnia bona, &c.* of the Hainault merchants, as before. It appears afterwards, Mich. 15 E. 2. Rot. 142. *coram Rege*, that the said earl of Hainault in the parliament, anno 4 E. 2 acknowledged himself *per nuncios suos*, to be indebted to the Lincoln merchants in the sum of 95*l.* on account of this depredation; 70*l.* of which was allotted to Walter le Ken one of them, in satisfaction for his loss; and at his suit a writ was directed to the sheriff, *quod levare faceret 70 libras de bonis, &c.* of the Hainault merchants, arrested by consent of the said earl of Hainault at Yarmouth, and bring the money into chancery, *ad satisfaciendum prædicto Waitero le Ken*; by virtue of which several sums of money were paid to him, *in parte debiti prædicti*.

Trin. 8 E. 2. 111. in dorso. *coram Rege. Kane*. A mandate issues to the constable of Dover, and warden of the cinque-ports, to take into custody several persons, for entering a ship from Flanders *vi & armis*, laden with cloth and other goods, belonging to certain merchants of Ipres, "quos pannos abduxerunt, & mercatores ligaverunt, & imprisonaverunt, &c. ita quod habeat eos coram rege ad respondendum præfatis mercatoribus super præmissis, &c."

Mitch. 18 E. 2. Rot. 25. in dorso. *coram Rege. Lincoln*. The mayor and commonalty of Grymesby implead several persons "pro carcandis & discarcandis navibus apud Villam de Cle, infra quatuor leucas villæ de Grymesby," whereby the said corporation was endangered, and lost the custom due to them on all goods and merchandise,

"carcata, seu discarcata, infra quinque leucas villæ de Grymesby, in auxilium firmæ suæ de rege," and a precept issues to the sheriff to attach, and bring them *coram Rege*, to answer for the said offenses.

Mich. 12 E. 2. Rot. 17. Rex. The king signifies by writ to the justices of his bench, that precepts had issued to several sheriffs to attach certain persons, "quorum nomina sub pede sigilli sui eis misit, qui durante sufferentia inter subditos regis Angliæ, & comitis Flandriæ, quandam navem de Flandria diversis bonis & mercimoniis, ad valorem 2000 marcarum, carcatam, infra aquam de Tyne prope Tynemuth, vi armatâ ceperunt, & bona & mercimonia prædicta, &c. inter se partiti fuerunt." In consequence of which process it appears, Rot. 18. *ibidem*, that several persons were brought *coram Rege* by the sheriff of Northumberland; where they were impleaded by the king's attorney for having part of the said goods, "Et dicunt quod nihil ceperunt, &c. Et de hoc ponunt se super patriam." Upon which the king's attorney joined issue with them, and the court bailed them *die in diem, quousque, &c.*

Trin. 25 E. 3. Rot. 22. *Lincoln Rex, William Cuspeman and Robert Fitz-William* had been indicted, "coram vicecomite & custodibus pacis in comitatu Linc." Quod felonice deprædaverunt *Johannem Gryme de Kirkeby*, in mari apud *Freston-bord*; et quod de *Freston-bord* porrexerunt supra mare versus partes boreales, & in alto mari deprædaverunt, & demerferunt octo batellas piscatorum, & sex homines in prædictis batellis existentes, felonice interfecerunt." The indictments were sent into the king's bench, and thereupon the said *William* and *Robert* were brought *coram Rege* apud *Aylesbury*, and responded, &c." But it appearing that both of them had been tried upon the said indictments before the justices of gaol-delivery at *Lincoln*, and acquitted; "Consideratum est quod iidem *Robertus* & *Willelmus* eant inde quieti."

Mich. 27 E. 3. Rot. 29. Rex. *London. Henry Pickard*, coroner of *London*, delivered with his own hand *coram Rege*, quosdam cognitiones *coram ipso factas* in the Tower of *London* by several persons, who confessed that they had feloniously entered a ship near *Fewerham*, thrown the men on board it into the sea, plundered it, and then sunk it; that they afterwards went from *Waxereng usque apud foologeng de Tener*, and feloniously entered another ship there, strip-

ped,



row seas or coast, though it were high seas, because within the king's realm of *England*.

And as it was thus in the king's bench, so in this case special commissions to hear and determine offences upon the coast, *secundum legem & consuetudinem regni Angliæ*, did often issue.

But indeed a general commission of *oyer and terminer* of felonies *infra comitatum*, &c. did not extend to misdemeanors upon the sea-coast, unless in those creeks and rivers and arms of the sea, that were within the body of the county.

So that even in these cases of felonies or treasons committed upon the sea-coast in the narrow seas, the king's bench or special commissions of *oyer and terminer secundum legem & consuetudinem regni Angliæ*, had a concurrent jurisdiction with the court of admiralty.

But this jurisdiction of the common law courts in cases of felonies and treasons, and other crimes committed upon the sea-coast, was interrupted by a special order of the king and his council, *Claus. 35 E. 3. m. 28. dorso*, and by a *Superfedeas* that issued shortly after; and since 38 E. 3. I have not observed, that the king's bench, or courts of the common law have proceeded criminally in cases of crimes of this nature committed upon the high sea.

But if any felony or treason was committed within any creek or arm of the sea, which was within the body of a county, the courts of the common law only had jurisdiction in such cases, and the admiral had no jurisdiction at the common law in such cases.

And thus far touching the jurisdiction of the admiral or maritime court at common law. [ 16 ]

2. But by the statute of 15 R. 2, cap. 3. of the death of a man, or maihem in great ships hovering in the main stream of great rivers *below the bridges* (for so is the record, and not *below the points*) nigh to the sea, the admiral shall have jurisdiction.

ped it of what goods were on board, killed all that were in it except two women, and flung them into the sea; "Et quod fornicaverunt cum duabus mulieribus prædictis, quas quidem post tres dies claflos felonice interfecerunt." Upon this four of the said criminals were immediately brought *coram Rege*, and being asked severally, why judgment should not pass upon them, "juxta cognitiones suas prædictas, nihil dicunt. Ideo consideratum est, quod trahantur, & suspendantur," As to two others, "quia curia

"nondum advisatur de procedendo ad judicium super eis," they were committed to the marshal, and afterwards removed to *Newgate* by the king's writ, being appealed, "coram Vic' & Coron' Civitatis London, by Allan de Crendon, de morte Thomæ de Crendon fratris sui, apud le forlonges in mari juxta insulam de Teneto in com' Kanc' felonice interfecti, super appello prædicto, secundum legem & consuetudinem regni Angliæ, responsuri."

This first gave the admiral jurisdiction in any river or creek within the body of the county, which only extends to the death of a man and maihem.

But yet observe, this is not exclusive of the courts of common law; and therefore the king's bench, or the general commission of *oyer and terminer* to hear and determine felonies, &c. in the county, have herein a concurrent jurisdiction with the court of admiralty.

And as well the coroner of the county, as of the admiral, may take inquisitions upon such deaths happening in great rivers, namely, arms of the sea, that flow and reflow beneath the first bridges. 8 *E. 2. Coron.* 399.

Only these things are observable. 1. That it extends only to rivers, that are arms of the sea, namely, that flow and reflow, and bear great ships. 2. It seems to extend only to such deaths as happen in those great ships, not in small vessels. 3. That by that statute this jurisdiction is annexed to the court of admiralty, and consequently they may proceed therein by proofs, according to the course of the marine law, and hold their session where they please, tho they did often, even before the statute of 28 *H. 8.* proceed by commission under the great seal, and by inquisition.

3. By the statute of 28 *H. 8. cap. 15.* the course of proceeding in criminal causes is settled in a different method, in which these things are observable, *viz.* 1. The things to which it extends, *treasons, felonies, robberies, murders, and confederacies.* 2. Where committed, *viz. in and upon the sea, or in any other haven, creek, river, or place, where the admiral hath, or pretends to have power, authority, or jurisdiction:* This seems to me to extend to great rivers, where the sea

[ 17 ] flows and reflows below the first bridges, and also in creeks of the sea at full water, where the sea flows and reflows, and upon high water upon the shore, tho these possibly be within the body of the county, for there, at least by the statute of 15 *R. 2.* they have a jurisdiction, and thus accordingly it hath been constantly used in all times, even when judges of the common law have been named and sat in their commission; but we are not to extend the words (*pretend to have*) to such a pretense as is without any right at all, and therefore, altho the admiral pretends to have jurisdiction upon the shore, when the water is reflowed, yet he hath no cognizance of a felony committed there; and therefore it was resolved, 25 *Eliz. Lacie's case,* That if a man be stricken upon the high sea, and die upon

upon the shore after the reflux of the water, the admiral by virtue of this commission hath no cognizance of that felony. 2 *Co. Rep. f. 93. a. Bingham's case*, 5 *Co. Rep. f. 107. a. Constable's case*, *Co. P. C. cap. 7. p. 48.* but of this hereafter. • 3. The commission must be directed to the lord admiral or his lieutenant, and three or four others. 4. The proceeding and trial is to be according to the course of the common law, as if the offense were committed at land within the realm. 5. Their session is to be in such places and counties as shall be appointed by the king's commission; no challenge for default of hundreders. 6. The offender excluded from clergy; but *quare*, whether the statute of 1 *E. 6. cap. 12.* does not restore it even in this case, as some of the judges in *Alexander Poulter's case (d)* held? But my lord *Coke*, *P. C. cap. 49.* saith piracy is excluded from clergy: It seems to me, that as to all offenses but treason, and piracy, and murder, the offender is to have his clergy by the statute of 1 *E. 6. cap. 12.* 7. The hearing and determining being directed to be according to the course of the common law, if the prisoner stands mute, he shall have *peine fort & dure*. *Co. P. C. cap. 49. p. 114.* 8. This statute is not repealed by the statute of 35 *H. 8. cap. 2.* nor by the statute of 1 & 2 *P. & M. cap. 10.* 9. An accessory cannot be punished by this act, but may be punished by the admiral according to the marine or civil law. 10. An attainder upon this act [ 18 ] worketh no corruption of blood.

Thus far in general of this commission; only I shall add,

1. That touching piracy upon the sea at this day, it is commonly taken the common law hath no concurrent jurisdiction; and therefore if an accessory be at land to a piracy at sea, the commissioners upon this statute cannot try it because done at land, and besides the statute extends only to principals. *Co. P. C. p. 112.* nor can the common law try it, because piracy is not made felony, whereof the common law can take notice; Again, if *A.* commit a robbery at sea, and brings the goods to land within the body of a county, this is not felony triable by the common law, because the common law takes no notice of the original fact. *Co. P. C. p. 113. Butler's case cited 23 Eliz.*

2. That touching treason or felony committed upon the high sea, as the law now stands, it is not determinable by the common law courts, but only upon this statute.

(d) 11 *Co. 31. b.*

3. But

3. But if a felony be committed in a navigable arm of the sea, the common law hath a concurrent jurisdiction.

But note well, that besides this commission founded upon the statute of 28 H. 8. which extendeth only to treason, murder, robbery, and confederacies, there is, and for above these hundred years last past there hath been in the same commission, a common law commission of *oyer and terminer*, and also a commission of the peace and gaol-delivery for all offenses against any penal laws *super mare, vel infra fluxum maris ad plenitudinem maris*; and also of all treasons, murders, felonies, &c. *super mari vel aliquo rivō, portū, aquā dulci, crecā, seu infra fluxum maris ad plenitudinem maris, à quibuscunque primis pontibus versus mare & super littus maris, &c. secundum stylum & consuetudinem regni Angliæ & curiæ admiralitatis*, and limits the county of their session and inquiry. This may be seen at large in 25 Eliz. in *Lacie's case* (e).

But then for so much as lies within the body of any county, their [19] commission is a commission of the peace, gaol-delivery, and *oyer and terminer*, and consequently plain commissions at common law, and their sessions ought to be within the county where the fact inquirable is to be inquired, because it is but a special commission at common law.

The case of *Lacy* was thus:

*Die Lunæ in quartā septimanā Quadragesimæ 23 Eliz.* at the castle of *York*, there was a general session by commission of gaol-delivery and *oyer and terminer* for the county of *York* directed to baron *Chute* and others.

At this session *Ambrose Lacy* and others were indicted of the murder of *Richard Peacock*, supposing the stroke given 5 August 22 Eliz. and the death 6 August 22 Eliz. both supposed to be at *Scarborough*, in *commitatū Eboracensi*.

This indictment was delivered into the king's bench *in mense Martii* following, and *Lacy* appearing in the king's bench was thereupon arraigned: he pleaded that the place, where *Richard* was stricken and after died, was called *Scarborough-sands*, and that it is and at the time of the stroke & *continūe postea fuit locus infra fluxum & refluxum maris infra plenitudinem ejus in Scarborough prædicti*, & *parcellā portūs de Scarborough*, and that within that place the admirals 28 H. 8. & *semper tam antea, quam postea habebant & prætendebant habere jurif-*

*ditionem*; then shews the letters patents of *oyer and terminer* to baron *Chute* and others within the counties of *York*, &c. according to the usual form, which was delivered to baron *Chute* and the rest 18 Feb. 23 Eliz.

That afterwards 25 Feb. 23 Eliz. the commission upon the statute of 28 H. 8. including also the commission of gaol-delivery, *oyer and terminer*, and the peace, *ut supra*, issued to the earl of *Lincoln*, lord admiral, and divers others, &c. to inquire, hear and determine, and deliver the gaol of all murders *tam super mare vel aliquo rivo, portu, aquâ dulci, crecâ, seu loco quocunque infra fluxum maris ad plenitudinem à quibuscunque primis pontibus versus mare, quàm super littus maris & alibi ubicunque infra jurisdictionem nostram maritimam & jurisdictionem curiæ admiralitatis, &c.*

That this commission was delivered to the lord admiral, &c. 26 Feb. 13 Eliz.

That afterward and before the inquisition before baron *Chute*, &c. the lord admiral gave notice to the said baron [ 20 ] *Chute* of that commission.

And that after that notice, viz. 6 Martii in quartâ septimandâ *Quadragesimæ* this inquisition was taken before baron *Chute*, &c. upon which he is now arraigned.

Then he shews, that 2 Martii 23 Eliz. the lord admiral, &c. issued their precept to the sheriff of *York* by virtue of the second commission, and thereupon an indictment was found, that *Ambrose Lacey* killed *Peacock se defendendo*, and set forth the special manner, and avers that it is the same death, and that the *locus, in quo* the stroke was given, was called *Scarborough-sands infra fluxum & refluxum maris ad plenitudinem ejus, & parcella portus de Scarborough*; and that the admiral 28 H. 8. *ac continuè postea & antea habebat vel pretendebat habere jurisdictionem, & sic dicit quòd inquisitio coram baron Chute fuit void.*

The king's attorney demurred, and Mich. 26 Eliz. judgment was given, *quòd eat sine die.*

Which judgment doth not at all enforce, that the admiral had jurisdiction by the statute of 28 H. 8. in this case, where a murder was committed in a port, or a stroke given at high sea, and a death upon the sands; but only this second commission extending so large, namely upon the sea-shore and in the ports, did for so much repeal the



former commission in the county at large; for *that* second commission was in part a common law commission, as hath been said.

And therefore I take it to be true, that if a man be stricken upon the shore at full sea, and die upon the shore at low water, this is not within the statute of 28 H. 8. nor within a general commission of *oyer* and *terminer* in the county, but yet I do not think it is to be determined by the constable and marshal, as my lord Coke, *ubi supra*, intimates, but it may be determined in the king's bench sitting in the county, where the party died, or by a special commission of *oyer* and *terminer*.

[ 21 ] III. The third kind of special commission is, that which is limited to particular places, that are not counties: Such are the commissions of *oyer* and *terminer*, and likewise of gaol-delivery, or the peace limited and granted within certain corporations or boroughs; nay, I think it may be granted to particular rivers, tho they extend to several counties, but then every county must have a particular session of its own, for so much of the river as is within the precinct of that county.

If the king issues a commission of *oyer* and *terminer* or gaol-delivery to any city or town not being a county, if a general commission afterwards issues for the whole county, this second commission after notice or a session by virtue thereof determined and superseded the special commission; but this is remedied by the statute of 2 & 3 P. & M. cap. 18. whereby it is enacted, that such a special commission shall not be determined by the granting or sitting of a general commission in the county at large.

IV. Special commissions of *oyer* and *terminer* may be made for some special offenses: And such were antiently very usual, as touching labourers, weights and measures, and the like; for as a general commission may be to hear and determine all offenses, so it may be for particular offenses.

V. Special commissions to hear and not to determine offenses: Tho by force of some particular statutes such commissions of inquiry may issue, as upon the statute of 23 H. 6. cap. 10. of sheriffs and some others, yet regularly as to matters of misdemeanor, especially such as are capital, as felony or treason, no such commission of inquiry only is warrantable: *Vide T. 5 Jac. 12 Co. Rep. p. 31.*

VI. A commission to determine and not to inquire: Regularly in

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all commissions *ad audiendum & terminandum* the commissioners ought to proceed upon indictments before themselves; *de quo infra*.

But it hath been not unusual in cases,\* especially of treason, that where an indictment is taken before justices of *oyer* and *terminer* for an offense committed in the proper county, a special commission may issue to determine that indictment in another county, but then upon *not guilty* pleaded the same must be tried before [ 22 ] these second commissioners, by men of the county where the offense was committed: *Vide Co. P. C. p. 27. Plowd. Com. 390. Casus com' Leiceſter and Somervill's caſe, &c. (f)*.

I ſhall not inſtance farther touching ſpecial commissions: Some acts of parliament have directed commissions of this nature, as upon the ſtatute for treaſons and felonies committed in another county by the ſtatute of 33 H. 8. cap. 23. (which, tho repealed as to treaſons by 1 & 2 P. & M. cap. 10. yet ſtands as to murders, and *vide Crompt. fol. 22. a. Grevill* examined before the council was arraigned for murder in another county upon this ſtatute (\*), and ſtanding mute was preſſed,) and upon the ſtatute of 35 H. 8. cap. 2. of foreign treaſons.

*Et hæc dicta ſunt de ſpecial commissions d' oyer and terminer.*

See Index to 2 Hawk. P. C. tit Oyer and Terminer. 4 Blackf. Com. ch. 5. p. 71.  
Foster. 1.

## CHAP. IV.

*Concerning general commissions of oyer and terminer.*

JUSTICES of *oyer* and *terminer* are of two kinds, viz. *Justiciarii ordinarii*, ſuch is the court of king's bench, the ſupreme ordinary court of *oyer* and *terminer*, and is comprized within the ſtatutes, that give power to juſtices of *oyer* and *terminer*, as hath been already ſaid.

The delegate or commiſſionate juſtices of *oyer* and *terminer* are thoſe, who are by commiſſion, which uſually is granted in the circuits directed to juſtices of aſſiſe and divers others, or any three of them, whereof commonly one of the juſtices of aſſiſe is of the *quorum*; and it is *ad inquirendum per ſacramentum proborum & legalium hominum* of the ſeveral counties *de quibuscunque proditionibus, &c.* and [ 23 ] divers other offenses therein mentiond, *ac de omnibus injuriis &*

(f) 1 And. 107.

(\*) This caſe was M. 31 Eliz.



*malefactoris quibuscunque in comitatibus Bucks, &c. eaque omnia audiendum & terminandum, facturi inde quod ad justitiam pertinet secundum legem & consuetudinem regni Angliæ, &c.* and this to be done *tam infra libertates quàm extra.*

This commission is specially called a commission of *oyer and terminer*; and therefore, altho justices of peace have a clause in their commission *ad audiendum & terminandum* felonies, &c. yet justices of peace come not under the name of justices of *oyer and terminer* within those acts of parliament, that mention justices of *oyer and terminer*; as upon the statute of 5 *Eliz. cap. 14.* for forgery, as shall be said farther hereafter in the chapter of justices of peace. 9 *Co. Rep. 118. b.* lord *Sanchar's* case, *Co. P. C. cap. 41. p. 103.*

But the justices of the court of king's bench are the sovereign ordinary commissioners of *oyer and terminer*, as hath been before said.

My lord *Coke* in his 4 *Instit. cap. 28 & 30.* hath laid together the learning of the courts of *oyer and terminer* and gaol-delivery, whose method I shall follow

Commissioners of *oyer and terminer* before their sessions, issue a precept to the sheriff much of the same form as commissioners of gaol-delivery do; see the form thereof, *Rast. Entries 443. b.* title *oyer and terminer. 1 E. 3.*

1. The justices of *oyer and terminer* in criminal causes cannot be by writ, but must be by commission under the great seal; otherwise their proceedings are void. 42 *Affiz. 12.*

2. Both in commissions of *oyer and terminer* and of gaol-delivery, and other commissions of like nature directed to one or more, there may be additional commissions of association, and thereupon writs are to issue to the former commissioners *de admittendo in societatem*; and if all cannot attend the session, a writ of *Si omnes interesse non possitis, tunc vos tres vel duo vestrum, quos presentes esse contigerit, (quorum aliquem vestrum, A. B. vel C. D. unum esse volumus,) ad præmissa faciend' intendatis.* &c. *Vide F. N. B. p. 111, 112.*

[ 24 ] 3. Justices of *oyer and terminer* or gaol-delivery, if they once sit without adjournment, their commission is determined; but tho they be appointed only *pro hac vice*, yet they may continue their sessions from day to day by adjournment; the like for all other commissions.

But it is not always necessary nor usual to enter their adjournment on record, (tho it might be fit in many cases,) and then if it be not entered

entered on record, their session . . . . . to the first day, and so are their records entered as of the first day of the session.

But in some cases it is absolutely necessary to enter their adjournments on record, as where an indictment is taken the first day of the session before justices of *oyer* and *terminer*, and they make a precept to the sheriff to return a jury the next day, or at any following day, upon the prisoner's plea of not guilty, there must be a record made of the adjournment of the sessions to that day, otherwise it will be erroneous, (because without such entry the whole sessions will be supposed in law to be held the first day,) and out of the sessions; the like for justices of peace.

So if after the first day of the sessions either of *oyer* and *terminer*, or gaol-delivery, there be a felony committed, and the party indicted for it, there must be an entry of the adjournment, at least till the day of the indictment taken, because otherwise the felony will be supposed in law to be committed after the determination of the sessions. 14 Car. 1. *Sampson's case* (a).

4. Commissions of *oyer* and *terminer*, gaol-delivery, and regularly all other commissions are determined by one of these four ways. 1. By a session and non-adjournment, as before. 2. By the king's death: yet it is held, tho in strictness of law the commissions be determined by the king's death, so as no proclamation without an act of parliament can give them continuance, but they must have new commissions, *Croke*, 1 Car. 1. p. 1. yet the acts they do by virtue of these commissions after the king's death, and before notice thereof, stand good. *M.* 3 Car. C. B. *Croke*, p. 97, 98. in *Sir Randolph Crew's case* (\*). 3. By express *Superfedeas* by a writ; but this *Superfedeas* by writ, tho it be a *Superfedeas omnino*, yet [25]

(a) *W. Jones*, 420.

(\*) But now by 7 & 8 W. cap. 27. and 1 Ann. cap. 8. it is enacted, "That no commission either civil or military, "That no patent or grant of any office or employment either civil or military, "That no commission of assize, *oyer* and *terminer*, general gaol-delivery, or of association, writ of admittance, writ of *fi non omnes*, writ of assistance, or commission of the peace shall be determined by the demise of any king or queen of this realm, but shall continue in full force for six months next ensuing notwithstanding such demise, unless superseded and determined by the next successor: And also no original writ, writ

"of *Nisi prius*, commission, process, or proceedings whatsoever in, or issuing out of any court of equity, nor any process or proceeding upon any office or inquisition, nor any writ of *Certiorari*, or *Habeas Corpus* in any matter or cause either criminal or civil, nor any writ of attachment, or process for contempt, nor any commission of delegacy, or review for any matters ecclesiastical, testamentary, or maritime, or any process thereupon shall be determined, abated or discontinued by the demise of any king or queen of this realm, but shall remain in full force, as if such king or queen had lived.

is not an absolute repeal of the commission, but only a suspension, for it may be renewed again by a writ of *Procedendo*, 12 *Affiz.* 21. adjudged. 4. By the issuing a new commission of the same nature in the same county, and notice thereof.

And therefore before the former commission be determin'd, there must be notice, which is, of three kinds. 1. By shewing the new commission; this determines the former, as to all those and those only to whom it is shewn. 2. By a proclamation of the latter commission in the county; this determines the former commission wholly. 3. By a session in the county by force of the latter commission in the county. *Coke*, 4 *Instit. cap.* 28: p. 165.

If a general commission of *oyer* and *terminer*, gaol delivery, or the peace, issue for the county at large; and afterwards a special commission of the like nature for one town, or for the *loca maritima* of that county, this new commission, with notice as before, doth determine the general commission *pro tanto*. 25 *Eliz.* *Lacie's case*, 1 *Leon.* n. 363. p. 270. & *supra*, cap. *præcedente*.

And so *à converso*, if a special commission of *oyer* and *terminer*, gaol-delivery, or the peace, issue for a particular town or city, not being a county, or for the *loca maritima*, a general commission of like nature in the county, with such a notice as before, determines the special commission: But by the statute of 2 & 3 *P. & M. cap.* 18. this is helped as to special commissions in cities and towns corporate, as hath been before said; but that statute is to be intended only of towns or cities, as it seems, (*quære*) and extends not to commissions of *oyer* and *terminer*. 4 *Co. Instit.* p. 165. *in margine*.

But if there be a general commission of *oyer* and *terminer*, or gaol-delivery, or peace for the whole county, and a special commission of the same nature to a liberty, hundred, or other precinct, as in a hundred, liberty, or franchise within the county, and both bear *teste* the same day, they all stand. Thus it is in *Suffolk*, where there have been always three commissions of gaol-delivery to the justices of assize, one for the county at large, another for the franchise, another for the town of *Bury*, and they impanel several grand juries, and sit and act respectively by each commission.

And the justices of gaol-delivery in the franchise must sit in the franchise by the statute of 27 *H. 8. cap.* 24. and the reason is, because anciently the abbots of *St. Edmund's-Bury* did by virtue of the king's letters patent,

patent, constitute their own justices of gaol-delivery in the franchise and town; and therefore the sessions of gaol-delivery is fittest to be held at *Bury*; but the commission of *oyer* and *terminer* extends *tam infra libertates, quàm extra*; but of this *vide cap. prox.*

But a commission of one nature doth not supersede a commission of another nature, as a commission of *oyer* and *terminer* is not repealed by a subsequent commission of gaol-delivery or the peace, nor *è converso*, for they are of several natures. 3 *Mar. B. Commission* 24.

These things before-mentiond are common to all judiciary commissions; these that follow, more particularly concern general commissions of *oyer* and *terminer*.

1. Regularly upon the commission of *oyer* and *terminer* there should issue a precept to the sheriff in the name of three commissioners at least, whereof one of the *quorum*, and under their particular seals, bearing date fifteen days at least before their session, to the sheriff to return twenty-four for a grand inquest *ad inquirendum, &c.* [ 27 ] at such a day; and the sheriff is to return his pannel annexed to the precept.

2. Regularly the commissioners of *oyer* and *terminer* cannot proceed upon any indictment taken before others than themselves. 3 *Mar. B. Commission* 24. And therefore they cannot proceed upon the coroner's inquest, or upon an indictment of felony before justices of peace.

But this rule hath two exceptions. 1. That it is only intended of a general commission of *oyer* and *terminer*, for, as hath been shewn, there may be a special commission to determine a treason or felony taken before other commissioners of *oyer* and *terminer*, *Plowd. Com. p. 390. Casus com' Leicest.*; nay, or by the coroner or justices of the peace. 2. That it doth not extend to an inquisition taken before other commissioners of *oyer* and *terminer*; for it is and always hath been the constant practice to take indictments before commissioners of *oyer* and *terminer*, as for highways, barrettry, forgery, perjury, &c. and to try them before other commissioners of *oyer* and *terminer* at another subsequent sessions; and if there were any doubt of that at common law, yet the statute of 1 *E. 6. cap. 7.* hath settled it, *viz.* " That no process or suit made before the justices of assise, gaol-  
" delivery, *oyer* and *terminer*, justices of peace, or any the king's  
" commissioners, shall be in any wise discontinued by making or  
" publishing any new commission or association, or by altering the

“ names of the justices ; but the new justices of assise, gaol-delivery  
 “ and the peace, or other commissioners may proceed in every be-  
 “ half, as if the old commissions, justices and commissioners had still  
 “ remaind and continued not altered.

And this gives power to the justices of *oyer and terminer*, &c. to proceed upon indictments taken by former justices of *oyer and terminer*, as well in cases of treason or felony, as other misdemeanors.

3. In case where a felon or traitor, &c. pleads to an indictment taken before justices of *oyer and terminer*, they ought not, (as in case of justices of gaol-delivery,) to award a precept *cre tenuis* to the sheriff to return a jury, but it must be by precept in the names [ 28 ] and under the seals of the commissioners, or three of them, whereof one of the *quorum*. 4 *Co. Instit. cap. 30. p. 168.* & *ibidem cap. 28. p. 164.* and the sheriff ought to return the pannel filed to the precept.

4. But the indictment may be preferred, issue joined, precept made and returned; and prisoner tried the same day before commissioners of *oyer and terminer*; see the precedents cited 4 *Co. Instit. cap. 28. p. 164.* P. 16 *Car. 1. B. R. Croke 583.* resolved *per omnes Justiciarios Angliæ*, altho there were no commission of gaol-delivery in that case, but only of *oyer and terminer*. *Accords H. 9 Car. B. R. Chapman's case* for barretry before justices of *oyer and terminer*. 2 *Roll. Abr. p. 96.* And the same law is questionless for justices of gaol-delivery. T. 9 *Car. B. R. Croke 315.*

But in cases of justices of the peace it hath been held, that they cannot try the same session that the party pleads to the indictment, much less the same he is indicted. 22 *E. 4. Coron. 44. H. 11 Car. 1. B. R. Croke, p. 438 & 448.* adjudged in cases not capital, *Bumpsted's case* in an indictment of extortion, and accordingly ruled T. 23 *Car. B. R. Pue's case* for seditious words. 2 *H. 8. Kelw. 259.*

But yet it hath been held good even before justices of peace to receive an indictment, and put the party, if present, to plead to it, and try it the same sessions, T. 14. *fac. B. R. Cro. 404. Rice's case* adjudged good, 4 *Co. Instit. cap. 28. p. 164. without question they may*: And there can be no difference assigned between sessions of the peace and *oyer and terminer* in this case, nor between causes criminal and capital, for the offenses rise in the same county, and as there goes out a summons of gaol-delivery, so there issues a general summons



mons of the sessions of the peace; and that all constables, &c. then attend; *quod vide Crompt. de pace, f. 232. a. 2 Co. Instit. super Articulis, cap. 15. p. 568.*

Yet in respect of this contrariety of opinion, the use hath commonly obtaind, that in cases not capital both before justices of *oyer and terminer*, and of the peace, he that traverseth an indictment, hath time to try it till the next session; but where the party is in prison, the justices of gaol-delivery put him to answer, and [29] try it presently.

But in all treasons and felonies, as well before justices of *oyer and terminer* or of peace, as well as before justices of gaol-delivery, the constant course is to indict the party, put him to plead, try him, and give judgment, and all at the same sessions; and it is fit to hold the course according to the modern usage; but it seems to me, that in all cases criminal or capital, justices of *oyer and terminer* may *de rigore juris* proceed to indictment, trial and judgment the same sessions.

5. The court of the general commissioners of *oyer and terminer*, as likewise that of the gaol-delivery and of assize, comes under the name of a court of record in relation to those offices, that by act of parliament are directed to be punished in any court of record; as the statute of 5 & 6 E. 6. cap. 14. of forestallers, &c. and the statute of 33 H. 8. cap. 9. of unlawful games, by the opinion of my lord Coke, 4 Instit. cap. 28. p. 164. and according to him, if it be limited to be punished in any of *his majesty's* courts of record.

But there is a great authority against this, and that in such cases, especially the latter, it only extends to the four great courts at *Westminster*. as upon the statute of drapery, 4 & 5 P. & M. cap. 5. which is, that the penalties of that act shall be recovered by action, bill, plaint or information, or otherwise *in any court of record*, wherein no essoin, protection, wager of law, or injunction shall be allowed; this extends only to the four courts of *Westminster*, *Gregory's case*, 6 Co. Rep. f. 19. b. of tillage, labourers, &c. (e) *to be recovered in any of the queen's courts of record*, by the opinion of all the judges except Catlin, Sanders and Whiddon, extends only to the four courts of *Westminster*, and not to commissioners of *oyer and terminer*; but otherwise it is, if no court be appointed. M. 6 & 7 Eliz. Dy. 236. a.

(a) 5 Eliz. cap. 4.

Again, by the statute of 23 *H. 8. cap. 4.* against brewers for selling  
 [ 30 ] beer by less measure than is appointed by the act, the penalty  
 half to the king half to the informer, to be recovered by action  
 of debt, bill, plaint, or information in any of the king's courts, wherein  
 no wager of law, essoin, protection or privilege shall be allowed, *T.*  
*4 Car. C. B. Croke, p. 112. Farrington's case:* Ruled, that notwithstanding the statute of 21 *Jac. cap. 4.* this information lies in  
 the common bench, because the justices of *Nisi prius, oyer and terminer*,  
 or of the peace, or gaol-delivery cannot hold plea upon this  
 statute, because these justices cannot allow an essoin or protection;  
 and the statute of 23 *H. 8.* extends only to such courts as can allow  
 a protection, &c. and accordingly I have known it resolved upon the  
 statute of 7 *E. 6. cap. 5.* for wines; and about 23 *Car. 2.* it was re-  
 solved upon a writ of error in the exchequer-chamber, upon a judg-  
 ment given in the exchequer for *Foly* a defendant in an information  
 upon the statute of 1 *Eliz. cap. 15.* (whereby the cutting of timber  
 within fourteen miles of a navigable river is prohibited on pain of  
 forfeiting of forty shillings for every tree, a moiety to the queen, and  
 a moiety to the informer, to be recovered by original writ, bill, plaint  
 or information, wherein no essoin, protection, wager of law, or in-  
 junction shall be allowed,) that this extends not to the commissioners  
 of *oyer and terminer*, nor other courts in the country, but only to the  
 four courts at *Westminster*. 1. Because original writs are not re-  
 turnable before them. 2. They cannot allow or disallow protections  
 or essoins; whereupon the judgment for costs was affirmed; and yet  
 here is no mention of any court, or court of record, or his majesty's  
 courts, but purely upon these two reasons.

And yet I believe hundreds of informations have been before justices  
 of *oyer and terminer* and *assise*, yea and of the peace in the country  
 upon several acts, that have the like clauses, as 35 *H. 8. cap. 7.* for  
 the preservation of woods, and infinite others according to my lord  
*Coke's* opinion, but when it hath come to be judicially debated, I have  
 not known it to obtain; but the resolution in *Farrington's* case and  
 in *Gregory's* case have still been allowed.

[ 31 ] 6. Commissioners of *oyer and terminer* cannot assign a  
 coroner to an approver, nor justices of peace, but justices of  
 gaol delivery may. 4 *Co. Instit. p. 165. Stamf. P. C. p. 143. b.*

7. By the statute of 5 *E. 3. cap. 11.* justices of *oyer and terminer*  
 may issue process of outlawry in any county of *England* against  
 persons



persons indicted before them, and also a *capias utlegatum* against persons outlawed.

8. By the statute of 9 E. 3. *cap.* 5. justices of *oyer* and *terminer*, gaol-delivery, and assise are to send their records and proceffes determined and put in execution to the exchequer at *Michaelmas* once every year under their seal, to be kept by the treasurer and chamberlains, but are to take out their estretes first.

9. All the precepts and proceffes of justices of *oyer* and *terminer* regularly are to be in the names and under the seals of the justices (*viz.* three of them, one of the *quorum*) ; and altho at this day there is no other warrant for the execution of prisoners condemned, but a calendar left with the sheriff under the hand of the justice that sits, yet antiently there was a warrant under their hands and seals, and in the names of the commissioners. *Co. P. C. p.* 31.

But if the prisoner be in custody of the sheriff, the truth is, there is no need of any warrant or calendar, for the open pronouncing and entering of the judgment *Suspendatur* is a warrant for the execution, and so it is in the king's bench, the entry on record of the judgment with a *præceptum est marescallo quod faciat executionem periculo incumbente*, without any formal writ or precept of the court is sufficient, and more is not usual : and the calendar subscribed by the judge of gaol-delivery is but a memorial ; and *Rolle* would never sign any calendar, but gave his orders openly in court with a charge to the sheriff and gaoler to take notice of them.

More may occur touching these matters in the next chapter.

See Index to 2 Hawk. P. C. tit. Oyer and Terminer.

## C H A P. V. [ 32 ]

*Touching justices of gaol-delivery.*

THIS court is by commission under the great seal directed commonly to five or any two of them, *quorum aliquem vestrum A. B. vel C. D. unum esse volumus ad gaolam nostram comitatûs nostri S. de prisonibus in eâ existentibus deliberandis* ; see the whole tenor of the commission. 4 *Co. Instit. cap.* 30. *p.* 168.

1. By

1. By the statute 8 R. 2. cap. 2. no man of law shall be justice of assise or common deliverance of the gaol in his own country; this statute is expounded by 33 H. 8. cap. 24. to be meant of the county, where he dwelleth; and as to justices of assise a penalty of one hundred pounds is added, if he exercises that office in the county where he is born or doth inhabit; but both these acts are usually dispensed with by a special *non obstante*.

By a special privilege by charter granted to the city of London the lord mayor is of the *quorum*, 2. R. 3. 11. a. and so it is in the city of Norwich.

2. Justices of gaol-delivery may proceed against prisoners (if in gaol) upon inquisition before the coroner or any other justices; and therefore justices of peace must send in their indictments not determined unto the justices of gaol-delivery to be proceeded upon, whether they be felonies or trespasses, if the party be in gaol or set to bail. Stat. 4 E. 3. cap. 2.

3. The justices of gaol-delivery after their commission sealed do, or should issue a precept to the sheriff importing these things, viz.

1. That upon such a day and place, *Venire facias omnes prisiones in prisonā domini regis com' prædict' existentes vel per ipsum per manucaptionem dimiss. cum eorum attachiamentis & omnibus aliis eorum deliberationem tangent' & penes se remanent'*. 2. *Quod Venire facias* at the day and place 24 legales homines de quolibet

[ 33 ] hundredo & inquirendum pro domino rege & corpore comitatūs prædicti.

3. *Ac alios 24 probos & legales homines de comitatu prædicto ad faciendam juratam inter dominum regem & prisiones prædictos*. 4. *Et proclamari facias dictam deliberationem gaolæ in omnibus civitatibus, burgis & aliis locis, quod omnes, qui sequi voluerint versus prisiones prædictos pro domino rege vel se ipsis, adtunc sint ibi in formā juris prosecuturi*. 5. *Scire facias etiam omnibus Justiciariis ad pacem comitatūs prædicti, coronatoribus, capitalibus constabulariis pacis, majoribus, ballivis, senescallis magnatū, ballivis hundredorum & libertatū, quod tunc sint ibi ad faciendum quod ad officium suum pertinet, & tu adtunc sis ibi unā cum ballivis & ministris suis ad faciendum ea, quæ tuo & eorum officio incumbunt*. 6. *Et habeas ibi tam nomina Justiciariorum ad pacem, coronatorum, capitalium constabulariorum pacis, senescallorum magnatū, ballivorum hundredorum & libertatū, quam juratorum prædictorum, & hoc præceptum*.

This

This precept is made in the king's name, or in the name of the justices of gaol-delivery, *Vide formam inde Rast. Entries, p. 385. a. Gaol-delivery 1. Venire facias de quolibet hundredo 24 tam milites, quam alios (\*) & de qualibet villatâ, ubi dicti prisoners indictati existunt, quatuor homines & præpositum ad faciendum ea, quæ ex parte domini regis tunc ibidem injunguntur.*

This is not unlike the summons of the *Iters* formerly, nor altogether unlike the summons of the sessions of the peace, *quod vide Crompton de Pace, p. 232. a.* which is in the king's name, and so may this, with the *Teste* of the chief justice: Or it seems it may be in the name of the justices of gaol-delivery and under their seal; *vide simile in Holcroft's case, Co. Entries 55.* by the justices of gaol-delivery for the verge; this precept is accordingly returned, the justices of peace, coroners, mayors, bailiffs of hundreds, and liberties, constables of hundreds, and names of the grand inquest returned and called in order.

4. And therefore it hath never been a question, but that the justices of gaol-delivery may take an indictment, try, [34] and give judgement the same day. 22 E. 4. *Coron. 44.*

5. But altho this solemnity of summons of the gaol-delivery may be, and should be used, yet they may command the sheriff *ore tenus*, to return a pannel without any precept in writing to him, (as is necessary in case of justices of *oyer and terminer*,) and the reason is given, because there is a general command to the sheriff by the summons of the gaol-delivery to return twenty-four to try prisoners. 4 H. 5. *Enquest 55. 4 Co. Instit. cap. 30. p. 168.*

6. They may deliver by proclamation persons imprisoned, where either no indictment is preferred, or an indictment preferred and *ignoramus* found, which is said cannot be done by justices of *oyer and terminer*, or of the peace. 2 R. 3. *Coronæ 47.*

7. They may originally take indictments of felony of such prisoners as are in gaol; this hath been accordingly resolved and is the constant practice, and so may justices of *oyer and terminer*: So that when the prisoner is in gaol, both have a concurrent jurisdiction. 4 Co. *Instit. cap. 30. p. 168 & 169.* and accordingly it was resolved in the case of *Apharry and Morgan, P. 29 Eliz.* there cited. And therefore the case of 3 Mar. B. *Commission 24. and Pasch. 32 Eliz.*

(\*) The words in *Rastal* are *libros & legales homines.*

*B. R. Purfell's case, Croke, n. 10 p. 179.* wherein it is said, that justices of gaol-delivery cannot take an indictment, unless they be also justices of peace, and then they may take an indictment as justices of peace, and try him as justices of gaol-delivery, is to be intended, where the offender is at large and out of prison, for if he be in prison, the indictment against him may be taken before them as justices of gaol-delivery, or as justices of *oyer and terminer*, or of the peace.

8. And therefore justices of *oyer and terminer*, gaol-delivery, and of the peace may make up their record by all three of the powers; and if it be good by one commission or by the other, it is good and not erroneous, and the best shall be taken for the king. 9 *H. 7. 9. a. 3. Mar. B. Commission 24. Crompt. Jurisdiction de Courts 226.*

[ 35 ] 9. If a person be let to bail, yet he is in law, in prison, and his bail are his keepers, and therefore the justices of gaol delivery may take an indictment against him, as well as if he were actually in gaol; but he that is let to mainprise is not in custody, 21 *H. 7. 33. a. 9 E. 4. 2. a. 39 H. 6. 27. b.* in the one case the entry is *traditur in ballium*. in the other *deliberatur per manucaptionem*.

10. They may take an indictment against persons for high treason, if they be in gaol, and may try and give judgment upon them, as well as commissioners of *oyer and terminer* against the opinion delivered *H. 15 Jac. B. R. Bumpsted's case.*

This appears by the statute of 1 *E. 6. cap. 7. vide 4 Co. Instit. p. 169. & libros ibi*, and it is constant experience.

11. By the statute of 1 *E. 6. cap. 7.* the subsequent commissioners of gaol-delivery have power to give judgment upon a person reprieved after conviction, and altho it be made a *quære, Dy. 205. a.* whether they may as well award execution upon a judgment given by the former commissioners of gaol-delivery, &c. yet it seems to be without question they may. 1. Upon the very common law, if a person be indicted and outlawed for felony before justices of peace, yet if he be in prison the justices of gaol-delivery have power to award execution upon that outlawry, for they are constituted *ad gaolam deliberandam* 15 *H. 7. 5. b.* agreed, and certainly if there had been any doubt of that, the statute of 1 *E. 6.* would have made as special a provision for awarding execution upon a judgment given by former commissioners, as for giving judgment upon a conviction before them. 2. But if there were any doubt thereof at common law, yet the statute of 1 *E. 6. cap. 7.* hath sufficiently enabled them thereunto by the last clause thereof,

thereof, viz. that notwithstanding the altering of the commissions of assize, oyer and terminer, gaol-delivery, or the peace the new justices may proceed in every behalf, as if the old commissions or commissioners had continued not altered.

12. They may receive appeals by bill against any person being in gaol.

13. They may assign a coroner to an approver, and make out process against the appellee in a foreign county by the [ 36 ] statute of 28 E. 1.

14. The sheriff is to deliver unto the justices of gaol-delivery the names of all persons in gaol, or that are bailed or let to mainprise by him for felony by the statute of 3 H. 7. cap. 3.

15. If a statute limit specially an offense to be heard and determined by the justices of peace, as that of 3 H. 8. cap. 5. it is doubtful whether justices of gaol-delivery, yea of oyer and terminer may hear and determine it; but upon the statute of 7 H. 7. cap. 1. which speaks only of justices in the county, either the commissioners of oyer and terminer or gaol-delivery may hear and determine it.

16. By the statute of 3 H. 8. cap. 12. The justices of gaol-delivery or of the peace, have power in open session to reform all pannels returned before them, by putting out and putting in names of persons, which pannels so reformed, shall be accordingly returned by the sheriff: And note, this command is *ore tenus*.

And hence it comes to pass, that altho upon trials of felons in the king's bench, or oyer and terminer, if the prisoner challenge twenty peremptorily, as he may, so that there be not sufficient remaining of the pannel, there is to be a *Tales* granted by precept returnable as the case requires; yet before justices of gaol-delivery the prisoner gets no time by it, for the sheriff by the command of the court *ore tenus*, may enlarge the pannel without any formal precept: *Vide Stamf. P. C. Lib. III. cap. 5. fol. 155. b.* and therefore *Tales* are not granted by precept before justices of gaol-delivery, which much expedites all business before them.

17. By the statute of 9 E. 3. cap. 5. The records before them determined are to be delivered to the treasurer and chamberlains of the *Exchequer* at *Michaelmas* yearly.

18. By the statute of 34 H. 8. cap. 14. The clerks of the crown, clerks of assize, and clerks of the peace are to certify into the king's bench



bench the names of all persons outlawed, attainted, or convicted, and  
 [ 37 ] upon letter from the justices aforesaid certificates shall be made  
 of such persons outlawed, attain't, or convict, to the justices  
 of gaol-delivery.

19. Justices of gaol-delivery may send prisoners by *Habeas Corpus* to the sheriff of another county, and a precept to the sheriff of that other county to receive them, namely, for a felony committed in that county, tho that county be out of the circuit of the justice that sends them; and tho I once knew it scrupled, yet I think the law is clear in it; *vide* 1 & 2 P. & M. cap. 13. in fine; for of necessity the justices of gaol-delivery have in some cases power out of the precincts of their county or circuit; as where an approver appeals a person in a foreign county, and this is certified, as it ought, to the justices of gaol-delivery, where the approver is, the justices of gaol-delivery, may make out process of *capias*, and it seems also of *exigent* against the appellee, and yet he is neither in gaol nor in the same county. 29 E. 3. 42. a. *Corone* 462.

But upon an inquisition before the coroner returned before justices of gaol-delivery they cannot make process of outlawry: *vide petitionem inde in parlamento*, 29 E. 3. n. 22. *sed non obtinuit*; but the answer was only, *Soit l' auncient ley sur ceo use*.

20. *A.* and *B.* are indicted before the justices of peace of *Middlesex*, and according to the statute of 4 E. 3. cap. 1. the indictment is delivered over to the justices of the gaol-delivery of *Newgate*: *A.* appears and is tried and acquitted, *B.* appears not. 1. The justices of peace cannot make out process against *B.* because the record is not before them. 2. The justices of gaol-delivery cannot make out process returnable before the justices of the peace, because another court. 3. By some opinions the justices of gaol-delivery may make out process to the outlawry returnable at the next sessions of gaol-delivery; but others thought they had no such power, for their commission is to deliver the gaol; and not to issue process against them that are out of gaol, neither can they proceed to the outlawry before themselves, as commissioners of *oyer and terminer*, because the indictment was taken before other justices, *viz.* of the peace: It was therefore held the  
 [ 38 ] entire record must be removed into the king's bench by *certiorari*, and from thence process of outlawry may go against  
*B.* T. 11. Car. B. R. 2 Rol. Abr. 96. *Storie's case*, who in this case

was

was outlawed before the justices of peace, and the outlawry therefore reversed.

21. By the statute of 26 *H. 8. cap. 6.* The justices of peace and gaol-delivery in the counties adjacent to *Wales* have power to hear and determine counterfeiting, washing, or clipping of coin, murder, burnings of houses, manslaughter, robbery, burglary, rapes, and other felonies, and the accessories thereof committed in *Wales*, or any lordship marcher, &c. as if committed in the same adjacent county: This is repealed as to treasons by the statute of 1 & 2 *P. & M. cap. 10.* but stands in force as to other felonies.

22. By the statute of 27 *H. 8. cap. 24.* The power of making justices of eyre, of assize, gaol-delivery, and of the peace in counties palatine and franchises is resumed, and the same are to be made by letters patents under the great seal of *England*.

But they shall hold their sessions only within such franchises and liberties, and in none other places, as the justices of the said liberties lately have commonly used within the said liberties; and that no person within the said liberties be compellible by authority of this act to appear out of the same before other justices of assize, gaol-delivery, or of the peace, than those named by the king to sit within the said liberties.

By this statute, 1. These justices sitting within exempt franchises or counties palatine are now the king's courts and the king's justices, and therefore a *certiorari* issuing out of the king's bench to these justices sitting in *Durham* or the *cinque-ports* ought to be obeyed as by other justices out of franchises. 2. That yet where franchises of this nature were antiently granted to abbots to make justices of gaol-delivery to sit within franchises, as for instance in the franchise of *St. Edmunds-Bury*, there is a special commission of gaol-delivery for that franchise. 3. That this restriction of sitting within the franchise extends not to the commission of *oyer and terminer*, for that extends *tam infra libertates, quàm extra*, and therefore may sit out of a franchise, and determine misdemeanors within the franchise: And this [ 39 ]

I did once in a session in the county of *Suffolk*, which by reason of sickness at that time, could not be held in *Bury*, viz. I kept the session for the whole county by virtue of the commission of *oyer and terminer*.

4. This resumption extends not to cities and boroughs, but they are specially excepted, and particular provision for the bishops of *Ely*,

*Durham* and *York*, to be justices of the peace only within their franchise.

23. By the statute of 6 R. 2. cap. 5. they are to hold their sessions in the principal towns, where the county-court is held; but this is but directive not coercive, for the judges may, and usually have appointed their sessions at their pleasure in other places.

4. Blackf. Com. ch. 19. p. 269. 270. See Index to a Hawk. Tit. Gaol-delivery.

## CHAP. VI.

*Touching the power of justices of assise and nisi prius, with relation to felony.*

THE settled course of granting *nisi prius* was by the statute of 27 E. 1. *de finibus*, cap. 3.

By the construction made of that statute, if a man be indicted in the country, and that indictment removed by *certiorari*, and the body of the prisoner by *habeas corpus* into the king's bench, and there he pleads *not guilty*, after that statute and before the statute of 6 H. 8. cap. 6. the transcript of the record might be sent down by *nisi prius* to try that issue. 22 E. 4. 19. 5 Mar. B. Coron. 231. Statute 42 E. 3. cap. 11. 4 Co. Rep. 43. 5. *Bibith's case*.

And the like may be done in an appeal, 21 H. 7. 34. a. 2 & 3 P. & M. Read's case, Dy. 120. a. *Rast. Entries* in title *Appeal per totum*, 8 H. 5. 6. Coron. 463.

[40] Upon the statute of 27 E. 1. cap. 3. and the statute of 14 H. 6. cap. 1. there hath been variety of opinions touching their power in cases of felony: Some have thought, that by virtue of those statutes they had originally a power to hear and determine felonies without any other commission, tho as to treason concerning coin, upon the statute of 3 H. 5. cap. 7. it is expressly directed, that they shall have a commission for the hearing and determining that offense; thus *Stamf. Lib. II cap. 5. f. 57 & 58*. Again, others have thought, that they have not any such original power without a special commission enabling them to hear and determine felonies originally; but that commission, as it seems by the statute of 27 E. 1. cap. 3. is called a writ, but is in truth no other than a commission, for all associations are commissions; and then the naming of them justices of  
*nisi*

*nisi prius* is nothing else but the description of those persons, to whom commissions of gaol-delivery shall be directed, and so they are no other but justices of gaol-delivery.

Others have thought, and that truly, that the justices of *nisi prius* have not any original power of hearing and determining indictments of felony without a special commission for that purpose, but that by virtue of the acts of 27 E. 1. and 14 H. 6. they have a power to determine such felonies only, as are sent down to trial before them; as they have power by the statute of *Westm. 2. (a)* to give judgment in actions of *darrein presentment* and *quare impedit*, where an issue is brought down to trial before them, tho they have no power originally to hold plea in a *quare impedit*.

And that this was the meaning of the statute of 14 H. 6. cap. 1. and tho it speaks of all cases of felony and of treason, yet it is intended only of such felonies or treasons as were at issue and brought down before them to be tried by *nisi prius*, appears in this, that as to those points of treason, which were enacted by 3 H. 5. cap. 7. it is expressly enacted by that statute, that they shall have commissions to hear and determine them, and so as to those they needed not the aid of a new statute to enable it.

Now as to the usage thereupon.

1. In case of appeals. If issue be joined and sent down by *nisi prius* to be tried, antiently indeed they did not proceed to judgment; but if the defendant, were acquitted, they did by the same jury inquire, 1. Of the damages. 2. Of the sufficiency of the plaintiff. 3. Of the abettors; and this inquest being returned into the king's bench, there judgment and execution were made, *quod vide* 8 H. 5. 6. *Coron.* 463. yea and by *Fairfax*, 22 E. 4. 19. If the plaintiff were nonsuit at the *nisi prius*, the justices of *nisi prius* should only record it, and remit the record into the king's bench, and not arraign the prisoner at the king's suit.

But the later practice and authority is otherwise, *viz.* That they may not only inquire of the abettors, but also give judgment against them; and, if the plaintiff be nonsuit, may arraign the prisoner at the king's suit, and give judgment and make execution. *Dy.* 120. a. *Read's* case. And so if he be convict of manslaughter upon an appeal, the justices of *nisi prius* allow his clergy, 4 Co. Rep. 43. b. *Bi-*

(a) cap. 30. See 2 Co. Instit. 424.

*bith's* case; and this it seems is warranted by the construction of the statute of 14 H. 6. cap. 1. for the statute of *Westm. 2. cap. 12. (b)* extends not to this case, especially of arraiguing the prisoner upon a nonsuit.

2. As to an indictment of felony or treason removed out of the county by *certiorari*, and the party pleading, the record is sent down by *nisi prius* to be tried, the judges of *nisi prius* may upon that record proceed to trial, and judgment, and execution, as if they were justices of gaol-delivery by virtue of the statute of 14 H. 6. cap. 1.

But if there were any question upon that statute, yet the statute of 6 H. 8. cap. 6. which extends to all justices and commissioners as well as those of gaol-delivery and of the peace, enables the court of king's bench to send to them the very record itself, and by special writ or mandate to command them to proceed to trial and judgment upon such issue joined; as they may command the justices, before whom the indictment was taken, to proceed to hear and determine the same if no such issue were joined.

4 Blacks. Com. ch. 19. p. 269. See Index to 2 Hawk. P. C. Titles *Affice. Nisi prius.*

(b) 2 Co. *Instit.* 383.

*Concerning the commission of peace, and the power thereof, in relation to felonies.*

AT common law there were conservators of the peace assigned by the king by commission.

But the first establishment of justices of the peace was by the statute of 1 E. 3. cap. 16. *Good and lawful men shall be assigned in every county to keep the peace.*

And by the statute of 18 E. 3. cap. 2. *Two or three of the best reputation in the counties, with other wise and learned in the law, shall be assigned by the king's commission to hear and determine felonies and trespasses done against the peace in the same counties, and inflict punishment reasonably according to law and reason, and the manner of the deed; and this statute directed their power of hearing and determining as well as keeping the peace.*



In pursuance of these statutes, and of other statutes (a) relative to justices of peace, they have a commission of the peace under the great seal directed to them.

And this commission consisted antiently of three clauses of *Assignavimus*, and now of two.

The first is, *Assignavimus vos conjunctim & divisim & quemlibet vestrum ad pacem nostram in com' Cant' conservandam, &c.* And this makes every of them conservators and justices of the peace for those acts that are performable by one justice.

The second is, *Assignavimus vos & quoslibet duos vel plures vestrum, quorum aliquem vestrum A. B. C. &c. unum esse volumus, justiciarios nostros ad inquirendum per sacramentum proborum & legalium hominum de comitatu prædicto, per quos rei veritas melius sciri poterit, de omnibus & omnimodis feloniiis, veneficiis, incantationibus, arte magicâ, sortilegiis, transgressionibus, forestallariis, regratoriis, ingrossariis, extortionibus quibuscunque: Ac de omnibus & singulis aliis malefactis & offensis, de quibus justiciarii pacis nostræ legitimè inquirere possunt aut debent, per quoscunque & qualitercunque in comitatu prædicto factis & perpetratis, vel quæ in posterum ibidem fieri contigerit; and then goes to some particular offenses, and to inspect indictments taken before them or before former justices of the peace, and to make process against persons indicted, quousque capiantur, reddant se, vel utlagentur: Ac omnia & singula felonias &c. & cætera præmissa secundum legem & consuetudinem regni nostri Angliæ audiendum & terminandum, and to do execution thereupon.* [ 43 ]

A proviso if a case of difficulty arise, then to respite judgment till the justices of assize come into the county, &c.

So that the commission gives a personal power to every justice of peace by the first clause; but by the second gives to them, or two of them, whereof one of the *quorum*, power to hear and determine felonies, &c.

But besides these powers specially given them by their commission, and the general acts of parliament touching justices of peace, there are divers subsequent statutes, that give them powers, sometimes to one justice, sometimes to two, sometimes in their sessions, sometimes out of their sessions, which it were too long here to recite; I shall only apply myself to that power, that they have by their com-

(a) 34 E. 3. cap. 1. 2 H. 5. cap. 1.

mission or otherwise, in relation to treasons, felonies, and capital offenses.

I. And in the first place touching the second *Assignavimus*, whereby they have power to hear and determine.

Without this clause they have no power to hear and determine felonies or other matters, for the bare making of them justices of peace without this clause doth not give them power to hear and determine indictments: *vide Stamf. P. C. Lib. II. cap. 5. f. 58. a.* And therefore in all returns of making up of records before justices of peace touching indictments or convictions, they must be mentiond to  
 [ 44 ] be justices of peace, *nec non ad diversa felonias, transgressiones, & alia malefacta in eodem comitatu perpetrata audiendum & terminandum assignat*.

Yet this clause doth not make them justices of *oyer* and *terminer*, for *that* is a distinct commission of another nature, as hath been shewn; and therefore those acts of parliament, that create new offenses and limit them to be heard and determind before justices of *oyer* and *terminer* only, give not thereby power to the justices of peace in such cases, unless also named in the act of parliament.

As the statute of 5 *Eliz. cap. 14.* of forgery, 3 *H. 7. cap. 13.* conspiring the king's death, 33 *H. 8. cap. 12.* murder in the king's palace, 8 *H. 6. cap. 12.* embezzeling records, 33 *H. 6. cap. 1.* embezzeling master's goods, 2 & 3 *E. 6. cap. 24.* stroke in one county and death in another, accessory in one county to a felony in another; for these statutes limit the punishment of these offenses to special judges appointed by the acts themselves, or to justices of *oyer* and *terminer*, under which appellation generally, in statutes, justices of peace come not. 9 *Co. Rep. 118. b. Co. P. C. cap. 41. p. 103. Dalt. cap. 20. (b).*

As touching high treason it is not mentiond in their commission, and they have no power to hear and determine it by the general words of their commission.

But a justice of peace upon complaint of a treason, may examine and commit the offender to prison, and take informations touching it, for it is a breach of the peace, and in order to the conservation thereof, he may commit the offender to gaol, in order to farther proceeding against him by justices of *oyer* and *terminer* or gaol-delivery.

But by some acts of parliament justices of peace may take indictments of particular treasons, but those presentments they must certify into the king's bench or gaol-delivery, as the case shall require, as upon the statute of 5 *Eliz. cap. 1.* for maintaining the authority of the see of *Rome*, 13 *Eliz. cap. 2.* for bringing in bulls for absolution, *Agnus Dei*, &c. 23 *Eliz. cap. 1.* for withdrawing and reconciling, or being withdrawn from the king's allegiance.

By the statute of 3 *H. 5. cap. 7.* as to treason for clipping, &c. power was given to the justices of peace to inquire [45] and make process thereupon, and antiently that clause was put into their commission, but now omitted; for by the statute of 1 *Mar. cap. 1.* the act of 3 *H. 5. cap. 6.* is repealed, and consequently the act of 3 *H. 5. cap. 7.* that gave power to justices of peace to inquire touching it.

By the statute of 26 *H. 8. cap. 6.* power is given to justices of peace to the adjacent counties to hear and determine counterfeiting and clipping of coin, and murders and other felonies in *Wales*; but this also as to treasons is repealed by the statute of 1 & 2 *P. & M. cap. 10.*

As touching felonies.

It is true, that by the antient statute of 6 *E. 1. cap. 9.* and 4 *E. 3. cap. 2.* murders and manslughters were to stay till the gaol-delivery.

But by the statutes of 18 *E. 3. cap. 2.* 34 *E. 3. cap. 1.* 17 *R. 2. cap. 10.* tho they do only mention felonies, and do not expressly mention murders and manslughters, and although the commission of the peace mentions not murders by express name but only felonies generally, yet by these general words in these statutes, and this commission, they have power to hear and determine murders or manslughters, and thus it has been resolved 5 *E. 6. Dy. 69. a. Prof. to 10 Co. Rep.* against the opinion of *Fitzherbert* in his Justice of Peace, and 9 *H. 4. 24. Coron. 457.*

For till the statute of 13 *R. 2. cap. 1.* a general pardon of all felonies had pardoned murder; and tho that statute require the word *murder* to be expressed, yet that is with relation only to pardons, and not to restrain the extent of the word *felonies* in a commission.

And therefore I know not what my lord *Coke* means in his comment upon the statute of *Gloucester. cap. 9. 2 Instit. p. 316.* where he saith, that justices of peace cannot take an indictment of the killing of a

*man se defendendo*, because not within their commission, but justices of gaol-delivery may; for if justices of peace have a power to hear and determine murder or manslaughter, it seems they may take an indict-

[46] ment of *se defendendo*, for the coroner may take an indictment of *se defendendo*. 3 E. 3. Coron. 286. Co. Entries 354.

a. *Crompt. Justice* 28. a. *Holme's case*, and so may justices of peace against the opinion of *Stamford, f. 15. b.* But tho the justices have this power, yet they do not ordinarily proceed to the hearing and determining of murder or manslaughter, and rarely of other offences without clergy, and the reasons are,

1. The monition and clause in their commission in *cases of difficulty* to expect the presence of the justices of assise.

2. The direction of the statute of 1 & 2 P. & M. cap. 13. which directs justices of peace in case of manslaughter and other felonies to take the examination of the prisoner and the information of the fact, and put the same in writing; and then to bail the prisoner, if there be cause, and to certify the same with the bail at the next gaol-delivery; and therefore in cases of great moment they bind over the prosecutors, and bail the party, if bailable, to the next gaol-delivery; but in smaller matters, as petit larciny and some cases within clergy, they bind over to the sessions, *vide Dalt. cap. 20. (c)*; but this is but in point of discretion and convenience, not because they have not jurisdiction of the crime.

By force of this commission they may take an inquisition touching *felo de se*, if not inquired before by the coroners; and tho the coroner's inquisition is to be *super visum corporis*, this needs not, but it is traversable. Co. P. C. p. 55.

They may proceed upon an indictment taken before former justices of the peace in the county by the statute of 11 H. 6. cap. 6. and 1 E. 6. cap. 7. but cannot proceed upon an indictment taken before commissioners of oyer and terminer or gaol-delivery. Lamb. Juslic. p. 551.

But if an indictment be taken before the sheriff in his Turn by the statute of 1 E. 4. cap. 2. those indictments are to be delivered to the justices of peace at their next session, and they may proceed upon those presentments.

Tho they have power to hear and determine felonies, yet, 1. They cannot deliver a person by proclamation, (as justices of gaol-delivery

may,) till an inquisition taken; but if an inquisition be taken and an *ignoramus* found, they may deliver him, as it seemeth, *Crompt. de Pace, f. 9. b.* 2. They cannot assign a coroner to an approver.

Tho this be not a commission of *oyer and terminer*, yet by the opinion *B. Commission* 8. a commission of *oyer and terminer* in the county determines the second *Assignavimus* of the commission of the peace *ad audiendum & terminandum; quod quære.*

A general commission of the peace in a county, in two cases, doth not determine the power of former justices of peace. 1. Where they are justices by charter, such as are in *London, Norwich, &c.* for these are perpetual and not amoveable. 2. Justices in a particular city or corporation, parcel of a county, by commission are not superseded by a new commission granted for the whole county by the statute of 2 & 3 P. & M. cap. 18. *Vide statute 11 H. 6. cap. 6.*

If the king by charter grant to a corporation, that the mayor and recorder shall be justices of peace within the city, whereby they are justices in perpetuity by charter, yet if there be no words of exclusion, the justices of peace of the county have a concurrent jurisdiction with the justices by charter, and so it is, if they be justices by commission in the town or city: Or the king, notwithstanding that charter, may grant a commission of the peace specially in that city or county, and they will have a concurrent jurisdiction with the justices by charter.

But if this franchise of being justices be granted, *ita quòd justiciarii comitatús senon intromittant*, then, tho a subsequent commission be granted in the county at large, it seems they have no jurisdiction in this corporation or town. 20 H. 7, 8. *Case de Abbè de St. Albans; quære tamen*, whether the indictment or session in the franchise be void or only a contempt in the justices: This was heretofore moved between the justices of the peace of *Surrey* and the borough of *Southwark*, but never resolved; but some thought it to be like the case of the bailiwick of a liberty and *retorna brevium* granted, *ita quòd vicecomes non intret*, if the sheriff executes a writ within the liberty, the execution is good, but the sheriff punishable for infringing [ 48 ] the franchise.

By the statute of 4 E. 3. cap. 2. the justices of the peace ought to deliver all their presentments to the next session of gaol-delivery, where they shall be finally heard and determined.



It is true the justices of peace may so deliver them over, and if they deliver them so over, the justices of gaol-delivery may proceed to determine them, as well as upon the coroner's inquest, namely if the offender be in gaol, but otherwise not.

But this delivery over of the presentments at the session is neither usual nor necessary at this day, for that statute was made when the justices of peace had only power to inquire and not to determine.

But by the statute of 18 E. 3. cap. 2. their commissions where to hear and determine, and so were all the commissions of the peace made after that statute, so that after that statute they might, if they pleased, determine the presentments taken before themselves.

The commissioners of *oyer* and *terminer* may indict and try at the same session, yet (as before) it hath been ruled otherwise in case of justices of peace, unless by consent. But certainly constant usage and learned opinion must give that exposition upon those resolutions, that it must extend only to popular actions or indictments for misdemeanors, and not in cases of felony, for here they may and do proceed *de die in diem* and at the same sessions, and so much is intimated in *Bumpsted's case*, H. 11 Car. 1. (d) *supra*, cap. 4. p. 28. and *Coke 4 Instit.* cap. 28. p. 164. expressly saith it is common experience, and reason speaks for it, as well as in the case of the commission of *oyer* and *terminer*, the session being in the same county, and with a public summons preceding every general sessions.

The ordinary course of proceeding is in their sessions, which are of two kinds, *viz.* private sessions, or public. Touching the former I shall say nothing, for it is ordinarily for the dispatch of country business, or about ale-houses, poor, &c.

[ 49 ] The public sessions are of two kinds, *viz.* the general quarter-sessions, and general sessions that are not quarter-sessions; both are or should be summoned by a precept in the king's name; *quod vide Grompt. Justice* 232. a. or of the Justices. *Lamb. Lib. IV. cap. 2.*

As to the jurisdiction in general both agree, that in either of these general sessions of the peace they may proceed touching those matters that are within their commission, as to take indictments, try felons, &c.

But by particular acts of parliament some things are limited to the quarter-sessions, and cannot be proceeded in at other general sessions,

as 5 & 6 E. 6. cap. 14. for ingrossing, 1 H. 7. cap. 7. hunting, 2 & 3 P. & M. cap. 8. highways, 5 Eliz. cap. 9. perjury, 5 Eliz. cap. 12. licencing badgers, 7 E. 6. cap. 5. wines, and divers others, *de quibus vide Lamb. Lib. IV. cap. 19.*

These quarter-sessions were by several acts of parliament appointed to be held at several times, by 25 E. 3. cap. 8. at the *Annunciation*, *St. Margaret*, *St. Michael*, and *St. Nicholas*.

By 36 E. 3. cap. 12. within the *utis* of *Epiphany*, within the week of *Lent*, between *Pentecost* and *Midsummer*, within eight days of *St. Michael*.

By 12 R. 2. cap. 10. the sessions are set at liberty, *viz.* to be held every quarter of the year at least; only *Middlesex* is excepted by 14 H. 6. cap. 4.

By the statute of 2 H. 5. cap. 4. in the first week after *St. Michael*, *Epiphany*, clause of *Easter*, and translation of *St. Thomas* the martyr.

By the statute of 33 H. 8. cap. 10. the *Tuesday* after *Easter* week is expounded to be in the week after *Clausum Paschæ*, for the sessions to be held; yet *Clausum Paschæ* or *Low-Sunday* is the first day of that week.

The strict regular exposition of the statute of 2 H. 5. for the week after *Michaelmas*, &c. is, that if *Michaelmas* fall upon the *Sunday* or *Monday*, the quarter-sessions in strictness should be held in the ensuing week, and not the same week.

Yet it is very plain, that the quarter-sessions are variously held in several counties, some at one day, some at another, [ 50 ] yet it hath been ruled, that these are each of them good quarter-sessions within the several acts that relate to quarter-sessions; for these acts, especially that of 2 H. 5. is only directive and in the affirmative, and therefore, tho the sessions are held at another day according to the general direction of the statute of 12 R. 2. yet they are quarter-sessions.

Nay in *Middlesex*, where by the statute of 14 H. 6. there are regularly but two sessions, yet they may hold quarter-sessions (as indeed they do,) in that county: tho these sessions are not precisely held at the times prefixed by 2 H. 5. yet they are quarter-sessions if held quarterly; and so it was agreed by the justices upon a late act (*e*) this session of parliament for the taking and subscribing the oaths of supremacy.

II. I shall now proceed to some few observations touching the power of particular justices of peace by virtue of their first *Assignamus* in the commission, which makes every particular justice a justice of peace, and gives him power to conserve the peace.

Concerning their power to bail or commit persons brought before them for felony *vide infra in capite de bail & mainprise (f)*, & *nota statute. 34 E. 3. cap. 1. & alia statuta.*

They are to execute their authority as justices of peace within the county wherein they are justices.

If a justice of peace lives or be out of the county, wherein he is justice, he cannot by his warrant fetch a person out of the county, where he is justice, to come before him in the county, where he is; 13 E. 4. 8. b. *Plowd. Com. 37. a. Platt's case.*

He cannot do a judicial act out of the county wherein he is a justice of peace, as take recognizances, take examinations, commit offenders, &c. but he may do a ministerial act, as to examine a party robbed, [51] whether he knows the felons according to the statute of 27 Eliz. cap. 13. H. 6. Car. 1. B. R. *Hetier's case, Croke, p. 211, 212.* yet *quære* of recognizances and examinations, for they are acts of voluntary jurisdiction, and therefore it seems may be done out of the county, as well as a bishop may grant administration, institution, or orders out of his diocese: But indeed imprisoning of a person for not giving recognizance, or committing a person for a crime, are acts of compulsory jurisdiction, and may not be exercised out of his county (g).

Yet suppose a man be a justice of peace in *London* and in *Middlesex*, as the recorder is, whether he may not commit a person in *Middlesex* brought out of *London* or *à converse*, it seems it hath been always practised, for he is in commission in both places.

If *A.* commits a felony in the county of *B.* where he lives, and goes into the county of *C.* and is there taken, a justice of the peace

(f) cap. 15.

(g) By 9 Geo. 1. cap. 7. §. 3. "If a justice happens to dwell in any city or other precinct, that is a county of itself, situate within the county at large, for which he shall be appointed a justice, tho not within the said county, he may grant warrants, take examinations, and make orders for any matters, which any one justice may act in at his dwelling-house, tho out of the county whereof he is appointed a justice, and in some

"city or precinct adjoining, that is  
"a county of itself; provided, that no  
"power is thereby given to the justices  
"for the county at large to hold their  
"sessions in cities or towns, that are  
"counties of themselves, nor to justices,  
"sheriffs, constables, or other peace-officers  
"of the county at large to act or  
"intermeddle in any matters arising with-  
"in such cities or towns, otherwise than  
"as if the said act had never been made."

of the county of *C.* may take his examination and informations in the county of *C.* tho the felony were committed in the county of *B.* yet *quære*, whether upon his arraignment in the county of *B.* those examinations can be given in evidence; I have not allowd them, because tho he may commit and examine, and give an oath to the informers, yea and bind them over to give evidence or commit them, yet that is but for necessity of preserving the peace, for he hath really no jurisdiction in the case.

And *note*, the custom of *London* enables the justices of gaol-delivery to sit at *Newgate*, which is in *London*, both for *Middlesex* and *London*, but the justices of the peace for *Middlesex* sit only in *Middlesex*, and the justices of the peace for *London* in *London*.

By the statute of 1 & 2 *Ph. & Mar. cap.* 13. they ought to take the examinations of felons (without oath,) and the informations of accusers or witnesses (upon oath,) and return them to the justices of gaol-delivery. [ 52 ]

And these examinations may be read as evidence against the prisoner, and so may the informations of witnesses taken upon oath, if they are dead or not able to travel, for they are judges of record, and the statute enables and requires them to take these examinations; but then oath is to be made in court by the justice or his clerk, that these examinations and informations were truly taken.

If *A.* brings *B.* before a justice of peace for suspicion of felony, if he can testify materially against him, he may bind him over to prosecute; and, if he refuses, the justice may commit him.

The justices of the peace have jurisdiction of felonies arising within the verge. 4 *Co. Rep.* 46. *a. Wigg's case.*

The justices of the peace in their sessions may proceed to outlawry in cases of indictment found before them, and that by the common law; and in cases of popular actions may proceed to outlawry by the statute of 21 *Jac. cap.* 4.

But they cannot issue a *capias utlegatum*, but must return the record of the outlawry into the king's bench, and there process of *capias utlegatum* shall issue. *Dalt. p.* 406. (*h*).

See Burn. Tit. Justices of Peace. 1 Blackf. Com. ch. 9. p. 351, &c. and Index to  
2 Hawk. P. C. Tit. Peace.

(*b*) *New Edit. p.* 672.

## C H A P. VIII.

*Concerning the coroner and his court, and his authority in pleas of the crown.*

**C**ORONERS are of three kinds, viz. 1. *Virtute officii*. 2. *Virtute cartæ sive commissionis*. 3. *Virtute electionis*, as the coroners of counties.

I. The coroner *virtute officii* is the chief justice of the king's bench, who by virtue of his office is the chief coroner of *England*, 4 *Co. Rep.* 57. *b. in case de comminallie de Sadlers*, and therefore it is there said, "That in the time of *H. 7.* it was resolved, if a man be slain in open rebellion, the chief justice upon the view of his body may make a record thereof and send it into the king's bench, and thereupon the party slain shall forfeit his lands and goods," which may be true as to goods, but not as to lands, because none can be attainted after his death but by act of parliament.

But of this hereafter.

II. Coroners by charter or commission or privilege: And these ordinarily were made by grant or commission without election; such are the coroners of particular lords of liberties and franchises, who by charter have power to create their own coroners, or to be coroners themselves. Thus the mayor of *London* is by charter coroner of *London*, the bishop of *Ely* hath power to make coroners in the isle of *Ely* by the charter of *H. 7.* Queen *Catharine* had the hundred of *Colridge* granted to her by the king 35 *H. 8.* with power to nominate coroners, 9 *Co. Rep.* 29. *b. Ameredith's case*.

And therefore by the statute of 28 *E. 3. cap. 6.* where the power of electing coroners is confirmed to the counties, yet there is a saving to the king and other lords, which ought to make such coroners, their [ 54 ] seignories and franchises, so that the king may grant coroners within certain precincts; and lords of franchises, that have power to nominate coroners by charter, may still do it without election.

There have been two great precincts, that by the king's grants have power of granting or having coroners, namely, the jurisdiction of the admiralty, and the verge.

As



As touching the former I have not seen the grant, but I have heard the lord admiral is either made coroner, or hath power to make them within his jurisdiction; and of the death of a man or other articles belonging to the coroner arising upon the high sea, inquisitions have been usually taken by the coroners appointed by the king or his admiral, and here the coroners of the county have no jurisdiction.

But of deaths of men happening upon arms of the sea below the bridges within the bodies of counties, as upon *Thames* or *Severn*, &c. in ships there hovering, tho the coroner of the admiralty hath jurisdiction, yet it is not exclusive of the jurisdiction of the coroner of the county, who may inquire in any great river upon these articles, where a man can see from one side to the other, 8 *E. 2 Coron.* 399. Only the inquisitions taken before the coroner of the admiral are returned before the commissioners upon the statute 28 *H. 8. cap.* 15. The inquisition before the coroner of the county is to be returned before the commissioners of gaol-delivery for the county.

The other great jurisdiction is the coroner of the king's house, usually called the coroner of the verge, who it seems antiently was appointed by the king's letters patent; but by the statute of 33 *H. 8. cap.* 12. the granting thereof is settled in perpetuity in the lord steward, or lord great master of the king's house for the time being.

Antiently the coroner of the verge had power to do all things within the verge belonging to the office of the coroner, exclusive of the coroner of the county; but because the king's court was moveable often, by the statute of *Articuli super cartas, cap.* 3. (a), it is ordained, that of the death of a man the coroner of the county shall join in inquisition to be taken thereof with the coroner of the king's house; and if it happen it cannot be determined before the steward, [55] process and proceeding shall be thereupon had at common law.

But yet in that case of death within the verge, the coroner of the county cannot take an inquisition without the coroner of the verge; and if he doth, it is void; but if one person be coroner of the county and also of the verge, the inquisition before him is as good as if the offices had been in several persons, and taken by both.

And tho the court remove, yet he may proceed upon that inquisition, as coroner of the county. 4 *Co. Rep.* 45 & 46 *Wigg's* case.

But if a murder or manslaughter be done within the precincts of the king's palace limited by the statute of 33 *H. 8. cap.* 12, then by that

(a) 2 *Co. Instit.* p. 550.

statute the inquisition shall be taken by the coroner of the household, without the adjoining or assisting of any coroner of any county, by twelve or more of the yeomen officers of the king's household; and this is enacted to be as sufficient, as if taken also by the coroner of the county, and the method of the return and proceeding upon those inquisitions before the lord steward is therein declared and enacted.

### III. The general coroners of counties.

These by the statute of *Westm.* 1. *cap.* 10. (*b*), and 28 *E.* 3. *cap.* 6. are eligible by the county in the county-court by the king's writ *de coronatore eligendo*, and sworn by the sheriff for the due execution of their office. *F. N. B.* 163.

The statute of *Westm.* 1. directs they should be knights, but that is out of use; but by the statute of 14 *E.* 3. *cap.* 8. they ought to have sufficient lands in the county; and by the statute 28 *E.* 3. *cap.* 6 they ought to be lawful and fit men.

In as much as their office is by election, their offices do not determine by the demise of the king, as sheriffs do. *Dy.* 165. *a.* (\*)

And in as much as they are elected by the freeholders of the county, if they be insufficient and not able to answer their fines, and perform the duties of their place, the whole county shall be answerable for them and their miscarriages, and amercements or fines shall be imposed upon them for the same, (*viz.* if upon process against the coroner for his fine or amercement the sheriff return *nihil habet*.) and process shall go against the whole county, because elected by them. 2 *Co. Instit.* p. 175.

In some counties there be only two coroners, in some four, in some six, and by the statute of 34 & 35 *H.* 8. *cap.* 26. in each county in *Wales*, and in *Chester* two.

If there be above two coroners in a county, and a writ be directed *coronatoribus*, tho one die, yet as long as the plural number remain, a return by the coroners is good; but if there be but only one survivor, he cannot execute the writ and return it till another be made. 14 *H.* 4. 35. *a.* 31 *Affiz.* 20. But if there be two coroners, in a county or more, one may execute the writ, as in case of an *exigent*, but the return must be in the name of the *coronatores*. 14 *H.* 4. 34. *b.* *per Hank.* 39 *H.* 6. 41.

But tho there be many coroners in the county, an inquisition *super visum corporis* may be taken by any one of them. *Stamf. P. C.* p. 53. *a.*

(*b*) 2 *Co. Instit.* p. 174.

(\*) See 4. *E.* 4. 43. *a.* in *notis ad p.* 101.

As coroners may be elected by writ *de coronatore eligendo*, so they may be amoved for reasonable cause, and new ones chosen in their room by writ.

And altho that cause be not traversable, 5 Co. Rep. 58. b. yet if it be false, he may have a *superfedeas* to that new writ. F. N. B. p. 163.

Thus far concerning the constitution of these officers and their different kinds; now touching their jurisdiction and proceeding.

Before the statute of *Magna Carta*, cap. 17. (c) the coroner held pleas of the crown, by that statute *nullus vice-comes, constabularius, coronator vel alii ballivi nostri teneant placita coronæ*, so that thereby their power in proceeding to trial or judgment in pleas of the crown is taken away.

But yet they retained a jurisdiction still as to matters of inquiry, taking of appeals, &c. all which is set down at large [ 57 ] in the statute of 4 E. 1. styled *De officio coronatorum*, viz. 1. Of the death of a man, whether by felony, misfortune, &c. viz. *de subito mortuis*. 2. Of *treasure-trove*. 3. Of appeals of rape. 4. Appeals *de plagis & mahemio*. 5. Of deodands. 6. Of wreck of the sea; and 7. By some, of breach of prison (d). I shall reduce them to these four, viz.

1. His power to take inquisitions *super visum corporis*. 2. His power to take appeals. 3. His power to take the accusation of an approver. 4. His power to take abjuration.

I. For inquisitions.

Regularly the coroner hath no power to take inquisitions, but touching the death of a man and persons *subito mortuis*, and some special incidents thereunto.

If any person dies suddenly, tho it be of a fever, and the township bury him before the coroner be sent for, the whole township shall be amerced. *Iuin. North. Coron.* 319. *Nota*, this case is misprinted, I have seen an antient transcript at large of the *Iter of North'ton*, and perused this very case, which in *libro meo* f. 52. b. is *morust de feyme*, viz. starved by hunger; for tho a man dies suddenly of a fever or apoplexy, or other visitation of God, the township shall not be amerced, for then the coroner should be sent for in every case; but if it be an unnatural or violent death, then indeed if the coroner be not sent for to view the body, the town shall be amerced.

(c) 2 Co. Instit. p. 32.

(d) Vide Coron. p. 435.