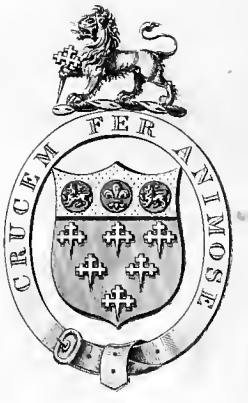
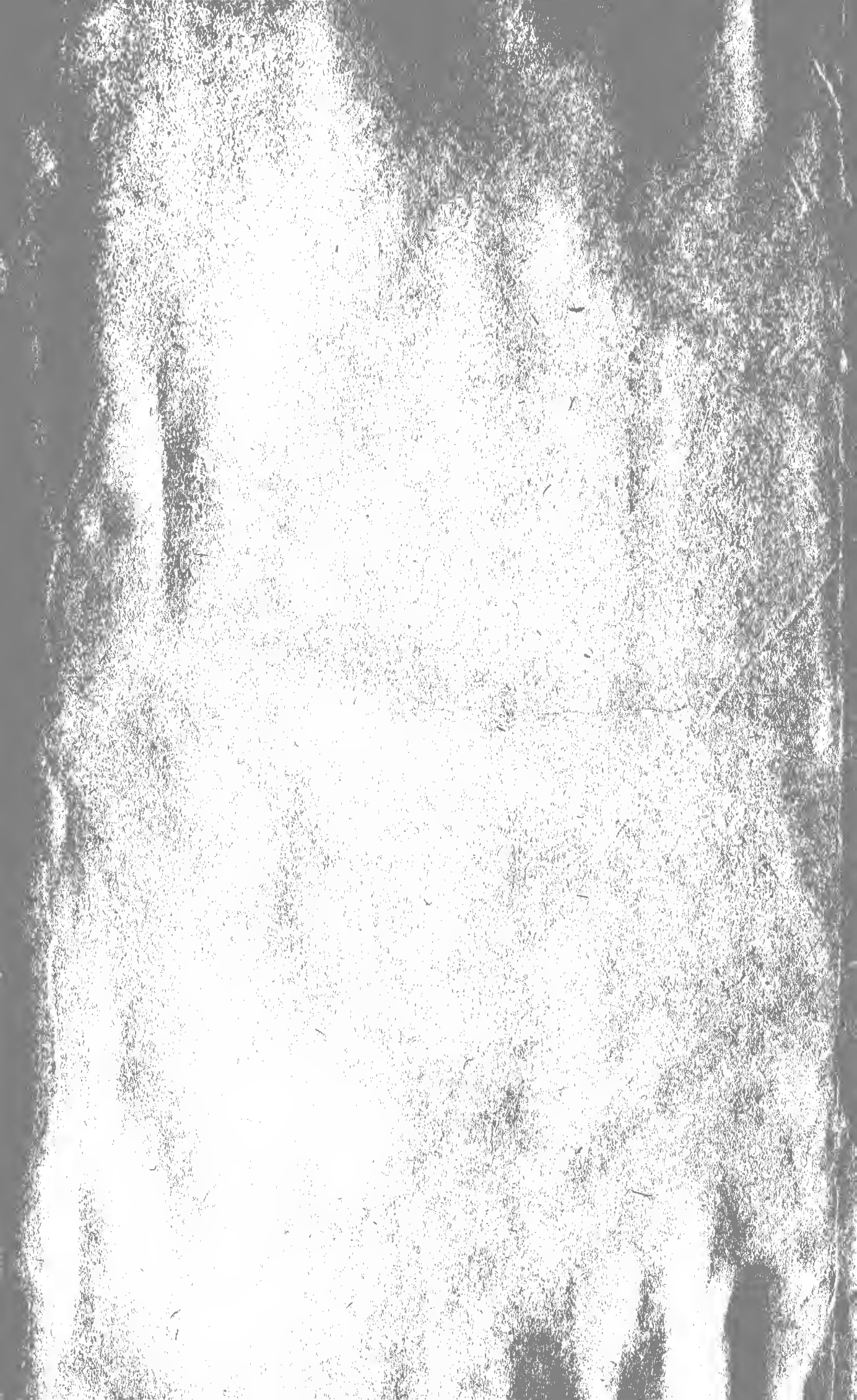


Charles Francis Adams.



John Adams

HISTORIA
PLACITORUM CORONÆ.

THE HISTORY
OF THE
Pleas of the Crown,

By Sir *MATTHEW HALE* Knt. ſometime Lord Chief Juſtice of the Court of King's Bench.

Now firſt publiſhed from his Lordſhip's Original Manuſcript, and the ſeveral References to the Records examined by the Originals, with large Notes.

By *SOLLOM EMLYN* of *Lincoln's-Inn* Eſq;

To which is added
A Table of the Principal Matters.

In Two Volumes.

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M DCC XXXVI.

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MDCCXXXVI.

A

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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 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, outlawry, 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 determind, 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 entred promiſcuouſly in the rolls; but then the rolls were

4 diſcri-

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

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 latter times the records of 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 ſit, and offenſes ariſing in other counties and removed before them by *Certiorari*.

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 *Habeas 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 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 *Mariæ*, *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,

juſtices, where the felony was committed, commanding them to proceed thereupon, 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 *eyre* and more, 27 *Aſſiz.* 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 ſuperſedes 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 Rawleigh*'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. Coxe*'s caſe (*b*).

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

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 forein 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 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. Caſtles* 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

(*c*) Thus it was done in *Althoe*'s caſe before mentiond, *Part* I. *p.* 464. (*d*) *Cro. Jac.* 643

a malefactor or for ſurety of the peace in any county of *England*, namely to 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 frequently and naturally ſit, as the king's deputy in adminiſtration of juſtice; but it is a miſconcluſion 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.

CHAP. II.

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

TOuching 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 *Inſtit. 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 houſhold, *&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 deliverd 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 repeald 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 convict 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 the king's goods of the value of twelve-pence, or breaking the king's houſe to ſteal the king's 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 houſhold, as manſlaughter or murder is directed to be tried or determind 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 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 reſtraind; 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 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 *Whitehall*, 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 followd, for he ſat in *Weſtminſter-hall.*

Altho this act erect 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 houſhold, 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 lord ſteward, commiſſioners of *oyer* and *terminer* and gaol-

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

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.

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 inquire, and not determine. 6. Commiſſions to determine and not inquire.

I. 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* 54. in *Holcroft*'s caſe. 5. It ſeems to me, that if a ſpecial commiſſion for the verge iſſue, which poſſibly may extend to *Middleſex*, *Surrey*, and *Hertford*, if a general commiſſion of *oyer* and *terminer* in the county of *Middleſex* iſſue 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 *è 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. Wrott* 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 expreſly

expreſly 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 examind 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 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 tho 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. & 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 *Aſſiz.* 25. So that the

(*a*) The caſes referd to here by lord *Hale* as proofs of the antient 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 marina- " riorum, quòd vi & armis, & felonicè " deprædati fuerunt navem de *Placen-* " *tiâ* in alto mari, inter *Le Ras* ſancti " *Martini*, & *Odyern'*, de bonis & mer- " cimoniis, &c." The indictment was returnd 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*, *& auditâ querelâ* to do juſtice to the merchants " ſuper recuperatione bono- " rum ſecundum legem mercatoriam, & " nichilominus malefactores prædictos " in priſonâ ſalvò cuſtodiri facere," till they ſhould be deliverd by courſe of law. The ſheriff neglecting to execute effectually what was injoind him by the ſaid writ, a ſecond writ was directed to the mayor of *Briſtol*, " Quòd præmiſſa " omnia & ſingula diligenter & effica- " citer 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.* " Quòd habuit ad par- " tem ſuam de bonis deprædatis ad va- " lentiam 25. injuſtè, &c. Et hoc parati " ſunt verificare per mercatores & ma- " rinarios 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, quòd " navem prædictam de bonis, &c. felo- " nicè deprædârunt," and thereupon a *capias* iſſued to the ſheriff to bring them *coram Rege ubicunque, &c.* to anſwer for the ſaid crime, *&c.*

Mich. 26 *E.* 3. *Rot.* 51. *in dorſo. coram Rege. Norfolk. John Selondere* impleaded ſeveral perſons, *de placito tranſgreſſionis per billam*, for entring his ſhip *ſuper coſterum maris de* North'lenn', beating and wounding him, and plundering the ſhip, *quam in mari prædicto reliquerunt in deſperatam, per quod navis prædicta periit omnino*; and recoverd 360 marks againſt them, for the damages ſuſtaind 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 896 *l.* 10 *s.* The ſhip in its paſſage was entred in a hoſtile manner in the port of *Gerſlet* in *Zealand*, and plunderd 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 returnd, that the *Hainault* merchants had *nulla bona infra ballivam 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 redeliverd to the *Hainault* merchants without warrant, and thereupon a ſecond writ iſſued to the ſaid bailiffs, ordering them to pay *indilatè* the ſaid 31 *l.* 17 *s.* to the *Lincoln* merchants in part of their loſs, or elſe to appear *coram Rege in octabis Trin. ubicunque, & interim* to ſeiſe *omnia bona, &c.* of the *Hainault* merchants, as before. It appears afterwards *Mich.* 15 *E.* 2. *Rot.* 142. *coram Rege*,

That

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

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 954 *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, *quòd levari 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 Waltero le Ken*: By virtue of which ſeveral ſums of money were paid to him, *in parte debiti prædicti.*

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

Mich. 18 *E.* 2. *Rot.* 15. *in dorſo. coram Rege. Lincoln'.* The mayor and commonalty of *Grymesby* implead ſeveral perſons " pro carcandis & diſcarcan-
" dis navibus apud *Villam de Cle*, infra
" quatuor leucas villæ *de Grymesby*," whereby the ſaid corporation was endamaged, 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. 19 *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 ſufferentiâ inter
" ſubditos regis *Angliæ*, & comitis
" *Flandriæ*, quandam navem de *Flan-*
" *driâ* diverſis bonis & mercimoniis,
" ad valorem 2000 marcarum, carcatam,
" infra aquam de *Tyne* prope *Tynemuth*,
" vi armatâ ceperunt, & bona & mercimo-
" nia prædicta, &c. inter ſe partiti fue-
" runt." 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 quòd nihil cepe-
" runt, &c. Et de hoc ponunt ſe ſuper
" patriam." Upon which the king's attorney joined iſſue with them, and the court bailed them *de die in diem, quouſque, &c.*

Trin. 25 *E.* 3. *Rot.* 22. *Lincoln. Rex. William Coupeman* and *Robert Fitz-William* had been indicted " coram
" vicecomite & cuſtodibus pacis in co-
" mitatu *Linc'*, Quòd felonicè deprædaverunt *Johannem Gryme* de *Kirke-*
" *by*, in mari apud *Freſton-hord*; Et
" quòd de *Freſton-hord* porrexerunt
" ſupra mare verſùs partes boreales, & in
" alto mari deprædaverunt, & demerſe-
" runt octo batellas piſcatorum, & ſex
" homines in prædictis batellis exiſtentes,
" felonicè interfecerunt." The indictments were ſent into the king's bench, and thereupon the ſaid *William* and *Robert* were brought " coram Rege apud
" *Ayleſbury*, ad reſpondendum, &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, quòd iidem *Robertus* & *Williel-*
" *mus* eant inde quieti.

Mich. 27 *E.* 3. *Rot.* 29. *Rex. London. Henry Pikard* coroner of *London* deliverd with his own hand *coram Rege, quaſdam cognitiones coram ipſo factas* in the *Tower* of *London* by ſeveral perſons, who confeſſed that they had felonioufly entred a ſhip near *Feverſham*, thrown the men on board it into the ſea, plunderd it, and then ſunk it; that they afterwards went from *Waxerynge uſque apud forlongg de Tenet*, and felonioufly entred another ſhip there, ſtripped it of what goods were on board, killed all that were in it except

row ſeas or coaſt, tho it were high ſea, 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 offenſes 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 *Superſedeas,* 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

except two women, and flung them into the ſea; "Et quòd fornicaverunt cum "duabus mulieribus prædictis, quas qui-"dem poſt tres dies elapſos felonicè "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. Ideò conſideratum eſt, "quòd trahantur, & ſuſpendantur." As to two others, "quia curia nondum ad-"viſatur de procedendo ad judicium ſu-"per 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 *Alan* de *Crendon,* de "morte *Thomæ* de *Crendon* fratris ſui, "apud le forlonges in mari juxta inſu-"lam de *Teneto* in com' *Kanc'* felonicè "interfecti, ſuper appello prædicto, ſe-"cundum legem & conſuetudinem regni "*Angliæ,* reſponſuri."

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

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.

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 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 pretend 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 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 *quære*, 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 ſtand mute, he ſhall have *peine fort & dure*. *Co. P. C. cap.* 49. *p.* 114. 8. This ſtatute is not repeald by the ſtatute of 35 *H.* 8. *cap.* 2. nor by the ſtatute of 1 & 2 *P. & M. cap.* 10. 9. An acceſſary cannot be puniſhed by this act, but may be puniſhed by the admiral according to

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

the marine or civil law. 10. An attainder upon this act 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 acceſſary 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 bring 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 28 *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.

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 rivo, portû, aquâ dulci, crecâ, 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 commiſſion is a commiſſion of the peace, gaol-

3 delivery,

(*e*) 1 *Leon.* 270.

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 quartâ ſeptimanâ 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 comitatû Eboracenſi.*

This indictment was deliverd 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 *& continuè poſtea fuit locus infra fluxum & refluxum maris infra plenitudinem ejus in* Scarborough *prædict'*, *& parcella portûs de Scarborough*, and that within that place the admirals 28 *H.* 8. *& ſemper tam antea, quam poſtea habebant & prætendebant habere juriſdictionem*; 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 deliverd 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 *tàm ſuper mare vel aliquo rivo, portû, 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 deliverd to the lord admiral, *&c.* 26 *Feb.* 23 *Eliz.* That

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

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

Then he ſhews, that 2 *Martii* 22 *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 Lacy* 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 portûs de Scarborough*; and that the admiral 28 *H.* 8. *ac continuè poſtea & antea habebat vel prætendebat 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 determind by the conſtable and marſhal, as my lord *Coke, ubi ſupra*, intimates, but it may be determind in the king's bench ſitting in the county, where the party died, or by a ſpecial commiſſion of *oyer* and *terminer*.

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 iſſue a commiſſion of *oyer* and *terminer* or gaol-delivery to any city or town not being a county, if a general commiſſion afterwards iſſue for the whole county, this ſecond commiſſion after notice or a ſeſſion by virtue thereof determind 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 determind 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 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 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 repeald as to treaſons by 1 *&* 2 *P. & M. cap.* 10. yet ſtands as to murders, and *vide Crompt. fol.* 22. *a. Grevill* examind 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 forein treaſons.

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

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 compriſed 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*

(*f*) 1 *And.* 107. (*) This caſe was *M.* 31 *Eliz.*

cramentum proborum & legalium hominum of the ſeveral counties *de quibuſcunque proditionibus, &c.* and divers other offenſes therein mentiond, *ac de omnibus injuriis & malefactis 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 *tàm infra libertates quàm extrà.*

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 *Aſſiz.* 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 veſtrûm, quos præſentes eſſe contigerit, (quorum aliquem veſtrûm* A. B. *vel* C. D. *unum eſſe volumus,) ad præmiſſa faciend' intendatis, &c. Vide F. N. B. p.* 111, 112.

3. Juſtices

3. Juſtices of *oyer* and *terminer* or gaol-delivery, if they once ſit without adjournment, their commiſſion is determind; but tho they be appointed only *pro hâc 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 entred on record, their ſeſſion always relates to the firſt day, and ſo are their records entred 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 erronious, (becauſe without ſuch entry the whole ſeſſions will be ſuppoſed in law to be held the firſt day,) and out of 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 determind 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 determind 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.* 1. *C. B. Croke*, *p.* 97, 98. in

4 Sir

(*a*) *W. Jones* 420.

Sir *Randolph Crew*'s caſe (*). 3. By expreſs *Superſedeas* by a writ, but this *Superſedeas* by writ, tho it be a *Superſedeas omnino*, yet is not an abſolute repeal of the commiſſion, but only a ſuſpenſion, for it may be renewed again by a writ of *Procedendo*. 12 *Aſſiz.* 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 determind 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 *è 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

(*) 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 imployment either civil or military, That no commiſſion of aſſiſe, "*oyer* and *terminer*, general gaol delivery, or of aſſociation, writ of admittance, writ of *ſi non omnes*, writ of "aſſiſtance, or commiſſion of the peace "ſhall be determind 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 determind 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 determind 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.

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 aſſiſe, 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 antiently the abbots of *St. Edmunds-Bury* did by virtue of the king's letters patents 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 *tàm 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 repeald 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.* 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' Leiceſter*; 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, barretry, 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 pro-
"ceſs 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 commiſ-
"ſioners may proceed in every behalf, as if the old commiſ-
"ſions, juſtices and commiſſioners had ſtill remaind and
"continued not alterd.

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 *ore tenus* to the ſheriff to return a jury, but it muſt

muſt be by precept in the names 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 preferd, iſſue joined, precept made and returnd, 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 *Jac. 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 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 ſeſ-

ſion; but where the party is in priſon the juſtices of gaol-delivery put him to anſwer, and 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 aſſiſe, comes under the name of a court of record in relation to thoſe offenſes, 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 recoverd by action, bill, plaint or information, or otherwiſe *in any court of record*, wherein no eſſoin, protection, wager of law, or injunction ſhall be allowd, 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 recoverd in any of the queen's courts of records*, 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.*

Again, by the ſtatute of 23 *H.* 8. *cap.* 4. againſt brewers for ſelling beer by leſs meaſure than is appointed by the act,

(*e*) 5 *Eliz. cap.* 4.

the penalty half to the king half to the informer to be recoverd 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 allowd, *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 reſolved upon a writ of error in the exchequer-chamber upon a judgment 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 recoverd by original writ, bill, plaint or information, wherein no eſſoin, protection, wager of law, or injunction ſhall be allowd,) 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 returnable 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 allowd.

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 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 proceſſes determind 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 proceſſes 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 entring 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 quòd 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.

CHAP.

CHAP. V.

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 veſtrûm* 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 the ſtatute of 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 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 determind 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 priſones in priſonâ domini regis com' prædict' exiſtentes vel per ipſum per manucaptionem dimiſſ. cum eorum attachiamentis & omnibus aliis*

eorum deliberationem tangent' & penes ſe remanent'. 2. *Quòd Venire facias* at the day and place 24 *legales homines de quolibet hundredo ad inquirendum pro domino rege & corpore comitatûs prædicti.* 3. *Ac alios* 24 *probos & legales homines de comitatu prædicto ad faciendam juratam inter dominum regem & priſones prædictos.* 4. *Et proclamari facias dictam deliberationem gaolæ in omnibus civitatibus, burgis & aliis locis, quòd omnes, qui ſequi voluerint verſus priſones prædictos pro domino rege vel ſeipſis; ad tunc ſint ibi in formâ juris proſecuturi.* 5. *Scire facias etiam omnibus Juſticiariis ad pacem comitatûs prædicti, coronatoribus, capitalibus conſtabulariis pacis, majoribus, ballivis, ſeneſcallis magnatum, ballivis hundredorum & libertatum, quòd tunc ſint ibi ad faciendum quod ad officium ſuum pertinet, & tu ad tunc ſis ibi unà cum ballivis & miniſtris ſuis ad faciendum ea, quæ tuo & eorum officio incumbunt.* 6. *Et habeas ibi tàm nomina Juſticiariorum ad pacem, coronatorum, capitalium conſtabulariorum pacis, ſeneſcallorum magnatum, ballivorum hundredorum & libertatum, quàm juratorum prædictorum, & hoc præceptum.*

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 *tàm milites, quàm alios* (*), *& de qualibet villatâ, ubi dicti priſones indictati exiſtunt, quatuor homines & præpoſitum ad faciendum ea, quæ ex parte domini regis tunc ibidem injungentur.*

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 returnd, the juſtices of peace, coroners, mayors, bailiffs of hundreds and liberties, conſtables of hundreds, and names of the grand inqueſt returnd and called in order.

(*) The words in *Raſtel* are *liberos & legales homines.*

4. And therefore it hath never been a queſtion but that the juſtices of gaol-delivery may take an indictment, try and give judgment the ſame day. 22 *E.* 4. *Corone* 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 impriſond, where either no indictment is preferd, or an indictment preferd and *ignoramus* found, which is ſaid cannot be done by juſtices of *oyer* and *terminer*, or of the peace. 2 *R.* 3. *Corone* 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. B. R. Purſell*'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 erronious, and the beſt ſhall be taken for the king. 9 *H.* 7. 9. *a.* 3. *Mar. B. Commiſſion* 24. *Cromp. Juriſdiction de Courts* 226.

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 deliverd *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, *viz.* that notwithſtanding the altering of the commiſſions of aſſiſe, *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 alterd.*

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

13. They

13. They may aſſign a coroner to an approver, and make out proceſs againſt the appellee in a forein county by the 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 determind 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 returnd before them by putting out and putting in names of perſons, which pannels ſo reformed ſhall be accordingly returnd 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 determind are to be deliverd 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 aſſiſe, and clerks of the peace are to certify into the king's bench the names of all perſons outlawed, attainted, or convicted, and upon letter from the juſtices a-

foreſaid certificates ſhall be made of ſuch perſons outlawed, attaint, 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 forein 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 returnd before juſtices of gaol-delivery they cannot make proceſs of outlawry: *vide petitionem inde in parliamento* 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 deliverd 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 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 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 acceſſaries thereof committed in *Wales*, or any lordſhip marcher, *&c.* as if committed in the ſame adjacent county: This is repeald 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 aſſiſe, 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 aſſiſe, 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 *tàm infra libertates, quàm extra*,

tra, and therefore may ſit out of a franchiſe, and determine miſdemeanors within the franchiſe: And this 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.

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. *b. 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.

Upon

Upon the ſtatute of 27 *E.* 1. *cap.* 3. and the ſtatute of 14 *H.* 6. *cap.* 1. there hath been variety of opinion 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 expreſly 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.* 2. 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 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 aſſiſes 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 ſpeak 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 expreſly 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.

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

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 abetters; 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 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 abetters 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. Bibith*'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 arraigning 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.

(*b*) 2 *Co. Inſtit.* 383.

CHAP. VII.

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 to 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 veſtrûm 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 veſtrûm, quorum aliquem veſtrûm* A. B. C. *&c. unum eſſe volumus, juſticiarios noſtros ad inquirendum per ſacramentum proborum & legalium hominum de comitatu prædicto, per quos rei*

 veritas

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

veritas melius ſciri poterit, de omnibus & omnimodis feloniis, veneficiis, incantationibus, arte magicâ, ſortilegiis, tranſgreſſionibus, foreſtallariis, regratariis, 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 poſterùm 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 ſecundùm legem & conſuetudinem regni noſtri* Angliæ *audiendum & terminandum*, and to do execution thereupon.

A proviſo if a caſe of difficulty ariſe, then to reſpite judgment till the juſtices of aſſiſe 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 commiſſion 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 or making up of records before juſtices of peace touching indictments or convictions, they muſt be mentiond to be juſtices of peace,

nec

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, acceſſary 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 alligeance.

(*b*) *New Edit. cap.* 40. *p.* 108.

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 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 repeald, 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 repeald by the ſtatute of 1 *&* 2 *P. & M. cap.* 10.

As touching felonies.

It is true, that by the antient ſtatutes of 6 *E.* 1. *cap.* 9. and 4 *E.* 3. *cap.* 2. murders and manſlaughters 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 expreſly mention murders and manſlaughters, and altho the commiſſion of the peace mention 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 manſlaughters, and thus it hath been reſolved 5 *E.* 6. *Dy.* 69. *a. Pref.* 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 pardond 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 *Glouceſt. cap.* 9. 2 *Inſt. 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 power to hear and determine murder or manſlaughter, it ſeems they may take an indictment of *ſe defendendo*,

fendendo, 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 juſtices have this power, yet they do not ordinarily proceed to the hearing and determining of murder or manſlaughter, and rarely of other offenſes 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. Juſtic. 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 deliverd 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 in-

(*c*) *New Edit. p.* 107.

quiſition 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 comitatûs ſe non 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 bailwick of a liberty and *retorna brevium* granted, *ita quòd vicecomes non intret*, if the ſheriff execute a writ within the liberty,

liberty, the execution is good, but the ſheriff puniſhable for infringing 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 determind.

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 ſeſſions 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 were 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.

Tho 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 hat 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 *Bumſted*'s caſe, *H.* 11 *Car.* 1. (*d*) *ſupra, cap.* 4. *p.* 28. and *Coke* 4 *Inſtit. cap.* 28. *p.* 164. expreſly 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 alehouſes, poor, *&c.* The

4 (*d*) *Cro. Car.* 438, 448.

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 Crompt. 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. licenſing 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 *utas* 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, 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 *Aſſignavimus* 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 ſtatut.* 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 live or be out of the county, wherein he is juſtice, he cannot by his warrant fetch a perſon out of the county, whereof 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, whether he knows

2 the

(*e*) 25 *Car.* 2. *cap.* 2. (*f*) *cap.* 15.

the felons according to the ſtatute of 27 *Eliz. cap.* 13. *H.* 6. *Car.* 1. *B. R. Helier*'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 *è converſo*, it ſeems it hath been always practiſed, for he is in commiſſion in both places.

If *A.* commit 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 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

(*g*) By 9 *Geo.* 1. *cap.* 7. §. 3. "If a "juſtice happen to dwell in any city or "other precinct, that is a county of it "ſelf, ſituate within the county at large, "for which he ſhall be appointed a "juſtice, tho not within the ſaid coun- "ty, he may grant warrants, take exa- "minations, 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 within ſuch cities or "towns, otherwiſe than as if the ſaid "act had never been made.

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 witneſs (upon oath,) and return them to the juſtices of gaol-delivery.

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.* bring *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 refuſe, 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. (*b*).

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

CHAP. VIII.

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

COroners 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 comminaltie 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 re- "bellion, 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 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 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 of 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 ordaind, that of the death of a man the coroner of the county ſhall join in inquiſition to be taken

(*a*) 2 *Co. Inſtit. p.* 550.

ken thereof with the coroner of the king's houſe, and if it happen it cannot be determind before the ſteward, 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 ſtatute the inquiſition ſhall be taken by the coroner of the houſhold, without the adjoining or aſſiſting of any coroner of any county, by twelve or more of the yeomen officers of the king's houſhold; 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

(*b*) 2 *Co. Inſtit. p.* 174. (*) See 4 *E.* 4. 45. *a. in notis ad p.* 101.

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 is directed *coronatoribus*, tho one die, yet as long as the plural number remains 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 *Aſſiz.* 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.*

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 *ſuperſedeas* 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

(*c*) 2 *Co. Inſtit. p.* 32.

But yet they retaind a juriſdiction ſtill as to matters of inquiry, taking of appeals, *&c.* all which is ſet down at large 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 ſubitò 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 *ſubitò mortuis*, and ſome ſpecial incidents thereunto.

If any perſon die ſuddenly, tho it be of a fever, and the townſhip bury him before the coroner be ſent for, the whole townſhip ſhall be amerced. *Itin. North. Coron.* 329. *Notá*, 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.

And ſo it is if the vill leaves a body, that died of a violent death, above ground unburied, the townſhip ſhall be amerced. 3 *E.* 3. *Coron.* 339. and the amercements in theſe caſes may be ſet upon the preſentment of the grand inqueſt, or upon the preſentment of the coroner.

But if a priſoner *in gaol* die a natural death, yet regularly the gaoler ought to ſend for the coroner to inquire, becauſe it may be poſſibly preſumed, that the priſoner died by the ill uſage of the gaoler.

(*d*) *Vide Coron. p.* 435.

And if this death happen in the king's bench, the clerk of the crown, who is the coroner for that court, is to view the body. 3 *E.* 3. *Coron.* 292. 8 *E.* 2. *Coron.* 421.

If the coroner have notice and come not in convenient time to view the body and take his inquiſition upon the death of him, that thus dies ſuddenly, and therefore upon a preſentment by the grand inqueſt of a death by miſadventure, if the like preſentment be not found in the coroner's roll, he ſhall be fined and impriſond. 3 *E.* 3. *Coron.* 292.

And by the ſtatute of 1 *H.* 8. *cap.* 7. he ſhall forfeit forty ſhillings for every ſuch default, and the juſtices of the peace and juſtices of aſſiſe have power to inquire of thoſe defaults, and this without any fee to be taken by the coroner. But by the ſtatute of 3 *H.* 7. *cap.* 1. If the coroner be remiſs, and make not inquiſitions upon perſons ſlain, or do not return the ſame to the next gaol-delivery, he is to forfeit 5 *l.* for every default.

The coroner cannot take an inquiſition but upon the view of the body, and if he doth, ſuch inquiſition is void; and the reaſon is, becauſe oftentimes much of the evidence ariſeth upon the view, for the inquiſition ought to contain the manner of his death, the place, length and depth of the wound, *&c.*

And therefore tho where there are many coroners, one may take the inquiſition. *Stamf.* 53. *a.* yet it cannot be done by deputy, for by the ſtatute of *Exon* 14 *E.* 1. the coroner is to view the body and take the inquiſition in his own perſon. *Crompt. Juſtice, f.* 227. *a.*

And therefore if the body be buried before the coroner come, tho the coroner ought to record it, and the townſhip ſhall be thereupon amerced, as before is ſaid, yet the coroner ought to take up the body and take his view thereof, if there be any poſſibility of it, and therefore the body hath in ſuch caſe been taken up fourteen days after, and an inquiſition thereupon taken. 2 *R.* 3. 2. *a.* 21 *E.* 4. 70, 71. *Wingfield's* caſe.

And therefore if the coroner take an inquiſition without view of the body, he may take a ſecond inquiſition *ſuper*

viſum corporis, and that ſecond inquiſition is good, for the firſt was abſolutely void. 2 *R.* 3. 2. 21 *E.* 4. 70.

But if a coroner take an inquiſition *ſuper viſum corporis*, and after this another coroner take an inquiſition upon the ſame matter, the ſecond inquiſition is void, becauſe the firſt was well taken. *M.* 6 *R.* 2. *Coron.* 107. *Crompt. Juſtic.* 229. *b.*

If a coroner take an inquiſition *ſuper viſum corporis* (as upon a *felo de ſe*,) and that is ſent into the king's bench and quaſhed, the coroner may take a new inquiſition *ſuper viſum corporis*.

But upon a ſurmiſe, that the coroner ought to have found him *felo de ſe* and hath not, there ſhall be no *melius inquirendum* directed to the ſheriff; I have known it often denied, and it was held it was within the reſtraint of the ſtatute 28 *E.* 3. *cap.* 9.

But poſſibly a commiſſion or writ may iſſue for the inquiry of the goods of a felon not mentiond in the coroner's inquiſition.

If the coroner do not inquire of a *felo de ſe* or of any other ſudden death, the juſtices of the peace or *oyer* and *terminer* may inquire thereof, and ſo may the juſtices of the king's bench, but then that preſentment is traverſable; but it is held that the preſentment of the coroner of a *felo de ſe* is not traverſable, *de quo ſupra Part* I. *cap.* 31. *p.* 414. *Co. P. C. cap.* 8. *p.* 55.

When notice is given to the coroner of a miſadventure, he is to iſſue a precept to the conſtable of the four or ſix next townſhips to return a competent number of good and lawful men of their townſhips, *viz.* twelve at leaſt to make an inquiſition touching that matter. 4 *E.* 1. *Officium coronatoris.*

If they make not a return, or the jurors returned appear not, their defaults are to be returned by the coroner, and the conſtables or jurors in default ſhall be amerced before the juſtices in *eyre* antiently, but now before the juſtices of gaol-delivery.

But if the jurors appear, by *Crompt. Juſtice, f.* 226. *b.* they are not challengeable by either party.

Yet

Yet in *Mich.* 4 *Car. B. R.* Sir *William Withipole*'s caſe by the greater opinion of all the judges of *England* the ſtatute of 11 *H.* 4. *cap.* 9. extends to inquiſitions before the coroner, and that if in an inqueſt before the coroner one of the jurors be outlawed, tho but of treſpaſs, this is a good plea to a coroner's inqueſt of murder. *Cro. p.* 134.

The jury is to be ſworn and charged to inquire upon the view of the body how the party came by his death, whether by murder by any perſon, or by misfortune, or as *felo de ſe.*

In ſuch caſes, where the coroner's inqueſt is concluſive, (as it is commonly held in the caſe of *felo de ſe,*) the coroner muſt hear evidence as well againſt the king's intereſt as for it, and that upon oath, for there is no perſon to be condemned to death, but only the fact to be inquired into.

And ſo it was ruled in *Barclaie*'s caſe who drowned himſelf, and the coroner would not admit witneſſes to prove him to be *non compos mentis* at the time, but ſhut them out, and only took witneſſes for the king; and for this cauſe the coroner was reprehended by the court of king's bench, and the inquiſition ſet aſide and not ſufferd to be filed, and a new inquiſition taken, whereby it was found he was *non compos,* for in this caſe there was no perſon put to anſwer; *de hoc vide ſupra Part* I. *p.* 415.

But it hath been held, that if a perſon be kild by another perſon, and it be certainly known that he kild him, the jury muſt hear evidence only for the king; and whether the killing were by malice or without malice, nay tho it were ſuch a killing as is juſtifiable, as an officer killing one that aſſaults him in doing his office, yet the inqueſt muſt find it murder, becauſe the party ſhall be put to anſwer, and upon not guilty pleaded the whole matter will come to be tried by the petit jury, where the evidence of both ſides may be openly heard in court, and ſuch direction given as the nature of the fact requires, *viz.* to be murder, manſlaughter, or *per infortunium:* and thus it hath been commonly practiſed of later years.

But it ſeemeth to me, that this is neither reaſonable nor agreeable to law or antient uſage, but is a novelty as to the

caſe of the coroner's inqueſt, tho it may be and is reaſonable and fit in caſe of an indictment by the grand inqueſt of the county, for theſe reaſons. 1. Becauſe the coroner's inqueſt is to inquire *truly* (*e*) *quomodo ad mortem devenit*, and is rather for information of the truth of the fact as near as the jury can aſſert it, and not for an accuſation. 2. Becauſe tho the priſoner may be arraigned upon the coroner's inqueſt, if it find it murder or manſlaughter, yet neither the court nor the proſecutor is concluded by it, but a bill of murder may be preferd to the grand inqueſt, and upon that new preſentment the party may be arraigned and tried, tho the coroner's inqueſt ariſe only to manſlaughter, or it may be to *ſe defendendo* or chance-medley. 3. And accordingly the antient practice hath been for the coroner's inqueſt to find the matter as they judge it was: *vide* 26 *Eliz. Crompt. Juſtice, f.* 28. *a. Holmes*'s caſe, *Coke*'s *Entries* 353. *b.* and very often in the antient *Iters* of *E.* 2. and *E.* 3. *de quo ſupra.*

And therefore the difference of the penning of the act of 1 & 2 *P. & M. cap.* 13. touching the examinations taken by the juſtices of the peace and the coroner is obſervable: The juſtices of the peace are to put into writing the informations againſt the felon of the fact and circumſtances thereof, or *ſo much thereof, as ſhall be material to prove the felony*; but the coroner is to put into writing *the effect of the evidence given to the jury before him being material*, without ſaying *ſo much as is material to prove the felony*, but the whole evidence given, whether to prove or diſprove the felony; and all this evidence is to be upon oath before the coroner's inqueſt, whether it make for or againſt the priſoner; but indeed when the priſoner is to be tried upon that indictment or the indictment of the grand inqueſt, thoſe witneſſes, that acquit the priſoner, are not to be heard upon oath at his trial, unleſs the proſecutor deſire it (*f*).

(*e*) Why ſhould not this argument hold as well in the caſe of an indictment by the grand inqueſt, ſince they are likewiſe by their oath *to preſent the truth, the whole truth, and nothing but the truth*? *vide infra p.* 157.

(*f*) This was indeed the practice, tho unſupported by any authority in law; but now by 1 *Ann. cap.* 9. the witneſſes on the behalf of the priſoner in all trials for treaſon or felony are to give evidence upon oath.

So that I do conceive the coroner's inqueſt ought in all caſes to hear the evidence upon oath, as well that which maketh for, as that which maketh againſt the priſoner, and the whole evidence ought to be returned with the inquiſition.

Now ſudden violent deaths, which are all within the coroner's office to inquire, are of theſe kinds. 1. *Ex viſitatione Dei.* 2. *Per infortunium*, where no other had a hand in it, as if a man fall from a houſe or cart. 3. By his own hand, as *felo de ſe.* 4. By the hand of another man, where the offender is not known. 5. By the hand of another, where he is known, whether by murder, manſlaughter, *ſe defendendo*, or *per infortunium.*

1. If the inqueſt find that he died *ex viſitatione Dei*, there is no more to be done, only the inquiſition together with the examinations are to be returned to the next gaol-delivery by the ſtatute of 3 *H.* 7. *cap.* 1.

2. If the inqueſt find the death *per infortunium* ſimply, as by a fall, *&c.* then the coroner is to take the examination and return the ſame with the inquiſition to the next gaol-delivery, and to inquire of the deodand, and the value, and in whoſe hands, and to ſeize and deliver the ſame to the townſhip to be anſwerable for the ſame to the king by the ſtatute of 4 *E.* 1. *De officio coronatoris.*

But if the perſon were drowned in a pit, the coroner ſhall command the vill to ſtop it, and if it be not done, the vill ſhall be amerced in *eyre*, or before juſtices of gaol-delivery. 8 *E.* 2. *Coron.* 416.

And *note*, that in no caſe the coroner ſets any fine or amercement, as for non-appearance of juries or conſtables, eſcapes of townſhips, *&c.* but only preſents it to the next juſtices in *eyre*, or now to the next gaol-delivery, and they impoſe the fine.

3. If the inqueſt find a man *felo de ſe*, they ought to find the ſpecial matter, and alſo what goods and chattels he had, of what value, and ſeize and deliver the ſame to the townſhip to be anſwerable to the king or his almoner, or the lord of the franchiſe, to whom they belong, and ſhall bind over the firſt finder of the body to the next gaol-delivery.

4. If the party be ſlain and the felon is not known, they are to find their inquiſition accordingly, and ſhall bind over the firſt finder of the body to the next gaol-delivery, and return his examinations together with his inquiſition by the ſtatute of 1 & 2 *P. & M. cap.* 13.

And *note*, that the antient manner of inquiry in this caſe, whether by the coroner or juſtices in *eyre*, was, 1. *Quis primus inventor?* 2. *An malè creditur?* if ſo, then if he were preſent, he might be arraigned; if abſent, they went on to the outlawry againſt him; but if they anſwerd *non malè creditur*, then he was diſcharged. 35 *H.* 6. 15. *a. B. Conſpiracy* 4.

5. But if the perſon was ſlain, and the party that did it was known, and the inquiſition found him guilty of the death, or that he died by his hand, there were theſe proceedings, namely,

The inqueſt were alſo to inquire of all, that were preſent, aiding, and abetting.

They ſhall alſo inquire of all acceſſaries before the fact, but they cannot inquire of acceſſaries after (*), and therefore a preſentment of a *fugam fecit* upon an acceſſary after is void. *Stamf. P. C.* 183, 184. 4 *H.* 7. 18. *b.*

If they find a man guilty as principal or as acceſſary before, they are alſo to inquire whether he fled for the ſame, for if the party be acquit upon his trial, nay tho the petit jury upon his trial find him not guilty, nor that he fled, yet this inquiſition before the coroner ſhall cauſe a forfeiture of his goods, for it is not traverſable. *Dy.* 238. *b. Stamf. P. C. p.* 183. *b.* (†).

If a party be found guilty by the coroner's inqueſt, or that he fled, they are alſo to inquire of his goods and chattels; and by the antient law the coroner was preſently thereupon to ſeize and inventory his goods, and deliver them to the *villata* to be anſwerable to the king for them, as appears by the ſtatute of 4 *E.* 1. how far this is alterd by the ſtatute of 1 *R.* 3. *cap.* 3. *vide quæ ſupra Part* I. *cap.* 27. *p.* 365.

But it ſeems, that if there be a preſentment before the coroner of a *fugam fecit*, the ſtatute of 1 *R.* 3. takes no place as

(*) *Vide Part* I. *p.* 416. *in notis.* (†) *Vide Part* I. *p.* 363 & *p.* 417.

as to that, becauſe, whether convict or acquit, the *fugam fecit* ſtands as an unavoidable forfeiture, and therefore the coroner may without queſtion ſeize the goods ſo found by inquiſition upon a *fugam fecit*, and commit them to the townſhip.

If the perſons, that are found guilty by the inqueſt, be taken, the coroner may and muſt commit them to the ſheriff, and he is to ſend them to the gaol by the ſtatute of 4 *E.* 1. But if any were preſent and found not guilty, the coroner was to bind them over to the next gaol-delivery by the ſame ſtatute, and to record their names in his roll: This was to the intent, that if farther evidence was diſcoverd againſt them, they might be there proceeded againſt, if not, then they might be uſed as witneſſes; but the ſtatute of 1 & 2 *P. & M. cap.* 13. hath made better proviſion; *de quo infra.*

If the parties found guilty as principals or acceſſaries before by the coroner's inqueſt be not to be found, the coroner might proceed to the outlawry againſt them at common law, *quod vide* 27 *Aſſiz.* 47. *viz.* by proceſs of *capias* to the ſheriff; and if they were returned *non inventi*, then they were demanded at five counties and outlawed: *vide Crompt. Juſtice, p.* 226. *b.*

But now that courſe is alterd, and the coroner ought not to proceed to the outlawry, but is to return his inquiſition to the next gaol-delivery by the ſtatute of 3 *H.* 7. *cap.* 1. and the juſtices of gaol-delivery are to proceed againſt the offenders, if in gaol, and if not in gaol, then to certify the inquiſition into the king's bench, and there proceſs of outlawry to go againſt them upon that inquiſition.

And by the ſtatute of 1 & 2 *P. & M. cap.* 13. the coroner is to take the examinations againſt the principals and acceſſaries before, and put them in writing, and bind over witneſſes by recognizance to the next gaol-delivery, and then to return their examinations, recognizances, and inquiſitions upon pain of 40 *s.* for every default.

In caſe of an indictment of murder or manſlaughter by the grand inqueſt, if the priſoner appear, plead, and be acquitted by the petit jury, they ſay ſo and no more, only they inquire of the flight.

But if a perſon be found guilty by the coroner's inqueſt, and plead and be acquitted, yet in as much as the coroner's inqueſt have found that he was kild, the court gives credit to it, and therefore the petit jury muſt alſo give in, who it was that kild him, which ſerves as an indictment againſt that other perſon, 13 *E.* 4. 3. *b.* 14 *H.* 7. 2. *b.* and commonly if they cannot tell, they give in ſome fictitious name as *John a-Noke*, which ſerves the turn.

If there be an inquiſition of manſlaughter or murder, and alſo an indictment by the grand inqueſt of the ſame offenſe, and he is arraigned and found not guilty upon the indictment by the grand inqueſt, yet it is neceſſary to quaſh the other inquiſition or arraign the party upon it, and he is to plead *auterfoits acquit*, or *not guilty*, and ſo be acquit upon that alſo, for it otherwiſe ſtands as a record againſt him, upon which he may poſſibly be outlawed.

But if both indictments be of the ſame nature and for the ſame offenſe and be good, he may be arraigned and tried upon both at once.

By the ſtatute of *Weſtm.* 1. *cap.* 10. the coroner was to take nothing for the execution of his office touching the death of a man.

But by the ſtatute of 3 *H.* 7. *cap.* 1. in caſes of murder or manſlaughter he was to have the fee of 13 *s.* 4 *d.* out of the goods of the felon, or out of the amercement ſet upon the townſhip for an eſcape.

But by the ſtatute of 1 *H.* 8. *cap.* 7. for an inquiſition upon the death of a man by ſimple misfortune or miſadventure, he is to take nothing upon pain of forfeiting forty ſhillings.

1. By what hath been before ſaid it appears, that the coroner hath power to take an inquiſition of felony of the death of a man, and likewiſe of certain incidents thereunto. 1. Of acceſſaries before the fact, but not of acceſſaries after. 2. Of the eſcape of the manſlayer, that thereupon the townſhip may be amerced, which is farther confirmed by the ſtatute of 3 *H.* 7. *cap.* 1. 3. Of his flight. 4. Of his goods and chattels: But he hath no power to take an inquiſition of any

other felony, tho in ſome caſes he hath power to take appeals of other matters, as ſhall be ſaid hereafter: 2 *Co. Inſtit. p.* 32. Only by cuſtom in *Northumberland* the coroner hath power to inquire of other felonies. 35 *H.* 6. 27. *b.*

But it is ſaid, that he may take the confeſſion of him, that breaks priſon, and upon his record thereof the party ſhall be hanged. 8 *E.* 2. *Coron.* 435.

2. But altho he hath power to take an inquiſition touching the death of a man, it muſt be *ſuper viſum corporis*, and not otherwiſe.

And therefore in antient times if a man were hurt in the county of *A.* and died in the county of *B.* the coroner of the county of *B.* could not take an inquiſition of his death, becauſe the ſtroke was not given in that county, nor could the coroner of the county of *A.* take an inquiſition, becauſe the body was in the county of *B.* but they uſed to remove the body into the county of *A.* and there the coroner of that county to take the inquiſition. 6 *H.* 7. 10. *a.*

But this would not avail, till the ſtatute of 2 & 3 *E.* 6. *cap.* 24. gave a remedy in this caſe by indicting and trying him in the county where he died.

But if he were ſtricken and had alſo died in the county of *A.* and the body had by ſome means been after removed into another county, he ought to be removed into the county of *A.* where he was ſtricken and died.

3. That altho he might take an indictment of death, and at common law proceed to outlawry, yet by the ſtatute of *Magna Carta, cap.* 17. he was diſabled to hear or determine that felony, or to make execution upon the outlawry.

4. But tho the coroner could not take any inquiſition but *ſuper viſum corporis*, yet in ſome caſes, that were not felony, he might take an inquiſition, as 1. *De Theſauro invento.* 2. Of wreck and royal fiſh. 3. And it ſeems he had a power to attach a perſon, that had dangerouſly wounded another, and that not only upon an appeal of mayhem, but alſo *ex officio*, as a thing tending to danger of death; *quod vide* 4 *E.* 1. *De officio coronatoris.*

And thus far touching inquiſitions before the coroner.

II. The ſecond thing, wherein the coroner's power lies, is taking of appeals, namely appeals of murder, appeals of robbery, appeals of rape, appeals *de plagis & mahemio*; and this appears by the ſtatute of 4 *E.* 1. *De coronatoribus.*

Theſe appeals can be taken only of facts done within the county, whereof he is coroner. *Stamf. P. C. f.* 63. *a.* (*g*).

This appeal is to be by bill in proper perſon, and before the coroner and ſheriff: *vide ſtat.* 3 *H.* 7. *cap.* 1.

But yet the coroner is the principal judge, and therefore a *certiorari* to remove ſuch a bill may be to the coroner alone. 4 *H.* 6. 16. *a. Dy.* 222. *b.* or to the coroner and ſheriff, becauſe by the ſtatute of *Weſtm.* 1. *cap.* 10. the ſheriff hath a counter-roll. 38 *E.* 3. 14. *b. Regiſter* 284. *a. Dy.* 223. *a.* But not to the ſheriff alone neither for appeals nor outlawries, unleſs in *London. Dy.* 317. *a.*

Altho by the ſtatute of *Magna Carta, cap.* 17. the coroner cannot determine the appeal, yet he may do theſe things. 1. He may record the nonſuit of the plaintiff in an appeal by bill before him. 22 *Aſſiz.* 93. 2. He may award a *capias* and *aliàs* to the ſheriff, and may thereupon demand the defendant at five counties, and outlaw the defendant. 22 *Aſſiz.* 97. tho *Stamford* make a doubt of it, *Lib.* II. *cap.* 14. *f.* 64. *a.* and thinks that the appeal muſt be removed by *certiorari* into the king's bench, and there only proceſs of outlawry can iſſue; but when the appeal is ſued before the coroner and ſheriff, to have the appeal determind it muſt be removed into the king's bench by *certiorari.*

III. The third power of the coroner is to take the accuſation of an approver, namely when a perſon is indicted before juſtices of gaol-delivery or in the king's bench for any felony, he may confeſs the offenſe, and impeach or accuſe or appeal others of felony, and thereupon the court aſſigns him a coroner to take his confeſſion.

The coroner upon an appeal by an approver may take an appeal of the approver againſt any perſon for any felony or treaſon

(*g*) & 52. *b.*

treaſon committed in the ſame county, or in any other county. 29 *E.* 3. 42. *Coron.* 462.

If the appeal be in the ſame county, it ſeems the coroner may make a precept to the ſheriff to take the perſon appeald; but if he be only a coroner of a franchiſe, it ſeems he may make a precept to the ſheriff to attach him, *quære*; but howſoever he cannot make a precept to the bailiff of the franchiſe, becauſe the bailiff of a franchiſe cannot execute a proceſs within his franchiſe, but by the precept of the ſheriff. 29 *E.* 3. 42. *Coron.* 462.

And therefore it ſeems in that caſe he muſt return the appeal before the judge of gaol-delivery within the franchiſe, and he may make proceſs within the franchiſe to the ſheriff; *vide* the caſe of *Ely* 29 *E.* 3. 41. *b.* *quære*, how the uſage is there, *viz.* whether the judge makes proceſs out of the liberty, and to whom.

But if the appeal be of a felony or treaſon out of the county, the ſame muſt be removed or certified to the juſtices of gaol-delivery, and they may make proceſs into any county of *England* to take the perſon appeald; and ſo the caſe of an appeal by an approver differs from the appeal by a perſon grieved. 5 *H.* 5. *Coron.* 437. 29 *E.* 3. 42. *Coron.* 462. *Stamf. P. C. Lib.* I. *cap.* 52. *f.* 53.

IV. The fourth power of the coroner is to take the confeſſion of a felony by a felon, tho the felony were committed in any forein county, and to take his abjuration. *Stamf. f.* 53.

But by the ſtatute of 1 *Jac. cap.* 25. continued by 21 *Jac. cap.* 28. the whole buſineſs of ſanctuary and the abjuration before the coroner relative to ſanctuary is taken away; and therefore it is needleſs to repeat the office or power of the coroner in relation to ſanctuary. *Co. P. C. cap.* 51.

CHAP. IX.

Concerning the ſheriff, *his power in pleas of the crown, as well by commiſſion, as in his* Turns.

THE power of the ſheriff to hold pleas of the crown, as well as the coroners and other the king's bailiffs, is reſtraind and taken away by *Magna Carta, cap.* 17. recited in the former chapter.

Yet after that ſtatute he had power to receive indictments and preſentments of felony, tho he had not power to determine them.

And this power was of two kinds, *viz.* ſpecial by virtue of a ſpecial writ or commiſſion, and general or *virtute officii* in his *Turn.*

The former of theſe powers *virtute brevis* or *commiſſionis* continued in uſe till the ſtatute of 28 *E.* 3. *cap.* 9. and by that ſtatute all former commiſſions and writs of that nature are repeald, and enacted, that for the future no ſuch commiſſion or commiſſions ſhall be granted.

And therefore *H.* 37 *Eliz. B. R.* where the coroner found a death *per infortunium*, and it was ſurmiſed for the king, that he was *felo de ſe*, and a *melius inquirendum* prayed to the ſheriff; ruled that none ſhould iſſue, becauſe contrary to the ſtatute.

The latter power of the ſheriff is *virtute officii*, and this ſtill continues in the ſheriff, namely, that he hath power in his *Turn* to take inquiſitions of felonies, that were felonies at common law; but the ſheriff cannot take any inquiſition of any felony created by act of parliament, unleſs the ſame act likewiſe give him juriſdiction; and therefore the ſheriff in his *Turn* cannot take an inquiſition of rape.

This court is a court of record, and the ſheriff or his ſteward or clerk is judge in it, the ſtyle *Placita coram vice-comite com'* S. *in Turno.*

The indictments taken here have theſe requiſites.

1. That the courts be held *infra menſem Paſchæ, & menſem Michaelis* by the ſtatute of 31 *E.* 3. *cap.* 15. or elſe they loſe their turn for that time, which hath been expounded their court ſo held for that turn only ſhall be void. *Stamf. P. C. f.* 84. *b.* 6 *H.* 7. 2. *a.* 38 *H.* 6. 7. *a.*

2. The indictment muſt be under the ſeals of the indictors, and by twelve jurors at leaſt by the ſtatute of *Weſtm.* 2. *cap.* 13. (*a*). And by the ſtatute of 1 *E.* 3. *cap.* 17. it muſt be by rolls indented between the ſheriff and the indictors, (which laſt ſtatute extends alſo to leets and franchiſes,) otherwiſe the indictments are void; and one of the indictors muſt ſhew one part of the indenture to the juſtices, when they come to make deliverance.

3. By the ſtatute of 1 *R.* 3. *cap.* 4. the indictors in the ſheriff's *Turn* muſt have 20 *s.* freehold, or 26 *s.* 8 *d.* copyhold, and be of good name, otherwiſe the ſheriff or bailiff ſhall forfeit 40 *s.* and the indictment is void.

And therefore if any be arraigned of felony upon ſuch an indictment, he may plead, that one of the indictors had not 20 *s.* freehold, nor 26 *s.* 8 *d.* copyhold; ſo that when it is ſaid *it ſhall be void,* it muſt be intended void by plea, for if the priſoner except not to it upon his arraignment, he is concluded by that omiſſion.

Upon theſe indictments of felonies in the ſheriff's *Turn,* tho they could not proceed to hear and determine them by reaſon of the ſtatute of *Magna Carta, cap.* 17. yet the ſheriff did commonly make out proceſs or precepts in nature of *capias* to arreſt the parties, as appears by the ſtatute of *Weſtm.* 2. *cap.* 13.

But now by the ſtatute of 1 *E.* 4. *cap.* 2. their power of making out proceſs upon theſe indictments is taken away, as well in caſe of indictments of felony, as other miſdemeanors within their cognizance; but they are to deliver all ſuch

2 preſent-

(*a*) 2 *Co. Inſtit. f.* 337.

preſentments and indictments to the juſtices of the peace at their next ſeſſions, who are to make out proceſs thereupon, and hear and determine them; but if the original preſentment were not within the juriſdiction of the *Turn*, the juſtices of peace ought not to proceed upon ſuch indictments, tho removed before them. 4 *E.* 4. 31. *a.* 8 *E.* 4. 5. *b.*

And what hath been ſaid touching the *Turns* of ſheriffs is in a great meaſure applicable to leets, namely they have power to receive indictments of felonies at common law, but not of felonies by act of parliament, unleſs ſpecially limited to them.

The ſtatutes of *Magna Carta*, *cap.* 17. 1 *E.* 3. *cap.* 17. extend to them as well as to *Turns*, but not the ſtatute of 1 *E.* 4. and therefore they cannot hear and determine felonies preſented in them, but muſt ſend their indictments of felony to the juſtices of gaol-delivery there to be heard and determind, if the offenders are in cuſtody, 8 *H.* 4. 18. *a. Franchiſe* 2. or remove them by *certiorari* into the king's bench, that proceſs may be made upon them to an outlawry.

And thus far concerning the ordinary juriſdiction, wherein felonies are inquired of, heard or determind; I have wholly omitted the courts in *eyre*, the courts of the *ſtaple*, and the franchiſe of *infangthief* and *utfangthief*, becauſe they are wholly diſuſed, and the learning concerning them rather for curioſity and antiquity, than for uſe in this buſineſs of pleas of the crown. The juriſdiction alſo of the royal franchiſes of *Ely*, *Hexam* and *Hexamſhire*, and other particular franchiſes remaining excepted by the ſtatute of 27 *H.* 8. *cap.* 24. are but particular juriſdictions, and not ſo uſeful for the pleas of the crown, as for a tract concerning the juriſdiction of courts.

And thus far touching the ordinary juriſdictions in caſes capital.

CHAP.

CHAP. X.

Concerning the apprehending *or* arreſting *of felons and traitors by* private perſons, *and* eſcapes.

HAving in the foregoing chapters conſiderd the ſeveral courts of ordinary juriſdiction, where traitors and felons are to be proceeded againſt, I ſhall now deſcend to the conſideration of the means and method of bringing ſuch offenders to trial, judgment, and execution.

And herein I ſhall obſerve this order, firſt to conſider thoſe courſes, that are preliminary to their arraignment, and afterwards to conſider of their arraignment, and thoſe proceedings, that are ſubſequent thereunto, their trial, judgment, and execution.

Concerning the former, namely the courſes preliminary to their arraignment, they are principally theſe, *viz.* 1. The arreſt or apprehending of them. 2. Their impriſonment or commitment, and therein of bailing or diſcharging them before indictment. 3. Their indictment.

Touching the firſt of theſe, namely their arreſts or apprehending them.

This is the firſt inſtance of their proſecution, and this is done either, 1. By private perſons by virtue of the law, or 2. By officers or *virtute officii*, or 3. Upon hue and cry levied, or 4. By warrant or precept *virtute præcepti*.

But before I come to theſe I will conſider ſomething concerning eſcapes of felons, and what puniſhment lies upon them, that permit it, which will open the conſideration of what is every perſon's duty in this caſe; and by this eſcape I do not mean eſcapes ſufferd by ſheriffs or gaolers, but eſcapes ſufferd by vills, townſhips, or private perſons.

If there be a murder or manſlaughter committed either in the day or night in an incloſed town, if the murderer be not taken, the town or city ſhall be amerced upon a preſentment thereof, either by the coroners or grand inqueſt before the juſtices of gaol-delivery. 3 *E.* 3. *Coron.* 299. But if it were a vill not encloſed, there if a murder were committed within the precinct of the vill, tho in the field, and the murderer not taken, if it were done in the night, the vill ſhould not be amerced; but if it were in day-light, tho in the evening, the town ſhould be amerced. 3 *H.* 7. *cap.* 1. 3 *E.* 3. *Coron.* 293.

And the ſame law is if the killing were by a man by miſadventure, if he eſcape and be not taken. 3 *E.* 3. *Coron.* 302. for tho by the ſtatute of *Marlebr. cap.* 26. that common fine or amercement called *murdrum* (*) was not to be impoſed in caſes of death *per infortunium*, yet the amercement called *eſcapium* took place even in that caſe. *Vide Bracton, Lib.* III. *cap.* 15.

If the malefactor were taken by the townſhip and deliverd to the ſheriff or his bailiff, or to the gaoler of the county, and then an eſcape happen, the townſhip is not chargeable, but the ſheriff or bailiff. 3 *E.* 3. *Coron.* 337.

But if he be in guard of the conſtable, and the conſtable is bringing him to the gaol, yea tho the gaoler refuſed to take him, if he eſcape, it is a charge upon the vill. 3 *E.* 3. *Coron.* 346. 10 *H.* 4. 7. *a. Eſcape* 8. *per Gaſcoigne*; nay, tho in the flight he be ſlain for neceſſity of retaking him becauſe he reſiſts, yet it is an eſcape upon the vill. 3 *E.* 3. *Coron.* 328.

And in caſe the vill be not ſufficient to anſwer the amercement, the hundred ſhall be charged therewith, and in default of the hundred the county; and if the killing be out of any vill, the hundred is amerceable for the eſcape. 8 *E.* 2. *Coron.* 425. *Stamf. P. C. Lib.* I. *cap.* 31. *f.* 34. *b.*

But this is only in caſe of felony touching the death of a man, for there the fact is apparent, that the man is ſlain; but in caſe of other felony, as theft, there tho the thief be not ta-

(*) *Vide Part* I. *p.* 39, 425, 447.

ken, no amercement lies upon the town, nor other penalty at common law, but by the ſtatute of *Winton*, *de quo infra*.

But if they had a felon in their cuſtody, or in the cuſtody of the conſtable, and he eſcape, the vill had been amerceable, and ſo is the hundred, if they have him in their cuſtody, or in the cuſtody of the conſtable of the hundred, and ſuffer him to eſcape. 3 *E.* 3. *Coron.* 316.

The law uſed in the time of *H.* 3. when *Bracton* wrote, appears *Lib.* III. *cap.* 10. to be thus: If a man had committed manſlaughter either by misfortune or otherwiſe, if he fled and the jury were inquired of by the judge if he were *in decennâ*, then the *decenna* was to be amerced by the court, becauſe they had him not there; if he were not in any *decenna*, then the vill was to be amerced, becauſe they received him an inhabitant and had him not *in franco plegio*, for every one above twelve years old ought to be in frank-pledge, except clergymen, noblemen, and knights and their families (*): And therefore in the caſe of clergymen, noblemen and knights if any of their family *de manupaſtu* committed a murder or manſlaughter, the clergyman, nobleman or knight was amerced if the malefactor fled, unleſs ſome ſpecial cuſtom had abrogated it, as in *Hertfordſhire*: And thus did the practice long after continue: *vide* 8 *E.* 2. *Coron.* 428. *Si ſerviens alicujus domini in ſervitio ſuo exiſtens facit feloniam & convincatur, quamvis poſt feloniam ipſius non receptavit, amerciandus eſt*; and 3 *E.* 3. *Itin. North'ton, Coron.* 293. It was preſented, that *A.* had kild *B.* and it was demanded of the preſenters, whether he were *in decennâ*, they anſwered *He was not*; then it was demanded where he abode; they ſay with the parſon of the town, and thereupon the parſon was amerced for his manupaſt; then it was demanded who was preſent when he ſlew him; they ſay *C.* it was then demanded of them, whether *C.* received him, [took him,] they ſay *Not*, wherefore *C.* was amerced: then it was demanded where the felon was; they ſay *he is eſcaped*; then it was demanded whether it were done in the day or the night; they anſwer *in the evening*; therefore the whole vill was amerced.

3 Several

(*) *Vide Part* I. *p.* 65. *in notis.*

Several things are obſervable in this caſe. 1. That if he had been *in decennâ*, the *decenna* had been amerced, becauſe they had not him preſent *ad ſtandum recto in curiâ*. 2. That becauſe the parſon nor his family were not by law to come to the view of frank-pledge, he was amerced for one, that was of his family, one *de manupaſtu*. 3. That he, that was preſent and took not the offender, was alſo amerced. 4. That becauſe the felony was committed in the day-time and the felon eſcaped, the whole vill was amerced, 22 *E.* 3. *Coron.* 238. ſo in effect three amercements for one eſcape.

And *note*, that according to *Bracton ubi ſupra* he is *de manupaſtu, qui eſt ad victum & veſtitum*, or *ad victum cum mercede*, as a houſhold ſervant; and according to the antient law, he that entertaind a man three nights made him to be *de manupaſtu*.

This law of amercing the *decenna* or him, of whoſe family an offender is, is not abrogated, but yet it is not now uſed; but it was certainly a moſt excellent conſtitution, whereby every man was under the pledge of his maſter or father, with whom he lived, or muſt be within ſome *decenna*, that may ſee him forthcoming: *vide Spelman in Gloſſar. Titul.* Friburg & *Leges Edvardi, cap.* 19, 20. (*a*).

As thus the vill is anſwerable for an eſcape, ſo is he that is preſent when a manſlaughter or murder is committed, and doth not do his beſt endeavour to apprehend the malefactor, tho he were not party or acceſſary to the crime, with this agrees 8 *E.* 2. *Coron.* 428. before-mentiond, where it is called only an amercement; but 8 *E.* 2. *Coron.* 395. he that was of full age, that was preſent when a manſlaughter was committed, *et ne leva le maine d' attach le felon*, was committed to priſon, till he made fine to the king, but he that was within age was diſcharged (*b*).

And tho in the book of 14 *H.* 7. 31. *b.* a perſon indicted for being preſent at a felony, without ſaying he was aiding and abetting, was diſcharged, it was, becauſe the indictment there was with intent to make him a felon, and not to charge him with a miſdemeanor for not purſuing the felon: *vide Co.*

P. C.

(*a*) *Wilk. Leg. Anglo-Sax. p.* 201. (*b*) *Vide Part* I. *p.* 21.

P. C. p. 117. It is a miſdemeanor, for which the party ſhall be fined and impriſond.

By that which hath been ſaid it appears, that the apprehending of a felon is in many caſes a duty and not arbitrary, even in caſes of a private perſon without any other warrant, than what the law gives, and that the omiſſion thereof is a miſdemeanor, and puniſhable by fine or amercement.

And now therefore I come to conſider touching the arreſts by a private perſon in caſe of felony.

And this is of theſe kinds. 1. Where the party arreſted hath really committed a felony, and this is known to the party arreſting. 2. Where the party arreſted hath really committed a felony, but it is only ſuſpected, and not certainly known to the party arreſting. 3. Where there hath been a felony committed, and the party arreſting doth upon probable grounds ſuſpect the perſon arreſted to have committed it, tho in truth he did it not.

I. As to the firſt of theſe, where a perſon hath committed felony and *A.* knows it.

It is true in this caſe, if the time and nature of the fact and the condition of things will bear it, it is beſt to complain to a juſtice of peace and have his warrant for the apprehending of him, or if that cannot be had in convenient time, then to call to his aſſiſtance the conſtable; but ſuch the caſe may be that the delay, that muſt ariſe neceſſarily by theſe ſolemnities, may give the felon opportunity to eſcape; and therefore in this caſe *A.* without any other authority than what the law gives him may arreſt or apprehend the felon; and if he cannot do it by his own ſtrength, he may call others to his aſſiſtance, or raiſe hue and cry for his apprehenſion; and if he doth not thus, he is puniſhable, as is above declared, if it can appear that he knew it.

And it will be all one, whether the felony were committed in the ſame county or in any other county, for the law in this caſe makes *A.* an officer; and this was antiently the law and ſtill is. *Bracton Lib. ult. in fine, In criminalibus cauſis, ubi ſequi debet capitale ſupplicium, vita videlicet vel muti-*

latio membrorum, non ſequitur attachiamentum aliquod, ſed corpus talis, quicunque ille fuerit, ab omnibus arreſtetur, qui ſunt ad fidem domini regis, ſive inde præceptum habuerit, ſive non habuerit; and accordingly it is ruled 10 *E.* 4. 17. *b.* that it is a good juſtification for a man in an action of falſe impriſonment to ſay, that the plaintiff committed a felony, and ſhew what, and the defendant arreſted him and deliverd him to the conſtable, or he might have brought him to gaol by himſelf or his ſervant, as is there agreed.

But the ſafer way is to bring him before a juſtice of peace, who may examine and commit him.

And as a private man may do thus upon a felony committed, ſo if he ſee danger of murder by a dangerous wound given, he may purſue the offender. 7 *E.* 3. 16. *Barre* 291.

And in both theſe caſes he may break open doors, if he be denied entrance, and if *de facto* the felon or malefactor be there, for the law makes him an officer in this caſe, as well as if he were a juſtice of peace or conſtable. 7 *E.* 3. 16. *b.*

Nay yet farther, if the felon reſiſts or flies, ſo that he cannot be taken without killing him, this is juſtifiable and no felony; but ſtill it muſt be where he cannot be otherwiſe taken, for it is for advancement of juſtice and ſuppreſſion of felons, and therefore if they cannot be otherwiſe apprehended, it is lawful as well, as if *A.* were a conſtable or had a warrant; and if the books, that ſpeak of this matter, be but carefully examined, it will appear that the law was ſo generally taken, tho he were purſued or taken without any formal proceſs to the ſheriff, and that as well before an arreſt made, as after; and this appears *in terminis* 22 *Aſſiz.* 55. 3 *E.* 3. *Coron.* 346, & 328 & 290. but indeed the books of 3 *E.* 3. *Coron.* 288, 289. are of a conſtable and watchman: but in 3 *E.* 3. *Coron.* 349. the townſmen that did it were fined 40 *s.* but it ſeems it was more for the eſcape, than the killing: *vide Stamf. P. C. Lib.* I. *cap.* 6. *f.* 13. *a. b. accordant.*

As to the ſtatutes of *Magna Carta, cap.* 29. 25 *E.* 3. *cap.* 4. 28 *E.* 3. *cap.* 3. 42 *E.* 3. *cap.* 3. they do not at all concern this preparatory impriſonment of a felon, as ſhall be ſhewn

in due time; and therefore whatſoever hath been before ſaid holds true in the firſt inſtance of his impriſonment, tho the party be not yet indicted.

II. As to the ſecond caſe, *viz.* where a felony is committed by *B.* but *A.* that arreſts him, doth not certainly know it, as not being preſent at the committing of it.

I take the law to be all one with the former caſe, only what he doth herein he doth at his peril, for if in truth *B.* be a felon, then *A.* may arreſt him, and may break a houſe to arreſt him, if he be within the houſe and refuſe to render himſelf; yea, and if he will not ſuffer himſelf to be taken, he may in caſe of neceſſity be kild; but this ſtill is at the peril of *A.* for if he be no felon, it may be manſlaughter at leaſt in *A.* if he doth it.

But how far forth this will be juſtifiable in caſe that *A.* hath a good cauſe of ſuſpicion, will be conſiderable in the next inquiries.

III. The third caſe is, there is a felony committed, but whether committed by *B.* or not *non conſtat*, and therefore we will ſuppoſe, that in truth it were not committed by *B.* but by ſome perſon elſe, yet *A.* hath probable cauſes to ſuſpect *B.* to be the felon, and accordingly doth arreſt him; this arreſt is lawful and juſtifiable, and the reaſon is, becauſe if a perſon ſhould be puniſhed by an action of treſpaſs or falſe impriſonment for an arreſt of a man for felony under theſe circumſtances, malefactors would eſcape to the common detriment of the people.

But to make good ſuch a juſtification of impriſonment, 1. There muſt be in fact a felony committed by ſome perſon, for were there no felony, there can be no ground of ſuſpicion. Again, 2. The party, (if a private perſon,) that arreſts, muſt ſuſpect *B.* to be the felon. 3. He muſt have reaſonable cauſes of ſuch ſuſpicion, and theſe muſt be alleged and proved.

1. There muſt be a felony done; and therefore if a man be taken for ſuſpicion of felony and deliverd to the conſtable, or remains in the cuſtody of him that took him, yet if in truth no felony were committed, he may be let go at

large, and no puniſhment ſhall enſue for the eſcape. *Kelw.* 34. *a. b.* But if a felony were committed, tho he, that is taken for the ſuſpicion thereof, be in truth innocent, and it ſo appear to the conſtable or him that arreſts him; yet if he let him go before he be indicted, and acquitted or deliverd by proclamation before the juſtices of gaol-delivery, the party letting him go ſhall be puniſhed for an eſcape. 44 *Aſſiz.* 12. *Poulton de Pace, f.* 146. *b.* 5 *H.* 7. 4. 7 *H.* 4. 35. *a.*

2. The party, that arreſts him, muſt be he that ſuſpects him, and regularly it cannot be done by another; and therefore if a man juſtify in falſe impriſonment for ſuſpicion, he muſt juſtify it as his own act, and not by the command of the ſheriff or other officer, nor can another juſtify by the command of him, that ſo ſuſpects. 11 *E.* 4. 4. *b.*

But this doth not always hold true, for an officer of juſtice may in aſſiſtance of him that ſuſpects juſtify the impriſonment, as a conſtable, upon a complaint made to him by him that ſuſpects, may juſtify, but he muſt allege his juſtification in the ſame manner, as he that ſuſpected ought, *viz.* a felony done and cauſe of ſuſpicion; and therefore the party ſuſpecting and deſiring the conſtable's aſſiſtance muſt acquaint him with the whole matter, and the cauſes of his ſuſpicion, otherwiſe he is not bound to aſſiſt him. 2 *H.* 7. 15. *b.* And in like manner a juſtice of peace being applied to by him that ſuſpects and acquainted with the whole circumſtances of the caſe(*).

And this appears beyond diſpute even by the ſtatute of 34 *E.* 3. *cap.* 1. whereby power is given to the juſtices of peace to arreſt all thoſe, whom they find by indictment or by ſuſpicion, and to put them in priſon.

And the reaſon is apparent, namely the juſtices of peace are made judges of the reaſonableneſs of the ſuſpicion, and when they have examined the party accuſing touching the reaſons of their ſuſpicion, if they find the cauſes of ſuſpicion to be reaſonable, it is now become the juſtice's ſuſpicion as well as theirs, and accordingly adjudged *P.* 43 *Eliz. C. B. Croke, n.* 35. *Tatam*'s caſe (*c*); and therefore the ſaying of my lord *Coke*, 4 *Inſtit. p.* 177. "That notwithſtanding ſuch warrant or "the

(*) *Vide Part* I. *p.* 580. (*c*) *Cro. Eliz. p.* 829.

" the aid of the conſtable upon ſuch complaint, it is ſtill the " party's arreſt and not the conſtables or juſtices, and that he " muſt be preſent, and that he cannot break open a door by " virtue of ſuch warrant," is neither warranted by the law nor the common practice (*); and in the book of 2 *H.* 7. 15. *b.* where one juſtified in aid of the conſtable upon a felony done and a ſuſpicion and cauſe thereof *ut infra*, it was ruled a good juſtification againſt the opinion of *Bryan*; and it is apparent by the ſtatute of 5 *E.* 3. *cap.* 14. " If any perſon hath any evil " ſuſpicion of perſons to be robberds-men, waſters or draw- " latches, they ſhall be incontinently arreſted by the conſta- " bles of the town, be it by day or night, and if they be ar- " reſted within franchiſes, they ſhall be deliverd to the bai- " liff of the franchiſe, if in the gildable, to the ſheriff, and " kept in priſon till the coming of the juſtices.

The ſuſpicion may be by any perſon, yet the impriſonment muſt be by the conſtable; and the reaſon is that which is given before, becauſe the conſtable is a proper officer, to whom complaints of this nature may be made.

And therefore if a felony be committed upon the goods of *A.* and the goods be found in the cuſtody of *B.* and *A.* comes to a conſtable and ſhews him the caſe, and requires him to bring him before a juſtice; this is a good juſtification by *A.* in falſe impriſonment brought againſt him without ſo much as an averment, that he ſuſpected him. *H.* 4 *Car. Rot.* 513. *Marbery* and *Porter*, *B. R. vide* 2 *E.* 4. 8. *b.*

But it is true, that he, that is not an officer, cannot juſtify by the command of him that ſuſpects, if he alſo be no officer; and ſo are the books of 5 *H.* 7. 5. *a. per Cur'.* 12 *Co. Rep.* 92. Sir *Antony Aſhley*'s caſe, 11 *E.* 4. 4. *b.*

But then the caſe is eaſily ſolved, for if a felony be committed, and *A.* hath probable cauſe to ſuſpect *B.* and accordingly ſuſpects *B.* and acquaints *C.* with the whole matter, *C.* upon this having probable cauſe to ſuſpect *B.* tho he cannot juſtify the impriſonment of *B. as by the command of A.* that firſt ſuſpected him, he may juſtify *by his own ſuſpicion*; and the like of him that comes in aid of *A.* to arreſt *B.* 5 *H.*7. 4 & 5.

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(*) *Vide Part* I. *p.* 579.

3. The third thing to be obſerved in this arreſt by a private perſon upon ſuſpicion is, that he hath a probable cauſe of ſuſpicion.

And theſe probable cauſes are very many, as for inſtance common fame, 15 *H.* 7. 4. *b.* 2 *H.* 7. 15. *b.* 11 *E.* 4. 4. *b.* *&c.* hue and cry levied, 21 *H.* 7. 28. hath part of the goods found upon him, or be indicted or the like, 12 *Co. Rep.* 92. *Aſhley's* caſe, party with him that committed the robbery. 7 *E.* 4. 20. *a.*

And *note*, that the law hath that care, that malefactors, tho but ſuſpected, ſhould be apprehended, that a man may allege twenty cauſes of ſuſpicion, and it ſhall not make his plea double, for one anſwer makes an iſſue upon the whole, *viz. de injuriâ ſuâ propriâ abſque tali cauſâ*, and no iſſue ſhall be ſingly taken upon one cauſe of ſuſpicion, where many cauſes are thus alleged. 2 *E.* 4. 8 *&* 9. 7 *E.* 4. 20. *a.*

Now what is to be done by a private perſon, that thus arreſts a party upon ſuſpicion of felony; if after ſuch an arreſt the party arreſting diſcharge him without bringing him to a juſtice or conſtable, he ſhall be puniſhed for the eſcape at the king's ſuit, but it makes not the impriſonment unlawful as to the party. 10 *E.* 4. 17. *b.*

Or he may carry him to the gaol, and if the gaoler receive him, he that made the arreſt is diſcharged, 10 *E.* 4. 18. *a.* but he muſt not carry him to a gaol of any other county than where he is taken, unleſs either there be no gaol in the county, or that he cannot for the danger of rebels bring him to that gaol. 11 *E.* 4. 4.

Or he may deliver him to the conſtable of the vill, and that is a ſufficient diſcharge. 10 *E.* 4. 17. *b.*

But the proper way is to bring him to a juſtice of peace, who may commit, or diſcharge, or bail him, as the caſe requires.

Yet if the party ſo arreſted be ſick and cannot be removed without danger of death, he may detain him in his own houſe, till he can reaſonably bring him to a juſtice or officer. 2 *E.* 4. 8. *b.*

The arreſt of a man upon ſuſpicion of felony by a private perſon is, as before is ſaid, a thing permitted by law and therefore juſtifiable; but it is not a thing commanded by law, neither is the party puniſhable, if he omit it, as in caſe where it is a known felony, or where done upon hue and cry levied, or by an officer, or by a precept; for no man is judge of a man's ſuſpicion but himſelf (*).

And therefore there is not the ſame privilege in all points allowd to him that arreſts upon ſuſpicion, as to him that arreſts upon hue and cry, or by warrant, or where he is preſent at the felony committed, and ſo knows it.

1. It ſeems he, that arreſts as a private man barely upon ſuſpicion of felony, cannot juſtify the breaking open of doors to arreſt the party ſuſpected, but he doth it at his peril, *viz.* if in truth he be a felon, then it is juſtifiable, but if he be innocent, but upon a reaſonable cauſe ſuſpected, it is not juſtifiable, 4 *Co. Inſtit. p.* 177, 178. (but yet to prevent a murder or manſlaughter a private perſon may break open a door, 12 *H.* 8. 2. *b.*) but he may enter by the doors open, and make the arreſt in the houſe.

But *note*, that in all arreſts he muſt acquaint the party with the cauſe of his arreſt.

But in caſe of a known felony done by the party, or where a felony is done and a conſtable comes and demands entrance upon a complaint to him, or by a juſtice of peace's warrant, or upon hue and cry; there the doors may be broke open upon notice and demand of entrance and refuſal.

2. Again, if there be a felony committed by *B.* and *A.* is preſent and ſees it, and purſues the felon, and he cannot be otherwiſe taken, and *A.* kills him in the purſuit, tho he have not arreſted him, the law juſtifies him; and poſſibly the ſame law may be in caſe of an officer, a warrant, or hue and cry, tho the perſon be not guilty of the fact, if he refuſe to ſubmit to the arreſt; but *de hoc infra.*

But if a felony be committed, and *A.* upon probable cauſe ſuſpects *B.* to have been the felon, tho the law permits him to arreſt *B.* tho in truth innocent, yet he cannot juſtify the kil-

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(*) *Vide Part* I. *p.* 490.

ling of him upon his flight and refuſing to ſubmit, *juſticiari ſe permittere nolens*; but if he kills him, it is at his peril, for if *B.* be innocent, it is at leaſt manſlaughter, *Co. P. C. p.* 56, 221. 22 *Aſſiz.* 55. and the reaſon is, becauſe *B.* is not bound to take notice of *A.* as authorized to arreſt him, as being no officer, nor having any warrant; it is true, a conſtable arreſting in the king's name, or offering ſo to do, the party is bound to take notice and ſubmit, as hath been ſaid, *Part* I. *cap.* 37. but a mere ſtranger offering to do it, a man is not bound to take notice of his authority, and therefore may fly from him if innocent, for poſſibly he may think he came to rob him.

3. Yet farther, if an innocent perſon be actually arreſted upon ſuſpicion by a private perſon, all circumſtances being duly obſerved, and he breaks away from the arreſt, yet I do not think the perſon arreſting can kill him, tho he cannot be otherwiſe taken, for the perſon arreſted is not bound to take notice of that authority, that the law gives to a private perſon in this caſe.

But then can he juſtify the beating or ſtriking of him in caſe he cannot otherwiſe take him, that thus makes the aſſault? As where a bailiff of the ſheriff by warrant arreſteth a perſon, tho he cannot ſtrike or beat him before the arreſt to take him; yet after the arreſt and eſcape ſuch a bailiff may juſtify his beating, if he cannot otherwiſe retake him according to the opinion of the book 2 *E.* 4. 6. *b.*

And it ſeems he cannot, but only lay his hands gently upon him to lay hold of him for the reaſon before given.

4. But then ſuppoſe that either before the arreſt or after the arreſt *B.* draws his ſword and aſſaults *A.* and *A.* preſſeth upon him either to take or detain him, and in the conflict *B.* kills *A.* is it murder in *B.* or if *A.* kills *B.* is it juſtifiable and no felony in *A?*

If the bailiff of a ſheriff is about to take a priſoner, and before he takes him the party draws his ſword and kills him, this is murder, as is before ſaid, *Part* I. *cap.* 37. And on the other ſide, if either after or before the arreſt the bailiff upon aſſault made upon him kills the party, this is no felony, neither

ther is he bound to give back to the wall. *Co. P. C. p.* 56 & 221.

It ſeems, that if the party arreſted kill him, that thus arreſts upon ſuſpicion, (always ſuppoſed the party killing is innocent,) this is but manſlaughter and not murder; and on the other ſide, if the party arreſting kill the party arreſted or intended to be arreſted by him upon ſuſpicion, that this is manſlaughter; and tho the arreſt in this caſe had been lawful, yet the party arreſting hath not the ſame privilege, as in caſe of killing a man upon hue and cry, tho the party arreſted after the arreſt or upon the attempt of the arreſt aſſaulted him, that arreſted him or attempted to arreſt him. 1. Becauſe in this caſe, tho the law impower the party to arreſt him, yet it is but a power of permiſſion, not an injunction by the law, neither is he puniſhable, if he had not made ſuch an arreſt, and ſo not like the caſe of an arreſt by an officer, warrant of a juſtice, or hue and cry, where it is a duty to arreſt, and the party, that omits his duty in this caſe, is puniſhable by fine and impriſonment for his omiſſion. 2. Becauſe he might have had a legal warrant from a juſtice of peace, or called an officer to his aſſiſtance, and then he had been under a more effectual protection of the law in what he did in purſuance of his duty. 3. It would give too great a latitude for perſons to be their own judges in this caſe, and to take away a man's life who is innocent, and poſſibly might not have ſufficient aſſurance, that either a felony had been committed, or that he that arreſts had a juſt or lawful cauſe of ſuſpicion.

And it ſeems the law is the ſame, whatſoever the cauſe of ſuſpicion were, yea altho the perſon were indicted for the offenſe, becauſe a perſon innocent may be indicted, and becauſe there is another way to bring him in to anſwer, namely proceſs of *capias* to the ſheriff, who is a known reſponſible officer. 3 *E.* 3. *Coron.* 346.

And thus far concerning arreſting by a private perſon upon ſuſpicion.

CHAP. XI.

Concerning arreſts *or* apprehenſion of felons, *or perſons* ſuſpected of felony *by an* officer.

THere are certain officers and miniſters of public juſtice, that *virtute officii* are impowerd by law to arreſt felons, or thoſe that are ſuſpected of felony, and that before conviction, and alſo before indictment.

And theſe are under a greater protection of the law in execution of this part of their office upon theſe two accounts. 1. Becauſe they are perſons more eminently truſted by the law, as in many other acts incident to their office, ſo in this. 2. Becauſe that they are by law puniſhable, if they neglect their duty in it.

And therefore it is all the reaſon that can be, that they ſhould have the greateſt protection and encouragement in the due execution of their office, ſince their actings herein are not arbitrary but neceſſary duties, (not permiſſions,) and under ſevere puniſhments in their neglect thereof.

And hence it is, that theſe officers, that are thus intruſted, may without any other warrant but from themſelves arreſt felons, and thoſe that are probably ſuſpected of felonies; and if they be aſſaulted and kild in the execution of their office, it is murder; and on the other ſide, if perſons, that are purſued by theſe officers for felony or the juſt ſuſpicion thereof, nay for breach of the peace or juſt ſuſpicion thereof, as night-walkers, perſons unduly armed, ſhall not yield themſelves to theſe officers, but ſhall either reſiſt or fly before they are apprehended, or being apprehended ſhall reſcue themſelves and reſiſt or fly, ſo that they cannot be otherwiſe apprehended, and are upon neceſſity ſlain therein, becauſe they cannot be otherwiſe taken, it is no felony in theſe officers or

their aſſiſtants, that upon inevitable neceſſity kill them, tho poſſibly the parties kild are innocent; for by their reſiſtance againſt the authority of the king in his officers they draw their own blood upon themſelves.

The officers that I herein principally intend are, 1. Juſtices of the peace. 2. Sheriffs. 3. Coroners. 4. Conſtables. 5. Watchmen. And when I mention theſe I alſo include all, that come in their aid and aſſiſtance; for every man in ſuch caſes is bound to be aiding and aſſiſting to theſe officers upon their charge and ſummons in preſerving the peace and apprehending of malefactors, eſpecially felons.

And if any being thereunto called ſhall not give their aſſiſtance, they are to be puniſhed by fine and impriſonment, and conſequently are under the common protection of the law equally with the officers themſelves.

And that was the reaſon of the ſtatutes of 7 *Jac. cap.* 5. and 21 *Jac. cap.* 12. that gave power as well to aſſiſtants of the moſt uſual peace-officers, as to the officers themſelves, to plead the general iſſue, and give the ſpecial matter of their juſtification in evidence, and allow double coſts to the defendant.

Whereſoever a private perſon may arreſt a felon or perſon ſuſpected, there any of theſe officers may do it; but of this ſufficient hath been ſaid before: I therefore come to that power, that concerns them ſpecially as officers in this caſe.

I. *Juſtices of peace* have a double power as in relation to arreſt of felons; one upon complaint of another perſon, whereof hereafter *cap.* 13. Another primitive and original in themſelves, whereof at preſent.

If a juſtice of peace ſee a felony, or other breach of the peace, committed in his preſence, he may in his own perſon apprehend the felon.

And ſo he may by word command any perſon to apprehend him, and ſuch command is a good warrant without writing; but if the felony or other breach of the peace be done in his abſence, then he muſt iſſue his warrant in writing under his ſeal to apprehend the malefactor, 14 *H.* 7. 9. *b.* adjudged; and by *Fineux*, if there be any riot or breach of

the peace like to happen by a tumultuous meeting, *&c.* he may command his ſervants or others to prevent it by arreſting the parties.

And *note*, that if the juſtice of peace hath either from himſelf or by a credible information from others knowledge of a felony done, and juſt cauſe of ſuſpicion of any perſon, he may himſelf arreſt and commit that perſon, 14 *H.* 7. 8. *per Keble*; and according to it are the expreſs words of the ſtatute of 34 *E.* 3. *cap.* 1. before-mentiond.

II. Secondly, As to the *ſheriff* it is ordaind by the ſtatute of *Weſtminſt.* 1. *cap.* 9. (*a*), "That all generally be ready and "appointed at the commandment and ſummons of the ſhe-"riff, and at the cry of the country to ſue and arreſt felons, "when any need ſhall be, as well within franchiſes as with-"out, and they, that will not ſo do, and thereof be attaint, "ſhall make grievous fine to the king, and if default be "found in the lord of the franchiſe, the king ſhall take the "franchiſe to himſelf, *&c.* And if the ſheriff, coroner or "bailiff will not attach or arreſt ſuch felons there, as they "may, or will not do their office for favour borne to ſuch "miſdoers, and be attaint, they ſhall have a year's impri-"ſonment and after make grievous fine, if they have where-"with, and if not, three years impriſonment.

By this ſtatute the ſheriff is not only enabled but injoind to arreſt felons, and all perſons are required to be aſſiſting to him therein upon his ſummons; and they are puniſhable by fine and impriſonment in default thereof.

And altho the ſheriff in his *Turn* had power to take preſentments of felonies at common law, yet this was not intended barely of iſſuing precepts upon ſuch inquiſitions, but to a miniſterial taking of felons as he was conſervator of the peace, for his *Turn* was kept but twice in the year, but the occaſions of taking felons were frequent.

And accordingly it was practiſed, *vide* 5 *H.* 7. 5. *a. in fine*, the ſheriff arreſted one ſuſpected of felony, and no queſtion of the lawfulneſs thereof.

III. *Coro-*

(*a*) 2 *Co. Inſtit. f.* 172.

III. *Coroners:* Tho coroners had no power of taking inquiſitions of any felony but the death of a man, as hath been ſhewn; and therefore by the expreſs proviſion of the ſtatute of 4 *E.* 1. *De officio coronatoris* he may not only make proceſs but make hue and cry after them, yet by the ſtatute of *Weſtminſt.* 1. *cap.* 9. above-mentiond he is a conſervator of the peace in relation to all felonies, and can command them to be apprehended, tho he can take no inquiſition concerning any but the death of a man.

IV. For the office of *conſtable* it is of twofold extent. 1. Miniſterial and relative to the juſtices of peace, coroners, ſheriffs, *&c.* whoſe precepts he ought to execute, or in default thereof he may be indicted and fined. 2. Original or primitive, as he is a conſervator of the peace at common law.

By the original and inherent power in the conſtable he may for breach of the peace and ſome miſdemeanors, leſs than felony, impriſon a perſon.

If a man leave an infant in the cold to the intent to deſtroy it, or charge the pariſh, the conſtable may take him and put him into the ſtocks. *M.* 34 & 35 *Eliz. B. R. Croke, n.* 1. *Beal* and *Charter p.* 287.

So if a conſtable be aſſaulted by *A.* tho it be in his own caſe, he may impriſon the party and carry him to gaol; but for opprobrious words, or a general hindrance of him to ſummon the trained bands to attend the lord mayor of *London* upon his precept, he cannot juſtify the impriſoning of a perſon in the *Compter, T.* 31 *Eliz. Rot.* 1521. *Fulwood* and *Gaſcoign* (*c*); but he muſt bring him to a juſtice of peace: *nota*, in the juſtification it was alſo alleged, that he aſſaulted him: *ideo quære* of that judgment.

And what may be done by a conſtable may be done by his deputy, for by the law a conſtable may make a deputy, and he is within the ſtatute of 7 *Jac. cap.* 5. to plead the general iſſue. *M.* 13 *Jac. B. R. Phelps* and *Winchcombe* (*d*).

If *A.* menace *B.* to kill him, upon complaint thereof to the conſtable he may arreſt him and put him into the ſtocks

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(*c*) *Savil. p.* 97. (*d*) *Moor p.* 845.

till he find ſurety of the peace, 44 *E.* 3. *Barre* 202. but that is intended, that he may detain him, till he can conveniently bring him to a juſtice of peace and to avoid the preſent danger, for tho ſome of the old books ſeem to hold, that the conſtable may take ſureties of the peace and detain a perſon till he give him ſureties, yet it cannot be by recognizance but by bond, and that for an affray or menace of breach of the peace done in his view. *H.* 37 *Eliz. B. R. Croke, n.* 25. *Sharrock* and *Hanmer* (*e*).

If information be given to a conſtable, that a man and woman are in incontinency together, he may take the neighbours and arreſt them, and commit them to priſon to find ſureties for the good behaviour, 1 *H.* 7. 6. *a.* there the cuſtom of *London* indeed is pleaded; but 13 *H.* 7. 10. *b.* adjudged, that it is a good juſtification for the conſtable or any in aſſiſtance to plead, that *A.* holds a meſſuage in the ſame vill, and ſhe kept perſons ſuſpected of common bawdry, and the plaintiff ſuſpiciouſly reſorted to that houſe with women of ill fame, and that he arreſted the plaintiff to find ſureties for the good behaviour.

The conſtable may arreſt ſuſpicious night-walkers (*f*) by the ſtatute of 5 *E.* 3. *cap.* 14. and men, that ride armed in fairs or markets or elſewhere. *Stat.* 2 *E.* 3. *cap.* 3. *de Northampton.*

And it appears by the books before-mentiond, that in caſes of arreſts of this or the like nature the conſtable may execute his office upon information and requeſt of others, that ſuſpect and charge the offenders, nay tho it be but with

(*e*) *Cro. Eliz. p.* 375.

(*f*) But then that ſuſpicion muſt not be a mere cauſeleſs ſuſpicion, but muſt be founded upon ſome probable reaſon; and ſo it was ruled in the caſe of the Queen and *Tooley*, *Mich.* 1709. for the murder of *Dent*, who was kild in aiding the conſtable, who had taken up a woman, that was walking the ſtreet, upon ſuſpicion, as being a woman of ill fame. *C. J. Holt* deliverd the reſolution of the court, that it was not murder, and gave this for one reaſon, "That it was "not lawful even for a legal conſtable "to take up a woman upon a bare ſu- "ſpicion only, having been guilty of no "breach of the peace nor any unlawful "act; and as to the caſe in 13 *H.* 7. 10. "the reaſon thereof was, becauſe it was "in the view of the conſtable, who found "her miſdoing; that of late conſtables "made a practice of taking up people "only for walking the ſtreets, but he "knew not whence they had ſuch an "authority. *MS. Rep.*

ſuſpicion thereof. 5 *E.* 3. *cap.* 14. 13 *H.* 7. 10. *b.* 44 *E.* 3. *Barre* 202.

But if there be an affray, tho to prevent it, or in the time of the affray the conſtable may upon information or complaint arreſt the offender, yet it is held, that if the affray be paſt and no danger of death, the conſtable cannot arreſt the parties without a warrant from a juſtice of peace. 38 *E.* 3. *B. Faux Impriſonment* 6.

But the law ſeems contrary, for tho in that caſe he cannot take ſurety of the peace himſelf, yet upon a complaint to him he may arreſt the party to bring him before a juſtice to find ſurety of the peace or for appearance. 44 *E.* 3. *Barre* 202. 35 *Eliz. Sharrock*'s caſe.

Now as touching the conſtable's power of arreſting *ex officio* in relation to felonies it may come under theſe conſiderations, 1. What his power is to arreſt, when a felony is *certainly* committed. 2. What his power is to arreſt in caſes of *ſuſpicion* of felony. 3. What his power is in caſe of *danger* of felony, tho none be committed, as in caſe of affrays or dangerous wounding.

1. As to the *firſt* of theſe, where a felony is committed, it is of all hands agreed, that he may *ex officio* arreſt and impriſon the felon, till he can conveniently be conveyed to a juſtice of peace or the common gaol.

And it will be all one, whether the felony were committed in the ſame vill, or in any other vill or county, if the felons be within the vill, where he is conſtable.

And this appears clearly by the books of 2 *H.* 7. 15. *b.* 7 *E.* 4. 20. *a.* and divers others, and by the ſtatute of *Weſtm.* 1. *cap.* 9. 5 *E.* 3. *cap.* 14.

And in that caſe it is on all hands agreed,

1. That he may break open doors to take the felon, if the felon be in the houſe and his entry denied, after demand and notice that he is conſtable.

2. That if in ſuch an attempt of arreſt the conſtable or any that come in his aſſiſtance be kild after competent notice that he is a conſtable, it is murder.

3. That if the felon reſiſt and cannot be taken, whether it be after the arreſt or before, the killing of the felon, who cannot be otherwiſe taken, is no felony.

And the reaſon of all this is, becauſe he is *ex officio* a conſervator of the peace, and is not only permitted but by law injoind to take a felon, and if he omits his duty herein, he is indictable and ſubject to a fine and impriſonment.

And it is not material, whether he ſaw the felony committed, or hath it only by complaint and information; for as well in one caſe as the other he is bound to apprehend the felon, and make ſearch after him within the limits of his juriſdiction, and to raiſe *hue* and *cry* upon him; and certainly what may be done upon *hue* and *cry* raiſed upon a felon may be done by that conſtable who upon the firſt complaint raiſeth it; and the law gives him protection in the execution of his office, and will never puniſh him in the neceſſary purſuit of what it injoins him.

And with this all the before cited books in the precedent chapter do agree; for I have before therein determind, that in this caſe a private perſon may kill a felon, who is really ſuch, if he cannot otherwiſe be taken: *vide ſupra p.* 77.

2. I come to the *ſecond*, namely what if there be a felony done, (ſuppoſe a robbery upon *A.*) and *A.* ſuſpects *B.* upon probable grounds to be the felon, and acquaints the conſtable with it, and deſires his aid to apprehend him; in this caſe I ſay,

1. That the conſtable may apprehend *B.* upon this account, tho the ſuſpicion ariſe in *A.* at firſt; and with this agree the ſtatutes of 3 *E.* 1. *cap.* 9. and 5 *E.* 3. *cap.* 14. and the books of 2 *E.* 4. 9. *a.* 5 *Co. Rep.* 91. *b.* *Semain*'s caſe, *Dalt. cap.* 109. *p.* 292. (*g*), 13 *E.* 4. 9. *a.* *accords* 2 *H.* 7. 15. *b.* tho *Brian* be to the contrary; but there are to be theſe circumſtances to accompany it, 1. *A.* the perſon ſuſpecting ought to be preſent, for the juſtification is, that he did aid *A.* in taking the party ſuſpected, 2 *H.* 7. 15. *b.* 2. He ought to inquire and examine the circumſtances and cauſes of the ſuſpicion of *A.* which tho he cannot do it upon oath, yet ſuch an information

(*g*) *New Edit. cap.* 162. *p.* 535.

tion may carry over the ſuſpicion even to the conſtable, whereby it may become his ſuſpicion as well as the ſuſpicion of *A.* And if the conſtable ſhould not be allowd this latitude in caſes of this nature, many felons would eſcape, and the party arreſted hath no prejudice thereby, for the juſtice of the peace, to whom in ſuch caſes he is properly to be brought, may conſider the circumſtances, and poſſibly in ſome caſes diſcharge or bail him, and upon his trial, if innocent, he will be diſcharged. 3. But there muſt be a felony in fact done, and the conſtable muſt be aſcertained of that, and aver it in his plea, and it is iſſuable.

2. Conſequently, if the conſtable upon ſuch an arreſt or attempt thereof be kild, it is murder as well as in the former caſe.

3. That in ſuch caſe, if the ſuppoſed offender fly and take houſe, and the door will not be opened upon demand of the conſtable and notification of his buſineſs, the conſtable may break open the door, tho he have no warrant. 13 *E.* 4. 9. *a.* for it is a proceeding for the king by perſons by law authorized, and therefore there is virtually a *non omittas* in the actings of their authority.

And the reaſon of the difference between private perſons arreſting upon ſuſpicion and conſtables is, 1. Becauſe that in the former caſe it is but a thing permitted to private perſons to arreſt for ſuſpicion, and they are not puniſhable if they omit it, and therefore they cannot break open doors; but in caſe of a conſtable he is puniſhable, if he omit it upon complaint. 2. Becauſe it would be a great inconvenience if every private man upon pretenſe of ſuſpicion ſhould break open houſes, for they may not be of known value or reſponſible; but a conſtable is an officer known within the vill, and his authority known, and is preſumed of ſufficiency, for he is choſen by the leet, like a bailiff *jurus & conus*, who need not ſhew his warrant (*).

4. Again it ſeems to me, that if a perſon thus charged with ſuſpicion of felony upon juſt grounds of ſuſpicion, and where a felony is actually committed, tho he be innocent,

2 yet

(*) *Part* I. *p.* 461.

yet if he reſiſt the officer after notice that he is the officer, and aſſault him, if the officer kill him, it is no murder.

But it may be more queſtionable, whether if he fly and cannot be apprehended, the officer may kill him, where he is ſuſpected and innocent, if he cannot be otherwiſe taken, as he may a felon, as before is ſhewn *p.* 77. but it ſeems he may, and it is no felony no more than in the former caſe, for theſe reaſons, 1. Becauſe the conſtable is obliged to do his office in caſe of a probable ſuſpicion, as well as in caſe of an actual felony. 2. Becauſe he cannot judge, whether the party be guilty or not, till he come to his trial, which cannot be till he be apprehended. 3. Becauſe the party draws upon himſelf this inconvenience, and makes himſelf ſuſpected by his very flight from the known officer.

And this is the reaſon, why tho a man be innocent of a felony committed, yet if he fled for it, and that be preſented by the coroner or found by the jury, that acquits him of the felony, yet he forfeits his goods, becauſe it was his own fault, that he did not *ſtare juri*, and brought upon himſelf the juſt cauſe of ſuſpicion, and put the country to trouble and hazard in purſuing him.

And yet it is true, that if the felon were not once in the hands of an officer, that had warrant to arreſt, as if he be in the houſe and fly out at a back-door before the officer ſeizeth him, this is not an eſcape in the officer, 27 *Aſſiz.* 9. But on the other ſide it may be ſaid, that it is nevertheleſs an eſcape in the townſhip, for which they ſhall be amerced, tho the perſon were never actually taken; *quod vide ſupra cap.* 10.

And therefore it is at the peril of the whole vill, if they take not a felon (*), and when he is upon probable cauſe ſuſpected, he is preſumed to be ſuch till the contrary appear upon his trial.

And therefore, as before is ſaid, a juſtice of peace cannot diſcharge a perſon brought before him but for ſuſpicion of felony, in caſe a felony were committed, but muſt either bail or commit him.

(*) This holds only as to felony touching the death of a man, but not in caſe of other felony, as theft, &c. *vide ſupra p.* 73.

And upon the reaſon before given it ſeems, that if a perſon be charged to the conſtable for felony or ſuſpicion of felony in the county of *A.* and the conſtable charge him in the king's name to yield himſelf, and he either before or after the arreſt purſue him into another vill, nay into another county, the conſtable hath the ſame privilege and protection upon his purſuit and arreſt, as if he were taken in the county of *A.* tho yet he muſt bring him before the juſtice of that county, where he was taken: *vide Crompton de Pace, p.* 172, 173. *Dalt. p.* 340. (*b*)

But for this latter caſe I take the law to be all one in caſe of a conſtable having a warrant to arreſt a felon, or not having one, but doing it by his own intrinſic power *virtute officii*, namely, that if he hath or hath not a warrant from a juſtice of peace to arreſt a felon, if the felon fly into another county before arreſt, he is to be brought before a juſtice of that county or to the gaol of that county, where he is arreſted; but if he were once arreſted and eſcape, and upon freſh ſuit he is taken by the conſtable in another county, yet he may be brought back to the juſtice or gaol of that county, where he was firſt arreſted (*), for in that caſe in ſuppoſition of law he is always in cuſtody by force and authority of the firſt arreſt, as well where the arreſt was *virtute officii*, as where done by a warrant. *Vide* 2 *E.* 4. 6. *b.* 13 *E.* 4. 8. *b.*

And thus far touching the ſecond caſe.

3. The *third* caſe is, where a felony is not yet committed, but in danger to be committed.

If *A.* hath wounded *B.* ſo that he is in danger of death, and *A.* flies and takes his houſe, and ſhuts the doors and will not open them, the conſtable of the vill where it is done or upon hue and cry may break the doors of the houſe to take him, if upon demand he will not yield himſelf to the conſtable. 7 *E.* 3. 16. *b. Barre* 291.

And in that caſe if the conſtable be kild, it is murder; if he kill *A.* if he cannot be otherwiſe taken, it is no felony, but excuſable and juſtifiable by the neceſſity cauſed by the obſtinacy and default of *A.* If

(*b*) *New Edit. p.* 534. (*) *Vide Part* I. *p.* 580.

If there be an affray in a houſe, where the doors are ſhut, whereby there is likely to be manſlaughter or bloodſhed committed, the conſtable of the vill having notice thereof and demanding entrance, if they within refuſe to do it but continue the affray, the conſtable may break open the doors to keep the peace and prevent the danger.

Nay yet farther, if there be diſorderly drinking or noiſe in a houſe at an unſeaſonable time of night, eſpecially in inns, taverns, or alehouſes, the conſtable or his watch demanding entrance, and being refuſed may break open the doors to ſee and ſuppreſs the diſorder; and this is conſtantly uſed in *London* and *Middleſex*.

I come now in the *laſt* place to conſider what the conſtable is to do with his priſoner, that he hath thus arreſted for felony or other cauſes above-mentiond.

In caſe of a ſudden affray through paſſion or exceſs of drink he may put the perſons in the ſtocks, or in a priſon, if there be one in the vill, till the heat of their paſſion or intemperance is over, tho he deliver them afterwards, or till he can bring them before a juſtice of peace.

If an offenſe be committed, for which the conſtable may arreſt, he may convey them to the ſheriff or his gaoler of the county; and if it be within a franchiſe, he may deliver them to the gaol of the franchiſe, and they are bound to receive them without taking any fine for the ſame by the ſtatute of 4 *E.* 3. *cap.* 10. *vide* 5 *H.* 4. *cap.* 10. 23 *H.* 8. *cap.* 2. But the ſafeſt and beſt way in all caſes is to bring them to a juſtice of peace, and by them the priſoner may be bailed or committed, as the caſe ſhall require, but till they are bailed or diſcharged, or the ſheriff or gaoler hath received them, they are ſtill under the charge of the conſtable that took them. 10 *H.* 4. 7. *a. Eſcape* 6. Till the conſtable can conveniently convey the parties arreſted to a juſtice of peace or the common gaol, as when the arreſt is in or near night, he may detain the party in the ſtocks; or if there be no ſtocks in that vill, he may bring them to the ſtocks of the next adjacent vill.

And if the perſon be of quality or ſick, the conſtable may [keep him in an houſe (*i*)] for a day and a night at leaſt, and in ſome caſes of neceſſity for a longer time, till he can with ſafety and conveniency convey him to a juſtice of peace or the common gaol. 20 *E.* 4. 6. *b.* 22 *E.* 4. 35. *b. Dalt. p.* 340.

The charges of ſending malefactors to gaol by the common law is to be borne by the vill, where they are apprehended. 3 *E.* 3. *Coron.* 328. 4 *E.* 3. *cap.* 10.

But now by the ſtatute of 3 *Jac. cap.* 10. the charge is to be borne by the priſoner, if he hath wherewith, the ſame to be levied by warrant of the juſtices of peace; and if he hath not wherewith, then the charge to be borne by the pariſh, townſhip, or tithing, where the offender is apprehended, by a tax or rate to be made, as by the ſaid act is preſcribed.

And what I have herein ſaid touching the conſtable is applicable to a tithing-man, headborough, burſholder, for their authority is much the ſame.

But the conſtable of the hundred is a diſtinct officer, and introduced upon the ſtatute of *Winton, vide H.* 37 *Eliz. B. R. Croke, n.* 25. *Sharrock* and *Hanmer*; yet he ſeems to be a conſervator of the peace.

V. *Watchmen:* Watchers are of three kinds, 1. That which is appointed by the ſtatute of *Winton, cap.* 4. which is that from *Aſcenſion-day* until *Michaelmas* watches ſhall be kept in all towns from ſun-ſetting to ſun-riſing in boroughs, *&c.* by twelve, in other towns by ſix or four, according to the number of the inhabitants: this watch is to be ſet by the conſtable, and the neglect thereof puniſhable by 5 *H.* 4. *cap.* 3. Their power is to arreſt ſuch as paſs by until the morning, and if no ſuſpicion, they are then to be deliverd, and if ſuſpicion be touching them, they ſhall be deliverd to the ſheriff, *viz.* to the common gaol there to remain, until they be in due manner deliverd; and if they will not obey the arreſt, hue and

(*i*) Theſe words are not in the *MS.* but they or others to the like effect are manifeſtly wanted to ſupply the ſenſe.

cry ſhall be levied upon them; but this watch extends only between *Aſcenſion-day* and *Michaelmas*.

2. But there is another watch, that may be kept by the conſtable *ex officio*, which may extend to other times, becauſe there be other things under his charge, as a conſervator of the peace, as for the purpoſe to raiſe or purſue hue and cry upon robberies committed by the ſtatute of *Winton*, *cap.* 1. to ſearch for lodgers in ſuburbs of cities, that are ſuſpicious perſons, which is to be done every week, or at leaſt once in fifteen days by the ſame ſtatute, *cap.* 4. for ſuch as ride or go armed by the ſtatute of 2 *E.* 3. *cap.* 3. for night-walkers and perſons ſuſpicious either by night or day by the ſtatute of 5 *E.* 3. *cap.* 14.

And altho a conſtable is not bound to any preciſe time for this kind of watch, nor puniſhable, if he omit it barely for the omiſſion, if he be ready upon occaſion to do his office, when required in theſe caſes, yet it is in his power to hold ſuch watches, as often as he pleaſes, and it is convenient and juſtifiable, and herein the watchmen are the miniſters and aſſiſtants of the conſtable, and are under the ſame protection with him, and may act as he doth; and regularly he ought to be in company with them in their walk and watch.

3. There is yet a third kind of watch, which is by authority of the juſtices of peace, which may be held at other times than the ſtatute of *Winton* appoints, and the watch thus appointed hath the ſame power as either of the former; and this ſeems to be within the power of any one juſtice of peace by the firſt *Aſſignavimus* in his commiſſion; *vide Lamb. Juſtic. Lib.* I. *cap.* 20. *p.* 185. *Dalt. cap.* 60. *p.* 142. (*k*), and *cap.* 109. *p.* 292. (*l*); but the ſafer way and more uſual is by order of the ſeſſions of the peace or of the court of king's bench, which hath the higheſt ordinary authority in matters of the peace and preſervation thereof.

Now a watchman hath a double protection of the law, *viz.* 1. As an aſſiſtant to the conſtable, when the conſtable is preſent or in the watch, for ſo every man, who is aſſiſting to the conſtable in the execution of his office, hath the

(*k*) *New Edit. cap.* 104. *p.* 352. (*l*) *New Edit. cap.* 109. *p.* 536.

ſame protection, that the law gives the conſtable. 2. Purely as a watchman ſet by order of law; and the law takes notice of his authority *ſub eo nomine*, and therefore killing of a watchman in execution of his office is murder. *Co. P. C. cap.* 7. *p.* 52. 9 *Co. Rep.* 66. *a. Mackally's* caſe.

And ſuch a watchman may apprehend night-walkers and commit them to cuſtody till the morning, and alſo felons and perſons ſuſpected of felony.

And thus far of arreſts *virtute officii.*

CHAP. XII.

Of arreſts of felons *upon* hue *and* cry *raiſed.*

HUE and *cry* is the old common law proceſs after felons and ſuch as have dangerouſly wounded any perſon: And this hath received great countenance and authority by ſeveral acts of parliament.

By the ſtatute of *Weſtm.* 1. *cap.* 9. (*a*), it is enacted, "That "all be ready and apparelled at the ſummons of the ſheriff "& *a cry de pays* to purſue and arreſt felons as well within "franchiſes as without; and if they do it not and be thereof "attaint, *le roy prendra a eux grevement*, they are to be in-"dicted and fined for the neglect.

By the ſtatute of 4 *E.* 1. *De officio coronatoris* "*Hue* and "*cry* ſhall be levied for all murders, burglaries, men-ſlain, "or in peril to be ſlain, as other-where is uſed in *England*, "and all ſhall follow the *hue* and ſteps as near as they can; "and he, that doth not and is convict thereof, ſhall be at-"tached to be before the juſtices in *eyre.*

By the ſtatute of *Winton*, *cap.* 1. "From henceforth every "country ſhall be ſo well kept, that immediately upon robbe-"ries and felonies committed freſh ſuit ſhall be made from

(*a*) 2 *Co. Inſtit. p.* 171.

town to town, and from country to country: and *cap.* 4. " If " any will not obey the arreſt of the town, where night-walk- " ers paſs, they ſhall levy *hue* and *cry* upon them, and ſuch " as keep the town (*viz.* the bailiff or conſtable,) ſhall follow " with *hue* and *cry* with all the town and the towns near; " and ſo *hue* and *cry* ſhall be made from town to town, un- " til they are taken and deliverd to the ſheriff; and for ar- " reſtments of ſuch ſtrangers none ſhall be puniſhed.

And this is in truth but the antient law; thus it appears by *Bracton, Lib.* III. *cap.* 1. where he mentions a proviſion *per dominum regem & ejus concilium,* (which muſt be intended an antient act of parliament,) *quòd omnes tàm milites quàm alii, qui ſunt quindecim annorum & ampliùs, jurare debent, quòd utlegatos, murdratores, robbatores, & burglatores non receptabunt, nec iis conſentirent, nec eorum receptatoribus, &, ſi quos tales noverint, eos attachiari facient, & hoc vice-comiti & ballivis ſuis monſtrabunt, & ſi hueſium vel clamorem de talibus audiverint, ſtatim audito clamore ſequentur cum familiâ & hominibus de terrâ ſuâ* (*).

And it is one of the articles of inquiry in the leet in the ſtatute *de viſu franci plegii, de hues levies & nient purſues,* and among the *capitula Itineris de hueſio levato & non ſecuto: vide Coke ſuper ſtat. Weſtm.* 1. *cap.* 9. 2 *Inſtit. p.* 172.

And altho it is a good courſe to have a juſtice of peace to direct his warrant for raiſing *hue* and *cry* to prevent cauſeleſs *hues* and *cries,* yet it is neither of abſolute neceſſity nor ſometimes convenient, for the felons may eſcape before the juſtice can be found, and *hue* and *cry* was part of the law before the ſtatute of 1 *E.* 3. *cap.* 16. which firſt inſtituted juſtices of peace.

And altho alſo it is ſpecially incumbent upon conſtables to purſue *hue* and *cry,* when called upon, and they are ſeverely puniſhed, if they neglect it (*b*), and it prevents many inconveniences, if they be there, for it gives a greater authority to their

(*) *Vide Part* I. *p.* 23 & 24. *in notis.*

(*b*) By 8 *Geo.* 2. *cap.* 16. " If any " conſtable, headborough, &c. within " the hundred, wherein any robbery " ſhall happen, ſhall refuſe or neglect " to make *hue* and *cry* after the felons " with the utmoſt expedition, as ſoon " as he ſhall receive notice thereof, he " ſhall for every ſuch refuſal or neglect " forfeit five pounds, one half to the " king, and the other half to ſuch per- " ſon, as ſhall ſue for the ſame.

their purſuit, and enables the purſuants in his aſſiſtance to plead the general iſſue upon the ſtatutes of 7 & 21 *Jac.* without being driven to ſpecial pleading; and therefore to prevent inconveniences, that may happen by unrulineſs, it is moſt adviſable, that the conſtable be called to this action.

Yet upon a robbery or other felony committed *hue* and *cry* may be raiſed by the country in the abſence of the conſtable, it is therefore called *Cry de pais.*

Neither is there any inconvenience conſiderable in it, for if *hue* and *cry* be raiſed without cauſe, they that raiſe it are puniſhable by fine and impriſonment. 2 *Co. Inſtit. p.* 173.

And accordingly it was agreed by the two chief juſtices and three other judges upon the trial of *Packhurſt*, *Jackſon* and others, who were all convicted of murder and executed for killing two of the countrymen, that followed them, being highway robbers. *Lent* vacation *anno Car.* 2. 26.

In this matter of *hue* and *cry* theſe things are conſiderable, *viz.* 1. By whom it is to be levied. 2. How it is to be levied. 3. In what manner to be purſued. 4. What may be done by them that purſue it. 5. How puniſhed, if omitted or neglected.

I. *Hue* and *Cry* may be raiſed as well by an officer of juſtice, as by the precept of a juſtice of peace upon information of a felony.

Or it may be raiſed by any private perſon, that is robbed, or knows of any felony.

II. Touching the manner of it: It is diverſe according to variety of circumſtances. 1. The party, that levies it, ought to come to the conſtable of the vill, and give him notice of a felony committed, and give him ſuch reaſonable aſſurance thereof, as the nature of the caſe will bear. 2. If he knows the name of him that did it, he muſt tell the conſtable the ſame. 3. If he know it not, but can deſcribe him, he muſt deſcribe his perſon, or his habit, or his horſe, or ſuch circumſtances that he knows, which may conduce to his diſcovery. 4. If the thing be done in the night, ſo that he knows none of theſe circumſtances, he muſt mention the number of the perſons, or the way they took. 5. If none of

all theſe can be diſcoverd, as where a robbery or burglary or felony is committed in the night, yet they are to acquaint the conſtable with the fact, and deſire him to ſearch in his town for ſuſpected perſons, and to make *hue* and *cry* after ſuch as may be probably ſuſpected as being perſons vagrant in the ſame night, for many circumſtances may *ex poſt facto* be uſeful for diſcovering a malefactor, which cannot be at firſt found (*c*).

III. In what manner it is to be purſued. 1. The conſtable is to make ſearch in his own vill, 2 *E.* 4. 8 & 9. 2. He is to raiſe all the neighbouring vills next about, *Crompt. de Pace, f.* 178. *b.* 3. It is to be purſued with horſe and foot: *vide* 27 *Eliz. cap.* 13. *Dalt. cap.* 28. *p.* 75. (*d*), *per direction de Hyde* chief juſtice.

IV. What may be done in purſuance of a *hue* and *cry* levied, and therein I think as followeth.

1. That in caſe of *hue* and *cry* once raiſed and levied upon ſuppoſal of a felony committed, tho in truth there was no felony committed, yet thoſe, that purſue *hue* and *cry*, may arreſt and proceed, as if ſo be a felony had been really committed.

And therefore the juſtification of an impriſonment by a perſon upon ſuſpicion, and by a perſon, eſpecially a conſtable, upon *hue* and *cry* levied do extremely differ, for in the former there muſt be a felony averred to be done, and it is iſſuable; but in the latter, *viz.* upon *hue* and *cry* it need not be averred, but the *hue* and *cry* levied upon information of a felony is ſufficient, tho perchance the information were falſe;

(*c*) By 27 *Eliz. cap.* 13. To the levying of *hue* and *cry* ſo as to charge the hundred for any robbery it is requiſite, "That the party robbed do with all "convenient ſpeed give notice thereof "to the inhabitants of ſome town, vil- "lage or hamlet near the place where "the robbery was committed:" And by 8 *Geo.* 2. *cap.* 16. it is further required, "That the party robbed do with "all convenient ſpeed give notice there- "of to ſome conſtable, headborough, "&c. of ſome town, &c. near the place "of the robbery, or leave notice in "writing of ſuch robbery at the dwel- "ling houſe of ſuch conſtable, &c. de- "ſcribing, as far as the nature and cir- "cumſtances of the caſe will admit, the "felon or felons, and the time and "place of the robbery; and alſo within "twenty days next after the robbery "committed cauſe public notice to be "given thereof in the *London Gazette*, "therein likewiſe deſcribing the felon "or felons, and the time and place of "ſuch robbery, together with the goods "whereof he was robbed.

(*d*) *New Edit. cap.* 54. *p.* 169.

and therefore I do not find any averment of a felony committed in caſe of a juſtification of an impriſonment upon *hue* and *cry*. 5 *H.* 7. 5. *a.* 21 *H.* 7. 28. *a. per Rede*, 2 *E.* 4. 8 & 9.

And the reaſons hereof are theſe. 1. Becauſe the conſtable cannot examine the truth or falſhood of the ſuggeſtion of him that firſt levied it, for he cannot adminiſter him an oath, and if he ſhould forbear his purſuit of the *hue* and *cry* till it be examind by a juſtice of peace, the felon might eſcape, and the purſuit would be loſt and fruitleſs. 2. Becauſe the conſtable is by the acts of parliament before-mentiond compellible to purſue *hue* and *cry* and he is puniſhable, and ſo are thoſe of the vill, if they do it not, as appears by the acts of parliament above-mentiond. 3. Becauſe he, that firſt raiſeth a *hue* and *cry*, where no felony is committed, *viz.* the perſon that giveth the falſe information, is ſeverely puniſhable by fine and impriſonment, if the information be falſe. 21 *H.* 7. 28. *a.* 29 *E.* 3. 39. *a. b.* 2 *Co. Inſtit. p.* 173.

And therefore if he raiſe a *hue* and *cry* upon a perſon that is innocent, yet they, that purſue the *hue* and *cry*, may juſtify the impriſonment of that innocent perſon, and the raiſer is puniſhable; and by the ſame reaſon, if he give notice of a felony committed, when there was in truth none.

2. If *hue* and *cry* be raiſed againſt a perſon certain for felony, tho poſſibly he is innocent, yet the conſtables and thoſe that follow the *hue* and *cry* may arreſt and impriſon him in the common gaol, or carry him to a juſtice of peace.

3. If the perſon purſued by *hue* and *cry* be in a houſe and the doors are ſhut, and refuſed to be opened upon demand of the conſtable and notification of his buſineſs, he may break open the doors; and this he may do in any caſe, where he may arreſt, tho it be only a ſuſpicion of felony, for it is for the king and commonwealth, and therefore a virtual *non omittas* is in the caſe: *vide* 5 *Co. Rep.* 92. *b. Semain*'s caſe. And the ſame law is upon a dangerous wound given, and a *hue* and *cry* levied upon the offender. 7 *E.* 3. 16. *b. Barre* 291.

And it ſeems in this caſe, that if he cannot be otherwiſe taken, he may be kild, and the neceſſity excuſeth the conſtable: *vide Part* I. *cap.* 9. *p.* 53.

4. Upon *hue* and *cry* levied againſt any perſon, or where any *hue* and *cry* comes to a conſtable, whether the perſon be certain or uncertain, the conſtable may ſearch in ſuſpected places within his vill for the apprehending of the felons. *Dalt. cap.* 28. *p.* 75. (*e*), *Crompt. de Pace, f.* 178. *b.* 2 *E.* 4. 8. *b.*

But tho he may ſearch ſuſpected places or houſes, yet his entry muſt be *per oſtia aperta*, for he cannot break open doors barely to ſearch, unleſs the perſon againſt whom the *hue* and *cry* is levied be there, and then it is true he may; therefore in caſe of ſuch a ſearch the breaking open the door is at his peril, *viz.* juſtifiable, if he be there; not juſtifiable, if he be not there; but it muſt be always remembred, that in caſe of breaking open a door there muſt be firſt a notice given to them within of his buſineſs, and a demand of entrance, and a refuſal before doors can be broken.

5. If the *hue* and *cry* be not againſt a perſon certain, but by deſcription of his ſtature, perſon, clothes, horſe, *&c.* the *hue* and *cry* doth juſtify the conſtable or other perſon following it in apprehending the perſon ſo deſcribed, whether innocent or guilty, for that is his warrant, it is a kind of proceſs, that the law allows, (not uſual in other caſes,) *viz.* to arreſt a perſon by deſcription.

6. But if the *hue* and *cry* be upon a robbery, burglary, manſlaughter, or other felony committed, but the perſon, that did the fact, is neither known nor deſcribible by perſon, clothes, or the like, yet ſuch a *hue* and *cry* is good, as hath been ſaid, and muſt be purſued, tho no perſon certain be named or deſcribed.

And therefore in this caſe all that can be done is for thoſe that purſue the *hue* and *cry* to take ſuch perſons, as they have probable cauſe to ſuſpect; as for inſtance, ſuch perſons as are vagrants, that cannot give an account where they live, whence they are, or ſuch ſuſpicious perſons as come late into their inn or lodgings, and give no reaſonable account where they had been, and the like: *vide* 2 *E.* 4. 8. *b.*

And

(*e*) *New Edit. cap.* 54. *p.* 169.

And here the juſtification of the impriſonment is mixed partly upon the *hue* and *cry* and partly upon their own ſuſpicion, and therefore, 1. In reſpect that it is upon *hue* and *cry* there needs no averment, that the felony was done, yet it muſt be averred, that an information was given, that the felony was done, if the arreſt be by that conſtable that firſt received the information, and ſo raiſed the *hue* and *cry*; or if the arreſt were made by that conſtable, or thoſe vills, to whom the *hue* and *cry* came at the ſecond hand, it muſt be averred, that ſuch a *hue* and *cry* came to them purporting ſuch a felony to be done; but 2. Alſo in as much as the *hue* and *cry* neither names nor deſcribes the perſon of the felon, but only the felony committed, and therefore the arreſt of this or that particular perſon, and ſo applied, is left to the ſuſpicion and diſcretion of the conſtable, or the people of the ſecond or third vill, he that arreſts any perſon upon ſuch general *hue* and *cry* muſt aver, that he ſuſpected and ſhew a reaſonable cauſe of ſuſpicion.

But now by the ſtatute of 7 *Jac. cap.* 5. The conſtable or any that come in his aſſiſtance, even in this caſe of *hue* and *cry*, may plead the general iſſue, and give the whole matter of the juſtification in evidence, for the purſuit of *hue* and *cry*, tho performed by others as well as the conſtable, is principally the act of the conſtable of the vill, and the others are but as his deputies or aſſiſtants within the precincts of their conſtable-wick.

V. For the laſt matter how the neglect of the purſuit of *hue* and *cry* is to be puniſhed, it hath been before declared upon the ſtatutes of 3 *E.* 1. *cap.* 9. 4 *E.* 1. and 13 *E.* 1. of *Winton*, they are to be indicted, fined and impriſond.

CHAP. XIII.

Arreſts of felons virtute præcepti, *or of* warrants.

I Come now to conſider of arreſts of felons or perſons ſuſpected of felony by warrant or precept, namely not of precepts that iſſue upon matter of record, as upon appeals or indictments, which regularly are to be by writ, but ſuch warrants as are preparatory to it, or for conſervation of the peace.

And herein regularly all courts and perſons, that have judicial power by the common law, or by act of parliament for the conſervation of the peace, have power to grant warrants for arreſting of felons; but ſuch as are ſimply miniſterial and have no juriſdiction, as conſtables, cannot iſſue warrants for that purpoſe, but muſt do their office either alone, or with others called to their aſſiſtance.

The court of king's bench hath not only a power to iſſue writs upon indictments or appeals before them, but have alſo power by order to command the ſheriff of the county, where they ſit, or the marſhal of the court to apprehend felons or diſturbers of the peace, and bring them before the court; and this is warrantable by the cuſtom of the court, which is part of the law of the land.

Yea I have known by great advice, that where there hath been information upon oath of a breach of the peace, and a deſign by perſons, whoſe names could not be known, to commit a riot or breach of the peace, an order hath been made by the court to the ſheriff to bring before them ſuch perſons, as ſhould be probably ſuſpected to be parties therein, and to bring them into the court, *M.* 23 *Car.* 2. in *Storie*'s caſe for attempting to take away the daughter of Mrs. *Gilburn* with masks and vizards.

See before *cap.* 1. concerning the king's bench.

A commiſſion iſſues out of the *chancery* under the great ſeal to take perſons, that were notoriouſly famed of felony or treſpaſs, tho they were not indicted, and by virtue hereof the commiſſioners iſſue a precept to *B.* to take *J. S.* that had dangerouſly wounded another; this was admitted a good juſtification in the officer, tho the commiſſion itſelf was againſt law, 24 *E.* 3. 9. *B. Faux Impriſonment* 9. *Vide ſimile* 42 *Aſſiz.* 5. where a commiſſion iſſuing out of *chancery* to take *J. S.* and his goods, before he was indicted, is ruled to be againſt law.

And therefore I would never adviſe thoſe general proclamations, that have ſometimes iſſued, to take certain perſons notoriouſly ſuſpected of felony but not indicted.

It is true, that ſuch a proclamation may be a means to give notice of felons, but ſo it may perchance include true men; and therefore what by law a conſtable, ſheriff, officer, or private perſon may do in arreſting of felons or ſuſpected perſons without ſuch a proclamation may be juſtifiable, but not by virtue of the proclamation, neither can any juſtification be made by virtue of it; and therefore ſuch proclamations againſt perſons not indicted are againſt law, and may bring great inconveniences, 1. By leading the country into an error. 2. By the example itſelf, which may be of ill conſequence to honeſt men, as well as of uſe to apprehend felons.

27 *Aſſiz.* 35. A man was indicted of felony before juſtices of *oyer* and *terminer:* It is admitted, that the juſtices may not only award proceſs of outlawry thereupon, but may alſo iſſue a commiſſion (which is no other than a warrant under their hands and ſeals,) to take the party, and that by virtue of ſuch a warrant or commiſſion they may break open doors, but they muſt ſhew their commiſſion, if demanded.

By the common law the ſheriff of the county might give out a warrant for the apprehending a felon before indictment; and this is farther confirmed by the ſtatute of 3 *E.* 1. *cap.* 9. *au commandment, & a les ſummons de viſcount & au cry de pays* muſt be underſtood disjunctively, (*or at the cry of the country,*) for the ſheriff had juriſdiction at the common law to take indictments of old felonies in his *Turn*; and ſo he hath

ſtill, tho he is not now to make proceſs upon them by the ſtatute of 1 *E.* 4. *cap.* 2.

The coroners have alſo power to attach manſlayers by their warrants after inquiſition, whereby they are found guilty, but that ſeems not to be all their power; but they may make out warrants for apprehending thoſe perſons that are not, or cannot be preſented before them, as thoſe that were preſent and not guilty; nay alſo of burglars and robbers, and yet they cannot take an inquiſition touching them; this appears evidently by the ſtatutes of 3 *E.* 1. *cap.* 9. and 4 *E.* 1. *Officium coronatoris.* And with this agrees the common uſage at this day for the coroners to take manſlayers before their inquiſition be taken, for many times the inqueſt is long in their inquiry, and the offender may eſcape, if he ſtay till the inquiſition deliverd up.

But becauſe at this day the greateſt part of the buſineſs of this nature is diſpatched by juſtices of the peace, I ſhall be more large touching their warrants, wherein nevertheleſs much of what is ſaid therein will be applicable to the warrants, that iſſue in like caſes by other perſons.

And therein I ſhall principally conſider theſe particulars, 1. When and in what caſes they may iſſue their warrants for the apprehending of felons. 2. To whom. 3. How and in what manner ſuch precept or warrant is to iſſue. 4. What may be done by the officer in purſuance thereof.

I. As touching the firſt, in what caſes juſtices of peace may make warrants for the taking of felons or perſons ſuſpect of felony.

My lord *Coke* in his juriſdiction of courts, *cap.* 31. *p.* 176, 177. hath deliverd certain tenets, which, if they ſhould hold to be law, would much abridge the power of juſtices of peace, and condemn the conſtant and uſual practice, and give a looſe to felons to eſcape unpuniſhed in moſt caſes (*), *viz.* 1. That a juſtice of peace cannot upon complaint iſſue a warrant to apprehend a felon before indictment, grounding himſelf upon the haſty opinion of *Fitzherbert* and *Brudnell* 14 *H.* 8. 16. *a.* who yet hold the officer excuſed, that makes the arreſt upon that warrant. 2. That admit he may arreſt, yet he

(*) *Vide Part* I. *p.* 579 *& ſupra p.* 79.

he cannot break open a houſe to take the felon by virtue of that warrant. 3. That admit he may arreſt by that warrant, yet he cannot iſſue a warrant in caſe only of ſuſpicion. 4. That admit he may, yet no houſe can be broken by virtue of ſuch warrant.

Touching the *ſecond* and *fourth* matter I ſhall conſider them, when I come to the buſineſs of the officer's power in purſuance of a juſtice's warrant; but touching the power of iſſuing this warrant by the juſtices of peace, I ſhall now conſider it: And therein I ſay as followeth.

1. That a juſtice of peace hath power to iſſue a warrant to apprehend a perſon accuſed of felony, tho not yet indicted.

That, upon which the doubt muſt ariſe to thoſe that made a doubt of it, muſt certainly be the ſtatutes of *Magna Carta, cap.* 29. *Nullus liber homo impriſonetur &c. niſi per legale judicium parium ſuorum vel per legem terræ.* 25 *E.* 3. *cap.* 4. "None "ſhall be taken upon ſuggeſtion made to the king or his "council, unleſs it be by preſentment or indictment, *&c.* "or by writ original at the common law." 28 *E.* 3. *cap.* 3. "No man ſhall be taken, or impriſond, or diſinherited, "or put to death without being brought to anſwer by due "proceſs of law." 42 *E.* 3. *cap.* 3. "Whereas upon falſe ac"cuſations people have been brought before the king and "council, it is enacted, that no man ſhall be put to anſwer "without preſentment before juſtices or matter of record, "or by due proceſs and writ original according to the old "law of the land.

Now all the weight of the queſtion upon theſe ſtatutes is to ſee what the law of the land is, for if theſe preparatory arreſts of felons be not againſt the law of the land, they are not reſtrained by theſe ſtatutes. Certainly by the law of the land, if a felony were committed, or but ſuſpected to be committed, a man might be arreſted by the party that knows, or upon probable grounds ſuſpects him to be the felon; or by a conſtable upon complaint, or upon *hue* and *cry*, and he might be carried to priſon, and there detained till deliverd by due courſe of law; and yet this perſon ſo ar-

reſted not all this while indicted: *vide ſtatutes* 3 *E.* 1. *cap.* 9. 4 *E.* 3. *cap.* 10. and 5 *E.* 3. *cap.* 14. And all this was in order to preſerve the peace of the kingdom, and to ſuppreſs felons.

But this being not found effectual enough, by the ſtatute of 1 *E.* 3. *cap.* 16. for the better keeping and maintaining of the peace commiſſions are to iſſue for the ſame in the ſeveral counties; this was their primitive inſtitution. Their power was enlarged by the ſtatute of 18 *E.* 3. *cap.* 2. to hear and determine felonies and treſpaſſes: and by the ſtatute of 34 *E.* 3. *cap.* 1. their power is farther enlarged, and particularly their taking as well perſons ſuſpected as indicted of felonies mentiond in that act is required, which, tho perchance it refer only to thoſe that have been robbers and gone beyond the ſea and ſince returned, yet it is a pattern for others.

Now by theſe ſtatutes ſurely as much power is intended to be tranſlated to the juſtices of peace in order to the preſervation thereof, as was in a conſtable or private perſon, for the juſtices of the peace are conſervators of the peace and more.

And let a man look upon all the acts of parliament, that have been down to this day, he ſhall find that the power of juſtices of peace to convene and commit felons before indictment is allowed. 4 *E.* 3. *cap.* 2. Sheriffs ſhall not let to mainpriſe ſuch as be indicted or taken by juſtices of peace, unleſs mainpernable by law, 1 *R.* 3. *cap.* 3. and 3 *H.* 7. *cap.* 3. concerning bailing of priſoners committed upon ſuſpicion, 1 *&* 2 *P. & M. cap.* 13. 2 *&* 3 *P. & M. cap.* 10. by which it appears, that juſtices of peace may commit for felony, yea or for ſuſpicion of felony, 3 *Jac. cap.* 10. 5 *H.* 4. *cap.* 10. ſo that the impriſonment before indictment is ſurely lawful and not within the reſtraint of *Magna Carta*; and if ſo, then ſurely their arreſt is much more lawful, for it is but to bring perſons to an examination in order to their commitment, bail, or diſcharge; and there is no greater record of their commitment than of their arreſts.

2. He may alſo iſſue a warrant to apprehend a perſon ſuſpected of felony, tho the original ſuſpicion be not in himſelf

ſelf, but in the party that prays his warrant; and the reaſon is, becauſe he is a competent judge of the probabilities offerd to him of ſuch ſuſpicion.

And as a conſtable may upon complaint arreſt a perſon ſuſpected of felony, as appears by what hath been ſaid in the foregoing chapters (*), ſo a juſtice of peace may do the like by his warrant; and it is alſo the conſtant practice accordingly.

But that I may ſay it once for all, it is fit in all caſes of warrants for arreſting for felony, much more for ſuſpicion of felony, to examine upon oath the party requiring a warrant, as well whether a felony were done, as alſo the cauſes of his ſuſpicion, for he is in this caſe a competent judge of thoſe circumſtances, that may induce the granting of a warrant to arreſt.

And if there were no other reaſon to prove it than this, it were ſufficient; namely, that the juſtice of peace may commit him to gaol, that is brought before him for ſuch ſuſpicion, or bail him, as appears by the ſtatutes of 1 *R.* 3. *cap.* 3. 3 *H.* 7. *cap.* 3. 1 *&* 2 *P. & M. cap.* 10. and therefore *à fortiori* may make a warrant to convene or bring him before him to examine the cauſe of the ſuſpicion.

II. As touching the ſecond matter, to whom this warrant is to be directed.

Uſually the warrant or precept is directed to the ſheriff, or bailiff, conſtable, or tithingman, and they are bound to execute it; and if they do not, they may be indicted and fined for their neglect.

But it may be directed to any private perſon or his own ſervant, 14 *H.* 8. 16. *a. Cromp. de Pace, f.* 147. *b.* but he is not bound to execute it, but if he execute it, it is as good as if he were an officer.

If a warrant be directed from a juſtice of peace to a conſtable of *D.* to arreſt a felon, *&c.* he is not bound to go out of the vill, where he is conſtable, to execute the warrant; but yet if he do execute it in another vill, it is good enough, for he acts herein not ſimply as conſtable of *D.* but by virtue

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(*) *Vide cap.* 10. *p.* 80. and *cap.* 11. *p.* 91. See alſo *Part* I. *p.* 610.

of the juſtice's warrant; and ſo it was ruled in my time at the aſſizes in *Norfolk* about 1668.

III. As to the third matter, how and in what manner it is to be made or iſſued; touching which theſe things are regularly to be obſerved.

The party that demands it ought to be examind upon his oath touching the whole matter, whereupon the warrant is demanded, and that examination put into writing.

The party charging another thus with felony ought to be bound by recognizance to proſecute at the next ſeſſions or aſſizes, as the caſe ſhall require. *Dalt. cap.* 117. *p.* 334. (*a*).

The warrant ought to be under the hand and ſeal of the juſtice, 2 *Co. Inſtit. p.* 52. It muſt have a certain date, but the place, tho it muſt be alleged in pleading, need not be expreſſed in the warrant. 14 *H.* 8. 16. *a.*

Regularly the warrant ought to contain the cauſe ſpecially, and ſhould not be generally *to anſwer ſuch matters as ſhall be objected againſt him*, becauſe it cannot appear, whether it be within the juriſdiction of the juſtice of peace, neither can it appear whether the party be bailable or not. 2 *Co. Inſtit. p.* 52, 591.

And therefore upon ſuch a general warrant returned upon an *habeas corpus*, it is in the pleaſure of the court of king's bench to bail or diſcharge him; and accordingly for this reaſon, *P.* 23 *Car. B. R.* in *Brown*'s caſe he was diſcharged.

But yet I hold ſuch a warrant is not therefore void, but if *de facto* the matter be within the juriſdiction of the juſtice, and ſo averred, ſuch a general warrant is a good juſtification eſpecially in caſe of felony, and antiently it was generally held ſuch general warrants were good in caſes of treaſon or felony (*), tho in warrants of the peace and good behaviour the cauſe muſt be ſhewn, that the party may come provided with his ſureties; and accordingly *vide Raſtal*'s *Entries*, tit. *Attachment* 1. *Dalt. cap.* 117. *p.* 329. (*b*), *Crompt. de Pace, f.* 148. *a.*

T. 37

(*a*) *New Edit. cap.* 169. *p.* 579.

(*) *Crompt.* 233. *b.* 1 *Sid.* 78. *Dalt. p.* 574. and Sir *William Wyndham*'s caſe, *Trin.* 2 *Geo.* I. *B. R. Vide tamen* the caſe of *Kendal* and *Rowe*, *State Tr. Vol.* IV. *p.* 861, 862. 5 *Mod. Rep. p.* 80, 82, 85.

(*b*) *New Edit. p.* 574.

T. 37 *Eliz. C. B. Broughton* and *Mulſhoe* (*c*); and accordingly ruled by my lord *Coke* himſelf contrary to his opinion in his comment upon *Magna Carta*, *T.* 7 *Jac. C. B.* the caſe of the mayor of *Canterbury*: *vide ſupra Part* I. *cap.* 54. *p.* 609. *Breach* of priſon.

A juſtice of peace may make his warrant to apprehend a perſon ſuſpected by name upon a complaint made to him; but where upon a complaint to a juſtice of a robbery he made a warrant to apprehend all perſons ſuſpected and bring them before him, this was ruled a void warrant, *P.* 24 *Car.* 1. in the caſe of juſtice *Swallowe*, and was not a ſufficient juſtification in falſe impriſonment.

A juſtice of peace may make a warrant as well in caſe of felony as of the peace to bring the party *before himſelf*, and then the officer ought to bring the party before him, that made the warrant, 5 *Co. Rep.* 59. *b. Foſter*'s caſe; or he may make the warrant to bring him *before any of his majeſty's juſtices of the peace*, or *before himſelf, or any of his majeſty's juſtices of the peace*, and then it is in the election of the officer to bring him before which juſtice of the county he pleaſes; and it is not in the election of the party to go before whom he pleaſes; adjudged 5 *Co. Rep.* 59. *b. Foſter*'s caſe againſt the opinion of *Fineux* 21 *H.* 7. 21. *a.*

And in ſome caſes he may make his warrant to bring him to the ſeſſions of the peace, tho it is better to bring him before himſelf or ſome juſtice, that the party may be in the mean time bailed, if there be cauſe, to appear at the ſeſſions of the peace or gaol-delivery, as the cauſe ſhall require.

A warrant of the peace may be to bring the party complained of to the juſtice to the intent to find ſureties for his appearance at the ſeſſions, *&c.* and in the mean time to keep the peace, or the warrant may be *ſi recuſaverit* then to bring him to the common gaol *ibidem moraturus, quouſque gratis hoc fecerit*; and yet the conſtable or officer may bring him in that caſe before the juſtice; and if he refuſe there to give ſureties, he may by virtue of the firſt warrant bring him to gaol, and commit without any farther warrant or *mittimus*, 5 *Co. Rep.* 59. *b. Foſter*'s caſe. The

(*c*) *Moor p.* 408.

The warrant of a juſtice before indictment may be in the king's name with the *Teſte* of the juſtice, or it may be in the name of the juſtice of peace himſelf; the latter moſt uſual; but proceſs after indictment iſſued from a ſeſſions of the peace is always in the king's name, *Dalt. Juſtice, p.* 404, 347, 348. (*d*). But whether generally a juſtice of peace out of ſeſſions can iſſue a warrant to apprehend perſons offending againſt a penal law, tho within their cognizance, and ſo to bind them over to the ſeſſions, or in default thereof to commit them, and this before indictment, ſeems doubtful: *vide Lamb.* 188, 189. *Dalt. cap.* 117. *p.* 331. (*e*). Theſe things ſeem to make againſt it. 1. Becauſe ſome acts of parliament do particularly and expreſly authorize them to it, which they would not have done, if it had been otherwiſe lawful. 2. Becauſe in moſt caſes of this nature, tho the party were indicted or an information preferd, yet the *capias* was not the firſt proceſs but a *venire facias* and *diſtringas*, and in caſes of information no proceſs of outlawry at all, 8 *H.* 6. 9. *b.* until the ſtatute of 21 *Jac. cap.* 4. gave proceſs of outlawry in actions popular, as in actions of treſpaſs *vi & armis.*

In caſe of a complaint and oath of goods ſtolen, and that he ſuſpects the goods are in ſuch a houſe, and ſhews the cauſe of his ſuſpicion, the juſtice of peace may grant a warrant to ſearch in thoſe ſuſpected places mentiond in his warrant, and to attach the goods and the party in whoſe cuſtody they are found, and bring them before him or ſome juſtice of peace to give an account how he came by them, and farther to abide ſuch order, as to law ſhall appertain: *vide Dalt. p.* 353. (*f*).

And this is warrantable by law, and without it felons could not in many caſes be diſcoverd, and is the conſtant practice at this day notwithſtanding the opinion of my lord *Coke* in his juriſdiction of courts, *p.* 176.

But in that caſe it is convenient, 1. To expreſs that the ſearches be made in the day-time. 2. That the party ſuſpecting be preſent to give the officer information of his

(*d*) *New Edit. p.* 593. (*e*) *New Edit. p.* 576. (*f*) *New Edit. p.* 598.

goods. 3. There can be no breaking open of doors to make the ſearch, but he muſt enter *per oſtia aperta*, or upon the voluntary opening of the door by the houſe-keeper or his ſervants; and the reaſon is, becauſe the bare having of ſtolen goods in his houſe doth not neceſſarily make a man either a felon or acceſſary. 4. But becauſe the having of ſtolen goods in his cuſtody is *primâ faciê* an evidence of a felony and a good cauſe of ſuſpicion, it is a lawful clauſe in the warrant to attach the party, in whoſe cuſtody they are found, to come before the juſtice. 5. The goods being found ought not to be deliverd to the party complaining, but to remain in the conſtable's hand, till either by a writ of reſtitution upon the conviction of the felony, or by due order of the court they be deliverd.

But the general warrant to ſearch all places, whereof the party and officer have ſuſpicion, tho it be uſual, yet it is not ſo ſafe upon the reaſon of juſtice *Swallow*'s caſe before cited; and yet ſee precedents of ſuch general warrants *Dalt. p.* 353, 354.

The warrant of a juſtice of peace ought regularly to mention the name of the party to be attached, and muſt not be left in generals or with blanks to be filled up by the party afterwards. *Dalt. cap.* 117. *p.* 329. (*g*). If there be a riot or breach of the peace in the preſence of one or more juſtices they may arreſt the rioters themſelves, or command any officers or others by word of mouth without warrant to arreſt them, and they may by virtue thereof *flagrante crimine* arreſt them in the abſence of the juſtice by the true meaning of the ſtatutes of 34 *E.* 3. *cap.* 1. and 13 *H.* 4. *cap.* 7. *quod vide* adjudged 14 *H.* 7. 9 & 10.

And therefore if a riot be committed and diſperſed by the coming of the juſtice of peace, and they be ſuſpected probably to meet again or threaten to do ſo, tho the conſtables may *ex officio* ſuppreſs the riot, and raiſe the power of the vill to do it; yet I think it clear that a juſtice of peace may deliver a ſpecial warrant in the hands of any perſon to arreſt the rioters, if they re-aſſemble, tho there be no particular perſons

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(*g*) *New Edit. p.* 574.

ſons named in the warrant, becauſe it may be impoſſible to be known what their names are, and yet the peace is neceſſary to be kept, as well as the breach of it to be puniſhed; and the juſtice cannot always perſonally watch their re-aſſembling, but muſt truſt others to do it; and this is admitted of all hands in the book of 14 *H.* 7. 9. and the only doubt is, whether it may be done by word, which yet is adjudged there good.

And thus far for warrants.

IV. The fourth thing is the manner and order of their execution.

If a warrant or precept to arreſt a felon come to an officer or other, if the felon be arreſted and after arreſt eſcape into another county, yet he may be purſued and taken upon freſh purſuit, and brought before the juſtice of the county, where the warrant iſſued, for the law adjudgeth him always in the officer's cuſtody by virtue of the firſt arreſt; but if he eſcape before arreſt into another county, if it be a warrant barely for a miſdemeanor, it ſeems the officer cannot purſue him into another county, becauſe out of the juriſdiction of the juſtice that granted the warrant; but in caſe of felony, affray, or dangerous wounding the officer may purſue him and raiſe *hue* and *cry* upon him into any county, but if he take him in a forein county, he is to bring him to the gaol or juſtice of that county, where he is taken, for he doth not take him purely by the warrant of the juſtice, but by the authority that the law gives him; and the juſtice's warrant is a ſufficient cauſe of ſuſpicion and purſuit. 2 *E.* 4. 6. *b.* *Dalt.* *cap.* 118. *p.* 340. (*h*), 7 *E.* 3. 16. *b.* 11 *E.* 4. 4. *b.*

Tho a perſon, that hath a warrant to arreſt for felony or other miſdemeanor, may call others to his aſſiſtance, yet he cannot make a warrant to another as his deputy to execute it, or command another to execute it in his abſence. 8 *E.* 4. 14. *a.*

But it is held, that, if the warrant be directed to the ſheriff, he may make a warrant to his bailiff to execute it, and may command by word his under-ſheriff to execute it without any other warrant. 8 *E.* 4. 14. *a.* *Dalt.* *cap.* 117. *p.* 332. (*i*).

If

(*h*) *New Edit. p.* 24 & 585. (*i*) *New Edit. p.* 577.

If a warrant iſſue from a juſtice of peace to a private perſon to arreſt for felony or any other matter, he is not bound to ſhew his warrant, unleſs it be demanded, and then he muſt ſhew it.

But if it be directed to a known officer, as to the ſheriff, who is a known officer in the county, or to a conſtable, who is a known officer in the vill, he is not bound to ſhew his warrant, tho demanded, no more than a bailiff *jurus & conus*; it is enough for him to ſay *I arreſt you for felony*, &c. *in the king's name.* 8 *E.* 4. 14. *a.* 14 *H.* 7. 9. *b.* 21 *H.* 7. 23. *a.* 9 *Co. Rep.* 69. *Mackally*'s caſe (*).

But it is reaſonable and alſo ſafe for the officer to acquaint him what he attacheth or arreſteth him for, for it is a great ſecurity to the officer, that arreſts him, and juſt for the party arreſted to know the cauſe for what it is.

A warrant of a juſtice of peace to arreſt for felony may be executed in a franchiſe within the county, for it is the king's ſuit, in which a *non omittas* is virtually included.

Where by virtue of a warrant from a juſtice of peace the houſe may be broken to apprehend a felon or other malefactor, there are theſe diverſities.

Upon a warrant to ſearch for ſtolen goods the doors cannot be broken open, for tho it be for the king, yet the law enables not the breaking of houſes in all caſes for the king: (*vide* ſtatute 12 *Car.* 2. *cap.* 19. a ſpecial act to enable the ſearch and breaking open of an houſe in caſe of goods uncuſtomed,) and therefore the entry to ſearch by ſuch a warrant muſt be *per oſtia aperta.*

So upon an *excommunicato capiendo*, tho it be the king's ſuit, yet doors cannot be broken to take him. *H.* 42 *Eliz. C. B. Croke, n.* 17. *Smith* and *Smith* (*k*).

If a juſtice of peace iſſue a warrant to apprehend a felon, who is in his own houſe, and after notice of the warrant and

3 requeſt

(*) This was an arreſt in a civil action, and the warrant there meant was not the writ or warrant for arreſting the party, but the general warrant conſtituting him bailiff, and of this are the caſes in the year-books here cited to be underſtood; tho it may be otherwiſe in caſe of felony, becauſe in ſuch caſe a private perſon may arreſt a felon without any warrant at all. *Vide Part* I. *p.* 458. *in notis.*

(*k*) *Cro. Eliz.* 741.

requeſt to open the door it is refuſed or neglected to be done, the officer may break open the door to take him; and the ſame law is, if it be but for ſuſpicion of felony. 13 *E.* 4. 9. *a.* 5 *Co. Rep.* 91. *b.* *Semain*'s caſe (†).

And ſo much more may he break open the houſe of another perſon to take him, for ſo the ſheriff may do upon a civil proceſs, 5 *Co. Rep.* 93. *a.* *Semain*'s caſe. But then he muſt at his peril ſee that the felon be there, for if the felon be not there, he is a treſpaſſer to the ſtranger, whoſe houſe it is; but in both caſes the officer muſt firſt notify his buſineſs that he comes about, and demand admiſſion. *Ibidem.*

But in caſe of warrants to ſearch for ſtolen goods I think the doors of any perſon cannot be broken up.

If a warrant of the peace iſſue from a juſtice of peace, the officer or miniſter of ſuch warrant may break open a door in caſe of refuſal to open after demand and notice of his buſineſs: ruled by *Popham* and *Clerk* 3 *Jac. Dalt. cap.* 78. *p.* 204, 205. (*l*).

Now touching the killing of a man *juſticiari ſe nolentis*, where there is a lawful warrant againſt him, much hath been ſaid before, where I conſiderd the conſtable's power (*); ſomewhat I ſhall ſay here.

It is neceſſary in this caſe to conſider the difference between an arreſt upon a warrant for felony, and an arreſt for a ſimple miſdemeanor.

And alſo a difference if the officer kills him in caſe of a flight, or of a reſiſtance and an attempt of a reſcue after arreſt.

If there be a warrant againſt *A.* for a treſpaſs or breach of the peace, and *A.* flies and will not yield to the arreſt, or being taken makes his eſcape, the miniſter kills him, this is murder.

But if *A.* either upon the attempt to arreſt, or after the arreſt aſſault the miniſter, that hath the warrant to arreſt him, to the intent to make his eſcape from him, and the miniſter ſtanding upon his guard kills him, this is no felony,

(†) *Part* I. *p.* 582. (*l*) *New Edit. cap.* 127. *p.* 427. (*) *Supra p.* 91 & 77. *Part* I. *p.* 489.

lony, for being by law authorized to arreſt him, he is not bound to go back to the wall, as in common caſes of *ſe defendendo*, for the law is his protection. And therefore as on the one ſide if *A.* kill him, it is murder, ſo on the other ſide if upon this aſſault by *A.* the miniſter kill him, it is no felony, the neceſſity excuſeth him, if he cannot otherwiſe ſave himſelf and perform his duty.

And herein it agrees with the common caſe of a ſheriff's bailiff in the execution of his warrant. *Co. P. C. cap.* 8. *p.* 56.

But where a warrant iſſueth againſt a felon, and either before arreſt or after he flies and defends himſelf with ſtones, as the book of 3 *E.* 3. *Corone* 290. or with his bow and arrows, as the record is of *M.* 22 *E.* 3. *Rot.* 117. *coram rege Ebor* (*m*), ſo that the officer muſt give over his purſuit, or otherwiſe cannot take him without killing him, if he kill him, it is no felony; and the ſame law is for a conſtable, that doth it *virtute officii*, or upon a purſuit of *hue* and *cry*.

And the ſame law it is, if in truth he were no felon, but yet a warrant is againſt him as ſuſpect of felony, and he having notice thereof flies and reſiſts, for the officer or miniſter ought to purſue his warrant, or otherwiſe he is puniſhable; and the party by his flight and reſiſtance is acceſſary to his own death.

But then there muſt be theſe cautions. 1. He muſt be a lawful officer, or there muſt be a *hue* and *cry*, or there muſt be a lawful warrant. 2. That the party ought to have notice of the reaſon of the purſuit, namely becauſe a warrant is againſt him, for his flight muſt be upon notice to him of the intent to arreſt him for felony. 2 *E.* 4. 9. *a.*

(*m*) This was the caſe of *Henry Veſcy*, who had been indicted before the ſheriff *in Turno ſuo anno R. R. nono* of divers felonies, whereupon the ſheriff *mandavit commiſſionem ſuam* Henrico *de* Clyderawe *& aliis ad capiendum prædictum* H. Veſcy *& ſalvò ducendum uſque caſtrum de* Ebor'. *Veſcy* would not ſubmit to an arreſt, but fled *& inter fugiendum* ſhot with his bow and arrows at his purſuers, but in the end was kild by *Clyderawe*. *Clyderawe* was afterwards indicted, "quòd felonicè interfecit prædictum *H. Veſcy*, ſed quia "compertum eſt, quòd prædictus *H. de* "*Clyderawe* prædictum *H. Veſcy* indictatum de diverſis feloniis fugam "faciendo, ut felonem domini regis, virtute commiſſionis ſuæ prædictæ anno "R. nono interfecit & non felonicè; "conſideratum eſt, quod idem *H. de* "*Clyderawe* eat inde quietus.

And 3. It muſt be a caſe of neceſſity, and that not ſuch a neceſſity as in the former caſe, where an immediate aſſault is made upon the miniſter juſt at his coming to arreſt, or to reſcue himſelf from him; but this is the neceſſity, *viz.* that he cannot otherwiſe be taken, and the reaſon is, becauſe it is for the public good, and they are puniſhable, if they neglect in any manner what they ought to do, namely the miniſter by fine and impriſonment, and a townſhip by an amercement.

But tho a private perſon may arreſt a felon, and if he fly ſo as he cannot be taken without he be kild, it is excuſable in this caſe for the neceſſity, 22 *Aſſiz.* 55. *per Thorp*, yet it is at his peril, that the party be a felon, for if he be innocent of the felony, the killing, at leaſt before the arreſt, ſeems at leaſt manſlaughter for the reaſon above given, for an innocent perſon is not bound to take notice of a private perſon's ſuſpicion (*).

If a juſtice of peace have juriſdiction in the caſe, (as he hath in all felonies and breaches of the peace, yea tho it be high treaſon, ſo far forth as it is a breach of the peace,) tho he err in granting of his warrant, it ſeems that the officer, that executes it, is excuſable. 14 *H.* 8. 16. *a. per curiam.*

Yet in ſome caſes, as touching rates for the poor, tho he hath juriſdiction in the matter by the ſtatute of 43 *Eliz. cap.* 2. the officer is puniſhable for executing the warrant, where none ought to iſſue, becauſe it is a circumſcribed particular juriſdiction given him by act of parliament, which he ought ſtrictly to purſue. *T.* 10 *Car. B. R.* 2 *Rol. Abr.* 560. *Nichols* and *Walker.*

When the officer or miniſter hath made his arreſt, he is forthwith to bring the party to the gaol, or to the juſtice according to the import of the warrant.

But if the time be unſeaſonable as in or near the night, whereby he cannot attend the juſtice, or if there be danger of a preſent reſcue, or if the party be ſick and not able at preſent to be brought, he may, as the caſe ſhall require, ſecure him in the ſtocks, or, in caſe the quality of the perſon or the indiſ-

(*) *Vide ſupra p.* 83.

indiſpoſition ſo require, ſecure him in a houſe, till the next day or ſuch time as it may be reaſonable to bring him. 2 *E.* 4. 9 & 10. (†).

When he hath brought him to the juſtice, yet he is in law ſtill in his cuſtody, till either the juſtice diſcharge or bail him, or till he be actually committed to the gaol by warrant of the juſtice. 10 *H.* 4. 7. *a. Eſcape* 8.

And thus far concerning arreſts by warrant or precept.

CHAP. XIV.

Concerning the office of a juſtice, *when a perſon charged or ſuſpected of* felony *is* brought before him.

WHEN a party thus arreſted for felony is brought to the juſtice of peace, he muſt either diſcharge, or commit, or bail him.

But preparatory to theſe acts there are ſome things, that are required of him before he do either.

1. By the ſtatute of 1 & 2 *P. & M. cap.* 13. and 2 & 3 *P. & M. cap.* 10. he is to take the informations upon oath of the proſecutor and witneſſes and put them into writing; and he is likewiſe to take the examination of the perſon accuſed, but this is to be without oath and put into writing.

And theſe examinations and informations he is afterwards to deliver into the general ſeſſions of the peace or to the gaol-delivery, as the caſe ſhall require; and becauſe it may be unſeaſonable to take theſe informations or examinations preſently, or poſſibly it may take longer time, the priſoner may be continued in the cuſtody of the officer, or may be detained in the juſtice's houſe, or committed to ſome near ſafe place of cuſtody, till the examinations can be taken.

1 But

(†) *Vide ſupra p.* 95, 96.

But this muſt be diſpatched in ſome convenient time, and therefore *P.* 43 *Eliz. C. B. Scavage* and *Tateham* (*a*) in an action of falſe impriſonment brought by a perſon brought before the mayor of *Pomfret* a juſtice of peace upon ſuſpicion of felony, the defendant could not upon the account of examination juſtify the detaining him in the juſtice's houſe nineteen days; but it was held, that he might detain him three days upon that account.

2. It is fit to take a recognizance from the proſecutor to appear and prefer a bill of indictment, and alſo of the witneſſes to appear and give evidence at the next ſeſſions of the peace or gaol-delivery, as the caſe ſhall require, if he ſhall find cauſe to commit or bail the priſoner; otherwiſe it is, if he ſhall diſcharge him.

Theſe things being thus premiſed, as I ſaid, the priſoner is either to be diſcharged, or committed, or bailed.

I. Touching the diſcharge of a priſoner. If a priſoner be brought before a juſtice of peace expreſly charged with felony by the oath of a party, the juſtice cannot diſcharge him, but muſt bail or commit him.

If he be charged with ſuſpicion only of felony, yet if there be no felony at all proved to be committed, or if the fact charged as a felony be in truth no felony in point of law, the juſtice of peace may diſcharge him, as if a man be charged with felony for ſtealing of a parcel of the freehold, or for carrying away what was deliverd him, and ſuch like, for which tho there may be cauſe to bind him over as for a treſpaſs, the juſtice may diſcharge him as to felony, becauſe it is not felony, *Kelw. f.* 34. 44 *Aſſiz.* 12. *Poulton de Pace* 146. *b.* But if a man be kild by another, tho it be *per infortunium* or *ſe defendendo*, (which is not properly felony,) or in making an aſſault upon a miniſter of juſtice in execution of his office, (which is not at all felony,) yet the juſtice ought not to diſcharge him, for he muſt undergo his trial for it; and therefore he muſt be committed, or at leaſt bailed.

(*a*) *Cro. Eliz.* 829. *Vide Part* I. *p.* 586.

II. As touching commitment or impriſonment of a party brought before a juſtice for felony or ſuſpicion thereof, theſe things are to be obſerved.

1. The commitment muſt be by writing under the ſeal of the juſtice.

And therefore altho a juſtice may by word of mouth arreſt a perſon for a breach of the peace done in his preſence, yet in that caſe the commitment of him ought to be a *mittimus* under ſeal; thus it was reſolved in *Sandford*'s caſe (*). *P.* 23 *Car.* 1. *B. R.* but agreed he may detain him in his cuſtody, till a warrant can be made.

And herein the power of a juſtice differs from the power of a court, for the court of king's bench may commit by order, and ſo may the court of ſeſſions of the peace, becauſe there is or ought to be a record of the commitment.

Nay in chancery, if an order be made for commitment of a perſon, till he enter into bond, *&c.* the warden of the *Fleet* may juſtify the impriſonment by virtue of that order. *T.* 39 *Eliz. B. R.* 2 *Rol. Abr. p.* 559. *Tayler* and *Beal.*

2. The *mittimus* ought to have theſe circumſtances. 1. It muſt contain the certainty of the cauſe, and therefore if it be for felony, it ought not to be generally *pro felonia*, but it muſt contain the eſpecial nature of the felony briefly, as *for felony for the death of J. S.* or *for burglary in breaking the houſe of J. S. &c.* and the reaſon is, becauſe it may appear to the judges of the king's bench upon an *habeas corpus*, whether it be felony or not (†): and likewiſe by the ſtatute of 3 *H.* 7. *cap.* 3. the ſheriff is to make a calendar of the priſoners in his gaol, and deliver it to the juſtice of gaol-delivery ſignifying the priſoners and their cauſes: *vide* 2 *Co. Inſtit.* 52 & 591. 2. It is fit to mention the name of the juſtice, and his authority in the beginning of the *mittimus*, tho this is not always neceſſary, for the ſeal and ſubſcription of the juſtice to the *mittimus* is ſufficient warrant to the gaoler: *vide ſupra* (**) & *Dalt.* 355 & 383. (*b*), for it may be ſupplied by averment, that it was done by the juſtice. 3. It muſt have

I a certain

(*) *Part* I. *p.* 612. (†) *Vide ſupra. p.* 111. (**) *Part* I. *p.* 577. (*b*) *New Edit. p* 575 & 593.

a certain date of the year and day (*). 4. It ſhould have an apt concluſion, namely to detain him till he be thence deliverd by due courſe of law. 2 *Co. Inſtit. ubi ſupra* (†).

But altho it be true, that theſe things are regular and fit, namely the cauſe, the juſtice committing, the date, the apt concluſion, yet I am far from thinking the warrant void, that hath not all theſe circumſtances.

And therefore the juſtification in falſe impriſonment againſt the gaoler may be good by virtue of ſuch a warrant; and it ſeems to me, (contrary to the opinion of my lord *Coke ubi ſupra,*) that if an eſcape be ſufferd willingly by the gaoler upon ſuch a general warrant, it will be felony in him: *vide quæ ſupra cap.* 54. *Part* I. *p.* 609. *De frangentibus priſonam* (*c*).

And therefore if the concluſion of the *mittimus* be to detain him till further order by the juſtice, it is true it is an unapt concluſion, and therefore binds not up the hands of the juſtices, to whom it may belong, to bail or deliver him, as the caſe ſhall require; but the commitment is notwithſtanding good, if there be any tolerable certainty in the body of the warrant for what it is, as for felony generally, tho the particular is beſt to be expreſſed.

3. Regularly the commitment is to be to the common gaol of the county, or if the offenſe be committed and the party taken within a franchiſe, that hath a gaol, (as the *Gatehouſe* at *Weſtminſter,*) then to the gaol of the franchiſe by the ſtatute of 5 *H.* 4. *cap.* 10.

Only ſometimes it hath been uſed by the juſtices of peace to ſend ſuch priſoners, which are bailable and have not their bail ready, to ſome private priſon, as the *New Priſon* in *Middleſex* for ſome ſhort time, till they can procure their bail; but this hath always been diſliked by the juſtices of the king's bench and gaol-delivery as inconvenient, and not agreeable to the law (*d*).

4. If the priſoner be bailable, yet the juſtice is not bound to demand bail, but the priſoner is bound to tender it, otherwiſe

(*) *Supra p.* 111.
(†) *Vide Part* I. *p.* 584.
(*c*) See alſo *Part* I. *p.* 595.
(*d*) See the caſe of *Kendal* and *Roe*, *State Tr. Vol.* IV. *p.* 862. & *ſupra Part* I. *p.* 585. *in notis.*

therwiſe the juſtice may commit him; *quod vide* 14 *H.* 7. 10. *a. per Fineux* accordingly adjudged *T.* 40 *Eliz. C. B. Collen*'s caſe; and ſo of a ſheriff, that hath taken a man by *capias*, where he is bailable.

Thus far touching commitment of an offender.

But in ſome caſes the offender is neither diſcharged nor committed, but bailed, and that comes next to be conſiderd.

But becauſe the buſineſs of bail is large and various, I ſhall refer that to the next chapter.

CHAP. XV.

Concerning bail *and* mainpriſe.

TOuching bailing of felons, *&c.* there will be theſe things inquirable, 1. What it is, and the nature and kinds of it. 2. In what caſes it may be, and in what not. 3. By whom (*a*). 4. In what manner it is to be done, by writ or without writ (*b*). 5. The penalty of erring therein (*c*).

Touching the *firſt*, namely the nature of bail.

Bail and mainpriſe are uſed promiſcuouſly oftentimes for the ſame thing, and indeed the words import much the ſame thing, for the former is *traditus J. S.* and the other is *manucaptus per J. S.*

But yet in a proper and legal ſenſe they differ. 1. Always mainpriſe is a recognizance in a ſum certain, but bail is not always ſo. 2. He, that is deliverd *per manucaptionem* only, is out of cuſtody; but he that is bailed, is in ſuppoſition of law ſtill in cuſtody, and the parties that take him to bail are in law his keepers, and may re-ſeize him to bring him in; and therefore if a man be let to mainpriſe, ſuppoſe in the king's bench, an appeal or other ſuit cannot be brought againſt him as *in cuſtodiâ mareſcalli*; but if he be let to bail, he is in ſuppoſition of law ſtill *in cuſtodiâ mareſcalli*, 33 *E.* 3. *Mainpriſe* 12.

3 36 *E.* 3.

(*a*) *Infra cap.* 16 *& ſub fine cap.* 17. (*b*) *Infra cap.* 17. (*c*) *Infra ſub fine hujus capitis.*

36 *E.* 3. *Ibidem* 13. 32 *H.* 6. 4. *a. Protection* 13. and accordingly the books of 21 *H.* 7. 20. *b. per Fineux*, and 9 *E.* 4. 2. *a.* that ſeem to differ, are to be underſtood. 3. Tho ſometimes the recognizances themſelves both in bail and mainpriſe are in ſums certain, as ſhall be ſhewn, yet the entry on record in the one caſe is *deliberatur per manucaptionem*, and in the other caſe *traditur in ballium.*

But now for the kinds of bail properly ſo called, it is of theſe kinds.

1. Sometimes it is in no ſum certain at all, but *traditur in ballium* to *J. S.* and this is the uſual form in all bails in civil actions in the king's bench; and antiently it was ſo alſo in criminal caſes, tho now, as ſhall be ſhewn, it differs.

And of this kind was the antient form of that bail, which was *corpus pro corpore*, which now is rarely uſed in that form, and the reaſon why that is diſuſed is, becauſe there was antiently a looſe opinion, that he, who was bail in this manner for a felon, was to be hanged, if he brought not in the principal to keep his day, 33 *E.* 3. *Mainpriſe* 12. but the truth is, all his puniſhment is to be fined for his default. *Crompt. Juſtice, f.* 157. *a.* 11 *H.* 6. 31. *b.*

And ſo in civil actions, where this kind of bail is ſometimes in uſe, as appears 27 *H.* 8. 11 & 12. 21 *H.* 7. 20. *b.* the bail is amerced, if he have not the principal at the day.

2. Sometimes the bail is only a recognizance in a ſum certain for the appearance of a felon, and this is uſual, *viz.* the principal in double the ſum; as for inſtance in 40*l.* or more, the ſureties each of them in 20*l.* apiece *ad comparendum & ſtandum recto in curiâ de latrocinio prædicto ſecundum legem &c. Dalt. cap.* 114. *p.* 305. (*a*).

The ſureties ought to be at leaſt two men of ability, and their number and ſufficiency and the ſum of the recognizance is much in the diſcretion of him, that is to take it, and therefore he may examine them upon oath; but how theſe are puniſhable, that take inſufficient bail, ſhall be ſaid hereafter.

(*a*) *New Edit. cap.* 165. *p.* 150.

The ſureties *ad ſtandum juri* doth import alſo, that he ſhall plead to the felony, and therefore before the ſtatute of *Marlbridge, cap.* 28. (*b*), if the felon had ſtood upon his *privilegium clericale* and would not anſwer the felony, his bail had been amerced, which is remedied by that ſtatute.

3. The third ſort of bail is that, which is indeed the true and regular bail, which is not only a recognizance in a ſum certain, but alſo a taking to bail, the true form whereof is containd in *Lambert's Juſtice, Lib.* I. *cap.* 23. *p.* 264. *Memorand' quòd die, anno, &c. coram, &c. venerunt* A. & B. *& ceperunt in ballium* J. S. *captum & detentum pro ſuſpicione cujuſdam feloniæ uſque proximam generalem gaolæ deliberationem in comitatu prædicto tenend', & aſſumpſerunt, viz. quilibet eorum ſub pœnâ* 20 *l. de bonis & catallis, terris & tenementis corum & cujuſlibet eorum ad opus dicti domini regis levand', ſi prædictus* J. S. *ad eandem proximam gaolæ deliberationem non perſonaliter comparebit coràm juſticiariis dicti domini regis ad dictam gaolam deliberand' aſſignatis ad reſpondendum dicto domino regi tunc & ibidem ſuper præmiſſis,* or *ſuper iis, quæ ad tunc & ibidem ipſi objicientur,* or rather according to the antient form *ad ſtandum recto de latrocinio prædicto ſecundùm legem & conſuetudinem regni* Angliæ. *Dat. ſub ſigillis noſtris die, anno, &c. Vide F. N. B.* 250. *Crompt.* 157. *b.*

But the ſeal need not be, for he is a judge of record, only his hand ſimply ſubſcribed, or ſubſcribed *capt. & cognitus die & anno ſupradicto coram* Math. Hale.

This is the form of a bail, where the principal is either an infant or in priſon, and ſo abſent; and thereupon a warrant iſſues under the hand and ſeal of him, that takes the bail for his enlargement, called a *liberate.*

But if he be bailed by a juſtice of peace before commitment, or if committed and brought into the court of king's bench or ſeſſions to be bailed, then the party himſelf is alſo bound; and ſometimes the recognizance is ſimple with a condition added for his appearance, and ſometimes the condition is containd in the body of the recognizance, *ut ſupra:* Only it is to be remembred, that when any perſon is bailed

(*b*) 2 *Co. Inſtit. p.* 150.

for any miſdemeanor either upon the return of an *habeas corpus* or otherwiſe, the return or record ought to be firſt filed, and a *committitur mareſcallo* entred, and then bail taken, for all perſons, that are bailed in the king's bench, are *de facto*, or in ſuppoſition of law firſt ſuppoſed to be *in cuſtodiâ mareſcalli*.

The advantage of this kind of bail is this, that it is not only a recognizance in a ſum certain, but alſo a real bail, and they are his keepers, and may be puniſhed by fine beyond the ſum mentiond in the recognizance, if there be cauſe, and may reſeize the priſoner, if they doubt his eſcape, and bring him before the juſtice or court, and he ſhall be committed, and ſo the bail be diſcharged of his recognizance. 36 *E.* 3. *Mainpriſe* 13. 32 *E.* 3. *Mainpriſe* 23. *Crompt. Juſtice, f.* 157. *a.*

Touching the *ſecond*, in what caſes a perſon is bailable, that is accuſed or indicted of felony or acceſſary, or in relation thereunto.

I ſhall not meddle with bailing of priſoners in civil actions or for offenſes leſs than felony by acts of parliament, only thus much.

Regularly in all offenſes either againſt the common law or acts of parliament, that are below felony, the offender is bailable, unleſs 1. He hath had judgment. 2. Or that by ſome particular or ſpecial act of parliament bail is ouſted.

What acts of parliament ouſt bail in particular offenſes againſt thoſe acts is not my purpoſe to declare, they are very well collected by Mr. *Dalton, cap.* 114. (*c*), and Mr. *Crompton de pace regis, f.* 154. *b.* & *ſequentibus.*

In relation to capital offenſes there are eſpecially theſe acts of parliament, that are the common land-marks touching offenſes bailable or not bailable, *viz.* 3 *E.* 1. or *Weſtm.* 1. *cap.* 15. 34 *E.* 3. *cap.* 1. 23 *H.* 6. *cap.* 10. 1 *R.* 3. *cap.* 3. 3 *H.* 7. *cap.* 3. 1 & 2 *P.* & *M. cap.* 13. and 2 & 3 *P.* & *M. cap.* 10.

As to the ſtatute of 3 *E.* 1. it declares, who are bailable and who not as well in other caſes, as in caſes capital.

But

(*c*) *New Edit. cap.* 166. *p.* 553.

But at that time few were concerned in bailing of priſoners, but the ſheriff, in whoſe cuſtody they moſt commonly were, and ſuch ſubordinate officers, that either under the ſheriff or as bailiffs of liberties had the cuſtody of priſoners, [as appears from the words of the ſtatute,] *Et pur ceo, que viſcounts & autres queux ont priſe & retenus priſoners:* And therefore ſtill the ſtatute did not extend to courts of juſtice, much leſs to the court of king's bench: *vide* 2 *Co. Inſtit. p.* 185, 186. *ſuper hoc ſtatutum*; neither doth this ſtatute ſingly of itſelf extend to juſtices of the peace, for they were not in being till 1 *E.* 3. and therefore the ſtatute of 1 & 2 *P. & M. cap.* 13. eſpecially makes this ſtatute of 3 *E.* 1. a direction touching bailing of offenders.

And therefore it ſeems alſo upon the ſame reaſon the ſtatute of 27 *E.* 1. *cap.* 3. *de finibus levatis*, that directs and authorizeth juſtices of gaol-delivery to inquire of ſheriffs and others, that have let out of priſon by replevying perſons not repleviſable, or have offended againſt the ſtatute of *Weſtminſter*, and to puniſh them according to that ſtatute, extends not to courts or juſtices of the peace, but only to ſheriffs and ſubordinate officers.

And the truth is, it could not be well applicable to any but them, for as all writs of *homine replegiando, de manucaptione, & de odio & atiâ* were directed to the ſheriffs, ſo in moſt caſes what was to be done in thoſe times for bailing of priſoners was moſt commonly to be done by the ſheriff.

This ſtatute declares, 1. Who were not bailable by the common law. 2. Who from thenceforth ſhould not be bailable; and 3. Who ſhould be bailable, and inflicts puniſhment upon ſheriffs and bailiffs bailing thoſe, that are not repleviſable, and not bailing thoſe that are repleviſable.

And this act extends not only to ſuch bailments as might be *virtute officii*, but alſo to bailments by force of the common writ *de homine replegiando* or *de manucaptione*; whereof hereafter.

My lord *Coke* in his comment upon this chapter (*d*) hath given us the ſubſtance and intent of this ſtatute, which I ſhall therefore but in effect tranſcribe. *Firſt*,

(*d*) 2 *Co. Inſtit. p.* 186 *& ſeq.*

4

I. As to thoſe that were irrepleviſable at common law, I mean before the ſtatute of 3 *E.* 1. (for poſſibly more antiently all offenders were repleviſable,) they are of four ſorts.

1. *Firſt for the death of a man.*

At this time there was held little difference between murder and manſlaughter but only in degree, for till 23 *H.* 8. clergy was allowable in the one as well as in the other, nay at this day, if the indictment run only *interfecit & murdravit* without *ex malitiâ præcogitatâ*, the priſoner hath clergy.

And as to the point of bail no difference was at common law, nor after the ſtatute of 3 *E.* 1. till later ſtatutes, (*de quibus infra,*) between murder, manſlaughter, or the killing of a man *ſe defendendo*, or *per infortunium*, for they, that could not bail in murder, regularly could not bail in the other three caſes.

And this held univerſally as to bailment by the ſheriff or by the juſtices of peace; but as to others it had ſome exceptions.

The court of king's bench might and ſtill may bail in any caſe whatſoever, even in high treaſon or murder, for the court is held in law *coram ipſo rege.* 4 *Co. Inſtit. p.* 71. 2 *Co. Inſtit. p.* 186. but this is in the diſcretion of the court, and none can challenge it *de jure.*

And this bailment in the king's bench may be upon an original indictment before them in the county, where they ſit, or upon an indictment removed by *certiorari*, or upon a priſoner removed by *habeas corpus* before or after an indictment taken; *vide infra.*

In ſome caſes juſtices of gaol-delivery may bail in caſe of the death of a man.

1. If a man be found guilty of a death *ſe defendendo*, or *per infortunium* upon his trial, the juſtices of gaol-delivery may certify the matter into *chancery*, that the party may ſue his pardon of courſe, and in the mean time bail him till the next ſeſſions. 3 *E.* 3. *Coron.* 361.

And the ſame law it is, if the coroner's inqueſt only find it *ſe defendendo*, ſuch inquiſition ſhewing the ſpecial matter, as it ought, is good, *Stamf. P. C. cap.* 7. *f.* 15. *b.* 26 *Eliz. Holmes*'s caſe, *Crompt. de pace*, *f.* 153. *b.* & 28. *a.* and the reaſon of the book of 12 *E.* 3. cited by *Crompton*, that in an indictment before the coroner *ſe defendendo*, the words *ſe defendendo* were void and ſtricken out, is not becauſe they were againſt the king, but becauſe they were too general.

2 *Co. Inſtit. ſuper ſtat. Glouc. cap.* 9. *p.* 316. an indictment *ſe defendendo* is good before juſtices of gaol-delivery, but it is there ſaid it is not good before juſtices of peace; *de quo ſupra p.* 45. and therefore upon ſuch an indictment before the coroner *ſe defendendo* ſpecially the juſtices of gaol-delivery may bail the party till the next ſeſſions to procure his pardon of courſe, as well as if it had been found upon his trial; and ſo it was done 26 *Eliz.* in *Holmes*'s caſe, *Crompt.* 153. *b. vide Ap-Rice*'s caſe, 19 *H.* 7. *Kelw.* 53. *a. Crompt. ibidem.*

2. If a man be convict of manſlaughter, and hath a pardon to plead, which the juſtices of gaol-delivery ſee in the interval of the ſeſſion, they may bail him, (notwithſtanding his conviction and that of manſlaughter,) to another ſeſſion to plead his pardon. 2 *E.* 6. *B. Mainpriſe* 94. *Crompt.* 153. *b.*

3. If a perſon be brought before the judges of gaol-delivery upon ſuſpicion of murder, but before commitment or indictment [it appears] upon examination of the fact by the juſtices of gaol-delivery, that he is not guilty, (tho in truth a felony were committed,) the juſtices of gaol-delivery may bail him to another ſeſſions: *vide* 31 *Eliz. in caſe de Salford, Crompt.* 154. *a.*

But I am not of the mind that the ſame judge [*Shuttleworth*] was of, that if he be convict upon a trial againſt the opinion of the judge, that he can bail him to ſue his pardon; but all he may do is to reprieve him before judgment, and certify for him for a pardon.

And therefore it ſeems to me there is no difference between this caſe and that of *Dy.* 179. *a.* where a man is con-

vict, and it is doubted whether he be within clergy, yet he remaineth not bailable.

4. If a man be indicted of murder at the ſeſſions of gaol-delivery, and prays his trial, but the proſecutor for the king is not ready with all his evidence, the judge may reſpite his trial till another ſeſſions; and tho he be not bound to bail him, yet if he do find that it is no contrivance of the priſoner to ſurpriſe the proſecutor, but that it is merely the neglect of the proſecutor, or that his pretenſe is merely a delay to continue the party in priſon, I have known it often practiſed at *Newgate* and elſewhere for the juſtice of gaol-delivery to bail the priſoner till another ſeſſions, if it be far off, and upon circumſtances conſiderd.

And yet in none of theſe caſes neither juſtices of peace nor ſheriff can bail, but how far they may bail in caſes of manſlaughter ſhall be ſaid hereafter, when we conſider the ſubſequent ſtatutes.

And thus far at preſent for bailing in caſe of the death of a man.

2. The *ſecond* caſe where a man was not bailable by the common law is, where a man is taken *per mandatum domini regis:* this is not intended of the perſonal command of the king, for regularly as the king cannot in perſon arreſt or impriſon, ſo he cannot command another to impriſon, but it muſt be done by ſome order, writ or precept, or proceſs of ſome of his courts. 16 *H.* 6. *Monſtrauns de fait* 182. 1 *H.* 7. 4. *b.* 2 *Co. Inſtit. ſuper ſtatutum Weſtminſt.* 1. *cap.* 15. *p.* 187.

Nay, altho ſuch a mandate be by commiſſion under the great ſeal, it is void, 42 *Aſſiz.* 5. therefore the *præceptum* or *mandatum domini regis* in this act is intended of the proceſs of law iſſuing out of the king's courts according to their ſeveral juriſdictions, 2 *Co. Inſtit. ſuper Mag. Chart. cap.* 29. and *Weſtm.* 1. *cap.* 15. But if intended of the king's perſonal command, tho ſuch a perſon ſo taken be not bailable by the common writ *de homine replegiando*, yet he is bailable by the court of king's bench or chancery upon an *habeas corpus*; *de quo infra* 2 *Co. Inſtit. p.* 55, 187.

3. *Thirdly,*

3. *Thirdly, Or of the juſtices, viz.* by writ or proceſs iſſuing according to law within their ſeveral juriſdictions, for altho theſe were bailable in many caſes by the courts that iſſued the proceſs, yet they were not bailable by the common writ *de homine replegiando*, but are excepted therein, nor by the ſheriff *virtute officii* till the ſtatute of 23 *H.* 6. *cap.* 10.

4. *Fourthly, Or for the Foreſt*; perſons impriſond by the juſtice in *eyre* in the foreſt are not repleviſable by the common writ *de homine replegiando.*

II. The ſecond part of this ſtatute is enacting or declarative, who are not bailable; but ſo far as this ſtatute looks, it only concerns the ſheriff and bailiffs, and the common writs of *homine replegiando* or *de manucaptione*, which are directed to the ſheriff, tho afterwards it was made the rule in many things to juſtices of peace, *&c.* by the ſtatutes of 1 *&* 2 *P. & M.* and 2 *&* 3 *P. & M. de quibus infra.*

And the caſes, wherein bail is reſtrained by this ſtatute, are thirteen in number, ſome in reſpect of the heinouſneſs and weight of the offenſe, as treaſon, burning of houſes, breaking of priſon, *&c.* and the reſt upon the great evidence and probability of guilt, as perſons outlawed, *&c.* but I ſhall follow them in the order that the ſtatute ſets them down.

1. Perſons outlawed; for outlawry is an attainder of felony, and [the outlaw] is preſumed guilty, becauſe he withdraws himſelf from the proceſs of law.

And upon the ſame reaſon it is, that a perſon convict of felony, while the judge adviſeth upon his clergy, is not bailable, becauſe he is convicted, *Dy.* 179. *a.* Nay, tho he be convicted againſt the direction of the court, he is not bailable againſt the opinion of *Shuttleworth*, 31 *Eliz. Crompt. f.* 154. *a.*

And therefore if the ordinary had had a clerk convict in his cuſtody, if the ordinary let him to bail, he was puniſhable: *vide* 15 *H.* 7. 9. *a.*

But if a man be outlawed for felony, and be taken upon a *capias utlegatum* and plead in avoidance of the outlawry againſt him, that he is of another place, and ſo not the perſon outlawed, or bring a writ of error to reverſe the out-

lawry and aſſign his errors, the court of king's bench may bail him; and it is not unuſual ſo to do, whether the outlawry be upon an appeal or an indictment.

If a man be indicted or appealed for ſuch an offenſe, wherein bail may be taken, the indictment or appeal does not hinder his bailment, becauſe it induceth no ſufficient preſumption of his guilt; if he were bailable before indictment, he is bailable after, 2 *Co. Inſtit. ſuper ſtat. Weſtm.* 1. *cap.* 15. and *ſtatutum ipſum F. N. B.* 249. 22 *Aſſiz.* 94. but not allowd, till he hath pleaded to the indictment 16 *Aſſiz.* 13. 29 *Aſſiz.* 44.

But if a man be indicted before juſtices of a higher juriſdiction, as before juſtices of *oyer* and *terminer*, he cannot be bailed by juſtices of peace, for they cannot proceed upon an indictment taken before ſuperior judges, tho otherwiſe the cauſe might be within their cognizance.

2. Perſons, that have abjured for felony, are not bailable, for they are attainted in law.

3. Approvers in felony are not bailable, becauſe they do confeſs themſelves guilty.

4. Perſons taken with the *mainouvre* are not bailable, becauſe it is *furtum manifeſtum.*

But that is intended of the thief himſelf, for if *A.* ſteal goods and ſell them to *B.* and *B.* is taken with them, *B.* is bailable.

5. Perſons, that being committed for felony break priſon, are not to be bailed, for 1. It carries a preſumption of their guilt. 2. It is a ſuperadded felony to the former, for which they ſtood committed.

6. Notorious thieves: and herein common fame and other circumſtances may be oppoſed againſt their bailing, unleſs they can ſhew reaſonable evidence to prove their innocence. 16 *E.* 4. 5. *a. b.*

7. Perſons impeached and approved by an approver, becauſe it induceth a ſtrong ſuſpicion that they are guilty, becauſe the accuſer confeſſeth himſelf guilty before he can impeach others.

But this hath certain exceptions. 1. If the approver be dead. 2. If the approver hath waved his appeal. 3. If the perſon accuſed by the approver be of good fame.

8. Perſons arreſted for wilful burning of another man's houſe, which was a felony at common law.

9. Perſons arreſted for falſifying the king's coin.

10. Or for counterfeiting the king's great or privy ſeal.

11. He, that is excommunicated by the ordinary, is not bailable, unleſs it be for a temporal cauſe, and then upon a prohibition granted he may not only be bailed but deliverd; or upon an appeal and a ſpecial writ *de cautione admittendâ*, if not obeyed by the ordinary, a ſpecial writ may iſſue for his enlargement.

12. Or if he be impriſond for ſome open miſdeed, as if *A.* dangerouſly wound *B.* he may be impriſond till it be known whether the party will die or live; and regularly is not to be bailed, till it ſhall probably appear, that the danger is over. 10 *H.* 7. 20. *a.* 3 *H.* 7. *cap.* 1.

13. Nor he that is arreſted for treaſon, that toucheth the king, whether he be indicted or not; theſe are neither bailable by virtue of the common writ *de homine replegiando*, nor *ex officio* by the ſheriff or bailiff of a liberty.

But all or any of theſe are bailable by the court of king's bench. 2 *Co. Inſtit.* 189.

III. The third thing provided by this ſtatute is to declare, who are bailable by the ſheriff, and they are of ſeven kinds.

1. Perſons indicted before the ſheriff for larciny, if they have not been accuſed of other felonies before, or as the writ of the regiſter, *f.* 83. *b.* 268. *b.* ſtyles them, if they are of good fame.

This therefore lies very much in the diſcretion and true information of the ſheriff or other juſtice, that commits them.

2. Perſons impriſond for a light ſuſpicion, *dum tamen fuerint bonæ famæ.*

3. Perſons indicted for petit larciny.

4. Perſons accuſed for receiving of felons.

5. Or of commandment, force, or aid to the felony done.

Theſe two laſt concern acceſſaries after and before, wherein there is ſome diverſity of opinion in our books.

Regularly in all caſes of felony, tho it be murder, the acceſſary is bailable till the principal be attaint, and this holds as well in caſes of the death of a man, as other felonies, 40 *E.* 3. 42. *a.* 40 *Aſſiz.* 8. But if the principal be once attaint, and then the acceſſary is taken, he ſhall not be bailed until he hath pleaded to the indictment; but after plea pleaded by him he ſhall be bailed, notwithſtanding the attainder of the principal, tho it be in caſe of murder. 43 *E.* 3. 17. *b.* 50 *E.* 3. 15. *a.* 27 *Aſſiz.* 10. 47 *Aſſiz.* 16.

6. Or indicted or accuſed for an offenſe, for which he ought not to loſe life or member, unleſs in caſes of offenſes againſt acts of parliament, where the acts of parliament exclude bail.

7. Or appeald by an approver, who is ſince dead.

Theſe be the caſes, wherein by that act the party is bailable.

And therefore, tho a party be committed and the tenor of the *mittimus* be to detain him without bail or mainpriſe, yet if the offenſe be by law bailable, he that hath the power of bailing may bail him. *Crompt. de Pace* 153. *a.*

This ſtatute adds a penalty, 1. For bailing a perſon not bailable; if he be a ſheriff, conſtable, or bailiff of fee, he ſhall loſe his office; and if he be an under-bailiff or not a bailiff of fee, he ſhall have three years impriſonment and be fined at the king's pleaſure. 2. And if he ſhall detain perſons repleviſable after ſurety offerd, he ſhall be grievouſly amerced.

And thus far for the ſtatute of 3 *E.* 1.

CHAP.

CHAP. XVI.

Concerning the ſtatutes of 34 E. 3. 1 R. 3. 3 H. 7. 1 & 2 P. & M. 2 & 3 P. & M. *in relation to* bailment of priſoners.

ANtiently moſt of the buſineſs touching bailment of priſoners for felony or miſdemeanors was performed by the ſheriff or ſpecial bailiffs of liberties either by writ or *virtute officii.*

But when the offices of juſtices of peace were inſtituted by the ſtatute of 1 *E.* 3. they gradually had the greater buſineſs of committing and bailing offenders devolved into their hands; and by ſucceſſive acts of parliament.

1. The power of the ſheriff grew out of uſe. 2. The juſtices of peace obtaind moſt of the ſheriff's power in relation to bailment. 3. Their power of bailment as in relation to offenſes extended larger than the ſheriff's, and in ſome kind larger than the limits preſcribed by 3 *E.* 1. 4. Yet in ſome reſpects the ſheriff's power as to bailing in offenſes not capital was enlarged by the ſtatute of 23 *H.* 6. *cap.* 10.

I ſhall therefore take theſe ſeveral ſtatutes in order of time.

I. The ſtatute of 34 *E.* 3. *cap.* 1. gave them power to apprehend malefactors, and to commit them to cuſtody, or to bind them to their good behaviour, which was not intended perpetual, but in nature of bail, *viz.* to appear at ſuch a day at their ſeſſions, and in the mean time to be of good behaviour.

By the ſtatute of 23 *H.* 6. *cap.* 10. there is not only power but command to the ſheriff to let out by ſufficient ſureties parties arreſted in perſonal actions and upon indictments of treſpaſs, (except perſons taken by *excommunicato capiendo*, condemnation, judgment, execution, ſurety of the peace, or

by commandment of the juſtices, or perſons taken upon the ſtatute of labourers,) yet their power of bailing of felons, *&c.* by the ſtatute of 3 *E.* 1. continued.

II. By the ſtatute of 1 *R.* 3. *cap.* 3. "Foraſmuch as per-
" ſons have been taken and impriſond upon ſuſpicion of
" felony, ſometimes upon light ſuſpicions, ſometimes by
" malice, and detaind without bail or mainpriſe, it is en-
" acted, that every juſtice of peace within their limits have
" power to let ſuch priſoners to bail, as if they had been in-
" dicted before them at their ſeſſions, and ſhall have power
" to inquire of eſcapes."

This gave power to any one juſtice of peace to bail any priſoner for felony, and excepts not manſlaughter, but withal ſuppoſeth, that before this act they could not bail till indictment in their ſeſſions; but it ſeems was ſomewhat uncertain, for it was, *where they were committed for malice or light ſuſpicions.*

III. The ſtatute of 3 *H.* 7. *cap.* 3. reciting the ſtatute of 1 *R.* 3. and that by colour thereof divers perſons not mainpernable were let to bail, enacts, "That two juſtices of the
" peace, whereof one of the *quorum*, have power to let ſuch
" perſons, as are mainpernable by law, to bail to the next
" ſeſſions of the peace or gaol-delivery, and ſhall accordingly return the recognizance under pain of 10 *l.*

This ſtatute ſeems, 1. To repeal the ſtatute of 1 *R.* 3. as to bailing by one juſtice, and gives it to two juſtices, whereof one of the *quorum.* 2. It limits alſo their power of bailment only to ſuch caſes as are bailable by law; and therefore, it ſeems, takes in the ſtatute of 3 *E.* 1. as the directory what perſons are by law bailable. And thus it ſtood till 1 *Mar.*

IV. By the ſtatute of 1 *&* 2 *P. & M. cap.* 13. theſe two things are principally enacted.

1. That whereas the ſtatute of 3 *H.* 7. is general, that the two juſtices ſhall let to bail ſuch as are bailable by law, this ſtatute in expreſs words makes the ſtatute of 3 *E.* 1. the ſtandard for the taking of bail by two juſtices.

2. That any perſon arreſted for manſlaughter or other felony bailable by law, or ſuſpicion thereof, ſhall not be baild but by two juſtices of peace, whereof one of the *quorum*, both to be preſent at the bailing of ſuch offender, and to certify it in writing at the next gaol-delivery; but the juſtices of peace and coroner in *London* to do as formerly [and the county of *Middleſex*, and in other cities, boroughs, and towns corporate within their ſeveral juriſdictions]: Juſtices of peace, *&c.* offending contrary to the true intent of this act, the juſtices of gaol-delivery may fine them.

V. The ſtatute of 2 *&* 3 *P. & M. cap.* 10. only provides for examinations and informations to be taken by the juſtices of peace as well upon commitment, as bailing of any priſoner for manſlaughter or other felony.

Upon theſe ſtatutes, and that of 3 *E.* 1. which expreſly ſaith, "that *for the death of a man*(*) a perſon is not bailable by "law", it hath been queſtiond, whether juſtices of peace may bail in caſe of manſlaughter.

On the one ſide the ſtatutes of 2 *Mar.* and 3 *Mar.* expreſly admit that they may, and accordingly the uſual practice hath been: *vide Lamb. Juſtice, p.* 25. *& ſequentibus.*

On the other ſide theſe things make againſt their bailing, *viz.* 1. The ſtatute of *Weſtm.* 1. [3 *E.* 1.] *cap.* 15. recites expreſly, that for the death of a man the offender is not by law bailable, and the very ſtatute of 1 *&* 2 *P. & M.* refers to the ſtatute of 3 *E.* 1. as the rule and ſtandard for juſtices of peace to proceed by in caſe of bailing.

2. Again, the ſtatute of *Glouceſter, cap.* 9. (†) expreſly provides, "That he, that kills a man by miſadventure, ſhall remain "in priſon till the coming of the juſtices in *eyre* or gaol-deli- "very, and then he ſhall be tried"; and if in caſe of a death by *infortunium*, much more in caſe of a ſimple manſlaughter.

3. The writ of *homine replegiando* excepts the caſe of the death of a man from bail.

4. It was reſolved by all the judges of *England*, 7 *Car.* 1. that a man is not bailable for manſlaughter, as I had it from the book of the late chief juſtice *Hyde*, who accordingly did

2 ſet

(*) *Vide Glanvil, Lib.* xiv. *cap.* 1 & 3. (†) 2 *Co. Inſtit. p.* 315.

ſet a fine of 20 *l.* upon a learned reader being a juſtice of peace, and now an antient ſerjeant at law, for bailing a man in caſe of manſlaughter in the county of *Salop*, which I knew to be true; and this was approved by moſt of the judges that heard it.

To ſettle this buſineſs therefore I ſay,

1. That in caſe of murder it is of all hands agreed, that the juſtices of peace cannot bail, but it is to be done regularly only in the king's bench.

2. That in caſe of manſlaughter, if the fact be apparent by plain proof or confeſſion, that a man is kild, and kild by *J. S*, whether the ſame were done *ex malitiâ præcogitatâ*, or upon a ſudden falling out, or but *ſe defendendo*, yet a juſtice of peace or two juſtices, whereof one of the *quorum*, cannot bail by any law in force.

3. That whether it do *conſtare de perſonâ occidentis*, or *de modo occidendi*, or not, yet if the party be indicted of manſlaughter, nay tho it were but *ſe defendendo*, the juſtices of peace cannot bail.

4. But if there be a manſlaughter committed, and it is certainly no more, and a party ſuſpected is brought before two juſtices of peace, whereof one is of the *quorum*, if the matter be doubtful and uncertain, whether this be the perſon that did the fact, the two juſtices of peace, whereof one is of the *quorum*, may bail that man, and that by virtue of the ſtatute of 1 *R.* 3. *cap.* 3. which gave power to one juſtice of peace generally to bail any perſon ſuſpect of felony, if it appear to him to be a light ſuſpicion, (whereof he muſt needs be the judge,) which doubtleſs extended to manſlaughter; and altho the ſtatute of 3 *H.* 7. *cap.* 3. transfer that power to two juſtices of peace, whereof one of the *quorum*, yet ſtill it was bottomed upon the ſtatute of 1 *R.* 3. and the ſtatute of 1 & 2 *P. & M.* is bottomed upon that of 3 *H.* 7.

Again, the ſtatute even of *Weſtminſter* 1. [*viz.* 3 *E.* 1.] tho it ſay *de morte hominis* there is no bail at common law, yet it muſt be intended, when the offender is certainly known, for it generally provides, that perſons taken upon a light ſuſpicion ſhall be baild; and therefore the ſtatute of 1 & 2 *P. & M.* when

it

it makes the ſtatute of *Weſtminſter* 1. the ſtandard of their proceeding in point of bailment, and yet ſuppoſeth one taken for manſlaughter bailable, muſt mean ſuch a manſlaughter, where the party is [only] ſuſpected, not where the thing is done [by him], for the words *bailable by law* do not only refer to *felony*, which is the laſt antecedent, but *manſlaughter*: And by this conſtruction all the ſtatutes and all parts of the ſtatutes ſtand together (*e*).

CHAP. XVII.

Concerning the fourth general, *namely, the* various manner *of bailing priſoners.*

THE fourth thing comes to be conſiderd, namely, the different manner of bailing of malefactors.

And this is of two kinds.

Firſt, By writ.

Secondly, *Ex officio* without a writ.

2 And

(*e*) Since our author wrote there has been another very material ſtatute in relation to bailment, *viz.* 31 *Car.* 2. *cap.* 2. commonly called the *habeas corpus* act. By this ſtatute, §. 7. " If any perſon committed for high treaſon or felony ſhall pray or petition in open court the firſt week of the term, or firſt day of the ſeſſions of *oyer* and *terminer*, or general gaol-delivery, to be brought to his trial, and ſhall not be indicted ſome time in the next term or ſeſſions after ſuch commitment, the court is required upon motion made the laſt day of the term or ſeſſions to ſet at liberty ſuch priſoner upon bail, unleſs it appear to the court upon oath made, that the witneſſes for the king could not be produced the ſame term or ſeſſions. And if any perſon ſo committed having made his prayer or petition, as aforeſaid, ſhall not be indicted and tried the ſecond term or ſeſſions after his commitment, or upon his trial ſhall be acquitted, he ſhall be diſcharged from his impriſonment.

This act (which is related by biſhop *Burnet* in his hiſtory of his own times, *Vol.* I. *p.* 485. to have paſſed the houſe of lords in a very remarkable manner,) is generally eſteemed the great bulwark of *Engliſh* liberty, altho upon ſome important occaſions it has been thought proper, as to treaſon, to ſuſpend it for a time. See *6 Ann. cap.* 15. *1 Geo.* 1. *cap.* 8. & *cap.* 30. *9 Geo.* 1. *cap.* 1.

And *firſt*, Concerning bailing by writ.

And theſe are of four kinds. 1. *Homine replegiando.* 2. *Breve de manucaptione.* 3. *Habeas corpus.* 4. *De odio & atiâ.*

I. The writ of *homine replegiando* lies for any perſon impriſond for a miſdemeanor, wherein by the law he is bailable; and therefore in the writ there is an exception of the death of a man, perſons impriſond by the command of the king or his juſtices, or for offenſes of the foreſt, *vel pro aliquo alio recto, quare ſecundùm conſuetudinem* Angliæ *non ſit replegiabilis. F. N. B. 66. f.*

But tho offenſes in the foreſt are excepted, yet a ſpecial writ of *homine replegiando* lies for one taken by the miniſters of the foreſt (*nota*, not by the chief juſtice). *F. N. B. 67. a.*

So that this writ as to the point of bailing is founded upon the ſtatute of *Weſtm.* 1. *cap.* 15. or at leaſt governed by it, only in the ſtatute there the exception is of perſons taken by [command of] *the juſtices*, here it is *capitalis juſtitiarii.*

By this writ the ſheriff is to deliver the party by mainpriſe; and if he return, that *J. S.* makes title to the perſon impriſond, either as his villain or ward, *&c.* he is to take ſureties of the party impriſond to appear in the king's bench or common-pleas, and to take bail of him for his appearance at the day, and to attach *J. S.* to appear at the ſame day, *&c.* where the buſineſs may be determind; and if *J. S.* be returned *non eſt inventus*, then a *capias in withernam* may be granted againſt him to take his body, and if a *non eſt inventus* be returned, a *withernam* to take his goods.

II. The writ of mainpriſe, and that is of two kinds, namely, 1. The general original writ *de manucaptione.* 2. Special writs of mainpriſe, both iſſuing out of the *Chancery.*

1. The general writs of mainpriſe are at large ſet down in the *Regiſt. f.* 268. *& ſeq.* and *F. N. B.* 250. *& ſequentibus*, and theſe writs ſeem to be grounded or directed alſo by the ſtatute of 3 *E.* 1. *cap.* 15. for that is the rule and direction, whereby perſons are to be baild by this general writ, for no perſons criminal are bailable by this common writ of mainpriſe, for as ſuch they are bailable by that ſtatute; and this common writ of mainpriſe reſpects either ſuch as are committed by the

ſheriff or bailiff of a hundred, or ſuch as, tho they are in the ſheriff's cuſtody, are yet committed to his cuſtody by others, as juſtices of the peace, *&c.*

1. As to thoſe of the *former* kind, we muſt call to remembrance what hath been before ſaid touching the power of the ſheriff to take indictments of felony, either by commiſſion or in his *Turn.*

The former power is repealed by the ſtatute of 28 *E.* 3. *cap.* 9. As to the latter, tho the power of taking indictments continue in the ſheriffs *Turn*, yet by the ſtatute of 1 *E.* 4. *cap.* 2. they are to ſend them to the juſtices of peace to be determind in their ſeſſions, but the ſheriff nor his bailiffs are not to arreſt or attach any perſon thereupon; and the like law is for bailiffs of hundreds, who have a leet of the hundred or *Turn* accompanying it.

And therefore as to theſe the writ of mainpriſe is conſequentially taken away according to my lord *Coke* in his comment *ſuper Weſtm.* 1. *cap.* 15. 2 *Inſtit. p.* 190.

But whereas it is there ſaid, that *by that ſtatute the writ of mainpriſe* generally *is taken away*, it is certainly miſtaken, for the writ of mainpriſe hath ſtill its uſe in caſes of perſons committed by the juſtices of peace, and ſome other caſes, as ſhall be farther ſhewn.

2. The *ſecond* ſort therefore of theſe common writs of mainpriſe were for ſuch malefactors, as were committed by others, if they were ſuch as by the ſtatute of *Weſtm.* 1. *cap.* 15. were bailable, and the writ of mainpriſe in this caſe continues in force and uſe to this day, as for inſtance, *F. N. B.* 250. *d.* for a perſon approved by an approver, if the approver is ſince dead; yet ſuch a perſon can neither be taken by warrant of the ſheriff or juſtice of peace, but by the coroner or juſtices of gaol-delivery.

F. N. B. 250. *g.* 251. *c.* for one indicted before the juſtices of peace for a treſpaſs, 250. *i.* for foreſtalling, 250. *e.* as acceſſary to a felony, where the principal is not attaint.

Again, *F. N. B.* 250. *f.* for one taken by the king's commiſſion for felony.

And this is that writ, that ſeems intended by the book of 14 *H.* 6. 8. *a.* where it is ſaid, "That he that is taken by ſuggeſtion, as by juſtices of peace, *&c.* may be baild without writ, but he, that is taken by a writ, muſt be baild by writ"(*); which ſeems intended of this writ of mainpriſe, and tho the ſaying be not univerſally true at this day, for ſome that are taken by proceſs or writ may, at leaſt at this day, be baild *virtute officii*, eſpecially upon the ſtatute of 23 *H.* 6. *cap.* 10. *& Weſtm.* 1. *cap.* 15. yet it ſufficiently intimates, that the writ of mainpriſe was not taken away by 28 *E.* 3. *cap.* 9.

And thus far for the general writs of mainpriſe.

2. Special writs of mainpriſe were ſometimes granted upon ſpecial occaſions for thoſe, that were not bailable otherwiſe.

Thus it was uſual in antient times by the king's ſpecial warrant, ſometimes by ſpecial commiſſion, ſometimes by immediate writ out of *chancery* in times of war, to deliver perſons in priſon for felony upon mainpriſe to go into forein parts in the king's wars, as *Gaſcoigne* and elſewhere, at the king's wages, *& ſtabunt recto in curiâ*, after their return, *ſi quis verſùs eos loqui voluerit*, and upon the return of ſuch manucaptions into the chancery to have charters of pardon. See precedents of ſuch commiſſions and writs, *Pat.* 22 *E.* 1. *m.* 1. to *Roger Brabazun* and *William Brereford*. *Rot. Vaſcon.* 22 *E.* 1. *m.* 8. *n°.* 11. *& m.* 12. *n°.* 4. for malefactors impriſond in all the gaols in *England* for felony and other crimes *per manucaptionem deliberand'*; and the like was often practiſed upon like occaſions in the reigns of other kings.

And thus far for writs of mainpriſe.

III. The third uſual writ for bailing of criminals is by *habeas corpus*, and this is a writ of a high nature, for if perſons be wrongfully committed, they are to be diſcharged upon this writ returned; or if bailable, they are to be baild; if not bailable, they are to be committed.

This writ iſſues out of the great courts of *Weſtminſter*, but hath different uſes and effects.

1. It

(*) See our author's note *ad F. N. B. 66. e.*

1. It may iſſue out of the court of *Common-pleas* or *Exchequer*, but that is or ought to be always, where a perſon is privileged, or to charge him with an action.

If a perſon is ſued in the common-pleas, or is ſuppoſed to be ſo ſued, and is arreſted for a pre-ſuppoſed miſdemeanor, yea or for felony, an *habeas corpus* lies in the court of *Common-pleas* or *Exchequer*, and if it appear upon the return, that the party is wrongfully committed, or by one that hath not juriſdiction, or for a cauſe for which a man ought not to be impriſond, the privilege ſhall be allowd, and the perſon diſcharged from that impriſonment; or if it be doubtful, he may be baild to appear in the court of *King's bench*, which hath conuſance of the crime returned. *Coke Magn. Cart. cap.* 29. 2 *Inſtit. p.* 55.

And upon this account, *P.* 43 *Eliz. C. B.* in the caſe of *Bates*, that was impriſond by the council-table, for not bringing in his ſubſcription to the *Eaſt-India* company, and this being returned upon the *habeas corpus* together with a writ againſt him out of the common-bench, they adjudged the privilege to be allowd, and the party to be diſcharged (*a*).

But if a man be ſued in the common-bench, and is arreſted and impriſond for felony, tho the gaoler upon the *habeas corpus* ought to return the cauſes, as well criminal as that wherewith he is charged out of that court, yet the court of common-pleas ought not to commit him to the *Fleet*, nor diſcharge him of the impriſonment, nor yet to take bail of him to anſwer there, for they have not conuſance of ſuch crimes; the like it is, if he be returned committed for a riot or ſurety of the peace by juſtices of peace; and therefore all they can do is to take his appearance, and take him to mainpriſe upon the action, and remand him as to the matter of crime, for which he was well committed by the juſtices, and to remand his body to the ſheriff's cuſtody upon his commitment for the crime. 2 *H.* 7. 2. *a.*

But now by the ſtatute of 16 *Car.* 1. *cap.* 10. they have an original juriſdiction to bail, diſcharge, or commit upon an *habeas corpus* for one committed by the council-table, as

(*a*) See *Moor* 838. *& ſeq.*

well as the king's bench, and that altho there be no privilege for the perſon committed.

2. As to the *King's-bench* and *Chancery*, they have an original power both to grant an *habeas corpus*, and to bail, or diſcharge, or remand, as the caſe requires, tho there be no privilege returned. *Coke* on *Mag. Cart. cap.* 29. 2 *Inſtit. p.* 55. but ſome things they differ in.

The *king's-bench* in matters civil grant their *habeas corpus ad faciendum & recipiendum*, and this is done as well in vacation as term, and returnable before any particular judge of that court, or into the court itſelf.

And if there be returned even upon that writ any civil action, and alſo a matter of crime, as if a perſon be arreſted for debt, and alſo charged with a warrant of a juſtice of peace for felony, in that caſe, 1. If it appear to the judge or court, that the arreſt for debt or other civil action is fraudulent, they may remand him. *Dyer* 249. *b. Harriſon*'s caſe. 2. If it be found real, they may commit him to the king's-bench with his cauſes, tho they are matters of crime, for that court hath conuſance, as well of the crime, as of the civil action; but then in the term the court may take his appearance or bail to the civil action, and remand him, if they ſee cauſe, as to the crime to be proceeded on below.

But upon the writ *ad faciendum & recipiendum* there ought not ſingly a matter of crime to be return'd, for that belongs to the *habeas corpus ad ſubjiciendum.*

The other writ is the *habeas corpus ad ſubjiciendum*, which is for matters only of crime, and is not regularly to iſſue nor be returnable but in the term-time, when the court may judge of the return, or bail, or diſcharge the priſoner (*b*).

(*b*) By the ſtatute of 31 *Car.* 2. *cap.* 2. ſuch writ may iſſue in the vacation time on behalf of any perſon, who ſtands committed for any crime, (unleſs for felony or treaſon plainly expreſt in the warrant of commitment, or as acceſſary before to any petit-treaſon, or felony, or upon ſuſpicion thereof,) other than perſons convict or in execution; for by that ſtatute it is provided, "That if any ſuch perſon, "or any one on his behalf, complain to "the lord chancellor or lord keeper, "or any one of his majeſty's juſtices ei- "ther of the one bench or of the other, "or the barons of the exchequer of the "degree of the coif, and the ſaid lord "chancellor, &c. or any of them, upon "view of the copy of the warrant of "commitment or detainer, or otherwiſe "upon oath made, that ſuch copy was "denied

Till the return filed the court may remand him, after it is filed the court is either to diſcharge, or bail, or commit him, as the nature of the cauſe requires.

If

" denied to be given by ſuch perſon in " whoſe cuſtody the priſoner is detaind, " are hereby authorizd and required un- " der the penalty of 500 *l.* upon requeſt " made in writing by ſuch perſon or any on " his behalf, atteſted and ſubſcribed by " two witneſſes, who were preſent at the " delivery of the ſame, to award an *habe-* " *as corpus* under the ſeal of ſuch court, " whereof he ſhall then be one of the " judges, to be directed to the officer, " in whoſe cuſtody the party ſo com- " mitted or detained ſhall be, returnable " *immediatè* before the ſaid lord chan- " cellor or ſuch juſtice, *&c.* and upon ſer- " vice thereof, as aforeſaid, the officer " or his under-officer ſhall (within three " days after ſuch ſervice, if not beyond " the diſtance of twenty miles, or ten " days, if above twenty miles, and not " beyond the diſtance of an hundred " miles, or twenty days, if above the di- " ſtance of one hundred miles,) under " the penalty of 100 *l.* bring ſuch pri- " ſoner before the ſaid lord chancellor, or " ſuch juſtice, *&c.* before whom the ſaid " writ is made returnable, and in caſe of " his abſence before any other of them, " with the return of ſuch writ and the true " cauſes of the commitment and detainer, " and thereupon, within two days after " the party ſhall be brought before them, " the ſaid lord chancellor, *&c.* before " whom the priſoner ſhall be brought, " as aforeſaid, ſhall diſcharge him from " his impriſonment, taking his recogni- " zance with one or more ſureties in any " ſum according to their diſcretions, ha- " ving regard to the quality of the pri- " ſoner, and nature of the offenſe, for " his appearance in the court of king's " bench the term following, or at the " next aſſizes, *&c.* or in ſuch other " court, where the ſaid offenſe is pro- " perly cognizable, as the caſe ſhall re- " quire, and then ſhall certify the ſaid " writ with the return thereof, and the " ſaid recognizances into the ſaid court, " unleſs it ſhall appear unto the ſaid lord " chancellor, *&c.* that the party ſo com- " mitted is detained upon a legal pro- " ceſs, order, or warrant out of ſome " court, that hath juriſdiction of cri- " minal matters, or by ſome warrant " ſigned and ſealed with the hand and " ſeal of any of the ſaid juſtices, or ba- " rons, or ſome juſtice of the peace for " ſuch matters or offenſes, for which " by law the priſoner is not bailable.

" No perſon to be intitled to the be- " nefit hereof, unleſs he firſt pay or cauſe " to be paid or tenderd the charges of " bringing, to be aſcertraind by the judge " or court, that awarded the writ, and " indorſed thereon, not exceeding 12 *d.* " *per* mile, and give ſecurity by his own " bond to pay the charges of carrying " back, if remanded by the court or " judge, and that he will not make any " eſcape by the way.

It is further provided by this ſtatute, " That no perſon ſet at large upon any " *habeas corpus* ſhall be re-committed for " the ſame offenſe, but by order of court " having juriſdiction of the cauſe; any " perſon knowingly offending herein to " forfeit 500 *l.*

This writ to run into counties pala- " tine and privileged places.

" That no ſubject of *England* be ſent " priſoner into *Scotland*, or any places be- " yond the ſea, either within or without " his Majeſty's dominions, under the pe- " nalty of a *præmunire*, except perſons " orderd to be tranſported, or offenders " ſent to be tried, where their offenſes " were committed.

" That after the aſſizes proclaimed " and during the continuance thereof " no priſoner be removed but before " the judge of aſſiſe in open court, " nor at any other time, but by *ha-* " *beas corpus*, or other legal writ, ex- " cept where the priſoner is deliverd " to the conſtable, *&c.* to be carried to " the common gaol; or where any per- " ſon is ſent by order of any judge of " aſſiſe, or juſtice of peace, to any com- " mon work-houſe or houſe of correc- " tion; or is removed from one place to " another within the ſame county in " order for his trial or diſcharge in due " courſe of Law; or in caſe of ſudden " fire, infection, or other neceſſity.

If together with the *habeas corpus* there iſſue a *certiorari* to remove the indictment, yet in caſe of felony, tho the body and record be returned and filed, the court may remand him and the record by the ſtatute of *6 H. 8. cap. 6.* but in other caſes the record cannot be remanded, but they muſt proceed in the king's bench both to pleading, trial, and judgment.

But if the body be removed by *habeas corpus*, and the record alſo by *certiorari*, but the record not filed, tho the return upon the *habeas corpus* be filed, a *procedendo* may iſſue to the court below.

And thus far for the *habeas corpus* in the king's bench.

By virtue of the ſtatute of *Magna Carta*, and by the very common law an *habeas corpus* in criminal cauſes may iſſue out of the *Chancery*. *Coke* on *Magna Carta*, *cap. 29. 2 Inſtit. p. 55.*

But it ſeems regularly this ſhould iſſue out of this court in the vacation time, but out of the king's bench in the term-time, as in caſe of a *ſuperſedeas* upon a prohibition. *38 E. 3. 14. a. B. Superſedeas 13.*

When the cauſe is returned, the chancellor may judge of the ſufficiency or inſufficiency thereof, and may diſcharge or bail the priſoner to appear in the king's bench, or may *propriis manibus* deliver the record into the king's bench, together with the body, and thereupon the court of king's bench may proceed to bail, diſcharge, or commit the priſoner.

But if the chancellor ſhall not diſcharge him, but bail him, this ſurety muſt be to appear in the king's bench, or if the chancellor ſhall do neither, it ſeems he may commit him to the *Fleet* till the term, and then he may be turned over to the king's bench, and there proceeded againſt, for the chancellor hath no power to proceed in criminal cauſes.

And if the *habeas corpus*, and alſo a *certiorari* be granted, returnable in *Chancery*, and the cauſe and body be returned there, they may be ſent into the king's bench; if the body only be returned with his cauſes by *habeas corpus* into the *Chancery*, and deliverd over into the king's bench, they may proceed to the determination of the return, and either by *procedendo* remand him, or grant a *certiorari* to certify the record alſo,

alſo, and thereupon commit or bail the priſoner, as there ſhall be cauſe.

But the ſending an *habeas corpus ad faciendum & recipiendum* by the chancellor for perſons arreſted in civil cauſes, eſpecially being in execution, is neither warrantable by law, nor antient uſage, and particularly forbidden by the ſtatute 2 *H.* 5. *cap.* 2. as to perſons in execution.

And thus far of bailing by *habeas corpus.*

IV. Touching the writ *de odio & atia* for a man accuſed of manſlaughter, in ſome places called a writ *de bono & malo*, and *de ponendo ad ballium*, it is grounded upon the ſtatute of *Magna Carta*, *cap.* 26. repealed by 28 *E.* 3. *cap.* 9. and revived again, as is ſuppoſed, by 42 *E.* 3. *cap.* 1. whereby all acts made againſt *Magna Carta* are repeald. It is a writ much out of uſe, but the whole learning concerning it is put together by my lord *Coke* upon *Magna Carta*, *cap.* 26. 2 *Inſtit. p.* 42. and upon *cap.* 29. 2 *Inſtit. p.* 55. and thither I ſhall refer myſelf.

It has been diſuſed by reaſon of the great trouble in the attaining and execution of it, for, 1. There muſt be a writ to inquire *de vita & membris.* 2. There muſt be an inquiſition taken. 3. He was to be bailed by twelve perſons.

And now the juſtices of gaol-delivery uſually going their circuits twice a year, unleſs in the four northern counties, a priſoner comes to his trial as ſoon, if not ſooner, than ſuch inquiſition and mainprize can be taken.

And thus far of manucaption or bail by writ.

The *ſecond* general is bailing *virtute officii.*

The court of king's bench may *virtute officii* bail any perſon brought before them, of what nature ſoever the crime is, even for treaſon or murder, as hath been before ſhewn, *p.* 129.

Concerning bailment of felons by juſtices of the gaol-delivery and of the peace *virtute officii*, and the ſtatutes relating to them, enough hath been ſaid before.

The ſheriff, it ſeems, might *ex officio* without writ at common law bail offenders indicted before him in his *Turn*, or upon a commiſſion to him; but this power is in effect

taken away from him in caſes of felony, by the ſtatutes of 28 *E.* 3. *cap.* 9. and by the ſtatute of 1 *E.* 4. *cap.* 1. and 1 *R.* 3. *cap.* 3. transferd to the juſtices of the peace, as hath been before declared.

The marſhal of the king's bench took upon him antiently *virtute officii* to bail perſons indicted or appeald; but this is wholly taken from him by the ſtatute of 5 *E.* 3. *cap.* 8.

CHAP. XVIII.

Concerning warrants to ſearch for ſtolen goods, *and* ſeizing *of them.*

I Thought fit to inſert this buſineſs in this place. 1. Becauſe it is a buſineſs preparatory to the diſcovery of felons, and preparing evidence againſt them, and to the helping of perſons robbed to their goods. 2. Becauſe it is found by experience of great uſe and neceſſity, eſpecially in theſe times, where felonies and robberies are ſo frequent. And therefore this means of diſcovering of them is now grown common and uſual, much more than in antient times; and if it ſhould be diſuſed or diſcountenanced, it would be of public inconvenience; and therefore I can by no means ſubſcribe to that opinion of my lord *Coke*'s, 4 *Inſtit. cap.* 31. *p.* 176. as it is there generally ſet down, "That juſtices of peace have no "power upon a bare ſurmiſe to break open any man's houſe "to ſearch for a felon or ſtolen goods either in the day or "night"(*c*).

The moderation and temperaments, that are to be added to theſe warrants, are theſe:

[1. Touching the granting thereof.]

(*c*) *Vide ſupra, p.* 79, & 107.

1. They are not to be granted without oath made before the juſtice of a felony committed, and that the party complaining hath probable cauſe to ſuſpect they are in ſuch a houſe or place, and do ſhew his reaſons of ſuch ſuſpicion.

And therefore I do take it, that a general warrant to ſearch in all ſuſpected places is not good, but only to ſearch in ſuch particular places, where the party aſſigns before the juſtice his ſuſpicion and the probable cauſe thereof, for theſe warrants are judicial acts, and muſt be granted upon examination of the fact.

And therefore I take thoſe general warrants dormant, which are made many times before any felony committed, are not juſtifiable, for it makes the party to be in effect the judge; and therefore ſearches made by pretenſe of ſuch general warrants give no more power to the officer or party, than what they may do by law without them.

2. It is fit that ſuch warrants to ſearch do expreſs, that ſearch be made in the day-time, and tho I will not ſay they are unlawful without ſuch reſtriction, yet they are very inconvenient without it, for many times under pretenſe of ſearches made in the night robberies and burglaries have been committed (*), and at beſt it creates great diſturbance.

3. They ought to be directed to conſtables and other public officers, whereof the law takes notice, and not to private perſons, tho it is fit the party complaining ſhould be preſent and aſſiſtant, becauſe he knows his goods.

4. It ought to command, that the goods found, together with the party, in whoſe cuſtody they are found, be brought before ſome juſtice of the peace, to the end that upon farther examination of the fact the goods and party, in whoſe cuſtody they are found, may be diſpoſed, as to law ſhall appertain.

And the reaſon is, tho the receiving of ſtolen goods doth not *ipſo facto* make a man an acceſſary to felony, tho he know them to be ſtolen (†), yet it carries with it a great preſumption,

I

(*) *Vide Part* I. *p.* 553. *Co. P. C. p.* 64. *Kel.* 43.

(†) But now by 3 & 4 *W. & M. cap.* 9. & 5 *Ann. cap.* 31. whoever knowingly buys or receives ſtolen goods ſhall be taken as acceſſary to the felon. *Vide Part* I. *p.* 620.

ſumption, that the receiving of them was to aid the felon; and beſides, by the examination of the receiver evidence may be gotten to diſcover the felon.

II. Touching the execution of this warrant:

1. Whether the ſtolen goods are in the ſuſpected houſe or not, the officer and his aſſiſtants in the day-time may enter *per oſtia aperta* to make ſearch, and it is juſtifiable by this warrant.

2. If the door be ſhut, and upon demand it be refuſed to be opend by them within, if the ſtolen goods be in the houſe, the officer may break open the door, and neither the officer nor the party that comes in his aſſiſtance are puniſhable for it, but may juſtify it upon the general iſſue by the ſtatute of 7 *Jac. cap.* 5. ſo that *in eventu* it is juſtifiable by both, for it is a proceſs for the king, and includes a *non omittas*, and the very having of the goods carries a ſufficient ground *primâ facie* of ſuſpicion, that he was the felon that ſtole them, and may be thereupon juſtifiably arreſted.

3. If the goods be not in the houſe, yet it ſeems the officer is excuſed, that breaks open the door to ſearch, becauſe he ſearcheth by warrant, and could not know, whether the goods were there till ſearch made; but it ſeems the party, that made the ſuggeſtion is puniſhable in ſuch caſe, for as to him the breaking of the door is *in eventu* lawful or unlawful, *viz.* lawful, if the goods are there; unlawful, if not there.

III. Now upon the return of this warrant executed, the juſtice, before whom it is returned, hath theſe things to do:

1. As touching the goods brought before him, if it appear they were not ſtolen, they are to be reſtored to the poſſeſſor; if it appear they were ſtolen, they are not to be deliverd to the proprietor, but depoſited in the hand of the ſheriff or conſtable to the end the party robbed may proceed by indicting and convicting the offender to have reſtitution.

2. As touching the party, that had the cuſtody of the goods.

If they were not ſtolen, then he is to be diſcharged.

If ſtolen, but not by him, but by another, that ſold or delivered them to him, if it appear, that he was ignorant

that

that they were ſtolen, he may be diſcharged as an offender, and bound over to give evidence as a witneſs againſt him that ſold them; if it appear he was knowing they were ſtolen, it is fit to bind him over to anſwer the felony, for there is a probable cauſe of ſuſpicion, at leaſt that he was acceſſary after.

CHAP. XIX.

Concerning Preſentments, Inquiſitions, *and* Indictments, *and their kinds.*

I Have gone through thoſe matters, that are preparatory to the proceeding againſt malefactors in the ſeveral courts, wherein their offenſes are puniſhable, namely, the arreſt and impriſonment, or bailing of offenders, and the ſeveral juriſdictions, and juſtices, and miniſters of juſtice concerned therein.

That which follows to be conſiderd is the manner of bringing the offender to his legal trial and judgment, which is either by appeal, which is the ſuit of the party, or by indictment, which is immediately the king's ſuit.

The former of theſe, namely appeals, I ſhall conſider after the buſineſs of indictments, becauſe it is but rare to have an appeal, and the moſt proſecutions of this nature are by indictment or preſentment, and therefore I ſhall conſider this firſt.

I ſhall diſtribute this matter into theſe general heads, namely, 1. Touching indictments and preſentments. 2. Proceſs. 3. Arraignment. 4. Pleas of the offender. 5. Trial. 6. Judgment. 7. Execution; each of which will take in ſeveral particular heads and diſtributions.

Preſentment is a more comprehenſive term than *indictment*, for regularly an indictment is an accuſation given in againſt a perſon by the grand inqueſt for ſome miſdemeanor,

whereunto he is put to anſwer; but preſentments do not only include ſuch indictments, but alſo ſome other informations whereunto the party is not put to anſwer, as preſentments of *felo de ſe*, of *fugam fecit*, of deodands, of deaths *per infortunium*, and many others.

In this title concerning preſentments and indictments I ſhall conſider theſe points. 1. The ſeveral kinds of preſentments and indictments. 2. Where a man ſhall be put to anſwer in criminals without indictment. 3. Who may be indicters, and how returned. 4. Of what they may inquire. 5. What the penalty of not inquiring or preſenting. 6. What formalities are required in indictments.

Firſt, Touching the ſeveral kinds of preſentments, inquiſitions and indictments in matters capital.

They may be diſtinguiſhed, 1. In relation to the courts or judicatories, or juriſdictions, where they are made.

And, 2. In reſpect of their effects or natures.

I. Touching the former branch of diſtribution in relation to the juriſdictions where made, and that multiplies preſentments or indictments according to the juriſdictions, as ſome are in the leet, ſome in the ſheriff's *Turn*, ſome before the coroner, ſome before juſtices of peace, juſtices of *oyer* and *terminer*, gaol-delivery, king's bench, whereof enough before hath been ſaid, and ſhall not need here to be repeated.

But thoſe, that moſt concern capital offenſes, are ſuch as are taken before the coroner, or ſuch as are taken before juſtices by commiſſion, whereof more ſhall be ſaid in the enſuing chapters.

II. As to the ſecond kind of diſtribution in reſpect of the nature and effect thereof.

1. Some preſentments are of themſelves convictions, and not traverſable.

2. Others are not convictions, but only in nature of informations, and therefore traverſable.

Regularly all preſentments or indictments before juſtices of the peace, *oyer* and *terminer*, gaol-delivery, *&c.* are traverſable, and conclude not the party or thoſe claiming under him.

And therefore, tho it hath been held, that the preſentment of a *felo de ſe* before the coroner be not traverſable, (*de quo ſupra*, yet of all hands it is agreed, that a preſentment of a *felo de ſe* before juſtices of peace or *oyer* and *terminer* is traverſable by the executors, *&c. Co. P. C. cap.* 8. *p.* 55. *H.* 37 *Eliz. B. R. Laughton*'s caſe.

If a preſentment be made *ſuper viſum corporis*, that *A.* kild *B.* and fled, this preſentment of the flight is held not traverſable, but concluſive to forfeit the goods, tho he be after acquitted of the felony, and expreſly found by the petty jury upon his trial, that *non ſe retraxit* (*d*), 13 *H.* 4. 13 *b. Forfeiture* 32. 3 *E.* 3. *Forfeiture* 35. 7 *Eliz. Dy.* 238. *b.* And the ſame law is, if it be found *ſuper viſum corporis*, that the felon fled and was kild in the flight, this preſentment, tho after the party's death is concluſive as to the forfeiture for the flight. 3 *E.* 3. *Coron.* 289, 290, 312.

But if before juſtices aſſigned to hear and determine, it be preſented, that *J. S.* committed a felony and fled, or if upon the arraignment of a perſon for felony he be found not guilty, and that he fled, this is but in nature of an inqueſt of office, and the flight is traverſable in an action, or information, or *ſcire facias* brought by the king for the goods of the perſon; 37 *Aſſiz.* 7. 47 *E.* 3. 26. *a.* And all the reaſon, that can be given why the coroner's inqueſt of a *fugam fecit* is concluſive, and not the other, is only that which is given 8 *E.* 4. 4. *a. Ceo eſt un ancient poſitif ley del coron'.*

If a man be preſented to have ſufferd an eſcape, becauſe in this caſe the party is at leaſt to be fined, he ſhall have his traverſe to it, and is not concluded by it.

But if either before the juſtices in *eyre*, or before the coroner an eſcape be preſented upon a vill either before or after the arreſt, this is held not to be traverſable, becauſe there is only an amercement to be ſet upon the vill, *viz. villata in miſericordiâ*; and the reaſon given by *Stamford* is, *quia de minimis non curat lex*; *Stamf. P. C. Lib.* I. *cap.* 32. *f.* 35. *b.*

But if it fall out, that there be an indictment for ſuch an eſcape, (as there hath been formerly againſt the city of

2 *London*

(*d*) *Vide ſupra, p.* 63, 64.

London for the eſcape of thoſe, that riotouſly kild Dr. *Lamb* (*e*), who were thereupon fined 2000 *l.*) ſuch an indictment is not concluſive, but traverſable.

Whether an inquiſition of a *felo de ſe* before the coroner be traverſable, *vide quæ ſupra, Part.* I. *cap.* 31. *p.* 414.

And there are no preſentments beſides what are before mentiond, that are in themſelves convictions and not traverſable, but a preſentment in a leet of bloodſhed or the like, and in the *Swanimote* court of the foreſt for offenſes of *Vert* and *Veniſon.*

But even thoſe preſentments are traverſable alſo in two caſes, *viz.* 1. If the offenſe preſented be out of their juriſdiction. 2. Or if the preſentment be ſuch as concerns the freehold, as preſentments of nuſances, or ſuch matters as charge the freehold; 41 *E.* 3. 26. *b.* 45 *E.* 3. 8. *b.*

And therefore it was reſolved in the *Exchequer* in a *quo warranto* againſt the water-bailiff and conſervator of the river *Severn*, 22 *Car.* 2. that upon a bare preſentment the conſervators cannot ſet a fine upon a ſuppoſed unlawful fiſhing or the like, unleſs the party comes in and confeſſes it, or plead to it, and be convicted by a jury of the offenſe.

A preſentment of a riot or forcible detainer by a juſtice or two juſtices of peace, as the caſe ſhall require, is a conviction by the ſtatute of 15 *R.* 2. *cap.* 2. 8 *H.* 6. *cap.* 9. 13 *H.* 4. *cap.* 7.

But a preſentment by a juſtice of a default in repairs of an highway, tho by the ſtatute of 5 *Eliz. cap.* 13. it is ſuch a preſentment, as the parties ſhall be put to anſwer, yet it is not concluſive, but the traverſe of the party is ſaved by the ſtatute; and it is but reaſon, for tho the view of the juſtice can aſcertain the decay or want of repairs, yet it cannot aſcertain in what pariſh it lies, or who is bound by tenure or preſcription to repair.

CHAP.

(*e*) *Cro. Car.* 252.

CHAP. XX.

Where a man ſhall be put to anſwer *in* criminal *and* capital offenſes without indictment *at the king's ſuit.*

AT the common law there were ſeveral means of putting the party to anſwer a felony without any indictment, ſome whereof are ſtill in force, others are taken away by ſtatute.

I. If a thief or robber were taken with the *mainouvre*, *cum manu opere*, and the *mainouvre* brought into court with the priſoner, he ſhould have been arraignd upon the *mainouvre* at the king's ſuit; 2 *E.* 3. *Coron.* 156. And therefore *M.* 18 & 19 *E.* 1. *coram rege*, *rot.* 28. *Norf. Et quia prædictus* Johannes de Brampton [*falſarius ſigilli regis & brevium ſuorum, ut dicitur,*] *non eſt appellatus, nec indictatus, nec captus cum manu opere, per quod ſecta domino regi in hujuſmodi caſu poteſt competere, ideò* [*conſideratum eſt, quòd*] *prædictus* Johannes [*eat inde*] *ſine die*, &c.

And *T.* 10 *E.* 2. *rot.* 132. *Bucks*, *Robert Legat* was arraignd for counterfeiting the king's ſeal, upon the counterfeit commiſſion brought into court without indictment, and he pleaded not guilty; and was acquit (*).

But upon a bare information or bill, without indictment or the *mainouvre* at common law no party was to be put to anſwer for a felony; and therefore, *M.* 20 & 21 *E.* 1. *coram rege*, *rot.* 27. *Hibernia*, *William Prene*, the king's carpenter in *Ireland*, being accuſed for felony by a bill in the king's-bench there, and convicted and condemned, but after ranſomed for 200 *l.* and a writ of error brought in the king's-bench in *England*, and aſſignd, that he ought not to be put to anſwer in caſe of life or member *per vocem & per billam*, *quam* Ni-

(*) *Vide Part* I. *p.* 186 & 349.

gellus le Broun *porrexit versùs ipſum, licèt non eſſet indictatus per* 12. (*f*).

But it ſeems to me, that this proceeding upon the *mainouvre* is wholly taken away by the ſtatutes of 25 *E.* 3. *cap.* 4. 28 *E.* 3. *cap.* 3. 42 *E.* 3. *cap.* 3. and therefore I do not find any proceeding upon the *mainouvre* ſince theſe ſtatutes.

II. A ſecond ſort of proceeding in caſes capital without indictment is, where an appeal is brought at the ſuit of the party, and the plaintiff is nonſuit upon that appeal, yet the offender ſhall be arraigned at the king's ſuit upon ſuch appeal; and ſo it is in caſe the appellant die or releaſe; and in ſuch caſe, altho the party be indicted as well as appeald, yet upon the nonſuit of the plaintiff, the proceeding for the king ſhall not be upon the indictment, but upon the appeal. 4 *E.* 4. 10. *a.*

But this hath theſe two qualifications.

1. It muſt be where the plaintiff in the appeal hath either declared upon his appeal by writ, or formed his appeal by bill, for the bare ſuing of a writ without a declaration is not ſuch an appeal, as the party being nonſuit the defendant ſhall be thereupon arraigned, for 1. The writ may be brought in his name by a ſtranger without his privity. 2. Becauſe the writ alone contains not ſuch certainty of time, place, and other matters, whereby the party may be put to anſwer. 7 *H.* 7. 6. *b.*

2. It muſt be where an appeal is well begun, and by a party enabled to proſecute it, therefore, if the appeal abate, becauſe the plaintiff is outlawd, or a woman (who cannot bring an appeal, but only of the death of her husband,) or if the year

(*f*) That caſe was thus: *William Prene* aſſigned for error, that "par ceo que le "commune laie de *Engleterre*, e de "*Irelaund*, veut, ke nul homme par bille "ſaunz enditement, ou par ſute de apel, "ſuz les plez de corone, ne ſait [ſoit] "attache, ne mis en reſpounz; yet that "he the ſaid *William* had been impri- "ſond, & *de diverſis feloniis acculpatus* "par une bille par *Nel le Broun* bote "en mayns des juſtices; altho par en- "queſt, ne par chapiter, ne fut endite. And upon conſideration of the whole matter the court of king's bench in *England* were of opinion, "Quòd prædictum re- "cordum eſt irritandum, & adnichi- "landum; & ideò mandatum eſt capi- "tali juſtic' *Hiberniæ*, quòd corrigat, "&c. & acceptâ ſecuritate de prædicto "*Willielmo* ad ſtandum recto in com' "ubi deliquiſſe debuit, & vocatis ſuper "hoc convocandis ponat prædictum *Wil- "lielmum* per apertum & manifeſtum in- "dictamentum de certis feloniis in cer- "tis locis, ſi aliquis vel aliqui eum fortè "indictare ſive appellare voluerit ſe- "cundùm legem & conſuetudinem re- "gni, &c. & quòd interim per manu- "captionem bona & catalla, terras & te- "nementa, eidem *Willielmo* deliberet, &c.

and day be paſt, or by the miſnoſmer of the defendant, *&c.* there the appellee ſhall not be arraigned at the king's ſuit, becauſe the appeal was never good, but ſhall be diſmiſſed, only the judges may arraign him upon an indictment, if any be before them for that offenſe, or if none be, yet they may bind him over to another ſeſſions, and in the mean time to be of good behaviour; 19 *E.* 2. *Coron.* 317. All the learning touching this buſineſs is fully declared by *Stamf. Lib.* III. *cap.* 59. *f.* 147. *& ſequentibus.*

III. A third ſort is upon an appeal by an approver, but the whole learning touching that will come in its proper place hereafter (*g*).

IV. The fourth ſort is by appeals by particular perſons, eſpecially of treaſon in parliament; and this was very frequent in antient times, eſpecially in the time of *R.* 2. namely *anno ſeptimo, undecimo, & duodecimo,* which bred great inconveniencies.

And therefore by the ſtatute of 1 *H.* 4. *cap.* 14. all theſe kinds of appeals in parliament are wholly taken away; and ſince that time I find not any ſuch appeals brought in parliament.

And therefore, when the now earl of *Briſtol* in this preſent parliament in the lords houſe preferd articles of high treaſon and other miſdemeanors againſt the earl of *Clarendon,* then lord chancellor, upon a reference unto all the judges and upon great conſideration the judges *unâ voce* returned their opinions, that theſe articles were contrary to the ſtatute of 1 *H.* 4. and could not be preferd in the lords houſe by the ſaid earl or any other private perſon (*h*).

But impeachments by the houſe of commons of high treaſon, or other miſdemeanors in the lords houſe have been frequently in practice, notwithſtanding the ſtatute of 1 *H.* 4. and are neither within the words nor intent of that ſtatute, for it is a preſentment by the moſt ſolemn grand inqueſt of the whole kingdom.

V. If in a civil action *de uxore raptâ cum bonis viri* upon not guilty pleaded the defendant be convicted, this antiently ſerved in nature of an indictment of felony 13 *Aſſiz.* 6. 18 *E.* 3. 32. *a. Stamf. P. C. f.* 94. *b.* So if upon a ſpecial verdict

2 in

(*g*) *Vide infra cap.* 29. *p.* 226. (*h*) See *Stat. Tr.* Vol. II. *p.* 550.

in treſpaſs brought in the king's-bench it be found, that the defendant took them felonioufly, antiently this ſerved for an indictment. 31 *E.* 1. *Enditement* 31.

So if in an action of ſlander for calling a man thief the defendant juſtifies, that he ſtole goods, and iſſue thereupon taken, it be found for the defendant, if this be in the king's bench, and for a felony in the ſame county, where the court ſits, or if it be before juſtices of aſſize, who have alſo a commiſſion of gaol-delivery, he ſhall be forthwith arraigned upon this verdict, as on an indictment, and the reaſon is, becauſe here is a verdict of twelve men in theſe caſes, and ſo the verdict, tho in a civil action, ſerves the king's ſuit as an indictment, and is not contrary to the acts of 25, 28, & 42 *E.* 3. which enact, *that no man ſhall be put to anſwer, &c. but upon indictment or preſentment.*

But if the ſheriff return a reſcue of a priſoner taken for felony, 1 *H.* 7. 6. *a.* or a breach of priſon by one arreſted for felony, 2 *E.* 3. 1. *b.* this is not ſufficient to arraign the party, nor doth it countervail an indictment, for it is not by the oath of twelve men; *vide hoc totum Stamf. P. C. Lib.* II. *cap.* 29. *f.* 95. *a.*

By the ſtatute of 11 *H.* 7. *cap.* 3. there was power given to proceed upon all penal ſtatutes by information before juſtices of aſſize and peace, but there is an exception of all caſes of treaſon, murder and felony.

Ill uſe was made of this ſtatute by *Empſon* and *Dudley*, and great inconvenience and trouble to the people did ariſe by it, and therefore 1 *H.* 8. *cap.* 6. it was repeald.

And tho informations are practiſed oftentimes in the crown-office in caſes criminal, and by many penal ſtatutes the proſecution upon them is by the acts themſelves limited to be by *bill*, *plaint*, *information* or *indictment*, yet thus much is obſervable.

1. That the method of proſecution of *capital* offenſes is ſtill to be by indictment, except the caſes above mentiond.

2. That in all criminal cauſes the moſt regular and ſafe way, and moſt conſonant to the ſtatutes of *Magna Carta*, *cap.* 29. 5 *E.* 3. *cap.* 9. 25 *E.* 3. *cap.* 4. 28 *E.* 3. *cap.* 3. & 42 *E.* 3. *cap.* 3. is by preſentment or indictment of twelve ſworn men.

CHAP.

CHAP. XXI.

Who may be indictors, and where and how returned.

INquiſitions, preſentments, or indictments are taken before courts or officers of ſeveral kinds, and accordingly by acts of parliament ſeveral things are preſcribed touching them.

I. Touching inqueſts before coroners: By the ſtatute of 4 *E.* 1. *De officio coronatoris*, the coroner is to iſſue his precept to four, five or ſix vills to appear before him at a certain day to make inquiry, this precept is directed to the conſtables of the vills, who accordingly give ſummons to a competent number of inquirers, twelve at leaſt (*i*), and by them the inquiſition is made, when they have been ſworn and have heard their evidence upon oath taken before the coroner.

II. Touching inqueſts of felonies in leets and *Turns* : By the ſtatute of *Weſtminſter* 2. *cap.* 13. indictments in the ſheriffs *Turns* are to be by twelve at leaſt, and they are to ſet their ſeals to the inquiſitions, otherwiſe they are void (*k*).

And by the ſtatute of 1 *E.* 3. *cap.* 17. which extends as well to leets as *Turns*, they are to be by indenture, one part to remain with the indictors, the other with the ſheriff or ſteward.

And by the ſtatute of 1 *R.* 3. *cap.* 4. no perſon ſhall be returned upon a pannel in the ſheriff's *Turns*, unleſs he hath 20 *s.* *per ann.* of freehold, or 26 *s.* 8 *d.* of copyhold, and all indictments in the *Turn* taken otherwiſe ſhall be void.

But now by the ſtatute of 1 *E.* 4. *cap.* 2. the ſheriff cannot proceed upon any indictments for felony, or otherwiſe taken in his *Turn*, but muſt ſend them to the ſeſſions of the peace, and the juſtices there are to make proceſs and proceed thereupon.

But then there muſt be care taken, 1. That the indictments be of ſuch matters only, as are within the juriſdiction of the ſheriff's *Turn*, otherwiſe the juſtices may not proceed upon them,

(*i*) *Vide Cobat's* caſe *ſupra*, *p.* 161. *in notis.* (*k*) 2 *Co. Inſtit. p.* 387.

4 *E.* 4. 31. *a.* 8 *E.* 4. 5. *b.*(*) and 2. That they be by indenture and under the ſeals of the preſenters according to the former ſtatutes.

III. Indictments taken in the county of *Lancaſter* before the ſheriff or juſtices againſt any perſon inhabiting out of the ſame county, or taken in any other county againſt inhabitants of the county of *Lancaſter* ought to be by twelve men, and each indictor to have lands or tenements of the yearly value of 5 *l.* by the ſtatute of 33 *H.* 6. *cap.* 2.(†)

IV. Touching murders, *&c.* committed in the king's palace the ſtatute of 33 *H.* 8. *cap.* 12. hath appointed that twenty-four of the king's yeomen officers of the cheque-roll of the king's houſe ſhall be returned to make inquiry, and the trial to be by a jury of the gentlemen officers.

V. Concerning inquiries to be made before juſtices itinerant, the courſe was this: There firſt went out the writ of the common ſummons of the *eyre*, directed to the ſheriff to ſummon *de quâlibet villâ quatuor homines & præpoſitum, & de quolibet burgo duodecim legales burgenſes* to be at the day and place for the *eyre*, and upon that day the ſheriff and lords of liberties were to return the names of the bailiffs of their hundreds and liberties, and thoſe bailiffs were ſworn to elect two men in their ſeveral hundreds, and preſent their names to the court, and theſe two hundreders for each hundred were to chooſe of themſelves and the reſt of their ſeveral hundreders reſpectively, ordinarily ſixteen, or ſometimes only twelve, who were ſeverally ſworn upon inquiries and preſentments of things done within their hundred, as ſo many grand inqueſts for every ſeveral hundred, and the twelve returned for each borough were the grand inqueſt for the borough; this cauſed a vaſt and chargeable attendance upon the courts in *eyre*, and hath been long diſuſed, and therefore I ſhall not ſay more of it.

VI. Concerning the chooſing and returning of the grand jury before juſtices aſſigned to keep the peace, *oyer* and *terminer*, and gaol-delivery, I ſhall be ſomewhat more large, becauſe before theſe juſtices ordinarily criminal and capital cauſes are heard and determined.

(*) *Vide ſupra p.* 71. (†) *Part* I. *p.* 286.

Upon the ſummons of any ſeſſion of the peace there goes out a precept either in the name of the king or of two or more juſtices of peace directed to the ſheriff, that *non omittas propter aliquam libertatem in ballivâ tuâ, quin eam ingrediaris, & venire fac' tali die ac loco viginti quatuor liberos & legales homines de quolibet hundredo in ballivâ tuâ, tàm infra libertates, quàm extra, ad faciendum & exequendum ea, quæ ex parte domini regis tunc & ibidem eis injungantur*, and a *ſcire fac'* to all coroners, conſtables and bailiffs, *&c.* to be there at that day. *Lamb. Lib* II. *cap.* 2.

And according to others *Venire fac' viginti quatuor liberos & legales homines de quolibet hundredo in ballivâ tuâ, quorum quilibet habeat* 40 s. *per ann. liberi tenementi ad minus, venire fac' etiam viginti quatuor tàm milites quàm alios probos & legales homines de corpore com' tui, quorum quilibet habeat* 40 s. *de terris & tenementis liberi tenementi, ad inquirend' ſuper iis, quæ ex parte domini regis ad tunc & ibidem eis injungerentur, præmunientes omnes juſticiarios ad pacem, conſtabularios, &c.* Crompt. *f.* 212. *a.*

And in caſes of commiſſions of *oyer* and *terminer* and gaol-delivery, *Quòd non omittas propter aliquam libertatem, quin eam ingrediaris, & venire fac' tàm viginti quatuor probos & legales homines de quolibet hundredo com' prædict', ad inquirendum, præſentandum, faciendum & exequendum ea omnia, quæ ex parte domini regis tunc & ibidem eis injungerentur, quàm alios viginti quatuor probos & legales homines de com' prædict', ad faciend' juratam inter dominum regem & priſones prædictos, &c. Co. Entr. f.* 55. *a.*

Upon this precept the ſheriff is to return twenty-four or more out of the whole county, namely a conſiderable number out of every hundred, out of which the grand inqueſt at the ſeſſions of the peace, *oyer* and *terminer*, or gaol-delivery are taken and ſworn *ad inquirendum pro domino rege & corpore comitatûs*, (not, as antiently in *eyre*, a kind of grand inqueſt out of every hundred;) but in ſome counties which conſiſt of gildable and ſuch franchiſe, where anciently ſeveral juſtices of gaol-delivery ſat, as in *Suffolk* (*) there are two grand juries, one for the gildable, another for the franchiſe, becauſe there are two ſeveral commiſſions of gaol-delivery.

4 Now

(*) *Vide ſupra, p.* 26.

Now touching the grand jury thus returned before juſtices aſſigned there are ſome things conſiderable.

They muſt be *probi & legales homines*, and therefore, if any one of the indictors be outlawd, tho in a perſonal action, it is a ſufficient plea to avoid the indictment; 11 *H.* 4. 41 *b.* *M.* 4 *Car. B. R. Croke p.* 134. Sir *William Withipole*'s caſe, and the ſtatute of 11 *H.* 4. *cap.* 9. hereafter mentioned fortifies this, *de quo infra.*

And therefore, if any of them be attainted in a conſpiracy, or *decies tantum*, or of perjury, or outlawd in any perſonal action, or attaint of felony or in a *præmunire*, they are not to be indictors, becauſe in law, they are not *probi & legales. Lamb. Juſtic.* 391.

Touching their *annuus cenſus* I do not find any thing determined, but freeholders they ought to be. The ſtatute of 2 *H.* 5. *cap.* 3. that requires jurors, that paſs upon the trial of a man's life, to have 40 *s. per ann.* freehold, hath been the meaſure by which the freehold of grand jurymen hath been meaſured in precepts of ſummons of ſeſſions (†).

By the ſtatute of 11 *H.* 4. *cap. ultimo*, reciting, that inqueſts had been formerly returned of perſons outlawd, fled to ſanctuary for treaſon or felony, *&c.* enacts, "That no in-"dictments be made by ſuch perſons but by inqueſt of loyal "ſubjects returned by the ſheriffs or bailiffs duly without de-"nomination of any perſon, but only by the ſworn bailiffs "and miniſters of the ſheriff; and if any indictment be "otherwiſe taken, it be void.

Upon this ſtatute it hath been reſolved in Sir *William Withipole*'s caſe above cited. 1. That it extends to coroners inqueſts. 2. It is a good plea upon this ſtatute, that one of the indictors is outlawd in a perſonal action, as well as of felony, or that any of the jurors were impanneld at the denomination of any contrary to this ſtatute.

By the ſtatute of 3 *H.* 8. *cap.* 12. it is enacted, "That "the juſtices of gaol-delivery, and juſtices of peace, where-"of one of the *quorum*, in open ſeſſions may reform the "pannels returned by the ſheriff, (which be not at the ſuit of "the

(†) *Vide infra, p.* 272. *in notis.*

" the parties,) by putting to and taking out the names of " perſons returned, and ſhall command the ſheriff to return " the ſame accordingly, upon pain of 20 *l.* and the king's " pardon to be no bar to the proſecutor.

This act extends not only to pannels of grand inqueſts returned, but alſo to pannels of the petty jury, commonly called the jury of life and death, which may be reformed by the juſtices according to this act, and the ſheriff is bound to return the pannel ſo reformed.

The grand inqueſt returned the firſt day of the ſeſſions and ſworn commonly ſerves the whole ſeſſions of the peace, *oyer* and *terminer*, or gaol-delivery; yet the court may command another grand inqueſt to be returned and ſworn, which is done ordinarily upon two occaſions.

1. If before the end of the ſeſſions the grand jury having brought in all their bills are diſcharged by the court, and after that diſcharge either ſome new felony or other miſdemeanor is committed, and the party taken and brought into gaol; or if after the diſcharge of the grand inqueſt ſome offender be taken and brought in during the ſeſſions. In the former caſe, there is a neceſſity to make a ſpecial record of the adjournment of the ſeſſions from day to day, becauſe otherwiſe the whole ſeſſions are in ſuppoſition of law only the firſt day, and therefore without the entry of ſuch adjournment the offenſe and proceedings will be in ſuppoſition of law after the ſeſſions ended, and ſo the proceeding will be erronious(*): This was the caſe of *Sampſon* (*h*), who being arraigned and tried for a murder committed after the firſt day of the ſeſſions and before the ſeſſions ended, for want of entry of an adjournment it was ruled erronious. And the ſame is to be obſerved, if upon record it appears, that the grand inqueſt was returned after the firſt day of the ſeſſions, unleſs an adjournment be enterd of record.

2. The ſecond ordinary inſtance of a new grand jury returned is upon the ſtatute of 3 *H.* 7. *cap.* 1. namely, a grand inqueſt impanneld to inquire of the concealment of another grand inqueſt, upon which defaults preſented the former grand inqueſt is to be amerced; and this, tho it mention only an inqueſt thus to be taken by juſtices of peace, yet it extends to the king's

(*) *Supra p.* 248 (*h*) *W. Jones*, 420.

king's bench, and hath been practiſed there accordingly in my knowledge, and poſſibly at the ſeſſions of *oyer* and *terminer* and gaol-delivery, tho that can rarely come in queſtion, becauſe the ſeſſions of the peace ordinarily accompanies thoſe commiſſions.

And this is the proper and legal way of puniſhing the grand inqueſt, if they refuſe to preſent ſuch things as are within their charge, and for which they have probable evidence to make a preſentment, but of this more in the next chapter.

CHAP. XXII.

Concerning the demeanor of the grand inqueſt *in relation to their preſentments.*

THE coroners inqueſt may and muſt hear evidence of all hands, if it be offerd to them, and that upon oath, becauſe it is not ſo much an accuſation or an indictment, as an inquiſition or inqueſt of office, *quomodo* J. S. *ad mortem ſuam devenit*, tho it be alſo true, that the offender may be arraigned upon that preſentment.

But the grand inqueſt before juſtices of peace, gaol-delivery, or *oyer* and *terminer* ought only to hear the evidence for the king, and in caſe there be *probable* evidence (*a*), they ought to find the bill, becauſe it is but an accuſation, and the party is to be put upon his trial afterwards.

But if a bill of indictment for murder, or other capital offenſe be preſented againſt *A.* if upon the hearing the king's evidence, or upon their own knowledge of the incredibility of the witneſſes they are diſſatisfied, they may return the bill *ignoramus*.

(*a*) This ſame doctrine is laid down by C. J. *Pemberton* in the caſe of the earl of *Shaftsbury*, *Stat. Tr. Vol.* III. *p.* 415. *Vide tamen* Sir *John Hawles* remarks on that caſe, *Stat. Tr. Vol.* IV. *p.* 183. wherein he unanſwerably ſhews, that a grand jury ought to have the ſame perſuaſion of the truth of the indictment, as a petty jury, or a coroner's inqueſt: *vide ſupra p.* 61.

If *A.* be kild by *B.* ſo that it doth *conſtare de perſonâ occiſi & occidentis*, and a bill of murder be preſented to them, regularly they ought to find the bill for murder, and not for manſlaughter, or *ſe defendendo*, becauſe otherwiſe offenſes may be ſmotherd without due trial; and when the party comes upon his trial, the whole fact will be examined before the court and the petty jury, and in many caſes it is a great diſadvantage to the party accuſed (*). For if a man kill *B.* in his own defenſe, or *per infortunium*, or poſſibly in executing the proceſs of law upon an aſſault made upon him, or in his own defenſe upon the highway, or in defenſe of his houſe againſt thoſe that come to rob him, (in which three laſt caſes it is neither felony nor forfeiture, but upon not guilty pleaded he ought to be acquitted,) yet if the grand inqueſt find an *ignoramus* upon the bill, or find the ſpecial matter, whereby the priſoner is diſmiſſed and diſcharged, he may nevertheleſs be indicted for murder ſeven years after.

But if the grand jury had found the bill for murder, (yea or for manſlaughter,) and the party pleading not guilty the ſpecial matter is given in evidence, and the petty jury find the ſpecial matter, (or in the three laſt caſes find him not guilty, as they may,) this acquittal upon this finding will be a good plea of *autrefoits acquit*, and he ſhall never be arraigned for it again.

If a bill be againſt *A.* for murder, and the grand inqueſt upon the evidence before them or their own knowledge be ſatisfied that it was but *per infortunium*, or *ſe defendendo*, and accordingly return the bill ſpecially, the court may remand them to conſider better of it, or may hear the evidence at the bar, and accordingly direct the grand inqueſt; but I have known a judge blamed for ſetting a fine upon the grand inqueſt for ſuch a return, becauſe in truth it comes not up to felony.

But if a bill go out againſt *B.* for murder, and it doth *conſtare de perſonâ occidentis*, may the grand inqueſt find the bill for manſlaughter, and *ignoramus* for the murder? and is the court bound to receive ſuch a return?

(*) Notwithſtanding this, according to lord *Coke* 9 *Co.* 119. *a.* indictments, which concern the life of a man, ought to be framed as near the truth, as may be.

In this caſe of all hands it is agreed (*b*), that the grand jury is to blame, becauſe they take upon them to anticipate the evidence, that is to be given to the petit jury, and ſo determine matter of law, which belongs to the court to determine, and by this means many murders may eſcape under the diſguiſe of manſlaughter, and ſo eſcape with their clergy.

Some therefore have made it a practice to ſet a fine upon the grand jury in this caſe, and it hath proceeded ſo far, as to fine petit juries alſo in ſuch like caſes; whereof hereafter.

That which I think herein, and in other concealments of grand inqueſts is, as follows, *viz.*

1. That the Court may receive ſuch a return from the grand inqueſt, and it is a matter of diſcretion, eſpecially, if upon inquiry from the indictors or witneſſes, or upon view of their examinations it do plainly appear, that the crime amounts to no more.

2. That barely upon ſuch a return no fine can be ſet upon the grand inqueſt, unleſs the evidence to the grand inqueſt be given at the bar in the preſence of the court; for otherwiſe the court cannot underſtand, whether the grand inqueſt doth well or ill in ſuch caſe.

3. That if the evidence to the grand inqueſt be given at the bar upon an indictment in the king's bench, and the grand inqueſt will not find a bill according to the direction of that court, as for inſtance, will find a man guilty only *ſe defendendo*, or of manſlaughter, when it is murder, that court may ſet a fine upon the grand inqueſt, and ſo it hath been practiſed; for it is the higheſt court in *England* of ordinary juſtice, eſpecially in criminal cauſes.

4. That

(*b*) This is far from being agreed of all hands, for ſuch an anticipation of the evidence by the grand jury is what they cannot avoid, they being bound by their oaths, as much as the petit jury, to *preſent the whole truth, and nothing but the truth*, nor do they in this caſe ſo properly determine matter of law as matter of fact; for whether murder or not depends upon a preconceived malice, which (tho it is to be preſumed, where no provocation appears), is matter of fact, and proper for the conſideration of a jury, and tho judges have ſometimes fined jurors for not finding ſuch bills for murder, yet ſuch proceedings have been generally cenſured, as in the caſe of Sir *H. Wyndham* and others, *P.* 19 *Car.* 2. who were fined by *Keeling*, C. J. for not finding a bill of murder, albeit they were ſatisfied the man died by the hand of the party indicted; but upon complaint in parliament the chief juſtice was fain to ſubmit. 2 *Keb.* 180.

4. That if, the juſtices of *oyer* and *terminer*, or gaol-delivery having heard the evidence at the bar, the grand inqueſt will not find according to their directions, the juſtices may bind them over by recognizance into the king's bench, and upon an information againſt them they may be fined.

5. That in ſuch a caſe juſtices of peace, *oyer* and *terminer*, or gaol-delivery may according to the ſtatute of 3 *H.* 7. *cap.* 1. impanel another inqueſt to inquire of their concealments, and thereupon ſet fines upon them.

6. But in my opinion fines ſet upon grand inqueſts by juſtices of the peace, *oyer* and *terminer*, or gaol-delivery for concealments or non-preſentments in any other manner are not warrantable by law; and tho the late practice hath been for ſuch juſtices to ſet fines arbitrarily, yea not only upon grand inqueſts, but alſo upon the petit jury in criminal cauſes, if they find not according to their directions, it weighs not much with me for theſe reaſons; 1. becauſe I have ſeen arbitrary practice ſtill go from one thing to another, the fines ſet upon grand inqueſts began, then they ſet fines upon the petit juries for not finding according to the directions of the court; then afterwards the judges of *niſi prius* proceeded to fine jurors in civil cauſes, if they gave not a verdict according to direction even in points of fact; this was done by a judge of aſſiſe (*c*) in *Oxfordſhire*, and the fine eſtreated, but I by the advice of moſt of the judges of *England* ſtaid proceſs upon that fine; the like was done by the ſame judge in a caſe of burglary, the fine was eſtreated into the *Exchequer*; but by like advice I ſtayed proceſs, and in the caſe of *Wagſtaff* (*d*) and other jurors fined at the *Old-Bailey* for giving a verdict contrary to direction, by the advice of all the judges of *England* (only one diſſenting) it was ruled to be againſt law; but of this hereafter (*e*). 2. My ſecond reaſon is, becauſe the ſtatute of 3 *H.* 7. *cap.* 1. preſcribes a way for their fining, which would not have been, if they had been arbitrarily ſubject to a fine before. 3. It is of very ill conſequence, for the pri-

(*c*) Juſtice *Hide* at *Oxford*. *Vaugh.* 145. (*d*) *Vaugh.* 153. (*e*) *Cap.* 42.

vilege of an *Engliſhman* is, that his life ſhall not be drawn in danger without due preſentment or indictment, and this would be but a ſlender ſcreen or ſafe-guard, if every juſtice of peace or commiſſioner of *oyer* and *terminer*, or gaol-delivery may make the grand jury preſent what he pleaſes, or otherwiſe fine them; and there is no parity of reaſon or example between inferior judges and the court of king's bench, which is the ſupreme ordinary court of juſtice in ſuch caſes; and thus far concerning fining of grand inqueſts. (*f*)

They are ſworn to keep the king's counſel undiſcoverd, the revealing or diſcloſing whereof was heretofore taken for felony, 27 *Aſſ.* 63. but that law is antiquated, it is now only fineable; if there be thirteen or more of the grand inqueſt, a preſentment by leſs than twelve ought not to be; but if there be twelve aſſenting, tho ſome of the reſt of their number diſſent, it is a good preſentment; for if twelve agree, it is not neceſſary for the reſt to agree. *Lamb. Juſtice* 400.

But in caſe of a trial by the petit jury, it can be by no more nor leſs than twelve, and all aſſenting to the verdict, (*g*) accordingly it was adjudged *M.* 42 *E.* 3. *Rot.* 16. *Suff. Rex* (*h*), the judgment was reverſed, becauſe but eleven indictors.

(*f*) The court of king's bench, it is true, may much more ſafely be truſted, than other inferior courts, but yet our author's arguments do ſufficiently evince, that no court whatever ought to have ſuch a power of making juries find what they pleaſe, nor has the law veſted ſuch a power in any court; for as to matter of fact the jury are the ſole judges, and herein are to be guided entirely by their own judgments and conſciences; indeed in matters of law the court is the proper judge, and the jury are not to find contrary to their direction, but even here they are not bound to follow the direction of the court, but, if they cannot aſſent thereto, ought to find the fact ſpecially; indeed where the fact is agreed, if they will obſtinately find matter of law contrary to the direction of the court, there may be ſome reaſon why they ſhould be fined. See *Hood*'s caſe *Kelyng* 50. but barely finding matter of fact againſt the direction of the court is no ſufficient cauſe to fine a jury. *Buſhell*'s caſe, *Vaugh.* 153. and this diſtinction is founded on the antient maxim of the common law; *ad quæſtionem juris non reſpondent juratores, ſed judices; ad quæſtionem facti non reſpondent judices, ſed juratores.* Co. Lit. §. 366. *& libros ibi.*

(*g*) See the inconveniences hereof, *Pref.* to *Stat. Tr. p.* 7.

(*h*) This caſe proves nothing as to the petit jury, it being an indictment on the coroner's inqueſt, as appears by the record, which is as follows: "*John Cobat* of *Ipſ-*
" *wich* was indicted by the coroner's in-
" queſt conſiſting only of eleven, quod
" die Sabbati prox' ante feſtum Sancti ad
" vincula anno regni regis *E.* 3. poſt
" conqueſtum triceſimo quinto inſultum
" fecit

But if a preſentment be deliverd into a court of ſeſſions and received, no amerciament lies, that it was not aſſented to by twelve, but otherwiſe it is in caſe of a preſentment by a leet, for the party diſtrained, *&c.* may aver, that it was not preſented by twelve. 45 *E.* 3. 26. *b. B. Leet* 7.

The indictors are preſumed in law to be indifferent, unleſs the contrary appear; 1. Becauſe returned by the ſheriff. 2. Becauſe ſworn by the court to preſent, and therefore ſhall never be charged by writ of conſpiracy for any conſpiracy before their being ſworn, tho the party be acquit. 7 *H.* 4. 31. *b.* 19 *H.* 6. 19. *a.* But 21 *E.* 3. 17. by *R. Th.* it is a good replication to ſay, he procured himſelf to be returned of the grand inqueſt.

If a bill of indictment be for murder, and the grand jury return it *billa vera quoad* manſlaughter, *& ignoramus quoad* murder, the uſual courſe is in the preſence of the grand jury to ſtrike out *malitioſè & ex malitiâ ſuâ præcogitatâ* and *murderavit*, and leave in ſo much as makes the bill to be but bare manſlaughter, and ſo to receive it.

But the ſafeſt way is to deliver them a new bill for manſlaughter, and they to indorſe it generally *billa vera*, for the words of the indorſement make not the indictment, but only evidence the aſſent or diſſent of the grand inqueſt, it is the bill itſelf is the indictment, when affirmed. And ſo in like caſes, where the bill contains two offenſes, as burglary and theft, forcible entry and detainer. *H.* 4 *Jac. B. R. Yelverton* 99. *Ford*'s caſe.

I The

" fecit *Johanni le Swon* ſervienti Prioris " ſanctæ Trinitat. *Gippewici* in ſuburbio " libertat. villæ prædictæ in quodam " campo juxta *Tremons' Hegg*, & dictum " *Johannem le Swon* ibidem cum qua- " dam armâ vocat' *Sparth'* precii quatuor " denar. verberavit felon' de quâ quidem " verberatione dictus *Johannes le Swon* " moriebatur, ſed languebat à dicto die " Sabbati prox. ante feſtum Sancti *Petri* " ad vincula uſque ad diem Jovis tunc " prox. ſequent", the which indictment was afterwards in *Mich'* term *anno* 42 of the ſame reign removed into the king's bench, " & continuato inde proceſſu verſus " præfat' *Johannem* uſque à die Paſchæ " in xv dies anno regni regis nunc *An-* " *gliæ* quadrageſimo tertio, ad quem di- " em coram domino rege apud *Weſtm'* " venit prædictus *Johannes Cobat* per " man', & viſo & diligenter examinato " per cur' indictamento prædicto, pro eo " quòd compert. eſt in eodem, quòd fue- " runt niſi undecim juratores tantùm in " inquiſitione prædictâ, ubi in qualibet " inquiſitione de jure fore deberent xii " jurati, & ſic videtur cur', quòd indicta- " mentum prædictum minus ſufficiens eſt " ad præfat' *Johannem Cobat* ulterius " inde ponere reſponſur'. Ideo idem *Jo-* " *hannes Cobat* ad præſens eat inde ſine " die, ſalvo ſemper jure regis, &c.

The grand jury are ſworn *ad inquirendum pro corpore comitatûs*, and therefore regularly they cannot inquire of a fact done out of that county for which they are ſworn, unleſs ſpecially enabled by act of parliament, but only in ſome ſpecial caſes. *Mich.* 9 *Car. B. R. Bell*'s caſe.

If a man had been ſtricken in the county of *A.* and had died in the county of *B.* the offender had not been indictable of murder, *&c.* in the county of *A.* becauſe the death was in the county of *B.* neither had he been indictable in the county of *B.* becauſe the ſtroke was given in the county of *A.* but by the ſtatute of 2 *&* 3 *E.* 6. *cap.* 24. he may be indicted in the county, where the party died, tho the ſtroke were in another county, and alſo the offender ſhall be tried there, but an appeal may be brought in either county. 7 *Co. Rep.* 2. *a. Bulwer*'s caſe.

So if *A.* had committed a felony in the county of *D.* and *B.* had been acceſſary before or after in the county of *C. B.* could not have been indicted as acceſſary in either county at common law, but by that ſtatute he is indictable, and ſhall be tried in the county where he ſo became acceſſary. *Stamf. P. C. Lib.* I. *cap.* 46.

So if a ſtroke were given *ſuper altum mare*, and the party came into the body of the county, and there died, this is *caſus omiſſus*, and the party is neither indictable by the jury of the county where he died, nor before the admiral by the ſtatute of 28 *H.* 8. *cap.* 15. *Co. P. C. cap.* 7. *p.* 48.

If *A.* rob *B.* in the county of *C.* and carry the goods into the county of *D. A.* cannot be indicted of robbery in the county of *D.* becauſe the robbery was in another county, but he may be indicted of larciny or theft in the county of *D.* becauſe it is theft wherever he carries the goods; the like law in an appeal, 4 *H.* 7. 5 *b.* 7 *Co. Rep.* 2. *a. Bulwer*'s caſe.

But by the force of ſome acts of parliament treaſons and felonies committed in one county may be indicted and tried in another county.

By the ſtatute 33 *H.* 8. *cap.* 23. upon examination, as in that ſtatute is provided, treaſons, miſpriſions of treaſons, and

and murders committed in any place within the king's dominions or without may be inquired of, heard, and determined in any county, where the king by his commiſſion ſhall appoint.

This ſtatute, at leaſt as to the trial of treaſons and miſpriſions, is repealed by the ſtatute of 1 & 2 *P. & M. cap.* 10. *Stamf. P. C. Lib.* II. *cap.* 26. *fol.* 89, 90. *Co. P. C. cap.* 2. *p.* 27.

But it ſeems that ſtatute ſtands in force as to indictments and trials of murder, the circumſtances required by that ſtatute being obſerved.

By the ſtatute 35 *H.* 8. *cap.* 2. becauſe ſome doubt was conceived, whether forein treaſons committed out of this realm might be inquired of, heard and determined within the realm, it is enacted, that ſuch offenſes ſhall be inquired of, heard and determined in the king's bench, or in ſuch counties, where the king ſhall iſſue his commiſſion, by the good men of the ſame county.

This ſtatute ſtands in force, not repealed by 1 & 2 *P. & M. cap.* 10. *Co. P. C. cap.* 2. *p.* 24.

By the ſtatute 27 *Eliz. cap.* 2. treaſons by prieſts or jeſuits coming into *England*, and felony for receiving them; and by the ſtatute 1 *Jac. cap.* 11. felony for taking a ſecond husband or wife, the firſt living, are inquirable and determinable where the offender is apprehended; the like for felony in exportation of wools by the ſtatute of 14 *Car.* 2. *cap.* 18. But yet it was held at common law, that treaſon in adhering to the king's enemies beyond the ſea was inquirable and triable where the offender had lands, *vide Coke* ſuper *Littleton*, *Sect.* 440. *p.* 261. *b.* 5 *R.* 2. *Trial* 54. but this is now ſettled by the ſtatute of 35 *H.* 8. *cap.* 2. *vid. Co. P. C. cap.* 1. *p.* 11.

If *A.* by reaſon of tenure of lands in the county of *B.* be bound to repair a bridge in the county of *C.* if the bridge be in decay, he may be indicted in the county of *C.* that he is bound *ratione tenuræ* of lands in the county of *B.* to repair the bridge. 5 *H.* 7. 3. 3 *E.* 3. *Aſſiſe* 446.

CHAP. XXIII.

Concerning the forms of indictments in caſes capital, *and firſt touching the* form of the caption *returned upon a* certiorari.

IT will be a buſineſs of too much length and beſides my intention to treat of all indictments in caſes criminal, but I ſhall confine myſelf only to thoſe that are capital.

Touching the forms of indictments there are two things conſiderable, 1. The caption of the indictment, 2. The indictment itſelf.

The caption of the indictment is no part of the indictment itſelf, but it is the ſtyle or preamble, or return that is made from an inferior court to a ſuperior, from whence a *certiorari* iſſues to remove; or when the whole record is made up in form, for whereas the record of the indictment, as it ſtands upon the file in the court, wherein it is taken, is only thus; *Juratores pro domino rege ſuper ſacramentum ſuum præſentant*, when this comes to be returned upon a *certiorari* it is more full and explicite, *viz.* in this form,

Norff. *Ad generalem ſeſſionem pacis tent' apud* S. *in comit' prædicto 5 die Octobris anno regni, &c.* 25 *coram* A. B. C. D. *& ſociis ſuis juſticiariis domini regis ad pacem dicti domini regis in comit' prædict' conſervand', necnon ad divers' felonias trangreſs' & alia malefacta in eodem comitat' audiend' & terminand' aſſignatis, per ſacrament'* E. F. G. H. *&c. proborum & legalium hominum comit' prædict' jurat' & onerat' ad inquirend' pro dicto domino rege & pro corpore comit' prædict' exiſtit præſentatum.*

1. Firſt, the name of the county muſt be in the margin of the record, or repeated in the body of the caption.

2. The court, where the preſentment is made, muſt be expreſſed, *viz. ad generalem ſeſſionem pacis, &c.* or *ad generalem goalæ regis deliberationem, &c.*

3. It muſt appear where the ſeſſions was held, and that the place, where it was held, is within the extent of the commiſſion, and therefore, if *Dorſet* be in the margin, and the caption be *ad generalem ſeſſionem pacis tent' apud* S. and ſays not *in comitat' prædicto*, it is naught. *H.* 42 *Eliz. B. R. Ludlow*'s caſe, *Croke, n.* 10. *p.* 738. *P.* 40 *Eliz. B. R. Croke, n.* 4. *p.* 606. *Child*'s caſe; ſo if weſt-riding *in comit' Eborum* be in the margin, and caption be *apud* S. *in comit' prædicto*, it ſhall be quaſhed, becauſe it doth not ſay *apud* S. *in* weſt-riding *in comitatû prædict'*. *T.* 5 *Jac. B. R.* and *P.* 9 *Jac. B. R. Thorny*'s caſe, *Croke, n.* 6. *p.* 276.

4. The juſtices names, *H.* 42 *Eliz. B. R. Ludlow*'s caſe.

But it is not neceſſary to name all the juſtices by name, but the reſt may be ſupplied by the words (*& ſociis ſuis, &c.*) But ſo many are fit to be named, as are enabled by their commiſſion to hold a ſeſſion, and the return of the caption is ſuppoſed to agree with the title of their ſeſſions.

5. The title of their authority, as *juſtic' ad gaolam domini regis com' prædict' deliberand'*.

And *note*, that if there be a ſeſſion by three commiſſions, as of gaol-delivery, *oyer* and *terminer*, and the peace, if it be returned at a ſeſſion holden before them, and the record be made up, as upon all three commiſſions, if they have juriſdiction to take the indictment but by one of thoſe, it is good, tho not enabled to take it by the other. 9 *H.* 7. 9. *a.*

Tent' coram juſticiariis ad pacem, without ſaying *necnon ad divers' felonias &c. audiend' & terminand' aſſignatis*, is not good to remove an indictment, becauſe tho that clauſe be uſually added to all commiſſions of the peace, yet they are not thereby juſtices of *oyer* and *terminer*, and that clauſe ought to be added to their return, becauſe without that clauſe they cannot proceed by indictment. 22 *E.* 4. 12. *b.* 2 *R.* 3. 9. *a. b.*

And altho in all commiſſions of *oyer* and *terminer*, gaol-delivery, and of the peace, there be ſome that are of the *quorum*, without which there can be no ſeſſions held, yet in the caption there need not be any mention, whether any of them, or which of them are of the *quorum*, but generally as before, for it is ſufficient, if *de facto* the ſeſſions be held before him or them, that are of the *quorum*, tho not ſo mentiond in the return, and ſo is the uſual courſe.

But it ſeems, that if an act of parliament do expreſly limit, that ſuch or ſuch an offenſe ſhall be heard and determined before two or more juſtices of the peace, *&c.* whereof one to be of the *quorum*, the caption of ſuch an indictment of ſuch an offenſe ought to mention, whereof *A. &c.* is of the *quorum*, as is uſed in the return of orders made by two juſtices touching baſtard children upon the ſtatute of 18 *Eliz. cap.* 3. becauſe the act of parliament preciſely limits one to be of the *quorum*, and therefore muſt be purſued.

6. It muſt return, that the indictment was made *per ſacramentum.*

7. It muſt name the jurors, that preſented the offenſe, and therefore a return of an indictment or preſentment *per ſacramentum* A. B. C. & D. & *aliorum* is not good, for it may be the preſentment was by a leſs number than twelve, in which caſe it is not good. *H.* 41 *Eliz. B. R. Croke, n.* 16. *Clyncard's* caſe, *p.* 654. and it ſeems to me, that all the names of the jurors ought to be returned; for the party indicted may have an exception to ſome or one of them, as that he is outlawd, in which caſe the indictment may be quaſhed by plea, tho there be twelve beſides without exception, for poſſibly that one, who is not *legalis homo*, may influence all the reſt, and ſo vitiate the whole indictment.

8. They muſt be returned to be *probi & legales homines*, and *de comitatû prædicto*, and this holds as well in the caſe of the coroner's inqueſt, as of other indictments or preſentments. *P.* 20 *Jac. B. R. Croke* 2. *Oily's* caſe, *p.* 635.

9. It ſeems requiſite alſo to add this clauſe, *onerati & jurati ad inquirendum pro domino rege & pro corpore comit' prædict'*; and if it be a preſentment by the grand jury of a liberty,

berty, *ad inquirend' pro domino rege & pro libertate de* S. *vel rapâ de* S.

10. If it concludes *qui dicunt*, and ſays not *ſuper ſacrament', &c.* or *præſentatum exiſtit*, and ſays not *per ſacramentum, &c. præſentatum exiſtit*, it ſhall be quaſhed, for their preſentment muſt be upon oath, and ſo returned; ſo ruled *T.* 23 *Car.* 1. *B. R.*

And thus far for the caption of the indictment, where *note*, 1. That if the caption be faulty in the form, yet the ſame term it may be amended by the clerk of the aſſiſes, or the peace, but not in another term.

2. But in another term the clerk, that returns it, ſhall be fined for his informal return.

CHAP. XXIV.

Concerning the body of the indictment *in caſes capital, and the* ſeveral parts *thereof, and the* forms *requiſite therein.*

THIS is a large and uncertain title, and hard to be reduced to any certain orders; 1. Becauſe the parts of an indictment are many. 2. The ſtrictneſs required in indictments is great, becauſe life is in queſtion. 3. Therefore very nice and ſlender exceptions have been of latter ages allowd, and they have been with too much facility quaſhed and reverſed. 4. The circumſtances of facts and crimes are very various.

Yet I ſhall endeavour to reduce this title to as much certainty, and as good a method as I can, confining myſelf to capital cauſes, tho there be many things that will ariſe equally applicable to cauſes of an inferior nature.

An indictment is nothing elſe but a plain, brief, and certain narrative of an offenſe committed by any perſon, and of thoſe neceſſary circumſtances, that concur to aſcertain the fact and its nature; and therefore I ſhall conſider 1. Some generals, that concern indictments in general. 2. I ſhall conſider the ſeveral parts of indictments in their order.

Among theſe generals theſe will come to be conſiderd, that follow.

I. Regularly, every indictment ought to be in *Latin*, as all pleadings in the courts of law ought to be, and it is of excellent uſe, becauſe it being a fixed, regular language, it is not capable of ſo many changes and alterations, as happen in vulgar languages. (*a*)

If there be a proper *Latin* word for any offenſe or thing containd in an indictment, it may not be ſupplied with general words and an *Anglicè*.

Therefore an indictment, *quòd exercuit quaſdam diabolicas artes, Anglicè* witchcraft, was quaſhed, becauſe there is a proper *Latin* word for it, *viz. Incantatio. M.* 2 *Car. B.* Dr. *Lamb*'s caſe. (*b*)

Regularly, falſe *Latin* doth not vitiate an indictment, if yet the indictment be reaſonably intelligible, 5 *Co. Rep.* 121. *a. Long*'s caſe, *M.* 30 & 31 *Eliz. Croke, n.* 3. *B. R. Brickett*'s caſe, (*c*), as *præfato reginæ*, where it ſhould be *præfatæ*.

But if the words be words of art, and by omiſſion or miſplacing of letters become inſignificant, they vitiate the indictment, as *burgariter* for *burglariter*, *feloniter* for *felonicè*, *murdredavit* for *murdravit*; but *burgulariter* hath been held good, 4 *Co. Rep.* 39. *b. Brook*'s caſe, *ibid.* 41. *b. Haydon*'s caſe, 5 *Co. Rep.* 121. *a. Long*'s caſe. *H.* 45 *Eliz. B. R. Croke, n.* 15. *Ryle*'s caſe. (*d*)

(*a*) This is now alterd by 4 *Geo.* 2. *cap.* 26. 6 *Geo.* 2. *cap.* 6. which requires all indictments, *&c.* to be in the *Engliſh* tongue; for notwithſtanding the excellency of the uſe here mentiond by our author, it was thought to be of much greater uſe and importance, that they ſhould be in a language capable of being known and underſtood by the parties concerned, whoſe lives and liberties were to be affected thereby.

(*b*) *Noy* 85. *Latch* 156. *W. Jones* 143.

(*c*) *Cro. Eliz.* 108.

(*d*) *Cro. Eliz.* 920.

So if it make the indictment inſenſible or uncertain, as if *A.* and *B.* be indicted for ſtealing, *felonicè cepit & aſportavit*, where it ſhould be *ceperunt*, it ſhall be quaſhed, *P.* 42 *Eliz. B. R. Lane*'s caſe (*e*); ſo in an indictment of murder, the ſtroke laid *in ſiniſtro bracio*, where it ought to be *brachio*, for it appears not where the wound was, the words being inſenſible. *T.* 31 *Eliz. B. R. Webſter*'s caſe. (*f*)

Abbreviations, that are uſual, are allowable in indictments, as well as in other pleadings, and ſhall be conſtrued to the beſt advantage for the maintaining of the indictment, as if an indictment be maintainable upon one ſtatute or more, a concluſion *contra formam ſtatut. in hujuſmodi caſu edit. & proviſ.* ſhall be conſtrued ſingularly or plurally, as makes beſt for the maintenance of the indictment. (*g*)

Figures to expreſs numbers are not allowable in indictments, tho ſometimes literal numbers be allowable in returns, but in indictments the numbers, whether cardinal or ordinal, muſt be expreſſed in *Latin.*

II. An indictment grounded upon an offenſe made by act of parliament muſt by expreſs words bring the offenſe within the ſubſtantial deſcription made in the act of parliament, and thoſe circumſtances mentiond in the ſtatute to make up the offenſe ſhall not be ſupplied by the general concluſion *contra formam ſtatuti.*

And ſo it is, if an act of parliament ouſt clergy in certain caſes, as murder *ex malitiâ præcogitatâ*, robbery in or near the highway, ſtabbing one not having ſtruck firſt, nor having a weapon drawn, tho the offenſes themſelves were at common law, yet becauſe at common law within clergy, they ſhall not be ouſted of clergy, tho convicted, unleſs theſe circumſtances, as *ex malitiâ præcogitatâ*, or *prope altam viam, &c.* be expreſſed in the indictment.

But where an offenſe is made felony, or otherwiſe puniſhable by act of parliament, tho the indictment muſt take in the circumſtances, which in the body of the act make up the offenſe, yet if by a proviſo in the ſame ſtatute,

I or

(*e*) *Cro. Eliz.* 754.

(*f*) By the name of *Goſlen*'s caſe. *Cro. Eliz.* 137.

(*g*) This is alſo alterd by 4 *Geo.* 2. *cap.* 26. 6 *Geo.* 2. *cap.* 6. which prohibits all abbreviations in indictments, *&c.*

or by any ſubſequent ſtatute ſome caſes or circumſtances are exempted out of the act, the indictment need not mention and qualify the offenſe, ſo as to exempt it out of the proviſo, but the party ſhall have advantage of the proviſo by pleading *not guilty*, and in the ſame manner ſhall have advantage of the ſubſequent ſtatute to excuſe him by virtue of the ſtatute of 21 *Jac. cap.* 4.

If a ſtatute prohibit any act to be done, and by a ſubſtantive clauſe gives a recovery by action of debt, bill, plaint, or information, but mentions not indictment, the party may be indicted upon the prohibitory clauſe, and thereupon fined, but not to recover the penalty, as upon the ſtatute of 3 *Jac. cap.* 5. prohibiting recuſants to baptize their children by a popiſh prieſt. *H.* 7. *Car. B. R. per Cur'*, but then it ſeems the fine ought not to exceed the penalty, *P.* 22 *Car. B. R. College of Phyſicians, vide tamen M.* 20 *Jac. B. R. Croke, n.* 4. *Caſtle*'s caſe *contra.* (*h*)

But if the act be not prohibitory, but only that if any perſon ſhall do ſuch a thing, he ſhall forfeit 5 *l.* to be recoverd by action of debt, bill, plaint, or information, he cannot be indicted for it, but the proceeding muſt be by action, bill, plaint, or information. *P.* 6 *Car. B. R. Day*'s caſe.

If a man be indicted for an offenſe, which was at common law, and concludes *contra formam ſtatuti*, but in truth it is not brought by the indictment within the ſtatute, it ſhall be quaſhed, and the party ſhall not be put to anſwer it as an offenſe at common law.

As if a man be indicted for drawing his dagger in the church upon *J. S. contra formam ſtatuti, viz.* 5 *E.* 6. *cap.* 4. but omits theſe words *with an intent to ſtrike*, the indictment ſhall be quaſhed, and the party not put to anſwer the aſſault at common law. *P.* 33 *Eliz. B. R. Croke, n.* 23. *Penhallo*'s caſe. (*i*)

So if a man be indicted for a riotous and forceable entry *contra formam ſtatuti, viz.* 8 *H.* 6. *cap.* 9. and the ſtatute is miſrecited, he ſhall not be put to anſwer the offenſe at common

(*h*) *Cro. Eliz.* 644. (*i*) *Cro. Eliz.* 251.

mon law, but the indictment ſhall be quaſhed. *M.* 35 & 36 *Eliz. B. R. Croke, n.* 10. *Hall* and *Gaven* (*k*), *M.* 41 *Eliz. B. R. Croke, n.* 10. *Eden*'s caſe (*l*) yet *vide M.* 10 *Car. Holme*'s caſe. (*m*) A man indicted for felonious burning of a houſe, upon *not guilty* pleaded a ſpecial verdict was found, it was adjudged no felony, as the caſe was found, yet upon the ſame indictment he was adjudged to the pillory, and fined 500 *l.* and bound to his good behaviour, but *quære* of that caſe, for it ſeems unreaſonable, becauſe being tried for felony, he hath not thoſe advantages for his defenſe, as if he were indicted only for treſpaſs; (*n*) *M.* 10 *Car. B. R. Croke, n.* 3. *vid.* 2 *H.* 7. 10. *b.*

If a ſtatute be particular, it muſt be recited in the indictment, and proved by an examined copy upon the trial.

But if a man be indicted *quòd furatus eſt*, and ſays not *felonicè*, this indictment imports but a treſpaſs, and the offender may be put to anſwer it as a treſpaſs. 2 *H.* 7. 10. *b.* 18 *E.* 4. 10. *b.*

And ſo it ſeems, if a man be indicted at a leet, *quòd felonicè rapuit* ſuch a woman, and this indictment is removed into the king's bench; becauſe the leet hath no juriſdiction to take an indictment of rape as a felony, he ſhall not be put to anſwer it as a felony, but ſhall be fined as for a treſpaſs, becauſe as a treſpaſs the leet may enquire of it. 6 *H.* 7. 5. *a.*

If it be a general ſtatute, it need not be recited, but it is ſufficient to conclude *contra formam ſtatuti in hujuſmodi caſu edit' & provis'*, for the court ought to take notice of it, and all penal ſtatutes, that induce a forfeiture to the king, or make a felony or treaſon are general ſtatutes, becauſe it concerns the king; but if a general ſtatute be recited in an indictment, and be miſrecited in a point material, and conclude *contra formam ſtatuti prædicti*, it is fatal, and the indictment ſhall be quaſhed, but it ſeems, that if it conclude generally *contra formam ſtatuti in hujuſmodi caſu edit' & provis'*,

(*k*) *Cro. Eliz.* 307.
(*l*) *Cro. Eliz.* 697.
(*m*) *Cro. Car.* 376.
(*n*) For inſtance, he could not have the aſſiſtance of counſel.

it is good, for the court takes notice of the true ſtatute, and will reject the miſrecital as ſurpluſage. *M.* 7 *Car. B. R. Croke, n.* 14. *Barn*'s caſe (*o*) in maintenance, and *M.* 8 *Car. B. R. per Jones ſuper ſtat' de cottages* (*p*).

1. If an act of parliament making a felony or other offenſe be but temporary, and made perpetual by another ſtatute, the indictment concluding *contra formam ſtatuti* is good.

2. If the former ſtatute be diſcontinued, and revived by another ſtatute, the beſt way is to conclude *contra formam ſtatutorum*, *M.* 31 & 32 *Eliz. B. R. Mill*'s caſe, tho there is good opinion, that it is good enough to conclude *contra formam* of the firſt ſtatute, as in caſe of the ſtatute of 5 *E.* 6. of ingroſſing, 37 *H.* 8. for uſury, and 5 *Eliz.* for perjury, which were diſcontinued and revived, yet indictments good concluding *contra formam* of the firſt ſtatute. *T.* 9 *Jac. Rot.* 124. *C. B. Weſtwood*'s caſe.

3. If one ſtatute be relative to another, as where the former makes the offenſe, the latter adds a penalty, as the ſtatutes of 1 and 23 *Eliz.* the indictment ought to conclude *contra formam ſtatutorum. P.* 42 *Eliz. B. R. Croke, n.* 6. *Dingly* and *Moore* (*q*).

III. Touching the joining of perſons and offenſes in one indictment.

If there be one offender and ſeveral capital offenſes committed by him, they may be all contained in one indictment, as burglary, and larciny: Larcinies committed of ſeveral things, tho at ſeveral times, and from ſeveral perſons, may be joined in one indictment.

If there be ſeveral offenders, that commit the ſame offenſe, tho in law they are ſeveral offenſes in relation to the ſeveral offenders, 21 *E.* 4. yet they may be joined in one indictment, as if ſeveral commit a robbery, or burglary, or murder.

And ſo it is, tho the offenſes are of ſeveral degrees, but dependent one upon another, as the principal in the firſt degree, and the principal in the ſecond degree, *viz. preſent, aiding*, and *abetting* the principal, and acceſſary before or after.

(*o*) *Cro. Car.* 232. (*p*) 31 *Eliz. cap.* 7. (*q*) *Cro. El.* 750.

IV. Touching the joining of ſeveral offenſes of the ſame nature, but diſtinctly committed by ſeveral offenders, ſome have been ruled inſufficient, as an indictment of ſeveral perſons, *quòd non eſcourarunt foſſata ſeparalia ante ſeparalia ſua pomaria*, quaſhed in 23 *Car.* 1. *B. R.* ſo of ſeveral officers, *quòd colore ſeparalium officior' ſuorum ſeparaliter extorſivè ceperunt, &c. M.* 33 & 34 *Eliz. B. R. Lake*'s caſe in *Hughe*'s *Rep.* and ſo if two are indicted for uſing a trade not being bound apprentice, it is not good. *P.* 16 *Car.* 1. *B. R. Brooke*'s caſe (*r*).

But yet in *T.* 21 *Jac. B. R. A. B. C.* and *D.* were indicted for erecting four ſeveral inns *ad commune nocumentum*, it was ruled, that for ſeveral offenſes of the ſame nature ſeveral perſons may be indicted in the ſame indictment, but then it muſt be laid *ſeparaliter erexerunt*, and for want of that word (*ſeparaliter*) the indictment was quaſhed.

And it is common experience at this day, that twenty perſons may be indicted for keeping diſorderly houſes, or baudy-houſes, and they are daily convict upon ſuch indictments, for the word *ſeparaliter* makes them ſeveral indictments.

CHAP. XXV.

Concerning the forms of indictments *in particular, and the* ſeveral parts *thereof.*

THE moſt conſiderable parts of an indictment in capital offenſes are, 1. The name and addition of the party offending. 2. The day and time of the offenſe committed. 3. The place where it was committed. 4. Upon or againſt whom committed. 5. The manner of the commiſſion of it. 6. The fact itſelf and the nature of it. 7. The concluſion.

This

(*r*) 2 *R. A.* 78. *pl.* 6.

This is the grammatical order, wherein things are ſet down in the indictment, and upon theſe parts moſt of the conſiderations and obſervations touching indictments do ariſe, and thoſe, that are not reducible to theſe heads, are partly obſerved before, and ſhall be more fully proſecuted in the end of this chapter.

I. As to the name and addition of the party indicted, this regularly ought to be inſerted, and inſerted truly in every indictment.

But if the party be indicted by a wrong chriſtian name, ſirname, or addition, and he plead to that indictment *not guilty*, or anſwer to that indictment upon his arraignment by that name, he ſhall not be received after to plead *miſnomer*, or falſity of his addition, for he is concluded and eſtopped by his plea by that name, and of that eſtoppel the gaoler and ſheriff, that doth execution, ſhall have advantage.

M. 16 *Jac.* and *P.* 17 *Jac. B. R.* Debt was brought againſt Sir *Francis Forteſcüe* knight and baronet, and he appeard, and judgment given againſt him, ruled 1. That he ſhall never aſſign for error, that he was no baronet, tho baronet be parcel of the name. 2. If execution be ſued againſt him by the name of Sir *Francis Forteſcue* knight and baronet, and he brings falſe impriſonment againſt the ſheriff, the ſheriff ſhall have advantage of this eſtoppel, adjudged *(a)*.

Therefore he, that will take advantage of the *miſnomer* of his chriſtian name, addition, or ſirname, muſt do it upon his arraignment, and the entry muſt be ſpecial, *viz. ſuper quo venit* Robertus Williams, *qui indictatus eſt per nomen* Johannis Williams, *& dicit quòd ubi in indictamento ſupponitur, quòd quidam* Johannes Williams *vi & armis, &c. ipſius nomen eſt* Robertus *& non* Johannes; for, if he ſhould ſay *venit prædictus* Johannes Williams, he concludes himſelf, and cannot plead, that his name is *Robert*, and ſo I have known it ruled againſt the book of 1 *E.* 4. 2. *b.*

The miſnaming of the ſirname of the offender in an appeal is a good plea in abatement, but tho the ſirname be miſtaken

(a) 2 *Rol. Rep.* 50, 88.

miſtaken in an indictment, yet it ſhall not abate. 1 *H.* 5. 5. *b. per Hankford. Stamf. P. C. Lib.* III. *cap.* 18. *tamen quære.*

But the miſtake of the chriſtian name is pleadable, as well in caſe of an indictment, as an appeal, and the party ſhall be diſmiſſed from that indictment. 11 *H.* 4. 41. *b. Coron.* 88. *Stamf. P. C. ubi ſupra,* but by *Rolf* 3 *H.* 6. 26. *a.* it is no plea in an indictment (*b*).

But the ſafeſt way is to allow his plea of *miſnomer* both as to his ſirname and as to his chriſtian name, for he, that pleads *miſnomer* of either, muſt in the ſame plea ſet forth what his true name is, and then he concludes himſelf, and if the grand jury be not diſcharged, the indictment may preſently be amended by the grand jury, and returned according to the name he gives himſelf.

By the ſtatute of 1 *H.* 5. *cap.* 5. in all indictments, *&c.* the party indicted ought to have the addition of his myſtery, degree, place, and county.

Therefore, if the party indicted have no addition, or a falſe addition, he may upon his arraignment except to the former, and plead to the latter.

And if he be outlawed upon ſuch indictment, where there is no addition, or a falſe addition, he may avoid it by writ of error, *&c.*

But altho there be no addition, yet if he appear, and plead not guilty without taking advantage of that defect, he ſhall never allege the want of addition to ſtop his trial or judgment, for by ſuch his appearance and pleading to iſſue the indictment is affirmed, and the want of addition ſalved, and the ſtatute ſatisfied. *H.* 18 *Jac. B. R. Croke, n.* 5. *Johnſon's* caſe, (*c*) adjudged.

The addition required by the ſtatute is of his degree, as *Yeoman, Gent. Eſq*; of his myſtery, as *husbandman, ſailor, ſpinſter, &c.* therefore, if the addition be only general, as ſervant, farmer, citizen, 9 *E.* 4. 48. *a.* or of crimes or miſdemeanors only, as extortioner, vagabond, heretic. 22 *E.* 4. 1. *a.* theſe are no good additions.

(*b*) The words of the book are, *it is no plea in felony.* (*c*) *Cro. Eliz.* 609.

The addition ought to be to his ſubſtantive name, not only to the *alias dictus*. *M.* 33 & 34 *Eliz. Croke, n.* 11. *Leke*'s caſe (*d*) as *A. B. alias dictus A. C. butcher*, becauſe regularly the addition refers to the laſt antecedent, and upon the ſame reaſon it is, if the indictment run Sibilla B. *nuper de* C. *uxor* Johannis B. *nuper de* C. *ſpinſter*, becauſe *ſpinſter* is an addition applicable to the husband, as well as to the wife; but an indictment of *John B. vir.* Emelin B. *nuper de* C. *yeoman* is good, becauſe *yeoman* is not applicable to a woman, but to a man. *P.* 31 & 32 *H.* 8. *Dyer* 46, 47. adjudged, and 4 *H.* 6. 4. *b.*

Single woman is a good addition, 14 *E.* 4. 7. *b.* ſo is *widow*, 10 *H.* 6. 21. *a.* ſo is *uxor J. S.* adjudged, *P.* 42 *Eliz. B. R. Eleanor Gower*'s caſe.

An indictment againſt a peer of the realm is good without an addition, becauſe no proceſs of outlawry lies againſt him. *M.* 31 & 32 *Eliz. B. R. Croke, n.* 15. Lord *Dacre*'s caſe (*e*).

If ſeveral perſons be indicted for one offenſe, *miſnomer* or want of addition of one quaſheth the indictment only againſt him, and the reſt ſhall be put to anſwer, for they are in law as ſeveral indictments, and ſo in treſpaſs. 7 *E.* 4. 10. *b.*

Becauſe the titles of miſnomer and addition are general titles, whereof much is ſaid in our books, as well in caſes of civil ſuits as indictments, this ſhall ſuffice in this place touching this part of the indictment.

II. Touching the time, *viz.* the year and day, wherein the fact was committed; this is neceſſary to be containd in the indictment.

Tho the day be inſerted, but not the year, the indictment is inſufficient, and it ſhall not be ſupplied by intendment of (*ultimo præterito,*) unleſs it be ſo expreſt, but if it be ſo expreſt, it is ſufficient aſcertaining the year by the day of the ſeſſions. *Lamb.* 49.

If the ſeſſions be held the 20 day of *May*, and the indictment ſuppoſe the offenſe to be the 10 day of *Maii ultimi*

(*d*) *Cro. Eliz.* 249, 198. (*e*) *Cro. Eliz.* 148.

præteriti, it relates to the month, if *ultimo præterito* it relates to the day by the neceſſary grammatical conſtruction, but if it be *ult' præterit'* with an abbreviation without the termination of the genitive or ablative caſe, it ſhall relate to the day, *viz.* the 10th day of the ſame *May*, as if it were in *Engliſh* the 10th day of *May* laſt paſt, it relates to the day and not to the month regularly, and ſo for the words next enſuing, *vide P.* 23 *Eliz. B. R. Rot.* 39. *b.* Sir *Richard Shuttleworth*'s caſe, *M.* 21 *Jac. B. R. Croke, n.* 14. *Buckley*'s caſe (*f*).

If *A.* be indicted, that he *in feſto Sancti Petri anno* 20 *Car.* kild *J. S.* this is not good, becauſe there be two feaſts of St. *Peter*, and neither without addition. 3 *H.* 7. 5. *b. viz.* St. *Peter ad vincula*, and St. *Peter in cathedrâ*.

If *A.* be indicted, *quòd primo die* Maii *& ſecundo die* Maii *apud* D. he made an aſſault upon *B. & quandam togam ipſius* B. *adtunc & ibidem invent' felonicè cepit, &c.* this indictment is not good, becauſe there are ſeveral days mentiond before, and it is uncertain to which the felonious taking ſhall relate. 2 *H.* 7. 7. *b. &* 10. *b.*

A. is indicted, *quòd primo die* Maii *anno* 21 Eliz. *in quendam* B. *inſultum fecit & ipſum verberavit*, and ſays not *adtunc & ibidem verberavit*, yet ruled good, for the *vi & armis*, day and place named in the beginning refer to all the enſuing acts. 5 *H.* 7. 17. *b.*

But in an indictment of felony there muſt be *adtunc & ibidem* to the ſtroke or to the robbery, and the day and place of the aſſault is not ſufficient, * and this is *in favorem vitæ*. *P.* 43 *Eliz. B. R. Richardſon*'s caſe. And therefore it is uſual to repeat the *adtunc & ibidem* to the ſeveral parts of the fact, as in larciny or robbery from the perſon, *quòd* A. B. *die, &c. anno, &c. apud, &c. in quendam* C. D. *inſultum fecit, & bona & catalla ipſius* C. D. *ſcilicet unam togam ad valenc', &c. adtunc & ibidem inventam adtunc & ibidem felonicè cepit & aſportavit*; A. is indicted, *quòd primo die* Maii *anno* 2 Eliz. *apud* C. *habens in manu ſuâ dextrâ gladium, &c. percuſſit* B. and it is not ſaid *adtunc & ibi-*

2 *dem*

(*f*) *Cro. Jac.* 677. * Becauſe it is the ſtroke or robbery, which makes the felony.

dem percuſſit, quaſhed, becauſe the day, and year, and place relate only to the having of the ſword, not to the ſtroke. *H.* 42 *Eliz. Croke, n.* 11. *Cotton*'s caſe (*g*).

If *A.* be indicted of murder or manſlaughter, as well the day and place of the ſtroke or other act done inducing death, as of the death, muſt be expreſt, the former, becauſe the eſcheat or forfeiture of lands relates thereto, the latter, becauſe it muſt appear, that the death was within the year and day after the ſtroke.

But tho the day or year be miſtaken in the indictment of felony or treaſon, yet if the offenſe were committed in the ſame county, tho at another time, the offender ought to be found guilty; but then it may be requiſite, if any eſcheat or forfeiture of land be conceived in the caſe, for the petit jury to find the true time of the offenſe committed, and therefore it is beſt in the indictments to ſet down the times as truly as can be, tho it be not of abſolute neceſſity to the defendant's conviction. 2 *Co. Inſt.* 318. *P.* 32 *Eliz. Syer*'s caſe adjudged. *Co. P. C. p.* 230.

And therefore, if for that variance he be acquitted, he is erroniouſly acquitted, and yet that erronious acquittal ſhall be a good plea of *auterfoits acquit*, for if he be afterwards indicted for the ſame felony, and the day truly ſet forth, he may aver it to be the ſame felony notwithſtanding the variance in the day. 2 *Co. Inſt. ubi ſupra* in felony, and the ſame law is in treaſon. *Co. P. C. p.* 230.

Where the time of the day is material to aſcertain the nature of the offenſe, it muſt be expreſt in the indictment, as in an indictment for burglary it ought to ſay *tali die circa horam decimam in nocte ejuſdem diei felonicè & burglariter fregit*, yet by ſome opinion *burglariter* carries a ſufficient expreſſion, that it was done in the night.

So upon breaking a houſe in the day-time, to ouſt the offender of his clergy upon the ſtatute of 39 *Eliz. cap.* 15. it is uſual to add *tempore diurno*, for the ſtatute expreſſeth it ſo, otherwiſe, tho the indictment be good, yet he ſhall not be ouſted of his clergy.

III. Touching

(*g*) *Cro. Eliz.* 739.

III. Touching the place, where the felony is committed; regularly the vill, or hamlet and county muſt be expreſt in the indictment.

And herein much of what hath been ſaid of the time will be applicable to the place, for where the time muſt be repeated again upon ſeveral acts done, regularly the place alſo muſt be repeated, *viz. adtunc & ibidem.*

In ſome crimes no vill need be named, as upon an indictment of barretry, becauſe he is a barretor every where, and it ſhall be tried *de corpore comitatûs.* *T.* 43 *Eliz. B. R. Tunſtall*'s caſe, but *P.* 3 *Car. B. R. Man*'s caſe the indictment was quaſhed for want of a vill alleged; the latter reſolution is fitteſt to be purſued.

Suff. In the margin, the indictment ſuppoſing a fact done *apud* S. *in com' prædict'* is good, for it refers to the county in the margin.

But if there be two counties named, one in the margin, another in the addition of any party, or in the recital of an act of parliament recited in the premiſſes of the indictment, the fact laid *apud* S. *in com' prædicto* vitiates the indictment, becauſe two counties are named before, and it is uncertain to which it refers. *H.* 42 *Eliz. B. R. Croke, n.* 12. *Wingfield*'s caſe (*b*).

Indictment againſt *A. B.* that he *apud* N. *in com' prædict'* made an aſſault upon *C. D.* of *F. in com' prædict', & ipſum adtunc & ibidem cum quodam gladio, &c. percuſſit, &c.* this indictment is not good, becauſe two places named before, and if it refers to both, it is impoſſible, and if only to one, it muſt refer to the laſt, and then it is inſenſible. 2 *H.* 7. 10. *b. P.* 44 *Eliz. B. R. Ogle*'s caſe.

A. is indicted, *quòd ipſe tali die & anno apud* C. *in quendam* B. *inſultum fecit, & ipſum cum quodam cultello, &c. felonicè percuſſit, occidit, & murdravit* without ſaying *adtunc & ibidem percuſſit, occidit, & murdravit*, the indictment is not good, for the aſſault may be at one day and place, and the killing at another. *P.* 5 *E.* 6. *Dy.* 68, 69. 1 *R.* 3. 1. *a.*

(*b*) *Cro. Eliz.* 739.

If a man be indicted for that *ratione tenuræ* of certain lands he is bound to repair a bridge, and that it is in decay, it muſt be alleged where thoſe lands lie. 5 *H.* 7. 3. *b.*

IV. Touching the name of the perſon upon whom the offenſe is committed.

An indictment of murder *cujuſdam ignoti* is good, and ſo for ſtealing of the goods *cujuſdam ignoti*, *Plo. Com.* 85. *b. Patridge's* caſe, 1 *Mar. Dy.* 99. *a.* ſo of an aſſault *in quendam ignotum*, and if he be acquitted or convicted, and be afterwards indicted for an aſſault or murder of ſuch a man by name, he may plead the former conviction or acquittal, and aver it to be the ſame perſon. 11 *Eliz. Dy.* 285. *a.*

But an indictment, *quòd invenit quendam hominem mortuum, ac felonicè furatus eſt duas tunicas*, without ſaying *de bonis & catallis cujuſdam ignoti*, is not good. 11 *R.* 2. *Enditement* 27.

If the goods of a chapel be ſtolen, the indictment ſhall ſay *bona & catalla capellæ in cuſtodiâ præpoſitorum*, if it be done in time of vacation *bona & catalla capellæ tempore vacationis*; but if the goods of a pariſh church be ſtolen, as the bell, the books, *&c.* it ſhall run *bona parochianorum de* S. *in cuſtodiâ gardianorum eccleſiæ*, and ſhall not ſuppoſe them *bona eccleſiæ.* 7 *E.* 4. 14, 15. *M.* 31 *&* 32 *Eliz. B. R. Hadnam & Green* verſus *Ringwood.* (*i*) *T.* 36 *Eliz. B. R. Methold & Barefoot.*

If the goods, which *A.* hath as executor of *B.* be ſtolen, the offender may be indicted, *quòd bona* B. *teſtatoris in cuſtodiâ* A. *executoris ejuſdem* B. *&c. Lamb.* 496. or it may be general *bona ipſius* A.

If *A.* dying be buried, and *B.* opens the grave in the night-time and ſteals the winding-ſheet, the indictment cannot ſuppoſe them the goods of the dead man, but of the executors, adminiſtrators, or ordinary, as the caſe falls out. *Co. P. C.* 110 (*k*).

If *A.* deliver goods to *B.* a common carrier to carry for him, and *B.* is robbed, the indictment may ſuppoſe them the goods of *A.* or the goods of *B.* at election, for *B.* hath a kind of ſpecial property, becauſe chargeable for them to *A.*

(*i*) *Cro. Eliz.* 145, 179. (*k*) *Haine's* caſe. 12 *Co.* 112.

An indictment, *quòd felonicè, &c. cepit quandam peciam panni cujuſdam* J. S. without ſaying *de bonis & catallis cujuſdam* J. S. was therefore quaſhed. *M.* 38 *&* 39 *Eliz. B. R. Croke, n.* 6. *Long*'s caſe (*l*).

There is no need of an addition of the perſon robbed or murderd, *&c.* unleſs there be a plurality of perſons of the ſame name, neither then is it eſſential to the indictment, tho ſometimes it may be convenient for diſtinction ſake to add it, for it is ſufficient, if the indictment be true, *viz.* that *J. S.* was kild or robbed, tho there are many of the ſame name.

V. Touching the thing wherein or of which the offenſe is committed, there is required a certainty in an indictment.

An indictment againſt *A.* that he is *communis latro*, 29 Aſſ. 45. *communis champartor, conſpirator, confœderator*, 29 Aſſ. 45. *defamator bonorum nominis & famæ*, M. 14 Jac. B. R. Jones's *caſe* (*m*), *Communis malefactor*, 22 Aſſ. 73. *common robber*, 3 *E.* 2. *action ſur ſtatute* 26. *communis malegeſtûs, & communis perturbator pacis domini regis*, M. 6 Car. 1. B. R. *Periam*'s caſe (*n*) are not good, becauſe they are too general and contain not the particular matter, wherein the offenſe was committed.

But *communis barrectator & pacis domini regis perturbator & litium ſeminator* is good, becauſe barretry is an offenſe known in law, and conſiſts of divers particulars, and the reſt that is added thereunto are but the aggravations of the offenſe, for barretry itſelf is the crime, *M.* 15 *Jac. B. R. Bowſer*'s caſe (*o*); ſo an indictment, that he is *noctivagus* is good. *H.* 2 *Car.* 1. *B. R.*

An indictment againſt *A. quòd felonicè cepit & aſportavit bona & catalla* B. without ſhewing what in certain, as *ſcilicet unum equum, unum bovem, &c.* is not good. *Lamb.* 496.

The number of things ſtolen muſt be expreſt, therefore it is not ſufficient to ſay *felonicè furatus eſt oves* or *columbas* out of a dove-cote, or young hawks out of the neſt without expreſſing their number.

(*l*) *Cro. Eliz.* 490. (*m*) 2 *R. A.* 79. *pl.* 1. (*n*) *Ibid.* 79. *pl.* 10. (*o*) *Ibid.* 79. *pl.* 3.

If theft be alleged of any thing, the indictment muſt ſet down the value, that it may appear, whether it be grand or petit larciny. *Lamb.* 497.

Where theft is charged in an indictment for a living thing, as a horſe or ſheep, the regular way is to ſay *pretii* 5 *s. &c.* if it be of a dead thing, that is eſtimated in the indictment by weight or meaſure, there alſo it ought to be *pretii*, and ſo it may be, if it be of any ſingle thing, tho dead, and not eſtimated by weight or meaſure.

But if it be dead things in the plural number, there it ought to be *ad valenciam. Lamb.* 497. but this I take to be but clerkſhip and not ſubſtantial, for if *pretii* be ſet inſtead of *ad valenciam*, or *e converſo*, I think it doth not vitiate the indictment, and ſo it is, if one *pretii* or *ad valenciam* be added to ſeveral things, where in true clerkſhip it ſhould be applied ſeverally, it is good if the party be convict of all, but poſſibly, if the party be convict but of part, it is not good, becauſe it will be uncertain whether grand or petit larciny. *Noy*'s *Rep.* 115. *Wood* and *Smith*, yet *vide T.* 23 *Car.* 1 *& M.* 23 *Car.* 1. *B. R. Brook*'s caſe and *William Arundell*'s caſe in [action of] treſpaſs, where there is but one *ad valenciam*, where divers goods were taken, tho it be aided after a verdict, yet, if the judgment be by *nihil dicit*, it was ruled error, and indictments are not aided by verdict.

An indictment, *quòd felonicè cepit* 20 *oves matrices & agnos* or *matrices & verveces*, is not good, becauſe it doth not appear how many of one ſort and how many of another, but 20 *oves* generally might have been good without diſtinguiſhing *matrices & verveces*, as in caſe of replevin or treſpaſs.

But an indictment *de quatuor riſcis & ciſtis, Anglicè* cheſts and coffers is good, becauſe *ſynonyma*, *P.* 40 *Eliz. Drecot & Henſhaw*; regularly the ſame certainty is required in an indictment for goods, as in treſpaſs for goods, and rather more certainty, for what will be a defect of certainty in a count will be much more defective in an indictment, therefore for this matter *vide* title *Count & Breve per totum.*

VI. The fact itſelf muſt be certainly ſet down in an indictment.

An

An indictment againſt *A. quòd felonicè abduxit unum equum* without ſaying *cepit & abduxit* is not good, for he might have the horſe by bailment, and then it is no felony. 13 *E.* 4. 10. *a.*

An indictment of poiſoning, wherein it is alleged, that J. S. *fidem adhibens* to the priſoner, *& neſciens potum prædictum cum veneno fore intoxicatum accepit & bibit*, and ſays not *venenum prædictum*, is not good, and ſhall not be ſupplied by the implication of other parts of the indictment. 4 *Co. Rep.* 44. *b. Vaux*'s caſe.

An indictment of rape, *quòd felonicè & carnaliter cognovit* without the word *rapuit* is not good, tho it conclude *contra formam ſtatuti.* 9 *E.* 4. 26. *a.*

An indictment, that A. *exoneravit quoddam tormentum, &c. verſus* B. *dans ei unam mortalem plagam* without ſaying *percuſſit*, is not good. 5 *Co. Rep. Long*'s caſe 122. *a.*

So if it be *dedit mortalem plagam* without *percuſſit* it is not good. *P.* 9 *Jac. B. R. Bulſtrode*'s *Rep. p.* 124.

For burglary, the offenſe muſt be *fregit & intravit.*

VII. The offenſe itſelf muſt be alleged, and the manner of it (*p*).

An indictment of felony muſt always allege the fact to be done *felonicè*; an indictment of burglary muſt lay the offenſe to be *felonicè & burglariter fregit & intravit*; an offenſe of high treaſon muſt be laid to be done *proditoriè*; petit treaſon *felonicè & proditoriè*, for tho he be acquitted of the petit treaſon, he may be convict of the manſlaughter or murder.

A. is indicted, that *furatus eſt unum equum*, it is but a treſpaſs for want of the word *felonicè. Stamf. P. C. p.* 96. *a.*

If *A.* be indicted, *quòd* 1 Decemb. *anno, &c. apud, &c. felonicè & ex malitiâ ſuâ præcogitatâ in & ſuper* B. *inſultum fecit, & cum quodam gladio, &c. adtunc & ibidem percuſſit, & dedit eidem* B. *mortalem plagam, &c.* whereof he died, the firſt *felonicè & ex malitiâ ſuâ præcogitatâ* applied to the aſ-

4 ſault

(*p*) This ſhould have been the 5th head according to our author's diviſion at the beginning of this chapter, but our author has here tranſpoſed it, and added a new fifth head *touching the thing wherein the offenſe is committed*, which makes the number of general heads in this chapter eight inſtead of ſeven.

ſault runs alſo to the ſtroke; 1. becauſe placed in the beginning of the ſentence; 2. becauſe done *adtunc & ibidem.*

An indictment of murder or manſlaughter hath theſe certainties and requiſites to be added to it more than other indictments, for it muſt not be only *felonicè*, and aſcertain the time of the act done, but muſt alſo

1. Declare how, and with what it was done, namely *cum quodam gladio, &c.*

Yet if the party were kild with another weapon, it maintains the indictment, but if it were with another kind of death, as *poiſoning*, or *ſtrangling*, it doth not maintain the indictment upon evidence. 2 *Co. Inſt.* 319. *Co. P. C. p.* 48.

And if *A.* and *B.* are indicted for murder, and it is laid, that *A.* gave the ſtroke, and *B.* was preſent, aiding and abetting, yet if it fall out upon evidence, that *B.* gave the ſtroke, and *A.* was preſent, aiding and abetting, it maintains the indictment. 9 *Co. Rep. Sanchar*'s caſe (*q*).

So if *A.* be indicted for poiſoning of *B.* it muſt allege the kind of poiſon, but if he poiſoned *B.* with another kind of poiſoning, yet it maintains the indictment, for the kind of death is the ſame.

2. He muſt ſhew in what hand he held his ſword.

If an indictment runs thus, that *cum quodam gladio, quem in dextrâ ſuâ tenuit, percuſſit*, without ſaying *in dextrâ manu*, for this cauſe an indictment was quaſhed. *P.* 44 *Eliz. B. R. Cuppledick*'s caſe.

3. Regularly it ought to ſet down the price of the ſword or other weapon, or elſe ſay *nullius valoris*, for the weapon is a deodand forfeited to the king, and the townſhip ſhall be charged for the value, if deliverd to them.

But this ſeems not to be eſſential to the indictment.

4. It ought to ſhew in what part of the body he was wounded, and therefore if it be *ſuper brachium*, or *manum*, or *latus* without ſaying whether right or left, it is not good. 5 *Co. Rep.* 121. *b. Long*'s caſe.

(*q*) 9 *Co.* 119. *a.* all that this caſe proves is only, that if a man be indicted as acceſſary to two, and he be found guilty as acceſſary to one, the verdict is good.

So if it be *in ſiniſtro bracio*, where it ſhould be *brachio*, it is not good, becauſe inſenſible. *T.* 31 *Eliz. B. R. Webſter*'s caſe.

So if the wound be laid *circiter pectus*, it is not good. *T.* 29 *Eliz. Clenche*'s *Rep.* 10. *Super partes poſteriores corporis* not good. *H.* 23 *Car.* 1. *B. R. Savage*'s caſe (*r*).

But *ſuper faciem*, or *caput*, or *ſuper dextram partem corporis*, or *in infimâ parte ventris* are certain enough. *Long*'s caſe, 5 *Co. Rep.* 121. *b.*

5. Regularly the length and depth of the wound is to be ſhewed, but this is not neceſſary in all caſes, as namely where a limb is cut off, 4 *Co. Rep.* 42. *a. Haydon*'s caſe; ſo it may be alſo a dry blow, and *plagâ* is applicable to a bruiſe or a wound.

But tho the manner and place of the hurt and its nature be requiſite, as to the formality of the indictment, and it is fit to be done, as near the truth, as may be, yet if upon evidence it appear to be another kind of wound in another place, if the party died of it, it is ſufficient to maintain the indictment.

6. It is uſual to allege the party ſtricken to have been *in pace Dei & domini regis*, but not neceſſary to be inſerted. 4 *Co. Rep.* 41. *b. Haydon*'s caſe.

7. It is neceſſary to allege in fact, that the party wounded died of that wound, and alſo the time and place, as well of the death as of the wound given, that it may appear, that he died within the year and day of that wound, as *de quâ quidem plagâ idem* J. S. *adtunc & ibidem inſtanter obiit*, or *de quâ quidem plagâ mortali idem* J. S. *languebat, & languidus vixit uſque talem diem anno ſupradicto, quo quidem die idem* J. S. *de plagâ mortali prædictâ obiit.*

Altho as well in the indictment of manſlaughter as murder the ſtroke is to be alleged to be *mortalis plaga*, and given *felonicè*, and in both caſes *interfecit*, yet in caſe of murder there is ſomewhat more to be laid, or otherwiſe it will amount but to an indictment of manſlaughter, and the offender ſhall have his clergy.

1 And

(*r*) *Styl.* 76.

And the ſpecial words in an indictment of murder are 1. *Ex malitiâ præcogitatâ.* 2. *Murdravit*, this word *murdravit* is a word of art, and cannot be otherwiſe expreſt, therefore *murderavit* inſtead of *murdravit* vitiates an indictment of murder. *H.* 45 *Eliz. Croke, n.* 15. *Ryle*'s caſe (*s*).

Tho *murdravit* be in the indictment, yet if it want the words *ex malitiâ ſuâ præcogitatâ*, the party ſhall have his clergy. *Dy.* 224. *b.* 11 *Co. Rep.* 37. *a.*

An indictment of treaſon for counterfeiting the king's coin ought to ſhew particularly what kind of coin, *viz. groats* or *ſhillings*. 27 *H.* 6. *Enditement* 10. but altho it is uſual to expreſs the numbers of each kind, yet it is not of abſolute neceſſity in the indictment. *M.* 38 *&* 39 *Eliz. B. R. Long*'s caſe.

An indictment of high treaſon for conſpiring the king's death ought not only to contain the compaſſing or conſpiring to do the act, but muſt alſo ſet down an overt act in purſuance of it.

As in all indictments of felony there muſt be *felonicè*, and of treaſon there muſt be *proditoriè*, ſo it muſt be laid to be done *vi & armis* at common law. *Stamf. P. C.* 94. *a.*

But the ſtatute of 37 *H.* 8. *cap.* 8. hath now made that not to be neceſſary.

And therefore *P.* 16 *Jac. B. R. Croke, n.* 2. *Hart*'s caſe (*t*) it was adjudged and affirmed in a writ of error, that an indictment of reſcue without the words *vi & armis* is good by reaſon of this ſtatute, which extends to make good indictments of felony, treaſon, or other miſdemeanors, notwithſtanding the omiſſion of *vi & armis*, as well as notwithſtanding the omiſſion of *gladiis, baculis & cultellis*, but this ſtatute extends not to declarations in treſpaſſes, ſuits between party and party, or informations for the king, but only to indictments.

VIII. Touching the concluſion of the indictment.

Upon an indictment of murder, where the ſtroke is ſuppoſed to be done at one day or place, and the death at another day or place, the concluſion ought not to be *& ſic felonicè*,

(*s*) *Cro. Eliz.* 920. (*t*) *Cro. Jac.* 473. vide *Cro. Jac.* 345.

nicè, voluntariè, & ex malitiâ ſuâ præcogitatâ prædictus J. S. *præfatum* A. B. at the day and place, where the ſtroke was given, *interfecit & murdravit*, this is not good, becauſe tho the ſtroke is the offenſe and cauſe of the death, yet it is neither murder nor manſlaughter till the party die. *M.* 32 & 33 *Eliz. B. R. Croke, n.* 13. *Foſter*'s caſe (*u*).

But if it ſuppoſe the murder or manſlaughter to be where the party died, this is good, for then and not before it is murder. 4 *Co. Rep.* 41. *b. Haydon*'s caſe.

But the beſt way is *& ſic præfatus* A. *ipſum* B. *&c. modo & formâ prædictis interfecit & murdravit.* 4 *Co. Rep.* 42. *b. Haydon*'s caſe.

But if the concluſion be *& ſic præfatum* B. *apud* C. (where the ſtroke only was given) *modo & formâ prædict' interfecit & murdravit*, it is not good, for it is repugnant. *M.* 32 & 33 *Eliz. B. R. Croke, n.* 13. *Foſter* and *Hume.*

And if in the ſame caſe the concluſion be only *& ſic die & loco prædictis interfecit & murdravit*, it is doubtful whether it be good, becauſe one time and place is alleged for the ſtroke, another for the death, and (*prædictis*) may refer to either. *H.* 42 *Eliz. B. R. Croke, n.* 12. *Wingfield*'s caſe (*x*).

Regularly every indictment ought to conclude *contra pacem domini regis*, for that is not taken away by the ſtatute of 37 *H.* 8. *cap.* 8.

And therefore an indictment without concluding *contra pacem, &c.* is inſufficient, tho it be but for uſing a trade not being an apprentice. *H.* 23 *Car.* 1. *B. R.* for every offenſe againſt a ſtatute is *contra pacem*, and ought ſo to be laid.

But an indictment need not conclude, *& contra coronam & dignitatem ejus*, tho it be uſual in many indictments. *M.* 23 *Car. B. R.*

An indictment, that concludes *contra pacem*, and ſaith not *domini regis*, is inſufficient. *M.* 23 *Car.* 1. adjudged.

If *A.* be indicted for an offenſe ſuppoſed to be committed in the time of a former king, and concludes *contra pacem domini regis nunc*, it is inſufficient, for it muſt be

1 ſuppoſed

(*u*) *Cro. El.* 196. 4 *Co.* 42. *b.* by the name of *Hume* and *Ogle.* (*x*) *Cro. El.* 739.

ſuppoſed to be done *contra pacem* of that king, in whoſe time it was committed.

But if a man be indicted in the time of one king *contra pacem domini regis nunc*, he may be arraigned for that offenſe in the time of his ſucceſſor. 1 *E.* 6. *B. Corone* 178. *Enditement* 44. neither is the indictment itſelf diſcontinued by the demiſe of the king, tho in ſome caſes the proceſs be. 7 *Co. Rep.* 30, 31.

If an offenſe be ſuppoſed to be begun in the time of one king, and continued in the time of his ſucceſſor, (as a nuſance,) it muſt conclude *contra pacem* of both kings, or elſe it is inſufficient. *T.* 3 *Jac. B. R. Yelverton*'s *Rep.* 66. Sir *John Winter*'s caſe.

If an offenſe be alleged in the time of Q. *Eliz.* and the indictment taken in the time of K. *James*, and concludes *contra pacem nuper reginæ & domini regis nunc*, it ſeems good, and *domini regis nunc* but ſurpluſage, as well as in a count in treſpaſs. *M.* 13 *Jac. Croke*, *n.* 3. *Cottington* and *Wilkins*, (*z*) *quære.*

Touching the concluſion *contra formam ſtatuti*, ſomewhat hath been ſaid in the laſt chapter; I ſhall add ſome things more.

If an offenſe be newly enacted, or made an offenſe of an higher nature by act of parliament, the indictment muſt conclude *contra formam ſtatuti*, as an indictment for buggery, tranſporting of wool, *&c.*

Rape, tho before the ſtatute of *Weſtminſter* 2. it was a treſpaſs, yet being made felony by that ſtatute, the indictment ought to conclude *contra formam ſtatuti.* 6 *H.* 7. 5. *a.*

If an offenſe were high treaſon, *&c.* at the common law, and a declarative act of parliament declares it ſo, as the ſtatute of 25 *E.* 3. *de proditionibus*, the ſtatute of 3 *H.* 5. of clipping the coin, *&c.* till repealed by 1 *Mar.* the indictment is good with a concluſion *contra formam ſtatuti*, or without ſuch a concluſion.

But at this day the indictment for clipping, waſhing, *&c.* of coin enacted to be treaſon by the ſtatutes of 5 *&* 18

(*z*) *Cro. Jac.* 377.

Eliz. muſt not only expreſs, as the ſtatute requires, that it was (*cauſa lucri,*) but muſt conclude *contra formam ſtatuti.*

If an offenſe were felony at common law, but a ſpecial act of parliament ouſts the offender of ſome benefit, (that the common law allowd him,) when certain circumſtances are in the fact, tho the body of ſuch indictment muſt expreſs thoſe circumſtances according as they are preſcribed in the ſtatute, yet the indictment muſt not conclude, *contra formam ſtatuti.*

Thus the ſtatute of 21 *Jac. cap.* 27. concerning murdering of baſtard children requires proof by one witneſs, that the child was dead born, the indictment muſt ſhew, that it was a baſtard child, to bring the offender within that ſtatute, but concludes not *contra formam ſtatuti.*

So by the ſtatute of 8 *Eliz. cap.* 4. in caſes of pickpockets, 39 *Eliz. cap.* 15. breaking houſes in the day-time, and ſtealing to the value of 5 *s.* the ſtatute of 23 *H.* 8. *cap.* 1. in caſes of petit treaſon, wilful murder of malice prepenſe, robbing in or near the highway, 18 *Eliz. cap.* 7. in caſe of burglary, the ſtatute of 4 *&* 5 *P. & M. cap.* 4. in caſe of malicious commanding, *&c.* any perſon to commit murder, robbery, wilful burning, the offenders are ouſted of their clergy; the body of the indictment muſt bring them within the expreſs purview of the ſtatutes, or otherwiſe they ſhall have the benefit of clergy, but it need not conclude *contra formam ſtatuti*, neither is it uſual in ſuch caſes, for they were felonies before, and the ſtatutes do not give them a new puniſhment, nor make them to be crimes of another nature, but only in certain caſes take away clergy.

But yet, if they ſhould conclude in theſe caſes *contra formam ſtatuti*, it would not vitiate the indictment, but would be only ſurpluſage, for tho the ſtatutes do not give a new penalty, yet they take away an old privilege, when the caſe falls within the circumſtances mentiond by the act.

Upon the ſtatute of 1 *Jac. cap.* 8. ouſting perſons of clergy in caſe of ſtabbing, the other party not having a

weapon

weapon drawn, nor ſtricken firſt, I have known it held it is ſufficient, that the indictment bring the fact within the purview of the ſtatute, tho it conclude not *contra formam ſtatuti*, becauſe it was felony before, and the ſtatute only takes away clergy. *H.* 23 *Car.* 1. *Page* and *Harwood* (*a*).

Yet the uſual courſe at this day is to conclude ſuch an indictment *contra formam ſtatuti*, and accordingly it hath been ruled good. *T.* 9 *Jac. B. R. Croke*, *n.* 4. *Bradley* and *Banks*, but it is not there queſtiond but that it may be good without it, ſo that in theſe caſes, where clergy is ſpecially ouſted by an act of parliament, the indictment is good with this concluſion or without it, but the beſt way in theſe caſes is to follow what is moſt uſual.

If an offenſe be at common law, and alſo prohibited by ſtatutes, the indictment may conclude *contra formam ſtatuti* or *ſtatutorum*; thus in barretry, tho there be no direct ſtatute againſt it by that name, yet the general tenor of the ſeveral acts running againſt it by circumlocutions, the indictment concluding *contra formam ſtatuti*, or *diverſorum ſtatutorum* is good, and it is the uſual form. *M.* 31 & 32 *Eliz. B. R. Croke*, *n.* 14. *Burton*'s caſe (*b*), *H.* 9 *Car.* 1. *B. R. Chapman*'s caſe (*c*), but it muſt conclude alſo *contra pacem*, *M.* 6 *Car. B. R. Periam*'s caſe (*d*).

If an offenſe be at common law, and alſo prohibited by ſtatute, with a corporal or other penalty, yet it ſeems the party may be indicted at common law, and then, tho it conclude not *contra formam ſtatuti*, it ſtands as an indictment at common law, and can receive only the penalty, that the common law inflicts in that caſe.

Thus an indictment for a riot is good, tho it conclude not *contra formam ſtatuti*, becauſe an offenſe at common law, tho prohibited alſo by acts of parliament under ſeverer penalties. *P.* 5 *Jac. B. R. Wormall*'s caſe (*e*).

So it ſeems, if perjury be committed, that is within the ſtatute of 5 *Eliz. cap.* 9. but concludes not *contra formam ſtatuti*,

(*a*) *Aleyn* 43. *Styl.* 86.
(*b*) *Cro. Eliz.* 148.
(*c*) *Cro. Car.* 340.
(*d*) 2 *R. A.* 82. *pl.* 5.
(*e*) 2 *R. A. p.* 82. *pl.* 4.

tuti, yet it is a good indictment at common law, but not to bring him within the corporal puniſhment of the ſtatute.

And yet *Mich.* 10 *Jac. B. R.* an indictment of forceable entry upon the ſtatute of 8 *H.* 6. *cap.* 9. and *Mich.* 9 *Car.* 1. *B. R.* an indictment for forgery quaſhed for not concluding *contra formam ſtatuti*, *Smith*'s caſe (*f*); yet both theſe were offenſes at common law, tho reſtitution were not at common law in the firſt caſe, nor pillory and loſs of ears in the ſecond, but only fine and impriſonment, or at moſt ſtanding in the pillory, but without mutilation.

Regularly, if a ſtatute only make an offenſe, or alter an offenſe from one crime to another, as making a bare miſdemeanor to become a felony, the indictment for ſuch new made offenſe, or new made felony muſt conclude *contra formam ſtatuti*, or otherwiſe it is inſufficient.

And on the other ſide, if an offenſe be purely at common law, if it conclude *contra formam ſtatuti*, it is inſufficient, and ſhall be quaſhed, except in the inſtance above given touching clergy, *de quo ſupra.*

And therefore an indictment of battery concluding *contra formam ſtatuti* is inſufficient, and ſhall be quaſhed. *T.* 12 *Car. B. R. Croke*, *n.* 2. *Cholmley*'s caſe (*g*).

Theſe general obſervations I ſhall add touching indictments upon ſtatutes, and concluding *contra formam ſtatuti.*

Altho an indictment grounded upon a ſtatute muſt conclude *contra formam ſtatuti*, yet it is not neceſſary to recite the ſtatute in the indictment, unleſs it be a private ſtatute, whereof the court cannot take notice. *Plo. Com.* 79. *b. Patridge*'s caſe. *Dy.* 347. *a.* 363. *a.*

Altho it need not recite a general penal ſtatute, yet it muſt bring the fact within the expreſs prohibition of the ſtatute, otherwiſe the concluſion *contra formam ſtatuti*, and the implication thereof will not aid the indictment, but it will be inſufficient, 9 *E.* 4. 26. *b.* As in an indictment in a *premunire* for aiding one being a principal maintainer of the juriſdiction of the ſee of *Rome contra formam ſtatuti*, yet theſe words being omitted *to the intent to ſet forth the authority*, &c.

I which

(*f*) 2 *R. A.* 82: *pl.* 3. (*g*) *Cro. Car.* 465.

which are part of the qualification of the offenſe containd in the ſtatute, the indictment is inſufficient, and not aided by the concluſion *contra formam ſtatuti.* *T.* 20 *Eliz. Dy.* 363. *a. ibid.* 347. *a.* ſo an indictment upon the ſtatute of 1 *Jac. cap.* 12. of witchcraft, if *A.* be indicted, that *exercuit incantationem, anglicè* witchcraft *contra formam ſtatuti,* without ſaying, that thereby any perſon was pined, lamed, *&c.* in his body, it is inſufficient, becauſe that is a circumſtance required to make it felony; but if the indictment be, that *exercuit, anglicè* did imploy *malos & nefarios ſpiritus eâ intentione* to deſtroy *J. S.* this is good, tho no other event enſues, for the bare imployment of evil ſpirits to or for any intent is felony. *T.* 24 *Car.* 1. *B. R.* upon an indictment removed from *St. Edmnds-Bury.*

And thus far touching the forms of indictments, wherein generally we are to take notice, 1. That none of the ſtatutes of jeofails extend to indictments, and therefore a defective indictment is not aided by verdict.

2. That in favour of life great ſtrictneſſes have been in all times required in points of indictments, and the truth is, that it is grown to be a blemiſh and inconvenience in the law, and the adminiſtration thereof; more offenders eſcape by the over eaſy ear given to exceptions in indictments, than by their own innocence, and many times groſs murders, burglaries, robberies, and other heinous and crying offenſes eſcape by theſe unſeemly niceties to the reproach of the law, to the ſhame of the government, and to the encouragement of villany, and to the diſhonour of God. And it were very fit, that by ſome law this over-grown curioſity and nicety were reformed, which is now become the diſeaſe of the law, and will I fear in time grow mortal without ſome timely remedy (*h*).

(*h*) This advice of our author would, if complied with, be of excellent uſe, for it would not only prevent the guilty from eſcaping, but would likewiſe be a guard to innocence, for thereby would be removed the only pretenſe, upon which counſel is denied the priſoner in caſes of felony, for if no exceptions were to be allowed, but what went to the merits, there would then be no reaſon to deny that aſſiſtance in caſes, where life is concerned, which yet is allowd in every petit treſpaſs.

CHAP. XXVI.

Concerning proceſs upon indictments.

IN many caſes upon an indictment proceſs of outlawry lies not at common law, nor at this day, as in an indictment of foreſtalling, 22 *E.* 4. 11. *b.* but in an indictment of treſpaſs the proceſs is *venire facias*, and when *non inventus* is returned, *capias* and *exigent.*

But in all indictments of felony or treaſon proceſs by *capias* and *exigent* lies, and at the common law in caſe of felony or treaſon there was but one *capias*, and upon *non inventus* returned an *exigent* awarded, and ſo to the outlawry. 22 *Aſſ.* 81. 1 *H.* 5. 6. *a.*

But by the ſtatute of 25 *E.* 3. *cap.* 14. If a man be indicted before juſtices in their ſeſſions to hear and determine, and be returned *non eſt inventus* upon the *capias* iſſued, another writ of *capias* ſhall iſſue returnable three weeks after with a precept to ſeiſe his goods, and detain them till the precept returned, and if again *non inventus* be returned, then an exigent ſhall iſſue, and the goods forfeit, and if he yield himſelf upon the *capias*, then the goods ſaved.

This ſtatute extends not to treaſon, and therefore certainly in treaſon the exigent muſt iſſue upon *non inventus* returned upon the firſt *capias.*

And altho the ſtatute ſpeaks generally of felony, it ſeems that upon an indictment of murder the *exigent* ſhall iſſue after the firſt *capias*, as at common law, and accordingly in an appeal of robbery. 8 *H.* 5. 6. *b. Proceſs* 226. *Coron.* 184.

But it is ſaid, that in an indictment (or appeal) of robbery there ſhall be two *capias* in the king's bench before the exigent ſhall iſſue. 8 *H.* 5. *ubi ſupra. Stamf. P. C. Lib.* II. *cap.* 17. *fol.* 67. *a.*

But at this day the proceſs in caſe of an indictment of any felony is only one *capias*, and then an *exigent*.

For this ſtatute of 25 *E.* 3. *cap.* 14. as to the ſecond caſe is hardly applicable to the king's bench, nor indeed well to other juſtices, that ſit by commiſſion, for the ſecond *capias* is to be returned at three weeks after, which may be out of term, or after the ſeſſion of the juſtices ended; therefore *quære* the uſage.

By the ſtatute of 8 *H.* 6. *cap.* 10. upon appeals or indictments of treaſon, felony, or treſpaſs before juſtices of peace or any other having power to take ſuch indictments or appeals, or other juſtices or commiſſioners in any county or franchiſe againſt any perſon dwelling in any other county than where the indictment or appeal is taken, after the firſt *capias* another *capias* ſhall iſſue to the ſheriff of that county, wherein the party indicted is ſuppoſed to be converſant, returnable before the ſaid juſtices or commiſſioners three months after, *&c.* with a precept to the ſheriff to make proclamation at two county courts for his appearance at the day of the return, and then the *exigent* to iſſue upon his default, and in caſe any *exigent* be awarded, or outlawry pronounced, otherwiſe to be holden for none.

But if the party were converſant in the county, where he is indicted at the time of the felony or treaſon committed, the proceſs to be, as was at common law.

A *proviſo* not to extend to the king's bench nor *Cheſter*.

By the ſtatute of 10 *H.* 6. *cap.* 6. the ſame proceſs is directed upon indictments of felony or treaſon removed into the king's bench by *certiorari*, or into any other courts.

But as to indictments of felony or treaſon originally taken in the king's bench, they are not within theſe ſtatutes, but by the ſtatute of 6 *H.* 6. *cap.* 1. there is ſpecial proviſion made, that before any *exigent* awarded the court ſhall iſſue a *capias* to the ſheriff of the county, where the indictment is taken, and another to the ſheriff of that county, whereof he is named in the indictment, having ſix weeks time or more before the return, and after theſe writs returned the *exigent* to iſſue as before.

Upon

Upon theſe ſtatutes little effect hath been obtaind, for if the party were converſant in the county, where the felony or treaſon was committed, (as indeed he cannot be otherwiſe,) then he may be named of that place, where the fact was committed in the indictment, and then the proceſs is to go, as at common law before the ſtatutes, and this is the uſual courſe at this day, that if the felony be committed in *A.* in the county of *B.* the indictment runs only, *quòd* J. S. *nuper de* A. *in com'* B. *prædict'* (where the indictment is taken.)

And upon the ſame reaſon it is, if *J. S.* be indicted in the county of *B.* for a felony there committed, and the indictment runs thus: J. S. *nuper de* A. *in com'* B. *aliàs* J. S. *nuper de* D. *in com'* S. there ſhall no proceſs go to the ſheriff of *S.* becauſe that addition is only in the *aliàs dictus*, which is neither material nor traverſable, and therefore proceſs ſhall iſſue only in the county of *B.* where he is indicted, and no *capias* with proclamation in the county of *S.* and the ſame law in an appeal. 1 *E.* 4. 1. *a.*

If *J. S.* be indicted in the county of *B.* in this manner; J. S. *de* A. *in com'* B. *nuper de* C. *in com'* D. the *capias* ſhall iſſue only in the county of *B.* for there the indictment ſuppoſeth him actually converſant at the taking of the indictment, but if the indictment runs thus; J. S. *nuper de* A. *in com'* B. *nuper de* C. *in com'* D. in this caſe there ſhall go a *capias* not only into the county of *B.* where he is indicted, but upon the return thereof, (if it be before commiſſioners,) a *capias* with proclamations to the ſheriff of *D.* and (if in the king's bench upon an indictment originally found there,) one *capias* to one ſheriff, and another to the other ſheriff according to the ſtatutes of 8, 10 and 6 *Hen.* 6. abovenamed, becauſe he is not named *de* A. in *com'* B. but *nuper de* A. *in com'* B. and *nuper de* C. *in com'* D. and not with an *aliàs dictus*, as in the former caſe. 30 *H.* 6. *Proceſs* 192 (*b*).

If a man be indicted by the name of *J. S. nuper de* A. *in com' Ceſtriæ*, the ſecond *capias* with proclamation ſhall be awarded to the prince or his lieutenant, 31 *H.* 6. 11. and

4 the

(*b*) And *Proceſs* 103.

the like to the biſhop of *Durham*, or chancellor of *Lancaſter*.

There was a very ſharp, yet uſeful ſtatute, 2 *H.* 5. *cap.* 9. " If any perſon make complaint in the chancery of any " felony or riot committed, and that the offender fly or " withdraw himſelf to the intent to avoid execution of the " common law, a bill thereof ſhall be made for the king, " and deliverd to the chancellor, who, (if he be duly in- " formed, that ſuch bill containeth truth,) ſhall at his diſ- " cretion grant a *capias* to the ſheriff of the county, where " the offenſe is committed, returnable in chancery at a cer- " tain day, and if the perſons yield themſelves to the ſhe- " riff, they ſhall be committed or baild, as the caſe ſhall " require, and it ſhall be commanded to inquire of the fact, " and thereupon to be done, as the law requireth; but if " they appear not, then a writ of proclamation to iſſue to " the ſheriff returnable in the king's bench, by which it " ſhall be commanded, that he make proclamation in two " counties, that the parties appear in the king's bench to " anſwer the matters in the bill (the ſubſtance whereof is " to be recited in the writ,) upon pain to be convict of the " offenſe, and if they come not at the day, to ſtand at- " taint, and if they come then, the fact to be inquired of " as above.

" Provided that the ſuggeſtion of ſuch riots be teſtified " to the chancellor under the ſeals of two juſtices of the " peace and the ſheriff of the county before the *capias* " granted, the ſubſtance of the complaint to be expreſt in " the writ of *capias*, and alſo in the writ of proclamation". Like proviſion for the county palatines.

This is marked as an obſolete ſtatute, but I know no act of parliament that repeals it, unleſs it be the implication of the ſtatute of 16 *Car.* 1. *cap.* 10. which yet ſeems not to extend to the repeal of theſe ſtatutes, for the chancellor hath no power to hear and determine the offenſes, but only to grant preparatory proceſs to bring them in to anſwer according to law, for they are to be proceeded againſt by indictment, if they appear.

Yet this ſtatute hath not been, that I know of, put in ure. 1. Becauſe it ſeems doubtful, whether it extends to murders or robberies, unleſs accompanied with a riot. 2. Becauſe it is left to the diſcretion of the chancellor to iſſue the proceſs. 3. Becauſe ſo many things previous to the proceſs are required, as bill, certificates, probable evidence. 4. Becauſe it takes up ſo much delay, that they may as ſoon be taken up by the ordinary way of indictment and proceſs of outlawry. 5. And eſpecially, becauſe in ſuch caſe the warrant of the chief juſtice or any other judge of the king's bench, upon oath made touching the offenſe and the offenders, reacheth all parts of *England*. 6. Becauſe it is ſo ſevere, for an innocent perſon may be convicted upon default of appearance, and yet have had no notice; but in caſe of an outlawry, tho it be an attainder in itſelf, yet ſmall exceptions are commonly allowd to the proceſs or return, and ſo by writ of error uſually and eaſily reverſible, and the party put to plead to the indictment.

But certainly it might be of great uſe to bring in and puniſh notorious offenders, if iſſued diſcreetly and upon great occaſions, provided the parties were firſt indicted by the grand inqueſt.

Now, for the farther declaring the buſineſs of proceſs upon indictments of felony theſe points are conſiderable. 1. Who may iſſue proceſs of outlawry. 2. Againſt whom it is to be iſſued in relation to principals and acceſſaries. 3. What the tenor of the *exigent* and outlawry. 4. What the effect or conſequence of either. 5. How avoided either by diſcontinuance, *ſuperſedeas*, or error.

I. As to the firſt of theſe, namely, who may iſſue proceſs by *capias* and *exigent*.

The court of king's bench either upon an indictment originally taken before them, or removed thither by *certiorari* may iſſue proceſs of *capias* and *exigent* into any county of *England* upon a *non eſt inventus* returned by the ſheriff of the county, where he is indicted, and a *teſtatum*, that he is in ſome other county.

Juſtices of gaol-delivery regularly cannot iſſue a *capias* or *exigent*, becauſe their commiſſion is to deliver the gaol *de priſonibus in eâ exiſtentibus*, ſo that thoſe, whom they have to do with, are always intended in cuſtody already; *vide ſupra cap.* 5.

Juſtices of *oyer* and *terminer* may iſſue a *capias* or *exigent*, and ſo proceed to the outlawry of any perſon indicted before them, directed to the ſheriff of the ſame county, where they hold their ſeſſion at common law.

But by the ſtatute of 5 *E.* 3. *cap.* 11. they may iſſue proceſs of *capias* and *exigent* to all the counties of *England* againſt perſons indicted or outlawed of felony before them.

Juſtices of peace may make out proceſs of outlawry upon indictments taken before themſelves, or upon indictments taken before the ſheriff, and returned to the juſtices of peace by the ſtatute of 1 *E.* 4. *cap.* 1. but the power of the ſheriff to make any proceſs upon indictments taken before him is taken away by that ſtatute.

The proceſs to the outlawry, *viz.* the *capias* and *exigent* muſt be in the king's name, and under the judicial ſeal of the king appointed to that court, that iſſues the proceſs, and with the *teſte* of the chief juſtice, or chief judge of that court or ſeſſions.

A man is indicted by inquiſition before the coroner, *quære*, if he can by law make out proceſs of outlawry; *videtur quòd ſic.* 27 *Aſſiz.* 47. *B. Outlawry* 38.

II. Againſt whom proceſs of outlawry ſhall iſſue upon an indictment.

Altho in civil actions between party and party regularly a *capias* or *exigent* lies not againſt a lord of parliament of *England*, whether ſecular or eccleſiaſtical, yet in caſe of an indictment for treaſon or felony, yea, or but for a treſpaſs *vi & armis*, as an aſſault or riot, proceſs of outlawry ſhall iſſue againſt a peer of the realm, for the ſuit is for the king, and the offenſe is a contempt againſt him: And therefore, if a reſcue be returned againſt a peer, 1 *H.* 5. or if a peer of parliament be convict of a diſſeiſin with force, *H.* 32 *Eliz.*

B. R.

B. R. *Croke, n.* 9. Lord *Stafford*'s caſe (*i*), or denies his deed, and it be found againſt him, *M.* 38 & 39 *Eliz. B. R. Croke, n.* 26. the earl of *Lincoln*'s caſe (*k*), a *capias pro fine* and *exigent* ſhall iſſue, for the king is to have a fine, and the ſame reaſon is upon an indictment of treſpaſs or riot, and much more in the caſe of felony.

In an appeal by writ againſt principal and acceſſary, becauſe the writ is general and diſtinguiſheth not which is principal and which acceſſary, the proceſs by *capias* ſhall go againſt them all, but if the defendants make default, the plaintiff in the appeal ought to declare, which is principal and which acceſſary before the *exigent* iſſue, and then the *exigent* ſhall go only againſt the principal, and if he diſtinguiſheth it not, but prays an *exigent* againſt all, he is concluded to charge any as acceſſary.

But in an appeal by bill or an indictment the bill or indictment declares, which is principal and which acceſſary, and there indeed the proceſs by *capias* is againſt them all, but when it comes to the *exigent*, the *exigent* ſhall iſſue only againſt the principal, and proceſs continue by *capias infinite* againſt the acceſſary, till the principal be outlawd, and then an *exigent* to iſſue againſt the acceſſary, becauſe then the principal is attaint by outlawry; and if the acceſſary appear upon the *capias*, he ſhall be let to bail, and have *idem dies* by bail till the proceſs be determind againſt the principal, and this was the common law, but farther ſettled by the ſtatute of *Weſtm.* 1. *cap.* 14. 2 *Co. Inſt. p.* 183. and *Stamf. P. C. Lib.* II. *cap.* 17. *fol.* 69 & 70.

If *A.* and *B.* be indicted as principals in felony, and *C.* as acceſſary to them both, the *exigent* againſt the acceſſary ſhall ſtay as before, till both be attainted by outlawry or plea. 40 *Aſſiz.* 25. & 7 *H.* 4. 36. *b.* for it is ſaid, if one be acquitted, the acceſſary is diſcharged, becauſe indicted as acceſſary to both, and therefore ſhall not be put to anſwer till both be attaint. 2 *Co. Inſt.* 183. *Plowd. Com.* 99. *b. dubitatur*; for tho *C.* be acceſſary to both, he might have been indicted

as

(*i*) *Cro. Eliz.* 170. (*k*) *Cro. Eliz.* 503.

as acceſſary to one, becauſe the felonies are in law ſeveral, but if he be indicted as acceſſary to both, he muſt be prov'd ſo. 4 *Co. Rep.* 44. *b. Vauxe*'s caſe, 47. *b. Waite*'s caſe, 2 *Co. Inſt. ubi ſupra*; but *vide* 9 *Co. Rep.* 119. *a.* lord *Sanchar*'s caſe *contra per totam Curiam.*

Nota the diverſity ſeems to be between an acceſſary to two principals in an appeal, there he ſhall not be convict, if he be only acceſſary to one; but if *A.* and *B.* be indicted as principals, and *C.* be indicted as acceſſary to both, if he be found acceſſary to one, he ſhall be convicted, becauſe the king's ſuit; *quære*, 8 *H.* 5. 6. *b.* 9 *Co. Rep.* 119. *a.* lord *Sanchar*'s caſe (*).

III. As to the writ of *exigi facias*, and the return thereof.

If the defendant render himſelf to the ſheriff before the *quinto exactus*, and appear in court at the return of the *exigent* and plead, and is baild to attend the trial, and then make default, the inqueſt ſhall not be taken by default in any caſe of felony, either upon an indictment or an appeal, tho it may in other caſes, but a new *capias*, and after that an *exigent* ſhall iſſue, and a *capias* againſt the bail. 19 *E.* 3. *Exigent* 10.

If an *exigi facias* be deliverd to the ſheriff, and there are but two county-courts before the return, and the ſheriff return the firſt and ſecond *exactus & non comparuit*, and that there were no more county-days between the delivery of the writ to him and the day of the return, there may iſſue a ſpecial *exigi facias* with an *allocato comitatu*, if it be prayd, after the return, and before any new county-day be paſt, but if any county-day be paſt between the laſt of the former county-days and the return, no *exigi facias* ſhall iſſue with an *allocato comitatu*, but an *exigi facias de novo*, for the demand of the party muſt be at five county-courts ſucceſſively held one after another without any county-court intervening, 22 *E.* 3. 11. *a.* ſo if after the ſecond *exactus* the offender render himſelf and find mainpriſe, and at the day of the return make default, no *exigi facias* with an *allocato comitatu* ſhall iſſue, becauſe three county-days intervened, but

(*) *Vide ſupra*, Part I. *p.* 624.

a new *exigent* and a *capias* againſt the bail. 22 *E.* 3. *ubi ſupra*, and 32 *E.* 3. *Exigent* 14.

And therefore in *London*, where the holding of the huſtings is uncertain, no *exigi facias* ſhall iſſue with an *allocato huſting*, becauſe the court cannot take notice of the ſet times of holding it, as they may of the times of holding the county-court. 21 *E.* 3. 35. *b.* 17 *E.* 3. 43. *b.* *Exigent* 11. but *vide contrarium* at this day an *allocato* huſting, *H.* 19 *Jac. B. R. Archer* and *Dalby* (*l*), where it was agreed, that if an *exigent* iſſues in *London*, and they begin in huſting *de placito terræ*, (as they may) they ſhall proceed along at that huſtings to the outlawry without mingling their huſtings *de communibus placitis*, but if an *allocato huſting* comes, they ſhall proceed without omitting any huſting.

If the offender appear at the *capias* and plead to iſſue, and is then let to bail to attend his trial, and then make default, the inqueſt in caſe of felony ſhall never be taken by default, but a *capias ad audiendam juratam* ſhall iſſue, and if he be not taken an *exigent*, *vide* 26 *Aſſ.* 51. *Coron.* 196. and if he appeard upon the *exigent* and then made default, an *exigi facias de novo* ſhall iſſue. 16 *Aſſ.* 13.

But, if upon the *capias* or *exigent* the ſheriff return *cepi corpus*, and at the day hath not his body, the ſheriff ſhall be puniſhed, but no new *exigent* awarded, becauſe in cuſtody of record. 30 *Aſſiz.* 23. but if the party be returned outlawd, the proceſs thereupon is a *capias utlegatum*.

And that I may ſay is once for all, as well this proceſs of *capias utlegatum* as all other proceſs upon an indictment, and generally all proceſs for the king are with a *non omittas propter aliquam libertatem*.

And therefore by virtue of theſe proceſſes the ſheriff may enter into any liberty to execute the ſame.

And if the party be in his own houſe, or in the houſe of any other, if the doors be ſhut, and the ſheriff having given notice of his proceſs demand admittance and the doors be not opend, he may break open the doors and enter to take the offender. 5 *Co. Rep.* 91. *b.* *Semayne*'s caſe, *& libros ibidem.*

2 Nay

(*l*) *Palm.* 278.

Nay farther, if a party outlawd be in a houſe, and the door be refuſed to be opend, the conſtable or any other perſon in purſuit of the felon may break open the doors and apprehend a perſon outlawed or indicted of felony.

The return of the outlawry muſt be certain.

It muſt ſhew where the county-court was held, and in what county, therefore *ad comitatum meum* S. *tent. apud* C. and ſays not *in comitatu prædicto* or *in com'* S. is erronious. 11 *H.* 7. 10. *a. dubitatur.*

The like if it be *ad comitatum meum tentum apud* S. *in com'* Somers', and ſays not *ad comitatum meum* Somers', or *ad comitatum* Somers' without ſaying *ad comitatum meum* Somerſet. *P.* 7 *Jac. B. R.* adjudged, *Whiting*'s caſe (*m*). 6 *H.* 7. 15. *b.* 11 *H.* 7. 10. *a.*

And yet in that caſe at the deſire of the king's attorney, in caſe of an outlawry of felony a *certiorari* iſſued to the coroners to certify the truth, and thereupon the return was amended according to a like precedent in the time of *E.* 4. *T.* 3 *Car. B. R. Plum*'s caſe (*n*).

The ſheriff muſt return the day and year of the king to every *exactus.*

If the day and year of the king be inſerted in the 1, 2, 3 and 5 *exactus*, but omitted in the 4th *exactus*, it is erronious, and ſhall not be ſupplied by intendment. *M.* 14 *Jac. B. R. Chapman*'s caſe adjudged (*o*).

So if it be *anno regni dominæ reginæ* without ſaying *Elizabethæ*, or *dominæ Elizabethæ* without ſaying *reginæ*. *P.* 7 *Jac. C. B. Burford*'s caſe (*p*) and *Brandling*'s caſe (*q*), or *anno regni domini regis Jacobi* without ſaying *regni ſui Angliæ*, for the year of *England* and *Scotland* differ. *H.* 7 *Jac. Pen*'s caſe (*r*), ſo if there be leſs than a month between the firſt and ſecond *exactus*. *H.* 13 *Jac. B. R. Taverner*'s caſe (*s*).

Ad huſting tent' apud Guildhall civitatis London without ſaying *de communibus placitis* is erronious, becauſe they have two

(*m*) 2 *R. A. p.* 802. *pl.* 2.
(*n*) *Palm.* 480. *Latch* 210.
(*o*) 2 *R. A. p.* 803. *pl.* 1.
(*p*) 2 *R. A. p.* 802. *pl.* 6.
(*q*) *Ibid. p.* 802. *pl.* 7.
(*r*) *Ibid. p.* 802. *pl.* 8.
(*s*) *Ibid. p.* 802. *pl.* 5.

two huſtings, one *de communibus placitis*, another *de placitis terræ*. 6 H. 7. 15. b. 11 H. 7. 10. *a.*

So if an *exigent* be againſt *A. and B.* and the return is *primo exacti fuerunt & non comparuerunt* without ſaying *nec eorum aliquis comparuit*, it is erronious. *H.* 13 *Jac. B. R. Taverner*'s caſe adjudged (*t*), *& ſæpius alibi.*

If there be two coroners in a county, the calling upon the *exigent* may be by one of them, and likewiſe one alone may give the judgment of outlawry. 14 *H.* 4. 34. *b. per Hankf.* 39 *H.* 6. 40. *b.*

But it ſeems the return muſt be by two in miniſterial acts. 14 *H.* 4. 34. *b.* 39 *H.* 6. 40. *b.*

The name of the coroner muſt be ſubſcribed to the judgment of outlawry at the *quinto exactus*. *M.* 9 *Car. B. R. Ethrington*'s caſe upon an outlawry of felony, and it muſt be ſubſcribed alſo by the name of their office *A. B.* and *C. D. coronatores*, unleſs in *London*, where the mayor is coroner. *M.* 13 *Jac. B. R. Earle*'s caſe (*u*). *P.* 17 *Jac. Croke*, *n.* 11. *Garrard*'s caſe (*x*).

The ſheriff's name and office muſt alſo be ſubſcribed to the return of the *exigent*, *e. g. A. B. armiger*, *vicecomes.*

IV. As to the effect of the *exigent* or outlawry in treaſon or felony.

1. As to the *exigent* the very iſſuing of the writ of *exigent* in caſe of treaſon or felony gives to the king or the lord of a franchiſe, to whom that liberty is granted, the forfeiture of all the goods of the party ſo put in *exigent* from the time of the *teſte* of the writ of *exigent*. 41 *Aſſiz.* 13.

And therefore, if in an appeal the *exigent* be well awarded, tho the writ of appeal be abated, the forfeiture of the goods by the *exigent* ſtands in force. 43 *E.* 3. 17. *b. Stamf. P. C. Lib.* III. *cap.* 22. *fol.* 184. *b.*

And tho the outlawry be reverſed for error in law or in fact, as if the party were impriſond at the time of the outlawry and after the *exigent*, whereby the outlawry is re-

2 verſed

(*t*) *Ibid. p.* 802. *pl.* 1. (*u*) 2 *R. A. p.* 802. *pl.* 3 & 4. (*x*) *Cro. Jac.* 531.

verſed, yet the *exigent* being well awarded the forfeiture of the goods ſtands. 19 *E.* 3. *Forfeiture* 19. 30 *H.* 6. *ibid.* 31.

And therefore a ſpecial writ of error lies even upon the award of the *exigent* for the party ſo put in *exigent* or his executors to reverſe the award of the *exigent*, if it were erroniouſly awarded for error in law or error in fact. *M.* 33 & 34 *Eliz. B. R. Marſhe*'s caſe *adjudged*, cited in *Foxley*'s caſe, 5 *Co. Rep.* 111. *a.* but not without reverſal by writ of error. *Ibid.* As if he were in priſon, or beyond the ſea, or had a charter of pardon before the *exigent* awarded, and thereupon the very award of the *exigent* ſhall be reverſed, and the party reſtored to his goods, and ſo it is for matter of law, as if the *exigent* iſſued againſt the acceſſary before the principal attainted. *Stamf. ubi ſupra.*

But the avoiding only of the outlawry avoids not the *exigent* if well awarded, nay altho the party render himſelf after the *exigent* awarded and plead to the indictment, and is found not guilty, yet the forfeiture by the *exigent* ſtands in force. 22 *Aſſiz.* 81.

Therefore it is neceſſary for a party outlawd in felony to bring his writ of error ſpecially *tam in adjudicatione brevis de exigi facias, quàm in promulgatione utlegariæ*, for tho the outlawry be reverſed, it doth not reverſe the award of the *exigent.*

But error in the *exigent* is cauſe to reverſe the outlawry, and error in the appeal or indictment, upon which the *exigent* is awarded, is cauſe to reverſe both outlawry and *exigent.*

But without a judgment of reverſal in a writ of error the forfeiture by the *exigent* awarded ſtands, tho the indictment be quaſhed or the appeal abated, becauſe the king's title being of record muſt be avoided by a record, and ſo are the books of 41 *Aſſiz.* 13. 43 *E.* 3. 17. *b.* to be reconciled, *vide Foxley*'s caſe, *ubi ſupra.*

2. As touching the forfeiture by outlawry. Outlawry of treaſon or felony is a conviction and attainder of the offenſe charged in the indictment.

And as the award of the *exigent* gives the forfeiture of the goods, ſo the outlawry gives the forfeiture or loſs of the lands of the party outlawd, *viz.* in caſe of outlawry of treaſon his lands are forfeited to the king, of whomſoever they are held, and in caſe of outlawry of felony to the lord by eſcheat, of whom they are immediately holden.

But it muſt be remembred, that the bare judgment of outlawry by the coroners without the return thereof of record is no attainder, nor gives any eſcheat. *Co. Lit.* §. 197. *fo.* 128. *b.* 28 *Aſſiz.* 49.

But it muſt be returned by the ſheriff with the writ of *exigi facias*, and the return indorſed.

And therefore, if there be a *quinto exactus*, and thereupon *utlegatus eſt per judicium coronatorum*, but no return thereof is made, there lies a writ of *certiorari* to the coroners, 9 *H.* 4. 7. *b.* 36 *H.* 6. 24. *b.* *Dy.* 223. *a.* or to the ſheriff and coroners. *Regiſter* 284. *a.* 38 *E.* 3. 14. *b.* *vide Dy.* 317. *a.* to certify the outlawry into the king's bench, but this is only either to ground a charter of pardon upon it. 9 *H.* 4. 7. *b.* or to amerce the ſheriff, where he returned only a *quarto exactus* when it was *quinto exactus*, 36 *H.* 6. 24. *b.* but of what effect it is otherwiſe there ſeems diverſity of opinions: I think as followeth.

1. That it doth not diſable the party to bring an action, becauſe in relation to party and party it ſtands as nothing, till returned by the ſheriff. *Mich.* 14 & 15 *Eliz.* *Dy.* 317. *a.* *Puttenham*'s caſe.

2. That conſequently, barely upon ſuch a return of an outlawry upon a *certiorari* without the writ of *exigent* indorſed and returned together with the *certiorari*, it ſeems no writ of eſcheat lies for the lord; *quære.*

3. But if the writ of *certiorari* be directed to the ſheriff and coroners, and the writ of *exigent* be extant in court, and they return this outlawry, poſſibly this may be a ſufficient warrant to enter it of a record, as a return upon the *exigent*, for the king's advantage, and to iſſue upon it a *capias utlegat.* 38 *E.* 3. 14. *b.* to have the forfeiture of his goods. 14 & 15 *Eliz.* *Dy.* 317. *a.* *Co. Lit. fol.* 288. *b.* 37

H. 6. 17. *a. vide Proctor's* caſe. *P.* 5 *Eliz. Dy.* 223. *a.* And *Stanley's* caſe there cited out of 18 *E.* 4. to this purpoſe.

4. But unleſs the writ is ſome way returned or extant, I think it gives the king no title to land or goods, for the writ of *exigi facias* is the warrant of the outlawry, and that which gives the coroners their authority in ſuch a caſe to give judgment of outlawry.

And it is not like the caſe, where there was once a writ and return of outlawry, and the record ſince loſt, for that upon circumſtances a jury upon the general iſſue may find a record, tho not ſhewn in evidence, but here the writ was never in truth indorſed nor returned.

5. But if the writ of *certiorari* were directed to the coroners alone, tho it may be a ground to cauſe the ſheriff to mend his return and make it according to the truth, yet the certificate of the coroners will not make a record to intitle the king or lord to any thing without the writ of *exigent* extant, and the return upon it amended by the ſheriff, for without the *exigi facias* and the return of the outlawry upon it, I think there is neither diſability, forfeiture, nor eſcheat, and therefore *P.* 8 *Jac. C. B.* a *certiorari* ſhall not be ſo much as granted to the coroners to remove an outlawry after the parties death. Sir *John Fit's* caſe.

V. Touching the avoiding of the outlawry, it is to be done either by plea or by writ of *identitate nominis*, or by writ of error.

1. By plea, where the record of the outlawry is not avoided but made good againſt another perſon, as where the outlawry is againſt *J. S. de B.* and the party taken upon it is another perſon of another addition, as *J. S. de C.* or *J. S. junior*, *&c. vide* 19 *H.* 6. 58. *a.* 10 *E.* 4. 16. *a.* 20 *H.* 6. 19. *a.*

2. By writ of *identitate nominis*, *vide F. N. B.* 267. 20 *E.* 3. *Brief* 683. 14 *H.* 4. 27. *a.*

3. By writ of error, for it is a judgment of record and muſt be avoided by record.

The errors aſſignable are either errors in law, whereof before, or errors in fact, which are many, as if the party outlawd

lawd were an infant under fourteen years old in caſe of felony. *Dy.* 104. *b.* 3 *H.* 5. *Utlagarie* 11.

So if he were impriſoned at the time of the outlawry, unleſs being brought to the bar and demanded, if he will appear, and he refuſe it. *M.* 8 *Jac. C. B.* 1 *H.* 7. 13. 21 *E.* 4. 73. *b.*

As touching avoiding of an outlawry of felony, becauſe beyond the ſea. *H.* 15 *Jac. B. R. Carter*'s caſe (*y*) theſe differences were agreed by the court, whereby the differing books are reconciled upon view of divers precedents.

1. If a man having committed a felony goes beyond the ſea voluntarily, or upon his own occaſions, and not in the king's ſervice before any *exigent* awarded, tho after the indictment, and then an *exigent* is awarded, and the offender being beyond the ſea is outlawd for the felony, he may aſſign it for error.

2. But if after the *exigent* awarded upon the indictment of felony, then he goes beyond the ſea voluntarily or upon his own occaſions, and being ſo beyond ſea is outlawd, he ſhall not avoid it by ſuch being beyond ſea, becauſe the *exigent* awarded gives him notice of the proſecution, and by ſuch a means he may avoid his conviction by ſtaying till all the witneſſes are dead.

3. But yet *primâ facie* the error in that caſe is well aſſigned by alleging he was *ultra mare tempore promulgationis utlegariæ*, and if he were in the realm after the *exigent* iſſued, it ſhall come in by the plea of the king's attorney to ſhew it.

4. But if he were within the realm at the time of the *exigent* iſſued, and went beyond ſea upon the ſervice of the king or kingdom, and then is outlawd being beyond ſea, this outlawry ſhall be reverſed, and if the party allege generally, that he was *ultra mare tempore promulgationis utlegariæ*, and the king's attorney reply, that he was in *England tempore emanationis brevis de exigi facias*, it is a good replication for the plaintiff in the writ of error to allege, that he went out after the *exigent* and before the outlawry pronounced upon the king's command or ſervice, and ſhew it ſpecially, and ſo confeſs and avoid the plea.

3 And

(*y*) 2 *R. A.* 804. *pl.* 2, 3, 4, 5.

And it is to be obſerved, that altho the death of the king doth not diſcontinue the indictment, yet the king's death pending the proceſs and before the outlawry diſcontinues the proceſs, and this is not aided by the ſtatute of 1 *E.* 6. *cap.* 7.

Upon a writ of error upon an outlawry in felony the record of the outlawry *cum omnibus ea tangentibus* is removed into the king's bench, wherein theſe things are obſervable.

1. That the party outlawd muſt render himſelf in cuſtody, and in cuſtody muſt come in perſon to the bar, and when he is demanded what he can ſay, he is in perſon to pray allowance of the writ of error.

2. The writ being allowd the record is to be removed, namely the indictment, proceſs, and return, and outlawry, he is then to aſſign his errors in perſon, and a day is given to the king's attorney to reply to him, and in the mean time a *ſcire facias* to the lords mediate and immediate is to iſſue returnable at fifteen days *ad audiendum errores.*

3. If any lords do appear, they may plead to the errors; if the ſheriff return there are no lands, *&c.* then the court proceeds to examine the errors.

4. The outlawry being reverſed he is put to anſwer the indictment, and may plead to it, and be tried at the king's bench bar, or the record may be remitted into the country, if it were removed into the king's bench by *certiorari*, with a command to the juſtices below to proceed by the ſtatute of 6 *H.* 8. *cap.* 6. *de quo ſupra, p.* 3.

CHAP. XXVII.

Touching certiorari *out of the king's bench.*

THO a writ of *certiorari* be not properly or directly a proceſs upon an indictment, yet it has relation to it, and in order to the full underſtanding of the pleas of the crown is neceſſary to be conſiderd.

The king's bench is the ſovereign ordinary court of juſtice in cauſes criminal, and therefore may iſſue a *certiorari* unto inferior juſtices to remove indictments or appeals, and that is done for ſeveral ends.

1. Sometimes to conſider and determine the validity of indictments, and to quaſh or affirm them, as there is cauſe.

2. Sometimes to have the priſoner or offender tried either at the bar, or by *niſi prius* before the king's juſtices of the courts of *Weſtminſter*.

3. Sometimes to examine, and affirm or reverſe the proceedings and judgments given by inferior judges, for it was frequent heretofore to have the record removed by *certiorari* firſt, and then a writ of error, *quod coram vobis reſidet*, tho it is now ordinarily done together by writ of error.

4. Sometimes to plead the king's pardon.

5. Sometimes to iſſue proceſs of outlawry againſt the offender in thoſe counties and places, where the proceſs of inferior juſtices cannot reach them.

Tho this be uſual to remove records of indictments by *certiorari*, yet the chancellor may deliver an indictment removed before him, or the juſtices of peace, or other commiſſioners of *oyer* and *terminer* or gaol-delivery may deliver indictments taken before them *manibus propriis* without writ, and ſuch a record ſo removed, and a record made of it removes the record.

If there be an indictment to be removed and the party be in cuſtody, it is uſual to have an *habeas corpus* to re-

move the priſoner, and a *certiorari* to remove the record, for as the *certiorari* alone removes not the body, ſo the *habeas corpus* alone removes not the record itſelf, but only the priſoner with the cauſe of his commitment, and therefore altho upon the *habeas corpus* and the return thereof the court can judge of the ſufficiency or inſufficiency of the return and commitment, and bail or diſcharge, or remand the priſoner, as the caſe appears upon the return, yet they cannot on the bare return of the *habeas corpus* give any judgment, or proceed upon the record of the indictment, order, or judgment without the record itſelf be removed by *certiorari*, but the ſame ſtands in the ſame force it did, tho the return ſhould be adjudged inſufficient, and the party diſcharged thereupon of his impriſonment, and the court below may iſſue new proceſs upon the indictment, tho it be otherwiſe in an *habeas corpus* in civil cauſes, for it is a *ſupersedeas*, and cloſeth up the hands of the inferior court in civil cauſes.

By the ſtatute of 1 & 2 of *P. & M. cap.* 13. an *habeas corpus* or *certiorari* to remove a priſoner or a recogniſance ought to be ſigned with the proper hand of the chief juſtice, or in his abſence by one of the juſtices of the court, out of which it iſſues.

By the ſtatute 21 *Jac. cap.* 8. all *certiorari's* to remove indictments before juſtices of peace ſhall be deliverd at the quarter-ſeſſions in open court, and the party indicted ſhall become bound with ſufficient ſureties in ten pounds to the proſecutor with condition to pay him ſuch charges as the juſtices of peace ſhall aſſeſs, if the party be convicted, otherwiſe the juſtices of peace may proceed to trial notwithſtanding ſuch *certiorari*.

A *certiorari* may iſſue to the juſtices of a county palatine, or to the mayor of the *cinque ports* to remove an indictment taken before them, and muſt not be directed to the chancellor of *Durham*, &c. or warden of the *cinque ports*, for now by the ſtatute of 27 *H.* 8. *cap.* 24. all commiſſions of the peace, gaol-delivery, *oyer* and *terminer*, &c. are to be made in the king's name, and theſe juſtices in criminal cauſes are immediately

diately ſubject to this court, as other juſtices of like nature elſewhere are; and if they return a privilege of the county palatine or *cinque ports* upon the *certiorari*, it ſhall not be allowd, but an *aliàs certiorari* ſhall iſſue with a precept to produce their charters, by which they claim ſuch exemption. *P.* 43 *Eliz. B. R. Rot.* 119. *T.* 8 *Car. B. R.* (*a*) and *M.* 8 *Car. B. R.* (*b*) upon an indictment of ſodomy in the *cinque ports*. *T.* 1653. *Rutabie*'s caſe upon an indictment of murder in *Durham* (*c*).

A *certiorari* iſſues bearing *teſte* the laſt day of *Trinity term* to remove all indictments againſt *A.* and *B.* returnable *tres Michaelis*; at the quarter-ſeſſions it is deliverd, and then an indictment is found againſt *A. B.* and *C.*

Ruled 1. That tho the delivery of a *certiorari* ſuperſedes the proceeding upon an indictment, yet it doth not hinder the taking of an indictment after the delivery of the writ.

2. Altho the indictment be taken after the *teſte* of the *certiorari*, and before or after the delivery thereof, yet all ſuch indictments againſt *A.* and *B.* ought to be removed, and the juſtices below cannot proceed upon ſuch indictments to trial, judgment, or execution; and if they do, it makes their proceedings erronious and void, and likewiſe ſubjects the juſtices to an attachment for the contempt, whether they proceed at the ſame ſeſſions, or a private ſeſſions after.

3. That ſuch a *certiorari* to remove all indictments againſt *A.* and *B.* removes all indictments wherein *A.* or *B.* are indicted either alone or together with any other perſon. *M.* 22 *Car.* 1. *B. R. Orfener*'s caſe (*d*) adjudged. 1 *R.* 3. 4. *b.* 6 *H.* 7. 16. *a.*

If *A. B.* and *C.* are indicted, (ſuppoſe for a battery,) ruled, 1. Tho *A.* alone tender ſecurity for the coſts, it is ſufficient within the ſtatute, and the record ought to be removed into the king's bench. 2. If the indictment be at a private ſeſſions, this indictment ought to be deliverd into the quarter-ſeſſions, yet the delivery of the *certiorari* at the private

I ſeſſions

(*a*) *Hoſſtil Tilden*'s caſe, 1 *R. A.* 395. *pl.* 6.

(*b*) *Dugdale*'s caſe. *ibid.*

(*c*) *Vide ſupra*, *Part* I. *p.* 467. and alſo *Simpſon*'s caſe, 1 *R. A.* 395. *pl.* 5.

(*d*) The ſame points reſolved in *Cheyney*'s caſe. 1 *R. A.* 395. *pl.* 1, 2.

ſeſſions cloſeth the hands of the juſtices, altho the allowance of the writ and the tender of the ſecurity muſt be by the ſtatute at the quarter-ſeſſions. *M.* 1653. *B. R.* adjudged.

Nota, *T.* 15 *Car.* 1. *B. R.* in *Hancock*'s caſe theſe points were reſolved. 1. That if many are indicted, and one only tender ſureties for the coſts upon the ſtatute of 21 *Jac.* it is ſufficient.

2. If the ſurety be ſufficient as to 10*l.* that is a ſufficient ſurety, and ought to be allowd by the juſtices of peace.

3. A *feme covert* is not within the ſtatute of 21 *Jac.* to find ſureties.

4. If a *certiorari* iſſue and ought to be allowd, the proceeding of the juſtices after is *coram non judice.*

5. It was reſolved *M.* 4 *Car.* that the removal of an indictment of forceable entry by the proſecutor is not within the ſtatute of 21 *Jac.*

And ſo *note* a difference between a writ of error and a *certiorari*, the former is a *ſuperſedeas* to the iſſuing of execution from the time of the delivery of the writ till the day of the return be paſt, but then if the plaintiff proceed not to the removal of the record, execution ſhall be granted for his delay, but a *certiorari* is a *ſuperſedeas* from the time of the delivery thereof for ever, unleſs a *procedendo* iſſue. 21 *H.* 6. 28. *b. Dy.* 245. *a.*

If at the ſeſſions of the peace an indictment of forceable entry be, and reſtitution be awarded, and after the ſeſſions and before reſtitution actually made a *certiorari* is deliverd to one juſtice of peace, before the ſtatute of 21 *Jac.* it cloſed up their hands, and no reſtitution ſhall be awarded, but the juſtice ought to make a *ſuperſedeas* thereupon.

And it ſeems the ſame law ſtill remains at this day upon indictments of forceable entry found at private ſeſſions, becauſe the juſtices make execution thereupon before any quarter-ſeſſions come by virtue of the ſtatute of 8 *H.* 6. *cap.* 9. and if the *certiorari* ſhould not be obeyed, it would be fruitleſs.

If *A. B. C.* and *D.* be actually indicted in one indictment for one offenſe, and a *certiorari* be to remove all indictments

againſt *A.* and *B.* this will be ſufficient to remove the indictment againſt *A.* and *B.* and alſo it removes the indictment as to *C.* and *D.* for the juſtices may deliver the indictment *per manus proprias.* *M.* 37 & 38 *El. B. R. Woodward's* caſe, *contra* 6 *E.* 4. 5. *a.*

But if the indictment be but one, but the offenſes ſeveral, as if *A. B. C.* and *D.* be indicted by one bill for keeping ſeveral diſorderly houſes, a *certiorari* to remove this indictment againſt *A.* and *B.* removes not the indictment as to *C.* and *D.* for tho they are all compriſed in one bill, yet they are ſeveral indictments and ſeveral offenſes, and ſo the record is in the king's bench virtually and truly as to *A.* and *B.* but as to *C.* and *D.* the record remains below.

But if the juſtices *per manus ſuas proprias* deliver the bill into court againſt all of them as they may, then if a record be made of that delivery, the indictment is entirely removed againſt *A. B. C.* and *D.* becauſe not done upon the writ of *certiorari*, but *per manus ſuas proprias*: But otherwiſe it is, where the offenſes are ſeveral, and the indictment againſt *A.* and *B.* is removed by writ, and by a return indorſed upon the writ, for then that ſingle indictment, that concerns *A.* and *B.* is removed, and not the others, where the offenſes are ſeveral, and ſeverally charged.

But as I ſaid, if there be one indictment againſt *A. B. C.* and *D.* for one murder or burglary, another againſt the ſame perſons for robbery, and a third againſt the ſame perſons for a rape, a *certiorari* to remove all indictments againſt *A.* and *B.* removes all theſe ſeveral indictments againſt *A. B. C.* and *D.* for tho in law each of them be ſeverally a felon, yet inaſmuch as they are jointly charged they ſhall be all removed as to *A. B. C.* and *D.* by virtue of this one writ, contrary to the opinion of *Markham.* 6 *E.* 4. 5. *a.*

And yet in ſome caſes variance between the *certiorari* and the record cauſeth the record not to be removed, as if the *certiorari* be to remove the record of an inquiſition *in curiâ noſtrâ*, whereas it was *in curiâ* of the predeceſſor, the record is not removed. 3 *Eliz. Dy.* 206. *b.*

So if it be to remove an indictment for ſtealing of two horſes, and the record is but for one. 3 *Aſſiz.* 3. *Plow. Com.* 393. *a.*

If a *certiorari* iſſue, it is a *ſuperſedeas* in law, and it makes judicial proceedings after the *certiorari* deliverd erronious, but poſſibly it makes miniſterial proceedings, as the award of reſtitution in a forceable entry, void alſo; *vide* 6 *H.* 7. 16. *a. per Keble,* altho it doth not remove the record before the return. *Dy.* 245. *a.*

After a *certiorari* iſſued and deliverd, and before the record removed the inferior judge may be enabled to proceed by a *procedendo* or *ſuperſedeas* of the *certiorari* iſſuing out of the court of king's bench.

But if the record be removed and filed in court, at common law no *procedendo* could be granted, neither could the record be remitted, but now by the ſtatute of 6 *H.* 8. *cap.* 6. the court of king's bench may remand the record, and command the judges below to proceed upon the indictment ſo remitted.

And *note* the difference between a *certiorari* in the king's bench and chancery: In the king's bench the very record itſelf is removed, and that which remains in the court below is but a ſcroll. But uſually in chancery, if the *certiorari* be returnable there, they remove but the tenor of the record, and therefore if the tenor of a record of an indictment, or attainder, or conviction be removed by *certiorari* into the chancery, and thence ſent by *mittimus* into the king's bench, they cannot thereupon proceed either to judgment or execution, becauſe they have only the tenor of the record before them, and not the record itſelf, as in the former caſe. *Vide* 37 *H.* 6. 17. 39 *H.* 6. 4. *Dy.* 217. *a.* 2 *E.* 3. 21. *a.* (*e*).

(*e*) *Vide Dyer* 369. *b.*

CHAP.

CHAP. XXVIII.

Touching the arraignment of offenders *in capital offenſes.*

IN the former chapter I have ſhewd how the priſoner is to be accuſed, namely by indictment, and how to be brought in by proceſs to his anſwer, and how to be dealt with, if he make default, or ſtand out againſt the proceſs of law.

I am now to conſider how he is to be proceeded againſt, if he be taken, or render himſelf, and appear in court.

For in caſe of an indictment of treaſon or felony no offender can appear by attorney, but in perſon, tho in ſome caſes of other indictments after plea pleaded, the defendant may appear by attorney. 9 *E.* 4. 4. *a.* 22 *Aſſiz.* 73. *B. Attorney* 63.

When the offender in treaſon or felony comes into court, or is brought in by proceſs, ſometimes of *capias*, and ſometimes of *habeas corpus* directed to the gaoler of another priſon, the firſt thing, that follows thereupon, is his arraignment.

And herein I will conſider, 1. What the arraignment of a priſoner or malefactor is. 2. How it is performed, and in what manner. 3. When it is to be done.

I. Arraignment therefore is nothing elſe but the calling of the offender to the bar of the court to anſwer the matter charged upon him by indictment or appeal.

And the word in *Latin* is no other than *ad rationem ponere*, and in *French ad reſon*, or abbreviated *a reſn*, for as the *vox forenſis diſrain* or *derayn* uſed antiently in our books *de ceo tend ſuit & derayne* imports in *Latin diſrationare* to diſprove or evince the contrary of any thing, that is or may be affirmed,

See *Spelman*'s *Gloſſ.* title *Dirationare*, and *Selden*'s notes upon *Forteſcue*, *cap.* 21. *p.* 23. ſo *arraignè* is *ad rationem ponere* to call to account or anſwer.

And this appears to be the true ſenſe and etymology of the word by the excellent record of the reverſal in parliament of the judgment given againſt the *Mortimers E.* 2. the reverſal and whole record is entred *verbatim Patents* 1 *E.* 3. *part* 2. *m.* 3. where there are three errors aſſigned in that arbitrary judgment, and all ruled in parliament to be errors, and the attainder reverſed. 1. *Quòd cum aliquis de regno regis tempore pacis deliquerit erga dominum regem vel alium, per quod debeat vitam vel membrum perdere, & ſuper hoc coram judicibus in judicium ductus fuerit, primò debeat poni rationi & ſuper delicto ſibi impoſito reſponſiones ipſius audiri, priùs quam procedatur ad judicium de eo; ſed in recordis & proceſſibus prædictis continetur, quòd prædicti* Rogerus & Rogerus *coram juſtic' ducti adjudicati fuerunt judicio tractûs & ſuſpendii, & poſtea perpetuæ priſonæ adjudicati & mancipati abſque hoc, quòd ipſi fuiſſent inde arrenati, ſeu quòd ipſi ad aliqua eis impoſita reſpondere poſſint, quod eſt contra legem & conſuetudinem regni, &c. per quod ad judicium de eis erronicè proceſſum eſt.*

2. *Dicit etiam quòd in recordis & proceſſibus prædictis continetur, quòd dominus rex recordabatur verſus ipſos* Rogerum & Rogerum, *quòd ipſi hoſtiliter equitaverunt cum* Humfredo de Bohun *nuper com'* Heref. *& aliis inimicis domini regis contra ipſum regem & populum regni ſui diverſa mala & facinora perpetrando, quare judicia prædicta ſuper eiſdem reddita fuerunt, cujuſmodi recorda non eſt domino regi facere, niſi de inimicis ſuis tempore guerræ, & hoc, viz. quando idem dominus rex equitat cum vexillis explicatis, & non tempore pacis, ſed eo tempore dominus rex non equitavit cum vexillis explicatis, nec fuit tempore guerræ, cancellario domini regis & juſticiariis placearum de utroque banco ſedentibus ad juſtitiam unicuique conqueri volenti & proſequenti faciend', per quod ad judicium de eis, ut prædictum eſt, erronicè proceſſum eſt.* 3. *Dicit etiam quòd erratum eſt in hoc, quòd, cum in Magna Charta de libertatibus* Angliæ *continetur, quod nullus liber homo capiatur, aut impriſonetur, aut de libero tenemento ſuo diſſeiſietur, vel de libertatibus vel liberis conſuetudinibus ſuis, aut*

utlegatur, aut exulet, aut aliquo modo deſtruatur, nec dominus rex ſuper eum ibit, nec ſuper eum mittet, niſi per legale judicium parium ſuorum vel per legem terræ, ſed in recordis & proceſſibus prædictis continetur, quòd prædicti Rogerus & Rogerus *ſigillatim judicio tractûs & ſuſpendii adjudicati fuerunt, & poſtea perpetuæ priſonæ adjudicati & mancipati abſque legali judicio parium ſuorum ad hoc vocatorum, & contra legem terræ.* And thereupon judgment of reverſal is given in theſe words, *Et quia inſpectis recordis & proceſſibus prædictis compertum eſt in eiſdem, quòd prædicti* Rogerus Mortimer & Rogerus Mortimer *coram juſtic' ducti judicio tractûs & ſuſpendii adjudicati fuerunt, & poſtea perpetuæ priſonæ adjudicati & mancipati abſque hoc, quòd ipſi ad aliqua eis vel eorum alteri impoſita poſſint reſpondere, & hoc tempore pacis, & abſque hoc, quòd dominus rex equitavit cum vexillis explicatis, & cancellario domini regis & juſtic' de utroque banco ſedentibus, ut prædictum eſt, & abſque legali judicio parium ſuorum, quod eſt contra legem & conſuetudinem regni* Angliæ *& tenorem Cartæ prædictæ, conſideratum eſt per dominum regem nunc & ejus concilium in pleno parliamento, quòd omnia judicia prædicta ob defectus & errores prædictos & alios in recordis & proceſſibus prædictis compertos revocentur &c.*

I have tranſcribed the record more at large, becauſe there are many uſeful parts in it, ſome whereof will be uſeful to other purpoſes.

But as to the buſineſs in queſtion theſe two things are obſervable. 1. What arraignment is, namely it is *ad rationem ponere*, for that, which in one part of the record is *arrenatus*, is before rendred *rationi ponere*, to be put to anſwer; and therefore *Spelman*, who is ſeldom miſtaken, is yet herein miſtaken both in the nature, orthography, and etymology of the word, which he ſaith is *arramare* or *adrhamire*, for it is nothing ſo. 2. Of what importance and how eſſential it is, that in capital offenſes the offender being in court ſhould be arraigned or put to anſwer, the want whereof rendred the judgment given againſt the *Mortimers* erronious, and reverſed by the king and his parliament.

The Arraignment of a priſoner therefore conſiſts of theſe parts.

1. The calling the priſoner to the bar by his name, commanding him to hold up his hand, which tho it may ſeem a trifling circumſtance, yet it is of importance, for by holding up his hand *conſtat de perſonâ indictati*, and he owns himſelf to be of that name (*a*).

2. Reading the indictment diſtinctly to him in *Engliſh*, that he may underſtand his charge.

3. Demanding of him, whether he be guilty or not guilty, and if he pleads *not guilty*, the clerk joins iſſue with him *cul. priſt*, and enters the priſoner's plea; then he demands how he will be tried, the common anſwer is *by God and the country*, and thereupon the clerk enters *po. ſe*, and prays God to ſend him good deliverance.

But if the priſoner hath any matter to plead either in abatement or in bar of the indictment, as *miſnomer*, *auterfoits acquit*, *auterfoits convict*, a pardon, *&c.* then he pleads it without immediate anſwering to the felony, but in ſome caſes *ſi trove ne ſoit*, then to the felony *not guilty*, *de quo poſtea*. And thus far what the arraignment is.

II. How to be done or performed.

On the part of the court what is to be done is ſhewn before, but in relation to the priſoner and his coming to the bar.

The priſoner, tho under an indictment of the higheſt crime, muſt be brought to the bar without irons and all manner of ſhackles or bonds. *Stamf. P. C. fol.* 78. *a.* 2 *Co. Inſt.* 316. *Co. P. C. p.* 34, 35. *Bract. Lib.* III. *fol.* 137. *a. & alios libros ibi*, unleſs there be a danger of eſcape, and then they may be brought with irons.

But *note* at this day they uſually come with their ſhackles upon their legs for fear of an eſcape, but ſtand at the bar unbound, till they receive judgment (*b*).

III. When

(*a*) The ceremony of holding up the hand is not required in the caſe of a peer, nor is it of abſolute neceſſity in the caſe of a common perſon, it being ſufficient, that it appears to the court, who is the perſon indicted. See Lord *Delamere*'s caſe, *State Tr. Vol.* IV. *p.* 211. and Lord *Mohun*'s caſe, *State Tr. Vol.* IV. *p.* 508.

(*b*) By this it appears to have been our author's opinion, that upon whatever occaſion a priſoner be brought into court, he ought not to ſtand there *in vinculis* till after his conviction, when he comes to

III. When the party is to be arraigned.

In caſe of murder at the common law the judges did uſually forbear to arraign the priſoner upon an indictment till the year and day were paſt, whether an appeal were depending or not *per omnes juſtic'* Angliæ, 22 *E.* 4. *Coron.* 44. unleſs the evidence were very clear to convict him, and no appeal depending, or altho an appeal were depending, if the appellant were an infant. 21 *E.* 3. 23. *b.* *Stamf. P. C. fol.* 107. *a.* becauſe of the delay.

But now by the ſtatute of 3 *H.* 7. *cap.* 1. the juſtices ſhall proceed to try him upon an indictment of murder (or manſlaughter,) tho within the year, and if acquitted, yet he ſhall not be diſcharged, but at the diſcretion of the juſtices ſhall be continued in cuſtody or upon bail, till the year and day be paſt.

So that by this ſtatute *auterfoits acquit* of principal or acceſſary, or *auterfoits attaint* of the principal upon an indictment is no bar to an appeal, but *auterfoits acquit* upon an appeal remains a bar to an indictment for the ſame offenſe.

But *auterfoits convict* upon an indictment and having had his clergy is a good bar to an appeal notwithſtanding this ſtatute, *de quo infra*; and yet in favour of an appeal, if a man be indicted of murder, and plead to it, and be convict, if the wife enter an appeal for the ſame death againſt the priſoner, as long as that appeal is depending judgment ſhall be reſpited, but if the wife be nonſuit in her appeal, then judgment ſhall be given upon the conviction. *Vide M.* 12 & 13 *Eliz. B. R. Dy.* 296. *a.* *Stanley*'s caſe.

But as to other indictments, as of robbery, *&c.* the ſame remain at common law, as before this ſtatute, yet it is the conſtant courſe, unleſs an appeal be depending, to arraign the priſoner upon an indictment within the year, for now by the ſtatute of 21 *H.* 8. *cap.* 11. the party robbed hath as effectual reſtitution of his goods upon his proſecution of an

indictment,

to receive judgment, not even at the time of his arraignment, (for that is the time our author is here diſcourſing of,) yet in *Layer*'s caſe, *Mich.* 9 *Geo.* 1. *B. R.* a difference was taken between the time of arraignment, and the time of trial, and accordingly the priſoner in that caſe ſtood at the bar in chains during his arraignment. See *State Tr. Vol.* VI. *f.* 230, 231.

indictment, as upon an appeal, and ſo an appeal of robbery is rarely brought.

Nay, tho an appeal of robbery be brought by writ, the juſtices will not ſtay the arraignment of the priſoner upon the indictment, unleſs it be by bill, or that the plaintiff in an apppeal by writ hath declared upon the writ, becauſe the writ is general, and it cannot appear what the goods are till declaration: But in an appeal of death by writ the perſon kild is certain. 31 *H.* 6. 11. *a.* *Stamf. P. C. Lib.* II. *cap.* 36. *fol.* 107. *a.*

If a man be indicted and appealed before the ſame juſtices for the ſame murder or other felony, the party ſhall be arraigned upon the appeal firſt, and not upon the indictment, in favour of the appellant, as I have ſaid; but if the appellant be nonſuit upon his appeal, the priſoner ſhall be arraigned upon the appeal (*c*), and proceſs ſhall ceaſe upon the indictment. 4 *E.* 4. 10. *a.* and it ſhall be entred *ceſſet proceſſus* upon the indictment. 4 *E.* 4. 10. *a.* And if the priſoner plead and be acquitted, or plead the king's pardon and it be allowd, regularly the acquittal or pardon, and the allowance thereof ſhall be entred upon the appeal, tho it be ſafe to enter it likewiſe upon the indictment; and therefore, if in that caſe thro the miſtake of the clerk there be no entry of *ceſſet proceſſus* upon the indictment, and the indictment lying thus open there be proceſs of outlawry made upon the indictment, and the party be outlawd, he hath no remedy but to bring a writ of error upon the outlawry, and he may aſſign for error his acquittal upon the appeal, and aver it to be the ſame felony, and upon confeſſion of the king's attorney it ſhall be reverſt. 4 *E.* 4. 10. *a.*

If there be an inquiſition before the coroner of murder, and returned, and likewiſe an indictment for the ſame offenſe by the grand inqueſt, it is uſual to arraign the priſoner upon the indictment, but he may be arraigned upon both at the ſame time, but if arraigned upon the indictment only, there ought to be an entry of *ceſſet proceſſus* upon the coroner's inqueſt as to the priſoner, who may otherwiſe be outlawd upon it.

(*c*) At the ſuit of the King.

If a priſoner be found guilty of murder by the coroner's inqueſt, and a bill of indictment of murder be againſt him at the ſeſſions of gaol-delivery for the ſame murder, it is uſual to arraign him upon the coroner's inqueſt, and not upon the indictment, and if he be acquit upon that, then to arraign him upon the bill, and put him to his plea of *auterfoits acquit.*

But to avoid the trouble of a double arraignment and plea, I have obſerved this courſe.

1. If one indictment be of manſlaughter, and the other of murder, then to arraign him of that offenſe, which is higheſt, and ſpare the other.

2. If both be of murder, but one is inſufficient, as for the moſt part coroners inqueſts are, then to arraign him upon the good indictment, and quaſh the other.

3. If both preſentment and indictment be of the ſame nature, and both (for inſtance) of murder, and both good, and both returned into court the ſame ſeſſions, I have uſually arraigned, the priſoner upon both, (ſo as they be put upon the ſame inqueſt to be tried,) to avoid the trouble of the plea of *auterfoits acquit* or *attaint*, and to indorſe his acquittal or attainder upon both preſentments, always directing the jury to acquit him upon both, if acquitted upon one, and *è converſo.*

Now concerning the arraignment of the acceſſary, regularly the acceſſary ſhall not be arraigned, nor put to anſwer till the principal be attaint by outlawry or confeſſion, or be convict and attaint alſo by judgment upon verdict, for it is an offenſe dependent upon the principal, and tho the principal be convict, yet if he have his clergy, the acceſſary is diſcharged thereby, and ſhall not be arraigned. 2 *Co. Inſt.* 183. *ſuper ſtat. Weſtm'* 1. *cap.* 14.

But yet the principal and acceſſary being indicted by one or ſeveral indictments, and both appearing may be arraigned together at the ſame time, (*d*) and both pleading not

3 guilty

(*d*) They *may be*, but not *neceſſarily muſt*, as was laid down for law by C. J. *Pemberton* in the trial of count *Conings-mark.* See *State Tr. Vol.* III. *p.* 465. and Sir *John Hawle*'s remarks thereon. *State Tr. Vol.* IV. *p.* 199.

guilty the ſame jury ſhall be charged with both, and directed to inquire of both, *viz.* firſt of the principal, and if they find him guilty, then to inquire of the acceſſary. 9 *Co. Rep.* 119. *a.* Lord *Sanchar*'s caſe. 2 *Co. Inſt.* 184. *ſuper Stat. Weſtm'* 1. *cap.* 14.

But if *A.* and *B.* be indicted for murder, *A.* as giving the ſtroke, and *B.* as being preſent, aiding, and abetting, if *A.* flies, and *B.* is apprehended, *B.* may be arraigned and tried before *A.* be attainted by outlawry, tho he be principal but in the ſecond degree, for they are both principals, and ſo it was done in the caſe of *Thady H.* 25 *&* 26 *Car.* 2. tho in point of diſcretion it is good to try them both together.

If *A.* be indicted of high treaſon, and *B.* be indicted for receiving or comforting him, or procuring or abetting, (but not preſent), here it is true they are all principals, but in as much as *B.* in caſe of a felony would have been but acceſſary, and it is poſſible that *A.* may be acquitted of the fact, it ſeems to me, that *B.* ſhall not be put to anſwer of the receit or procurement till *A.* be outlawd, or at leaſt jointly with *A.* (*e*), and in this caſe the ſame jury may be charged with both, and their charge ſhall be firſt to inquire, whether *A.* were guilty, and if not, then to acquit both *A.* and *B.* and if *A.* be found guilty, then that they inquire of *B.* And in *Somervill*'s caſe 26 *Eliz.* (*f*) mentiond before, the inquiry was firſt of the principal offender, and then of the receiver or procurer to avoid that inconvenience and *awerouſt*, that might happen in caſe *B.* were firſt convict of the procurement and receit, and yet poſſibly *A.* might be acquitted of the principal fact.

If the principal do not plead *not guilty*, but ſome other plea, as in abatement, or in bar, the acceſſary ſhall not be put to plead till the plea of the principal be determind. 9 *H.* 7. 19. *b.* but if the principal plead *not guilty*, then the acceſſary, if preſent, ſhall be put to plead preſently, and they may be tried by the ſame inqueſt, *ut ſupra.*

In

(*e*) Yet in lady *Liſle*'s caſe, *State Tr.* Vol. IV. *p.* 105. it was without any foundation in law practiſed quite contrary. *Vide ſupra, Part* I. *p.* 238. *in notis.*

(*f*) 1 *And.* 109.

In antient time, if the principal made default, and appeard not, the acceſſary was not put to anſwer. 44 *E.* 3. 7. *b. Coron.* 216. But of later times the acceſſary, if he appear, hath been arraigned and put to plead, but proceſs againſt the inqueſt, and trial ceaſeth till the principal come in or be attaint by outlawry. 9 *H.* 4. 2. *a.* 7 *H.* 4. 36. *a. Stamf. P. C. Lib.* I. *cap.* 49. *fol.* 46. *a.*

But the acceſſary may pray proceſs againſt the principal, *& renuntiari juri pro ſe introducto*, and his conſent makes it not error. 8 *H.* 5. 6. *b. Coron.* 463. and therefore, if the acceſſary be acquitted before the principal tried, it is agreed, that it is a good acquittal, and by the ſame reaſon, if he were convict, it is a good conviction, yet no judgment ſhall be given againſt him upon that conviction till the principal tried.

And upon this reaſon it is, that if *A.* be arreſted or in priſon for felony, and *B.* reſcue him, or the gaoler ſuffer him voluntarily to eſcape, tho this be a diſtinct felony in *B.* the reſcuer, and in the gaoler, that voluntarily ſuffers him to eſcape, for which they may be preſently indicted, yet they ſhall not be arraigned or put to anſwer till *A.* be convicted and attainted by judgment, or outlawd. 1 *H.* 7. 6. *a.* 1 *E.* 3. 16. *b.* 2 *Co. Inſt.* 592. *ſuper ſtat. de frangentibus priſonam*, for if *A.* be acquitted upon the indictment, the reſcuer or gaoler ſhall be diſcharged.

But if *A.* be indicted of the felony or not indicted, and be lawfully impriſond and break the priſon, he may be indicted and arraigned for his felony in breaking the priſon before his conviction of the felony, for which he was committed. 2 *Co. Inſt. ubi ſupra.*

And yet, if after that indictment *A.* be arraigned of the principal felony and acquitted, he may plead that acquittal of the principal felony in bar to the indictment for the breach of priſon; *vide rationem ſupra, Part.* I. *cap.* 54. *p.* 611.

If a *capias* be awarded againſt a felon, and he render himſelf and plead not guilty, and is let to bail, and then make default, a *capias ad audiendam juratam* ſhall iſſue, and if brought in, he ſhall be tried upon his plea, but it is ſaid by *Scot*, that if he had rendred himſelf upon the *exigent*,

and pleaded not guilty, and been let to bail till the trial, and then made default, whereupon an *exigent* is awarded, and the felon is brought in upon the *exigent*, he ſhall plead *de novo*, and conſequently be arraigned *de novo*, for by the *exigent* awarded the firſt iſſue is diſcontinued. 16 *Aſſiz.* 13.

CHAP. XXIX.

Concerning the plea of the priſoner *upon his arraignment, and firſt,* of his confeſſion *of the fact charged,* and approving *others.*

WHEN the priſoner is arraigned, and demanded what he ſaith to the indictment, either he confeſſeth the indictment, or pleads to it, or ſtands mute and will not anſwer.

The confeſſion is either ſimple, or relative in order to the attainment of ſome other advantage.

That which I call a ſimple confeſſion is, where the defendant upon hearing of his indictment without any other reſpect confeſſeth it, this is a conviction; but it is uſual for the court, eſpecially if it be out of clergy, to adviſe the party to plead and put himſelf upon his trial, and not preſently to record his confeſſion, but to admit him to plead. 27 *Aſſiz.* 40.

If it be but an extrajudicial confeſſion, tho it be in court, as where the priſoner freely tells the fact, and demands the opinion of the court, whether it be felony, tho upon the fact thus ſhewn it appear to be felony, the court will not record his confeſſion, but admit him to plead to the felony

not guilty. 22 *Aſſiz.* 71. *Stamf. P. C. Lib.* II. *cap.* 51. *fol.* 142. *b.*

A confeſſion in order to ſome other advantage is either, where the priſoner confeſſeth the felony in order to his clergy, *de quo infra, cap.* 44. or where he confeſſeth the offenſe, and appealeth others thereof thereby to become an approver, and thereupon to obtain his pardon, if he convict them, and this lets in the whole learning touching approvers and approvement, which I ſhall here open in the order that Mr. *Stamford* hath gone before me.

1. Of what offenſes a man may be an approver. 2. In what ſuits. 3. At what time. 4. Before whom. 5. In what manner. 6. How he ſhall be orderd before and after his appeal. 7. What proceſs ſhall iſſue againſt the party appeald. 8. What pleas he ſhall have, and how tried. 9. How proceeded in. 10. What judgment ſhall be given for or againſt the appellor or appellee.

Before I come to theſe particulars we are to know, that it is purely in the diſcretion of the court to admit the approver to appeal or not, or to give him any reſpit from judgment or execution upon his confeſſion and approvement, for otherwiſe it would be in the power of any party arraigned for felony by becoming an approver to delay judgment, where (it may be) his appeal is but feigned, for the admiſſion of his appeal or reſpit of judgment is but a matter of grace and diſcretion. 21 *H.* 6. 34. *b. Coron.* 66 & 67 *per omnes juſtic' utriuſque banci. Co. P. C. cap.* 56. *p.* 129.

And therefore this courſe of admitting of approvers hath been long diſuſed, and the truth is, that more miſchief hath come to good men by theſe kind of approvements by falſe accuſations of deſperate villains, than benefit to the public by the diſcovery and convicting of real offenders, gaolers for their own profits often conſtraining priſoners to appeal honeſt men, and therefore proviſion made againſt it by 1 *E.* 3. *cap.* 7.

And upon this reaſon it is, that as of later times the admiſſion of ſuch appeals hath been wholly diſuſed, ſo in times, when they were admitted, a great ſtrictneſs was held

upon ſuch appeals, as will appear upon the examination of the enſuing particulars.

I. Therefore touching the offenſes, whereof an approvement may be.

It may be only of capital offenſes, as of treaſon or felony, whether they be at common law, or by act of parliament.

When a priſoner is admitted to be an approver, he is ſworn in court to approve, or rather to diſcover all felonies and treaſons that he knows, and a certain time prefixt, (as three or four days,) to make his appeal, and a coroner aſſigned to him to receive ſuch his appeal and diſcovery. 12 *E.* 4. 10. *b.*

And yet the appeal is not good, as an appeal, or as an approvement to compel the parties appealed to anſwer, but only as to ſuch felonies or treaſons, that were committed by the appellee together with the appellor, and whereof the appellor ſtands indicted in court, and as to other treaſons or felonies, [than] whereof the appellor ſo ſtands indicted, it is no legal appeal or approvement to put the appellee to anſwer.

And therefore, if *A.* being indicted for robbing of *B.* and he appeal *C.* that he robbed *A.* himſelf, this is a void appeal, and the appellor ſhall be executed, and the appellee ſhall not be put to anſwer to it. 25 *E.* 3. 39. (*a*).

So if he appeal *C.* as acceſſary to the robbery of *B.* either before or after, *C.* ſhall not be put to anſwer, for it is not the ſame felony charged upon *A.* but only an acceſſary to it. 10 *E.* 4. 14. *a.*

So if *A.* be indicted of felony, and he appeal *B.* of treaſon, *B.* ſhall not be put to anſwer that appeal, but *B.* being ſo accuſed it may be a ground for the juſtices in point of diſcretion to make *B.* find ſureties for his appearance at the next ſeſſions or in the king's bench, and in the mean time to be of good behaviour towards the king and his people, as was done when a perſon, that had abjured for felony, made ſuch an appeal of treaſon. *M.* 19 *E.* 2. *Coron.* 387. *vide ſimile* 21 *E.* 3. 18. *a. Coron.* 449.

II. In

(*a*) *N. Edit.* of the year books, *fol.* 82. *b.*

II. In what ſuits.

Approvement lies not in an appeal of felony, for the delay, that may come thereby to the plaintiff. *M.* 15 *E.* 3. *Coron.* 113. 2 *R.* 3. 22. *b.* And therefore, if a party be indicted of felony, and the priſoner becomes an approver, if an appeal for the ſame felony be ſued afterwards, all proceedings upon the approvement ſhall ſtay. 8 *H.* 5. *Coron.* 442.

But if *A.* be indicted of felony, and he becomes an approver, and appeal *B.* as a companion with him in the ſame felony, and *B.* comes in, it ſeems he may not become an approver, and appeal *C.* of the ſame felony, 15 *E.* 3. *Coron.* 113. *Stamf. P. C. Lib.* II. *cap.* 58. *fol.* 147. *a.* tho 11 *H.* 4. 93. *b.* *B. Coron.* 34. ſeems to be contrary.

If a man be arreſted and impriſond for ſuſpicion of felony, he cannot become an approver, becauſe he is not indicted. *Stamf. P. C. Lib.* II. *cap.* 55. *Co. P. C. cap.* 56. *p.* 129. againſt the opinion of *Strange* and *Hankf.* 6 *H.* 6. *Coron.* 231.

III. At what time a man ſhall become an approver.

After a perſon is abjured for felony, 19 *E.* 2. *Coron.* 387. 19 *E.* 3. *Ibid.* 443. or be outlawd, 21 *E.* 3. 17. *b.* *Coron.* 452. or otherwiſe attaint, and hath his clergy 17 *E.* 3. *Coron.* 445. he ſhall not be admitted to be an approver; nor one convict by verdict. 19 *H.* 6. 47. *b.* *Coron.* 8.

If *A.* be indicted of felony, and plead *not guilty*, and put himſelf upon the country, and the jury is charged with him, yet before the evidence fully heard, and the jury gone from the bar, he may be admitted to be an approver. 12 *E.* 4. 10. *b.* 11 *H.* 7. 5. *b.* *per omnes juſtic'*: *Vide contra* 2 *H.* 7. 3. *a.* (*b*), 9 *H.* 5. *Coron.* 440.

But if the whole evidence be heard, then he ſhall not be admitted to be an approver. 21 *E.* 3. 18. *a.* *Coron.* 449. 2 *H.* 7. 3. ſo that it ſeems much in the diſcretion of the court to admit him to be an approver at any time before verdict given,

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(*b*) In this caſe the whole evidence had been given, and the jury gone from the bar, which was one reaſon aſſigned by the court, why they could not admit the priſoners to become approvers, ſo that this caſe no way contradicts what is before ſaid, but there was another exception beſides, on which the court laid the greateſt ſtreſs, becauſe they only prayd a coroner, but did not acknowledge the felony.

given, tho after *not guilty* pleaded. 12 *E.* 4. 10. *b. in B. R.* & 11 *H.* 7. 5. *b. per omnes juſtic'*, which is of greater weight than the other books.

IV. Before whom a man may become an approver.

It may be before the juſtices of the king's bench, or juſtices of gaol-delivery, or juſtices in *eyre*, for they may aſſign a coroner to the priſoner to receive his appeal.

But it cannot be in inferior courts, as thoſe that have *ſoke* and *ſake*, and *infangtheft*, and *utfangtheft*. *Bract. Lib.* III. *cap.* 35.

But in caſe of a royal franchiſe, as a county palatine, or the royal franchiſe of *Ely*, where the biſhop hath juſtices and coroners of his own making, there a felon may become an approver. 29 *E.* 3. 42. *a. Coron.* 462. in the caſe of *Ely*.

Neither can a man become an approver before juſtices of peace, nor *oyer* and *terminer*, for they cannot aſſign a coroner. 9 *H.* 4. 1. *Coron.* 457. 4 *Co. Inſt.* 165, 169. *Co. P. C.* 130.

V. The manner of approver, and of the allowance of it.

Before any man ſhall be admitted to be an approver he muſt confeſs the indictment in open court, and pray a coroner to be aſſigned him, and regularly this is to be done upon his arraignment before plea pleaded, tho as hath been ſaid, his confeſſion hath been ſometimes admitted after *not guilty* pleaded. 11 *H.* 7. 5. *b.* 12 *E.* 4. 10. *b.* and therefore, if he hath pleaded before *not guilty*, and then prays a coroner without confeſſing the felony, the inqueſt ſhall be taken, and if found guilty he ſhall be executed. 2 *H.* 7. 3. *a.* adjudged; and if he hath not pleaded to the country, but prays a coroner, and will ſay no more, he ſhall have *peine fort & dure*, tho the book of 1 *H.* 5. *Coron.* 441. be that he ſhall be hanged.

Upon confeſſing the felony and praying a coroner to be aſſigned the court doth theſe things.

1. They aſſign him a coroner to take his appeal. 2. They prefix him a time to make his appeal, ſometimes three, ſometimes four days. 8 *H.* 5. *Coron.* 439. 12 *E.* 4. 10. *b.* 26 *Aſſiz.* 19. 3. He ſhall be removed out of ſtrait cuſtody, and make his appeal before the coroner, that he may not

have any juſt pretenſe to ſay, it was by dureſs or conſtraint 12 *E.* 3. *Coron.* 169. and therefore, if upon the coming back of the approver to the court he wave his appeal, as being made by dureſs and againſt his will, the coroner ſhall be examind touching it upon oath; and if he affirm it was made *de bon grèe*, the appeal ſhall ſtand, but the approver ſhall be hanged. 22 *E.* 3. *Coron.* 255. 12 *E.* 3. *Coron.* 169. 4. The coroner muſt put his appeal into form, and when the priſoner comes back into the court he muſt repeat his appeal, and ſhall not be helped by the court or any by-ſtander. 26 *Aſſiz.* 19. and if he miſs in repeating his appeal in any matter of moment, as the colour of the horſe, *&c.* he ſhall be hanged, for if he miſtake in ſuch circumſtances, which muſt needs come from his own memory and information, it is a ſign it is feigned. 5. If he make not his appeal before the coroner in the time prefixt, he ſhall be hanged, and if he make it and diſavow it when he comes into the court, he ſhall upon the examination of the coroner upon oath be hanged. 6. If he appeal one, who by his own confeſſion is not in the kingdom, he ſhall be hanged. 2 *E.* 3. *Coron.* 153. for he cannot be attaint at his ſuit. 7. After his appeal made he ſhall have an allowance of 1 *d. per diem* by the book of 12 *E.* 4. 10. *b.* 26 *Aſſiz.* 19. 8 *H.* 5. *Coron.* 439. three half-pence *per diem per Britton*, and by *Forteſcue* 21 *H.* 6. 34. *b.* nothing at all, till he hath convicted the appellee.

VI. Touching proceſs upon an appeal by an approver.

It is to be known, that altho a coroner cannot receive an original appeal but of ſuch felonies, as are committed in that county, whereof he is coroner, yet if a felon become an approver, the coroner may take an appeal of any felony, tho committed in a forein county. 9 *H.* 5. *Coron.* 437.

Altho it ſeems, that book is not law, for he can appeal only in the county, where he is indicted, and he cannot be indicted in one county of a felony committed in another county, therefore *quære librum*; it ſeems it muſt be intended, where *A.* is indicted in the county of *B.* and taken in the county of *C.* and there the coroner receives his confeſſion

and appeal, which poſſibly he may do without any ſpecial aſſignment *virtute officii*, as he may take an abjuration of a priſoner in a foreign county.

But the coroner in that caſe cannot make proceſs againſt the appellee in a forein county. 29 *E.* 3. 42. *a. Coron.* 462. but he may in the ſame county. *Stamf. P. C.* 146. *a. b.*

And therefore the biſhop of *Ely* having the royal franchiſe of *Ely* and juſtices and coroners of his own, and alſo having franchiſe of *retorna brevium* in divers hundreds in the county of *Suffolk*, and likewiſe a gaol there, a felon indicted and in priſon at *Ely* became an approver before the coroner of the franchiſe of *Ely*, and appeald one in the biſhop's gaol in his hundred in the county of *Suffolk*, the coroner of *Ely* cannot make proceſs to the biſhop's bailiff of his liberty in the county of *Suffolk* to bring the appellee to *Ely*, which is in another county, *viz. Cambridgeſhire*, adjudged 29 *E.* 3. 42. *a. Coron.* 462.

At common law it ſeems, if an approver appeal parties, that are demurrant in a forein county, there could be no proceſs made but in the king's bench by removing the record thither by the juſtices of gaol-delivery, before whom the parties became an approver.

But this is remedied by the ſtatute of 28 *E.* 1. *de appellatis*, whereby power is given to juſtices of gaol-delivery to iſſue proceſs to the ſheriffs of forein counties to take the appellees, and bring them before the juſtices in that county, where the appellor is indicted.

If the appellor allege the place, whereof the appellees are, (as he muſt,) and thereupon proceſs iſſues to the ſheriff of that county, and he return there are no ſuch perſons in his bailiwick, 25 *E.* 3. 42. *b.* or *non ſunt inventi*, 21 *H.* 6. 34. *b.* the approver ſhall have judgment and be executed, and he ſhall not be received to ſay they are in another county, and pray proceſs thither. 22 *E.* 3. *Coron.* 460. for if he be once found falſe in what he ſaith, he ſhall not be credited in any thing, but his appeal ſhall be preſumed untrue: *Vide* 21 *H.* 6. 34. *b. Coron.* 456.

If

If the approver die before his appeal determind, or be executed for the felony. 21 *E.* 3. 18. *a.* 21 *E.* 3. 17. *b.* *Coron.* 452. or hath the advantage of his clergy. 3 *E.* 3. *Coron.* 369. or diſavows his appeal and will not proſecute it 21 *H.* 6. 34. *b.* 3 *H.* 6. 50. *b.* yet proceſs ſhall be continued againſt the appellee at the king's ſuit, and the appellee, if he come in, ſhall be arraigned, for the appeal was well commenced, and it ſtands, as an indictment, by reaſon of the great preſumption, that a man, that confeſſeth himſelf guilty, would not charge another falſly to be companion with him in the ſame felony.

But if the appeal were never well commenced, as if the appellor were convicted by verdict or outlawry, *de quibus infra*, or if the king pardons the approver after the approvement made, and before trial. 47 *E.* 3. 16. *a.* *Stamf. P. C. fol.* 149. *a.* the appellee ſhall be diſcharged without arraignment at the king's ſuit, or further proceſs upon the appeal, for now the approver having his pardon is ſure to eſcape, and therefore ſhall not be truſted in his proſecution againſt another for the ſame felony: But of theſe matters farther under the next head.

If the appellee be returned *non inventus*, the appellor, as hath been ſaid, may be executed, but proceſs of outlawry ſhall iſſue againſt the appellee, as it ſeems, not by one *capias* and *exigent*, but by *capias*, *alias*, *pluries* and *exigent*; *quære.*

VII. Touching proceedings upon the appeal after appearance of the appellee.

He that is appeald ſhall not be let to bail but in three caſes. 1. If the approver be dead. 2. If the perſon appeald be of good fame. 3. If the appellor wave his appeal. *Weſtm'* 1. *cap.* 15. (*a*). *Stamf. P. C. Lib.* II. *cap.* 18. *fol.* 74. *a. b.*

And therefore, if *A.* be ſeverally appeald by two approvers *B.* and *C.* indicted ſeverally of ſeveral felonies, and *A.* join battle and vanquiſh *B.* yet he ſhall not be let to bail till the appeal of *C.* be determind. 25 *E.* 3. 42. *b.*

I When

(*a*) 2 *Co. Inſt.* 188.

When the appellee comes in he may take his legal exceptions to the inſufficiency of the appeal, as that the appellor is not in priſon but at large. 21 *E.* 3. 18. *a. Coron.* 448. 6 *H.* 6. *Coron.* 231. or that the appellor is within age, or above ſeventy years old, or a woman, or maimed, whereby the appellee loſeth his trial by battle. *Stamf. P. C. cap.* 58. *fol.* 147. *b.* or that he is a clerk convict, and hath not made his purgation. 17 *E.* 3. 13. *a.* or that he is abjured the realm. 19 *E.* 2. *Coron.* 387. or that he was convict by verdict before he appeald of the ſame offenſe: *Vide Co. P. C. cap.* 56.

Alſo he may have all thoſe exceptions, which an appellee at the ſuit of a lawful perſon either by writ or bill may have, as that the plaintiff is outlawd for another felony, or in a perſonal action, but if he hath obtaind his pardon, the appellee ſhall be put to anſwer, as in another appeal. 21 *E.* 3. 17. *b.* but if the approver be pardond that felony, upon which he makes his appeal, the appellee ſhall not be put to anſwer neither at the party's ſuit, nor at the ſuit of the king. 47 *E.* 3. 16. *a. ubi ſuprà.*

If the appellee hath no exceptions to the appeal, or to the diſability of the appellor, but pleads to the felony, he may put himſelf upon trial, either by battle, or by the country.

Touching the form of the trial by battle, I ſhall make no long narrative at this time, becauſe it is an unuſual trial at this day, and beſides, it will come more aptly in another place.

If when battle is joind they come to the combat, and the appellee be vanquiſhed, it is an attainder of the appellee, and the appellor ſhall have the benefit of the king's grace and a pardon *tanquam ex merito juſtitiæ.*

But if the approver appeal ſeveral perſons, and they ſeverally join battle, the appellor ſhall not have his pardon till he vanquiſh them all ſucceſſively, for if he be vanquiſhed by the laſt, or diſavow his appeal againſt the laſt, he ſhall be executed. 41 *E.* 3. *Coron.* 98. 21 *H.* 6. 34. *b. Coron.* 456.

And *note*, that, if in the field when they come to battle, the appellor diſavow his appeal, the approver ſhall be executed, and the appellee deliverd without being arraigned at

the king's ſuit, for his diſavowing in the field is *quaſi* a trial of the fact. 21 *H.* 6. 34. *b. Coron.* 456. *Stamf. P. C.* 148. *a. b.*

But if before the deraigning of battle the approver diſavow his appeal, the approver ſhall be hanged, but the appellee ſhall be put to anſwer at the king's ſuit, for it may be the king hath other evidence beſides the approver to convict him.

If *A.* becomes approver, and appeals *B. C.* and *D.* of the ſame felony, and in his combat with *B.* becomes recreant, *B.* ſhall be diſcharged, but the appeal ſhall ſtand againſt *C.* and *D.* 41 *E.* 3. *Coron.* 98.

If three be indicted for the ſame felony, and they become approvers, and the appellee joins battle with them all, he ſhall perform it ſeverally, but if he vanquiſh one of the appellants, he is thereby acquitted againſt all the reſt, and the approvers ſhall be executed, and the appellee deliverd. 7 *E.* 3. 12. *a.*

But if the appeal be of ſeveral felonies, tho he vanquiſh one appellant, he muſt fight ſucceſſively with the reſt. 19 *H.* 6. 35. *a.* 47 *E.* 3. 5. *a.* for the charges are ſeveral by the ſeveral appellants.

If the appellee put himſelf upon trial *per patriam*, the approver ſhall be ſworn as well to the petit jury upon the trial, when he gives his evidence, as well as make a general oath at the time of his firſt becoming approver, and hence he is called *probator*, (*quod tamen quære*, becauſe he is a perſon convict,) ſo that altho he were a partner in the offenſe, and tho he ſtand indicted of it, and tho he be convicted by his confeſſion, yet he is admitted a witneſs upon his own accuſation or appeal, and the reaſon is, becauſe he accuſeth himſelf by his confeſſion, as well as he doth the appellee by his appeal, and therefore gains a probable credibility of his teſtimony.

And therefore *P.* 19 *Jac.* in the ſtar-chamber, *Noye*'s *Rep. p.* 154. in Sir *Percy Cresby*'s caſe, one defendant, that accuſeth not himſelf, is not admitted as a witneſs to convict his companion, but if he accuſe himſelf, he is a witneſs againſt his companion.

But this teſtimony or evidence is not concluſive to the jury, for the jury may conſider as well the credibility or not credibility of the witneſs, as the matter he ſwears.

And altho it ſeems it is now no plea for the appellee to ſay, he is *boni nominis & famæ, & in franco plegio & in aſſiſâ domini regis, & habet dominum, qui ipſum advocet,* as it was in *Bracton*'s time, it is good evidence for the priſoner, if there be no other evidence againſt him but the teſtimony of the approver; and therefore, if the appellor die, yet the king may proceed with the appeal, becauſe tho he cannot have the teſtimony of the approver himſelf, yet there may be other evidence of the fact.

But yet, when the approver is dead after his appeal, and before trial, the party is bailable, becauſe much of the evidence, which may conduce to the conviction, namely the oath of the approver, is loſt, and ſo leſs probability of his conviction.

If the approver be vanquiſhed and kild upon the place in the battle, or if the appellee be acquitted by verdict, yet a judgment muſt be entred upon his confeſſion, for his bare confeſſion of the felony is a conviction, it is true, but not an attainder till judgment given, *quòd ſuſpendatur per collum,* which is not preſently entred upon his becoming approver, but when either by trial, or for any other cauſe before ſhewn, the court thinks not fit to ſpare his execution.

And on the other ſide, if the appellee be convict by verdict or battle, or ſlain upon the field, yet judgment muſt be given, *quòd ſuſpendatur per collum.* 8 *E.* 3. *Judgement* 225. And in that caſe, altho the life of the approver is ſaved, yet he ſhall be baniſhed, unleſs he obtain the king's pardon. *Stamf. P. C. Lib.* II. *cap.* 52. lord *Coke P. C. cap.* 56. ſaith he ſhall have a pardon *ex debito juſtitiæ.* And thus far concerning approvers.

I ſhould now conſider the buſineſs of abjuration, which is always accompanied with a confeſſion of the felony before the coroner, but becauſe that was a kind of appendant to ſanctuary, which is wholly and finally taken away by the ſtatute of 21 *Jac. cap.* 28. I ſhall not incumber myſelf with that buſineſs.

CHAP.

CHAP. XXX.

Concerning the pleas of the priſoner *upon his arraignment, and firſt, concerning* pleas in abatement of the indictment.

THE priſoner upon his arraignment either confeſſeth, or pleads, or ſtands mute; the firſt of theſe is diſpatched in the former chapter, the ſecond matter comes now to be conſiderd, *viz.* his pleas upon his arraignment.

Pleas upon the arraignment are of four ſorts.

1. Pleas that are declinatory of his trial, and ſuch were antiently the plea of privilege of ſanctuary, and the plea of clergy; the former is taken away by the ſtatute of 21 *Jac. cap.* 28. the latter ſtands ſtill in force; but becauſe for the moſt part that benefit is claimed after conviction, and rarely before, I ſhall refer the whole buſineſs of clergy to a diſtinct examination, after I have done with the conviction of the priſoner.

2. Pleas in abatement of the indictment,

3. Pleas in bar of the indictment.

4. Pleas to the matter of the indictment, *viz. Not guilty.*

Now as to pleas in abatement of the indictment they are of theſe kinds.

I. Such defects as ariſe upon the indictment itſelf, and the inſufficiency of it, which hath been at large conſiderd in the 24th chapter; if any ſuch exception be taken by the priſoner, he may pray counſel to be aſſigned to him to manage his exceptions and take more; but he ſhall not have a copy of the indictment (*a*) from the court, but he and the counſel aſſigned may have *oyer* of the indictment, and preſs their exceptions upon it.

(*a*) But now by 7 *W.* 3. *cap.* 3. in all caſes of treaſon, which works corruption of blood, or of miſpriſion of ſuch treaſon, the priſoner ſhall have a copy of the indictment.

But it is rare to take any exceptions to indictments before conviction, unleſs upon indictments removed into the king's bench by *certiorari*, which the court may in diſcretion hear or not hear, but remand the priſoner and indictment.

And the reaſons, why they are not taken in the country before conviction are, 1. Becauſe he may have the ſame advantage of the exceptions after his trial and before judgment, as before trial. (*) And 2. Becauſe if the exceptions appear material, the court can quaſh that indictment, and direct a new bill to be ſent out to the grand jury, wherein theſe faults may be amended, and the priſoner arraigned *de novo*.

II. Such defects as are in matters of fact, as *miſnoſmer*, or falſe addition of the priſoner.

As to the plea of *miſnoſmer:* In appeals or actions between party and party, or in indictments, if the defendant plead *miſnoſmer*, he muſt be careful, that he conclude not himſelf by the manner of his pleading.

Therefore, where *Alan Gerard* was committed upon a *capias* in felony, the pleading was *& ſtatim ductus ad barram in propriâ perſonâ, & quæſitus quomodo ſe velit inde acquietare ſtatim dicit, quòd ipſe habet nomen* Johannis Allen, *& non* Alani Gerard, and pleads over to the felony *not guilty*, and the king's attorney replied, that *tempore indictamenti prædicti fuit & adhuc eſt cognitus tàm per nomen* Alani Gerard, *quàm per nomen* Johannis Allen, *& quòd culpabilis eſt de felon' &c. Et hoc petit quòd inquiratur per patriam, &c. ideo venit inde jurata, & prædictus* Alanus Gerard *per nomen* Johannis Allen *traditur in ballium: Vide* 6 H. 7. 7. *a.*

In an appeal or other action at the ſuit of the party *miſnoſmer* is a good plea.

(*) But now by 7 *W.* *cap.* 3. no indictment for high treaſon, whereby any corruption of blood may be made, or for miſpriſion of ſuch treaſon, nor any proceſs or return thereupon ſhall be quaſhed for miſ-writing, miſ-ſpelling, falſe or improper *Latin*, unleſs exception be taken in court before any evidence given upon ſuch indictment, nor ſhall any ſuch miſ-writing, &c. be any cauſe to arreſt judgment after conviction, but ſuch judgment may nevertheleſs be reverſed upon writ of error, as if this act had never been made.

If the defendant in an appeal or indictment plead *miſnoſmer* of his ſirname, the plaintiff or king may aver, *que conus per un noſme & lautre.* 1 *H.* 7. 29. *a.*

But in an appeal or action at the ſuit of the party, if *miſnoſmer* be pleaded of the chriſtian name, the plaintiff muſt take iſſue, and cannot plead *conus per lun noſme & lautre.* 1 *H.* 7. 29. *a.* 21 *E.* 3. 47. *b.*

In an indictment of felony if the priſoner plead *miſnoſmer* of his chriſtian name, ſome books hold it a good plea. 11 *H.* 4. 41. *b. Miſnoſmer* 18. *Stamf. P. C. Lib.* 3. *cap.* 18. *fol.* 181. *b.* but other books of greater and later authority be to the contrary. 1 *H.* 5. 5. *b. Miſnoſmer* 9. *Coron.* 274. 3 *H.* 6. 26. *a.* (*b*), *B. Miſnoſmer* 6. *per Rolf.*

It ſeems by the caſe of *Gerard* before cited, which was a record of a plea in the time of *E.* 4. tho the defendant may plead *miſnoſmer* of his chriſtian name, yet the king may aver *conus per l' un noſme & lautre*, tho it be otherwiſe in an appeal, but in all caſes of pleading *miſnoſmer*, he muſt plead over to the felony: *Vide Dy.* 88. *a. b.* 21 *E.* 4. 71. *a. b.*

But, as hath been before ſaid, there is little advantage comes by theſe pleas to the priſoner upon theſe reaſons; 1. Becauſe, if this exception be taken in the country at the gaol-delivery, the court may allow the exception, and direct a new bill according to what the priſoner ſays his true name or addition is, for, as has been ſaid, whoſoever pleads *miſnomer* or a falſe addition muſt give himſelf the true name and true addition by his plea, and that will be concluſive to him.

2. Becauſe this plea of *miſnoſmer* or untrue addition ſhall be always tried by the ſame inqueſt, that is to paſs upon the priſoner, and is ready at the bar, and at common law ſhould never be ſent to be tried in a forein county. 34 *H.* 6. 50. *a.* 1 *E.* 4. 3. *a.* tho the book of 5 *E.* 4. 2. *a.* as to the addition of place be contrary.

2 But

(*b*) The caſe in 1 *H.* 5. 5. *b.* was a miſnoſmer of the ſirname, and in the abridgment of that caſe, by *Fitzh. Coron.* 274. there is a *quære* added, *quære ſi ſoit en noſme de baptiſme*, and in 3 *H.* 6. 26. *a.* it was not the point of the caſe, but only ſaid *obiter arguendo*; and *Gerard*'s caſe is to the contrary. See alſo *Layer*'s caſe, *State Tr. Vol.* VI. *p.* 237.

But however in all caſes of indictments of felony, tho the plea in itſelf were a forein plea, and triable in another county, yet by the ſtatute of 22 *H.* 8. *cap.* 14. (continued by 28 *H.* 8. *cap.* 1. made perpetual by the ſtatute of 32 *H.* 8. *cap.* 3.) all forein pleas ſhall be tried by a jury of the ſame county, where the party is indicted, but that ſtatute extends not to treaſon, nor to an appeal of felony, but 32 *H.* 8. *cap.* 2. extends to appeals of felony, but not to an indictment of treaſon, ſo that forein pleas in caſe of indictments of treaſon ſtand as they did at common law. *Co. P. C. p.* 27.

And *note*, that regularly in all pleas, whether to the writ or in bar, by matter of record or by matter of fact, or both, if the plea do not confeſs the felony, as the plea of a pardon in caſe of an indictment, or a releaſe in caſe of an appeal, tho his plea be found againſt him by iſſue tried or adjudged againſt him by the court, yet he ſhall not be convicted thereupon, but plead over to the felony *not guilty*, as well upon an indictment, as upon an appeal, and this *in favorem vitæ*, 22 *E.* 4. 39. *per cur.* 9 *H.* 4. 1. *b.*

III. A third ſort of pleas in abatement by matter *dehors* is matter of record.

If *A.* be indicted of the murder of *B.* and there is another indictment afterwards taken of the ſame death againſt the ſame perſon, and he is arraigned upon the ſecond indictment, becauſe it is the king's ſuit the ſecond ſhall not abate, yet uſually the juſtices quaſh the other by judgment.

Yet *nota* the common courſe to prefer a new indictment of murder to the grand jury, altho an inquiſition of murder be returned by the coroner, and if the coroner's inquiſition be inſufficient indeed, it ſhall be quaſhed, but if ſufficient, it is uſual to arraign the priſoner upon both indictments, and an acquittal upon one ſhall be upon both, and this is done, becauſe otherwiſe the coroner's inqueſt will ſtand as a charge on record againſt the priſoner, tho acquitted upon the indictment, and proceſs of outlawry will iſſue thereupon.

So it is the conſtant uſe at this day to prefer two indictments upon the ſame killing againſt the ſame perſon, one of

of murder, and the other of manſlaughter upon the ſtatute of 1 *Jac.* for ſtabbing, and the priſoner arraigned upon both pleads to both, and the jury charged with both, *viz.* that if they find him guilty of both indictments, to return it ſo, if not guilty of murder, yet to inquire, whether guilty upon the other indictment.

If a duke, or an earl, or baron be indicted by a common name of *J. S. miles*, or *J. S. armiger*, he may plead the *miſnoſmer* to the indictment, *viz.* that he is a duke, or an earl, or baron, or peer of the realm, *nient noſme, &c.* becauſe that title is part of his name, and intitles him to be tried by his peers, but then he muſt ſhew forth a writ teſtifying it upon his plea pleaded, becauſe it is but dilatory, and ſhall not be tried by the country, but by the record 35 *H.* 6. 46. *a. per Forteſcue.* 6 *Co. Rep.* 53. *a.* counteſs of *Rutland*'s caſe, *per curiam.*

And thus far touching dilatory pleas.

CHAP. XXXI.

Concerning pleas in bar *of an indictment of felony or treaſon, and firſt, of* auterfoits acquit.

PLeas in bar of the indictment of felony or treaſon are of two kinds, *viz.* 1. Such as are purely matters of record, or 2. Such as are mixt, partly conſiſting of matters of record, partly of matters of fact.

Of the former ſort are the pleas of pardons, either general by act of parliament, or ſpecial by the king's charter.

But becauſe the buſineſs of pardons is not only a large title and full of variety, but is alſo applicable to all offen-

ſes criminal, whether the party be indicted or not indicted, or whether convicted, or attainted, outlawd, or put in *exigent*, I ſhall reſerve the diſcuſſion of pardons towards the end of this book.

Of the latter ſort are many pleas conſiſting of matters of record, and alſo matters of fact. And they are of theſe ſorts principally.

1. *Auterfoits acquit* of the ſame felony.
2. *Auterfoits attaint* or *convict* of the ſame felony.
3. *Auterfoits attaint* of another felony.
4. *Auterfoits convict* of another felony and had his clergy.

Now as to the plea of *auterfoits acquit*, (as alſo *auterfoits attaint de meſme felony ou treaſon*,) it conſiſts of two kinds of matters. 1. Matter of record, namely the former indictment and acquittal, and before what juſtices, and in what manner, *viz.* by verdict or otherwiſe; and 2. Matter of fact, namely, that the priſoner is the ſame perſon, that was acquitted, that the fact is the ſame of which he was acquitted, and whereof he is now indicted. This plea, tho the priſoner miniſtreth rudely, yet counſel ſhall be aſſigned to him to put his plea in due form, becauſe it is a ſpecial plea.

Mr. *Stamford* tells us, that the priſoner need not have the record of his acquittal *in poigne*, becauſe the plea is not dilatory, but in bar, (and ſo in the other caſe of *auterfoits attaint*, as it ſeems,) according to the difference taken by *Frowick*. 21 *H.* 7. 9. *a.*

But if that ſhould be law, it were in the power of every priſoner to delay his trial, as he pleaſeth, by pleading *auterfoits acquit* or *attaint* in another court, and ſo to put the king to reply *nul tiel record*, and then day given over to the next gaol-delivery to have the record, and to remove it by *certiorari* into the king's bench, if the trial be there, or the tenor of it by *certiorari* into chancery, and by *mittimus* into the court, where the trial is.

For regularly, if a record be pleaded in bar, or declared upon in the ſame court, the other party ſhall not plead *nul tiel record*, but have *oyer* of the record; but if it be in an-

other court, he ſhall plead *nul tiel record*, and a day given to procure the certificate of the record, or the tenor thereof. 5 *H.* 7. 24. *a. b.*

But it ſeems, that for the avoiding of falſe pleas and ſurmiſes and to bring offenders to ſpeedy trial in capital cauſes the priſoner muſt ſhew the record of his acquittal, or vouch it in the ſame court one of theſe ways.

1. By removing the tenor of the record of his acquittal into chancery by *certiorari*, and having it *in poigne*, or ſent to the juſtices by *mittimus ſub pede ſigilli*, and thus the priſoner pleading *auterfoits acquit* ſhewed the record of his acquittal *ſub pede ſigilli*. 2 *E.* 3. 26. *b. Coron.* 150.

2. Or elſe if he be arraigned in the king's bench upon an indictment removed, or found before them, and were formerly acquitted of the ſame felony, either before juſtices of peace or gaol-delivery, the court will give him a writ of *certiorari* to remove the record before them, and reſpit his plea till he can remove his acquittal into the court, that ſo he may form his plea upon it, for the record is part of his plea, and thus it was done. 20 *E.* 2. *Coron.* 232. and thereupon his plea is put into form ſetting out the record in certain, *Et hoc vocat recordum acquietanciæ prædictæ coram ipſo rege hic ad mandatum domini regis miſſum & coram ipſo rege remanens*, and thus it is pleaded in 2 *E.* 4. in *Hodſon*'s caſe, who was arraigned in the king's bench for murder, and pleaded an acquittal before the juſtices of peace in *Lincolnſhire*.

But it is to be obſerved, that the record muſt be removed by writ, for altho the king's bench may take an indictment or other record of the juſtices of peace *propriis manibus*, where it is to be proceeded on for the king, yet they cannot take a record of an acquittal to ſerve the priſoner's plea without writ. 8 *E.* 4. 18. *b.* 3 *E.* 3. *B. Coron.* 218.

If a man pleads *auterfoits acquit de meſme felonie*, and vouch the record, the court may examine proof, that it is the ſame felony, and thereupon allow it without any ſolemn confeſſion by the king's attorney, 26 *Aſſiz.* 15. But the ſafeſt way is the confeſſion of the king's attorney, or an inqueſt charged

to inquire, whether it be the ſame fact: *Vide R. Entries* 385. *a.* his plea allowd by the teſtimony of the juſtices of peace, before whom he was acquit, *ideo conſideratum eſt, quòd prædictus* B. *de feloniâ prædictâ ſit quietus & eat inde ſine die.*

3. If the priſoner be indicted and arraigned in the country before juſtices of gaol-delivery, *&c.* and the priſoner pleads *auterfoits acquit* of the ſame felony before the ſame juſtices in that county, or other juſtices of the ſame county, that were before them, then he concludes his plea, *Et hoc vocat recordum acquietanciæ prædictæ coram præfatis juſticiariis* at ſuch a gaol-delivery; and if it be in the king's bench, he mentions the term and roll, and thus is the plea in 13 *E.* 4. *Clud*'s caſe in the king's bench.

So that the priſoner, tho he do not ſhew the record *ſub pede ſigilli*, yet he muſt plead it certain, and have the record in court, and remove it thither, if it be not in the ſame court, and not expect till *nul tiel record* be pleaded, for it is part of the priſoner's plea, tho the court may favour him with time to procure the removal of the record.

Now the matter of fact of his plea conſiſts in his averment, that he is the ſame perſon, and that the felony, whereof he was acquitted, is the ſame whereof he is indicted, which is iſſuable, and the king's attorney may take iſſue upon it, or confeſs it, if it be true, and then thereupon judgment ſhall be entred, *quòd eat ſine die*, or the court may examine proofs and allow it. 26 *Aſſiz.* 15.

But it is to be known, that there muſt not only be an acquittal by verdict, but a judgment thereupon, *quòd eat ſine die*, for the bare verdict of his former acquittal is not a ſufficient bar without a judgment pleaded alſo, tho the acquittal regularly is a warrant for entry of the judgment at any time after.

And *note* alſo, that a former acquittal by judgment is not only a bar of a new indictment for the ſame offenſe, but if the party be outlawd upon that new indictment, he may aſſign his former acquittal for error in that outlawry, and reverſe it for that cauſe, and in that caſe the judgment is not only for the reverſal of the outlawry, but alſo farther

quòd

quòd ipſe tàm de indictamento de morte & murdro prædict' &c. quàm de utlegariâ prædictâ eat ſine die, and ſuch is the judgment in *Clud*'s caſe 14 *E.* 4. where that error is aſſigned to reverſe the outlawry.

Now for the full declaration of this plea theſe things are conſiderable. 1. What ſhall be ſaid the ſame felony, whereof the party was acquitted. 2. What manner of acquittal there muſt be to make it a bar. 3. In what ſuits *auterfoits acquit* is a plea.

I. As to the firſt of theſe.

If *A.* and *B.* be indicted as principals in robbing or killing of *D.* and *B.* be convict, as principal, and *A.* be acquitted, if after this *A.* be indicted, as acceſſary after the fact, this former acquittal, as principal, is no bar, for it is another offenſe. 27 *Aſſiz.* 10. *Coron.* 200. 8 *H.* 5. 6. *b. Coron.* 463. *Stamf. P. C. fol.* 105. *a.*

But if *A.* be indicted, as acceſſary before the fact, he may (as it is held,) plead *auterfoits acquit*, as principal, becauſe it is in effect the ſame offenſe. 2 *E.* 3. 26. *b. Coron.* 150, 282. but antiently the law was otherwiſe. 8 *E.* 2. *Coron.* 424. *Itinere Kant'*.

If *A.* be indicted in the county of *B.* for the murder of *C.* and it be ſuppoſed, that the murder was committed 1 *Martii* 17 *Car.* and he be acquitted, and after indicted again in the ſame county, ſuppoſing the murder 21 *Car.* yet notwithſtanding that variance he may plead *auterfoits acquit*, and aver it to be the ſame felony, for the day is not material, and beſides the death is of a perſon certain, who can be but once kild. 3 *Aſſiz.* 15. 25 *E.* 3. *Coron.* 136. 22 *Aſſiz.* 55.

And the ſame law ſeems to be in an indictment of robbery, tho it is poſſible ſeveral robberies may be committed at ſeveral days, for ſtill it lies in averment, that it is the ſame notwithſtanding the variance.

If a man be indicted for the robbery or murder of *John a Stiles* and acquitted, and after indicted for the robbery or murder of *John a Nokes*, yet he may plead *auterfoits acquit*, and aver it to be the ſame perſon notwithſtanding the va-

riance in the firname, for a man may have divers firnames; and he may aver, *que conus per l'un noſme & l'autre.* 26 *Aſſiz.* 15 *Coron.* 189. 11 *H.* 4. 41. *a.*

If *A.* be indicted in the county of *B.* for a robbery or other felony ſuppoſed to be done at *D.* in the county of *B.* and be acquitted, and be afterwards indicted for a robbery upon the ſame perſon in the county of *B.* but at another vill, yet he ſhall plead *auterfoits acquit* notwithſtanding the variance of the vill, and may aver it to be the ſame; but if he be afterwards indicted in the county of *C.* for a robbery ſuppoſed to be committed in the ſame county of *C.* (as it muſt be,) he ſhall never plead *auterfoits acquit* of the ſame robbery in the county of *B.* for the juſtices in the county of *B.* can only inquire touching a felony in that county, and therefore it can never be averred to be the ſame, but it is ſaid, that it is otherwiſe in an appeal. 4 *H.* 7. 5. *b.*

And therefore the book of 41 *Aſſiz.* 9. where an acquittal pleaded in a forein county was allowd, muſt be intended of an indictment removed out of that county, where he was firſt indicted and acquitted.

If *A.* rob *B.* in the county of *C.* and carry the goods into the county of *D.* tho he cannot be indicted of robbery in the county of *D.* yet he may be indicted of larciny in the county of *D.* becauſe the goods were carried thither; but ſuppoſe he be acquitted of larciny in the county of *D.* yet that acquittal is no bar to an indictment of robbery in the county of *C.* becauſe it is another offenſe.

Nay it ſeems, it is no bar to an indictment of larciny in the county of *C.* for tho he be acquitted in *D.* it may be, becauſe the goods were never brought into that county, and ſo the felony in *C.* may not be in queſtion, neither can the grand inqueſt or petit jury in the county of *D.* take notice of any felony committed in the county of *C.* and ſo the felony in *C.* is a diſtinct felony from that containd in the indictment in *D.*

If *A.* commit a burglary in the county of *B.* and likewiſe at the ſame time ſteal goods out of the houſe, if he be indicted of larciny for the goods and acquitted, yet he may be indicted for the burglary notwithſtanding the acquittal.

And *è converſo*, if indicted for the burglary and acquitted, yet he may be indicted of the larciny, for they are ſeveral offenſes, tho committed at the ſame time. And burglary may be where there is no larciny, and larciny may be where there is no burglary.

Thus it hath happend, that a man acquitted for ſtealing the horſe hath yet been arraigned and convict for ſtealing the ſaddle, tho both were done at the ſame time.

But if a man be acquit generally upon an indictment of murder, *auterfoits acquit* is a good plea to an indictment of manſlaughter of the ſame perſon, or *è converſo*, if he be indicted of manſlaughter, and be acquit, he ſhall not be indicted for the ſame death, as murder, for they differ only in degree, and the fact is the ſame. 4 *Co. Rep.* 46. *b. Holcroft*'s caſe *per cur'*, and upon the ſame reaſon *auterfoits acquit* upon an indictment of murder is a good bar to an indictment of petit treaſon, and *è converſo*.

II. As to the ſecond what manner of acquittal is a good plea.

It muſt be an acquittal upon trial either by verdict or battle.

And therefore, if *A.* be accuſed and committed for felony, but no bill preferred, or *ignoramus* found, ſo that at the end of the ſeſſions he is quit by proclamation, and deliverd, yet he may be afterwards indicted, for he is not *legitimo modo acquietatus*.

If *A.* be aſſaulted upon the highway, or in his houſe by thieves or burglars to rob him, and he kill one of the thieves, which is no felony in law, and this matter be ſpecially found by the coroner's inqueſt, or the grand inqueſt, whereupon he is diſcharged, yet he may be indicted *de novo* ſeven years afterward for murder or manſlaughter, and cannot plead the acquittal by the grand inqueſt.

But if he had been indicted generally of murder or manſlaughter, and plead to it *not guilty*, and this ſpecial matter had been found by the petit jury, and thereupon judgment given, *quòd eat ſine die*, if he be afterwards indicted for the ſame fact, he may plead *auterfoits acquit*. *Crompt. fol.* 28. *a. Bull*'s caſe 26 *Eliz.*

Therefore it is no prudence to have the matter in any caſe found ſpecially by the grand inqueſt or coroner's inqueſt, tho the fact being truly found by them amounts not to felony, as in the caſe before; and ſo *per infortunium*, or *ſe defendendo*.

If *A.* be indicted for felony, and be erroniouſly acquit by the miſtaken direction of the judge, as for that the felony was not committed the day mentiond in the indictment, yet that miſtake lies not in averment, but to another indictment ſetting the day right he may plead *auterfoits acquit*. 2 *Co. Inſt.* 318.

If *A.* be indicted of murder or other felony, and plead *non culp.* and a ſpecial verdict found, and the court do erroniouſly adjudge it to be no felony, yet as long as that judgment ſtands unreverſt by writ of error, if the priſoner be indicted *de novo*, he may plead *auterfoits acquit* and ſhall be diſcharged: *vide* 9 *H.* 5. 2. *b.* for it is the king's own ſuit, and tho the error appear, and regularly the judgment againſt the king is *ſalvo jure regis*, yet it is otherwiſe in caſe of life.

But if the judgment be reverſt the party may be indicted *de novo*; *quære*, whether in that caſe upon the reverſal upon the point of the verdict the party ſhall not be executed, for the judge *a que* ſhould have given that judgment, but it ſeems *in favorem vitæ* he ſhall be arraigned *de novo*, for poſſibly he hath other matter for his defenſe.

If at common law *A.* had committed murder, and had been arraigned within the year upon an indictment, and had been acquitted, tho this arraignment ſhould not have been, yet it ſtands as a good acquittal pleadable to another indictment or appeal: *vide* 8 *H.* 5. 6. *b. Coron.* 463. 16 *E.* 4. 11. *a.*

A. was indicted for the murder of *B.* by poiſoning, and the indictment runs, *quòd* B. *fidem adhibens perſuaſioni dicti* A. *neſciens prædictum potum cum veneno fore intoxicatum recepit & bibit, per quod prædictus* B. *immediatè poſt receptionem veneni prædicti obiit*; but it is not alleged, *quòd venenum prædictum recepit & bibit*; upon this he was arraigned and acquitted, and had judgment, *quòd eat ſine die*. Afterwards he was indicted

dicted again for the ſame offenſe, and pleaded *auterfoits acquit*, and ſhewd the record in certain, and pleaded over to the felony and murder *not guilty*.

It was reſolved, 1. That the indictment was inſufficient for this cauſe. 2. That in this caſe *auterfoits acquit* was no plea, becauſe the indictment itſelf was inſufficient, for it containd not any matter of felony. 3. And ſo he is not *legitimo modo acquietatus*, and ſo the difference is between this caſe and thoſe above of an erronious judgment; for here the foundation itſelf, namely the indictment containd no felony. 4. But if the error be only in the proceſs in an appeal or indictment, and yet the priſoner appear and plead *not guilty* and be acquit, this acquittal is pleadable 19 *E.* 3. *Coron.* 444. 5. But if he had been attainted upon this inſufficient indictment and judgment given, he ſhould not have been *auterfoits arraigne* upon a new indictment for the ſame offenſe, unleſs the former judgment had been firſt reverſed. 6. But *auterfoits convict* or *auterfoits acquit* by verdict, *&c.* is no plea, unleſs judgment be given upon the conviction or acquittal in any caſe, 4 *Co. Rep.* 44, 45. *Vauxe*'s caſe.

And the true reaſon of this judgment is rightly given by my lord *Coke P. C.* 214. becauſe the judgment upon the acquittal is only, *quòd eat ſine die*, which may be upon the defect in the indictment, which the judges are bound to look into, and it ſhall be ſuppoſed, that it was given upon that defect, and not upon the verdict, for the judgment is the ſame in both; but the judgment upon a conviction is, *quòd ſuſpendatur*, which is all the judgment that can be given.

But in the caſe of the ſpecial verdict above, where an erronious judgment of acquittal is given, yet it is concluſive to the king till the judgment be reverſed by error, for the judgment could be only given upon the verdict, the indictment being ſufficient, and ſo is the diverſity.

And *note* generally, that where *auterfoits acquit* or *attaint* is pleaded, yet *in favorem vitæ* he ſhall plead over to the felony, and be tried for the ſame, tho his ſpecial plea be found or adjudged againſt him, *Vauxe*'s caſe, *ubi ſupra*, & 22 *E.* 4. 39. *b.*

III. The third general is where, and in what ſuits *auterfoits acquit* is a good plea.

If *A.* be appeald of murder of *B.* by *C.* as ſon and heir of *B.* and is acquitted, and in truth *C.* was not the heir, but *D.* and thereupon *D.* brings an appeal, this *auterfoits acquit* is no plea, becauſe not brought by the right party. 21 *H.* 6. 28. *b.* neither is it a bar to the king, but he may be indicted notwithſtanding that acquittal, or if *D.* be nonſuit in his new appeal, he may be arraigned upon that appeal at the king's ſuit. 21 *H.* 6. 28. *b.*

If an appeal of murder or robbery be brought by *A.* againſt *B.* and *B.* is thereupon acquit by verdict, regularly this is a good bar to an indictment preferd by the king for the ſame robbery or murder both at common law and at this day.

But an acquittal by battle upon an appeal is held to be no bar to an indictment for the ſame offenſe: *vide Stamf. P. C. Lib.* II. *cap.* 36. *p.* 106. *b.* (*)

And at common law, if *A.* had been arraigned upon an indictment for murder or robbery, tho within the year, if an appeal be after brought for the ſame crime *auterfoits acquit* upon the indictment had been a good bar to the appeal. 16 *E.* 4. 11. *a.*

And therefore the juſtices at common law would rarely arraign a priſoner upon an indictment, eſpecially for murder within the year after the death in favour of the appeal. 22 *E.* 4. *Coron.* 44. unleſs the appellant had been an infant 32 *H.* 6. *Coron.* 278 & 279. or the evidence had been very pregnant. 21 *H.* 6. 28. *b.*

But now by the ſtatute of 3 *H.* 7. *cap.* 1. in caſe of murder or manſlaughter the juſtices ſhall proceed to arraign the priſoner upon an indictment, tho within the year; and if the principal or acceſſary be acquitted or attainted within

(*) The reaſon aſſigned for this by *Stamford* is, becauſe trial by battle does not lie againſt the king, wherefore he ſhall not be bound by ſuch trial, yet *Stamford* makes a *quære* of this, for *Bract. Lib.* III. *cap.* 19. §. 8. is expreſs to the contrary, and ſays, that if he be acquit by battle, he ſhall go quit not only againſt the appellants, but alſo from the ſuit of the king, *quia per hoc purgat innocentiam ſuam verſus omnes, ac ſi ſe poneret ſuper patriam, & patria omninò ipſum acquietaverit.*

the year and day, yet this ſhall be no bar to an appeal againſt them, as if there had been no ſuch acquittal, and therefore tho upon the indictment the offenders be acquit within the year, the court ought not to diſcharge them, but at diſcretion to bail or commit them, till the year and day be paſt, *vide le ſtatute.*

So that by this ſtatute *auterfoits acquit* or *attaint* upon an indictment of murder or manſlaughter is no bar of an appeal for the ſame death, tho on the other ſide *auterfoits acquit* or *attaint* upon an appeal ſtands ſtill a good bar to an indictment for the ſame murder or manſlaughter. *Stamf. P. C. ubi ſupra.* 4 *Co. Rep.* 40. *a. Darley*'s caſe.

But *auterfoits convict* of murder or manſlaughter, and had his clergy upon an indictment is a good bar to an appeal notwithſtanding this ſtatute, for indeed the ſtatute itſelf hath this exception, *the benefit of clergy not being had,* 4 *Co. Rep.* 45. *b. Wigg*'s caſe, and this, tho an appeal were depending, whereunto the priſoner had not pleaded at the time of his acquittal. 4 *Co. Rep.* 45. *b. Holcroft*'s caſe.

But the caſe of other appeals, as of robbery, rape, *&c.* are not within this ſtatute, and therefore *auterfoits acquit* upon an indictment within the year ſtands as at common law a good bar to an appeal of robbery, or any other offenſe other than murder or manſlaughter.

And yet at this day the judges never forbear to proceed upon an indictment of robbery, rape, or other offenſe, altho within the year, and the reaſon is, becauſe appeals of robbery eſpecially are very rare, and of little uſe ſince the ſtatute of 21 *H.* 8. *cap.* 11. gives reſtitution to the proſecutor upon an indictment, as effectually as upon an appeal.

CHAP. XXXII.

Concerning the plea of auterfoits attaint *or* convict *of the ſame felony, or any other offenſe.*

IF *A.* be indicted and convict of felony, but hath neither judgment of death, nor hath prayd his clergy, this is no bar of a new indictment for the ſame offenſe, if the firſt were inſufficient. 4 *Co. Rep.* 45. *a. Vauxe*'s caſe, and it ſeems, tho it were ſufficient, yet it is no bar without clergy or judgment; but if he had his clergy allowd him, *auterfoits convict* and had his clergy is a good bar to an indictment, or an appeal for the ſame crime, and ſo remains at this day, notwithſtanding the ſtatute of 3 *H.* 7. *cap.* 1. 4 *Co. Rep.* 40. *a.* 45. *b. Wigg*'s caſe.

And ſo it is tho he prays his clergy, and the court will adviſe upon it, tho the clergy be not actually allowd. (*) 4 *Co. Rep.* 46. *a. Holcroft*'s caſe. *Co. P. C. cap.* 57.

Auterfoits attaint de meſme felonie, tho upon an inſufficient indictment, was at common law a bar to appeals, as well as indictments of the ſame offenſe. 4 *Co. Rep.* 45. *a. Vauxe*'s caſe, and remains ſo ſtill at this day in all caſes but in appeals of death, which is alterd by the ſtatute of 3 *H.* 7. *cap.* 1.

If *A.* be attaint of felony by outlawry, yet, if he reverſe the outlawry, he ſhall be put to anſwer the ſame felony, and plead to the indictment, whereof he was outlawd; but if he reverſe the outlawry for this error, becauſe he was *auterfoits acquit* for the ſame felony, (which, as before is ſaid, is aſſignable for error,) he ſhall be diſcharged of the indictment, for it ſtands as well a plea to the indictment, as an error in the outlawry.

If

(*) See the caſe of *Armſtrong* and *Liſle*, *Kel.* 103. 104.

If *A.* be indicted of piracy and refuſing to plead hath judgment of *peine fort & dure*, and by the general pardon piracies are excepted, but the judgment of *peine fort & dure* is pardond by the general words of all contempts, *quære*, whether he may be arraigned for the ſame piracy, but by the better opinion he may be arraigned of any other piracy committed before that award. 14 *Eliz. Dy.* 308. *a.*

If *A.* be attaint of treaſon or felony by outlawry, yet he ſhall not be *de novo* indicted or appeald for the ſame felony till the outlawry be reverſed, for *auterfoits attaint* of the ſame felony is a good plea. *Co. P. C.* 213.

Auterfoits attaint de murder is a good plea to an indictment of petit treaſon.

If *A.* had been indicted at common law of felony, and had judgment of death, yet he may notwithſtanding his attainder be arraigned for treaſon committed before the felony for the advantage of the king, who is to have the eſcheat, but not for a treaſon committed after the felony. 1 *H.* 6. 5. *b. Stamf. P. C. Lib.* II. *cap.* 37. *fol.* 107. *b.* But in this my lord *Coke* differs from *Stamford*, and ſaith that for a treaſon committed after he ſhall be arraigned. *Co. P. C. p.* 213. (*a.*)

If *A.* commit divers robberies, one upon *B.* another afterwards upon *C.* and afterwards another upon *D.* and they bring ſeveral appeals, and he be attaint at the ſuit of *B.* yet he ſhall be put to anſwer to the appeals of *C.* and *D.* for the benefit of the reſtitution of their goods. *Stamf. ubi ſupra.*

And if there be an indictment and attainder at the proſecution of *B.* yet *quære*, whether after at the proſecution of *C.* he may not be put to anſwer an indictment at his proſecution to have benefit of reſtitution upon the ſtatute of 21 *H.* 8. *cap.* 11. *Stamf. Lib.* 3. *cap.* 10.

It ſeems in that caſe there may be an inqueſt of office to inquire of the robbery of *C.* ſo as to intitle him to reſtitution without arraigning the party upon the indictment of *C.*

(*a*) The caſe in 1 *H.* 6. 5. *b.* was of a treaſon ſubſequent to the felony, and therefore rather makes againſt *Stamford* in favour of lord *Coke*'s opinion.

If *A.* commit ſeveral felonies and be attaint for one of thoſe felonies, and the king pardon that attainder and the felony, for which he was attaint, if he be after indicted or appeald for the ſame felony, he may plead his attainder, and it will be no good replication to ſay he was pardoned after.

But yet he may be indicted or appeald for the other felonies, and if he plead his former attainder, it is a good replication to ſay he was pardoned after, whereby he is now reſtored to be a perſon able to anſwer to thoſe offenſes. *6 H. 4. 6. b.* *10 H. 4. Coron. 227.* *vide contra Co. P. C. p. 213.*

And ſo if a perſon attaint commit a felony after, and be pardoned the firſt felony and attainder, yet he ſhall be put to anſwer the new felony. *6 H. 4. 6. b.*

If *A.* commit ſeveral felonies and be convict for one of them, but no judgment of death nor clergy given him, he may be indicted for all thoſe former felonies. *Stamf. ubi ſupra.*

But if he had been convict for any one felony, and prayd his clergy, and read and been deliverd to the ordinary, he ſhould never be arraigned for any of thoſe former felonies. And it ſeems by the better opinion, that if he had prayd his clergy, *& tradito ei libro legit ut clericus*, but no award of *tradatur ordinario*, yet he ſhould not be arraigned for any felony committed before his clergy allowd, for it was the fault of the court, that they did not award *tradatur ordinario.* *4 Eliz. Dy. 211. b.* *Co. P. C. cap. 57.*

And the reaſon is, becauſe the ſtatute of *25 E. 3. cap. 5. pro clero* enacts, that he ſhall be arraigned of all his offenſes together, and then deliverd to the ordinary, and therefore if once deliverd to the ordinary, all his capital offenſes committed before are in effect diſcharged, and therefore at leaſt before the priſoner departs from the bar after his clergy allowd, he muſt be indicted, or otherwiſe he is for ever diſcharged.

But for any felony committed after conviction and clergy allowd, he may be indicted and arraigned, but not if he ſtands attainted and unpardoned.

But at this day that old law concerning the diſcharge of offenſes by clergy allowd is alterd.

By the ſtatute of 8 *Eliz. cap.* 4. it is enacted, "That if "any perſon admitted to his clergy ſhall before ſuch his "admiſſion have committed any offenſe, whereupon clergy "is not allowable by the laws and ſtatutes of this realm, "and not being thereof indicted and acquitted, convicted "or attainted, or pardoned ſhall and may be indicted or ap-"peald for the ſame, and put to anſwer, as if no ſuch ad-"miſſion to clergy had been.

And by the ſtatute of 18 *Eliz. cap.* 7. delivery to the ordinary is taken away, and burning in the hand wholly ſubſtituted in lieu thereof, and that every perſon admitted to his clergy ſhall anſwer ſuch felonies or offenſes, as he ſhould have done, if he had been deliverd to the ordinary and made his purgation.

So that now clergy doth diſcharge all offenſes precedent within clergy, but not ſuch other offenſes, as are out of the benefit of clergy.

There remains one ſpecial kind of *auterfoits acquit* of another perſon, than he that pleads it, which I ſhall mention and ſo conclude this chapter.

The acceſſary upon his arraignment may plead the acquittal of the principal.

A gaoler arraigned for the voluntary eſcape of a priſoner for felony may plead the acquittal of the felon of the principal felony, and ſo may the reſcuer arraigned upon an indictment for reſcue of a felon, and that is the reaſon, that the gaoler and reſcuer ſhall never be arraigned till the principal felon be tried and convicted, becauſe if he be acquitted, the gaoler or reſcuer cannot be guilty of felony.

If *A.* ſteal the goods of *B.* and break priſon, *A.* may be arraigned for the felony of breaking the priſon before the arraignment upon the principal felony, but if *A.* be arraigned upon the principal felony and acquitted before conviction of the felony for breaking the priſon, *A.* may plead this acquittal, for hereby that felony is purged before his con-

conviction, this was Mrs. *Samford*'s caſe in *Kent* for ſtealing the goods of the earl of *Leiceſter* (*).

To conclude this whole matter of *auterfoits acquit, convict* or *attaint* theſe things are to be obſerved. 1. The party that pleads the record muſt plead it ſpecially ſetting forth the record. 2. He muſt either ſhew the record *ſub pede ſigilli*, or have the record removed into the court, where it is pleaded by *certiorari*, or if it be a record of the ſame court muſt vouch the term, year and roll, for the record is part of his plea. 3. He muſt make averments, as the caſe ſhall require, as that he is the ſame perſon, that it is the ſame offenſe. 4. No iſſue ſhall be taken upon the plea of *nul tiel record*, becauſe it is pleaded in court, but the king's attorney may have *oyer* of the record. 5. The averments are iſſuable. 6. If iſſue be taken upon them, they ſhall be tried by the jury, that is returned to try the priſoner by the ſtatute of 22 *H.* 8. *cap.* 14. 7. He, that pleads theſe pleas, muſt alſo plead over *not guilty* to the felony, for if the pleas be adjudged againſt him, yet he ſhall be tried upon the *not guilty*.

CHAP. XXXIII.

Concerning pleas to the felony, viz. Not guilty.

REgularly, where a man pleads any plea to an indictment or appeal of felony, that doth not confeſs the felony, he ſhall yet plead over to the felony *in favorem vitæ*, and that pleading over to the felony is neither a waving of his ſpecial plea, nor makes his plea inſufficient for doubleneſs. 22 *E.* 4. 39. *b.*

And

(*) *Vide ſupra, Part* I. *p.* 612.

And therefore, if he pleads any matter of fact to the writ or indictment, or pleads *auterfoits convict*, or *auterfoits acquit* he ſhall plead over to the felony; and altho he doth it not upon his plea, but his plea be found or tried againſt him, yet he ſhall not be thereby convict without pleading to the felony and trial thereupon. 22 *E.* 4. 39. *b.*

But if a man plead to the juriſdiction of the court, as if an indictment of rape be found before the ſheriff in his *Turn* and deliverd to the juſtices, becauſe the ſheriff hath no juriſdiction to take an indictment of rape, the priſoner may plead to it without anſwering to the felony, thus it was done, 22 *E.* 4. 22. *b.* which was one *Wheeler*'s caſe; ſo if the juſtices of peace ſhould arraign one for treaſon.

Or if a man plead a plea, that confeſſeth the fact, as a releaſe in an appeal, he ſhall not plead over to the felony. 22 *E.* 4. 39. *b.* 9 *H.* 4. 1. *b.*

But yet even in that caſe it ſeems to me, that he may, if he pleaſe, plead over to the felony *not guilty*, and accordingly it is held by *Markham*, 7 *E.* 4. 15. *a.* in caſe of a releaſe.

If *A.* be indicted of felony and plead the king's pardon, for inſtance, if the indictment be of murder, and the party plead a pardon of felonies, or the like, he ſhall not need to plead over to the felony, becauſe it ſuits not with his plea.

And yet, if the pardon upon a demurrer of the king's attorney, or upon adviſement of the court be adjudged inſufficient, the party ſhall not be thereupon convict, but ſhall be put to plead to the felony and be tried for it, and yet the pleading of the pardon is a kind of confeſſion of the fact, but yet *in favorem vitæ* the party ſhall be put to anſwer the felony (*); and thus it was done in the caſe of *Ruttaby*, (†) who was indicted for murder in *Durham*, and the indictment removed by *certiorari* into the king's bench, and there he pleaded the king's pardon of murder, which for ſome defects was adjudged inſufficient to pardon him.

He was thereupon remanded, and the indictment remitted, and tried for the fact in *Durham*, and, as I have heard, acquitted. *Hill.* 1653.

(*) *Vide ſupra*, *p.* 239. (†) *Vide ſupra*, *Part* I. *p.* 467, *Part* II. *p.* 212.

And regularly in all caſes of felony or treaſon, where a man pleads a ſpecial matter, tho he conclude his plea with *not guilty* to the felony, or do not conclude it ſo, yet if his plea be tried or found, or ruled againſt him, he ſhall be put to his plea of *not guilty* and be tried for the felony, for tho a man ſhall loſe his land in ſome caſes for miſpleading, yet he ſhall not loſe his life for miſpleading. *Stamf. P. C. Lib.* II. *cap.* 34. *fol.* 98. *b.*

And therefore the book of 14 *E.* 4. 7. *a.* that ſaith, if the appellee demurs, and it be judged againſt him, it is peremptory, and he ſhall be executed, muſt be underſtood *cum grano ſalis*; and therefore *Brook* in abridging it. *B. Peremptory* 86. makes a doubt of it.

But the true difference ſeems to be this, if a perſon be indicted or appeald of felony and he will demur to the appeal or indictment and it be judged againſt him, he ſhall have judgment to be hanged, for it is a confeſſion of the indictment, and indeed a wilful confeſſion, for he may have all the advantages of exception to the inſufficiency of the indictment or appeal by way of exception either before his plea of *not guilty*, or after his conviction and before judgment, as he might have by demurrer, and in caſe of his demurrer no judgment of *peine fort & dure* can be given, becauſe the demurrer is a plea, and thus the book of 14 *E.* 4. 7. *a.* and 7 *E.* 4. 29. *a.* are to be underſtood, and accordingly 2 *Co. Inſt.* 178. *ſuper ſtat. Weſtm.* 1. *cap.* 12.

But if the priſoner pleads in bar, and concludes, as he ought to the felony, or plead a pardon, where he concludes not to the felony, and the attorney general demur, and he join in demurrer, and it be adjudged againſt the priſoner, yet he ſhall be put to anſwer the felony, for this demurrer is no confeſſing of the indictment, and it is all one, as if his plea were found againſt him by the jury, or by certificate of the biſhop, which yet is not ſo peremptory (*a*) but he ſhall be after tried for the felony. *Stamf. P. C. Lib.* II. *cap.* 34. *fol.* 98. *b.*

(*a*) See 14 *E.* 4. 7. *a.*

If *A.* be indicted of murder and he hath the king's pardon of manſlaughter, if he be arraigned upon the indictment for murder, he muſt not plead generally *not guilty*, for then he waves his pardon, but he muſt confeſs the indictment as to manſlaughter, and plead thereunto the king's pardon, and as to the murder, *viz. interfection' ex malitiâ præcogitatâ* he is to plead *not guilty*, and if he be found guilty of murder, he ſhall have judgment, if acquit of the murder, then his plea ſhall be allowd, and thus I directed it in Sir *Thomas Pettus*'s caſe in *Norfolk* about 24 *Car.* 2. and it is purſuant to the direction of the ſtatute of 13 *R.* 2. *cap.* 1. which requires, that before the pardon allowd it ſhall be inquired by the country, whether the party were ſlain of malice prepenſe, and if ſo, the pardon to be diſallowd.

Now the plea to the felony conſiſts of two parts, *viz.* 1. The iſſue of *not guilty*, whereunto the clerk joins iſſue *cul. priſt.* 2. The putting himſelf upon the country, when the clerk demands how he will be tried.

If either of theſe fail, it is in law a ſtanding mute, whereupon in caſe of felony he is put to his penance, and in caſe of treaſon he hath judgment, as upon a *nihil dicit*, and ſo is attainted. 14 *E.* 4. 7. *a.*

In caſe of an indictment of felony or treaſon there can be no juſtification made, as a man cannot plead, that what he did was *ſe defendendo*, or in his defenſe againſt a burglar or robber, tho it amount in truth to no felony.

And the reaſon is, becauſe the indictment ſuppoſeth in treaſon, that the fact was done *proditoriè & contra ligeantiæ ſuæ debitum*, and in felony, that the fact was done *felonicè*, which is the point of the indictment, and muſt be anſwerd directly, but upon *not guilty* pleaded he ſhall have the advantage of all ſuch defenſes, as he can make to acquit himſelf of the felony or treaſon, and may give all his ſpecial defenſe in evidence, tho the matter of fact be proved upon him, and ſo it is the moſt advantageous plea for the priſoner.

If dureſs and compulſion from others will excuſe him or his own neceſſary defenſe in ſafe-guard of his life, or any other matter, the jury upon the general iſſue ought to take

notice of it, and to find their verdict accordingly, as effectually, as if it were or could be ſpecially pleaded.

And now we have brought the priſoner to his trial, wherein we ſhall now proceed. And theſe trials of priſoners are of two kinds, *viz.* by battle, or by the jury.

The former doth not concern indictments, for therein there is no trial by battle, but concerns only appeals and approvers, and I ſhall therefore defer the diſcuſſion of trials by battle, till I come to conſider of appeals in the end of this book, and proceed to the buſineſs of trial by jury.

CHAP. XXXIV.

Touching the trial *of offenders* by jury, *and firſt,* the proceſs.

After the priſoner hath pleaded and put himſelf upon the country, the next thing in order of proceeding is the trial of the offender.

And therein theſe things will be neceſſary to be conſiderd. 1. The proceſs, that brings in the jury to try the priſoner. 2. The return to be made of them, and of what nature and quality they ought to be. 3. What is to be done, if they appear not, or be challenged off. 4. Concerning the challenge of the king, or of the priſoner unto them, if they do appear. 5. The trial and allowance, or diſallowance of the challenge. 6. The order of the ſwearing of the jury. 7. The evidence to be given to the jury, what, and how, and in what manner. 8. The demeanor of the jury before and at the time of the delivering of the verdict. 9. The verdict itſelf, how to be given and orderd by the jury and by the court. 10. What is to be done in caſe of miſcarriage

riage of the jury either in their verdict, or the circumſtances that attend it.

I. And firſt therefore I will conſider what, and how proceſs is to iſſue to bring in the jury.

And this will be various according to thoſe courts or judicatories, wherein the priſoner is to be tried, *viz.* 1. In the king's bench. 2. Before commiſſioners of *oyer* and *terminer*. 3. Before juſtices of gaol-delivery. 4. Before juſtices of peace, for theſe are the uſual tribunals, where matters of this nature are determind.

1. Therefore, as to the king's bench.

If the offenſe be committed in the county, where the king's bench ſits, and the indictment be originally taken in the king's bench, and the priſoner arraigned there, the court may proceed *de die in diem* in the term-time, and there needs not fifteen days between the *teſte* and return of the *venire fac.* to bring in the jury. 9 *Co. Rep.* 118. *b.* lord *Sanchar*'s caſe.

And the ſame law is, if the offenſe be committed in the ſame county, where the king's bench ſits, and the indictment be taken before juſtices of peace of the ſame county, and removed into the king's bench by *certiorari*, and the priſoner be there arraigned and plead.

But if the offenſe be committed, and the indictment taken in another county, than where the king's bench ſits, and it be removed into the king's bench by *certiorari*, and the priſoner be there arraigned and plead, there muſt be fifteen days between the *teſte* and return of the *venire fac.* or other proceſs. Lord *Sanchar*'s caſe, 9 *Co. Rep. ubi ſupra.*

The *venire fac.* as all other proceſs of that court, iſſues in the king's name under the ſeal of the court and *teſte* of the chief juſtice, and always ought to bear *teſte* after the iſſue joined between the king and the priſoner.

2. As to the commiſſion of *oyer* and *terminer*. Tho there goes out a general precept in the name of three or more of the commiſſioners, and under their ſeals fifteen days before their ſeſſion directed to the ſheriff to return twenty-four jurors to try the iſſue between the king and the priſoners

ſoners to be arraigned, yet this is but preparatory, and to have a jury in readineſs; for after the priſoners arraigned and pleaded to the country a precept ought to iſſue to the ſheriff in nature of a *Venire facias*, which may bear *teſte* the ſame day, that the priſoners plead, commanding the ſheriff to return twenty-four, *&c.* to try the iſſue upon ſuch a day, and this precept muſt be in the names and under the ſeals of the commiſſioners or three of them, whereof one of the *quorum*, 4 *Co. Inſtit. cap.* 28. *p.* 164. and not barely by an award upon the roll.

Or they may make their precept returnable the ſame day that the priſoner pleads, *viz. ad horam primam poſt meridiem*, *&c.* for juſtices of *oyer* and *terminer* may take their indictment, and arraign the priſoner and try him the ſame day, againſt the opinion of 22 *E.* 4. *Coron.* 44. as appears by the precedents cited 4 *Co. Inſtit. ubi ſupra*, and by common experience.

If they make their precept returnable any day after, as for inſtance the ſecond day of the ſeſſions, they muſt not only make an adjournment, but record the adjournment, or elſe it will be intended returnable after their ſeſſions, for the ſeſſions is intended only the firſt day and no longer, unleſs an adjournment be entred.

3. Juſtices of gaol-delivery, after the priſoner hath pleaded, may take his pannel from the ſheriff without making any precept to him, 4 *H.* 5. *Enqueſt* 55. 4 *Co. Inſtit. cap.* 30. *p.* 168. the reaſon given is, becauſe juſtices of gaol-delivery ſend out a general commandment to the ſheriff before their ſeſſion to return juries againſt they come, otherwiſe it is, where they have a ſpecial commiſſion *per Hankf.*

But this is not the reaſon, for ſo it is done by juſtices of *oyer* and *terminer* and juſtices of peace, and yet they make ſpecial precepts of *venire fac. vide antea, cap.* 4.

4. Juſtices of peace, as to the point of their precepts of *venire fac.* agree with juſtices of *oyer* and *terminer*, for they are as to this purpoſe commiſſioners of *oyer* and *terminer*, and may indict, arraign and try the ſame day in

caſes of felony, as it is agreed 4 *Co. Inſt. p.* 164. and uſual practice.

Now there be certain general obſervations touching the proceſs againſt the jury.

1. In all caſes, where the proceſs is by writ or precept, as well the award, as the writ or precept ought to mention truly the *viſne*, from whence the jury ſhall come, and where it is only by award without writ or precept, as in caſe of the juſtices of gaol-delivery, the award ought to mention the *viſne*, from whence the jury ſhall come.

As if a murder be ſuppoſed to be at *D.* the *venire fac.* ought to return a jury *de vicineto de D.*

If the murder be alleged *apud civitatem Briſtol*, the *venire fac.* is moſt properly *de Briſtol*, and it is good, becauſe a city, 7 *H.* 4. 13. *a. Enqueſt* 36. but if it be from a place not a city, it muſt be *de vicineto de D.*

But tho it be a city, yet the *venire fac. de vicineto civitatis Briſtol* is good, tho it be alſo a county, as hath been often reſolved againſt the opinion of *Stamford*, *Lib.* III. *cap.* 4. *fol.* 154. *b.*

If the ſtroke be laid at *B.* and the death at *C.* in the ſame county, the *venire fac.* muſt be *de vicineto B. & C.* becauſe both make the felony.

But by the ſtatute (*a*), where the ſtroke is in one county, and the death in another, the indictment ſhall be, where the death was, and the *viſne* ſhall be from the place, where he is alleged to die, for neceſſity, becauſe the proceſs is not to go into the other county.

If a murder be laid *in quadam plateâ vocat.* Kings-ſtreet *in parochiâ Sanctæ* Margaritæ *apud civitatem* Weſtm. the *viſne* ſhall be neither from *Kings-ſtreet*, becauſe it is alleged to be only *platea* nor *de vicineto civitatis Weſtm.* but *de vicineto parochiæ Sanctæ Margaritæ*, becauſe more certain. 6 *Co. Rep.* 14. *a. Arundel's* caſe.

But if a murder be laid *apud B. in parochiâ de C.* the *venire fac.* ſhall be *de vicineto de B.* becauſe more certain, for it ſhall be intended a vill or hamlet within a pariſh, and by

4 common

(*a*) 2 & 3 *E.* 6. *cap.* 24.

common intendment a pariſh may contain many vills. 11 *Co. Rep.* 25. *b. Harper*'s caſe.

But at this day by the ſtatute of 22 *H.* 8. *cap.* 2. made perpetual by 32 *H.* 8. *cap.* 3. if a forein plea be pleaded in caſe of an indictment of felony, it ſhall be tried by the jury, that ſhould try the iſſue of *not guilty*, but in caſe of an indictment of treaſon, as I have before ſaid, that ſtatute takes not place, but it ſhall be tried by a jury of that place or county, where the forein matter pleaded ariſeth.

2. As to the number of the jury the *venire fac.* or precept is only *venire fac.* twelve, but the ſheriff ought to return twenty-four.

But the general precept, that iſſues before a ſeſſions of gaol-delivery, *oyer* and *terminer*, and of the peace before mentiond is to return twenty-four, and commonly the ſheriff returns upon that precept forty-eight.

But the award or precept to try the priſoner after he hath pleaded is only *venire fac.* twelve, and twenty-four are returned by the ſheriff upon that pannel.

3. Touching the manner of the precept, writ, or award.

If *A. B. C.* and *D.* be indicted for one felony or murder before any juſtices, they may iſſue one *venire fac.* or may iſſue ſeveral *venire fac.* or precepts, or awards of that kind.

If the *venire fac.* be joint, then if *A.* challenge twenty peremptorily, or challenge for cauſe, the jurors challenged ſhall be drawn againſt all, for each may have his ſeveral challenge, and the like, if it were in an appeal; ſo that, if there were eighty upon the pannel, they may be all challenged off by their ſeveral peremptory challenges, which is a great inconvenience, and therefore in ſuch caſe they antiently uſed to ſever the priſoners, and ſo put them to challenge apart, whereby they may poſſibly hit upon the ſame perſons. 9 *E.* 4. 27. *b.* 21 *H.* 6. 22. *a.* 22 *H.* 6. 4. *a.* therefore the beſt way is to make out ſeveral *venire fac.* and conſequently, if the pannel be challenged off, yet forty *tales* may be granted upon each *venire fac.*

And if the *venire fac.* in an appeal be once granted jointly, it cannot be afterwards ſeverd, neither can there be ſeveral

tales,

tales, for if the *venire fac'* be joint, the *tales* muſt be joint. 27 *H.* 6. 5 & 6.

And it ſeems, that in caſe of an indictment, tho it be the king's ſuit, if once a *venire fac.* iſſue joint, there cannot iſſue a ſeveral *venire fac.* nor a ſeveral *tales*, which in many caſes may much delay, if not fruſtrate the trial.

But before juſtices of gaol-delivery, where there is no precept but only an award, tho at firſt the award be joint, and the pannel accordingly returned by the ſheriff, and the priſoners challenge peremptorily ſeverally, whereby there are not enough left upon the pannel to try them, and a *tales* is awarded returnable the next day, yet the court may ſever the firſt award and alſo the *tales*. *Plow. Com.* 100. *a. b. Salisbury*'s caſe adjudged.

It is therefore conſiderable, whether the difference between the caſes of the old books and this be, that thoſe were of an appeal, which is the party's ſuit, and this of an indictment, which is the king's ſuit, or rather, (as I think,) becauſe this was in caſe of juſtices of gaol-delivery, where there is neither writ nor precept, but a command *ore tenus*, and when the record is made up, then an award upon the roll, which the juſtices may model, as they pleaſe, at any time before the trial, and requires not ſuch ſtrict formality as a writ. 4 *H.* 5. *Enqueſt* 55.

II. The ſecond general is touching the return of the ſheriff upon the precept, and the quality of the jurors.

Upon the writ or precept, or command to the ſheriff he ought to make the return, whether the place or *viſne* be within a franchiſe or not, and cannot return a *mandavi ballivo*, as in ſome caſes of appeals, for here the writ is for the king, and therefore with a *non omittas propter aliquam libertatem.*

The writ commands him to return *duodecim liberos & legales homines de vicineto*; they muſt be, 1. Freemen and regularly freeholders. 2. *Legales*, without any juſt exception. And 3. They are to be *de vicineto*, but this is not neceſſarily required, for they of one ſide of the county are by law *de vicineto* to try an offenſe of the other ſide of the county.

But concerning the quality of the jurors more ſhall be ſaid, when we come to conſider of challenges.

The jurors returned by the ſheriff were at common law thoſe, that were to try the priſoners, but by the ſtatute of 3 *H.* 8. *cap.* 12. all pannels returned by ſheriffs or their miniſters, (which be not between party and party,) before any juſtices of gaol-delivery, or of the peace, whereof one of the *quorum*, ſhall be reformed by putting to, and taking out the names of the perſons impannelled, by diſcretion of the juſtices, before whom ſuch pannel ſhall be returned, and the pannels ſo reformed ſhall be good and lawful, and the ſheriff ſhall return the pannel ſo reformed upon pain of 20 *l.*

This ſtatute, which began to be ſet on foot 11 *H.* 7. *cap.* 24. hath much reformed many practices of ſheriffs in packing of juries in caſes capital.

Note, tho the preamble of this ſtatute mention inqueſts of inquiry, the body of the act ſeems to extend to all pannels, as well of the petit jury, as of the grand inqueſt, and ſo it hath been conſtantly practiſed, for if a priſoner be arraigned before the judge, that ſits upon the crown-ſide, it hath been always uſual for the judge to ſend for a jury to the judge of *niſi prius*, and when the jury is brought, the ſheriff returns them between the king and the priſoner, which is by virtue of this ſtatute.

Where the jury muſt be *de medietate linguæ*, and other matters relating to the quality of the jurors will be conſiderd, when we come to conſider of challenges.

III. The third general is to conſider what is to be done, if the jury appear not, or be ſo challenged off, that there are not enough upon the pannel to try the priſoner.

If the proceſs be in the king's bench, and the jury fill not, or be challenged off, that there are not enough to try the priſoner, there ought to iſſue a *diſtringas juratores*, and a command to return *tales*.

But if the whole jury be challenged off, then a new *venire facias*, and if none of the jury appear, then a *diſtringas juratores* ſhall iſſue, and no *tales*.

But if ſome of the jury appear, but not a full jury, or if ſo many of them, that appear, are challenged off, that there remains not a full jury, a *diſtringas* ſhall iſſue with a *tales*.

If a full jury appear, and before they are ſworn one of them die, ſo that there remains not a full jury, a *tales* ſhall be granted, and ſo it is, if one juryman dies after he be returned and ſworn. 12 *H.* 4. 10. *a.* 20 *E.* 4. 11. *b.*

If a *tales* iſſue, and they do not appear full, or be challenged off, ſo that thoſe, that appear upon the principal pannel and *tales* make not up a full jury, another *tales* may be granted. 14 *H.* 7. 1. *b.*

In caſe of felony a *tales* may be granted of a greater number than the principal pannel in reſpect of challenges, ſo that there may be forty *tales* or more. 14 *H.* 7. 7. but if ſeveral ſucceeding *tales* be granted, the latter muſt be leſs in number than that which was next before, unleſs the array of the preceding *tales* be quaſhed, and then the number of the next may equal it. 20 *H.* 6. 40. *a.*

The times between the *teſte* and return of the *tales* muſt be (as it ſeems,) as in the principal *venire fac. viz.* if the indictment be in a forein county and removed into the king's bench, fifteen days, if in the ſame county, *de die in diem.*

If the indictment be before juſtices of *oyer* and *terminer*, the *tales*, as well as the principal pannel, ought to be by precept in the names of three of the juſtices, and may be made returnable *de die in diem*, or *de horâ in horam* of the ſame day.

And as to all other matters they reſemble the proceedings in the king's bench, *viz.* the number, the manner, and times of granting it, and ſo need not be repeated.

Before juſtices of gaol-delivery this learning of *tales* is not of much uſe, becauſe there is no particular precept to the ſheriff to return either jury or *tales*, but the general precept before the ſeſſions and the award, or command of the court upon the plea of the priſoner. 4 *H.* 5. *Enqueſt* 55. *Stamf. P. C. Lib.* III. *cap.* 6. *fol.* 155. *b.*

And yet, *vide Plow. Com.* 100. *a.* in *Salisbury*'s caſe before juſtices of peace and gaol-delivery, a *tales* granted returnable the next day.

CHAP. XXXV.

Concerning challenges, *and firſt, of* peremptory challenges.

CHallenges in reſpect of the parties taking them are of two kinds. 1. Challenges by the priſoner. 2. Challenges by the king.

Challenges by the priſoner are of two kinds. 1. Without cauſe ſhewn, which are commonly called peremptory challenges. 2. With cauſe ſhewn, which again are of two ſorts. 1. Of the array. 2. To the poll.

In this chapter I ſhall conſider peremptory challenges what they are, and what is to be done upon them.

By the common law, if a man were outlawd of felony or treaſon, and brought a writ of error upon the outlawry, and aſſigned ſome error in fact, whereupon iſſue was joined, he ſhould not challenge peremptorily or without cauſe. *Stamf. P. C. Lib.* II. *cap.* 7. *fol.* 158. *a.*

The like law ſeems to be, if he had pleaded any forein plea in bar or in abatement, which went not to the trial of the felony, but of ſome collateral matter only.

But if a man be indicted or appeald of treaſon or felony, and plead *not guilty*, or plead any other matter of fact triable by the ſame jury, and plead over to the felony, becauſe his life is now at ſtake he might challenge peremptorily and without cauſe any jurors under the number of three whole juries, namely thirty-five of the jurors returned,

turned, and they are to be withdrawn out of the pannel; and this was *in favorem vitæ*, *Moore* 12.

And if twenty men were indicted for the ſame offenſe, tho by one indictment, yet every priſoner ſhould be allowd his peremptory challenge of thirty-five perſons. 9 *E.* 4. 27. *b.*

And if there were but one *venire fac.* awarded to try them, the perſons challenged by any one ſhould be withdrawn againſt them all. 9 *E.* 4. 27. *Plow. Com.* 100. *Salisbury*'s caſe.

But if he had peremptorily challenged above thirty-five perſons, and inſiſted upon it, and would not leave his challenge, then in caſe of an indictment of high treaſon, it amounted to *nihil dicit*, and judgment of death ſhould be given againſt him.

But in caſe of petit treaſon or felony the priſoner was antiently put to *peine fort & dure*, as declining the trial by law appointed, the conſequence whereof was only the forfeiture of his goods, but it amounted to no attainder, and conſequently no eſcheat of his lands; *vide* 14 *E.* 4. 7. *a. Plow. Com.* 262. *b.* and thus the practice was until the beginning of *H.* 7. *vide* 17 *Aſſiz.* 6. 17 *E.* 3. 23. *a.*

But afterwards by the advice of all the judges of both benches it was reſolved, that the party ſo peremptorily challenging above thirty-five ſhould have judgment of death, and it amounted to an attainder, 3 *H.* 7. 12. *a. Co. P. C.* 227, 228. for having pleaded to the felony, and put himſelf upon the country here could be no ſtanding mute, and therefore the judges reſolved on this courſe, as moſt conſonant to law, to be practiſed in all circuits. 3 *H.* 7. 12. *a.*

But for all this the better opinion of latter times, as well as of former is, that the judgment in caſe of ſuch a peremptory challenge of above thirty-five at the common law before 22 *H.* 8. in caſe of felony was not an attainder but only penance according to the reſolution of the judges in the time of *E.* 4. mentiond by *Huſſey* 3 *H.* 7. 12. *a. Stamf. P. C. Lib.* II. *cap.* 61. *fol.* 150. *b. Stamf. prærogat.* 46. *a. Plow. Com.* 262. *b. per Weſton.*

And in this caſe the jury it ſeems was not to be ſworn, but the judgment was given ſingly upon his peremptory challenge.

And yet, if a priſoner plead *not guilty*, and put himſelf upon the country, and the priſoner challenge peremptorily under three juries, *viz.* thirty-five, whereby the jury remains, and a *tales* is granted, and the jury appears, and the priſoner then ſtands mute, yet the jury ſhall paſs upon him upon his plea of *not guilty*, which he had before pleaded. 15 *E.* 4. 33. *b.*

But by the ſtatute of 22 *H.* 8. *cap.* 14. it is enacted, "That no perſon arraigned for petit treaſon, murder, or "felony be admitted to any peremptory challenge above "the number of twenty, this act was continued until "32 *H.* 8. *cap.* 3. and then made perpetual.

By the ſtatute of 33 *H.* 8. *cap.* 23. it is enacted, "That "in caſes of high treaſon, or miſpriſion of treaſon, peremp-"tory challenge ſhall not be allowd.

But notwithſtanding theſe ſtatutes, by the ſtatute of 1 & 2 *P.* & *M.* *cap.* 10. enacting, "That all trials for *any* trea-"ſon ſhall be according to the due order and courſe of the "common law," peremptory challenge of thirty-five or under is at this day allowable in caſes of high treaſon and petit treaſon. *Co. P. C.* 227. *Stamf. P. C. Lib.* 3. *cap.* 7. *fol.* 158. *a.*

And conſequently all the conſequences thereof, namely the attainder of the priſoner, that peremptorily challengeth above thirty-five in an indictment of high treaſon or petit treaſon, ſtand as at common law.

But as to all murders and other felonies the ſtatute of 22 *H.* 8. *cap.* 14. taking away the peremptory challenge of above twenty ſtands in force. *Co. P. C.* 227, 228.

But then ſuppoſe the priſoner in caſe of felony peremptorily challenges above twenty, what ſhall be done? ſhall judgment of death be given, as where he challenged above thirty-five at common law? And it ſhould ſeem by the opinion of former times it ſhould.

For the ſeveral ſtatutes, that ouſt clergy in caſe of challenging above twenty, import, that by ſuch challenge the party ſhould be convict, otherwiſe clergy were needleſs to be ouſted upon ſuch challenge, as 25 *H.* 8. *cap.* 3. *vide* 11 *Co. Rep. Poulter*'s caſe 30 *b.* 4 & 5 *P.* & *M. cap.* 4.

But yet, if he challenge above twenty, as the law ſtands at this day, he ſhall not have judgment of death, but only his challenge ſhall be over-ruled, and the jurors ſworn for two reaſons. 1. Becauſe the ſtatute hath made no proviſion to attaint the felon, if he challenge above the number of twenty. 2. Becauſe the words of the ſtatute of 22 *H.* 8. are, *That he be not admitted to challenge above the number of twenty*, ſo that, if he challenge above twenty peremptorily, his challenge ſhall be only diſallowd. *Co. P. C. cap.* 102. *p.* 227, 228.

If *A.* be indicted and plead *not guilty*, the jury appears, he challengeth ſix of the jury for cauſe, and the cauſes found inſufficient, and the ſix are ſworn, and the reſt of the jury challenged off, whereby the inqueſt remains *pro defectû juratorum*, a *tales* granted and the jury appear, the priſoner may challenge peremptorily any of the ſix, that were before challenged for cauſe, allowd, and ſworn 32 *H.* 6. 26. *b.* 14 *H.* 7. 19. *a.* for it is poſſible a new cauſe of challenge may intervene after the former ſwearing. 2 *R.* 3. 13. *a.* but if a man challenge him for cauſe, he muſt ſhew a cauſe happend after the former ſwearing.

But if the priſoner upon the firſt pannel had challenged for inſtance fifteen peremptorily, and then the jury remains for default of jurors, and a *diſtringas* with a forty *tales* is granted, he ſhall challenge peremptorily no more than will fill up his number, *viz.* in caſe of felony at this day five more, and in caſe of treaſon or petit treaſon twenty more to make up his full number of twenty peremptory challenges in the firſt caſe, and thirty-five in the laſt.

CHAP. XXXVI.

Concerning challenges for cauſe *in caſe of indictments for treaſon or felony.*

CHallenges for cauſe upon indictments are of two kinds, either for the king, or for the priſoner, and each of theſe are again of two kinds, either to the array, or to the poll.

The king may challenge the array or the poll. 4 *H.* 7. 3. *b. Stat.* 33 *E.* 1. *Ordinatio de inquiſitionibus*, but then he muſt ſhew cauſe of challenge, but he need not ſhew the cauſe upon his challenge to the poll, till the whole pannel be peruſed. *Stamf. P. C. Lib.* III. *cap.* 7. *fol.* 162. *b.*

Challenges by the priſoner for cauſe ſhewn are of two kinds, *viz.* Either to the array or to the poll, but it is no principal challenge either to the array or poll, that the ſheriff or juror is of the king's livery, but he muſt conclude to the favour. 3 *H.* 6. *Challenge* 17.

If an alien be indicted or appealed of felony, tho the indictment ought to be by a grand inqueſt of *Engliſh*, yet by the ſtatute of 28 *E.* 3. *cap.* 13. the trial ſhall be *per medietatem linguæ, viz.* half the jury to be of aliens, except in caſe of felony by *Egyptians*, within the ſtatute of 1 & 2 *P.* & *M. cap.* 4.

And this ſtatute extends to felonies, as well made after the ſtatute of 28 *E.* 3. as before, for the ſtatute is general *all manner of inqueſts.*

And this ſtatute extended to trial of aliens indicted of treaſon alſo, and ſo the law ſtood till 1 & 2 *P.* & *M. cap.* 10. which reſtored the common-law trial in treaſon, and conſequently ouſted *medietas linguæ.* 1 *Mar. Dy.* 145. *a. Shirley*'s caſe. *Co. P. C. p.* 27.

If

If upon an indictment of felony againſt an alien he plead *not guilty*, and a common jury be returned, if he doth not ſurmiſe his being an alien before any of the jury ſworn, he hath loſt that advantage, *Dy.* 304. *a.* but if he allege, that he is an alien, he may challenge the array for that cauſe, and thereupon a new precept or *venire facias* ſhall iſſue, or an award be made of a jury *de medietate linguæ.* 21 *H.* 7. 32. *b.* but it is more proper for him to ſurmiſe it upon his plea pleaded, and thereupon to pray it.

It ſeems, that upon indictments of treaſon or felonies, the priſoner pleading *not guilty* there ought at common law to be four hundreders returned: *vide Stat.* 33 *H.* 8. *cap.* 23. that ouſted challenge for ſhire or hundred in caſes of treaſon, but that ſtatute as to treaſon was alterd by 1 *&* 2 *P. & M. cap.* 10.

But the ſtatute of 35 *H.* 8. *cap.* 6. requiring ſix hundreders, and that of 27 *Eliz. cap.* 6. requiring only two hundreders in perſonal actions extend not to trials upon indictments of treaſon or felony.

Yet I never knew any challenge for default of hundreders upon a trial of an indictment for felony or treaſon.

Challenges to the poll for cauſe are many, as in other caſes, which I ſhall not mention at large, becauſe they are all gatherd up by my lord *Coke ſuper Lit.* § 234. but ſhall only mention ſuch, as more ſpecially belong to capital cauſes.

By the ſtatute of 33 *H.* 8. *cap.* 12. for treaſon or felony committed in the king's houſe and tried before the lord ſteward all challenge except for malice is taken away. By the ſtatute of 25 *E.* 3. *cap.* 3. it is enacted, " That no in-" dicter be put in inqueſt againſt the party indicted, if he " be challenged for that cauſe.

By the ſtatute of 2 *H.* 5. *cap.* 3. no man is to be admitted in any inqueſt upon the trial of the death of a man (*a*), unleſs he have lands or tenements of the value of

2 40*s.*

(*a*) That is to ſay in capital cauſes: This ſtatute was introductive of a new law only with reſpect to the *quantum* of the freehold, for by the *common law* it was requiſite, that a juror ſhould be a freeholder, ſo that, tho this ſtatute be repeald

40 *s. per ann.* above all charges, if he be challenged: And by the conſtruction of this ſtatute, 1. It muſt be land of that value in the ſame county 9 *H.* 7. 1. *b.* Again 2. He muſt not only be ſeiſed thereof at the time of the pannel made, but alſo at the time that he comes to be ſworn, otherwiſe he may be challenged 12 *H.* 7. 4. *a.*

And altho the ſtatute of 27 *Eliz. cap.* 6. hath raiſed it to 4 *l. per annum*, yet that extends only to iſſues joined in the king's bench, common pleas, exchequer, and juſtices of aſſiſe, ſo that it reacheth not to trials of felons before juſtices of gaol-delivery, *oyer* and *terminer*, or of the peace, but theſe trials ſtand as they did by the ſtatute of 2 *H.* 5. as to the value of jurors, *vide ſtat.* 33 *H.* 8. *cap.* 23.

But yet by ſome ſubſequent ſtatutes the value of jurors freehold in caſes of trial of felony is changed.

peald by the general words of 1 & 2 *P. & M. cap.* 10. as to treaſon, yet ſome freehold was ſtill neceſſary, and ſo it was allowd in *Fitzharris*'s caſe by *Pemberton* C. J. See *Stat. Tr. Vol.* III. *p.* 263. notwithſtanding it was ruled otherwiſe in the caſe of lord *Ruſſel* by the ſame judge, *Stat. Tr. Vol.* III. *p.* 634. and in the caſe of Col. *Sidney*. *Ibid. p.* 736. which laſt reſolutions were declared to be illegal by ſeveral acts of parliament. See 1 *W. & M. Seſſ.* 2. *cap.* 2. 7 *W.* 3. *cap.* 3. See alſo Sir *John Hawles*'s remarks on thoſe trials. *Stat. Tr. Vol.* IV. *p.* 169, & *p.* 189. By 4 & 5 *W. & M. cap.* 24. continued by 10 *Ann. cap.* 14. & 9 *Geo.* 1. *cap.* 8. 'tis not ſufficient, that a juror be a freeholder, but he muſt alſo have within the ſame county freehold or copyhold lands to the clear yearly value of ten pounds, and tho this ſtatute ſeems principally to regard counties at large, yet it hath been allowd to extend to trials in *London* for high treaſon. *Francia*'s caſe. *Stat. Tr. Vol.* VI. *p.* 58. and *Layer*'s caſe *Stat. Tr. Vol.* VI. *p.* 245. See the ſtatutes of 3 *Geo.* 2. *cap.* 25. & 4 *Geo.* 2. *cap.* 7. made perpetual by 6 *Geo.* 2. *cap.* 37. whereby it is provided, "That all "leaſeholders upon leaſes for the term "of 500 years or more, or for 99 years, "or any other term determinable upon "one or more lives of an eſtate in poſ"ſeſſion in land in their own right of "the yearly value of twenty pounds or "upwards over and above the reſerved "rent payable thereout, (or in the "county of *Middleſex* upon any leaſes, "where the improved rents or value a"mount to fifty pounds or upwards *per* "*annum* over and above all ground "rents or other reſervations) may be "ſummoned or impannelled to ſerve on "juries in like manner as freeholders, "&c. And that the ſheriffs of *London* "ſhall not impannel or return any per"ſon to try any iſſue in *King*'s *bench*, "*Common Pleas*, and *Exchequer*, or to "ſerve on any jury at the ſeſſions of "*oyer* and *terminer*, gaol-delivery, or "ſeſſions of the peace, but ſuch who "ſhall be an houſholder within the "ſaid city, and have real or perſonal "eſtate to the value of one hundred "pounds, and that no perſon ſhall be "impanneld or returned to ſerve on any "jury for the trial of any capital of"fenſe, who ſhall not be qualified to "ſerve as a juror in civil cauſes; and the "ſame matter and cauſe alleged by way "of challenge and ſo found ſhall be ad"mitted as a principal challenge, and "the perſon ſo challenged may be ex"amined on oath as to the truth of the "ſaid matter.

By the ſtatute of 8 *H.* 6. *cap. ultimo* upon a trial *per medietatem linguæ* aliens need not have 40 *s. per ann.* ſo *defectus annui cenſûs* is no challenge as to the aliens, but ſtill it remains a good challenge as to the other half of the jury, that are denizens. *Stamf. P. C. fol.* 160. *b.*

By the ſtatute 23 *H.* 8. *cap.* 13. upon trials of felony or murder in cities or boroughs a citizen or burgher worth 40 *l.* perſonal eſtate may paſs, tho he have no freehold, but knights or eſquires living there are not within this proviſion.

The ſtatute of 33 *H.* 6. *cap.* 2. concerning indictments of perſons living in *Lancaſhire* refers not to trials.

By the ſtatute 11 *H.* 6. *cap.* 1. a challenge is allowd of any perſon living in the ſtews of *Southwark*, tho he be of ſufficient freehold.

When a priſoner challengeth for cauſe he ought to ſhew his cauſe preſently (*b*), becauſe it is the king's ſuit, 1 *H.* 5. 10. *b.* 38 *Aſſiz.* 22. (*c*) but ſome books are, that he ſhall not ſhew cauſe till the pannel be peruſed 6 *R.* 2. *Challenge* 105. but he muſt ſhew all his cauſes together *per* 24 *Eliz. C. B. Bracket*'s caſe.

If in a trial upon an indictment of felony eleven be ſworn, and the twelfth challenged, whereby the inqueſt remains for default of jurors, and a *diſtringas* with a *tales* iſſue, and the jurors appear, ruled 1. The king ſhall not challenge any of the eleven ſworn, unleſs it be for a cauſe happened ſince their ſwearing; if it happen before, tho not known till after, it ſhall not be allowd. 2. That the eleven, that were laſt ſworn, ſhall not be now firſt ſworn, but they ſhall be called, as they happen in the pannel. *M.* 43 & 44 *Eliz. B. R. Wharton*'s caſe, *Yelv.* 23.

And the ſame law is for the challenge of the priſoner for cauſe, but he may challenge them peremptorily notwithſtanding they were formerly ſworn, as before is ſhewn, *p.* 270.

Touching the trial of a challenge for cauſe made to the poll, *vide Co. Lit. p.* 158. *a.* If a juror be challenged before

3 any

(*b*) *Mo.* 846. *Luke* and *Clerk.* (*c*) See *Challenge* 128.

any juror ſworn, two triers ſhall be appointed by the court, and if he be found indifferent and ſworn, he and the two triers ſhall try the next challenge, and if he be tried indifferent, then the two firſt triers ſhall be diſcharged, and the two jurors tried indifferent ſhall try the reſt.

If the plaintiff challenge ten and the priſoner one, then he that remains ſhall have added to him one choſen by the plaintiff, and another by the priſoner, and they three ſhall try the challenge. If ſix be ſworn, and the reſt challenged the court may aſſign any two of the ſix ſworn to try the challenges.

If the array be challenged, it lies in the diſcretion of the court how it ſhall be tried, ſometimes it is done by two attornies, ſometimes by the two coroners, and ſometimes by two of the jury with this difference, that if the challenge be for kindred in the ſheriff, it is moſt fit to be tried by two of the jurors returned; if the challenge found in favour of partiality, then by any other two aſſigned thereunto by the court. 29 *Eliz. C. B. Leſter*'s caſe, *Trin.* 21 *Jac. B. R. Loyd* and *Williams* (*e*).

But all this learning touching challenges to the poll, whether peremptory or for cauſe, is intended of trials by ordinary juries, not of trial by peers, for there no challenge is allowable, for they are not only triers of the fact but in ſome reſpects judges. *P.* 7 *Car.* 1. *Caſus comitis* Caſtlehaven, (*f*), but of this more hereafter.

(*e*) 2 *Rol. Rep.* 363. (*f*) *Stat. Tr. Vol.* I. *p.* 366.

CHAP.

CHAP. XXXVII.

Concerning evidence *and* witneſſes.

HAving gone through thoſe things, that are previous and preparatory to the trial, I come now to conſider the trial it ſelf by jury, and the things concomitant with it, and firſt concerning the evidence to be given to prove the priſoner guilty.

To give a full account of evidence of this kind there will be theſe things examinable. 1. The quality and qualifications of witneſſes. 2. The manner of their teſtimony, what upon oath, and what without oath. 3. Thoſe evidences and examinations, that are in writing, what, and when allowable, and what not. 4. The things teſtified, and therein of preſumptions and preſumptive evidences by the common law, and by acts of parliament. 5. What variance between the evidence and indictment maintains the indictment.

I. Concerning the quality and competency of witneſſes to be produced.

It is to be obſerved, that there be many circumſtances that diſable a juror or are ſufficient cauſes of exceptions or challenges of him, that are not allowable exceptions againſt a witneſs.

The exception of kindred is a good cauſe of challenge againſt a juror, but not againſt a witneſs, therefore the father may be a competent witneſs for or againſt his ſon, or *è converſo*, the maſter for his ſervant or *è converſo*. Theſe and the like exceptions may be to the credit or credibility of a witneſs, but are not exceptions againſt his competency.

For that I may obſerve it once for all, the exceptions to a witneſs are of two kinds. 1. Exceptions to the credit of the witneſs, which do not at all diſable him from being ſworn, but yet may blemiſh the credibility of his teſtimony,

and in ſuch caſe the witneſs is to be allowd, but the credit of his teſtimony is left to the jury, who are judges of the fact, and likewiſe of the probability or improbability, credibility or incredibility of the witneſs and his teſtimony, and theſe exceptions are of that great variety and multiplicity, that they cannot eaſily be reduced under rules or inſtances. 2. Exceptions to the competency of the witneſs, which do exclude him from giving his teſtimony, and of theſe exceptions the court is the judge, and of theſe latter kind of exceptions I am here to treat.

If a perſon be outlawd in a perſonal action, it is a good cauſe of challenge againſt him as a juror, but yet he ſhall be ſworn as a witneſs notwithſtanding his outlawry. *Co. ſuper Lit.* §. 1. *fol.* 6. *b.*

The common incapacities or incompetencies of witneſſes are reckoned up by my lord *Coke ubi ſupra, viz.* 1. If he be attaint of giving a falſe verdict. 2. Or attaint of a conſpiracy at the king's ſuit, for then he is to have a villainous judgment and *amittere liberam legem*, otherwiſe it is if he be only attaint at the ſuit of the party: *vide* 24 *E.* 3. 73. *b.* 43 *E.* 3. 33. *b.* 4 *H.* 5. *Judgment* 220. 46 *Aſſiz.* 11. 27 *Aſſiz.* 59. 3. If he be convict of perjury. 4. Convict of a *præmunire.* 5. Convict of forgery upon the ſtatute of 5 *Eliz. cap.* 14. but [not] a conviction upon the ſtatute of 1 *H.* 5. *cap.* 3. 6. If he be convict of felony (*a*). And therefore it ſhould ſeem, that an approver ſhall not be ſworn as a witneſs, if the appellee plead to the country, but only his general oath, that he taketh at the time of his becoming an approver, ſhall be taken, *quod tamen quære*, for this caſe differs from the teſtimony of a perſon convict, for the approver accuſeth himſelf as well as the appellee. 7. If by judgment he hath loſt his ears. 8. Or by judgment ſtood upon the pillory. 9. Or tumbrel. *Co. P. C.* 219. for they are thereby infamous. 10. Or been branded, *ſtigmaticus.* 11. Or being a champion in a writ of right becomes recreant

(*a*) See *Dangerfield*'s caſe in the trial of lord *Caſtlemain*, *Stat. Tr. Vol.* III. *p.* 42. *Raym.* 379. and the trial of *Eliz. Cellier*, *Stat. Tr. Vol.* III. *p.* 35. *Raym.* 369.

or coward, for theſe render a perſon infamous, ſo that he loſeth *liberam legem.*

But yet in theſe exceptions theſe things are to be obſerved. 1. That he that allegeth this exception ought to ſhew forth a copy of the record atteſted or vouch the roll in court. 2. That if the king pardon theſe offenders, they are thereby renderd competent witneſſes, tho their credit is to be ſtill left to the jury, for the king's pardon takes away *pœnam & culpam in foro humano*, *M.* 12 *Jac. B. R. Cuddington & Wilkins* (*b*): but yet it makes not the man always an honeſt man, and therefore he ſhall not be a juryman 11 *H.* 4. 41. but yet may be a witneſs againſt the opinion of my lord *Coke* in *Craſhaw*'s caſe, *M.* 11 *Jac. B. R. Bulſtrode* 154. *quod vide.*

If a man be convict of felony, and prays his clergy, and is burnt in the hand, he is now a competent witneſs, for by the ſtatute of 18 *Eliz. cap.* 7. it countervails a purgation and a pardon, and he is thereby enabled afterwards to acquire goods. *Hob.* 288. *Searle* and *Williams.*

And ſo it is if he be in orders, whereby burning in the hand is diſcharged by the ſtatute of 4 *H.* 7. *cap.* 13. *Hob. ubi ſupra.*

And ſo it is if the burning in the hand be pardoned, *Hob. ibid.* or if he prays his clergy, tho the court do reſpit his reading, *quære*, *vide Holcroft*'s caſe, 4 *Co. Rep.* 46. *a.*

There are certain other matters, that render a man incompetent to be a witneſs, tho they are not ſuch as render him infamous by judgment or award in any of the king's courts.

1. Some are diſabled in regard of defect of intellectuals: A perſon of *non ſane memory* cannot be a witneſs, while he is under that inſanity, but if he have *lucida intervalla*, then during the time he hath underſtanding he may be a witneſs. *Co. Lit. ubi ſupra.* But it is a difficulty ſcarcely to be cleared, what is the *minimum*, *quod ſic* diſables the party.

If an infant be of the age of fourteen years, he is as to this purpoſe of the age of diſcretion to be ſworn as a witneſs, but if under that age, yet if it appear, that he hath a competent diſcretion, he may be ſworn.

(*b*) *Hob.* 67 & 81.

But in many caſes an infant of tender years may be examined without oath, where the exigence of the caſe requires it, as in caſe of rape, buggery, witchcraft, *de quibus vide quæ ſupra, Part* I. *cap.* 24. *p.* 302. *& cap.* 58. *p.* 634. *& infra, p.* 283.

2. It is ſaid by my lord *Coke ubi ſuprà,* that an infidel is not to be admitted as a witneſs, the conſequence whereof would alſo be, that a *Jew,* (who only owns the old teſtament,) could not be a witneſs.

But I take it, that altho the regular oath, as it is allowd by the laws of *England,* is *tactis ſacroſanctis Dei evangeliis,* which ſuppoſeth a man to be a chriſtian, yet in caſes of neceſſity, as in forein contracts between merchant and merchant, which are many times tranſacted by *Jewiſh* brokers, the teſtimony of a *Jew tacto libro legis Moſaicæ* is not to be rejected, and is uſed, as I have been informed, among all nations.

Yea, the oaths of idolatrous infidels have been admitted in the municipal laws of many kingdoms, eſpecially *ſi juraverit per verum Deum creatorem,* and ſpecial laws are inſtituted in *Spain* touching the form of the oaths of infidels. *Vide Covarruviam, Tom.* I. *Part.* 1. *de juramenti forma* (*c*).

And it were a very hard caſe, if a murder committed here in *England* in preſence only of a *Turk* or a *Jew,* that owns not the chriſtian religion, ſhould be diſpuniſhable, becauſe ſuch an oath ſhould not be taken, which the witneſs holds binding, and cannot ſwear otherwiſe, and poſſibly might think himſelf under no obligation, if ſworn according to the uſual ſtyle of the courts of *England.*

But then it muſt be agreed, that the credit of ſuch a teſtimony muſt be left to the jury.

3. Some regularly are diſabled in reſpect of the civil unity of their perſons, as the husband regularly is not allowd to be a witneſs for or againſt the wife, or *è converſo*; but *vide* touching this alſo at large *Part* I. *cap.* 24. *in fine & ibid. cap.* 64. *p.* 693. *ſuper ſtatut.* 1 *Jac. cap.* 11.

4. Some are diſabled to be witneſſes in reſpect, that they are concerned in intereſt.

And

(*c*) *P.* 249. *Edit. Antwerp.* 1614.

And therefore a party to an uſurious contract, if the money be unpaid, ſhall not be received as a witneſs to prove the uſury, becauſe he avoids thereby his own ſecurity, but otherwiſe it is, if the money be already paid, and the ſecurity taken up, for then he is allowable to be a witneſs for the king (*d*).

A. wounds *B.* for which he is indicted, yet *B.* may be a witneſs for the king: but this ſhall be no evidence in an action brought by *B.* for the aſſault, tho *A.* be convict at the king's ſuit.

If a reward be promiſed to a perſon for giving his evidence before he gives it, this, if proved, diſables his teſtimony.

And ſo for my own part I have always thought, that if a perſon have a promiſe of a pardon, if he give evidence againſt one of his own confederates, this diſables his teſtimony, if it be proved upon him (*e*).

Yet in ſome caſes a conſequential benefit to the witneſs doth not diſable his teſtimony, tho it may abate the credit of his teſtimony.

A. B. and *C.* are ſeverally indicted for perjury in proving a bond, *A.* traverſeth the indictment, *B.* and *C.* tho indicted for the ſame offenſe, yet not being convicted may be witneſſes for *A.* to prove the bond ſealed. *P.* 19 *Car.* 1. *B. R. Rot.* 2. adjudged in the caſe of *Billmore*, *Gray* and *Harbin*, and accordingly ruled *P.* 40 *Eliz. C. B. Gunſton* and *Downes* (*f*) in three actions ſeverally brought againſt three perſons for perjury in *Chancery* in one and the ſame point, for the other two are not immediately concerned in this trial, tho conſequentially they are concerned, the point being the ſame.

If *A.* bring an action upon the ſtatute of *Winton* againſt the hundred, none that live or have land in the hundred ſhall be admitted to give evidence for the hundred. *M.* 1650. *Bennet* verſus *Hundred de Hertford* (*g*).

Yet

(*d*) *Co. Lit.* 6. *b.*

(*e*) However the contrary opinion hath prevailed, ſee *Tong*'s caſe, *Kel.* 18. and *Layer*'s caſe *Stat. Tr. Vol.* VI. *p.* 257. but moſt certainly it is a great objection to the credibility, if not to the competency of the witneſs, *vide ſupra*, *Part* I. *p.* 304.

(*f*) 2 *R. A.* 685. *pl.* 3.

(*g*) 2 *R. A.* 685. *pl.* 6. *Styl.* 233. but this is now alterd by 8 *Geo.* 2. *cap.* 16. for by that ſtatute, "Any perſon inhabiting

Yet if a perſon be taken and indicted for the robbery, they of the hundred may be admitted to prove the defendant guilty of the robbery, and that he was taken upon their purſuit, tho this doth conſequentially diſcharge the hundred upon the *ſtatute* of *Winton*, & 27 *Eliz. cap.* 13.

A. brings an action againſt *B.* wherein *C.* is produced as a witneſs for *A.* and *A.* recovers upon his teſtimony, *C.* is thereupon indicted of perjury *contra formam ſtatuti* * *ad grave dampnum ipſius* B. *C.* pleads *not guilty*, ruled that *B.* ſhall not be received to give evidence againſt *C.* becauſe he is the party grieved, and ſhall recover 20 *l.* *M.* 1650. *B. R. Bacon's* caſe, 2 *Rol. Abr.* 685. *pl.* 4. and yet it ſeems he ſhall not recover the 20 *l.* upon the indictment, but muſt bring his action upon the ſtatute; and yet conſtant experience, and the very ſtatute of 21 *H.* 8. *cap.* 11. that gives reſtitution of goods to the party proſecuting an indictment of felony makes it evident, that he may be, and indeed ought to be the witneſs to convict the felon, tho thereupon he is to have reſtitution of the goods ſtolen.

If the tenant robs his lord, or the leſſee for life the reverſioner, or a reſiant the lord of the franchiſe, that hath *bona felonum*, theſe may be witneſſes upon an indictment or trial of the felon, notwithſtanding the conſequential advantage, that accrueth by the attainder or conviction of the party, yet the credibility of their teſtimony is to be left to the jury. But if *A.* hath a promiſe or grant of the goods of *B.* arreſted of felony, in caſe he be convict, I ſhould never allow *A.* to be a witneſs to convict *B.* for he by his own act after the felony committed acquires the intereſt, and ſo acts and ſwears for his own advantage.

A. brings an appeal againſt *B.* for the death of *C.* his father or her husband, *A.* cannot be a witneſs againſt *B.* upon *not guilty* pleaded, becauſe it is his or her own ſuit.

" ting within the hundred or any fran-
" chiſe thereof ſhall be admitted as a
" witneſs on behalf of the hundred in
" the ſame manner, as if he were not an
" inhabitant of that hundred, but reſi-
" ded in any other hundred whatſoever.

(*) *Viz.* 5 *Eliz. cap.* 9.

But if *A.* be nonſuit upon the appeal, and ſo the priſoner is arraigned upon the appeal at the king's ſuit, now *A.* may be a witneſs, becauſe now the proſecution is merely for the king.

If a man be indicted of high treaſon, the king cannot by his great ſeal or *ore tenus* give evidence, that he is guilty, for then he ſhould give evidence in his own cauſe; *vide ſupra, cap.* 28. *p.* 217. *& Part* I. *cap.* 26. *p.* 344. the caſe of the earl of *Lancaſter.*

Nay, altho he may in perſon ſit on the king's bench, yet he cannot pronounce judgment in caſe of treaſon, but it is performed by the *ſenior* judge, for as he cannot be a witneſs, ſo he cannot be a judge *in propriâ cauſâ.*

And the ſame law is for felony for the ſame reaſon, yet in ſome caſes the king's teſtimony under his great ſeal is allowable, as in an eſſoin *de ſervitio regis*, the warrant under the great ſeal (*h*) is a good teſtimonial of it. *F. N. B.* 17. *Stat. Glouc. cap.* 8.

Now as touching the compulſory means to bring in witneſſes they are of two kinds. 1. By proceſs of *ſubpœna* iſſued in the king's name by the juſtices of peace, *oyer* and *terminer*, gaol-delivery, or king's bench, where the plea of *not guilty* is to be tried. 2. Which is the more ordinary and more effectual means, the juſtices or coroner, that take the examination of the perſon accuſed, and the information of the witneſſes, may at that time or at any time after, and before the trial bind over the witneſſes to appear at the ſeſſions, and in caſe of their refuſal either to come or to be bound over, may commit them for their contempt in ſuch refuſal, and this is virtually included within their commiſſion and by neceſſary conſequences upon the ſtatute of 1 & 2 *P. & M. cap.* 13. whereof before, *p.* 52.

But that, which is a great defect in this part of judicial adminiſtration, is that there is no power to allow witneſſes their charges, whereby many times poor perſons grow weary of attendance, or bear their own charges therein to their great hindrance and loſs.

(*h*) But not under the privy ſeal. 2 *Co. Inſt.* 314. *ſuper ſtat. Gloceſter.*

II. As to the ſecond matter in what manner the evidence is to be given.

Regularly the evidence for the priſoner in caſes capital is given without oath, tho the reaſon thereof is not manifeſt, (*i*) but [otherwiſe it is] in all caſes not capital, tho it be miſpriſion of treaſon: neither is counſel allowd him (*k*) to give evidence to the fact, nor in any caſe, unleſs matter of law doth ariſe. 1 *H.* 7. 23. *Co. P. C. p.* 137.

But in ſome ſpecial felonies by act of parliament the priſoner's witneſſes in caſes capital ſhall be examind upon oath at his trial, namely the ſtatute of 31 *Eliz. cap.* 4. againſt imbezzelling of the king's ordnance, giving liberty to the priſoner to make lawful proof by witneſs or otherwiſe, ſeems virtually to allow the priſoner's teſtimony upon oath. *Co. P. C. cap.* 22. *p.* 79.

And the ſtatute of 4 *Jac. cap.* 1. touching felonies upon the borders, *&c.* gives examination of the priſoner's witneſſes upon oath.

If a witneſs be produced and ſworn for the king, yet if that witneſs allege any matter in his evidence, that is for the priſoner's advantage, (as many times they do,) that ſtands as a teſtimony upon oath for the priſoner, as well as for the king.

Regularly the king's evidence is given upon oath againſt the priſoner, and ought not to be admitted otherwiſe than upon oath; nay, inſtances have been given of very young witneſſes

(*i*) Nay, it is manifeſtly againſt all reaſon, that the priſoner ſhould not be allowd the ſame liberty to make out his innocence, as is allowd to prove his guilt, and tho it has been an uſual practice not to ſuffer witneſſes for the priſoner in capital caſes to be examined upon oath, yet as lord *Coke* obſerves *P. C. p.* 79. there is not ſo much as *ſcintilla juris* for it, it being unſupported by any act of parliament, antient author, book caſe, or record: See Sir *John Hawles*'s remarks on *College*'s trial. *State Tr. Vol.* IV. *p.* 178. To remedy this inconvenience it was provided by 7 *W. cap.* 3. "That every perſon indicted for high treaſon, "whereby corruption of blood may be "made, ſhall be admitted to make his "defenſe by witneſſes on oath," but this ſtatute being defective it is further provided by 1 *Ann. cap.* 9. "That the witneſſes for the priſoner in any trial for "treaſon or felony ſhall give their evidence upon oath in like manner, as the "witneſſes for the crown, and if convicted of perjury ſhall be ſubject to the "ſame penalties, forfeitures, *&c.*

(*k*) Upon an indictment, but it is otherwiſe in an appeal. *Corone* 31. 9 *E.* 4. 2. *a.* 1 *H.* 7. 26. *a.*

witneſſes ſworn upon evidence in capital cauſes, *viz.* one of nine years old. *Dalton's Juſtice, cap.* 111. *p.* 297. (*l*).

Yet ſuch very young people under twelve years old I have not known examind upon oath, but ſometimes the court for their information have heard their teſtimony without oath, which poſſibly being fortified with concurrent evidences may be of ſome weight, as in caſes of rape, buggery, witchcraft, and ſuch crimes, which are practiſed upon children: *vide ſupra, Part* I. *cap.* 24. *p.* 302 *&* *cap.* 58. *p.* 634. *&* *ſupra, p.* 279.

CHAP. XXXVIII.

Concerning evidence in writing.

BY the ſtatute of 1 *&* 2 *P. & M. cap.* 13. and 2 *&* 3 *P. & M. cap.* 10. Juſtices of peace and coroners have power to take examinations of the party accuſed, and informations of the accuſers and witneſſes, (the examinations to be without oath, the informations to be upon oath,) and are to put the ſame in writing, and are to certify the ſame to the next gaol-delivery.

Theſe examinations and informations thus taken and returned may be read in evidence againſt the priſoner, if the informer be dead, or ſo ſick, that he is not able to travel, and oath thereof made; otherwiſe not.

But then, 1. Oath muſt be made either by the juſtice or coroner, that took them, or the clerk that wrote them, that they are the true ſubſtance of what the informer gave in upon oath, and what the priſoner confeſſed upon his examination. 2. As to the examination of the priſoner, it muſt be teſtified, that he did it freely without any menace, or undue terror impoſed upon him; for I have often known the priſoner diſown his confeſſion upon his examination, and

(*l*) *N. Edit. cap.* 164. *p.* 541.

hath ſometimes been acquitted againſt ſuch his confeſſion; and the reaſon why theſe examinations and informations are allowable in evidence (under the cautions above premiſed,) is, becauſe they are judges of record, and the informations before them upon oath are authoriſed and required by act of parliament, and they are judges of the crimes upon which the informations are taken.

Welſh forceably took away Mrs. *Puckring* and married her, and thereupon a temporary act of parliament was obtained, enabling commiſſioners therein named to hear and determine that marriage, and to diſſolve it, if there were cauſe: In that cauſe Mrs. *Puckring* her ſelf was examind touching the manner of the marriage, as a ſupplemental proof, and died hanging the ſuit, *Welſh* was after indicted upon the ſtatute of 3 *H.* 7. for this fact for felony, and it was moved, that this examination of Mrs. *Puckring* might be read in evidence againſt the priſoner, but it was denied. 1. Becauſe it was a proceeding according to the civil law in a civil cauſe. 2. Becauſe that ſuit was originally at the inſtance of Mrs. *Puckring* and her own cauſe, and tho ſhe be according to the civil law examinable, as a ſupplemental proof, yet it was a cauſe for her own intereſt, and therefore at common law not allowable; tho the commiſſioners, that took the examination were judges conſtituted by that, which then was allowd to be an act of parliament. *M.* 1652. *B. R.*

A. commits a felony in the county of *B.* and flies into the county of *C.* and there is taken and brought before a juſtice of peace of the county of *C.* where *A.* is examind, and informations upon oath taken by that juſtice, tho the juſtice of peace of the county of *C.* had not an original cogniſance of a felony committed in the county of *B.* yet theſe examinations and informations being tranſmitted into the county of *B.* where *A.* is indicted, may be read in evidence againſt him. *Dalt. Juſt. cap.* 111. *p.* 299. for tho he hath not an original juriſdiction of the cauſe, yet he hath a conſequential juriſdiction thereof, having the party before him, and it is in order to the preſervation of the peace.

If a juſtice of peace take informations in a caſe of high treaſon, it ſeems theſe cannot be read in evidence upon an indictment of treaſon, becauſe high treaſon is not within that commiſſion, but it is of uſe only, as an information upon oath, which they may take, tho they cannot proceed upon it, for all treaſon is a breach of the peace; *quære tamen*, if it be not allowable to be given in evidence.

CHAP. XXXIX.

Concerning evidences *requiſite, or allowd* by acts of parliament, *and* preſumptive evidence.

BY the ſtatutes of 1 *E.* 6. *cap* 12. 5 *E.* 6. *cap.* 12. there ought to be two witneſſes to an indictment of high treaſon, and theſe witneſſes are to be ſworn before the jury alſo upon his trial, unleſs he willingly without violence confeſs the ſame.

Theſe two witneſſes are ſtill required upon his indictment, and it is not alterd by the ſtatute of 1 *&* 2 *P. & M. cap.* 10. which reſtores the common law trial, but extends not to the indictment. *Co. P. C. cap.* 2. *p.* 25. *vide ſupra, Part* I. *p.* 298.

A confeſſion upon examination before a competent judge before indictment is ſuch a confeſſion, as the ſtatute allows. *Co. P. C. ubi ſupra*, and ſo it was agreed in the caſe of *Tonge* and others 14 *Car.* 2. (*a*).

If one witneſs be poſitive, and the other witneſs is only by hearſay, theſe are not two lawful accuſers within the ſtatute, agreed by all the juſtices in the lord *Lumley*'s caſe *Hill.*

(*a*) *Kel.* 18. *vide Part* I. *p.* 304.

14 *Eliz.* cited, *Co. P. C. ubi ſupra* againſt the opinion in *Dy.* 99. *b. Thomas's* caſe; but two witneſſes are not requiſite either upon the indictment or trial of treaſons for counterfeiting money by the expreſs proviſo of the ſtatute of 1 & 2 *P. & M. cap.* 11. which directs, that in all treaſons for counterfeiting or impairing of coin the offenders ſhall be indicted, arraigned, tried, convicted and attaint by ſuch evidence, and in ſuch manner as was uſed before. 1 *E.* 6.

The words of the ſtatute 5 & 6 *E.* 6. *cap.* 11. are, "That no perſon ſhall be indicted, convicted, or attaint for "any the treaſons aforeſaid, or for any other treaſons, that "now be, *or hereafter ſhall be*, which ſhall hereafter be "perpetrated, committed or done, unleſs the ſame offender be thereof accuſed by two lawful accuſers, *&c.*" It may be conſiderable, whether this act extends to treaſons *de novo* made by act of parliament after 5 & 6 *E.* 6. (*b*).

If ſuch new treaſons be enacted after, as that of 5 *Eliz. cap.* 11. and 18 *Eliz. cap.* 1. concerning clipping and waſhing of coin, and alſo 1 *Mar. cap.* 6. which have this expreſſion (*being thereof lawfully convict or attaint, according to the due order and courſe of the laws of this realm ſhall ſuffer death, &c.*) there ſeems to be no neceſſity of two witneſſes upon the indictment or trial. 1. Becauſe *according to the due order and courſe of the laws* ſeems to intend common law (*c*). 2. But if there were doubt of that, yet in theſe acts concerning coin the ſtatute of 1 & 2 *P. & M. cap.* 11. enacts, "That all offenſes concerning counterfeiting, forging, or "impairing any coin current within the realm, ſhall be indicted, arraigned, tried, convict and attaint by ſuch evidence, and in ſuch manner, as hath been uſed before the "firſt year of *E.* 6." therefore, if the ſtatute of *E.* 6. ſhould be conſtrued to refer to any future ſtatute making treaſon, there will be the ſame reaſon to carry over the ſtatute of 1 & 2 *P. & M. cap.* 11. to the treaſons enacted againſt impairing of coin by 5 & 18 *Eliz.*

But

(*b*) See *Kel.* 9, 18, 49. *vide Part* I. *p.* 297.

(*c*) I cannot ſee why theſe general words ſhould be confined only to the *common law*, ſince *the laws* in the plural number do as fully expreſs, and ſeem moſt naturally to include all the laws of the land; whether *common* or *ſtatute*.

But yet, as to other treaſons, it may be very queſtionable, whether 5 & 6 *E.* 6. doth as to this point extend to treaſons newly enacted after, 1. Becauſe tho a former act may direct the proceedings upon a new offenſe made after, (as the ſtatutes of 18 *Eliz. cap.* 5. 31 *Eliz. cap.* 5. concerning informers, 21 *Jac. cap.* 4. concerning ſuing informations in the proper county, and pleading the general iſſue,) yet this doth not *in terminis* extend to offenſes to be committed againſt ſtatutes to be made, but only in all other treaſons hereafter to be committed (*d*). 2. Becauſe moſt commonly in the acts, that after 5 & 6 *E.* 6. enacted new treaſons, if the parliament intended two lawful witneſſes, it moſt commonlye xpreſſeth it accordingly; *quære*, for 1 & 2 *P.* & *M. cap.* 11. ſeems to import, that in new treaſons concerning counterfeiting forein coin made current by proclamation, there would have been a neceſſity of two witneſſes by the ſtatute of 5 & 6 *E.* 6. and therefore provides againſt it.

By the ſtatute of 21 *Jac. cap.* 27. the mother of a baſtard child concealing its death ſhall ſuffer as in murder, unleſs ſhe prove by one witneſs, that the child was born dead; this ſtatute ſtands yet continued among many others by a clauſe in the latter end of the act for relief of the northern army. 16 *Car.* 1. *cap.* 4. (*) until by parliament it be otherwiſe enacted.

The indictment to put the priſoner to this proof by one witneſs, that the child was dead born, muſt contain this ſpecial matter, that the priſoner was deliverd of a child, which by the laws of the kingdom was a baſtard, and that it was born alive, and ſhew how ſhe kild it.

(*d*) The ſtatute of 5 & 6 *E.* 6. ſeems *expreſly & in terminis* to extend to treaſons, which ſhould be afterwards enacted; what elſe can be the meaning of the words, *any other treaſons, that now be, or hereafter ſhall be*? for theſe words cannot reaſonably be intended only of offenſes hereafter to be committed, becauſe that is provided for by the other words immediately following, *which ſhall hereafter be perpetrated, committed or done*: but to obviate all doubts, it is ſince provided by 7 *W.* 3. *cap.* 3. "That in all ca- "ſes of high treaſon, whereby any cor- "ruption of blood ſhall enſue, no perſon "ſhall be indicted, tried or attainted, "but upon the oaths of two lawful wit- "neſſes.

(*) *Vide* 3 *Car.* 1. *cap.* 5. §. 22. *in fine.*

But the indictment need not allege, that ſhe conceald it, but it muſt be proved upon evidence (*d*), if advantage be taken of this ſtatute againſt her.

The indictment doth not conclude *contrà formam ſtatuti*, for the ſtatute only directs the evidence, where the caſe is within it, but created not a new crime (*e*).

If there be no concealment proved, yet it is left to the jury to inquire, whether ſhe murderd it or not, by thoſe circumſtances, that occur in the caſe, as if it be wounded or hurt, *&c.* but it doth not put her upon an abſolute neceſſity of proving it born alive by one witneſs, and ſo the evidence ſtands but as at common law.

If upon the view of the child it be teſtified by one witneſs by apparent probabilities, that the child was not come to its *debitum partûs tempus*, as if it have no hair or nails, or other circumſtances, this I have always taken to be a proof by one witneſs, that the child was born dead, ſo as to leave it nevertheleſs to the jury, as upon a common law evidence, whether ſhe were guilty of the death of it or not.

In ſome caſes preſumptive evidences go far to prove a perſon guilty, tho there be no expreſs proof of the fact to be committed by him, but then it muſt be very warily preſſed, for it is better five guilty perſons ſhould eſcape unpuniſhed, than one innocent perſon ſhould die.

If a horſe be ſtolen from *A.* and the ſame day *B.* be found upon him, it is a ſtrong preſumption that *B.* ſtole him, yet I do remember before a very learned and wary judge in ſuch an inſtance *B.* was condemned and executed at *Oxford* aſſiſes, and yet within two aſſiſes after *C.* being apprehended for another robbery and convicted, upon his judgment and execution confeſſed he was the man, that ſtole the horſe, and being cloſely purſued deſired *B.* a ſtranger to walk his horſe for him, while he turned aſide upon a neceſſary occaſion and eſcaped; and *B.* was apprehended with the horſe, and died innocently.

(*d*) If no intent to conceal, it is not murder within the ſtatute, tho no body were preſent at the time of the delivery. *Kel.* 33.

(*e*) See *Ann Davis*'s caſe, *Kel.* 32.

I would never convict any perſon for ſtealing the goods *cujuſdam ignoti* merely becauſe he would not give an account how he came by them, unleſs there were due proof made, that a felony was committed of theſe goods.

I would never convict any perſon of murder or manſlaughter, unleſs the fact were proved to be done, or at leaſt the body found dead (*f*), for the ſake of two caſes, one mentiond in my lord *Coke*'s *P. C. cap.* 104. *p.* 232. a *Warwickſhire* caſe (*g*).

Another that happend in my remembrance in *Staffordſhire*, where *A.* was long miſſing, and upon ſtrong preſumptions *B.* was ſuppoſed to have murderd him, and to have conſumed him to aſhes in an oven, that he ſhould not be found, whereupon *B.* was indicted of murder, and convict and executed, and within one year after *A.* returned, being indeed ſent beyond ſea by *B.* againſt his will, and ſo, tho *B.* juſtly deſerved death, yet he was really not guilty of that offenſe, for which he ſufferd.

But of all difficulties in evidence there are two ſorts of crimes, that give the greateſt difficulty, namely rapes and witchcraft, wherein many times perſons are really guilty, yet ſuch an evidence, as is ſatisfactory to prove it, can hardly be found; and on the other ſide perſons really innocent may be entangled under ſuch preſumptions, that many times carry great probabilities of guilt. *Tutius ſemper eſt errare in acquietando quàm in puniendo, ex parte miſericordiæ, quàm ex parte juſtitiæ.*

(*f*) This was alſo a rule in the civil law. *Dig. Lib.* XXIX. *Tit.* 5. §. 24.

(*g*) That caſe was thus, An uncle, who had the bringing up of his niece, to whom he was heir at law, correcting her for ſome offenſe, ſhe was heard to ſay, *Good uncle do not kill me*, after which time the child could not be found, whereupon the uncle was committed upon ſuſpicion of murder, and admoniſhed by the juſtices of aſſiſe to find out the child by the next aſſiſes, againſt which time he could not find her, but brought another child as like her in perſon and years as he could find and appareld her like the true child, but on examination ſhe was found not to be the true child; upon theſe preſumptions he was found guilty and executed; but the truth was, the child being beaten ran away, and was received by a ſtranger, and afterwards, when ſhe came of age to have her land, came and demanded it, and was directly proved to be the true child.

CHAP. XL.

Concerning variance *between the* indictment *and* evidence, *and where the* evidence proves the indictment, *and where not.*

IF *A.* be indicted, that the firſt of *July* 21 *Car.* 2. he robbed or murderd *B.* and upon evidence it appears, that it was committed another day or another year, either after or before the time laid in the indictment, yet this proves the iſſue for the king; only it is requiſite, if there be an eſcheat in the caſe, and that the felony were committed after the day laid in the indictment, for the jury to find the day, becauſe the relation of the eſcheat to avoid meſne grants and incumbrances relates to the time of the felony committed 32 *Eliz. per omnes juſtic' Co. P. C. cap.* 104. *p.* 230.

If *A.* be indicted for a robbery or murder *apud* A. *in com'* B. if it were committed in another county, regularly he ought to be found *not guilty*, becauſe regularly an offenſe of that nature in one county is not preſentable out of the county where it was done, but tho it were done in another vill in the county of *B.* yet he is to be found guilty, for the vill is not material.

If the evidence in murder differ from the indictment *in ſpecie mortis*, as if the indictment were for killing by poiſon, and the evidence be of killing by ſtabbing, it doth not maintain the indictment. 9 *Co. Rep.* 67. *a. Mackally's* caſe.

But if the indictment were for poiſoning with one kind of poiſon, and the proof be of another kind of poiſon, or the indictment be for killing with a ſword, and the evidence be of killing with a ſtaff, or with a gun, it maintains the indictment, for the common effectual word in both is *percuſſit*: *vide* 9 *Co. Rep.* 67. *a. Mackally's* caſe, *Co. P. C. cap.* 62. *p.* 135. Sir *Thomas Overbury's* caſe (*a*).

And

(*a*) *Stat. Tr. Vol.* I. *p.* 118.

And the ſame law holds in relation to the acceſſaries to ſuch principals, and with the ſame difference.

If *A. B.* and *C.* be indicted for the murder of *D.* and it is laid in the indictment, that *A.* gave him the ſtroke, whereof he died, and that *B.* and *C.* were *præſentes, auxiliantes & abettantes*, tho upon the evidence it appears, that *B.* alone gave the ſtroke, whereof he died, and *A.* and *C.* were *præſentes, auxiliantes & abettantes*, it maintains the indictment, for they are all principals, *Mackally*'s caſe, *ubi ſupra.* (*b*)

If *A.* and *B.* be indicted of the murder of *C.* and upon the evidence it appears, that *A.* committed the fact, and *B.* was not preſent, but was acceſſary before the fact by commanding it, *B.* ſhall be diſcharged. 26 *H.* 8. 5.

If *A.* and *B.* be indicted as principal, and *C.* is indicted as acceſſary to both after the fact done, *A.* and *B.* are convicted, or only *A.* is convicted, and upon the evidence againſt *C.* it appears he was acceſſary only to *A.* it maintains the indictment. 9 *Co. Rep.* 119. *a.* lord *Sanchar*'s caſe *per curiam* (*c*).

A. is indicted for murdering *B. ex malitiâ præcogitatâ*, evidence of malice in law, as killing an officer or watchman in the execution of his office, or killing a man without any provocation maintains the indictment, becauſe the law interprets it malice. 4 *Co. Rep.* 67. *b.*

A. is ſpecially indicted upon the ſtatute of 1 *Jac. cap.* 8. for ſtabbing *B.* not having a weapon drawn, nor ſtricken firſt, *contra formam ſtatuti*, upon the evidence it appears, that the perſon kild ſtruck firſt, yet it is good evidence to convict *A.* for manſlaughter. *H.* 23 *Car.* 1. *Harwood*'s caſe (*d*).

So if *A.* be indicted for petit treaſon for killing his maſter *felonicè, proditoriè, & ex malitiâ ſuâ præcogitatâ*, tho he were not his maſter, he may be found guilty of murder (*e*), and tho it were not *ex malitiâ præcogitatâ*, he may be found guilty of manſlaughter, and not guilty as to the petit treaſon; and ſo I have known it ruled oftentimes.

(*b*) See 1 *Salk.* 334. *Wallis*'s caſe.
(*c*) *Vide Part* I. *p.* 624.
(*d*) *Style* 86.
(*e*) *Vide Part* I. *p.* 378. & *poſtea*, *cap.* 46. *ſub fine.*

So if a man be indicted of burglary, and *quòd felonicè & burglariter cepit bona, &c.* he may be acquit of the burglary, and found guilty of ſimple felony, if the evidence riſeth no higher.

So if a man be indicted of murder *ex malitiâ præcogitatâ*, an evidence proving the killing upon a ſudden falling out is a good evidence to prove him guilty of manſlaughter, and the jury ought accordingly to find it. *Plow. Com.* 101. *a. Co. Lit.* 282. *a.* And ſo in an appeal.

CHAP. XLI.

Concerning the demeanor of the jury, *and* how their verdict *is to be given.*

AFTER the arraignment of the priſoners, and their pleas of *not guilty* received and recorded, the ſheriff returns the pannel of the jury, the priſoners are again called to the bar, and the jury being called, and appearing the priſoners are told by the clerk, that theſe good men now called and appearing are to paſs upon their lives and deaths; therefore, if they will challenge any of them, they are to do it before they are ſworn.

If no challenge hinder, the jury are commanded to look on the priſoners, and then ſeverally twelve of them, neither more nor leſs, are ſworn, *You ſhall well and truly try, and true deliverance make between our ſovereign lord the king and the priſoners at the bar, whom you ſhall have in charge, [and true verdict give] according to your evidence. So help you God.*

After the jury ſworn proclamation is to be made, "That "if any can inform for our lord the king againſt the pri- "ſoners at the bar, let them come forth and they ſhall be "heard"; then the priſoners are called ſucceſſively to the

bar, firſt *A.* and he is commanded to hold up his hand, the indictment is repeated, " To this he hath pleaded *not guilty*, " the iſſue is to try, whether he be guilty or not guilty; " if you find him *guilty*, you ſhall ſay ſo, and inquire " what goods or chattels, lands or tenements he had at the " time of the felony or treaſon committed, or at any time " after. And if you find him *not guilty*, you ſhall inquire, " whether he did fly for it, and if you find, that he fled " for it, you ſhall inquire of his goods and chattels, and " if you find him *not guilty*, and that he did not fly for it, " you ſhall ſay ſo and no more. Hear your evidence.

I have ſet down the clerk's charge to the jury, becauſe it contains the effect of their inquiry.

Tho there be twenty priſoners at the bar for ſeveral felonies, and the oath is general to try between the king and the priſoners at the bar, yet the jury is to inquire of no more than what they are particularly charged with, as before; and therefore, tho twenty have pleaded, and ſtand at the bar when the jury is ſworn, yet the court may ſtay at any number of the priſoners, and ſo the jury ſtand charged with no more than what are thus particularly charged upon them.

And when they go from the bar, and have brought in their verdict touching theſe particulars thus charged upon them, then, if the ſame jury paſs upon the remaining priſoners, yet they are to be called over again, the priſoners reminded of their challenges, and the jury ſworn *de novo* upon the trial of the reſt of the priſoners.

For in law the jury is charged with no more than thoſe, that have their indictments and plea of *not guilty*, and evidence concluded againſt and for them before the jury, tho poſſibly all the priſoners, that have pleaded, ſtood at the bar, when the jury was firſt ſworn; and this is the conſtant courſe at *Newgate*.

By the antient law, if the jury ſworn had been once particularly charged with a priſoner, as before is ſhewed, it was commonly held they muſt give up their verdict, and they could not be diſcharged before their verdict given up,

and ſo is my lord *Coke P. C. cap.* 47. *p.* 110. and this is the reaſon given 22 *E.* 3. *Coron.* 449. why after the plea of *not guilty*, and the inqueſt charged, the priſoner cannot become an approver, becauſe the inqueſt ſhall not be diſcharged; but the book at large, *viz.* 21 *E.* 3. 18. *a.* mentions not the charging of the inqueſt, but the plea of *not guilty* and the jury at the bar. *Co. Lit.* 227. *b.* But yet the contrary courſe hath for a long time obtaind at *Newgate*, and nothing is more ordinary than after the jury ſworn, and charged with a priſoner, and evidence given, yet if it appear to the court, that ſome of the evidence is kept back, or taken off, or that there may be a fuller diſcovery, and the offenſe notorious, as murder or burglary, and that the evidence, tho not ſufficient to convict the priſoner, yet gives the court a great and ſtrong ſuſpicion of his guilt, the court may diſcharge the jury of the priſoner, and remit him to the gaol for farther evidence, and accordingly it hath been practiſed in moſt circuits of *England* (*a*), for otherwiſe many notorious murders and burglaries may paſs unpuniſhd by the acquittal of a perſon probably guilty, where the full evidence is not ſearched out or given.

If after the jury ſworn and departed from the bar, one of them, *viz. A.* wilfully goes out of town, whereby only eleven remain, theſe eleven cannot give any verdict without the twelfth, but the twelfth ſhall be fined for his contempt, and that jury may be diſcharged, and a new jury ſworn,

(*a*) And ſo it was practiſed in *Whitebread*'s caſe in treaſon, ſee *State Tr. Vol.* II. *p.* 710, 827. See alſo *Kel.* 47, 52. But the reaſon given for this practice, if it were law, (which yet without the priſoner's conſent is unwarranted by antient uſage; *vide* 3 *Co. Inſt.* 110. *Co. Lit.* 227. *b.* 1 *And.* 103. *Raym.* 84. *State Tr. Vol.* II. *p.* 951.) ſeems to hold as ſtrongly in behalf of the priſoner as of the king. *State Tr. Vol.* IV. *p.* 190. and yet I do not find any inſtance, where a jury once ſworn was ever diſcharged, becauſe the *priſoner*'s evidence was not ready; on the contrary in lord *Ruſſel*'s caſe, the court refuſed to put off the trial only till the afternoon of the ſame day, pretending they could not do it without the conſent of the attorney general, altho in that caſe the jury were not ſworn, and the priſoner urged, that he had witneſſes, who could not be in town till night, in which caſe it was certainly in the diſcretion of the court to put it off or not. *State Tr. Vol.* III. *p.* 630, 631. It hath however been ſince holden for law, that a jury once charged in a capital caſe cannot be diſcharged, till they have given their verdict, and the caſe of *Whitebread* was thought a very extraordinary one. See lord *Delamere*'s caſe, *State Tr. Vol.* IV. *p.* 232. and *Rookwood*'s caſe, *State Tr. Vol.* IV. *p.* 659, 661. and *Cook*'s caſe, *State Tr. Vol.* IV. *p.* 731.

ſworn, and new evidence given, and the verdict taken of the new jury, and thus it was done by good advice at the gaol-delivery at *Hartford Aug.* 15 *Car.* 1. in the caſe of *Hanſcom* the departing juryman.

And ſo it is uſual at the gaol-delivery at *Newgate*, if a jury be charged with ſeveral priſoners, and the court finds by probable circumſtances, that the jury is partial to one of the priſoners, the court may diſcharge the jury of that priſoner, and put him upon his trial by another jury, and this is uſed alſo in other circuits (*).

Upon *not guilty* pleaded twelve are ſworn to try the iſſue, after their departure *A.* one of the twelve leaves his companions, which being diſcoverd to the court, by conſent of all parties *B.* another of the pannel is ſworn in the place of *A.* and afterwards *A.* returns to his company, which being made known to the court, *A.* is called and examind why he departed, he anſwerd to drink, and being examind, whether he had ſpoken with the defendant, denied it upon his oath, whereupon *B.* was diſcharged from giving any verdict, and the verdict taken of *A.* and the other eleven, and *A.* fined for his contempt, 34 *E.* 3. *Office de Court* 12. in treſpaſs.

If thirteen are by miſtake ſworn, the ſwearing of the laſt of the thirteen is void, and the other twelve ſhall ſerve.

If only eleven be ſworn by miſtake, no verdict can be taken of the eleven, and if it be, it is error; and ſo in a preſentment, but if twelve be recorded ſworn, no averment lies, that one was unſworn. *Lamb's Juſtice* 395.

The juſtices at common law may upon a juſt cauſe remove a juror after he is ſworn. 20 *H.* 6. 5. *a.*

When the jurors depart from the bar, a bailiff ought to be ſworn to keep them together, and not to ſuffer any to ſpeak with them.

After their departure they may deſire to hear one of the witneſſes again, and it ſhall be granted, ſo he deliver his teſtimony in open court, and alſo they may deſire to propound queſtions to the court for their ſatisfaction, and it ſhall be granted, ſo it be in open court.

(*) *Quære de hoc.*

The jury muſt be kept together without meat, drink, fire, or candle, till they are agreed. 24 E. 3. 75. (*b*). *Co. Lit.* 227. *b.*

If they agree not before the departure of the juſtices of gaol-delivery into another county, the ſheriff muſt ſend them along in carts, and the judge may take and record their verdict in a forein county; *quære*, whether in ſuch caſes the ſeſſion may be adjournd before the verdict taken. 19 *Aſſiz.* 6. *per Scot.* 41 *Aſſiz.* 11.

If there be eleven agreed, and but one diſſenting, who ſays he will rather die in priſon, yet the verdict ſhall not be taken by eleven, no nor yet the refuſer fined or impriſond, and therefore, where ſuch a verdict was taken by eleven and the twelfth fined and impriſond, it was upon great advice ruled the verdict was void, and the twelfth man deliverd, and a new *venire* awarded. 41 *Aſſiz.* 11. for men are not to be forced to give their verdict againſt their judgment (*c*): *vide P.* 20 *E.* 1. *Rot.* 43. *Norf. coram rege.*

In

(*b*) *N. Edit.* of year-books 24. *a.*

(*c*) But is it not a force, when any of the jurors are obliged to comply under the peril of being ſtarved to death, for how can it be expected, that twelve conſidering men ſhould in all caſes happen to be of the ſame ſentiments? and therefore antiently it was not neceſſary, (at leaſt in civil cauſes,) that all the twelve ſhould agree, but in caſe of a difference among the jury, the method was to ſeparate one part from the other, and then to examine each of them as to the reaſons of their differing in opinion, and if after ſuch examination both ſides perſiſted in their former opinions, the court cauſed both verdicts to be fully and diſtinctly recorded, and then judgment was given *ex dicto majoris partis juratorum*; thus in a great aſſiſe upon a writ of right between the abbot of *Kirkſtede* and *Edmund de Eyncourt* eleven of the jury found for the abbot, and one for *Edmund de Eyncourt*, in this caſe the verdict of the eleven was firſt recorded, Robertus *de* Harblinge *& omnes alii præter* Radulphum *filium* Simonis *dicunt ſuper ſacramentum ſuum, &c.* and then follows the *dictum* of the twelfth *Et prædictus* Radulphus *filius* Simonis *dicit ſuper ſacramentum ſuum, &c.* then follows the judgment, *Sed quia prædicti undecim concorditer & præcisè dicunt, quòd prædictus abbas & eccleſia ſua prædicta majus jus habeant tenendi &c. ideo conſideratum eſt, quòd prædictus abbas & ſucceſſores ſui teneant prædicta tenementa de cætero in perpetuum, &c.* Placita coram juſtic' itinerant' in com' *Lincoln* anno 56 *Hen.* 3. *Rot.* 29. in dorſo.

In an aſſiſe of novel diſſeiſin between *William Triſtram* plaintiff, and *John Simenel* and others defendants, where the whole jury conſiſted of only eleven, ten found for *Triſtram*, and one for *Simenel*, and both verdicts are recorded in this manner, *Decem jurati dicunt, quòd, &c. & undecimus juratorum, ſcilicet* Johannes Kineth *dicit, &c. Et, quia dicto majoris partis juratorum ſtandum eſt, conſideratum eſt, quòd prædictus* Willielmus *recuperet ſeiſinam ſuam de prædictis tenementis verſus prædictos* Johannem *& alios per viſum recognitorum & dampna, quæ taxantur per jur' ad duas marcas, &* Johannes *& alii in miſericordia.* Paſ. 14 E. 1. Rot. 10. coram Rege.

In capital cauſes, whether upon indictment or appeal, no verdict can be given by default in the abſence of the party. 16 *Aſſiz.* 13.

But

The like practice is ſuppoſed in the caſe here quoted by the author, *Paſ.* 20 *E.* 1. *Ret.* 43. *coram rege*, which was thus, *Martin Fitz-Osbert* recoverd ſeiſin of certain lands, &c. in *Weſt-Somerton* againſt the Prior of *Buttelye* before *John de Lovetot* and *William de Pageham*, judges of aſſiſe in *Norfolk anno* 16 *E.* 1. The prior afterwards complaind greatly, that injuſtice had been done him by *Lovetot* at the ſaid aſſiſe, and thereupon the biſhop of *Wincheſter* and others were orderd to hear the matter and do juſtice to the prior. Upon this *Lovetot* and *Pageham* were called before the ſaid biſhop, &c. and the prior objected to *Lovetot*, " Quòd fieri fecit falſam irro-
" tulationem in rotulis ſuis, & contrariam
" veredicto juratorum aſſiſæ prædictæ,
" &c. & hoc paratus eſt verificare per
" prædictos juratores, qui omnes ſunt ſu-
" perſtites, &c." To which *Lovetot* and *Pageham* replied by juſtifying themſelves, and inſiſting, " Quòd benè, &
" ritè proceſſerunt ad captionem illius
" aſſiſæ, undè vocant recordum rotulo-
" rum ſuorum, &c." in which the judgment pronounced by *Lovetot* was entred in the following manner, " Et quia per
" prædictam aſſiſam convictum [compertum] fuit, quòd *Edricus*, de quo præ-
" dictus *Martinus* exivit, fuit liber homo
" & liberæ conditionis; & quamvis ipſe
" *Edricus*, & exirus de ipſo proveniens
" tenuiſſent de prædicto priore & de
" prædeceſſoribus ſuis, tenementa ſua
" in villenagio, & per villana ſervitia,
" hoc eis non præjudicat, quò minus cor-
" pora ſua ſint libera; eò quòd nulla
" præſcriptio temporis poteſt liberum
" ſanguinem in ſervitutem reducere,
" ideò conſideratum eſt, quòd præ-
" dictus *Martinus* recuperet inde ſeiſi-
" nam ſuam, &c. Et *Johannes* de *Pyke-*
" *ring* unus recognitorum præfatæ aſſiſæ,
" pro eo quòd in veredicto præfatæ aſ-
" ſiſæ, narrando illud veredictum, con-
" trarius fuit omnibus aliis recognitori-
" bus, narrando aliud quàm inter illos
" fuit proviſum, ſicut per examinationem
" eorum convictum [compertum] fuit, &
" manucaptus eſt per, &c. ideò ipſe &
" manucaptores ſui in miſericordiâ. Et
" præceptum eſt vic', quòd capiat prædic-
" tum *J.* de *Pykering*, & ſalvò, &c. ita
" quòd habeat corpus ejus apud *Kente-*
" *ford*, &c. ad faciendam redemptionem
" ſuam pro tranſgreſſione prædictâ." The biſhop of *Wynton* and his fellows then proceeded to examine *Lovetot* and *Pageham* touching the ſaid judgment." " Et
" quia in conſideratione ſuper veredicto
" primæ aſſiſæ compertum eſt, quòd *J.*
" de *Pykering* unus recognitorum præ-
" dictæ aſſiſæ, narrando illud veredic-
" tum, contrarius fuit omnibus aliis re-
" cognitoribus, narrando aliud quàm in-
" ter eos fuit proviſum; & nichil de illo
" contrario in recordo prædicto ſpecifica-
" tur ſive declaratur; immo quòd vere-
" dictum captum fuit & receptum, ac
" ſi omnes de uno & de eodem aſſenſu
" fuiſſent in veredicto prædicto; nec e-
" tiam veredictum ipſorum undecim de-
" claratur ſive ſpecificatur, &c. nec
" duodecimus ab undecim fuit ſeparatus,
" nec examinatus per ſe; nec undecim
" à duodecimo fuerunt ſeparati, nec per
" ſe examinati &c. *prout moris eſt in*
" *tali caſu*; & ſic ex contrario veredicto
" ſubſecutum fuit judicium non legi ſive
" conſuetudini regni conſonum, videtur
" manifeſtè, quòd recordum illud non eſt
" plenum, ſeu perfectum, in hoc caſu,
" &c. Concordatum eſt quòd aſſiſa præ-
" dicta re-examinetur, &c." Upon this the ſheriff was orderd, quòd venire faciat hic &c. recognitores aſſiſæ prædictæ, & quòd ſcire faciat *Martin* to appear at the ſame day ad audiendum, &c. " Poſtea ad prædictum diem vene-
" runt recognitores aſſiſæ prædictæ. Et
" quia prædicti *Johannes* & *Willielmus*
" aliud recordati fuerunt, quàm compert-
" tum fuit per recordum rotulorum ip-
" ſius *Johannis*; & etiam quia juratores
" prædicti minùs ſufficienter fuerunt ex-
" aminati ſuper articulis prædictis, ſicut
" patet in recordo prædicto, iteratò fue-
" runt juratores jurati, & examinati; qui
" dicunt ſuper ſacramentum ſuum, quòd
" prædictus *Martinus* fuit villanus ipſius
" prioris dic, quo ejectus fuit de præ-
" dictis tenementis, &c. Et quiâ com-
" pertum

But if the priſoner hath pleaded to the country, and when he is to be tried will ſay nothing, yet no penance ſhall be inflicted, but the jury ſhall be taken. 15 *E.* 4. 33. *b.*

Now touching the giving up of their verdict, if the jury ſay they are agreed, the court may examine them by poll, and if in truth they are not agreed, they are fineable. 29 *Aſſiz.* 27. 40 *Aſſiz.* 10.

If the jurors by miſtake or partiality give their verdict in court, yet they may rectify their verdict before it is recorded, or by advice of the court go together again and conſider

" pertum eſt, &c. & quòd prior ad præ-
" dictam aſſiſam coram præfatis *J.* &
" *W.* reſpondebat per ballivum ſuum,
" qui quidem ballivus non potuit dedu-
" cere in judicium jus ſanguinis nativi do-
" mini ſui abſque præſentiâ domini ſui,
" &c. ac etiam in ſupradicto recordo,
" quòd nulla præſcriptio longi temporis
" poteſt liberum ſanguinem in ſervitu-
" tem reducere, quòd omninò falſum eſt,
" &c. videtur, quòd judicium *J.* de
" *Lovetot* erroneum eſt; ideò conſide-
" ratum eſt, quòd prædictus prior reha-
" beat prædicta tenementa, ita quòd om-
" nia ſint in eodem ſtatu, in quo fuerunt
" ante captionem prædictæ aſſiſæ." Afterwards by writ of error the record coram epiſcopo *Wynton* & ſociis ſuis auditoribus querelarum was brought coram rege, and *Martin Fitz-Osbert* aſſigned for error, that he had recoverd ſeiſin againſt the ſaid prior " in groſſo veredicto ſuper
" diſſeiſinâ ſecundùm legem commu-
" nem; & auditores ſine brevi regis inde
" eis directo, & ſine aliquâ præmuni-
" tione ipſo *Martino* ritè factâ, contra
" legem communem, ipſum à prædicto
" tenemento abjudicaverunt, & contra
" tenorem Magnæ Cartæ domini regis:
" Dicit inſuper, quòd prædicti auditores
" venire fecerunt coràm eis juratores
" præfatæ aſſiſæ in formâ certificationis,
" & ipſos juratores per ſacramentum
" ſuum re-examinaverunt & admiſerunt
" veredictum eorum contrarium vere-
" dicto per ipſos priùs pronuntiato; unde
" dicit, quòd in hiis & aliis erratum
" eſt, &c." To this the prior replied, that the ſaid *Martin* had been " Præ-
" munitus per breve, quod vocatur *ſcire*
" *facias*; & quòd prædicti auditores ha-
" buerunt plenam poteſtatem, tàm per
" breve domini regis, quàm per ſpeciale
" præceptum domini regis, ad corrigen-
" da recorda juſticiariorum vitioſa &
" erronea inventa; & hoc ſatis conſtat
" domino regi & ipſius conſilio, &
" quòd prædictus *Martinus* non recupe-
" ravit per groſſum veredictum; quia
" non fuit ibi veredictum niſi tale, quale
" imperfectum, quia per xi juratores
" captum; & quòd prædicti auditores
" non admiſerunt contrarium veredic-
" tum priori veredicto, quia veredictum
" priùs captum coram *J.* de *Lovetot*
" fuit tale, quale imperfectum, & con-
" tra legem terræ captum per xi jurato-
" res, de ſtatu ſanguinis ultra tempus li-
" mitatum; ſecundum veredictum ma-
" gis deberet dici ſuppletio prioris vere-
" dicti defectivi, quàm eidem contra-
" riari." To which *Martin* rejoined, and inſiſted, " Quòd prædicta aſſiſa fuit
" plena & perfecta coram *J.* de *Love-*
" *tot* & ſociis ſuis juſtic' capta, & hoc
" liquet expreſſè in eodem recordo, ubi
" dicit, *Jurati dicunt*, &c. Et quòd ipſe
" recuperavit prædicta tenementa per
" groſſum veredictum præfatæ aſſiſæ, pe-
" tit judicium, ſi prædictum groſſum ve-
" redictum ſuper diſſeiſinâ præcisè factâ
" aliquo modo ſecundùm legem & conſu-
" etudinem regni *Angliæ* debet adni-
" chillari, abſque brevi de attinctâ, &c.

The judgment in this caſe does not appear, but it ſhould ſeem, that the reaſon why the record of the verdict is ſaid to be imperfect was not, becauſe all the twelve did not agree, but becauſe the *dicta utriuſque partis* were not diſtinctly ſpecified and recorded, which is declared to be the uſage in ſuch caſe, *prout moris eſt in tali caſu.*

ſider better of it, and alter what they have deliverd. *Plow. Com.* 211. *b. Saunder's* caſe.

But if the verdict be recorded, they cannot retract nor alter it. *Co. Lit.* 227. 7 *R.* 2. *Coron.* 108. 20 *Aſſiz.* 12. 5 *H.* 7. 22. *b.*

In a caſe of felony or treaſon the verdict muſt be given in open court, and no privy verdict can be given. *Co. Lit.* 227. *b. Co. P. C.* 110.

If a man be arraigned upon an inqueſt of murder or manſlaughter taken by the coroner, and be found *not guilty*, the jury that acquits him ought to inquire, who committed the fact, and that ſhall ſerve as an indictment againſt that perſon, that the jury find did the fact.

But it is held, that if a man be arraigned upon an indictment found by the grand inqueſt, and be acquitted, the jury ſhall not make ſuch further inquiry. 14 *H.* 7. 2. *b.* 13 *E.* 4. 3. *b.* 37 *H.* 8. *B. Coron.* 117. 11 *H.* 4. 93. *a. B. Coron.* 32. 21 *E.* 3. 17. *b. B. Coron.* 39.

But ſurely the antient law was otherwiſe, and that the jury, that acquits, whether upon a preſentment, or upon an indictment of homicide, ſhall be chaced to ſay, who did the fact. 37 *Aſſiz.* 13.

So if a man be indicted *de morte cujuſdam ignoti*, the inqueſt ſhall be charged to tell the name, if they can. 2 *E.* 3. *Coron.* 159.

A man is indicted of robbery and acquitted, but it appeard to the court, that a robbery was done, but the priſoner *not guilty*, and therefore upon the ſtatute of *Wincheſter* the court compeld the jury to preſent who did it, for the hundred is to anſwer for the bodies of the offenders, and the book concludes generally, *Et tiel courſe tiendra, ou home eſt indite de mort de home & acquit* 3 *E.* 3. *Iter North. Coron.* 307. ſo that they made no difference, where the [indictment was by the grand inqueſt, or by the coroner's inqueſt.]

The ſame law in an appeal 22 *Aſſiz.* 39. *Coron.* 178. 4 *H.* 7. *Rot.* 21. *Raſtal's Entries* 57. *a.*

But at this day the law and practice hath obtaind, that only upon an arraignment upon the coroner's inqueſt the jury, if they acquit the priſoner, ſhall inquire who did the murder or manſlaughter, and commonly it is a buſineſs of form, for they uſually ſay, if it be not known, that *John a-Nokes* did it. 37 *H.* 8. *B. Coron.* 32. 21 *E.* 3. 17. *b. B. Coron.* 39. *Dy.* 238. *b.*

And as to indictments of robbery, if the petit jury acquit the priſoner, they do not inquire who did it, and the reaſon of the difference is, that for the moſt part in *Eyre* the petit jury were all of the ſame hundred, where the offenſe was committed, and then upon the ſtatute of *Winton* the hundred were to anſwer *de corporibus malefactorum*, and therefore it was reaſon to put them upon the inquiry, who committed the robbery, if it appear to the court, that a robbery was committed, and the caſe of 3 *E.* 3. *Coron.* 307. was in *Eyre*, but now the jury, that tries, as well as inquires, is for the moſt part of the reſt of the county, and therefore they anſwer only the point of *guilty* or *not guilty*: *vide Stamf. P. C.* 181. *a.*

The jurors of the petit inqueſt are charged to inquire if the party fled, and ſo of his goods and chattels, this is but an inqueſt of office, and traverſable; *vide ſupra Part* I. *cap.* 27. *p.* 362. But it hath been held, that a preſentment of flight before the coroner *ſuper viſum corporis* is concluſive to the party, and not traverſable: *vide quæ ſupra dixi, Part* I. *cap.* 31. *p.* 416, 417.

And therefore it is, that if the coroner's inqueſt *ſuper viſum corporis* preſent a *fugam fecit*, and the party be taken and arraigned, and plead to that indictment, the jury ſhall not be charged to inquire of the *fugam fecit*, becauſe found before by the coroner's inqueſt, and if they be charged therewith and acquit the priſoner, and likewiſe ſay, that he did not fly, yet the record of the inquiſition before the coroner finding the flight ſhall take place to intitle the king. 3 *E.* 3. *Forfeiture* 35. *P.* 7 *Eliz. Dy.* 238. *b.*

The jury may find a ſpecial verdict, or may find the defendant guilty of part, and not guilty of the reſt, or may

find the defendant guilty of the fact, but vary in the manner.

If a man be indicted of burglary, *quòd felonicè & burglariter cepit & aſportavit*, the jury may find him guilty of the ſimple felony, and acquit him of the burglary and the *burglariter*.

So if a man be indicted of robbery with putting the party in fear, the jury may find him guilty of the felony, but not guilty of the robbery.

The like where the indictment is *clàm & ſecretè à perſonâ*.

So if a man be indicted upon the ſtatute of 1 *Jac.* of ſtabbing *contra formam ſtatuti*, the jury may acquit him upon the ſtatute, and find him guilty of manſlaughter at common law. 23 *Car.* 1. *Harwood*'s caſe (*d*).

So if a man be indicted of ſtealing of goods of the value of 10 *s.* the jury may find him guilty only of goods to the value of 6 *d.* and ſo guilty only of petty larciny. 41 *E.* 3. *Coron.* 451. *Stamf. P. C. L.* III. *cap.* 9. *fol.* 165. *a.*

So if a man be indicted of murder *ex malitiâ præcogitatâ*, the jury may find him guilty of manſlaughter. *Co. Lit.* 282. *a.* or that he kild him *ſe defendendo*, or *per infortunium*; but *nota* in theſe caſes it is not ſufficient generally to find it done *ſe defendendo*, or *per infortunium*, but the ſpecial matter muſt be ſet down how it was done, and if upon the ſpecial matter ſhewn it ſhall appear to be murder or manſlaughter, the court will accordingly judge of it, tho the jury conclude, *Et ſic per infortunium*, or *ſic de defendendo*. 3 *E.* 3. *Coron.* 284, 286, 287, & 43 *Aſſiz.* 31. *Coron.* 226.

And in theſe caſes, tho it be found *per infortunium*, or *ſe defendendo* upon the ſpecial matter ſet forth, yet this ſpecial matter muſt be recorded, for tho it be not ſuch a felony, as hath judgment of life, yet it is ſuch an offenſe, as gives the forfeiture of goods, and therefore they may not find a general *not guilty*, but muſt find the ſpecial matter, and leave it to the court to judge.

1 At

(*d*) *Style* 86.

At the ſeſſions at *Newgate* 16 *Car.* 2. upon the evidence it appeard, that *A.* a boy riding in the ſtreet upon an horſe, *B.* another boy whipt the horſe, the horſe ran away againſt the will of *A.* and ran over a child and kild it, for this *A.* was indicted of murder by the grand inqueſt, and the jury found him generally *not guilty*; the court was in doubt of receiving the verdict, becauſe it was *per infortunium*, and ſo ought ſpecially to be found, but becauſe the coroner's inqueſt had found the ſpecial matter, and concluded it, as in truth it was, *per infortunium*, which preſentment *A.* was ready to confeſs, that ſo he might have his pardon of courſe, the verdict of *not guilty* was recorded, and ſo it was ſaid was the uſual courſe in that caſe; but it was agreed, that if *A.* had of his own accord put the horſe into ſpeed, and he had ſo kild the child, it had not been *per infortunium* but manſlaughter. *Richard Pretty*'s caſe for killing *Anne Jones*.

But now ſuppoſe the priſoner kild the party, but yet in ſuch a way as makes no felony, as if he were of *non ſane memory*, or if a man kills a thief, that comes to rob him, or to commit a burglary, or if an officer in his own defenſe kills one, that aſſaults him in the execution of his office, which are neither felony nor forfeiture, whether is it neceſſary to find the ſpecial matter, or may the party be found *not guilty?*

And I think, and ſo I have known it conſtantly practiſed, the party in theſe caſes may be found *not guilty*, and the jury need not find the ſpecial matter.

And the reaſon is, that in theſe caſes there is neither felony nor forfeiture.

And this is in effect declared by the ſtatute of 24 *H.* 8. *cap.* 5. "If any attempt to commit murder, robbery or burglary in "or nigh any common high way, or in the manſion-houſe, "*&c.* and the evil-doer be ſlain, and if the ſame by ver- "dict be found or tried, the ſlayer ſhall not loſe any goods "or chattels, but ſhall thereof be fully acquitted and diſ- "charged in like manner as he ſhould be, if he were "lawfully acquit of the death," and accordingly ruled in *Cooper*'s caſe. *P.* 15 *Car. B. R. Croke, p.* 544.

But

But it is uſed in ſuch caſes (and prudently enough,) for the coroner's inqueſt to find the ſpecial matter, and the bill of indictment of the grand jury to be for murder, and to have the party arraigned upon the bill of indictment, and to be acquitted thereupon upon trial, and to enter the acquittal upon the bill, and then to confeſs the coroner's preſentment, and to have judgment alſo thereupon; thus it was done in the caſe of *Richardſon* keeper of *Newgate*, who kild *Hyde*, that had committed a robbery and made reſiſtance, that he could not be taken without being kild. *M.* 25 *Car.* 2. at *Newgate.*

And therefore, where a thief was kild in purſuit becauſe of neceſſity, if the ſpecial matter be found, the killer ſhall have judgment, *quòd eat ſine die.* 22 *Aſſiz.* 55. *Coron.* 179. 22 *E.* 3. *Coron.* 258. 26 *Aſſiz.* 23. *Coron.* 192. 22 *E.* 3. *Coron.* 261. and the reaſon is, becauſe it is no felony, nor cauſeth any forfeiture ſo much as of goods, but is a juſtifiable act, and ſo differs from *ſe defendendo*, or *per infortunium*, which give a forfeiture of goods.

And ſince in an indictment or an appeal of felony the defendant cannot plead a juſtification, he ſhall have the advantage of it upon the general iſſue pleaded. 26 *H.* 8. 5. *b.* 37 *H.* 8. *B. Appeals* 122.

Yet *vide* 37 *H.* 6. 20 & 21. *per Needham* upon an indictment of murder the defendant may plead, that in an appeal before the conſtable and marſhal of treaſon he being appellee kild the appellant; yet in that caſe it ſeems, if he pleaded *not guilty*, he ſhall have advantage of that ſpecial juſtification upon evidence.

But [notwithſtanding] this, that I have ſaid, where the matter itſelf appears not to be felony, the priſoner upon *not guilty* pleaded may be found *not guilty*, without finding the ſpecial matter, and accordingly ruled. *P.* 15 *Car.* 1. *Croke*, *p.* 544.

Yet if the coroner's inqueſt find not the ſpecial matter but murder or manſlaughter, and the priſoner is arraigned upon it and plead *not guilty*, and upon the evidence it appear, that the priſoner kild the man, but in ſuch a manner as makes

no felony, as a thief that aſſaults him upon the highway, or a thief that reſiſts the arreſt, in this caſe the jury cannot find a general *not guilty*, but muſt find, that the priſoner did it and the manner how, and this is to be entred of record, as in caſe of a verdict *ſe defendendo.*

And the reaſon of the difference is, becauſe in the former caſe the jury gives a verdict of *not guilty* generally, without inquiring who did the fact. But where a man is arraigned upon the coroner's inqueſt *ſuper viſum corporis*, and pleads *not guilty*, if the jury acquit the priſoner by *not guilty*, yet they muſt inquire who did it, for here it is apparent there was a man ſlain, becauſe the coroner takes the inqueſt upon view of the body, and if they ſhould find him generally *not guilty*, and yet ſhould upon their other inquiry find he kild him, it would be a contradiction in itſelf, and therefore in this caſe, they are to find the ſpecial matter, and thereupon the court ſhall give judgment for his diſcharge.

Many ſpecial verdicts have been found, as upon the ſtatute of ſtabbing, ſo upon the point, whether murder or not, but it is difficult to find them ſo that judgment be given for murder, becauſe there are ſo many circumſtances required to be found, that if any be omitted, the verdict will fall only to manſlaughter.

I have rarely known upon any ſpecial verdict, where the queſtion was murder or manſlaughter, judgment to be given for murder (*d*), but commonly for manſlaughter or *ſe defendendo. Tutius erratur ex parte mitiori.*

(*d*) There have been however ſeveral inſtances, wherein it has been done, *viz. Mackally*'s caſe, 9 *Co. Rep.* 70. *a. Mawgridge*'s caſe, *Hill.* 5 *Ann. B. R. Kel.* 120. *Oneby*'s caſe. *Trin.* 13 *Geo. B. R.* all which were ſpecial verdicts, and the court ruled them to be murder.

CHAP. XLII.

Concerning the miſdemeanors of jurors, *and* their puniſhment.

IF any of the jury eat or drink without licenſe of the court before they have given up their verdict, they are fineable for it.

But tho it be not at the charges of either party, antiently it was held it would avoid the verdict. 24 *E.* 3. 24. *a.*

But at this day the law is ſettled, that it is only a miſdemeanor fineable in them that do it, but avoids not the verdict. 14 *H.* 7. 29. *b.* (*a*). 20 *H.* 7. 3. *a.*

But if it be at the charge, for the purpoſe, of the priſoner, and the verdict find him guilty, the verdict is good; but if they find him *not guilty*, and this appears by examination, the judge, before whom the verdict is ſo given, may record the ſpecial matter, and thereupon the verdict ſhall be ſet aſide and a new trial awarded. 14 *H.* 7. 30. *a. b.*

If a juryman before he be ſworn take information of the caſe, this is cauſe of challenge, as the law ſtands at this day, but antiently it was held otherwiſe, and that it was lawful, and that was the reaſon given in the ſtatute of 6 *H.* 6. *cap.* 2. which enacts, "That pannels of aſſiſes be deli-" verd by the ſheriff to either party ſix days before the ſeſ-" ſions, namely, that they might inform the jurors of their " right before the ſeſſion.

But this brought great inconvenience in embracery and tampering with jurors, and therefore it is juſtly diſuſed and diſapproved.

If a juryman have a piece of evidence in his pocket, and after the jury ſworn and gone together he ſheweth it to them, this is a miſdemeanor fineable in the jury, but it a-

(*a*) *Vide pluis de eco caſe* 15 H. 7. 1. b.

voids not the verdict, tho the caſe appear upon examination. *M.* 23 *Car.* 1. *B. R. M.* 40 & 41 *Eliz. B. R. Croke, n.* 1. *Graves* & *Short* (*b*): *vide tamen contrà* 11 *H.* 4. 18. *a.*

But if after the jury ſworn either party deliver a piece of evidence to the jury, and the verdict is given for him, that deliverd it, it ſhall avoid the verdict, but then this muſt appear by examination, and be indorſed upon the *poſtea* or verdict, ſo as it appear of record, and it muſt not be barely by affidavit made after. *M.* 40 & 41 *Eliz. B. R. Graves* & *Short. Co. Lit.* 227. *b.*

But if the verdict be given againſt him, that deliverd the evidence, the verdict is good. *Ibid.*

If a piece of evidence under ſeal be read in court, the jury ought regularly to have it with them, but not if it be not under ſeal.

But yet if after the jury ſworn a piece of evidence not under ſeal be by the court deliverd to the jury, it doth not avoid the verdict, and ſo it is, if it be deliverd by a mere ſtranger, or if it be deliverd by one of the parties, and the verdict be given againſt him, on whoſe behalf it was deliverd. *M.* 37 & 38 *Eliz. B. R. Croke, n.* 1. (*c*).

If after the jury ſworn and gone from the bar they ſend for a witneſs to repeat his evidence, that he gave openly in court, who doth it accordingly, this appearing by examination in court and indorſed upon the record or *poſtea* will avoid the verdict. *T.* 32 *Eliz. B. R. Croke, n.* 17. *Metcalfe* & *Deane* (*d*). *M.* 20 *Jac. B. R. Hillord* & *Hall* (*e*), becauſe not done openly in court, nor in the preſence of the parties concerned. *M.* 32 *Eliz. B. R. Leon. n.* 426. *Elme*'s caſe (*f*).

But if the jury after their departure from the bar deſire to hear the teſtimony of a witneſs again, they may be ſent for into court, and the witneſs may be heard again openly, where the court or parties may ask what queſtions they think fit.

If

(*b*) *Cro. Eliz.* 616.
(*c*) *Vicary* & *Farthing*, *Cro. Eliz.* 411.
(*d*) *Cro. Eliz.* 189.
(*e*) 2 *Rol. Rep.* 261. *Palm.* 325.
(*f*) 1 *Leon.* 305.

If depoſitions are read in court to the jury, and after the jury ſworn and going from the bar the ſolicitor or proſecutor for the king or party without conſent of parties or order of the court deliver the copies of the depoſitions to the jury, if they find againſt him, on whoſe part the copies were deliverd, the verdict is good, but if they find for him, on whoſe part they were deliverd, and this appear by examination, and be (as it ought to be,) indorſed upon the *poſtea* or record, the verdict ſhall be quaſhed, and a new *venire facias*, or award for a new jury ſhall be returned. *M.* 20 *Jac. B. R. Hillord* and *Hall.*

If after the evidence given, where divers evidences are read on both ſides, and the clerk is making up his bundle of evidences, that were under ſeal, to deliver to the jury, the ſolicitor for the plaintiffs delivers a bundle of depoſitions to the jury, ſome whereof were read, and ſome not read, and upon examination this appeard, tho the jury ſwore they opened not the bundle deliverd by the ſolicitor, yet the verdict for the plaintiff was for this cauſe avoided, (the matter being indorſed upon the record,) and a new *venire facias* awarded, for great inconvenience may be by ſuch a practice, and the oath of the jury, that never looked into them, was not regarded, for poſſibly it may be a miſdemeanor in them to look into it, which they ſhall not excuſe in this manner. *T.* 1653. *Webb & Taylor*, 2 *R. A.* 714. *pl.* 6.

If the party after the jury ſworn ſpeak with a juryman, but nothing touching the buſineſs in iſſue, this doth not avoid the verdict given after for him. *M.* 7. *B. R. per curiam.*

But if he or any in his behalf ſay to a juryman after his departure from the bar and before verdict given, the caſe is clear for the plaintiff, this ſhall avoid the verdict, if given for the plaintiff, for it is new evidence. *H.* 22 *Jac. B. R. Athil & Bulwer* adjudged. 2 *Rol. Abr.* 716. *pl.* 20.

If *A.* be challenged off, and twelve more ſworn, yet *A.* goes along with the twelve ſworn and is preſent at their conſultation, if *A.* give no new evidence, nor adviſed or directed them

them to find for that party, for whom the verdict is given, the verdict is good, but *A.* ſhall be fined for his miſdemeanor. *P.* 17 *Jac. B. R. Park*'s caſe.

Now touching fining of jurors I ſhall add farther.

If a man, that is one of the indictors, be returned upon the petit jury, and do not challenge himſelf, he ſhall be fined. 40 *Aſſiz.* 10.

If a jury ſay they are agreed, and it being asked, who ſhall ſay for them, they ſay their foreman, but upon farther inquiry they are not agreed, the jury ſhall be fined, *viz.* every one apart. 40 *Aſſiz.* 10. 29 *Aſſiz.* 27.

If a juryman be called and refuſe to appear, or if having appeard withdraw himſelf before he be ſworn, the court may ſet a fine upon him at their diſcretion: *vide Stat.* 35 *H.* 8. *cap.* 6.

So if he be challenged, and while the challenge is trying withdraw himſelf, and the challenge is upon the trial diſallowd, and he be not preſent to be ſworn 36 *H.* 6. 27. *a.* or being ſworn withdraw himſelf from his fellows before the verdict given. 34 *E.* 3. *Office de court* 12.

If eleven of the jury be agreed, and the twelfth refuſe, and make his companions lie by it, heretofore ſuch juryman hath been impriſond for his wilfulneſs, 8 *Aſſiz.* 35. and fined, and the inqueſt taken by the other eleven jurors. 3 *E.* 3. *Verdict* 40.

But upon great conſideration both theſe courſes have been diſallowd, and the judgment upon the verdict of eleven jurors reverſed, and the juryman (fined and impriſond) diſcharged, as being contrary to law, for it may be the twelfth was in the right, yet howſoever his conſcience is not in this manner to be forced, and therefore former precedents of this kind have been diſallowd. 41 *E.* 3. 11. *a.* 41 *Aſſiz.* 11.

But what if a jury give a verdict againſt all reaſon, convicting or acquitting a perſon indicted againſt evidence, what ſhall be done? I ſay, if the jury will convict a man againſt or without evidence, and againſt the direction or opinion of the court, the court hath this ſalve to reprieve

the perſon convict before judgment, and to acquaint the king, and certify for his pardon.

And as to an acquittal of a perſon againſt full evidence it is likewiſe certain the court may ſend them back again, and ſo in the former caſe, to conſider better of it before they record the verdict, but if they are peremptory in it, and ſtand to their verdict, the court muſt take their verdict and record it, but may reſpite judgment upon the acquittal.

But as touching puniſhing the jury, I ſhall ſay, what I think may be done, and what may not be done.

1. I think in ſuch a caſe the king may have an attaint, for altho a man convicted upon an indictment can have no attaint, becauſe the guilt is affirmed by two inqueſts, the grand inqueſt, that preſents the offenſe upon their oaths, and the petit jury, that agrees with them, yet where the petit jury acquits, they ſtand as a ſingle verdict, for they diſaffirm what the grand inqueſt of twelve men have upon their oaths preſented, and with this agrees the book 10 *H.* 4. *Attaint* 60, 64. *per Thorn.*

2. By the ſtatute of 26 *H.* 8. *cap.* 4. the juſticiar or ſteward, before whom any perſon is acquit of felony againſt pregnant evidence in *Wales* or the marches thereof, may bind over the jurors to appear before the preſident and council of the marches of *Wales*, who may, as they ſee cauſe, fine and impriſon ſuch jurors by their diſcretion.

3. I do confeſs in the king's bench there have been many precedents of jurors, that have acquitted perſons of murder, or other felony tried in that court, if they have gone againſt pregnant evidence, that have been fined, impriſond and bound to their good behaviour during their lives (*g*).

The like hath been done before juſtices in *Eyre*, and the court of king's bench is a court in *Eyre* and much more, for that court may reverſe judgments given in *Eyre*. See for this purpoſe *T.* 43 *Eliz. B. R. Rot.* 979. *Noy's Rep. p.* 48 & 49. *Wharton's* caſe, where the jury in the king's bench acquitting the priſoner of murder againſt pregnant evidence, and finding it only manſlaughter were fined 20 *l.* apiece,

3 bound

(*g*) *Vide ſupra p.* 159.

bound to the good behaviour and for the good behaviour of the priſoner, and committed, and this was done by the advice of all the judges. See the ſame caſe *M.* 44 & 45 *Eliz. B. R. Yelv. Rep. p.* 23.

M. 42 & 43 *Eliz. B. R. Croke, n.* 12. *p.* 778. *Wats & Braines.* In an appeal of murder there was a confederacy among the jury to bring in the verdict *not guilty*, and if the court diſliked it, then to change their verdict, and accordingly they did, and the court diſliking their verdict they went out and found him guilty, and this agreement being diſcoverd the principal confederates were fined and impriſond, but this fine was for their confederacy and practice, not for their verdict.

7 *R.* 2. *Coron.* 108. The jury acquitted a notorious robber in the king's bench againſt great evidence, and the court bound the jury for the good behaviour of the priſoner; the reporter makes a *quære per quel ley, vide* the notes annexed to *Benloe* 153. to the ſame purpoſe.

4. Again, in caſes of inqueſt of office there have been precedents in the *Exchequer*, and more frequent in the court of wards for fining of jurors, that would not find according to their evidence. *H.* 28 *Eliz. in Scaccario coram Theſ. & baronibus.* 3 *Hughes* 196.

5. The practice of the king's bench to fine jurors for finding verdicts contrary to their evidence was endeavouring to be brought in practice before judges of *niſi prius*; and about 14 *Car.* 2. in an *Oxfordſhire* caſe *Huntington* and his eleven companions jurors were fined 5 *l.* apiece for ſuch a verdict, and the fine eſtreated into the *Exchequer*, but by the whole court by the advice of the greater part of the reſt of the judges proceſs was ſtayed upon that eſtreat, as being impoſed contrary to law (*h*).

6. Before juſtices of *oyer* and *terminer* and gaol-delivery, if the jury acquitted a felon contrary to their evidence, the uſe was to bind them over to appear in the king's bench to anſwer an information, but I never knew any preferd, and indeed it were impoſſible almoſt for any judge or jury to convict a jury upon ſuch an account, becauſe impoſſible, that

(*h*) *Vide antea cap.* 22. *p.* 160. *Vaugh.* 145.

that all the circumſtances of the caſe, that might move the jury to acquit a priſoner, could be brought in evidence; this therefore ſeems to me to be but *in terrorem.*

7. But then it was endeavoured to bring the practice of the king's bench into uſe before juſtices of gaol-delivery and *oyer* and *terminer* to fine jurors in criminal cauſes for not obſerving the judges directions, and acquitting felons againſt their evidence, and accordingly a jury in *Gloceſterſhire* was fined 5 *l.* a man for acquitting a perſon indicted of burglary, the form of the fine was much the ſame as is hereafter mentiond, this fine was alſo eſtreated into the *Exchequer*, but all the court after great advice with the judges of the common pleas orderd a ſtay of proceſs thereupon, as being neither warrantable by law nor antient precedents in any court leſs than *Eyre.*

At the gaol-delivery at *Newgate* 10 *Maii* 17 *Car.* 2. *Wagſtaff* (*i*) and eleven other jurymen were fined five marks apiece for acquitting *Richard Tomſon* and others indicted for conventicles, *Eò quòd ipſi juratores adtunc & ibidem eoſdem* Ricardum Tomſon *&c. de prædictâ tranſgreſſione & contemptu contra regem hujus regni* Angliæ, *& contra plenam evidentiam, & contrâ directionem curiæ in materiâ legis ibidem de & ſuper præmiſſis eiſdem juratoribus verſùs præfatos* Ricardum Tomſon *&c. in dictâ curiâ ibidem apertè dat' & declarat' de præmiſſis eis impoſitis in indictamento prædicto acquietaverunt in contemptum dicti domini regis nunc legumque ſuarum, & ad magnam obſtructionem & impedimentum juſticiæ, necnon in malum exemplum omnium aliorum juratorum in conſimili caſu delinquentium.*

They were thereupon committed, and brought their *habeas corpus* in the court of common-bench, and all the judges of *England* were aſſembled to conſider of the legality of this fine, and the impriſonment thereupon, wherein there was ſome little diverſity of opinion, whether without a cauſe of ſuit returned alſo the common pleas could give judgment touching this fine, and if there were cauſe, deliver the party, or whether he muſt go into the king's bench by *habeas corpus* and *certiorari.*

3 But

(*i*) In *Buſhell's* caſe, *Vaugh.* 153.

But it was agreed by all the judges of *England*, (one only diſſenting,) that this fine was not legally ſet upon the jury, for they are the judges of matters of fact, and altho it was inſerted in the fine, that it was *contra directionem curiæ in materiâ legis*, this mended not the matter, for it was impoſſible any matter of law could come in queſtion, till the matter of fact were ſettled and ſtated and agreed by the jury, and of ſuch matter of fact they were the only competent judges.

And altho the witneſſes might perchance ſwear the fact to the ſatisfaction of the court, yet the jury are judges as well of the credibility of the witneſſes, as of the truth of the fact, for poſſibly they might know ſomewhat of their own knowledge, that what was ſworn was untrue, and poſſibly they might know the witneſſes to be ſuch as they could not believe, and it is the conſcience of the jury, that muſt pronounce the priſoner *guilty* or *not guilty*.

And to ſay the truth, it were the moſt unhappy caſe that could be to the judge, if he at his peril muſt take upon him the guilt or innocence of the priſoner, and if the judge's opinion muſt rule the matter of fact, the trial by jury would be uſeleſs.

Whereupon, and upon view of the precedents in the court of common bench, where priſoners not legally committed or fined had been diſcharged, tho no cauſe of privilege were returned, the jurors were diſcharged of their impriſonment.

And therefore, altho the long uſe of fining jurors in the king's bench in criminal cauſes may give poſſibly a juriſdiction to fine in theſe caſes, yet it can by no means be extended to other courts of ſeſſions of gaol-delivery, *oyer* and *terminer*, or of the peace, or other inferior juriſdictions.

CHAP. XLIII.

Concerning ſtanding mute, *and the puniſhment of* penance, *or* peine fort & dure.

I Have hitherto conſiderd the pleas of the priſoner in capital cauſes, namely, 1. Confeſſion, 2. Pleas in bar, and 3. Pleas to the felony, or *not guilty*.

And I have conſiderd the proceedings in order to bring the party to his trial, and the trial thereupon by the jury.

It remains, that I ſhould now come to conſider what is to be done in caſe the priſoner will not anſwer, but ſtand mute and make no defenſe.

In this matter theſe things are conſiderable.

1. What ſhall be ſaid in law a *ſtanding mute*, and what not.

2. What the conſequence or penalty is of a ſtanding mute in capital cauſes, and therein of *peine fort* and *dure*.

3. What cautions are to be uſed before the inflicting of it.

4. By what law it is introduced.

I. As to the firſt of theſe.

If the priſoner hath received his judgment already, or be convicted and brought to the bar, and demanded what he can ſay, why judgment ſhould not be given againſt him, if convicted, or why execution ſhould not be awarded, and he ſaith nothing, yet this is not ſuch a ſtanding mute as is in hand, for he is already convict or attaint: And therefore in ſuch caſe, if the party ſo called hath always remained in cuſtody from the time of his plea of *not guilty*, if he be called to ſhew what he can ſay, why he ſhould not have judgment upon his conviction or execution upon his former

judgment, and he ſay nothing, it ſhall not be inquired, whether he can ſpeak or not, but he ſhall have preſent judgment or execution, as the caſe requires. 10 *E.* 4. 19. *b.* But if long time hath paſſed between his conviction or judgment and this ſecond calling to the bar, it is prudent to make the inquiry, at leaſt by witneſſes, whether he can ſpeak, for poſſibly he may have a pardon to plead.

But if a man abjure or be outlawd of felony, and after return again, and be taken and brought to the bar to ſhew cauſe why execution ſhould not be done, if he ſtand mute, an inqueſt of office is to be taken by the court to inquire, whether he can ſpeak or not, and if it be found, that by viſitation of God ſince his abjuration, *&c.* he hath loſt his ſpeech, it ſhall be alſo inquired, whether it be the ſame perſon containd in the record of outlawry or abjuration, before judgment or execution (as the caſe requires,) ſhall be awarded againſt him, for he may plead in bar of execution in ſuch caſe, that he is not the ſame perſon. 10 *E.* 4. 19. *b.* 8 *H.* 4. 1. *b.* And ſo it ſeems to be, if he were brought in upon a *capias utlegat'*, or *habeas corpus* by the ſheriff; *de quo infra.*

And therefore the book of 26 *Aſſiz.* 19. that ſaith a party abjured ſtanding mute ſhall have *peine fort & dure*, is miſtaken, for he ſhall be hanged, if he ſtand mute of malice. *Stamf. P. C. Lib.* II. *cap.* 60. *fol.* 150. *b.*

If a man indicted of felony demur to the indictment, and will not otherwiſe anſwer, this is no ſtanding mute, but if the demurrer be ruled againſt him, he ſhall have judgment of death. 14 *E.* 4. 7. *a. per cur.*

If a man indicted or appeald of felony pleads *not guilty*, and puts himſelf upon the country, and the jury remains upon challenges till another day and then appears, and the priſoner at the bar will ſay nothing but ſtand mute, yet this is not a ſtanding mute, for the inqueſt ſhall be taken upon the iſſue already joined; and ſo in an appeal. 15 *E.* 4. 33. *b.*

And yet even in that caſe it is poſſible the priſoner may be taken dumb between his plea and his trial, and ſo loſe

ſome

ſome advantages, that the law gives him for his defenſe, as challenges, examination of witneſſes, and many matters for his defenſe; [therefore] the court hath uſed ſometimes by inqueſt, ſometimes by inquiry *ex officio* by the inqueſt impannelled to try his iſſue to inquire, whether he ſtand mute of malice, and then to try him, or if it be *ex viſitatione Dei*, then to reſpite his trial, but if he ſpoke the ſame day in the hearing of the court, then ſuch inqueſt of office is not taken, for the court is of their own knowledge aſcertained of his ability to ſpeak. 43 *Aſſiz.* 30. 8 *H.* 4. 1 & 2.

The ſtanding mute of a priſoner is not, where he hath pleaded *not guilty* and put himſelf upon the country, tho afterwards he would retract it.

If a priſoner for felony plead *not guilty* and put himſelf upon the country, and when the jury appears he challengeth peremptorily above thirty-five, in ſuch caſe the jury was not to be taken, but judgment of penance was antiently given againſt him, and ſo it was no attainder in caſe of felony. 17 *Aſſiz.* 6. 17 *E.* 3. 23. *a.* 14 *E.* 4. 7. *a.* 3 *H.* 7. 12. *a.* 2. *a.*

But the law herein was after declared otherwiſe, and by the advice of all the judges judgment of death ſhall be given, and ſo it was an attainder. 3 *H.* 7. 12. *a.* where it was ſettled for a rule in all circuits, and ſo it continued until 22 *H.* 8. *cap.* 14. when by act of parliament the challenge was reduced to twenty, and ſo the judgment of death upon peremptory challenge ceaſed, unleſs in high treaſon or petit treaſon, where it ſtands on foot as before, *vide Co. P. C. cap.* 102. *p.* 227, 228. who ſeems to hold, that for challenging above thirty-five judgment of *peine fort & dure* ſhall be given according to 14 *E.* 4. 7. *a.* & 3 *H.* 7. 2. *a. per omnes juſticiarios contra Keble.*

Regularly therefore a man is ſaid to ſtand mute, when being arraigned for felony or treaſon, either 1. He anſwers not at all, or 2. If he anſwers with ſuch a matter, as is not allowable for anſwer, and yet will not anſwer otherwiſe, or 3. Where he pleads *not guilty*, but when demanded how he will be tried, either will ſay nothing, or not put himſelf upon the country.

If he ſtand mute and ſay nothing at all, in caſe of felony the court ought *ex officio* to impannel a jury and ſwear it as an inqueſt of office to inquire, whether he ſtand mute of malice, and if found ſo, he ſhall have the judgment of *peine fort & dure*, or whether it be *ex viſitatione Dei*, and if found ſo, they are to inquire touching all thoſe points, which he might poſſibly plead for himſelf, as whether a felony were done, whether he be the ſame perſon, that is indicted for it, whether he did it, and whether he hath any matter to allege for his diſcharge.

But what if all this be found againſt the priſoner, what ſhall be done? whether judgment of death ſhall be given againſt him, tho he never pleaded, ſeems yet undetermined (*a*).

If a man plead *not guilty*, and being demanded how he will be tried anſwers by God and holy church 4 *E.* 4. 11. *a.* or delivers in a protection 7 *E.* 4. 29. *a. Coron.* 30. or will not put himſelf upon trial of his country, this is a ſtanding mute, as much as if he had not at all pleaded.

II. As to the conſequences of ſtanding mute.

In caſe of an indictment of high treaſon, the party ſtanding mute, judgment of high treaſon ſhall be given againſt him as upon a *nihil dicit*, *M.* 3 & 4 *Eliz. Dy.* 205. *a. rule accordant. Stamf. P. C. Lib.* II. *cap.* 60. *fol.* 150. *a.* 2 *Co. Inſt. ſuper ſtat' Weſtm'* 1. *cap.* 12. *vide infra*, *cap.* 44.

In an appeal antiently it had been held, that if the priſoner ſtand mute, judgment ſhould be given for the appellant. 21 *E.* 3. 18. *a.* (*).

But afterwards the law was held all one in caſe of an appeal and of an indictment, namely the defendant ſtanding mute judgment of *peine fort & dure* was given againſt him, yet the ſtatute of *Weſtm'* 1. *cap.* 12. ſpeaks only of the *king*'s ſuit, (†) *vide* 43 *Aſſiz.* 30. 3 *H.* 7. 2. *a.* 14 *E.* 4. 7. *a.*

If a man be indicted of felony and ſtands mute, he ſhall be put to penance, *T.* 18 *E.* 2. *B. R. Rot.* 20. *in dorſo, Berks*,

(*a*) *Vide B. Corone* 217. where a perſon, who could neither ſpeak nor hear, was arraigned for felony: *vide Part* I. *p.* 34. *in notis.*

(*) See *State Tr. Vol.* I. *p.* 367. lord *Audley*'s caſe.

(†) 2 *Co. Inſt.* 178.

rex (*b*). And yet *vide H.* 18 *E.* 3. *B. R. Rot.* 16. *Ebor. rex*, *Petrus Geldhird* arraigned (*c*) *pro depræ̃datione in regiâ viâ* ſtood mute, and an inqueſt of office being charged to inquire, if it were wilful, and found ſo, he had judgment to be hanged.

On the other ſide *T.* 30 *E.* 3. *Rot.* 11. *in dorſo Hunt. rex*; The biſhop of *Ely* arraigned for felony *dicit, quòd ipſe eſt membrum ſanctæ eccleſiæ, & epiſcopus unctus, & frater domini Papæ*, and that he could not anſwer without the archbiſhop of *Canterbury* [his ordinary] *coram laico judice*; there went out thereupon a writ to the ſheriff of *Hunt.* to return twenty-four to inquire of the whole fact, and by the inqueſt he was found guilty of the felony charged upon him, [*de receptamento felonum*] and his goods ſeiſed, but he was demanded by the archbiſhop of *Cant.* and deliverd to him as a member of holy church, ſo that there the fact was inquired of, tho the biſhop refuſed to anſwer, which was a kind of ſtanding mute (*d*).

By the ſtatute of 33 *H.* 8. *cap.* 12. any perſon arraigned before the lord ſteward for treaſon, murder, manſlaughter, or blood-ſhed in the king's palace, and ſtanding mute ſhall have judgment, as if convicted, ſo there is no penance in that caſe.

But upon the ſtatute of 28 *H.* 8. *cap.* 15. for commiſſioners of the admiralty proceeding in maritime felonies *&c.*

4 there

(*b*) This was the caſe of *Stephen le Ferrour*, who was indicted before juſtices of *oyer* and *terminer pro receptamento felonum*, and upon being arraigned *mutum ſe tenuit*, a jury was impannelled *ex officio*, who found *quòd mutum ſe tenet de merâ & ſpontaneâ voluntate ſuâ, & quòd loqui poteſt ſi velit*, and he was thereupon put to penance, *ad pœnam*; the record was removed by writ of error *coram rege*, where he pleaded *not guilty*, and was committed to the marſhal and afterwards produced the king's pardon, *Ideo inde quietus.*

(*c*) It appears by the record, that it was not upon an arraignment, that he ſtood mute, for he had fled from juſtice and was outlawd, but being afterwards taken he was brought into court, and demanded why execution ſhould not be done upon him in purſuance of the outlawry, to this he made no anſwer; but this is not a ſtanding mute to the purpoſe in hand, as our author himſelf has ſhewn at the beginning of this chapter.

(*d*) This was not properly a ſtanding mute, but a claiming the benefit of clergy, (which in antient times was uſually done before pleading,) and was of the like nature with the caſe of *Alan de Beckingham Mich.* 20 & 21 *Edw.* 1. *Rot.* 4. *in dorſo coram rege, Nottingham*, ſee *Part* I. *p.* 343. *in notis*, and the caſe of *John de Boſco, P.* 6 *E.* 2. *B. R. Rot.* 2. *Eſſex*, ſee *Part* I. *p.* 180. *in notis*, the reaſon therefore, why the fact was inquired of, was the ſame in this caſe, as in thoſe, *viz.* that it might be known, *pro quali ordinario liberari debeat*, whether as a clerk convict or acquit. *Vide* 2 *Co. Inſt. p.* 633.

there is no ſuch excluſive proviſion, and therefore they follow herein the courſe of the common law, ſo that any perſon indicted for piracy before theſe commiſſioners ſtanding mute ſhall have judgment of *peine fort & dure. T.* 7 *Eliz. Dy.* 241. *b. Brooke*'s caſe.

The judgment of *peine fort & dure* is, as it is recited by *Stamf. P. C. Lib.* II. *cap.* 60. *fol.* 150. *b. &* 4 *E.* 4. 11. *b. viz.* "That he be ſent to the priſon from whence he came, "and put into a dark, lower room, and there to be laid "naked upon the bare ground upon his back without any "clothes or ruſhes under him or to cover him except his "privy members, his legs and arms drawn and extended "with cords to the four corners of the room, and upon "his body laid as great a weight of iron, as he can bear, and "more. And the firſt day he ſhall have three morſels of "barly bread without drink, the ſecond day he ſhall have "three draughts of water, of ſtanding water next the door "of the priſon, without bread, and this to be his diet till "he die" (*e*). *Vide* the entry thereof *Raſt. Entries* 385. *a.*

This judgment is given for his contempt in refuſing his legal trial, and therefore he thereby forfeits his goods, but it is no attainder, nor gives any eſcheat or corruption of blood: *vide* 34 *E.* 3. *Eſcheat* 10. *Dy.* 308. *a.* 14 *E.* 4. 7. *a.*

The ſeverity of the judgment is to bring men to put themſelves upon their legal trial, and tho ſometimes it hath been given and executed, yet for the moſt part men bethink themſelves and plead.

If a peer of the realm arraigned upon an indictment of felony before his peers refuſe to plead, [he ſhall have] this judgment of *peine fort & dure. P.* 17 *Car.* 1. *caſus domini Caſtlehaven* (*f*).

And a woman ſhall have the ſame judgment, if ſhe ſtand mute. 2 *Co. Inſt.* 177. *ſuper ſtat. Weſtm'* 1. *cap.* 12. *Wiſeman*'s caſe there cited.

If

(*e*) But before they proceed to this extremity, it has been the practice to endeavour to make the priſoner plead by tying his thumbs together with whip-cord. *Thorely*'s caſe *Kel.* 27.

(*f*) *State Tr. Vol.* I. *p.* 367.

If a man be indicted of petit larciny and refuſe to plead, it ſeems judgment of *peine fort & dure* ſhall not be given, but the party convict, for he is not to have judgment of death.

But if a woman be indicted for ſimple larciny of goods under 10*s.* tho ſhe ſhall not die for it, but only be burnt in the hand by the ſtatute of 21 *Jac. cap.* 6. yet if ſhe refuſe to plead, the judgment of *peine fort & dure* ſhall be given againſt her, becauſe it may fall out upon the caſe, that ſhe hath been burnt in the hand before, and then ſhe is to be executed; and it is but a privilege, as clergy is, which ſhe muſt put herſelf by her defenſe into a capacity of enjoying.

If a new felony be made by act of parliament, tho it make no proviſion touching the penalty of ſtanding mute, yet it is a neceſſary conſequence thereof, tho not ſpecially provided for, if it be not ouſted by the act, that makes it felony; as clergy is an incident to every new created felony, unleſs ſpecially ouſted by act of parliament (*), for they are incidents: *vide Dy.* 241. *b.*

And therefore in rape, tho made felony by *Weſtm'* 2. *cap.* 34. if the party indicted ſtand mute, he ſhall have judgment of penance. *P.* 7 *Car.* 1. lord *Caſtlehaven's* caſe.

Tho judgment be given of *peine fort & dure*, yet if the offenſe laid in the indictment be within clergy, his clergy ſhall be allowd him, which appears by the ſtatutes of 23 *H.* 8. *cap.* 1. 25 *H.* 8. *cap.* 3. and other ſtatutes that ouſt clergy, where the party ſtands mute, in ſome particular caſes, and by the books.

III. As for the third general, the neceſſary cautions to be uſed in inflicting this ſevere puniſhment are theſe.

1. Let not the judgment be too haſtily given, let the priſoner have not only *trina admonitio*, but alſo ſome convenient reſpite, poſſibly till the afternoon, to bethink himſelf, if the arraignment be in the morning; or till the next morning, if the arraignment be in the afternoon: and let the judgment itſelf be diſtinctly read to him, that he may

(*) *Vide Part* I. *p.* 704.

know his danger before his final refuſal with due admonition not to deſtroy himſelf. 4 *E.* 4. 11. *b.*

2. Before any judgment final be given, if the priſoner ſtands wholly mute and ſays nothing at all, let an inqueſt of office be taken to inquire, whether it be *ex malitiâ*, or *ex viſitatione Dei*, unleſs he hath ſpoken in court the ſame day, *vide Raſt. Entries* title *gaol-delivery.*

3. And likewiſe let the judge hear the witneſſes upon oath to give a probable teſtimony of his guilt, for tho his malicious ſilence carries with it a preſumption of guilt, yet it is good to have ſome concurrent teſtimony. 1. In reſpect of the ſeverity of the judgment. 2. Becauſe the ſtatute of *Weſtm'* 1. *cap.* 12. *de quo infra*, ſeems to require it.

4. If the offenſe laid in the indictment be within clergy, tho in ſtrictneſs of law the priſoner ought to pray it, yet it is the duty of the judge to allow it, tho not prayd, and that as well after judgment pronounced as before.

IV. Concerning the fourth particular, by what law this judgment of *peine fort & dure* is introduced.

By the ſtatute of *Weſtm'* 1. *cap.* 12. *Purvieu eſt enſement que les felons eſcries, & queux ſont apertement de male fame, & ne ſoy voilent mitter en enqueſt de felonies, que homes met ſur eux devant juſtices a la ſuit le roy ſoient miſes en la priſon fort & dure, come ceux queux refuſent eſtre al common ley de la terre, mes ceo neſt my a entender pur priſoners, que ſont priſes per legier ſuſpicion.*

Some (*b*) have antiently thought, that this act of parliament introduced the penance, and therefore they did antiently think it did not extend to an appeal, becauſe that is the ſuit of the party and not the ſuit of the king, *de quo antea p.* 317.

But it ſeems, that altho this ſtatute is in ſome points directive, namely, that it ſhould be applied to thoſe, that are of ill fame, and not thoſe, who are taken upon a light ſuſpicion, and therefore the court before they give this judgment ought either by inqueſt of office, or at leaſt by examination of witneſſes to inquire concerning the probabilities

(*b*) *Stamf. P. C.* 149. *b. Poulton de pace regis* 211. *b.*

of the guilt: *vide Stamf. P. C. Lib.* II. *cap.* 60. *fol.* 150. *a.* yet this ſtatute doth not originally introduce the penance, but it was to be done by the common law, and accordingly it is agreed by my lord *Coke* in his comment upon this ſtatute 2 *Inſt. p.* 179.

And this appears 1. Becauſe this ſtatute only ſpeaks of impriſonment *fort & dure*, but enacts not the puniſhment itſelf by this lingring painful death, therefore the puniſhment, as it is thus inflicted, was at common law, and is by force of the common law. 2. Becauſe tho ſome antient opinions were, that it extended not to the caſe of an appeal of felony, yet the law hath conſtantly for many ages extended it to an appeal (*i*), which cannot be by force of this ſtatute, but by the common law.

3. The antients, as *Fleta* (*k*), *Britton* (*l*) and *Horn* (*m*), tho they wrote ſince the making of this ſtatute, mention the penance without referring of it to this act of *Weſtm'* 1. (*n*).

3 CHAP.

(*i*) *Kel.* 37.
(*k*) *Lib.* I. *cap.* 34. §. 33.
(*l*) *Cap.* 4. §. 23. & *cap.* 22. §. 73.
(*m*) *Mirror*, *cap.* 1. §. 9.
(*n*) This ſtatute was made 3 *E.* 1. and tho by the manner of the expreſſion it does not ſeem to have introduced this penance, but rather ſpeaks of it as a thing already known, yet I cannot find, that it is ever taken notice of in any antient author, book-caſe, or record before the reign of *E.* 1. on the contrary I find ſome inſtances in the preceding reign of perſons arraigned for felony ſtanding mute, who yet were not put to their penance, but had judgment to be hanged: at which time it ſeems to have been the uſual practice, that if the priſoner ſtood wilfully mute, a jury of twelve were impanneld *ex officio*, and if they found him guilty, another jury of twenty-four were choſen to examine the verdict of the former; and if they were of the ſame opinion, the priſoner was ſentenced to be hanged. *Placita coronæ coram juſtic' itinerant' in comitatû* Warwicenſi *anno* 5 H. 3. *Rot.* 1.

" *Agnes*, quæ fuit uxor *Roberti de* " *Boſco*, appellat *Thomam* filium *Huberti* " de morte *Roberti* viri ſui, & *Thomas* " venit, & quia ipſa habet virum *Rober-* " *tum de Verdun* nomine, qui nullum " facit appellum, ipſa non habet vocem " appellandi, & ideò inquiratur veritas " per patriam, & *Thomas* defendit mor- " tem, ſed non vult ponere ſe ſuper pa- " triam, & xii juratores dicunt, quòd " culpabilis eſt de morte illâ, & xxiv " milites, alii a prædictis xii, ad hoc e- " lecti idem dicunt, & ideò ſuſpendatur.

Catalla *Thomæ* xxxiv ſolidos & vi denarios, unde vicecomes reſpondebit.

Ibidem in dorſo. " *Thomas* de la " *Hethe* captus per indictamentum pro " furtis & aliis nequitiis & pro recepta- " mento venit, & non vult ponere ſe ſu- " per patriam; & juratores dicunt ſuper " ſacramentum ſuum, quòd malè cre- " dunt eum de receptamento *Holbæ Go-* " *lichtly*, qui fuit latro cognitus, & po- " ſtea ſuſpenſus apud *Caunped'em*, & de " hoc & de aliis furtis eum malè cre- " dunt, & xxiv milites ad hoc electi di- " cunt idem, quod prædicti xii juratores, " & quòd latro eſt de ovibus & de a- " veriis & aliis rebus, & ideò ſuſpen- " datur.

CHAP. XLIV.

Concerning clergy *how it ſtood at* common law, *and how generally* at this day.

HAving in the former chapter gone through the pleas and trials of the priſoners, and the proceeding upon ſtanding mute, I come to conſider the *privilegium clericale*, and I the rather refer it to be examind in this place, becauſe tho antiently clergy was prayd and allowd upon the arraignment of the priſoner, yet at this day it is rarely done but upon his conviction or ſtanding mute, and this is, 1. For the convenience of the court to be aſcertained firſt of the nature of the crime by the confeſſion or trial of the priſoner. 2. For the advantage of the priſoner, who poſſibly may be acquitted, and ſo need not the benefit of clergy: *vide Hob. Rep.* 288. *Searle & Williams.*

And for the full diſcuſſion of this matter, (which I muſt needs ſay is one of the moſt involved and troubleſome titles in the law,) I ſhall, as near as I can, hold this method. 1. To conſider ſomewhat in general touching the original and alteration of the privilege of clergy. 2. In what caſes it is to be allowd, and in what not (*a*). 3. What perſons are capable of this privilege, and what not (*b*). 4. At what time it is to be allowd, and when not (*c*). 5. The manner how it is to be allowd, and who the judge of it (*d*). 6. The conſequences of the praying or allowing of it (*e*).

For the firſt of theſe, namely the original and progreſs of this *privilegium clericale.*

Antiently princes and ſtates converted to chriſtianity in favour of the clergy, and for their incouragement in their offices and imployments, and that they might not be ſo much intangled in ſuits, did grant to the clergy very bountiful privileges and exemptions, principally of two kinds. 1. Exemption

(*a*) *Cap.* 45, 46, 47, 48, 49, 50. (*b*) *Cap.* 51. (*c*) *Cap.* 52. (*d*) *Cap.* 53. (*e*) *Cap.* 54.

emption of places conſecrated to religious duties from arreſts for crimes, which was the original of ſanctuaries. 2. Exemption of their perſons from criminal proceedings in ſome caſes capital before ſecular judges, which was the true original of the *privilegium clericale.*

The clergy increaſing in wealth, power, honour, number, and intereſt afterwards ſet up for themſelves, and that, which they obtained by the favour of princes and ſtates at firſt, they now began to claim as their right, and a right of the higheſt nature, namely *jure divino*; and by their canons and conſtitutions endeavourd, and (where they met with tame and eaſy princes and ſtates,) obtaind vaſt extenſions of theſe exemptions. 1. In the perſons concerned, namely to all that had any kind of ſubordinate miniſtration relative to the church. 2. In the cauſes, exempting as far as they could all cauſes of clergymen, as well civil as criminal, from the juriſdiction of the ſecular power, and wholly ſubordinating them immediately and only to the eccleſiaſtical juriſdiction, which they ſuppoſed to be lodged firſt in the pope by divine right and inveſtiture from *Chriſt*, and from the pope ſhed abroad into all ſubordinate and eccleſiaſtical juriſdictions, whether ordinary or delegate.

And by this means they endeavourd and in ſome kingdoms and for ſome ages obtained, that there was a double ſupreme power, or two kingdoms in every kingdom, the one a *regnum eccleſiaſticum*, abſolute and independent upon any but the pope over eccleſiaſtical men and cauſes, exempt and ſeparate from the ſecular magiſtrate; the other a *regnum ſeculare* of the king or civil magiſtrate, which yet was not ſo abſolute, but that it had ſubordination and ſubjection to this *regnum eccleſiaſticum*; ſo it was *regnum ſub graviori regno.*

He that liſts to ſee the whole ſcheme of their claim, let him read *Suarez* his large diſcourſe of the *monumenta eccleſiaſtica* in his *opuſcula.*

But altho the uſurpations of the pope were very great and obtained much in this kingdom, until the extermination of his pretended ſupremacy by king *H.* 8. yet this claim of the

exemption of the clergy totally from ſecular juriſdiction grew ſo burdenſome and intolerable, that it was from time to time qualified and abridged by the civil power, ſometimes by acts of parliament taking it away in ſome caſes, ſometimes by the interpretation and conſtruction of the judges, and ſometimes by the contrary uſage of the kingdom; for eccleſiaſtical canons never bound in *England* farther than they were received, and ſo had not their authority from their own ſtrength and obligation, but from the uſages and cuſtoms of the kingdom that admitted them, and only ſo far forth as they were ſo admitted. And therefore,

I. As to the exemption of the clergy from civil ſuits between party and party only, if upon the *diſtringas* he was returned *clericus & beneficiatus non habens laicum feodum*, proceſs iſſued to the biſhop to bring him in, and in caſe of a ſtatute merchant they were by ſpecial acts exempted from arreſts by *capias*. But yet they were not exempt from the juriſdiction of civil courts in civil cauſes, yet antiently they attempted this alſo in the king's courts but with ill ſucceſs, and ſo they never attempted it after, that I remember.

M. 7 *& 8 E.* 1. *B. R. Rot.* 13. *Cant. William Joye* plaintiff [brought an action] againſt *Guy Mortimer* rector of *Kingſton* for beating him and cutting off his upper lip with a knife, the defendant pleaded *quòd ipſe eſt clericus, & non debet hîc reſpondere*, and that was all the anſwer he would give, *Et quia querela iſta non tangit vitam & membrum, ſed eſt de quâdam tranſgreſſione perſonali, nec ipſe vult in curiâ domini regis reſpondere ad querelam iſtam*, judgment was given for the plaintiff to recover 100 *l.* damages taxed by the court, and [the defendant was] committed to gaol, and afterwards paid twenty marks to the king for a fine (*o*).

II. If they were indicted in caſes criminal but not capital, nor wherein they were to loſe life or limb, there *privilegium clericale* was not allowd them, and therefore not in

(*o*) The record of that caſe was thus, " *Willielmus Joye* de *Kyngeſton* queritur " de *Guydone de mortuo mari*, rectore " eccleſiæ de *Kyngeſton*, & *Thomâ le* " *Clerk*

indictments of treſpaſs, petty larciny, or killing *ſe defendendo. Stamf. P. C. fol.* 124. *a.*

III. If they were indicted of high treaſon, clergy was not allowable, and therefore *Hill.* 2 *H.* 4. *Rot.* 4. *B. R. rex*, where the biſhop of *Carliſle* was indicted of high treaſon, and inſiſted upon his *privilegium clericale*, *quia epiſcopus unctus*, yet this claim was diſallowd and he put upon his trial, and convicted (*p*).

Yet *Hill.* 17 *E.* 2. *Rot.* 87. *in dorſo*, *Heref. coram rege*, the biſhop of *Hereford* indicted of high treaſon for levying war againſt the king alleged, that he was *epiſcopus* Heref. *ad voluntatem Dei & ſummi pontificis*, and could not anſwer *abſque offenſâ divinâ & ſanctæ eccleſiæ*. Thereupon the plea was adjourned into parliament, where the biſhop anſwerd as before, and the archbiſhop of *Canterbury* claimed him and had him; thereupon it was orderd, that day ſhould be given in the king's bench to the biſhop, and the archbiſhop was to have him there at the day, and in the mean time a writ iſſued to the ſheriff of *Heref.* to return twenty-four to inquire, as if he had pleaded, [*quòd venire faciat tot & tales, &c. ad inquirendum prout moris eſt, &c. pro quali, &c.*] returnable at the ſame day; the biſhop appeard accordingly in the cuſtody of the archbiſhop,

2.

" *Clerk* de *Harengton* de hoc, quòd " *Thomas* ſimul cum aliis ex præcepto " prædicti *Guydonis* ipſum *Willielmum* " inſultaverunt, verberaverunt, & malè " tractaverunt, ita quòd de vitâ ipſius " deſperabatur; & dictus *Guydo* manû " ſuâ propriâ, & knypulo ſuo labium " ipſius *Willielmi* ſuperius abſcidit, unde " dicit quòd deterioratus eſt & dampnum habet ad valentiam centum librarum; & inde producit ſectam. Et " prædicti *Guydo* & *Thomas* veniunt & " dicunt, quòd clerici ſunt, & non debent hîc reſpondere, & ſæpiùs quæſiti " ſi velint reſpondere, ſemper dicunt " quòd clerici ſunt, & ſine ordinariis " ſuis nolunt reſpondere. Et quia querela iſta non tangit vitam & membrum, ſed eſt de quâdam tranſgreſſione perſonali, nec ipſi volunt in curiâ domini regis reſpondere ad querelam illam, conſideratum eſt, quòd " prædicti *Guydo* & *Thomas* de præ" dictâ tranſgreſſione convincantur, & " ſatisfaciant prædicto *Willielmo Joye* de " dampnis, ſcilicet quilibet eorum de " centum libris, & domino regi de " miſericordiâ, & committantur gaolæ " pro tranſgreſſione &c.

(*p*) The reaſon given in the record is in theſe words, " Quicumque ligeus domini regis, cujuſcumque ſtatûs, ſeu " conditionis, ſpiritualis, vel temporalis " fuerit, in terrâ *Angliæ* pro altâ pro" ditione & crimine læſæ majeſtatis in" dictatus eſt, & coram rege, vel juſti" ciariis ſuis inde arrenatus tenetur, & " debet per legem *Angliæ* indè reſpon" dere.

Yet in antient times a difference was made between treaſons, that were immediately againſt the king's perſon, and other treaſons: *vide Part* I. *p.* 185, 186, 222. *in notis*; and the caſe of the biſhop of *Hereford* here mentiond.

biſhop, and the jury found him guilty, *Ideo conſiderat' eſt, quòd prædictus epiſcopus tanquam convictus &c. remaneat penes prædictum archiepiſcopum ut priùs, &c.* and all his goods and chattels, lands and tenements were ſeiſed into the king's hands by writ directed to the ſheriff: Upon which it is obſervable, 1. That a kind of allowance is made of clergy in high treaſon. 2. That notwithſtanding his claim of clergy, yet a writ iſſued to ſummon a jury, who inquired whether guilty or not. 3. That upon this plea and this inquiſition, tho he had his clergy, it was *ut clericus convictus.*

Nota in the parliament of the 1 *E.* 3. this judgment was reverſed for this cauſe, that the juſtices took the inquiſition, *licèt idem epiſcopus in aliquam inquiſitionem ſe non poſuiſſet. Clauſ.* 1 *E.* 3. *Part* I. *M.* 13. ſo that the judgment was given upon the inquiſition, and not upon *nihil dicit* for ſtanding mute, and therefore erronious (*q*).

But afterwards *T.* 21 *E.* 3. *Rot.* 23. *Hertford, rex, John Gerberge* was indicted for a conſtructive treaſon namely, accroaching royal power, *de quò vide ſupra, Part* I. *cap.* 11. *p.* 80. 138. and thereupon claimed the privilege of clergy, *Et quia privilegium clericale in hujuſmodi caſu ſeditionis ſecundùm legem & conſuetudinem regni hactenus obtentas & uſitatas non eſt allocandum &c. quæſitum eſt ab eo ſæpiùs qualiter ſe velit acquietare,*

(*q*) The error of this judgment conſiſted not merely in its being given upon an inquiſition "in quam epiſcopus ſe non poſuiſſet," but becauſe it was given upon an inqueſt, "in quam epiſcopus ſe non poſuiſſet," *after he had been allowd his clergy and deliverd to his ordinary.* For the *Placita Coronæ* of thoſe times ſhew, that it was the conſtant practice for inqueſts *ex officio* to paſs upon clerks pleading their *privilegium clericale*, where clergy was allowable; the method whereof was thus. The clerk upon his arraignment pleaded his *privilegium clericale*; then came the ordinary and demanded him; then a jury *ex officio* was ſummond to inquire into the truth of the charge; or as it is expreſt in this record, "ad inquirendum, prout moris eſt, pro "quali, &c. (*i. e. pro quali eidem ordi-*"*nario liberari debeat,*") and according to ſuch inqueſt, the clerk was deliverd to the ordinary as acquit, or convict. Thus are the entries upon the rolls. "*A. B.* indictatus de felonià, eò quod, "&c. & ductus coram rege, & allocu-"tus qualiter ſe velit de felonià præ-"dictâ acquietare, dicit quòd clericus "eſt, & ſine ordinario ſuo non debet hìc "reſpondere. Et ſuper hoc venit *C. D.* "&c. Et petit ipſum tanquam clericum "ſibi liberari; ſed ut ſciatur pro quali "eidem ordinario liberari debeat, in-"quiratur rei veritas per patriam." Then a jury *ex efficio* was ſummond, by which if it was found, "Quòd *A. B.* "non eſt culpabilis, liberatur ordinario "pro tali &c." But if culpabilis "li-"beratur ordinario tanquam clericus "convictus, ſalvò cuſtodiendus, ſub pœ-"nâ quâ decet &c." *Vide M.* 20 & 21 *E.* 1. *Rot.* 4. *in dorſo, B. R. Hill.* 22 *E.* 1. *Rot.* 15. *Ibid. Trin.* 30 *E.* 3. *Rot.* 11. *B. R. Rex. Trin.* 31 *E.* 3. *Rot.* 15. *Ibid. Rex.*

tare, he ſtill replied, that he was a clerk, *aſſerens ſe nolle aliam reſponſionem exhibere*; and thereupon he is committed to the marſhal *ad pœnitentiam ſuam ſecundum legem & conſuetudinem regni ſubiturum &c.*

Nota clergy denied in ſuch a treaſon, yet penance awarded, tho the charge was treaſon.

Yet at common law before the ſtatute of 25 *E.* 3. *cap.* 4. *pro clero*, it ſeems that clergy was allowable to him, that was indicted for counterfeiting coin, or for counterfeiting money. *B. Clergy* 31. But that is alterd by the ſtatute of 25 *E.* 3. *pro clero.*

IV. If clerks were indicted with theſe clauſes, *inſidiatores viarum & depopulatores agrorum*, clergy was denied them, and therefore the act of 4 *H.* 4. *cap.* 2. was made to put theſe clauſes out of indictments and to allow clergy, if they were in the indictment.

Again, as it was denied in reſpect of ſome offenſes, ſo this *privilegium clericale* was by the common law abridged in reſpect of the perſon; for certainly by the canon laws Nuns had the exemption from temporal juriſdiction, but the privilege of clergy was never allowd them by our law: *vide ſtat'* 21 *Jac.* (*r*).

Again, tho the ordinary took himſelf to be the judge of the allowance of the clergy and of the purgation of the clerk, yet the king's courts took that courage to make the ordinary but a miniſter, and themſelves judges of the allowance and diſallowance of the clergy and purgation. 21 *E.* 4. 21. *b.* 9 *E.* 4. 28. *a.*

And ſo the judges of the common law would oftentimes deliver the clerk to the ordinary, but *abſque purgatione*, as where the clerk is attaint by outlawry or by judgment, or convict by his own confeſſion, or upon an appeal. *Stamf. P. C. Lib.* II. *cap.* 49. 3 *H.* 7. 12. *a.* 10 *E.* 3. *Coron.* 247. *Hob. Rep.* 288. *Searle & Williams*, or if he were a notorious malefactor, *vide* 10 *E.* 3. *Coron.* 247. or if he be convict by verdict of counterfeiting the ſeal or coin at common law before the ſtatute of 25 *E.* 3. *Lib. Parl.* 18 *E.* 1. *Berton*'s caſe (*), or if he

2 be

(*r*) *Cap.* 28. §. 6 & 7. (*) *Ryley*'s *Plac. Parl. p.* 56.

be committed by record to the ordinary *abſque purgatione. Hob. ubi ſupra.*

And in theſe caſes, if the ordinary admitted him to his purgation, he was fineable for it as a great miſdemeanor, and the party deliverd by ſuch purgation ſhall be again committed to priſon, *M.* 34 *&* 35 *E.* 1. *Rot.* 59. *Banc. B. R.* the caſe of *Hugh Forſham* deliverd by *William Teſta*, and another commiſſionated from the pope (*s*); and the entry in ſuch caſes is, *liberatur ordinario tanquam clericus convictus & utlegatus ad ſalvò cuſtodiend' periculo, quòd incumbit &c. & inhibitum eſt eidem ordinario, nè ad aliquam purgationem ipſius* A. B. *procedat domino rege inconſulto, eò quòd prædictus* A. B. *pro feloniis &c. utlegatus eſt &c. H.* 14. *E.* 3. *B. R. Rot.* 19. *Rex. Suff. Lond.* The caſe of *John de Hemmyngeſton* chaplain. But indeed, if the clerk had his clergy and were generally deliverd to the ordinary, he might admit him to make his purgation, and upon ſignification thereof by the ordinary into the chancery a writ ſhould iſſue to the ſheriff to deliver unto the party ſo purged all his goods and chattels ſeiſed into the king's hands upon that occaſion, *niſi fugam fecerit eâ occaſione. F. N. B.* 66. *a.* And all this is to ſhew, that whatſoever weight the clergymen laid upon their canons and their exemptions from the ſecular juriſdictions, yet their canons or conſtitutions, or pretenſions or claims of this kind were not binding here, nor ſo taken farther than either by acts of parliament or the common acceptation of

(*s*) That caſe was thus: Whilſt the temporalties of the archbiſhop of *Canterbury* were in the king's hands, two clerks convict of felony impriſond in the archbiſhop's priſon had been admitted to purgation, and deliverd out of cuſtody by maſter *Hugh Forſham*, " Per mandatum magiſtrorum *Willielmi Teſta*, " & *Geraldi*, clericorum papæ, adminiſtratorum ſpiritualitatis archiepiſcopatûs prædicti, abſque mandato domini regis." *Forſham* was brought *coram rege*, and arraigned for the ſaid offenſe; and the keeper of the gaol was alſo arraigned for bringing the ſaid clerks " coram præfato *Hugone* ad purgandum, abſque præcepto domini regis;" and were both convicted by their own confeſſion, and committed to the marſhal, " Et poſtea finem fecerunt " pro tranſgreſſione & contemptu prædictis." Afterwards the two clerks, who had been deliverd by ſuch purgation, were brought from the tower, where they had been impriſond by the king's writ. " Et ſeparatim allocuti qua" liter de felonià prædictâ ſe velint ac" quietare, dicunt quòd clerici ſunt, & " liberantur ordinario ſub pœnâ, quâ de" cet, &c.

the kingdom they were received, and therefore theſe privileges received divers alterations and corrections and reſtrictions by the temporal judges, as the occaſion required.

CHAP. XLV.

In what offenſes *clergy is allowable or not.*

NOW touching the offenſes, wherein clergy is or was allowable, and in what not.

There are theſe general rules, that have influence in this whole diſcourſe.

1. That in caſe of high treaſon againſt the king clergy was never allowable in this kingdom.

2. That at common law in all caſes of felony or petit treaſon clergy was allowable, excepting two.

3. That where a ſtatute makes a new felony, clergy is incident thereunto, unleſs it be ſpecially taken away by acts of parliament; but where it makes a new treaſon, there is no clergy.

Upon theſe generals much of the ſucceeding buſineſs of this chapter, and ſome that follow will be built.

I. As to the firſt of theſe I ſay generally in all caſes of high treaſon clergy was never allowd.

And this propoſition will be conſiderd two ways. 1. How the common law ſtood before the ſtatute of 25 *E.* 3. *pro clero*, and 2. How it ſtood after.

The ſtatute of 25 *E.* 3. *for the clergy* was made in the parliament held in *Hill.* 25 *E.* 3. which was in the ſame parliament, wherein the ſtatute of declaration of treaſon is made, commonly called *The ſtatute of purveyance.*

By this ſtatute *pro clero cap.* 4. it is enacted, "That all "manner of clerks, as well ſecular as religious, which

" ſhall be from henceforth convict before ſecular judges for " any treaſons or felonies touching other perſons than the " king himſelf or his royal majeſty, ſhall from henceforth " have and enjoy the privilege of holy church, and ſhall be " without impeachment or delay deliverd to the ordinaries " demanding them, and upon this the archbiſhop promiſeth, " that upon the puniſhment and ſafe keeping of ſuch clerks " offenders, which ſhall be deliverd to the ordinaries, he ſhall " thereof make a convenient ordinance, whereby they ſhall " be ſafely kept and duly puniſhed, ſo that no clerk ſhall " take courage to offend for default of correction.

At the ſame parliament it was declared what was treaſon, and among the reſt counterfeiting the great or privy ſeal, or the king's coin is declared treaſon, and put in the ſame rank with compaſſing the king's death or levying of war, and it is thereby enacted, " That no other offenſes, than " what are therein declared, be treaſon till declared by par- " liament.

Before this ſtatute there were two ſorts of treaſons, that concerned the king, one was of a greater note, and another of a leſs note.

Thoſe of the greater note were *conſpiring the king's death*, *levying of war againſt the king*, *adhering to his enemies*, and two others, that are ſince abrogated by the ſtatute of 25 *E.* 3. which came under the general and obſcure names of *ſedition*, and *accroaching of royal power*.

In any of theſe a party convict had not his clergy at common law, this appears by the judgment cited in the former chapter (*a*). *T.* 21 *E.* 3. *B. R. Rot.* 23. *Rex.*

But there were other treaſons, that concerned the king, which were of an inferior note, namely *counterfeiting the ſeal* and *counterfeiting the coin* and theſe, (the latter eſpecially,) had only judgment as in caſe of petit treaſon, namely to be drawn and hanged.

And it ſeems before the ſtatute of 25 *E.* 3. *de proditionibus* clergy was allowd in both theſe caſes, as appears by the old book of *E.* 3. *B. R.* title *Clergy*, *placito ultimo*, and the judgment

(*a*) *p.* 327. *Gerberge*'s caſe.

ment in parliament of 18 *E.* 1. in *Berton*'s caſe, who being convict for counterfeiting the king's ſeal had his clergy, but *tradatur ordinario ſine purgatione* (*b*).

But now as to the ſtatute of 25 *E.* 3. *pro clero*, and the ſtatute of 25 *E.* 3. at the ſame parliament *de proditionibus* laying them both together in all caſes of treaſon touching the king himſelf or his royal majeſty clergy is wholly taken away, and in all other caſes of treaſon or felony clergy is allowd; and conſequently in murder, robbery, petit treaſon clergy is ſettled by this act of parliament.

But whatſoever is declared treaſon againſt the king by the ſtatute of 25 *E.* 3. *de proditionibus*, as well counterfeiting the ſeal or the money of the kingdom, as any other treaſon therein declared, is wholly exempted from clergy. 19 *H.* 6. 47. *b. Stamf. P. C. Lib.* II. *cap.* 42. *fol.* 124. *a. M.* 31 *E.* 3. *coram rege Rot.* 18. *Rex, in dorſo, Bucks, caſus abbatis de Muſſenden* (*c*) *pro reſecatione & falſificatione legalis monetæ*, 24 *H.* 8. *Spelman*'s *Rep. accordant adjudge.* 2 *Co. Inſt.* 635, 636. *ſuper Artic' cleri.*

So that at this day in all caſes of high treaſon, whether thoſe declared by the ſtatute of 25 *E.* 3. *de proditionibus*, or any other treaſons newly enacted ſince, the privilege of clergy is wholly taken away; and, (which is the ſecond propoſition above mentiond.)

II. In all felonies, that were at common law before the ſtatute of 25 *E.* 3. *pro clero*, and in all caſes of petit treaſon by that ſtatute the privilege of clergy is reſtored and ſettled.

And therefore in all ſuch felonies or petit treaſons, which were ſuch at the time of the ſtatute of 25 *E.* 3. *cap.* 4. *pro clero* clergy is allowable, unleſs in ſuch caſes where it is taken away by ſubſequent acts of parliament, and ſo far forth only as the ſame is ſo taken away.

But in what caſes ſubſequent acts of parliament have taken away clergy, where at the time of the ſtatute of 25 *E.* 3. it was allowable, ſhall be the buſineſs of the next chapter.

2 But

(*b*) *Vide ſupra p.* 328. See alſo *Part* I. *p.* 185, 186. *in notis, & p.* 223. *in notis.* (*c*) *Part* I. *p.* 216.

But yet there ſeem to be two felonies, where clergy was not allowable notwithſtanding this act, namely certain acts, that by interpretation of law were hoſtile acts, which was the reaſon, that I long ſince heard Mr. *Noy* then the king's attorney give for it in the king's bench about 7 *Car.* 1. *viz.* 1. *Inſidiato viarum & depopulatio agrorum.* 2. Wilful burning of houſes.

1. Concerning the former of theſe it appears, that *inſidiatores viarum* and *depopulatores agrorum* were ouſted of their clergy notwithſtanding the ſtatute of 25 *E.* 3. *cap.* 4. *pro clero.* *Rot. Parl.* 4 *H.* 4. *n.* 30. there was a complaint in parliament by the archbiſhop of *Canterbury* and clergy, whereupon it was enacted, that that general clauſe ſhould be left out in indictments and words of the ſame effect inſerted, and that notwithſtanding the indictment carried the ſame effect, yet benefit of clergy ſhould not be denied, as appears at large by the ſtatute of 4 *H.* 4. *cap.* 2.

2. As touching wilful burning of houſes I have heard, as before, that clergy was not allowable by the common law, but of this more fully in the next chapter.

Now touching *ſacrilege* tho ſome later ſtatutes were made to ouſt clergy in that crime, yet it ſeems at common law, or at leaſt after the ſtatute of 25 *E.* 3. *cap.* 4. *pro clero* it was allowable, as appears 26 *Aſſiz.* 27. where it is agreed by the juſtices, that a perſon indicted of robbing a chapel and breaking a church ſhould have his clergy; but it ſeems, it was with this difference, that if the ordinary refuſed him, as he might, he ſhould not have his clergy. 20 *E.* 2. *Coron.* 283. *Stamf. P. C.* 123, 124. but otherwiſe the court would allow it him. 26 *Aſſiz.* 27.

CHAP. XLVI.

Where and in what offenſes, *that were capital at common law,* clergy is taken away *in part or in all by acts of parliament ſubſequent to* 25 E. 3. *and firſt, of* petit treaſon.

I Have before declared what capital offenſes were exempt from clergy at common law, and how the law ſtood in relation thereunto before and by the ſtatute of 25 *E.* 3. and have there ſettled it, that regularly in all capital offenſes, except treaſons, which touch the king, the offender is to have the privilege of his clergy.

But as touching treaſons, that touch the king, by virtue of the common law and the declaration of that ſtatute the benefit or privilege of clergy is not allowable, neither is there any ſtatute, that hath alterd the law in that point of treaſon, but it ſtands ſtill excluded from the privilege of clergy.

But as to petit treaſon and felonies ſubſequent ſtatutes have made great alteration as to the point of clergy from what was declared by the ſtatute of 25 *E.* 3. *cap.* 4. *pro clero.*

The inquiry therefore touching the alterations made by ſubſequent ſtatutes in point of petit treaſon and felony may be conſiderd in this method.

1. What alterations have been made by acts of parliament in relation to new felonies made by acts of parliament ſince 25 *E.* 3. And

2. What alterations have been made in ſuch offenſes, as were petit treaſon or felony at the time of the making of that ſtatute.

I. As to the former of theſe this general rule holds, that if an act of parliament make a felony, and doth not take

away clergy in expreſs words, in all theſe caſes clergy is allowable.

And if it doth make a felony and takes away clergy not generally, but in ſuch or ſuch caſes, regularly in other caſes clergy is allowable, as if it take away clergy in caſe the party be convicted by verdict, yet he ſhall have his clergy, if he ſtand mute.

But if it enacts generally, that it ſhall be felony without benefit of clergy, or that he ſhall ſuffer as in caſe of felony without benefit of clergy, this excludes it in all circumſtances, and to all intents; and becauſe I have before in the particular enumeration of felonies by act of parliament taken notice all along what are excluded of clergy and what not, I ſhall diſmiſs that part of the inquiry referring myſelf to the ſeveral acts of parliament, that enact the felonies themſelves; and ſhall proceed to the ſecond part of the inquiry.

II. Therefore as to thoſe felonies, that were ſuch at the time of the ſtatute of 25 *E.* 3. *cap.* 4. *pro clero.*

I ſhall firſt deliver ſome general poſitions, and then proceed to the particular felonies themſelves.

1. Therefore it is certain, that whatſoever petit treaſon or felony there was at the time of the making of that ſtatute, it was within the privilege of clergy by force of that ſtatute at leaſt, except thoſe two above mentiond in the laſt chapter.

2. That therefore all ſuch petit treaſons and felonies are at this day within clergy, unleſs where it is ouſted by ſubſequent ſtatutes now in force.

3. That where any ſtatute ſubſequent to 25 *E.* 3. *cap.* 4. hath ouſted clergy in any of thoſe felonies, it is only ſo far ouſted, and only in ſuch caſes and as to ſuch perſons, as are expreſly compriſed within ſuch ſtatutes, for *in favorem vitæ & privilegii clericalis* ſuch ſtatutes are conſtrued literally and ſtrictly.

And therefore, if clergy be ouſted as to the principal, it is not ouſted as to the acceſſary; if as to the acceſſary before, it is not extended to the acceſſary after; if where the priſoner

priſoner is convict by verdict, it holds not as to a conviction by confeſſion, nor as to an attainder by outlawry, nor to a ſtanding mute, as we ſhall ſee in the ſubſequent inſtances.

4. That in all caſes, where a ſubſequent act of parliament ouſteth clergy in caſe of any felony, the indictment muſt preciſely bring the party within the caſe of the ſtatute, otherwiſe, altho poſſibly the fact itſelf be within the ſtatute, and it may ſo appear upon the evidence, yet if it be not ſo alleged in the indictment, the party, tho convict, ſhall have his clergy. *Stamf. P. C. fol.* 130. *a. Dy.* 99. *a.* 183. *b.* 224. *b.* 261. *a.*

5. Altho the caſe be ſo laid in the indictment, that it comes within the ſtatute to exempt the priſoner from clergy, yet if upon the evidence it fall out that, tho it be a felony, yet it is not ſo qualified, as laid in the indictment, the jury ought to find him guilty of the felony ſimply, but not as to the manner laid in the indictment, (as for inſtance guilty of the felony, but not of the robbery, or not of the breaking of the houſe,) and thereupon the priſoner ſhall be admitted to his clergy; and this is commonly done.

And now I come to the particular offenſes, wherein clergy is taken away from ſuch felonies, where by the common law and the ſtatute of 25 *E.* 3. *cap.* 4. it was allowable.

And thoſe offenſes are theſe that follow.

1. Petit treaſon. 2. Murder. 3. Manſlaughter. 4. Rape. 5. Robbery. 6. Burglary. 7. Larciny of ſeveral kinds and degrees.

And I ſhall now purſue them in the ſame order, as they are ſet down.

Firſt, Petit treaſon, as the ſervant killing his maſter, *&c.*

It is plain, that after the ſtatute of 25 *E.* 3. *cap.* 4. clergy was to be allowd until 12 *H.* 7. *cap.* 7. *&* 23 *H.* 8. *cap.* 1.

The firſt ſtatute, that ouſted clergy generally in petit treaſon, was that of 12 *H.* 7. *cap.* 7. which yet extended but to conviction or attainder, and only to the principal not to the acceſſary.

By the ſtatute of 23 *H.* 8. *cap.* 1. it is enacted, " That " no perſon, which ſhall be found guilty after the laws of " the land for any manner of petit treaſon, or wilful mur- " der of malice prepenſed, or for robbing any churches, " chapels, or other holy places, or for robbing any perſon " or perſons in their dwelling houſe or dwelling place, the " owner or dweller of the ſame houſe, his wife, children, " or ſervants then being within, and put in fear or dread " by the ſame, or for robbing any perſon or perſons in or " near the highways, or for wilful burning of any dwelling " houſes or barns, wherein any corn or grain ſhall happen " to be, nor any perſon found guilty of any abetment, pro- " curement, helping, maintaining or counſelling of or to " any ſuch petit treaſons, murders or felonies ſhall from " henceforth be admitted to the benefit of clergy, except " clerks in holy orders, *viz.* in the order of ſubdeacon or a- " bove; and that ſuch perſons in orders convict of thoſe of- " fenſes ſhall be deliverd to the ordinary, but ſhall remain in " priſon without purgation, unleſs he become bound by re- " cogniſance before the king's juſtices, where he was con- " vict, with two ſufficient ſureties for his good behaviour.

" Perſons attaint by judgment upon confeſſion, outlawry, " or verdict admitted to clergy to remain in priſon without " purgation.

" Clerks convict, and upon their clergy allowd deliverd " to the ordinary may be degraded, and then ſent into the " king's bench by the ordinary to receive judgment upon " their conviction, and the juſtices having the record before " them ſhall give judgment upon ſuch conviction, as if he " had not had clergy.

This act, tho temporary, was continued by the ſtatute of 28 *H.* 8. *cap.* 1. and made perpetual by 32 *H.* 8. *cap.* 3. and by the ſame act perſons in orders are put into the ſame condition, as other perſons not in orders, notwithſtanding this ſtatute of 23 *H.* 8. *cap.* 1. or 25 *H.* 8. *cap.* 3.

This ſtatute of 23 *H.* 8. as to all theſe crimes extended to principals and acceſſaries before the fact, but not to acceſſaries after.

But yet it extended to exclude principals and acceſſaries before, only in caſe where they were found guilty after due courſe of law, *viz.* by verdict or confeſſion, *&c.* and extended not to ſtanding mute, *&c.* And therefore by the ſtatute of 25 *H.* 8. *cap.* 3. It is enacted, " That every per-
" ſon, that ſhall be indicted of petit treaſon, wilful burn-
" ing of houſes, murder, robbery, or burglary, or other
" felony according to the tenor or meaning of the ſaid ſta-
" tute of 23 *H.* 8. and thereupon arraigned do ſtand mute
" of malice or froward mind, or challenge peremptorily a-
" bove the number of twenty, or do not anſwer directly to
" the indictment and felony, whereof he ſhall be arraigned,
" ſhall be excluded from clergy in like manner, as if he
" had pleaded to the offenſe and been found guilty accord-
" ing to the laws of the land.

And provides, " That if any perſon be indicted in a fo-
" rein county for ſtealing of goods in another county, and
" be found guilty, ſtand mute, challenge above twenty pe-
" remptorily, or will not directly anſwer, he ſhall be ex-
" cluded from clergy, as he ſhould have been, if he had
" been arraigned for the robberies or burglaries in the ſame
" ſhire, where they were done, if by examination it ſhall
" appear to the juſtices, that had he been indicted and ar-
" raigned in the county, where the burglary was done, he
" ſhould have been excluded from his clergy by the ſaid
" ſtatute, had he been found guilty there.

This ſtatute was but temporary, becauſe bottomed upon the ſtatute of 23 *H.* 8. *cap.* 1. that was but temporary, but by the ſtatute of 28 *H.* 8. *cap.* 1. was continued till the laſt day of the next parliament, and by the ſtatute of 32 *H.* 8. *cap.* 3. made perpetual.

But hitherto in this caſe of petit treaſon, (and indeed generally in all theſe caſes of the ſtatute of 23 *H.* 8.) there were theſe defects.

1. That as to the principal the ſtatute of 23 *H.* 8. *cap.* 1. did extend to appeals, as well as indictments for the offenſes deſcribed in that ſtatute, and if they were found guilty by verdict or confeſſion, the appellee and acceſſary before

were excluded of clergy, but the ſtatute of 25 *H.* 8. *cap.* 3. extended only to indictments, and therefore an appellee ſtanding mute, *&c.* was to have his clergy in the caſes of the ſtatute of 25 *H.* 8. *cap.* 3. Again,

2. Neither of theſe ſtatutes extend, where the party is outlawd for theſe crimes.

3. As the law was then taken, challenging above twenty had been a conviction, or at leaſt had put the party to his penance; but that I may obſerve it once for all, now that clauſe of challenging above twenty mentiond in the ſtatute of 25 *H.* 8. and other ſtatutes hereafter mentiond imports nothing as to the point of clergy, for his challenge is over-ruled and he put upon the jury, as hath been before obſerved (*).

But becauſe the ſtatute of 1 *&* 2 *P. & M. cap.* 10. in caſe of petit treaſon reſtores the peremptory challenge of thirty-five, it ſhould ſeem, that if he challenge peremptorily above thirty-five, he ſhall have the benefit of his clergy, for it is now become *caſus omiſſus.*

And therefore by the ſtatute of 4 *&* 5 *P. & M. cap.* 4. " If any ſhould malitiouſly command, hire or counſel any " to commit petit treaſon, wilful murder, or to do any " robbery in any dwelling houſe or houſes, or to do any " robbery in or near the highway, or to burn any dwel- " ling-houſe or any part thereof, or any barn then having " any corn or grain in the ſame, then every ſuch offender, " 1. Being outlawd for the ſame, or 2. Arraigned and " found guilty by order of law, or 3. Otherwiſe lawfully " convict or attaint of the ſame, or 4. Who ſhall ſtand " mute of malice or froward mind, or 5. Shall peremptorily challenge above twenty perſons, or 6. Will not directly anſwer, is ouſted of his clergy.

But *nota*, every indictment to ouſt the acceſſary before of his clergy muſt run *malitioſè*, otherwiſe he ſhall have his clergy. 2 *Eliz. Dy.* 183. *b.*

But now by the ſtatute of 1 *E.* 6. *cap.* 12. it is enacted, " That no perſon, that hath been, or ſhall be in due form " of law attaint or convict of murder of malice prepenſed, " or

(*) *p.* 270.

" or of poiſoning of malice prepenſed, or breaking any " houſe by day or by night, any perſon being then in " the houſe, where the ſame breaking ſhall be committed, " and thereby put in fear or dread, or of or for robbing " any perſon or perſons in or near the highway, or for fe- " lonious ſtealing of horſes, geldings or mares, or of felo- " nious taking goods out of any pariſh church or other " church or chapel, or being indicted or appeald of any of " the ſaid offenſes, and thereupon found guilty by twelve " men, or ſhall confeſs the ſame upon his or their arraign- " ment, or will not anſwer directly according to the laws " of this realm, or ſhall ſtand wilfully or of malice mute, " ſhall be admitted to have the privilege of clergy or " ſanctuary, but ſhall be put from the ſame, and that all " perſons in all other caſes of felony, other than ſuch as " are before mentiond, which ſhall be arraigned or found " guilty upon their arraignment, or ſhall not confeſs the " ſame, or ſtand mute, or will not directly anſwer, ſhall " have and enjoy the benefit of clergy and ſanctuary, as " they might have had before the 24th of *April* 1 *H.* 8.

This ſtatute doth not reſtore clergy to the principal in caſe of petit treaſon, but leaves the law in relation thereunto, as it ſtood before, and upon the ſtatutes of 23 & 25 *H.* 8. tho here be no word of *petit treaſon*, for if the opinion of *Walſh* and my lord *Dyer M.* 6 & 7 *Eliz. Dy.* 235. *a.* be law, *viz.* that a general pardon of all offenſes except murder, doth not except petit treaſon, and ſo petit treaſon comes not within the expreſſion of *felony*, then the clauſe, *that in all other caſes of* felony *clergy ſhall be allowd*, doth not extend to allow clergy in petit treaſon.

But if that opinion be not law (*a*), (as I think it is not,) then the excluſion of clergy from murder by this ſtatute excludes it alſo in petit treaſon.

But if it did not, yet it does not reſtore clergy in petit treaſon to the principal (*b*), where found guilty or attaint, becauſe

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(*a*) *Vide ſupra Part* I. *cap.* 29. *p.* 378.

(*b*) The words here in the original MS. are [*takes not away clergy from the principal,*] but the ſcope of our author's argument plainly ſhews he intended to have wrote [*does not reſtore*]

becauſe before 1 *H.* 8. clergy was taken away in petit treaſon from the principal by 12 *H.* 7. *cap.* 7.

Again, by the ſtatute of 5 & 6 *E.* 6. *cap.* 10. taking notice, that by the act of 1 *E.* 6. the act of 25 *H.* 8. *cap.* 3. touching robbers and burglars arraigned in a forein county, and ouſting them of clergy by examination ſtands repeald; whereby offenders were much emboldened, it is enacted, "That the ſaid act made in the 25th year of King *H.* 8. "touching the putting ſuch offenders from their clergy, "[and every article, clauſe and ſentence containd in the "ſame touching clergy] ſhall from henceforth touching "ſuch offenſes from henceforth to be committed or done "ſtand, remain, and be in full ſtrength and virtue in ſuch "manner, as it did before the making of the ſaid act in "the ſaid firſt year of King *E.* 6. any clauſe, article or "ſentence compriſed in the ſaid act of 1 *E.* 6. to the con-"trary thereof notwithſtanding.

Now upon this act of 5 *E.* 6. *cap.* 10. it hath been taken, that not only the clauſe of the act of 25 *H.* 8. *cap.* 3. touching forein felonies ouſted of clergy upon examination, but the whole act of 25 *H.* 8. *cap.* 3. is re-enacted, and upon that account wilful burning ſtands by virtue of that act ouſted of clergy, becauſe ouſted of clergy by 23 & 25 *H.* 8. tho no mention be made thereof in the ſtatute of 1 *E.* 6. and accordingly reſolved 11 *Co. Rep.* 33. *Alexander Poulter*'s caſe, *de quo infrà.*

Upon the whole matter it ſeems plain, that at this day in relation to petit treaſon the law ſtands thus.

1. The principal convict by verdict or confeſſion is ouſted of clergy by 23 *H.* 8. *cap.* 1. both in appeals and indictments.

2. The principal ſtanding mute, or not directly anſwering is ouſted of clergy by 25 *H.* 8. *cap.* 3. in caſes of indictment, but not in caſe of an appeal; and the ſtatute of 1 *E.* 6. *cap.* 12. doth not alter the caſe as to the principal in petit treaſon.

3. Yet I ſee no proviſion to ouſt clergy of a clerk attaint of petit treaſon by outlawry, but that he may claim his clergy and be deliverd to the ordinary, as a clerk at-

taint without purgation, for this is not provided for, as it ſeems by theſe ſtatutes.

4. But in my opinion the ſtatute of 1 *E.* 6. *cap.* 12. taking away clergy from perſons attaint, as well as from perſons convict of murder doth extend to petit treaſon, which is in truth murder, and conſequently a perſon outlawd of petit treaſon, tho not by the ſtatutes of 23 or 25 *H.* 8. yet by the ſtatute of 1 *E.* 6. is exempt from clergy under the name of wilful murder (*c*).

And the ſtatute of 4 & 5 *P.* & *M.* *cap.* 4. taking away clergy from the acceſſary before in caſe of petit treaſon, where attainted by outlawry, had committed a great piece of abſurdity in putting the acceſſary in a worſe caſe than the principal, unleſs the law had been taken, that the ſtatute of 1 *E.* 6. *cap.* 12. had taken it away from the principal in the like caſe of outlawry, which is an attainder in law.

5. As to the acceſſary before the fact, he is ouſted of clergy in all the caſes before mentiond by the ſtatute of 4 & 5 *P.* & *M.* *cap.* 4. and ſo the law ſtands at this day, but it muſt be laid *malitioſè*. 2 *Eliz. Dy.* 183. *b.*

6. But the acceſſary after the fact hath his clergy in all caſes in petit treaſon, for no ſtatute takes it from him.

I have been the longer in this, becauſe it was neceſſary to take notice of the ſeries of all the ſtatutes, and to diſintangle them, and it will ſerve for the briefer collection of what follows in other caſes.

(*c*) If this ſtatute be conſtrued to take away clergy from petit treaſon, it takes it away, as well in caſe of an appeal, as of an indictment, not only where the party is convict by verdict or confeſſion, but alſo where he will not anſwer directly, or ſhall ſtand wilfully mute.

CHAP. XLVII.

Concerning the alteration made by ſeveral ſtatutes *in* caſes *of* murder, manſlaughter, rape, *and* wilful burning *of houſes or barns with corn.*

I. I Shall briefly conſider how the privilege of clergy ſtands as to *murder*, and therein.

1. At the common law, and by the ſtatute of 25 *E.* 3. *cap.* 4. clergy was to be allowd as well in murder, as any other felony.

2. Tho there were ſome particular ſtatutes, that in particular caſes took away clergy in caſe of heinous murders (*), yet the firſt general law, that took away clergy in caſe of wilful murder *ex malitiâ præcogitatâ* generally was 23 *H.* 8. *cap.* 1. which extended only to a conviction by verdict or confeſſion, and included acceſſaries before, and extended to appeals, as well as indictments.

3. The ſtatute of 25 *H.* 8. *cap.* 3. extended only to indictments but not to appeals; to principals and not to acceſſaries before or after.

4. But the ſtatute of 1 *E.* 6. *cap.* 12. took away clergy from principals in murder in all caſes, *viz.* conviction by verdict or confeſſion, attainder by outlawry or otherwiſe, ſtanding mute, or not directly anſwering (*a*), but this ſtatute of 1 *E.* 6. extended not to acceſſaries.

5. By

(*) *Vide* 12 *H.* 7. *cap.* 7. 4 *H.* 8. *cap.* 2. 22 *H.* 8. *cap.* 9.

(*a*) This ſtatute omits the caſe of challenging above twenty, but this our author thinks unneceſſary to be inſerted, becauſe ſince 22 *H.* 8. *cap.* 14. neither penance nor judgment of death is to follow in that caſe, but only the challenge is to be over-ruled, *vide ſupra p.* 270. & *infra cap.* 48. however this omiſſion is ſupplied by 3 & 4 *W.* & *M. cap.* 9. as to indictments.

5. By the ſtatute of 4 & 5 *P. & M. cap.* 4. all that ſhall malitiouſly command, hire, or counſel any to commit any wilful murder are ouſted of clergy in all caſes.

6. But acceſſaries to murderers after the fact have their clergy in all caſes.

So that the principal ſtands at this day ouſted of clergy in all caſes, and the acceſſary before is alſo ouſted of clergy in all caſes, but the acceſſary after is in no caſe ouſted of clergy.

But it muſt be remembred, that the party indicted muſt be brought within the very letter of the ſtatute.

If the indictment be *felonicè & ex malitiâ ſuâ præcogitatâ interfecit*, yet he ſhall have his clergy, becauſe there wants the word *murdravit*. *Dy.* 261. *a.*

So if it be *felonicè interfecit & murdravit*, and ſays not *ex malitiâ ſuâ præcogitatâ*, it is but an indictment of manſlaughter, and the priſoner ſhall have his clergy.

So if a man be indicted, as acceſſary before, *viz. quòd præcepit*, and ſays not *malitioſè præcepit*. *P.* 2 *Eliz. Dy.* 183. *b.*

II. As to *manſlaughter*, regularly in all caſes the perſon indicted or appeald ought to be admitted to his clergy.

But if *A. B.* and *C.* be indicted ſpecially upon the ſtatute of 1 *Jac. cap.* 8. ſetting forth, (as the indictment muſt,) "That *A. felonicè pupugit & percuſſit D.* not having any "weapon drawn, nor having ſtricken firſt, and that *B.* and "*C.* were preſent, aiding and abetting," tho *A. B.* and *C.* are all principals in manſlaughter at common law, yet *A.* only, that gave the ſtroke, ſhall be ouſted of his clergy. *H.* 23 *Car.* 1. *B. R. Page*'s caſe (*b*).

And therefore it ſeems in that caſe, if it be found, that *A.* gave not the ſtroke, but *B.* and that *A.* and *C.* were aiding and abetting, not only *A.* and *C.* that gave not the ſtroke ſhall have their clergy, but alſo *B.* becauſe, tho the caſe of *B.* is within the ſtatute, yet as to him the indictment brings him not within the ſtatute, and ſo differs from the caſe of a general indictment of murder, where tho it be laid, that

(*b*) *Styl.* 86.

A. gave the ſtroke, and *B.* was preſent, aiding and abetting, yet if upon the evidence it appears, that *B.* gave the ſtroke, and *A.* was abetting, *&c.* both ſhall be convict of murder, for both are equally murderers, and the indictment is true as to both, *quòd ex malitiâ ſuâ præcogitatâ interfecerunt & murdraverunt* (*).

By the ſtatute of 1 *Jac. cap.* 8. clergy is ouſted as to him, that ſo ſtabs upon any conviction by verdict, confeſſion or otherwiſe, and that as well in caſe of an appeal as of an indictment; but it extends not to ſtanding mute or not directly anſwering, for there is no conviction in that caſe, and ſo it ſeems as to an outlawry (*c*).

III. As to *rape*, by the ſtatute of 18 *Eliz. cap.* 7. If any man be convict thereof by verdict or confeſſion, or be outlawd for the ſame, he is excluded of clergy, but this act extends not to a ſtanding mute or not directly anſwering, for this is *caſus omiſſus* (*d*), and he ſhall have his clergy 11 *Co. Rep.* 35. *b. Poulter*'s caſe.

But at this day in all caſes challenging above twenty makes nothing either for or againſt clergy, for the party ſhall not be put to his penance nor be convict thereupon, but only his challenge ſhall be over-ruled and he put upon his trial, as hath been before obſerved (†), and therefore the clauſe in the act of parliament ouſting clergy, where he challengeth above twenty, or the not mentioning of that clauſe makes nothing at this day one way or another as to the point of clergy.

But neither acceſſaries before or after are upon this ſtatute exempt from the privilege of clergy.

IV. As to the caſe of *wilful burning*.

It ſtands now a ſettled point, that if the principal be convict by verdict or confeſſion, or ſtand mute, or will not directly anſwer, he ſhall not have his clergy, this is the point reſolved 11 *Co. Rep.* 35. *a. Poulter*'s caſe, and the conſtant practice is, and always hath been accordingly.

(*) *Vide ſupra p.* 292. 1 *Salk.* 334.

(*c*) But in all theſe caſes the offender is excluded from clergy by 3 & 4 *W. & M. cap.* 9. upon an indictment, but not in an appeal.

(*d*) But this is provided for in caſe of an indictment by 3 & 4 *W. & M. cap.* 9.

(†) *p.* 270.

And the ſtatute of 4 & 5 *P. & M. cap.* 4. ſtrongly proves the law to be ſo, for clergy is taken away from the acceſſary before, and it were a ſtrange overſight, if an act of parliament ſhould exempt the acceſſary from clergy in this caſe, and yet the principal ſhould have the benefit of it.

That which cauſed the doubt was the ſtatute of 1 *E.* 6. *cap.* 12. where it enumerates all the offenſes, which were then to be exempt from clergy, and mentions not the caſe of wilful burning, and enacts, "That in all other caſes of "felony the offenders ſhall have clergy, as they ſhould have "had before 1 *H.* 8." and the firſt ſtatute, that took away clergy from wilful burning of houſes or barns with corn was a ſtatute made after 1 *H.* 8. *viz.* 23 *H.* 8. *cap.* 1. & 25 *H.* 8. *cap.* 3.

There have been three anſwers given hereunto (*), *viz.*

1. That this was a felony, that even by the common law before 1 *H.* 8. was exempt from clergy, being an act of hoſtility, and this I remember was given by *Noy* attorney general about 8 *Car.* 1. but poſſibly this may be doubtful as to the fact, whether at common law clergy were not allowable upon this offenſe, and if it were not, yet it is a greater doubt, whether that law were not alterd by the act of 25 *E.* 3. *cap.* 4. *pro clero*, wherein clergy was ſettled in all caſes, except treaſons or felonies, that touch the king or his royal dignity.

2. Others have agreed, that clergy was taken away in theſe caſes of wilful burning by the ſtatutes of 23 *H.* 8. *cap.* 1. and 25 *H.* 8. *cap.* 3. and conſequently this offenſe not being enumerated in the ſtatute of 1 *E.* 6. *cap.* 12. is by the general concluding clauſe of that ſtatute reſtored to the benefit of clergy: But then they think, that by the ſtatute of 5 & 6 *E.* 6. *cap.* 10. the ſtatute of 25 *H.* 8. *cap.* 3. is wholly revived, and conſequently now the repeal of the exemption of clergy in caſe of wilful burning is repeald by the revival of the ſtatute of 25 *H.* 8. *cap.* 3. by the ſubſequent ſtatute of 5 & 6 *E.* 6. *cap.* 10. and thereby exemption from clergy in caſe of wilful burning is again eſtabliſhed.

1 But

(*) *Vide Part* I. *p.* 570, &c.

But this hath in it many difficulties. 1. It ſeems by the whole ſcope of the preamble and the ſtrict penning of the body of the act of 5 & 6 *E.* 6. *cap.* 10. that that act revived only ſo much of the act of 25 *H.* 8. *cap.* 3. as concerns the ouſting of felons of their clergy upon examination, where robberies or burglaries were committed in forein counties. 2. Again, the ſtatute of 25 *H.* 8. took away clergy from wilful burning only in caſes of indictment, and that only where the priſoner ſtands mute, anſwers not directly, or challengeth above twenty, but the ouſting of clergy in caſe of appeals, as well as indictments upon conviction by verdict or confeſſion ſtood purely upon the ſtatute of 23 *H.* 8. *cap.* 1. which is no where revived as to the point in queſtion, and yet that is the caſe, that muſt moſt ordinarily occur, namely, where the party is convict.

3. Therefore the laſt and I think the ſureſt anſwer as to this difficulty is, that the ſtatute of 3 & 4 *P.* & *M.* *cap.* 4. taking away clergy in all caſes from him, that malitiouſly commands, hires, or counſels the wilful burning of any dwelling-houſe or barn with corn, in all caſes of conviction, attainder, ſtanding mute, outlawry, peremptory challenge of above twenty, or not directly anſwering, doth by neceſſary conſequence take away clergy in all theſe caſes from the principal offender in ſuch wilful burning.

But *quâcunque viâ datâ* the law ſtands ſettled, that clergy is taken away in all caſes from the principal in wilful burning of a dwelling-houſe or a barn with corn, *quod vide* 11 *Co. Rep. Alexander Poulter*'s caſe *per totum.*

And therefore I can by no means think, that outlawry of the principal in this offenſe is within the privilege of clergy, for the acceſſary even in that inſtance is exempt from (*e*) clergy by 4 & 5 *P.* & *M.* *cap.* 4.

Now as touching the acceſſary by the ſtatute of 4 & 5 *P.* & *M.* *cap.* 4. they that ſhall malitiouſly command, hire, or

(*e*) The MS. has it [*is ſubject to*] but both the ſtatute and the ſenſe require it ſhould be [*is exempt from*].

or counſel this fact, *viz.* acceſſaries before, are exempt from the benefit of clergy in all caſes.

But acceſſaries after are within the benefit of clergy in all caſes.

CHAP. XLVIII.

Concerning clergy in robbery from the houſe, *or* robbery from the perſon.

ROBBERY is of two kinds, from the perſon, and from the houſe of another.

Firſt, Robbery from the perſon is a violent aſſault upon the perſon, and felonious and violent taking away his goods putting him in fear.

The principal in caſe of robbery in or near the highway is ouſted of his clergy, *viz.*

1. By the ſtatute of 23 *H.* 8. *cap.* 1. "Where he is con-"victed by verdict or confeſſion, whether it be in an ap-"peal or an indictment.

2. By the ſtatute of 25 *H.* 8. *cap.* 3. "In an indict-"ment, where the party ſtands mute, will not directly an-"ſwer, or challengeth above twenty.

And in caſe the robbery were in or near the highway in the county of *A.* and he carry the goods into the county of *B.* and there be indicted of larciny, and upon examination it appears it was ſuch a robbery in the county of *A.* that had he been indicted in the county of *A.* he ſhould have been ouſted of his clergy by the ſtatute of 23 *H.* 8. *cap.* 1. the juſtices of the county of *B.* ſhall ouſt him of his clergy in the county of *B.* whether he be convicted, ſtand mute, challenge above twenty, or anſwer not directly.

And tho this clauſe be repeald by the ſtatute of 1 *E.* 6. *cap.* 12. it is again revived by 5 & 6 *E.* 6. *cap.* 10. and ſtands now in force as to all robberies, where the party, if convict, is to be ouſted of his clergy by the ſtatute of 23 *H.* 8. *cap.* 1.

But it extends not to any felony, where clergy is ouſted by any ſtatute after 23 *H.* 8. *Co. P. C. cap.* 50. *p.* 115. *Stamf. P. C. fol.* 128. *a.* (*).

If *A.* commit a robbery near the highway in the county of *B.* and take away but to the value of 6 *d.* yet if indicted for robbery in the county of *B.* he ſhall have judgment of death without benefit of clergy, but if he carry thoſe goods into the county of *C.* and there is indicted and pleads, and the jury find him guilty to the value of 6 *d.* tho upon the evidence it appears, that it was a robbery in the county of *B.* yet he ſhall not have judgment of death, becauſe as it now ſtands, it is but petit larciny (*a*), where the priſoner is not to have his clergy but to be whipt, and the examination given by the ſtatute of 25 *H.* 8. is only to ouſt clergy, where demandable. *M.* 31 *Eliz. Moore*'s *Rep. n.* 739. *p.* 550.

If a man be indicted for a robbery *in viâ regiâ* (†), or *in altâ viâ*, or *in altâ viâ regiâ* and be convict, he ſhall be ouſted of his clergy by the ſtatute of 23 *H.* 8. but if it be laid to be *in viâ regiâ pedeſtri ducent' de London ad Iſlington*, tho he be convict, he ſhall have his clergy; adjudged 38 *H.* 8. *Moore*'s *Rep. n.* 16. *p.* 5.

But in that caſe it might have been laid *propè altam viam regiam*, and he ſhould have been ouſt of his clergy, for the words of the ſtatute are *in* or *near* the highway.

If a man be robbed upon the river *Thames* or other public river within the body of a county, this is a robbery upon the king's highway, and may be ſo laid in the indictment, and the party ſhall be ouſted of his clergy upon theſe ſtatutes, and ſo it was agreed in *Hide*'s caſe at *Newgate*, *M.*

(*) *Vide Part* I. *p.* 518. But by 3 & 4 *W.* & *M. cap.* 9. the like clauſe is enacted as to all felonies, wherein clergy was ouſted by that or any other ſtatute.

(*a*) *Vide Part* I. *p.* 536.

(†) According to what our author ſays *Part* I. *p.* 535. if the indictment be laid only *in viâ regiâ*, this will not be ſufficient to ouſt clergy.

23 *Car.* 2. for the public ſtreams are highways, and therefore they are called *hault ſtreames le roy* (*).

But this ſtatute of 25 *H.* 8. extends not to ſtanding mute, or not directly anſwering in an *appeal*, but only in an *indictment*, and therefore,

3. The ſtatute of 1 *E.* 6. *cap.* 12. ouſts ſuch robbery of clergy as well in an appeal as indictment, where the offender ſtands mute, or will not directly anſwer.

But mentions nothing of challenging peremptorily above twenty, neither need it, for, as hath been ſaid (†), he ſhall be only put from his challenge, and the jury ſhall be charged to paſs upon him, and no conviction or *peine fort & dure* ſhall enſue upon his peremptorily challenging above twenty, as the law now ſtands.

But whereas *Stamf. Lib.* II. *cap.* 42. *fol.* 129. *b.* affirms, "That upon all theſe ſtatutes, and in all the caſes mentiond "in them there are two caſes, wherein the offender in mur- "der, robbery, *&c.* ſhall have his clergy, namely, where the "offender is outlawd, or convict by battle," it is not true of the former, for outlawry is an attainder, and tho 23 *H.* 8. & 25 *H.* 8. ſpeak neither of outlawry nor attainder, yet the ſtatute of 1 *E.* 6. *cap.* 12. ſaith, if any perſon be *attaint* or convict of murder, *&c.* he ſhall be ouſted of clergy.

And the ſame law it is, if the appellee of robbery be vanquiſhed in an appeal, for he is thereby *convict*, and the ſtatute doth not mention only a conviction by twelve men, but *any perſon in due form of law attaint or* convicted *of murder*, &c.

And thus far concerning principals.

As touching acceſſaries by malitious commanding, hiring or counſelling any ſuch robbery, they are ouſted of clergy by 4 & 5 *P.* & *M. cap.* 4. in all caſes, namely being convict, ſtanding mute, not directly anſwering, or outlawd, *&c.*

But acceſſaries after have the benefit of clergy in all caſes.

Secondly, As touching a robbery from the houſe of any perſon.

This divides itſelf into theſe ſeveral heads.

2 1. Rob-

(*) *Vide Part* I. *p.* 536. (†) *Supra p.* 270.

1. Robbing in the dwelling houſe, the owner, his wife or family in the houſe and put in fear.

2. Robbing in the dwelling houſe, *any perſon* being in the houſe and put in fear.

3. Robbing in the houſe or tent, the owner, his wife, or ſervants being in the houſe, tho not being put in fear.

4. Robbing a houſe, and no perſon being therein.

As to theſe in their order.

I. Robbing any perſon in his dwelling houſe or dwelling place, the owner or dweller, his wife, children, or ſervants being within the ſame, and put in fear or dread by the ſame.

By the ſtatute of 23 *H.* 8. *cap.* 1. as well in an appeal as an indictment, the principal and acceſſary before the fact are ouſted of clergy in two caſes, namely,

1. If convict by verdict. 2. If convict by confeſſion.

By the ſtatute of 25 *H.* 8. *cap.* 3. there is farther proviſion made, but only in caſe of indictment, not of appeal, and only againſt the principal, but not the acceſſary before or after, *viz.* 1. If the principal ſtand mute of malice or froward mind. 2. If he challenge above twenty peremptorily. 3. If he will not directly anſwer.

There is farther proviſion made for ouſting of clergy, where robbers of houſes carry the goods into another county and be there indicted of larciny, if upon examination they ſhould be ouſted of clergy, had they been indicted in the firſt county; but, as hath been before obſerved,

1. This ouſting of clergy by examination in a forein county refers only to ſuch robbery, as by the ſtatute of 23 *H.* 8. *cap.* 1. is ouſted of clergy, namely, where the owner, his wife, children, or ſervants are then in the houſe and put in fear, not to ſuch robberies, as by acts of parliament made ſince are put out of clergy. 2. In caſe of an arraignment in a forein county, if the goods prove to be but of the value of 12 *d.* here is no clergy to be demanded or allowd, being but petit larciny, and therefore no ouſting of clergy by examination.

Dorothy Cole (*) was indicted in *Suſſex* for ſtealing goods, upon the evidence it appeard, that ſhe broke a houſe in *Kent*, and brought the goods into *Suſſex*, the jury found the goods to be of the value but of 7 *s.* yet in as much as there was no putting in fear of the owner, his wife, or family, ſhe was to have the benefit of the ſtatute of 21 *Jac.* and could not be ouſted of it by examination, for tho by the ſtatute of 39 *Eliz. cap.* 15. clergy were taken away, yet the taking away of clergy upon examination in a forein county extends only to robberies, where clergy is taken away by 23 *H.* 8. but if it had been with a putting in fear, ſo that in caſe of a man he ſhould have been ouſted of his clergy, it deſerves conſideration, whether the woman, if under 10 *s.* ſhould have been ouſted of the benefit of the ſtatute of 21 *Jac. cap.* 6. by examination, tho originally it were a burglary and robbery. *Sed de hoc infra.*

But theſe ſtatutes did not extend to any ſuch robbery, where 1. There was no putting in fear. 2. Where the owner, his wife, children or ſervants were not in the houſe, but only a ſtranger were there and put in fear. 3. Neither did they extend to one attaint by outlawry or battle. 4. The ſtatute of 25 *H.* 8. extended not to appeals.

As to acceſſaries before the fact, by the ſtatute of 4 & 5 *P. & M. cap.* 4. it is enacted, "That if any ſhall com-"mand, hire, or counſel any perſon to do any robbery in "any dwelling houſe or houſes, they ſhall be excluded "from clergy in all caſes, *viz.* convict, outlawd, ſtanding "mute, *&c.*

Upon this ſtatute theſe things are obſervable,

1. It requires an actual robbing, *viz.* taking away ſome goods; a bare breaking of the houſe is not ſufficient.

2. It extends to a robbing, without mentioning *put in fear.*

3. It extends to outlawry, which 23 or 25 *H.* 8. extended not to.

4. It extends to appeals as well as indictments; but acceſſaries after are in no caſe excluded from clergy.

2 II. Rob-

(*) *Vide Part* I. *p.* 518.

II. Robbing of any perſon by day or night, any perſon being then in the ſame houſe, and put in fear or dread thereby.

By the ſtatute of 1 *E.* 6. *cap.* 12. clergy is taken away in all caſes, *viz.* if he be attaint by outlawry or otherwiſe, convict by verdict, confeſſion, or wager of battle, ſtands mute, or will not directly anſwer: And this as well in appeals as indictments.

It is true, it mentions not peremptory challenge of above twenty, neither is it material for the reaſon before given.

But this ſtatute, tho it ſpeaks generally of breaking a houſe by day or by night, hath had this conſtruction always allowd, *viz.*

If the breaking of the houſe be in the night, then it muſt be ſuch a breaking as amounts to burglary, *viz.* with an intention to commit a felony, and then it ouſts clergy, if it be with a putting in fear.

If it be a breaking the houſe in the day-time, then it muſt be alſo ſuch a breaking, as hath an actual robbery joined with it, and then if there be a putting in fear alſo, the clergy is ouſted in all the caſes mentiond in this ſtatute.

But in both caſes there muſt be a putting in fear, otherwiſe this ſtatute ouſts not clergy.

This ſtatute therefore hath made theſe additions to the ſtatutes of 23 & 25 *H.* 8. *viz.* 1. It exempts burglary from clergy, tho there be no robbery, if there be a putting in fear. 2. If there be a burglary in the night, or robbery in the day committed in the houſe, and any ſtranger be then in the houſe and put in fear, it excludes from clergy, tho it be not the owner or any of his family. 3. It excludes the principal from clergy in caſes, where he is not excluded by any of the two former ſtatutes (*b*).

But again on the other ſide, it reſtores clergy to the acceſſary before the fact, tho convict by verdict or confeſſion, and repeals ſo much of the ſtatute of 23 *H.* 8. as excludes the acceſſary before from clergy. But as hath been ſaid,

(*b*) *Viz.* in caſe of attainder by outlawry, and alſo in caſe of ſtanding mute, or not directly anſwering in an appeal.

the ſtatute of 4 & 5 *P. & M. cap.* 4. takes off the clergy again from acceſſaries, where there is a robbery, and a putting in fear, but not where there is only a burglary with a putting in fear, but without robbery; but acceſſaries after in all caſes have their clergy.

III. If any perſon be found guilty of robbing any perſon in any part of his dwelling houſe or dwelling place, the owner or dweller of the ſame houſe, his wife, children or ſervants then being within the ſame, or in any other place within the precinct of the ſame houſe or place, ſuch offender ſhall not be admitted to his clergy, whether ſuch dweller or owner, his wife or children then and there being ſhall be ſleeping or waking. 5 & 6 *E. 6. cap.* 9.

And the ſame proviſion is made for excluding clergy, where a perſon ſhall commit a robbery in a booth or tent in any fair or market, the owner, his wife, children or ſervant being then in the ſame booth ſleeping or waking.

Upon this act we are to obſerve,

1. There muſt be an actual breaking of the houſe, ſuch a breaking as would make a burglary, if committed in the night, and the indictment muſt run *fregit & intravit domum manſionalem* J. S. *præfato* J. S. *uxore & liberis ſuis in eâdem domo exiſtent'*, and ſuch a breaking of the houſe muſt be proved in evidence: *vide ſupra, Lib.* I. *cap.* 44. *p.* 522.

2. The alleging of ſuch a breaking of the houſe is ſufficient to bring him within this ſtatute to ouſt him of his clergy, if it be proved, tho it be not alleged by the way of robbery, *viz. violenter & à perſonâ*, but only *è domo prædictâ*, for it countervails a robbery within this ſtatute.

If the ſervant ſteal goods out of his maſter's houſe in the day or night, the maſter, his wife and children being in the houſe, the ſervant is not to be ouſted of clergy by this ſtatute, for here is no breaking of the houſe.

If the ſervant unlatch a door, or turn a key in a door in the houſe and ſteal goods out of that room, tho if he had been a ſtranger, that had not to do in the houſe, he ſhould hereupon be ouſted of his clergy, yet it ſeems to me the ſervant ſhall not be thereupon ouſted of his clergy, for

the opening the door in this manner is within his truſt and ſo no breaking of the houſe, nor robbery within this act, and the ſame law ſeems to be upon the ſtatute of 39 *Eliz. cap.* 15.

But if the ſervant break open a door, whether outward or inward, (as for the purpoſe a cloſet, ſtudy, or counting-houſe,) and ſteal goods, this is a robbery and breaking the houſe within this ſtatute, as alſo within the ſtatute of 39 *Eliz.* for ſuch a breaking, tho by a ſervant in the night, would make burglary, for ſuch an opening is not within his truſt.

3. But there muſt not only be a breaking of the houſe, the owner, his wife, children or ſervants being within the ſame, but there muſt be alſo a felonious taking of the goods out of the houſe to exclude clergy by this ſtatute.

4. But a bare felonious taking of goods out of the houſe, whether by night or day without ſuch a breaking, as would make burglary, if done in the night, excludes not from clergy within this ſtatute.

5. This ſtatute both as to robbery in dwelling houſes or booths requires, that the dweller or owner, his wife, children, ſervants or ſervant be then within the houſe; ſo that the being of a ſtranger in the houſe excludes not clergy no more than upon the ſtatute of 23 *H.* 8. *cap.* 1. *Stamf. P. C. fol.* 129. *b.*

6. It extends to no other caſe, but where the party is found guilty, *viz.* either by verdict or confeſſion, and not to outlawry, ſtanding mute, or not directly anſwering, therefore in all theſe caſes the offender ſhall have his clergy (*c*).

7. It extends to an appeal, as well as indictment.

8. It doth not exclude acceſſaries neither after nor before from clergy.

Neither doth the ſtatute of 4 & 5 *P. & M. cap.* 4. extend to acceſſaries in this caſe, but only where robbery is committed, and any perſon within the houſe put in fear.

So that upon this ſtatute all acceſſaries to the felony deſcribed by this ſtatute are to have their clergy.

IV.

(*c*) But by 3 & 4 *W. & M. cap.* 9. clergy is taken away in theſe caſes alſo.

IV. Robbing from the houſe goods to the value of 5 *s.* in the day-time, no perſon being in the houſe.

By the ſtatute of 39 *Eliz. cap.* 15. it is enacted, "That "if any perſon be found guilty by verdict, confeſſion, or "otherwiſe for the felonious taking away in the day-time "of any money, goods or chattels of the value of 5 *s.* or "upwards in any dwelling houſe or houſes, or any part "thereof, or in any outhouſe belonging or uſed with the "ſaid dwelling houſe, altho no perſons ſhall be in the ſaid "houſe or outhouſe at the time of the felony committed, "ſuch perſons ſhall be excluded from their clergy.

1. Altho this ſtatute ſpeak only of *felonious taking* in the body or purview, yet inaſmuch as in the preamble it ſpeaks of *robbery* of houſes, a bare taking of goods out of a houſe, no body therein, without an actual breaking of the houſe, ſuch as would make burglary were it in the night, is not ſuch a taking out of a houſe, as excludes from clergy, and thus it hath conſtantly obtaind in practice againſt the opinion in *Popham*'s *Reports* 84. *Bayne*'s caſe (*d*).

2. The indictment muſt run according to the ſtatute, *viz. quòd tempore diurno, ſcilicet inter horas &c. domum manſionalem* J. S. *fregit & intravit nullâ perſonâ in eâdem domo tunc exiſtente, & ibidem &c. in eâdem domo inventa adtunc & ibidem felonicè furatus fuit, cepit & aſportavit*, for breaking the houſe in the day without taking goods is no felony. 11 *Co. Rep.* 36. *a. b. Poulter*'s caſe.

And if upon the evidence it fall out, that it was in the night, or that any perſon was in the houſe at the time, or that he ſtole, but broke not the houſe, he ſhall be found guilty of a ſimple felony and have his clergy, but not guilty according to the ſtatute (*e*).

(*d*) This caſe therefore was not eſteemed to be law. *Kel.* 68. but now by 10 & 11 *W.* 3. *cap.* 23. clergy is taken away from all, who ſhall by night or day privately and feloniouſly ſteal to the value of 5 *s.* in any ſhop, ware-houſe, coach-houſe or ſtable, or by 12 *Ann. cap.* 7. to the value of 40 *s.* in any dwelling houſe or outhouſe thereto belonging, altho it be not broken, nor any perſon therein.

(*e*) But theſe caſes are now provided againſt by 10 & 11 *W.* 3 & 12 *Ann* above-mentiond. *Vide Part* I. *p.* 564. *in notis.*

But there need not either in this caſe, or upon the ſtatute of 5 & 6 *E.* 6. above-mentiond be a formal mention of a robbery, as is uſed in an indictment for robbery from the perſon, for *fregit domum* imports it.

3. It takes away clergy only from the principal, and that only where the perſon is convict by verdict, confeſſion, or otherwiſe, and therefore excludes not clergy, where the party ſtands mute, or is outlawd (*f*), or will not directly anſwer, nor from the acceſſary. 11 *Co. Rep.* 36. *b. Poulter*'s caſe.

4. If a man break the houſe in the day-time with intent to ſteal, but ſteals nothing, this is no felony, but otherwiſe in caſe of breaking the houſe in the night with intent to ſteal, this is burglary 11 *Co. Rep.* 31. *b. Poulter*'s caſe.

If a man enter by the doors or windows open and ſteal goods, this excludes not clergy upon this ſtatute, nor upon the ſtatute of 5 & 6 *E.* 6. *cap.* 9. for it muſt be ſuch an act to make a robbery within either of theſe ſtatutes, as would make a burglary, were it in the night; it muſt be *fregit & intravit.*

And therefore the conſtant uſe at *Newgate* is, and always hath been upon theſe ſtatutes, that if a man enter the doors being open, and breaks open a cheſt and ſteals goods to the value of 5 *s.* this ſhall not ouſt him of his clergy within this ſtatute, or the ſtatute of 5 & 6 *E.* 6. *cap.* 9. (*g*).

But if a man enters an houſe the outward doors being open, and when he is in the houſe, breaks open, or unlocks or unlatcheth an inward door and ſteals goods out of the room to the value of 5 *s.* he ſhall be ouſted of his clergy upon this ſtatute, the ſame being done in the day-time no body being in the houſe; or if he ſteals goods of any value out of that inward room ſo opened by day or by night, the owner of the houſe, his wife, children, or ſervants being in the houſe, he ſhall be ouſted of his clergy, being indicted upon the ſtatute of 5 & 6 *E.* 6. *cap.* 9.

(*f*) Theſe caſes are ſince taken in by 3 & 4 *W.* & *M. cap.* 9. by which ſtatute clergy is alſo taken away from all who comfort, aid, abet, aſſiſt, counſel, hire, or command.

(*g*) *Vide Part* I. *p.* 523, 524, 527, & *Kel.* 69.

T. 16 *Car.* 2. *Simpſon*'s caſe (*h*) at *Cambridge* aſſiſes. *A.* being indicted upon the ſtatute of 39 *Eliz.* it was found by ſpecial verdict, that *A.* breaking into the houſe by day, no body being in the houſe, and breaking open a chamber-door and a cheſt took out goods to the value of 5 *s.* and laid them on the floor, and before he could carry them out of the houſe was taken: By the advice of all the judges of *England* he was ouſted of his clergy upon this ſtatute, for the taking them out of the cheſt was felony, and the ſtatute doth not alter the felony, but excludes from clergy, if it were done in the houſe, and of the value of 5 *s.* and none in the houſe.

Trin. 13 *Car.* 1. *Evans* & *Finch* (*i*) were indicted, for that they *tempore diurno, viz. circa horam* 12. did break *domum manſionalem* Hugonis Audley in the *Inner-Temple* London, *nullâ perſonâ in eâdem domo exiſtent*', and ſtole thence 40 *s.* Upon a ſpecial verdict found in this caſe, theſe points were reſolved.

1. That a chamber in an inn of court is *domus manſionalis* within this ſtatute.

2. That if no body were in the chamber at the time, tho others were in other chambers of the temple, yet this was a breaking of the *domus manſionalis* Hugonis Audley *nullâ perſonâ in eâdem domo exiſtente*, and maintains the indictment.

3. Becauſe only one of the perſons indicted did actually enter the chamber and took out the money, *viz. Evans*, and the other ſtood without upon the ladder and received it, *Evans* was excluded his clergy, and the other who ſtood upon the ladder and received the money had his clergy.

(*h*) According to this ſtate of the caſe here was a breaking not only of *a cheſt*, but alſo of *a chamber-door*, which is on all hands agreed to be an act ſufficient to make a robbery within the ſtatute, and ſo the difficulty removed, which ariſes from this caſe, as ſtated above *Part* I. *p.* 524 & 527, and indeed as that caſe is reported in *Kelyng p.* 31. and *in hoc libro Part* I. *p.* 508. & *p.* 526. the queſtion about the cheſt or trunk ſeems to have been only with relation to the *taking away*, whether the taking goods out of a cheſt and laying them on the floor without carrying them out of the chamber was a *taking away* or *ſtealing* within the ſtatute, and not whether it was a *robbery*, for if it were a ſtealing, that would be clear by the breaking open the chamber-door.

(*i*) *Cro. Car.* 473. *vide Part* I. *p.* 527. 556.

And poſſibly the ſame law may be upon the ſtatute of 5 & 6 *E.* 6. *cap.* 9. that he only, that enters the houſe in the day-time without putting in fear, and actually takes the goods ſhall be excluded from clergy, and thoſe, that ſtand without the houſe and are preſent and abetting, tho all principals, yet ſhall have their clergy, for I can ſee no difference in the caſes; *quære tamen* (*k*).

But if it were a burglary, then as well thoſe without, that were preſent and aſſiſting, as thoſe within, ſhall be excluded from clergy by the general words of the ſtatute of 18 *Eliz. cap.* 7. *they that commit any manner of burglary*; and the like in rape and in murder.

And ſo I do take it without any difficulty, if *A. B.* & *C.* come to commit a robbery upon the perſon of a man, and *A.* only takes the money from the perſon, and *B.* and *C.* are preſent and aſſiſting, or if they break a houſe in the day-time and commit a robbery in the houſe putting in fear, tho *A.* only enter the houſe, and *B.* and *C.* watch without, they ſhall be all excluded from clergy, for they are all robbers.

And if it ſhould be otherwiſe, this great abſurdity would follow, that *B.* and *C.* that are preſent, aiding and aſſiſting in the robbery, ſhould have a greater privilege, where they are preſent and ſo principals in the felony, than they ſhould have had, if they had been abſent, and only acceſſaries before the fact, in which caſe the ſtatute of 4 & 5 *P.* & *M. cap.* 4. excludes them from clergy in all caſes.

CHAP.

(*k*) This doubt is now at an end, for by 3 & 4 of *W.* & *M. cap.* 9. clergy is excluded from all aiders, abettors, &c.

CHAP. XLIX.

Concerning clergy *in* burglary.

BUrglaries may be of two kinds. 1. Simple burglary, that hath no robbery joined with it. 2. Burglary, that hath robbery or theft joined with it.

I. The former of theſe is, when a man in the night-time breaks and enters a houſe to the intent to commit a robbery, theft, or other felony.

And this, as it had the benefit of clergy by the common law, and by the ſtatute of 25 *E.* 3. *cap.* 4. *pro clero*, ſo it was not ouſted of clergy neither by the ſtatute of 23 *H.* 8. nor the ſtatute of 25 *H.* 8. but the firſt ſtatute, that ouſted clergy in burglary was 1 *E.* 6. *cap.* 12.

This ſimple burglary is again of two kinds. 1. Where any perſon is in the houſe and put in fear or dread. 2. Where no perſon is put in fear or dread, as poſſibly where no perſon is in the houſe, which yet taketh not away the offenſe of burglary. *Popham*'s *Rep.* 42. *per omnes juſticiarios Angliæ*, or if any perſon being in the houſe, yet is ſleeping and perceives not the burglary till the next morning, *&c.*

1. In the *firſt* of theſe caſes of ſimple burglary, namely with putting in fear or dread, the ſtatute of 1 *E.* 6. *cap.* 12. takes away clergy from the principal in all caſes, *viz.* tho attaint by outlawry or otherwiſe, or convict, or ſtanding mute, or not directly anſwering, as appears by the ſtatute itſelf, and the interpretation made of it. *Stamf. P. C. fol.* 126. *a.* 11 *Co. Rep. Poulter*'s caſe.

But clergy is not taken away from acceſſaries before or after by this or any other ſtatute, for as to the ſtatute of 4 *&* 5 *P. & M.* tho it take away clergy from thoſe, that malitiouſly command or hire, or counſel any perſon to do any robbery in any dwelling houſe, yet unleſs there be a rob-

bery in the dwelling houſe, as well as a burglary, it takes not away clergy from the acceſſary before (*a*), nor at all from the acceſſary after.

2. As to the *ſecond* kind of ſimple burglary without putting in fear, the ſtatute of 18 *Eliz. cap.* 7. generally takes away clergy from all perſons, that ſhall commit any manner of burglary in three caſes. 1. If he be outlawd for it. 2. If he ſhall be found guilty of it by verdict, or 3. If upon his arraignment he ſhall confeſs it.

But in all other caſes of ſtanding mute, or not directly anſwering he is to have his clergy (*).

And therefore, if a man be generally indicted of burglary without purſuing the ſtatute of 1 *E.* 6. *cap.* 12. *viz.* without alleging in the indictment, that the owner, his wife, children or ſervant were in the houſe and put in fear, the priſoner ſtanding mute, or not directly anſwering ſhall have his clergy, (namely, where the indictment is general,) notwithſtanding the ſtatute of 18 *Eliz. cap.* 7.

But the acceſſaries as well before as after are within privilege of clergy, for neither this nor any other ſtatute hath excluded them (*a*).

II. But now as to burglary joined with larciny or robbery in the dwelling houſe, this again is of two kinds, either with putting in fear, or without putting in fear.

If with putting in fear, then by the ſtatute of 23 *H.* 8. *cap.* 1. & 25 *H.* 8. *cap.* 3. the owner or dweller, his wife, children, or ſervants being within the houſe and put in fear, the offender is ouſted of his clergy, not upon the account of the burglary ſimply conſiderd, but upon the account of the robbery, if the party be found guilty by verdict or confeſſion, or ſtand mute, or will not directly anſwer.

But by the ſtatute of 1 *E.* 6. *cap.* 12. he is excluded from clergy in all caſes, if any perſon were in the houſe and put in fear.

(*a*) But by 3 & 4 of *W.* & *M. cap.* 9. clergy is taken away from the acceſſary before the fact.

(*) By the ſaid ſtatute of 3 & 4 of *W.* & *M.* clergy is taken away alſo in caſes of ſtanding mute, or not directly anſwering.

And altho as to the acceſſaries before, the ſtatute of 1 *E.* 6. *cap.* 12. reſtores clergy unto them, yet by the ſtatute of 4 & 5 *P.* & *M. cap.* 4. clergy is in this caſe taken away from acceſſaries before the fact, *viz.* counſellors, or commanders to do any robbery in a manſion-houſe are ouſted of clergy in all caſes.

But if it were a burglary joined with robbery of goods out of the houſe, whether the party were put in fear or not, the principal is ouſted of clergy by the ſtatute of 18 *Eliz. cap.* 7. upon the ſingle account of the offenſe of burglary, (if the offender be outlawd or convict by verdict or confeſſion,) for that ſtatute as to the point of clergy is not at all concerned as to the robbery, but ſingly upon the account of burglary the clergy is ouſted, tho he be acquit of the robbery or larciny.

But then as to the acceſſaries before the fact it is conſiderable, whether in burglary joined with robbery without putting in fear the acceſſary ſhall be ouſted of clergy by the ſtatute of 4 & 5 *P.* & *M. cap.* 4. it ſeems to me to be with this difference.

If the principal be indicted upon the ſtatute of 5 & 6 *E.* 6. *cap.* 9. ſpecially, ſetting forth, that the offender *felonicè & burglariter fregit domum* J. S. *prædicto* J. S. *uxore, liberis & ſervientibus ſuis in eâdem domo exiſtentibus*, and ſtole the goods in the ſame houſe, then the acceſſary to ſuch an indictment ſhall be arraigned and tried, and if convicted ſhall be ouſted of his clergy by force of the ſtatute of 4 & 5 *P.* & *M. cap.* 4.

But if in that caſe the principal be convict of the burglary, but acquit of the robbery, the acceſſary ſhall have his clergy, for the ſtatute of 4 & 5 *P.* & *M.* doth not exclude the acceſſary from clergy, but where there was a robbery.

And again, if the principal be indicted generally of burglary and robbery without forming the indictment either upon 23 *H.* 8. of putting in fear, or upon the ſtatute of 5 & 6 *E.* 6. the owner, his wife or children being in the

houſe, tho the principal be convicted and ouſted of his clergy by the ſtatute of 18 *Eliz.* yet the acceſſary ſhall have his clergy, altho here were a robbery committed in the dwelling houſe, and ſo within the ſtatute of 4 & 5 *P. & M. cap.* 4. and the reaſons are apparent.

1. Becauſe the principal is not ouſted of his clergy in reſpect of the robbery, for that not being laid according to either of the ſtatutes of 23 *H.* 8. or 5 & 6 *E.* 6. if there were no burglary in the caſe, he ſhould have had his clergy, and he is ouſted of his clergy merely upon the account of the burglary by the ſtatute of 18 *Eliz. cap.* 7. and not of the robbery, becauſe not laid purſuant to either of theſe ſtatutes of 23 *H.* 8. & 5 & 6 *E.* 6. and the ſtatute of 4 & 5 *P. & M.* ouſts the acceſſary of clergy in relation to the robbery in the dwelling houſe, and not in relation to the burglary.

2. Becauſe the ſtatute of 4 & 5 *P. & M.* cannot at all have any reſpect to the ſtatute of 18 *Eliz.* which was made twenty years after, and at the time of the ſtatute of the queen neither ſimple burglary, nor burglary joined with robbery had ouſted the principal of clergy, unleſs the robbery were purſuant to the ſtatutes of 23 *H.* 8. or 5 & 6 *E.* 6. which is not laid in the indictment purſuant to either, and therefore the acceſſary could not be ouſted of clergy by 4 & 5 *P. & M.* in this caſe, when if the principal himſelf had been indicted of burglary and robbery generally, he ſhould have had his clergy both as to the burglary and as to the robbery; ſo that upon a general indictment of the principal of burglary and robbery in the houſe, the acceſſary can in no ſort be excluded of clergy, unleſs the principal be ſpecially indicted of the robbery purſuant to the ſtatute of 23 *H.* 8. the owner, his wife or children being in the houſe and put in fear, or according to the ſtatute of 5 & 6 *E.* 6. *cap.* 9. the owner, his wife or ſervants being in the houſe, for tho the principal upon a general indictment of burglary and robbery may be ouſted of his clergy by the ſtatute of 18 *Eliz.* if found guilty of the burglary, yet he cannot be ouſted of his clergy upon the account of the robbery,

bery, becauſe not particularly laid according to the old ſtatutes, and conſequently the acceſſary muſt in that caſe have his clergy (*b*).

But in all caſes acceſſaries after muſt have their clergy.

CHAP. L.

Concerning clergy *in* ſimple larciny *and other felonies.*

I come now to conſider of ſome other kinds of felonies, wherein clergy is taken away, and eſpecially in larcinies of ſeveral kinds.

1. Stealing of horſes. 2. Sacrilege. 3. Taking from the perſon *clàm & ſecretè*. 4. Servants robbing their maſters. 5. Taking clothes off from racks. 6. Stealing king's ſtores. 7. Taking away women againſt their wills. 8. I ſhall conſider of piracies and robberies upon the ſea. 9. Concerning clergy of priſoners arraigned before the ſteward and marſhal.

I. By the ſtatute of 1 *E.* 6. *cap.* 12. the felonious ſtealing of horſes, mares or geldings is put from the privilege of clergy.

1. If the perſon be attainted. 2. Or convict by verdict or confeſſion. 3. Or ſtand mute. 4. Or will not directly anſwer. This was in effect enacted before by 37 *H.* 8. *cap.* 8. but it was neceſſary to be re-enacted here, becauſe otherwiſe the general clauſe in the act of 1 *E.* 6. *cap.* 12. reſtoring clergy in all caſes, where they had it before 1 *H.* 8. had reſtored clergy in this caſe.

(*b*) But as to this point the law is now alterd, for by 3 & 4 *W.* & *M. cap.* 9. clergy is taken away from the acceſſary before in all caſes of burglary.

There aroſe a doubt, whether, if there were one horſe, mare, or gelding ſtolen, the offender ſhould have had clergy; and the reaſon of the doubt was not ſingly, becauſe the ſtatute of 1 *E.* 6. was in the plural number, *horſes*, *mares*, or *geldings*, for then it might as well have been a doubt, whether upon the ſtatute of 23 *H.* 8. *cap.* 1. he, that had wilfully burned one houſe, ſhould not have had his clergy, becauſe the words of that ſtatute are in the plural number *dwelling houſes* or *barns*; and ſo for robbing any *churches* or *chapels*.

But the reaſon that made the ſcruple was, becauſe the ſtatute of 37 *H.* 8. *cap.* 8. was expreſly penned in the ſingular number, *If any man do ſteal any horſe, mare or filly:* and then this ſtatute of 1 *E.* 6. thus varying the number, and yet expreſly repealing all other excluſions of clergy introduced ſince the beginning of *H.* 8. made ſome doubt, whether it were not intended to enlarge clergy, where only one horſe was ſtolen.

To remove this doubt was the ſtatute of 2 & 3 *E.* 6. *cap.* 33. whereby clergy is excluded from him, that ſteals one horſe, gelding or mare in all the caſes of attainder, conviction, ſtanding mute, or not directly anſwering.

Theſe ſtatutes exclude the principal from clergy in all theſe caſes, but the acceſſary before or after have the privilege of clergy. 1 *Mar. Dy.* 99. *a.*

But by the ſtatute of 31 *Eliz. cap.* 12. *in fine ſtatuti* acceſſaries both before and after in horſe ſtealing are ouſted of clergy, as the principal ought to be.

II. As to ſacrilege, *viz.* the felonious taking of any goods out of any pariſh church, or other church or chapel, the principal is ouſted of clergy by the ſtatutes of 23 *H.* 8. *cap.* 1. 25 *H.* 8. *cap.* 3. and laſtly by 1 *E.* 6. *cap.* 12. in all caſes above mentiond.

And by the ſtatute of 23 *H.* 8. *cap.* 1. the acceſſary before, if found guilty by verdict or confeſſion, was ouſted of clergy, but that is repeald by 1 *E.* 6. *cap.* 12. as to all acceſſaries.

And the ſtatute of 4 & 5 *P.* & *M. cap.* 4. extends not to this caſe, for it takes away clergy from robbery of any dwelling houſe, but doth not extend to robbing of churches or chapels (*c*).

And certainly clergy was not taken away in caſe of ſacrilege at common law, or if it were, yet the ſtatute of 25 *E.* 3. *pro clero cap.* 4. reſtored clergy in that caſe as well as others, and the ſtatutes of 23 *H.* 8. & 1 *E.* 6. had been needleſs in this caſe, if ſacrilege were ouſted of clergy at common law, and accordingly is the book of 26 *Aſſiz.* 19. (*d*), and conſequently it is miſtaken in *Poulter*'s caſe 11 *Co. Rep.* 29. *b.*

III. As to picking of pockets, by the ſtatute of 8 *Eliz. cap.* 4. " If any perſon be indicted or appeald for felonious " taking any money, goods, or chattels from the *perſon* of " another *privily without his knowledge* in any place what- " ſoever, and be found guilty by twelve men, or confeſs " upon his arraignment, or be outlawd, or ſtand obſti- " nately mute, or will not directly anſwer, or challenge " peremptorily above twenty, he ſhall be excluded from " clergy."

Upon this ſtatute theſe things are obſervable.

1. It muſt be taken from the *perſon.*

2. It muſt be taken *privily without his knowledge*, and ſo laid in the indictment, otherwiſe he ſhall have his clergy.

3. The goods muſt be above the value of 12 *d.* for tho in robbery of never ſo ſmall a value clergy is ouſted, becauſe done *violently*, yet here it is otherwiſe, for if it be not above the value of 12 *d.* it is but petit larciny, for the ſtatute did not intend to alter the nature of the crime, but to exclude clergy, where it was grand larciny. *Co. P. C. cap.* 16. *p.* 68. (*e*).

1 4. It

(*c*) But if this ſhould be conſtrued a burglary, as it ſeems to be according to the book of 22 *Aſſiz.* 95. then clergy would be excluded from the acceſſaries before by the 3 & 4 of *W.* & *M. cap.* 9.

(*d*) *Vide accordant* 26 *Aſſiz.* 27. *Corone* 193. *Vide contra* 20 *E.* 2. *Corone* 283. but according to *Stamf. P. C. fol.* 123. *b.* it was left to the diſcretion of the ordinary to claim him or not. *Vide Co. P. C. p.* 114.

(*e*) *Vide Part* I. *cap.* 44. *p.* 529.

4. It doth not ouſt the acceſſary either before or after of the privilege of clergy.

IV. Concerning ſervants carrying away their maſters goods to the value of 40 *s.* this was made felony by the ſtatute of 21 *H.* 8. *cap.* 7. (*f*). And by the ſtatute of 27 *H.* 8. *cap.* 17. clergy was taken away.

By the ſtatute of 1 *E.* 6. *cap.* 12. reſtoring clergy in all caſes, as it was before 1 *H.* 8. except the caſes mentiond in that ſtatute, clergy is reſtored to that offenſe.

By the ſtatute of 1 *Mar. cap.* 1. repealing all felonies enacted ſince 1 *H.* 8. the very act itſelf of 21 *H.* 8. making this felony is repeald.

But by the ſtatute of 5 *Eliz. cap.* 10. the ſtatute of 21 *H.* 8. is again re-enacted to have continuance for ever; but the ſtatute of 27 *H.* 8. *cap.* 17. taking away clergy in that offenſe is not revived, and ſo clergy ſtands allowable as to that offenſe at this day (*g*).

V. By a ſtatute made the 22 *Car.* 2. *cap.* 5. clergy is taken away from thoſe, that ſteal clothes off the racks, with power in the judge to tranſport them to the king's plantations (*h*).

VI. By

(*f*) This ſtatute is to be taken ſtrictly with relation to ſuch goods, as are actually deliverd to keep by the *maſter* or *miſtreſs*. *Dy.* 5. *a. b.* for as to other goods, it was a felony at common law, tho under the value of 40 *s.* but where there was a delivery, the ſervant being in lawful poſſeſſion, it could not at common law be a felony, *vide Part* I. *p.* 667. Otherwiſe therefore it is in the caſe of a lodger ſtealing goods or furniture belonging to his lodgings, becauſe he is not intruſted with the poſſeſſion, but only with the uſe, and therefore it was felony at common law; *vide Part* I. *p.* 506. however to obviate all doubt, it is enacted and declared by 3 & 4 *W.* & *M. cap.* 9. "That "if any perſon or perſons ſhall take a- "way with an intent to ſteal, imbezzle, "or purloin any chattel, bedding or fur- "niture, which by contract or agree- "ment he or they are to uſe, or ſhall "be let to him or them to uſe in or with "ſuch lodging, ſuch taking, imbezel- "ling, or purloining ſhall be to all in- "tents and purpoſes taken, reputed and "adjudged to be larciny and felony, and "the offender ſhall ſuffer as in caſe of "felony.

(*g*) But ſince our author wrote is taken away again by 12 *Ann. cap.* 7. from all perſons, (except apprentices under the age of fifteen years, who ſhall rob their maſters,) if the offenſe be committed in a dwelling houſe or outhouſe.

(*h*) By 4 *Geo.* 2. *cap.* 16. the ſtealing linen, fuſtian, &c. from any whitening grounds to the value of 10 *s.* or buying or receiving the ſame, knowing it to be ſtolen is excluded from clergy with power to the court upon the circumſtances of the caſe to tranſport the offender for ſeven years.

VI. By the ſtatute of 22 *Car.* 2. *cap.* 5. clergy is taken away from thoſe, that imbezzle or ſteal the king's ſtores (*i*).

VII. By the ſtatute of 39 *Eliz. cap.* 9. Clergy is taken away from offenſes committed againſt 3 *H.* 7. *cap.* 2. concerning taking away and marrying or defiling of women in all caſes, *viz.* upon attainder, conviction by verdict or confeſſion, ſtanding mute, challenging above twenty peremptorily, outlawry, not directly anſwering.

It extends to take away clergy in theſe caſes from all principals and acceſſaries before the fact by expreſs words, but not from acceſſaries after.

VIII. As to the ſtatute of 28 *H.* 8. *cap.* 15. concerning piracy, robbery, murders and manſlaughters upon the ſea, it is enacted, " That for treaſon, murder, robbery, felonies " and confederacies done upon the ſea or in any places, " whereto that commiſſion extended (*k*), the offenders ſhall " not be admitted to have the benefit of clergy or ſanctu- " ary, but are excluded from the ſame (*l*).

Upon

(*i*) *Viz.* in ſuch manner as is forbid by 31 *Eliz. cap.* 4. whereby it was made felony: *vide Part* I. *p.* 688.

(*k*) It was a doubt upon this ſtatute, whether an acceſſary at land to a felony or piracy at ſea was included within the extent of the commiſſion directed by this act, *Telv.* 134, 135. but by 11 & 12 *W.* 3. *cap.* 7. (continued by 5 *Ann. cap.* 34. 1 *Geo.* 1. *cap.* 25. and made perpetual by 6 *Geo.* 1. *cap.* 19.) it is provided, " That acceſſaries to pi- " racy before or after ſhall be tried and " adjudged according to 28 *H.* 8. and " ſhall ſuffer the ſame penalties and " in like manner as the principals.

If a mortal ſtroke be given on the high ſea, or on the ſhore at full ſea, and the party die upon the ſhore at low water, this is not within this ſtatute, nor ſhall the admiral have juriſdiction to try the offenſe, nor yet can it be tried at common law by a general commiſſion of *oyer* and *terminer*: *vide ſupra p.* 20 & *Part* I. *p.* 426. To remedy this inconvenience it is provided by 2 *Geo.* 2. *cap.* 21. " That where any perſon ſhall be felo- " niouſly ſtricken or poiſoned upon the " ſea or any place out of *England*, " and ſhall die thereof in *England*; or " ſhall be felonioufly ſtricken or poi- " ſoned at any place in *England*, and " ſhall die thereof upon the ſea or any " place out of *England*, an indictment " may be found in ſuch county, where " ſuch death, ſtroke, or poiſoning ſhall " happen, againſt both principals and " acceſſaries, and may be proceeded up- " on in the ſame manner as if ſuch fe- " lonious ſtroke and death, or poiſoning " and death had happend in the ſame " county, where ſuch indictment ſhall be " found.

(*l*) It was doubted, whether this ſtatute of 28 *H.* 8. had not taken away the trial of theſe offenſes before the admiral, or his lieutenant or commiſſary, which had occaſiond a total diſuſer of ſuch manner of trial to the encouragement of pirates, who could not be tried by this ſtatute, unleſs (at great trouble and expenſe) brought to *England*, and therefore the aforeſaid ſtatute of 11 & 12 *W.* 3. *cap.* 7. provides, that they may be tried by the court of admiralty according to the directions of that act, which are there particularly mentiond.

Upon conſideration of the ſtatute of 1 *E.* 6. *cap.* 12. which in all caſes not mentiond in that ſtatute reſtores the privilege of clergy, as it was before 1 *H.* 8. it is ſaid in *Poulter*'s caſe 11 *Co. Rep.* 31. *b.* that thereby clergy is reſtored in caſe of piracy.

But upon conſideration of both theſe ſtatutes I think as followeth, *viz.*

1. *Firſt*, That by the ſtatute of 1 *E.* 6. *cap.* 12. in all other felonies (not particularly excepted by the ſtatute of 1 *E.* 6. *cap.* 12.) that the common law takes notice of, clergy is reſtored by the ſtatute of 1 *E.* 6. *cap.* 12. notwithſtanding this ſtatute of 28 *H.* 8. *cap.* 15. even for felonies within that juriſdiction or commiſſion of the admiralty ſettled by that ſtatute.

And therefore, if a man be ſlain below the bridges upon the river *Thames*, but not *ex malitiâ*, or if a larciny be committed there, that is within clergy, if committed upon the land, the party ſhall be admitted to his clergy by force of the ſtatute of 1 *E.* 6. *cap.* 12.

2. *Secondly*, if ſuch a felony were committed upon the high ſea, that were not excepted by the ſtatute of 1 *E.* 6. *cap.* 12. but ſhould have had clergy by that ſtatute were it upon the land, in ſuch caſe, tho the proceeding be by the ſtatute

By the ſame ſtatute it is enacted, "That if any of the king's natural-born "ſubjects ſhall commit any piracy, rob- "bery, or act of hoſtility againſt others "the king's ſubjects, altho it be under "colour of a commiſſion from any forein "prince; or being a commander or ma- "ſter of a ſhip, or ſeaman ſhall felo- "niouſly run away with his ſhip, &c. or "voluntarily yield up the ſame to any "pirate, or bring any ſeducing meſſage "from any pirate, enemy, or rebel, or "endeavour to corrupt any commander, "&c. to yield up or run away with any "ſhip, &c. or turn pirate, or go over "to pirates, or if any perſon ſhall lay "violent hands on his commander to "hinder him from fighting in defenſe of "his ſhip or goods, or ſhall confine his "maſter, or endeavour to make a revolt "in his ſhip, every ſuch perſon ſhall be "adjudged a pirate, felon and robber.

By 8 *Geo.* 1. *cap.* 24. "All perſons, "who by 11 & 12 *W.* 3. *cap.* 7. are de- "clared acceſſaries to any piracy there "mentiond, are declared to be principal "pirates.

By the ſame ſtatute it is provided, "That if any one ſhall trade with or "furniſh any pirate, &c. with proviſion, "&c. or ſhall fit out any ſhip or veſſel "with ſuch deſign, or ſhall conſult or "correſpond with any pirate, &c. know- "ing him to be ſuch, or ſhall forceably "board and enter any merchant ſhip on "the high ſeas, or in any port, haven "or creek, and ſhall throw over-board "or deſtroy any part of the goods or "merchandizes belonging to ſuch ſhip, "ſuch offender ſhall be adjudged guilty "of piracy, and ſhall be tried according "to the ſtatutes of 28 *H.* 8. & 11 & 12 "*W.* 3. and being convicted ſhall ſuffer "as a pirate without benefit of clergy.

of 28 *H.* 8. the party ſhall have his clergy, for the ſtatute of 1 *E.* 6. is general, *in all other caſes of felony clergy ſhall be allowd as it was before* 1 *H.* 8. and the exemption of clergy (*) was before that ſtatute of 28 *H.* 8. extendible to the admiral's juriſdiction, as well as to courts of common law.

3. *Thirdly*, But as to piracy or robbery upon the ſea by pirates and rovers I think clergy remains ſtill taken away by the ſtatute of 28 *H.* 8. and is not reſtored by 1 *E.* 6. *cap.* 12. (*m*), and the reaſons are,

1. Becauſe I take it before 1 *H.* 8. there was no clergy allowable for it at common law, for it was an act of hoſtility, and conſequently is not touched by the ſtatute of 1 *E.* 6. *cap.* 12.

2. Admitting, that clergy were allowable in piracy before 1 *H.* 8. and taken away merely by the ſtatute of 28 *H.* 8. *cap.* 15. yet clergy is not reſtored by 1 *E.* 6. therein, becauſe it reſtores it only *in all other caſes of felony*, which is intended only of felony, whereof the common law takes notice, but piracy is of another nature, and the common law takes not notice of it under the name of *felony*, and therefore a pardon of all *felonies* pardons not *piracy*: *vide Co. P. C. cap.* 49. *p.* 112, 113. and accordingly the uſe hath obtained in the proceedings of the commiſſions founded upon 28 *H.* 8.

IX. As to the ſtatute of 33 *H.* 8. *cap.* 12. touching felonies in the king's houſhold and proceedings thereupon before the lord ſteward there is a clauſe, that in caſe of manſlaughter in the king's houſe tried before the lord ſteward, and alſo in all other felonies committed within the king's houſe, the offenders, the abetters, procurers, and receivers being convict ſhall ſuffer pains of death, as appertaineth to felons, without benefit of clergy.

4 In

(*) *Viz.* the allowance of clergy; for our author here means by *exemption of clergy* the privilege of being exempted on account of clergy from puniſhment in the king's temporal courts.

(*m*) As to thoſe, who ſhall commit any offenſe, for which they ought to be adjudged pirates, felons, and robbers by 11 & 12 *W.* 3. *cap.* 7. clergy is expreſly taken away from ſuch by 4 *Geo.* I. *cap.* 11. and as no mention is made of ſuch as were deemed pirates before that ſtatute, it is an argument, that the law was taken to be, that they were ouſted of clergy before.

In my opinion the ſtatute of 1 *E.* 6. *cap.* 12. hath repeald ſo much of this ſtatute, as excludes from clergy ſuch offenſes, as are not exempt from clergy by 1 *E.* 6. for theſe are felonies, that the law takes notice of, and ſuch wherein clergy was allowable before 1 *H.* 8. and conſequently the general words of that act reſtore clergy in theſe caſes, tho the proceeding thereupon be before the lord ſteward by this act of 33 *H.* 8. *cap.* 12. for the words of 1 *E.* 6. *cap.* 12. are general *in all other felonies*, and they are *in materiâ favorabili*, in caſe of life, and in caſe of a privilege, which hath been ever favoured in law, and therefore ſhall be generally conſtrued and not reſtrained by conſtruction or interpretation.

CHAP. LI.

What perſons *are or are not* capable of clergy.

I have gone through the conſideration of the *crimes* or offenſes, wherein clergy is or is not allowable; I now come to conſider the *perſons*, that are or are not capable thereof, admitting the crimes themſelves within clergy.

Touching perſons to be admitted to clergy, ſucceſſion of times hath made great change in the law. Antiently *Nuns* profeſſed were admitted to the privilege of clergy, tho they could not be prieſts, yet they are within the *privilegium* or *immunitas eccleſiæ*, and had their clergy, 22 *E.* 3. *Coron.* 461. but other women had not by the common law the privilege of clergy.

But at this day profeſſion is aboliſhed, and no woman admitted to the privilege of clergy at this day; only by the ſtatute of 21 *Jac. cap.* 6. if a woman be lawfully convict by verdict

verdict or confeſſion of ſtealing goods under the value of 10 *s.* and above the value of 12 *d.* being ſuch an offenſe, wherein a man might have his clergy, ſhe ſhall for the firſt offenſe be burnt in the hand, and to be farther puniſhed with whipping, ſending to the houſe of correction, impriſonment, *&c.* as the judge ſhall in diſcretion think fit, this act hath continuance to this day by the ſtatutes of 3 *Car.* 1. *cap.* 4. 16 *Car.* 1. *cap.* 4. (*a*).

Again, by the ſtatute of bigamy *cap.* 5. (*b*) *Bigamus* was ouſted of clergy, 40 *Aſſiz.* 17. but by the ſtatute of 1 *E.* 6. *cap.* 12. he is reſtored to the benefit of clergy, if the offenſe be within clergy, and tho *Stamf. Lib.* II. *cap.* 46. *fol.* 134. *b.* doubts whether that point of the ſtatute be not repeald by the ſtatute of 1 *&* 2 *P. & M. cap.* 8. whereby all ſtatutes againſt the authority of the Pope or See of *Rome* are repeald, yet the law hath been ſufficiently ſettled in this point, that *bigamus* hath his clergy at this day *T.* 3 *Eliz. Dy.* 201. *b. Lamb*'s caſe, for by the ſtatute of 1 *Eliz. cap.* 1. all the clauſes in the ſtatute of 1 *&* 2 *P. & M. cap.* 8. not ſpecially excepted are repeald, and this is none of the excepted clauſes, and ſo the ſtatute of 1 *E.* 6. *cap.* 12. ſtands renewed by 1 *Eliz. cap.* 1. if at all impeached or repeald by 1 *&* 2 *P. & M.*

Again, at common law, if the clerk convict deliverd to the ordinary had broke the biſhop's priſon and been after taken, he had loſt the benefit of his clergy, 22 *E.* 3. *Coron.* 257. but at this day that can never come in queſtion, for by the ſtatute of 18 *Eliz. cap.* 7. clerks convict are not now to be deliverd to the ordinary, but burnt in the hand and ſo diſcharged.

Again, antiently the law was held, that if the priſoner had not *habitum & tonſuram clericalem*, he ſhould not have the benefit of clergy, 26 *Aſſiz.* 19. 20 *E.* 2. *Coron.* 233. or

(*a*) But now by the ſtatute of 3 *&* 4 of *W. & M. cap.* 9. a woman convicted or outlawd for any felony, for which a man might have his clergy, ſhall upon praying the benefit of that ſtatute be ſubject only to ſuch puniſhment, as a man would be in the like caſe, *viz.* be burnt in the hand and detained in priſon at the diſcretion of the judge, not exceeding one year.

(*b*) 2 *Co. Inſt.* 273.

the ordinary might have refuſed him, tho he could read; but in proceſs of time that law was alterd, and the court would admit him to his clergy, if the caſe were within clergy, tho he had not *habitum & tonſuram*, if he could read, and tho the ordinary refuſed him upon that account. 9 *E.* 4. 28. *b.* 34 *H.* 6. 49. *a. b.*

A man attaint (*) of hereſy, a *Jew*, or a *Turk* ſhall not have their clergy, but a perſon excommunicate ſhall have his clergy. 11 *Co. Rep.* 29. *b. Poulter*'s caſe.

A *Greek* or alien, who knows not our letters, ſhall have his clergy, and ſhall read in the book of his own country. *B. Clergy* 20.

A baſtard, a man blind ſhall have his clergy (*c*), if he can ſpeak *Latin* congruouſly. *B. Clergy* 21, 22.

By the ſtatute of 4 *H.* 7. *cap.* 13. " A man not within " holy orders, that hath once had his clergy, ſhall be burnt " in the hand with M or T, and being after arraigned for " any ſuch offenſe, (*viz.* an offenſe within clergy,) he ſhall " not be admitted to his clergy a ſecond time. " And if " any man upon a ſecond arraignment for ſuch offenſe claim " his clergy, as being a clerk in orders, if he have not his " letters of orders, or certificate of the ordinary witneſſing " the ſame, the juſtices ſhall by their diſcretion give him a " day to bring them, at which day if he fail, he ſhall loſe " his clergy that ſecond time.

Note no man ſhall be ouſted of his clergy a ſecond time by the bare mark in his hand, or by a parol averment without the record teſtifying it (†), and it ſeems, that if he deny he is the ſame perſon, iſſue muſt be joined upon it and tried to be the ſame perſon, before he can be ouſted of clergy.

The orders, that come under the name of holy orders, were four, *viz. a biſhop, a prieſt, a deacon*, and *a ſubdeacon*;

(*) This ſhould be *convict*, and ſo it is expreſt in the authority here cited, *viz.* 11 *Co.* 29. *b.* for hereſy wrought no attainder, altho by 2 *H.* 5. *cap.* 7. fee-ſimple lands were forfeited upon conviction.

(*c*) This is denied of a blind man. 11 *Co. Rep.* 29. *b.* & *Broke* in the place cited above makes a *quære* of it, becauſe he can by no diſpenſation be a clerk in orders, *aliter* of a baſtard, for he may be a prieſt by licenſe.

(†) Or a tranſcript thereof, for the manner of certifying which ſee 34 & 35 *H.* 8. *cap.* 14. and 3 & 4 *W.* & *M. cap.* 9.

other inferior orders, as *exorciſtæ, lectores, acoluthi, &c.* were not called holy orders, but were called *clerici in minoribus.*

By this and ſome other inſtances, which appear in the ſtatutes, it is evident, that the clergy in orders had a greater privilege allowd them than others.

1. A clergyman in orders in ſuch caſes, wherein clergy is ouſted by the ſtatute of 1 *E.* 6. *cap.* 12. as murder, robbery, *&c.* hath no more privilege than a layman, becauſe the ſtatute makes no exception or proviſion for him.

2. If a ſtatute be made after 1 *E.* 6. ouſting clergy generally, as the ſtatute of 4 *&* 5 *P. & M. cap.* 4. 18 *Eliz. cap.* 7. a clergyman in orders hath no more privilege than another, for the ſtatute provides not for him. *Stamf. P. C.* 135. *b.*

3. And therefore, tho the ſtatute of 23 *H.* 8. *cap.* 1. and 25 *H.* 8. *cap.* 3. excluding clergy from thoſe found guilty in petit treaſon, murder, robbery, *&c.* excepts ſuch as are in the order of ſubdeacon, or any ſuperior orders, and directs them to be deliverd to the ordinary to remain in priſon without purgation, or to be degraded, and then ſent by the ordinary into the king's bench to be executed, it ſeems, that this privilege is at this day gone, 1. Becauſe by the ſtatute of 18 *Eliz. cap.* 7. all delivery of clerks convict to the ordinary is wholly taken away. 2. Becauſe in all thoſe caſes, where clergy is ouſted by the ſtatute of 23 *H.* 8. clergy is ouſted by the ſtatute of 1 *E.* 6. *cap.* 12. (except burning of houſes, and acceſſaries before the fact, which ſtand within clergy by the ſtatute of 1 *E.* 6. *cap.* 12.) and in that ſtatute there is no ſaving of any privilege for clerks in orders, as there is by 23 *H.* 8.

And then as to acceſſaries before the fact clergy is likewiſe generally taken away by the ſtatute of 4 *&* 5 *P. & M. cap.* 4. without ſaving of more privilege to clergymen than to laymen.

4. But as to the privilege of a ſecond allowance of clergy, it ſhould ſeem at this day clergymen in orders ſhall have benefit of clergy a ſecond, third time, or oftner.

The ſtatute of 28 *H.* 8. *cap.* 1. puts clergymen in orders under the ſame pains and dangers in relation to the ſtatute of 23 *H.* 8. *cap.* 1. 25 *H.* 8. *cap.* 3. as other perſons not in orders; this takes away the privilege given by 23 *H.* 8. and 25 *H.* 8.

Then by the ſtatute of 32 *H.* 8. *cap.* 3. which makes the former perpetual, it is farther enacted, "That ſuch perſons "as be within holy orders, which by the laws of this realm "ought or may have their clergy for any felonies, and ſhall "be admitted to the ſame, ſhall be burnt in the hand as "lay clerks be accuſtomed in ſuch caſes, and ſhall ſuffer "and incur afterwards all ſuch pains, dangers and forfeit-"ures, and be ordered and uſed for their offenſes of felo-"ny to all intents, purpoſes and conſtructions, as lay per-"ſons admitted to their clergy be, or ought to be ordered "or uſed by the laws and ſtatutes of this realm, any law "or ſtatute to the contrary notwithſtanding.

This act was perpetual and ſubjected clerks in orders, notwithſtanding the ſtatute of 4 *H.* 7. *cap.* 13. to two inconveniences, *viz.* 1. To burning in the hand. 2. Excluſion of clergy a ſecond time.

But then the ſtatute of 1 *E.* 6. *cap.* 12. reſtores the privilege of clergy in all caſes, (except thoſe offenſes containd in the ſtatute of 1 *E.* 6. and expreſly excluded from clergy,) as it was before 1 *H.* 8.

And altho by this ſtatute of 1 *E.* 6. the burning of a clergyman in orders in the hand is not taken away by expreſs words, yet he is reſtored to his clergy a ſecond or other time, notwithſtanding he had formerly his clergy and was burnt in the hand.

But altho in expreſs words it reſtores not to clergymen in orders the exemption from burning in the hand given by 4 *H.* 7. *cap.* 13. yet it doth in equivalence, for it reſtores clergy in all other caſes *in like manner and form, as it was before* 1 *H.* 8. which as to clergymen in orders was without burning in the hand, and accordingly to this day their privilege in that kind continues: *vide* 2 *Co. Inſt.* 637. *Hob. Rep.* 294. *Searle & Williams.*

And

And tis a miſtake to ſay, that if he challenge above twenty, he ſhall loſe his clergy a ſecond time, becauſe the ſtatute of 1 *E.* 6. in letting looſe the clergy in other offenſes mentions not that caſe, for in caſe of challenging above twenty, there follows neither penance nor judgment of death, but only his challenge is over-ruled (*).

But indeed the caſe of outlawry is *caſus omiſſus*, for tho in the clauſe excluding clergy the word *attainder* is in, which extends to an outlawry, yet in the ſecond clauſe reſtoring clergy as it was before 1 *H.* 8. in other caſes *attainder* and *outlawry* are omitted.

As to clergy of noblemen.

By the ſtatute of 1 *E.* 6. *cap.* 12. "Peers of parliament "committing felonies within clergy may pray the benefit "of this act, and ſhall not be put to read, nor be burnt "in the hand for the firſt offenſe, without any attainder "or corruption of blood to be incurred thereby, and for the "firſt offenſe ſhall be deemed, taken and uſed as clerks con-"vict, which may make purgation, without any further "privilege of clergy from thenceforth at any time after for "any cauſe to be allowd or admitted.

This privilege of peers to be diſcharged in this manner by this ſtatute, 1. Muſt be prayd by them. 2. Extends to all caſes, where a common perſon may have his clergy. 3. To all caſes excepted from clergy by that ſtatute, except murder and poiſoning of malice prepenſe.

But it extends not 1. To felony put out of clergy by any ſubſequent ſtatute. 2. Nor to felonies within this ſtatute, where he cannot make purgation, as if he abjure, confeſs the felony, or be outlawd, by the opinion of *Stamf. P. C. fol.* 130. *a.* but this latter ſeems doubtful, eſpecially at this day, when delivery to the ordinary and purgation are both taken away by 18 *Eliz. cap.* 7.

I think it was never meant, that a peer of the realm ſhould be put to read or be burnt in the hand, where a common perſon ſhould be put to his clergy, neither is it ſaid, that he ſhall be diſcharged by his praying of the benefit of

2 this

(*) *Vide ſupra* p. 270, 345.

this ſtatute, where a common perſon ſhall have the privilege of clergy and may make his purgation, but only where he may have the benefit of his clergy in the firſt clauſe of the ſtatute, the other clauſe, (*ſhall be in caſe of a clerk convict, that may make purgation,*) is only for his ſpeedier diſcharge and farther advantage, and not to reſtrain the general clauſe.

And therefore a great lawyer in the late times hath been much blamed for burning a peer of parliament in the hand, that confeſſed an indictment of manſlaughter; and it was the only error of note, that that perſon erred in to my obſervation.

CHAP. LII.

At what time *clergy is to be allowd.*

ANtiently the law was very unſettled in this point, till ſettled by ſubſequent acts of parliament and reſolutions of the judges.

Before the ſtatute of *Weſtm.* 1. *cap.* 2. the ordinary would challenge clerks as ſoon as they were indicted, nay ſometimes, as ſoon as they were impriſoned (*), before they were indicted, as appears by the ſtatute of *Marlbr. cap.* 28. (*a*).

By the ſtatute of *Weſtm.* 1. *cap.* 2. it is provided, *Que quant clerke eſt priſe pur rette de felonie & ſoit demand per l'ordinarie, il lui ſoit liuer ſolonque le privilege de Saint Eſgliſe en tiel peril come il appent ſolonque le cuſtome avant ces heures uſe,* and a direction given thereby to the ordinary, *Que ceux que ſont endites de tiel rette per ſolemne inqueſts des probes hommes fait*

(*) *Vide Bract. Lib.* III. *f.* 123. *b.* (*a*) 2 *Co. Inſt.* 150.

fait in le court le roy, en nul manner les deliverent ſans due purgation, iſſint que roy n'eit meſtier de metter autre remedy (*b*).

After this ſtatute the priſoner was not only to be indicted before clergy allowd, but many times inquiſitions *ex officio* were taken (†). 1. Whether he were a clerk or no, and if not a clerk, he was not deliverd to the ordinary. 2. Whether he were guilty or not, and if not guilty, he was diſcharged. 3. If found guilty, he was then deliverd to the ordinary, *vide* 2 *Co. Inſt.* 164. 8 *E.* 2. *Coron.* 417. 17 *E.* 2. *Coron.* 386. 3 *H.* 7. 12. *b.* but his goods were ſeiſed.

But this was found a great inconvenience to the priſoner, becauſe in caſe of an inqueſt of office he loſt his challenges, and beſides poſſibly he might be quit of the felony, were he put upon the jury.

And therefore in the time of *H.* 6. the courſe was changed by *Priſot*, and the priſoner hath been always ſince put to plead to the indictment, and if convict, then to pray his clergy: *vide* 3 *H.* 7. 12. *b.* *Stamf. P. C. fol.* 131. *a.* 11 *Co. Rep. Poulter*'s caſe.

But if the priſoner will wave that advantage and will pray his clergy, he may, for no law ouſts him of it, but then, if the indictment be out of clergy, he muſt anſwer to the felony, or he ſhall have his penance.

But at this day clergy is never granted, unleſs the party confeſs the felony, or be convict by verdict.

If a man be indicted of a felony within clergy, and he plead and be convict, and it be demanded of him, what he can ſay why judgment ſhould not be given againſt him, he may pray his clergy, tho there be no ordinary to demand him, for as ſhall be ſaid in this caſe, the ordinary is but the miniſter of the court, and it is not now, as antiently, uſed for the ordinary to demand a priſoner, but he may pray his clergy himſelf.

If in that caſe the ordinary demand not the priſoner, nor the priſoner himſelf prays his clergy, yet if it appear to the court, that he is a clerk, or be ſo named in the in-

(*b*) 2 *Co. Inſt.* 163. (†) *Vide Part* I. *p.* 180. *in notis*, *p.* 343. *in notis*; *& ſupra p.* 318. *in notis.*

dictment or appeal, the court may, and it ſeems ought *ex officio* to allow him his clergy, but howſoever they ought not to execute him. 22 *E.* 3. *Coron.* 254. *Abridg. Aſſiz.* 74. (*c*).

If by any miſtake or over-ſight the court ſhould give judgment againſt him, yet they may, (and as I think,) ought to allow him his clergy after his attainder.

And therefore the priſoner condemned ſhall in ſuch a caſe be allowd his clergy under the gallows, if the judge come that way, 34 *H.* 6. 49. *a. b.* This is agreed may be done by the judges of the king's bench, as juſtices of peace, becauſe their commiſſion continues, but it is doubted, how it can be done by juſtices of *oyer* and *terminer* after their ſeſſion ended, *Crompt. Juſt.* 119. *a.*

And it is true, that tho they may allow clergy during the adjournment of their commiſſion, yet they cannot do it after their ſeſſion is over, but they may reprieve him after judgment, notwithſtanding their ſeſſion determind, upon conſideration that he can read, and then may allow him his clergy as a clerk attaint at the next ſeſſion. 3 & 4 *Eliz. Dy.* 205. *a.*

A. is indicted of a felony within clergy, and hath his book deliverd him but cannot read, and the ordinary returns accordingly *non legit*, and it is entred of record *non legit*, and the court reprieves him till another ſeſſions, and by that time he hath learned to read, tho the gaoler, that taught him to read in the mean time, was antiently puniſhable, yet he ſhall be admitted to his clergy and be delivered. 27 *Aſſiz.* 44. *n.* 11. *Dy.* 205. *a. b. per omnes juſticiarios*, *Dy.* 214. *b. Stone*'s caſe.

And the ſame law it is, if judgment of death were entred againſt him upon *non legit* returned, yet if he can read after, he ſhall be deliverd to the ordinary and have his clergy *per omnes juſticiarios.* 34 *H.* 6. 49. *Coron.* 20. (*)

If a man abjure the kingdom, (which is an attainder in law,) and come back again, he ſhall have the privilege of his clergy, as a clerk attaint. 8 *H.* 6. *Kelw.* 186. *b. Raſt. Entr. fol.* 1. *b.*

But

(*c*) This caſe is in 12 *Aſſiz.* 15.

(*) Theſe points cannot now come in queſtion, for the neceſſity of reading is entirely taken away by 5 *Ann. cap.* 6.

But in antient time he was not deliverd to the ordinary, but remanded to priſon till he obtained the king's pardon for returning into the kingdom without licenſe, and that being obtained he ſhould be delivered to the ordinary, 1 *E.* 3. 16. *b. Coron.* 155. *Stamf. P. C. Lib.* II. *cap.* 50. but this law is antiquated: *vide Raſt. Ent. fol.* 1. *b. ex T.* 15 *H.* 7. *rot.* 2.

If a man indicted of a felony within clergy ſtands mute, yet he ſhall have his clergy. *Moore*'s *Rep. n.* 738. *p.* 550. *Winter*'s caſe, yea tho judgment of *peine fort & dure* were given againſt him, if the caſe, as it appears upon the indictment, be within clergy, for the court in this caſe ought to be of counſel with a priſoner *in favorem vitæ*, tho he be wilful.

If the approver diſavow his appeal, or be vanquiſhed in battle, or become recreant therein, yet he ſhall have the privilege of clergy, if the cauſe, for which he is indicted, be within clergy.

But in theſe caſes of attainder antiently they were deliverd to the ordinary *abſque purgatione.* 15 *H.* 7. *Raſt. Ent.* 1. *b.*

CHAP. LIII.

Concerning the manner how, *and* the judge by and before whom *clergy is to be prayd or allowd.*

ANtiently the ordinary took upon him, as the perſon that was to judge of the competency or incompetency of the clerk. But in truth the king's juſtices were the judges both touching the competency of the clerk to be admitted, and the ſufficiency or inſufficiency of his perform-

ance therein, and the ordinary was in truth but the miniſter to the court. 5 *Co. Rep.* 26. *b. caſe of eccleſiaſtical law* (*a*).

If the ordinary had challenged one as a clerk, that the court judged not to be ſuch, the ordinary or biſhop ſhould be fined, and his temporalties ſeiſed, 7 *H.* 4. 41. *b. Stamf. P. C.* 132, 133. and the felon ſhall be hanged. 7 *E.* 4. 29. *a.* 9 *E.* 4. 28. *a.*

Again, if the ordinary refuſe one that can read, and return *non legit*, yet the court may hear him, and if they judge him to read ſufficiently, the priſoner ſhall be ſaved notwithſtanding the refuſal and return of the ordinary, and accordingly, if the ordinary be abſent, the court may give him his book. 7 *E.* 4. 29. *a.* 9 *E.* 4. 28. *a.* 7 *H.* 4. 41. *b.* 34 *H.* 6. 49. *a. b. Stamf. P. C. Lib.* 2. *cap.* 45. *fol.* 132, 133.

And therefore the judge may and uſually doth appoint the verſe, that the clerk ſhall read, *Stamf. P. C. ubi ſupra*, and therefore the practice of *Bryan* and *Starkey*, 21 *E.* 4. 21. is juſtly reprovable, who when they deliverd a book to the priſoner and he read well in the preſence of the juſtices, yet when the ordinary returned *non legit* gave judgment of death againſt the priſoner, for in truth the ordinary is but the miniſter, or at moſt the aſſiſtant to the court, and not the judge. *Hob. Rep. p.* 290. *Searle & Williams* (*b*).

(*a*) *Vide Kel.* 28, 51.

(*b*) But this learning is now out of uſe, for by 5 *Ann. cap.* 6. every perſon convicted of a felony within the benefit of clergy ſhall, upon praying the benefit of that ſtatute, without any reading, be allowd to be, and be puniſhed as a clerk convict, and this ſhall be as effectual and advantageous to him, as if he had read as a clerk.

CHAP. LIV.

Concerning the conſequences *of* clergy *granted or prayd.*

THE conſequences or effects upon clergy granted are conſiderable in two ways, 1. What they were before the ſtatute of 18 *Eliz.* and 2. What ſince.

Touching the conſequences of clergy before the ſtatute of 18 *Eliz.* they were theſe.

I. Regularly when clergy was granted, there was an entry made by the court of king's bench, *Et tradito ei hic per curiam libro legit ut clericus,* & J. S. (the ordinary or his deputy,) *petit ipſum, ut clericum, præfato ordinario deliberari, ideo conſideratum eſt, quòd prædictus* A. B. *liberetur præfato ordinario.* And if it be without purgation, then there is this added, *ſalvo cuſtodiend' abſque aliquâ purgatione inde de cætero faciend' ſub periculo, quod incumbit.* 17 *H.* 7. *Rot.* 2. *Raſt. Entries* 121. *a.* But if it be not without purgation, then that clauſe is omitted.

This is the form of the award in the king's bench, but before juſtices of gaol-delivery the entry commonly is, *Et traditur ordinario*, either generally or *abſque purgatione*, as the cauſe requires. *M.* 2 & 3 *Eliz. Dy.* 205. *b.* & *ibid.* 215. *a.*

II. When he was ſo deliverd to the ordinary, he was to remain in the ordinary's priſon; *viz.* if committed generally, then he was to remain till he had made his purgation, if *abſque purgatione*, then he was to remain there during his life, unleſs the king pardon him.

And if the clerk had broke priſon, this was not a felony within the ſtatute of 1 *E.* 2. *de frangentibus priſonam* (*); but if the clerk were attaint and deliverd to the ordinary

(*) Becauſe that ſtatute was conſtrued to extend only to the *king's priſon*: *vide Part* I. *p.* 608.

and broke priſon and eſcaped, and were after taken, he ſhould have been executed upon his firſt attainder, *quod vide* 27 *Aſſiz.* 42.

But by the ſtatute of 23 *H.* 8. *cap.* 11. if ſuch a clerk break the priſon of the ordinary and eſcape, this is made felony without clergy; only the clerk, if in orders, being convict was to be deliverd to the ordinary without purgation, and he might, if he pleaſed, degrade him and ſend him into the king's bench with letters ſignifying his degrading, and that court, having the record of the conviction before them, might give judgment and award execution, as if he had been a layman and found guilty before them.

But this among the reſt of the felonies enacted in the time of *H.* 8. was repeald by 1 *E.* 6. *cap.* 12. & 1 *Mar. cap.* 1.

III. If the clerk were committed generally, he might make his purgation (*), the form whereof is unneceſſary to recite, being it is now taken away by 18 *Eliz.* and is fully deſcribed and directed by *Stamford Lib.* II. *cap.* 48. *fol.* 138. and the ſtatutes of *Weſtm.* 1. *cap.* 2. 4 *H.* 4. *cap.* 3.

And if the ordinary would not admit a clerk to his purgation, a writ might iſſue out of the chancery to command it, where by law it might be done. 15 *H.* 7. 9. *a. per Fineux.*

And when he had made his purgation, he had always reſtitution of his *lands* ſeiſed, unleſs he were attaint. 8 *E.* 2. *Forfeiture* 34.

But as touching *goods* the difference was thus:

If before conviction upon his arraignment the priſoner had his clergy, (as was uſed commonly before the time of *H.* 6.) then if he made his purgation, upon ſignification thereof to the chancery he had a writ to the ſheriff to reſtore him his goods, *niſi eâ de cauſâ fugam fecerit*, for then he had no reſtitution, *F. N. B.* 66. *a.* but if he died before purgation, his executors could not have it.

But if he had pleaded to inqueſt, and were convict, then the goods were forfeited by the conviction, and he ſhould not

(*) This was a trial before the ordinary by a jury of twelve clerks, wherein if he was acquit, he was diſcharged; if found guilty, he was degraded.

not have reſtitution of his goods upon his purgation, and altho the law was taken antiently, that even in caſe of a conviction, unleſs there were an attainder alſo by judgment, he ſhould upon his purgation have had reſtitution. 3 *E.* 3. *Coron.* 365. 40 *E.* 3. 42. *a.* yet of latter times the law hath conſtantly obtained otherwiſe, as appeareth 8 *H.* 4. 2. *a.* 20 *E.* 4. 5. *B. Coron.* 166. *Plow. Com.* 262. *b. Stamf. P. C. Lib.* III. *cap.* 23. *vide* 3 *E.* 3. *Coron.* 332.

And the ſame law ſeems to be, if he come not in upon the *exigent* awarded, if he fled, if he ſtood mute, or challenged above thirty-five, for in all theſe caſes he forfeited his goods, and ſhould not have reſtitution upon his purgation, *vide* 8 *E.* 2. *Coron.* 417. where, tho he prayd his clergy before conviction, yet upon an inqueſt of office finding him guilty he forfeited his goods; the like *H.* 17 *E.* 2. *B. R. rot.* 87. *Heref.* in the biſhop of *Hereford*'s caſe before cited *cap.* 44. *p.* 326.

But if the clerk were deliverd to the ordinary *abſque purgatione*, there he continued priſoner during his life, unleſs pardoned by the king, and the king had not only his goods, as abſolutely forfeited, but alſo the profits of his lands during his life, as appears by the books above cited.

And if the clerk were ſo deliverd *abſque purgatione*, if the ordinary went about to admit him to purgation, a writ might iſſue out of the chancery to prohibit him. *Clauſ.* 22 *H.* 3. *m.* 17. *dorſo, Epiſcopo Exon. H.* 14 *E.* 3. *B. R. rot.* 19. *Lond.* and he ſhall for it be fined, and his temporalties ſeiſed for the contempt, and by ſome books it is an eſcape in the ordinary. 9 *E.* 4. 28. *a.*

There were certain caſes, wherein the clerk was deliverd to the ordinary *abſque purgatione.* 1. Where he was outlawd of felony 23 *H.* 8. *cap.* 1. *Raſt. Entries* 121. *a.* 2. Where he confeſſed the felony either upon his arrraignment, or became an approver, or confeſſed and abjured and after came into the realm again, for againſt his own confeſſion he ſhould not be admitted to purge himſelf of the crime he confeſſed. 3 *H.* 7. 12. *a.* 3. If he had judgment given againſt him, whereby he was attaint. 10 *E.* 3. *Coron.* 247.

4. If he were in orders and broke the priſon of the ordinary and made his eſcape, by the ſtatute of 23 *H.* 8. *cap.* 11. 5. Where a man in orders was convict of any of the felonies ouſted of clergy by 23 *H.* 8. *cap.* 1. he was to remain during his life without purgation, and the ordinary might degrade him and ſend him into the king's bench to receive judgment. 6. If he were only convict by verdict in an appeal, he ſhould not make his purgation. 12 *R.* 2. *Coron.* 109. 10 *E.* 2. *Coron.* 247.

IV. If a felon had his clergy, regularly he was never to be arraigned again before the king's juſtices for the ſame felony, unleſs it were in caſe, where he broke the priſon of the ordinary and eſcaped. 20 *E.* 2. *Coron.* 232. (*a*).

V. If a clerk had his clergy for felony, he was not to be arraigned for any other felony by him committed before his clergy allowd, for by the ſtatute 25 *E.* 3. *cap.* 5. *pro clero*, it is enacted, " That he ſhall be arraigned of all his " felonies at once (*b*);" yea and altho he only prayd his clergy, tho there be no entry of record, that he read or was deliverd to the ordinary, yet by force of this ſtatute he ſhall not be arraigned of any felony committed before, for the firſt felony being within clergy, and he praying his clergy, it was the fault of the court, that he had it not, which ſhall not turn to his diſadvantage. *T.* 4 *Eliz. Dy.* 214. *b. Stone*'s caſe.

Yet this hath ſome exceptions, for if he had committed treaſon againſt the king before his clergy admitted, he may after his clergy and after his purgation alſo be indicted and arraigned for that treaſon, becauſe it was an offenſe not within benefit of clergy.

VI. If he had committed a felony after he had his clergy, and was deliverd to the ordinary, he ſhould be put to anſwer that felony, *vide* 4 *Eliz. Dy.* 214. *b.* and if he had kild his keeper and thereby eſcaped out of the ordinary's

(*a*) For in that caſe *eccleſia ipſum tueri non debet*, *vide Bracton Lib.* III. *de coronâ*, *f.* 131. *a.*

(*b*) This ſtatute was only in affirmance of the common law, for he was to be degraded by the ordinary, and this was thought a ſufficient puniſhment for all offenſes committed before degradation; *vide Bracton Lib.* III. *de coronâ*, *cap.* 9. *f.* 123. *b.*

priſon, he ſhould not for that felony have had his clergy for it, *fruſtra legis auxilium quærit, qui in legem committit.* 8 *E.* 2. *Coron.* 419. 22 *E.* 3. *Coron.* 250.

The caſe of *Stone*, 4 *Eliz. Dy.* 214. *b.* was this.

Stone committed two felonies the ſame day, one (ſuppoſe it burglary) out of clergy, the other (ſuppoſe it larciny) within clergy, he is indicted of the larciny, he pleaded and was convict, and prayd his clergy, and entred *non legit ut clericus*, and no judgment, *quòd tradatur ordinario*, but is reprieved without judgment to another ſeſſions, at which he is indicted of the other felony out of clergy, but ſuppoſed to be the ſame day when the former felony was committed, he is arraigned and pleads *non culp.* and is found guilty, *& petit librum & legit ut clericus, ſed non crematur, neque traditur ordinario.*

1. It was agreed, that this ſecond reading, notwithſtanding the *non legit* firſt entred, is a good diſcharge of the firſt felony within clergy *per omnes juſticiarios*, *Dy.* 205. *a. b.* but then, 2. The queſtion was, what ſhould be done as to the ſecond not within clergy, whereof he was indicted and convicted; by ſeven juſtices he ſhall have judgment to die, becauſe it ſhall be intended a felony committed after the firſt arraignment, but by other ſeven he ſhall be diſcharged, for it ſhall be intended a felony committed the ſame day, as it is laid, and tho there be no award, *quòd tradatur ordinario*, yet that was the act of the court and ſhall not prejudice him; but he ſhall be adjudged in the cuſtody of the ordinary from the firſt prayer of his clergy.

But afterwards 28 *Maii* 8 *Eliz.* he was indicted for murder committed the firſt of *April* 1 *Eliz.* and was convict and had judgment, and was executed, and yet that murder was before his clergy prayd, and before the ſtatute of 8 *Eliz. cap.* 4. therefore it ſeems the former opinion obtained, for if he had been diſcharged by his reading as to the felony, whereof he was firſt indicted, he muſt have been diſcharged of all felonies committed before his firſt arraignment: The only ſalve that I can think of is either, 1. That he ſhould have *pleaded* it, and did not; or 2. That the *legit ut clericus*

muſt be intended to be applied to the ſecond felony only, and not to the firſt, whereupon *non legit* was entred. *Dy.* 215. *a.*

And thus far touching the effect of clergy, as it ſtood before 8 & 18 *Eliz.*

By theſe two ſtatutes two great alterations were made in the whole buſineſs of clergy, which took away many of thoſe intricate queſtions, tedious proceedings, and great inconveniencies, that were therein before this time.

1. By the ſtatute of 8 *Eliz. cap.* 4. it is enacted, "That "every perſon, which ſhall hereafter upon his arraignment "for any felony be admitted to the benefit of clergy by the "laws of this realm, and deliverd to the ordinary for the "ſame, and ſhall make his due purgation for the ſame of-"fenſe or offenſes, whereupon he was ſo admitted to his "clergy, and ſhall before his admiſſion to his clergy have "committed any other ſuch offenſe, whereupon clergy by "the laws or ſtatutes of this realm is not allowable, and "not being thereof before indicted and acquitted, convict-"ed, or attainted, or pardond ſhall and may be indicted "or appeald for the ſame, and thereupon put to anſwer, "and orderd and uſed in all things according to the laws "and ſtatutes of this realm in ſuch manner and form, as "tho no ſuch admiſſion to clergy had been.

By this ſtatute, tho all other felonies within clergy before clergy admitted ſtand diſcharged, as they were at common law, yet felonies out of clergy committed before clergy allowd may ſtill be proſecuted, notwithſtanding clergy allowd, and ſo as to ſo much it repeald the ſtatute of 25 *E.* 3. *pro clero, cap.* 5.

Then at the parliament of 18 *Eliz. cap.* 7. it is enacted, "That every perſon, which at any time hereafter ſhall be "admitted and allowd to have the privilege of clergy, ſhall "not thereupon be deliverd to the ordinary, as hath been "accuſtomed, but after ſuch clergy allowd, and burning in "the hand according to the ſtatute in that behalf provided, "ſhall forthwith be enlarged and deliverd out of priſon by "the juſtices, before whom ſuch clergy ſhall be granted, "that cauſe notwithſtanding, provided, that the juſtices

"may

" may for farther puniſhment detain the clerk in priſon for " any time not exceeding one year (*c*).

" Provided that, if any one ſhall be convicted of carnal " knowlege, and abuſing a woman child under ten years, " ſuch offenſe ſhall be felony without clergy.

" Provided, that any perſon admitted to the benefit of " clergy ſhall notwithſtanding the ſame be put to an- " ſwer other felonies, whereof he ſhall be indicted or ap- " peald, not being thereof before acquitted, convicted, at- " tainted, or pardoned, and ſhall in ſuch manner be ar- " raigned, tried, adjudged, and ſuffer ſuch execution for " the ſame, as he or they ſhould have done, if as a clerk " or clerks convict they had been deliverd to the ordinary, " and there had made his or their due purgation.

Upon this ſtatute theſe points are clear.

1. That if before his clergy admitted, he had committed any other felony within clergy, he is cleard of them as well as of that whereupon he hath his clergy, for his burning in the hand is in lieu of his delivery to the ordinary and purgation.

2. That as to former felonies out of clergy he is not diſcharged by his admiſſion to clergy, but ſhall be put to anſwer them.

3. That by his conviction he forfeits all his goods, that he hath at the time of the conviction, notwithſtanding his burning in the hand.

(*c*) By 5 *Ann. cap.* 6. it is enacted, " That where any perſon ſhall be con- " vict of larciny the judges ſhall award " him to the work-houſe or houſe of " correction, there to be kept without " bail at the diſcretion of the judges, " not leſs than ſix months, nor more " than two years from the conviction, " an entry whereof is to be made on re- " cord, and if ſuch offender eſcape he " ſhall be committed to ſuch houſe " there to remain not leſs than twelve " months, nor more than four years.

By 4 *Geo.* 1. *cap.* 11. and 6 *Geo.* 1. *cap.* 23. " The court may order any perſon " convicted of larciny, or any felonious " ſtealing of money, &c. within clergy, " (except perſons convict for receiving " ſtolen goods, knowing them to be ſto- " len,) inſtead of being burnt in the hand " or whipt, to be tranſported to any of his " Majeſty's plantations in *America*, for " the ſpace of ſeven years; and perſons " convict for receiving ſtolen goods, " knowing them to be ſtolen, or for " offenſes without clergy, but pardond " generally upon condition of tranſpor- " tation, to be tranſported for the term " of fourteen years; and if any ſhall re- " ſcue or aid ſuch offender to make his " eſcape, or if ſuch offender ſhall return " or be found at large without leave be- " fore the expiration of his term in " *Great Britain* or *Ireland*, he or they " ſhall be deemed guilty of felony with- " out clergy.

4. That yet by his burning in the hand he is put into a capacity of purchaſing and retaining other goods, becauſe the ſtatute taking away delivery to the ordinary and purgation, which ſhould have reſtored him to that capacity, gives him the capacity of purchaſing and retaining other goods, and is in nature of a pardon.

5. That preſently upon his burning in the hand he ought to be reſtored to the poſſeſſion of his lands, and from thenceforth to enjoy the profits thereof.

6. That altho he be not burnt in the hand, but the king pardons it, he is thereby put into the ſame condition, as if he were burnt in the hand, and renderd a perſon capable now to purchaſe and retain goods, altho the words of the ſtatute are *after clergy allowd and burning in the hand he ſhall be deliverd.* Theſe are all points reſolved in 5 *Co. Rep.* 110. *a. Foxley*'s caſe, and *P.* 41 *Eliz. Heſton*'s caſe therein cited (*).

7. And conſequently after clergy and burning in the hand he ſhall not be proceeded againſt by the eccleſiaſtical judge to deprivation or other eccleſiaſtical cenſure, for it amounts to a pardon by the king. *Hob. Rep. p.* 288. *Searle & Williams.*

8. That notwithſtanding this ſtatute requires burning in the hand to diſcharge a clerk convict, yet a clerk in holy orders, *viz.* in the order of ſubdeacon or above ſhall not be burnt in the hand, but the privilege allowd them by the ſtatute of 4 *H.* 7. *cap.* 13. to be ſaved from burning in the hand continues to them. 2 *Co. Inſt.* 637.

9. And upon the ſame account they may have their clergy in caſes within clergy a ſecond time according to the ſtatute of 4 *H.* 7. *cap.* 13. notwithſtanding this ſtatute.

10. That altho a clergyman in orders ſhall not be burnt in the hand, yet by virtue of the ſtatute 4 *H.* 7. *cap.* 13. and of this ſtatute after his diſcharge given by the court he ſhall have the ſame privilege, as if he had been burnt in the hand, and therefore ſhall not be drawn in queſtion in the eccleſiaſtical court to deprive him or inflict any eccleſiaſtical cenſure upon him. *Hob. Rep.* 288. *Searle & Williams.*

(*) *Vide ſupra p.* 278.

11. That notwithſtanding this ſtatute takes away delivery to the ordinary, and inflicts burning in the hand, yet the privilege of peers of parliament exempting them from reading and burning in the hand for the firſt offenſe is not hereby at all diminiſhed or alterd.

12. That the plea of *auterfoits convict* and had his clergy ſtands as a good bar to a new arraignment for the ſame felony, as it did before this ſtatute.

13. That if a man be indicted of murder, and upon not guilty pleaded is found guilty of manſlaughter, and prays his clergy, tho he neither be burnt in the hand, nor hath his clergy allowd, but the court will adviſe upon it, yet this ſtands as a good bar to a new indictment or appeal for the ſame felony, for the priſoner hath done what he can in praying his clergy, which prayer is recorded *petit librum*, and it is the act of the court to adviſe, and their delay in allowing him clergy, or burning him in the hand ſhall not prejudice the priſoner. 4 *Co. Rep.* 45. *b. Wigg*'s caſe and *Holcroft*'s caſe adjudged. *Co. P. C. cap.* 57. *p.* 131. (*d*).

(*b*) This point was however much litigated, and at laſt ſolemnly ſettled in the caſe of *Armſtrong* and *Liſle T.* 8 *W.* 3. *B. R. rot.* 565. *Kel.* 93. that a conviction of manſlaughter, and that he was a clerk and ready to read, if the court would have allowd him, is a good bar to an appeal, altho the court had not cald the defendant to judgment, but continued him over with a *curia adviſare vult.*

CHAP. LV.

Concerning judgments *in the ſeveral kinds of* capital offenſes.

HAving now gone through the preparatories to judgment, namely indictment, pleas, trial, and clergy, I come to conſider of the judgments, that are to be given in ſeveral capital offenſes, and therein, 1. I will conſider the ſeveral kinds of judgments. 2. Who are the judges, that may give them. 3. How and in [what manner.]

Firſt, for the ſeveral kinds of judgments I ſhall conſider theſe particulars.

1. What judgment is to be given in caſe of an acquittal of any capital offenſe.

2. What when clergy is allowd.

3. What to be given againſt a perſon convicted of treaſon, as againſt the king.

4. What to be given in caſe of petit treaſon.

5. What in caſe of felony.

6. What in caſe of *peine fort & dure*.

I. The judgment *upon the acquittal* of the priſoner is either when he is acquitted by ſpecial plea, as of *auterfoits acquit*, or of a pardon, *&c.* or other matter in bar, or elſe when he is acquitted upon not guilty pleaded; and of theſe in their order.

If the priſoner plead the king's pardon, the concluſion of his plea is ordinarily thus, *quarum quidem literarum domini regis (ac dicti brevis*, if there be a writ of allowance alſo pleaded,) *prætextu prædictus* T. H. *petit, quòd ipſe de præmiſſis per curiam hìc dimittatur, &c. ſuper quo viſis & per curiam hìc intellectis omnibus & ſingulis præmiſſis conſideratum eſt, quòd prædictus* T. H. *eat inde ſine die, &c.* and in the margin of the roll there is commonly enterd *literæ patentes allocantur: ſine die,*

die, &c. and no other judgment is uſually enterd in ſuch caſe. *Raſt. Entries* 455. *a. b.*

If the priſoner pleads *auterfoits acquit*, or *convict*, or *attaint de meſme felony*, and avers it to be the ſame, (as he muſt,) the concluſion of his plea is, *& hoc paratus eſt verificare, unde petit judicium, & quòd ipſe de præmiſſis per curiam hìc dimittatur*, and ſometimes and moſt commonly pleads over to the felony *not guilty*.

Et David Waterhouſe *armiger, coronator & attornatus domini regis in curiâ ipſius regis coràm ipſo rege, qui pro eodem domino rege in hâc parte ſequitur, pro eodem domino rege dicit & cognovit, quòd prædictus* Johannes Sayer, *qui modo comparet, & prædictus* Johannes *in inquiſitione prædictâ nominatus per nomen* Johannis Sawyer, *nuper de* W. *in com.* S. *&c. eſt una & eadem perſona*, and ſo goes along to all the averments *modo & formâ, prout prædictus* Johannes Sayer *ſuperiùs placitando allegavit, ſuper quo viſis & per cur. hìc intellectis omnibus ſingulis præmiſſis tàm in placito prædicto ipſius* Johannis Sayer *in formâ prædictâ placitat. & recordo convictionis prædict. quàm dicti domini regis attornati ejuſdem placiti cognitione, conſideratum eſt, quòd prædictus* Johannis Sayer *eat inde ſine die.* H. 5 Jac. *B. R. Sayer*'s caſe, where he pleaded *auterfoits convict* and had his clergy.

And judgment is in like manner enterd, *H. 6 Jac. B. R.* in the caſe of *Francis Smith* upon *auterfoits acquit* pleaded, *Et* David Waterhouſe *armiger, qui pro domino rege in hâc parte ſequitur, viſo placito prædicti* Franciſci Smith *& diligenter per ipſum examinat. præmiſſis, pro eo, quòd evidenter & manifeſtè apparet eidem* David Waterhouſe, *quòd placitum prædictum per præfatum* Franciſcum *ſuperiùs placitatum &c. hoc non dedicit ſed placitum illud ex parte dicti domini regis in omnibus fatetur, & cognovit fore verum: Ideò ut ſupra eat ſine die.*

The like form of judgment, *viz. quòd eat ſine die* was antiently uſed in caſe of *auterfoits acquit* pleaded. 2 *E.* 4. *John Hodgſon*'s caſe.

And *note*, this judgment of *eat ſine die* is of two kinds, ſometimes it is ſpecial, ſometimes it is general.

If *A.* bring an action of covenant againſt *B.* and a ſpecial verdict is found, but upon the peruſal of the declaration a fault therein appears, *Et quia videtur curiæ, quòd narratio eſt inſufficiens, conſideratum eſt quòd querens nihil capiat per billam, ſed quòd defendens eat indè ſine die*, this judgment ſhall not be a bar in another action, becauſe ſpecial and not given upon the verdict, but upon the inſufficiency of the declaration; otherwiſe it had been, if given generally, for it ſhould have been intended upon the verdict and merits of the cauſe. *T.* 1650. *Eales & Lambert* (*a*).

In a *quare impedit* by the king iſſue is joined and found for the defendant, at the day in bank it is alleged in arreſt of judgment, that no patron is named in the writ, the judgment ſhall be enterd generally, *quòd eat ſine die*, and not ſpecially upon the plea in abatement, but it ſeems, it ſhall not bar the king in a new action, for the *eat ſine die* ſhall be applied to the plea to the writ: *vide* 3 *H.* 4. 2 & 11. (*b*).

But it ſeems, that if a man pleads a plea in bar of the indictment, as *autrefoits acquit*, or a pardon, yet if the indictment be inſufficient, upon the reaſon of *Vaux*'s caſe 4 *Co. Rep.* 45. *a.* the *eat ſine die* ſhall be applied for the advantage of the king to the inſufficiency of the indictment, and not to the plea in bar; *quære tamen, non obſtante Vaux*'s caſe.

It is reaſon to have the *eat ſine die* ſpecial in that caſe, *eò quòd indictamentum prædictum apparet minùs ſufficiens, ideò conſideratum eſt, quòd eat ſine die*, and then it is applicable only to the inſufficiency of the indictment.

(*a*) This caſe (but not this point) is reported in *Styl.* 37, 54, 73.

(*b*) This caſe, (which is obſcurely ſtated by our author,) appears from the year-book to have been thus. A *quare impedit* was brought by the king, and a verdict paſt for the defendant, upon which the defendant prayd judgment, but the counſel for the king deſired, that the writ might abate, becauſe it was brought againſt the incumbent only, and not againſt the patron, but this was refuſed, becauſe the king was ſtopped from abating his own writ; then they prayd, that if judgment were enterd againſt the king, the cauſe thereof ſhould likewiſe be enterd, but this alſo was refuſed by the court as needleſs, and the judgment enterd generally, *quòd defendens eat ſine die*, (the ſame judgment, that ſhould be in caſe the writ had been brought againſt the patron and incumbent, and it had been found againſt the king,) becauſe the king will receive no prejudice thereby, for if this judgment ſhould afterwards be pleaded in bar, the king might reply, that judgment was given againſt the writ, becauſe the patron was not named therein.

If a man plead not guilty and is acquitted, antiently the judgment was not only, *quòd eat ſine die*, but *ideò conſideratum eſt, quòd eat indè quietus*, tho it were at the king's ſuit, *quod vide Raſt. Entries* 51. *a.* 2 *E.* 4. in the caſe of *Hodgſon* before cited, and ſo in the caſe of *Smith* before cited, *viz. H.* 6 *Jac.* and accordingly *H.* 3 *Jac. B.R. Raſt. Entries* 57. *Ideò conſideratum eſt, quòd idem* T. *ſit indè quietus, & eat ſine die. Raſt. Entries, fol.* 385. *Gaol-delivery* 6, 7, 10, 11.

Yet at common law without the aid of 18 *Eliz.* he might be bound to his good behaviour, if it were teſtified he was of ill fame, and ſhall be committed till he find ſureties. *Raſt. Ent.* 385. *Gaol-delivery* 5.

And if the entry were ſuch, I do not think the priſoner could ever be arraigned again notwithſtanding the inſufficiency of the indictment, till that judgment of acquittal were reverſed, for *eat indè quietus* cannot go to the inſufficiency of the indictment, but muſt go to the matter of the verdict.

But indeed in *Vauxe*'s caſe, 4 *Co. Rep.* 44. *a.* who was acquit by verdict upon *not guilty* pleaded, the judgment is only *Ideò conſideratum eſt, quòd prædictus* Willielmus Vaux *de feloniâ & murdro prædicto in indictamento prædicto ſuperiùs ſpecificat. necnon de dictâ felonicâ venenatione prædicti* Nich. Ridley *in eodem indictamento nominat. eidem* Willielmo *impoſit. eat ſine die*, not *eat indè quietus*: he was afterwards indicted *de novo* and pleaded the former acquittal, and yet becauſe the indictment was not ſufficient, he was put to plead to the felony, and had judgment and was executed.

The truth is the beſt reaſon to maintain that judgment is that, which is given by my lord *Coke P. C.* 214. in theſe words, *In the caſe of acquittal the judgment is*, quòd eat ſine die, *which may be given as well for the inſufficiency of the indictment, as for the party's innocence or not guiltineſs of the offenſe, and the judges of the cauſe ought before judgment to look into the whole record, and upon due conſideration thereof to cauſe it to be enterd*, ideò conſideratum eſt, quòd eat ſine die.

This is the beſt reaſon to ſupport that judgment, but if the judgment had been, *quòd eat indè quietus*, as the antient form is in caſe of acquittal upon *not guilty pleaded*, that

could never refer to the defect of the indictment, but to the very matter of the verdict; and if in *Vaux*'s caſe the judgment had been ſo enterd, he could never again have been indicted for the ſame offenſe, notwithſtanding the defect of the indictment, till that judgment reverſed by writ of error, tho, as it was, that judgment in *Vauxe*'s caſe was one of the hardeſt that ever I met with in criminal cauſes, for where the priſoner excepts to the inſufficiency of the indictment, or the court doth it *ex officio*, the judgment is ſpecial, *quòd indictamentum ob inſufficientiam caſſetur, & quòd* the priſoner *eat indè ad præſens ſine die.*

If a man be indicted of homicide *ſe defendendo*, or *per infortunium*, he muſt plead to it or confeſs it, and there is no judgment of death given againſt him, but *remittitur priſonæ*, or baild *ad expectand. gratiam regis.*

But if a man by the coroner's inqueſt be found to have kild a thief, that aſſaulted him to rob him or to commit a burglary, which is not felony, he ſhall neither be arraigned nor put to anſwer upon that indictment, but ſhall be diſmiſſed without any judgment.

But if he had been indicted of murder or manſlaughter, and upon *not guilty* pleaded the ſpecial matter is found, or the jury acquits him, the judgment ſhall be *quòd eat indè quietus*, and it is a perpetual diſcharge; and if he be found guilty *ſe defendendo*, yet the judgment given thereupon, *quòd expectet gratiam regis* is a perpetual bar to another indictment. *Co. P. C. cap.* 101. *p.* 213, 214.

II. The judgment in caſe of allowance of clergy is thus, *Super quo adtunc & ibidem quæſitum eſt per cur. domini regis de eodem* Johanne, *ſi quid pro ſe habeat vel dicere ſciat, quare curia domini regis hìc ad judicium & executionem de eo ſuper veredictum prædictum procedere non debeat*; *idem* Johannes *dicit, quòd ipſe eſt clericus, & petit beneficium clericale ſibi in eâ parte allocari, & tradito eidem* Johanni *libro idem* Johannes *legit ut clericus, ſuper quo conſideratum eſt per curiam hìc, quòd idem* Johannes *in manu ſuâ lævâ cauterizetur & deliberetur*, and the execution is accordingly enterd, *& inſtantèr crematur in manu ſuâ lævâ, & deliberatur juxta formam ſtatuti.*

And

And if he be a nobleman, and be demanded wherefore judgment ſhould not be given upon the verdict, he may aver, that he is a peer of the kingdom *habens locum & vocem in parliamento*, and pray the benefit of the ſtatute of 1 *E.* 6. *cap.* 12. and if it appear ſo in the indictment, or in caſe it do not, if the court be aſcertained thereof either by writ or *certiorari* to the clerk of parliament, or if it be confeſſed by the king's attorney, then the judgment is *ideò conſideratum eſt quòd deliberetur ſecundùm formam ſtatuti in hujuſmodi caſu edit. & proviſ.*

And if it be alleged, that he is a clerk in holy orders, then it ſhall be enterd after his reading, *Et quia curiæ hìc conſtat per certificationem Epiſcopi &c.* or *per literas teſtimoniales Epiſcopi, quòd ipſe eſt clericus in ſacris ordinibus conſtitutus, viz. in ordine ſubdiaconatûs, ideo conſiderat. eſt per curiam, quòd deliberetur ſecundùm formam ſtatuti in hujuſmodi caſu edit. & proviſ. ſine cauterizatione.* And the like, if he plead the king's pardon of burning in the hand.

And if a layman pray his clergy, and it appear of record, that he had it before, then the entry is, *Et quia per inſpectionem recordi coràm domino rege hìc miſſi &c. quòd alitèr idem* J. S. *indictatus exiſtit &c.* ſetting out the effect of the record, *& quòd ipſe eſt eadem perſona, & hoc idem* J. S. *non dedicit, ideò conſideratum eſt, quòd privilegium clericale eidem* J. S. *non allocetur, & quòd ſuſpendatur per collum quouſque &c.*

And ſo if he prays his clergy, [and cannot read,] *Et tradito ei per curiam libro idem* J. S. *non legit ut clericus, ideò conſiderat. eſt, quòd ſuſpendatur per collum, quouſque mortuus fuerit.*

III. The judgment in high treaſon againſt the king for conſpiring his death, or levying war, or for a prieſt upon the ſtatute of 27 *Eliz. cap.* 2. or for any new treaſon made by authority of parliament is in this manner.

Firſt the king's ſerjeant or attorney *juxta debitam legis formam petit verſùs ipſum* E. D. *ſuper veredicto prædict. judicium & executionem pro dicto domino rege habend. &c.* but this is not of abſolute neceſſity, for the court *ex officio* ought to give judgment.

Et ſuper hoc viſis & per curiam hìc pleniùs intellectis omnibus & ſingulis præmiſſis conſiderat. eſt, quòd prædictus E. D. *ducatur per vicecomitem com.* Middleſex, or *per mareſcallum hujus curiæ*, or *per conſtabular. turris* London *uſque mareſcalciam &c.* or *uſque turrim* London, or *uſque gaolam domini regis com. prædicti* (according as the priſoner is in cuſtody,) *Et de indè per medium civitatis* London *directè uſque ad furcas de* Tiburne *trahatur, & ſuper furcas illas ibidem ſuſpendatur, & vivus ad terram proſternatur, & interiora ſua extra ventrem ſuam capiantur (c) ipſoque vivente (d) comburantur, & caput ejus amputetur, & corpus ejus in quatuor partes dividatur, & caput & quarteria illa ponantur ubi dominus rex ea aſſignare voluerit.*

But if the priſoner be in the king's bench and the judgment be given in that court, the entry is, *quòd prædictus* J. S. *ducatur per prædictum mareſcallum uſque priſonam mareſcalciæ domini regis coràm ipſo rege, & de inde ad quendam locum executionis, vocat.* St. Thomas Watringes, *trahatur, & ſupra furcas ibidem ſuſpendatur*, and ſo forward as in the judgment.

Thus the judgment was enterd againſt *Barkly* a ſeminary prieſt upon an indictment in *Middleſex*, *P.* 38 *Eliz.* upon the ſtatute of 27 *Eliz.* But the judgment againſt a woman in all caſes of high-treaſon is to be drawn and burnt. *Co. P. C.* 211.

Upon an indictment of treaſon for counterfeiting the king's coin the judgment is only, as in petit treaſon, *viz. quòd ducatur uſque gaolam domini regis de* Newgate *per vic. com.* Middleſex, *& ab inde uſque ad furcas de* Tiburn *trahatur & ibidem ſuſpendatur, quouſque mortuus fuerit.*

And the judgment againſt a woman is alſo, as in petit treaſon, to be burnt. 25 *E.* 3. 42. (*e*).

This is agreed of all hands, but as to clipping or impairing of coin [there hath been ſome doubt], and likewiſe as to counterfeiting of forein coin made current by proclamation, becauſe theſe are new created treaſons. *Co. P. C. p.* 17.

(*c*) *Secreta membra amputentur* is here ſometimes inſerted, *Show. caſes in parliament p.* 187. but is not of neceſſity, *vide* the ſentence in lord *Derwentwater*'s caſe, *State Tr. Vol.* VI. *p.* 16.

(*d*) Theſe words *ipſoque vivente*, or others tantamount are abſolutely neceſſary, otherwiſe the judgment is erronious. See 2 *Salk.* 632. *Show. caſes in parliament p.* 127. *Rex* verſus *Walcot.*

(*e*) *N. Edit.* 85. *b.*

But yet in caſes of clipping or waſhing made treaſon by the ſtatute of 5 *Eliz. cap.* 11. & 18 *Eliz. cap.* 1. the judgment is now ſettled to be only drawn and hanged, as in caſe of counterfeiting of the coin of the kingdom by 25 *E.* 3. *de proditionibus*, and this was agreed, and accordingly judgment given againſt two *Frenchmen Hill.* 25 *Car.* 2. (*f*). according to the book of *T.* 6 *Eliz. Dy.* 230. *b.*

And with this agrees the reſolution of 24 *H.* 8. in juſtice *Spilman*'s reports cited 2 *Co. Inſt. p.* 636. A prieſt drawn and hanged for clipping the king's coin, and yet clipping was not held to be treaſon within the ſtatute of 25 *E.* 3. but made ſo [by the ſtatute of 3 *H.* 5. *cap.* 6. according to the common opinion and the recital of the ſtatute of 5 *Eliz.*] (*g*), and ſo repeald by the ſtatute of 1 *Mar. cap.* 1. yet even while that ſtatute of 3 *H.* 5. was in force, the judgment was only drawing and hanging in that caſe.

And upon ſearch of precedents both in the king's bench and at the *Old Baily*, tho ſome precedents were of hanging drawing and quartering for clipping, yet the moſt uſual were only drawing and hanging (*h*).

And upon the ſame reaſon I think, that in caſe of counterfeiting of forein coin made current by proclamation, made treaſon by the ſtatute 1 *Mar. cap.* 6. and the clipping or waſhing thereof, likewiſe made treaſon by 5 and 18 *Eliz.* I think there ought to be no other judgment but drawing and hanging, for by the proclamation and the act of 1 *Mar.* it is now become as the coin of this realm, and it were an incongruous thing for a man to be hanged and quarterd for counterfeiting forein coin made current by proclamation by interpretation of the ſtatute of 1 *Mar.* and yet to be only drawn and hanged for counterfeiting the proper coin of the kingdom.

For counterfeiting the great or privy ſeal certainly there was antiently no other judgment but that of petit

 treaſon,

(*f*) *Bellew & Norman.* 1 *Ven.* 254.

(*g*) In the original MS. the words in this place are, *By the ſtatutes of* 5 & 18 Eliz. *according to the common opinion and the recital of thoſe two ſtatutes*; but it appears by what follows, that the ſtatute of 3 *H.* 5. was intended here to be mentiond, nor is it recited in the ſtatute of 18 *Eliz.* but only in that of 5 *Eliz.*

(*h*) *Vide Part* I. *p.* 352.

treaſon, namely drawing and hanging, as appears by the book of 2 *H.* 4. 25. *a.* (*i*), and the record of that caſe, tho my lord *Coke* excepts againſt it in *P. C. p.* 15. *ſed de his vide quæ ſupra dixi Part* I. *cap.* 16. *p.* 187.

IV. The judgment in petit treaſon is for a man to be drawn and hanged, for a woman to be drawn and burnt, as alſo in high treaſon, *Co. P. C. p.* 211. for the other judgment is unſeemly for that ſex. *Stamf. P. C. Lib.* III. *cap.* 19. *fol.* 182. *b.*

V. The judgment in all caſes of felony is, *quòd ſuſpendatur per collum, quouſque mortuus fuerit.*

But if a man be outlawd of treaſon or felony, tho there be no other judgment, but *utlegatus eſt per judicium coronatorum*, yet it is of itſelf an attainder, and ſubjects the offender to ſuch an award thereupon to be made by the court, where he is brought, as is ſuitable to the offenſe, for which he is indicted and outlawd.

And this judgment is as well to be given againſt a nobleman as another in caſe of felony, and cannot be given otherwiſe by the court, or executed otherwiſe by the ſheriff. *Co. P. C. p.* 211 & 52. (*k*).

VI. The judgment of *peine fort & dure* at this day in caſe of felony is only where the priſoner ſtands mute of malice upon his arraignment or will not directly anſwer, for upon challenging above twenty his challenge ſhall be only over-ruled (*l*), and the trial proceed.

But at common law in all caſes of felony and at this day in petit treaſon, if he challenge thirty-ſix peremptorily, he ſhould have his judgment of penance (*m*), and this holds as well in an appeal as in an indictment, and as well in caſe of women as men. 2 *Co. Inſt.* 177. *ſuper ſtat. Weſtm.* 1. *cap.* 12.

The entry of the judgment is thus:

Et quæſitum eſt per curiam ab eo qualiter ſe velit indè acquietare, qui dicit, quòd ipſe non vult ſe ſuper aliquam juratam patriæ ponere, niſi ſolummodo in Deum; tunc inſuper dictum eſt ei per curiam hìc, quòd niſi alitèr in hâc parte reſpondeat mori debet, qui

(*i*) *Clement Peytenin's* caſe, *vide Part* I. *p.* 181. *in notis, & p.* 352.
(*k*) *Vide Part* I. *p.* 501.
(*l*) *Supra p.* 270.
(*m*) *Supra p.* 268, 316.

qui dicit, quòd non vult aliter reſpondere in hâc parte niſi ut priùs, ideò conſiderat' eſt, quòd idem R. B. *ducatur ad priſonam mareſcalciæ domini regis coràm ipſo rege, & ibidem nudus præter baccas ſuas ponatur ad terram ſuper dorſum ſuum directè jacens, & foramen in terrâ ſub ejus capite fiat & caput ejus in eodem ponatur, & ſuper corpus ſuum ubi libet ponatur tantum de petris & ferro, quantum portare poteſt & plus, quamdiu vivit, & quòd habeat de pane & aquâ peſſimis & priſonæ ei proximis, & illâ die quâ comedit non bibat, neque illâ die quâ bibit non comedat, ſic vivendo quouſque mortuus fuerit (n).*

And if he ſtand wholly mute, then the entry is thus:

Et allocutus quomodo ſe velit de feloniâ prædictâ acquietare, qui quidem R. *nihil reſpondet, ſed ſe mutum tenet, & ſuper hoc captâ inquiſitione per ſacramentum* 12 *&c. ſi prædictus* R. *loqui poſſit, vel ſi prædictus* R. *prædicto die &c. loquutus fuerit necne, qui dicunt ſuper ſacramentum ſuum, quòd prædictus* R. *loquutus fuit iſto eodem die & benè loqui poteſt ſi velit, ideò idem* R. *ut ipſe qui legem recuſat, hoc caſu eat ad pœnam &c.* ut ſupra. *Catalla ipſius nulla.*

And ſometimes alſo the jury were charged to inquire *ſi malè credatur*, but that was but rarely in caſe of an indictment (o), for the indictment itſelf carries a probability, that he may be guilty, when joined with his own wilful refuſing his trial, ſo that he forfeits his goods by ſuch ſtanding mute.

VII. Judgment in petit larciny is only to be whipt, or impriſoned by way of chaſtiſement (p).

VIII. Judgment in miſpriſion of treaſon is forfeiture of all his goods, forfeiture of the profits of his land during his life, and impriſonment during his life (q).

IX. Judgment in theftbote is fine and impriſonment.

I

CHAP.

(n) *Vide ſupra cap.* 43. *p.* 319. *Raſt. Entr. fol.* 385. *pl.* 2.

(o) *Vide* the caſe of *Thomas de la Hethe ſupra p.* 322. *in notis.*

(p) But by ſubſequent ſtatutes the offender may be tranſported. See 4 *Geo.* 1. *cap.* 11. and 6 *Geo.* 1. *cap.* 23. *vide ſupra p.* 388. *in notis.*

(q) *Part* I. *p.* 374.

CHAP. LVI.

Concerning giving of judgment, by whom, *and* when.

WHAT courts have juriſdiction in cauſes criminal and capital have been handled before in the beginning of this Part; I am now to conſider when one judge may give judgment upon a conviction before another judge, and how.

The king's bench is the center of all ſubordinate juriſdictions, eſpecially in matters capital.

If *A.* be indicted of felony before juſtices of peace, *oyer* and *terminer*, or gaol-delivery, and be convict by verdict or confeſſion, if the record of the conviction be removed into the king's bench by *certiorari*, and the priſoner alſo be removed thither by *habeas corpus*, that court may give judgment upon that conviction, but there muſt be firſt a filing of the record in the king's bench, and a commitment of the priſoner to the cuſtody of the marſhal, and he muſt be called to ſay what he can, why judgment ſhould not be given againſt him, and thereupon judgment may be given: *vide* 23 *H.* 8. *cap.* 1 & 11. 10 *H.* 4. 9. *a. Coron.* 467.

And indeed there was no other remedy before the ſtatutes of 11 *H.* 6. *cap.* 6. & 1 *E.* 6. *cap.* 7. for judgment to be given upon perſons reprieved before judgment, for the former commiſſions are determind by new ones at common law.

But if the conviction were not before the judge of the king's bench, ſo that the offender continued not always in cuſtody of the marſhal or of thoſe that are his bail, but be removed by *habeas corpus* or brought in by proceſs, the party ſo removed may plead he is not the ſame perſon and give ſome diverſity of name, and if the king's attorney confeſs it,

he ſhall be diſcharged and proceſs made out againſt the other perſon, thus it was done in the caſe of *John Apare*, *Lib. placitor. Coron. n.* 7. who was taken upon a *capias utlegat.* and pleaded he was not the ſame perſon.

Or the king's attorney may take iſſue upon it and aver him to be the ſame perſon, and known by one name or the other. 21 *E.* 4. *Surry. Lib. placitor. Coron. placito* 31. *Nicholas Browne*'s caſe.

Or if he anſwers nothing but ſtands mute, it ſhall be inquired whether he be the ſame perſon by inqueſt, before judgment be given againſt him, for he ſhall not be concluded by the return of the ſheriff either upon a *cepi corpus* or *habeas corpus*, if he was not always in cuſtody of the ſame court from the time of his firſt arraignment, *vide accords* 10 *E.* 4. 19. *b.* but if he had been always in cuſtody of the court of king's bench from the time of his arraignment, or had been baild by the court, and came in and rendred himſelf upon his bail, then no ſuch inquiry ſhall be made upon his ſtanding mute. 10 *E.* 4. 19. *b.*

And that I may ſay it once for all, the ſame law is where a party is outlawd or abjured, and comes by *capias utlegat.* or other proceſs into the king's bench, he ſhall be demanded what he can ſay why execution ſhould not be awarded againſt him upon the record removed, which 7 *H.* 6. 25. *a. B. Coron.* 44. is called an arraignment; if he confeſs himſelf to be the ſame perſon, execution ſhall be awarded; if he deny himſelf to be the ſame perſon and the king's attorney confeſs it, he ſhall be diſcharged; if the king's attorney take iſſue upon it, it ſhall be tried; if the priſoner ſay nothing, it ſhall be inquired by an inqueſt of office whether he be the ſame perſon: *vide* 8 *H.* 4. 3 & 18. *B. Coron.* 22, 23. 10 *E.* 4. 19. *b. M.* 5 *Car. Croke, p.* 176. *Coxe*'s caſe.

If an iſſue be joined in the court of king's bench in an appeal of felony, or in an indictment of treaſon or felony either upon a record originally begun in that court, or removed thither by *certiorari*, the uſual courſe now is to try it at the bar, or if it were removed by *certiorari* out of another county, to remit the record according to the ſtatute of

6 *H.* 8. *cap.* 6. to the juſtices, before whom ſuch indictment was originally taken, with a writ to command them to proceed therein, whether the record were ſo remitted before or after iſſue joined in the king's bench.

But many times that court antiently did, and at this day may ſend down the tranſcript to be tried by *niſi prius*, as well in an indictment as an appeal, and upon the return thereof the court may give judgment of death or acquittal, according to the verdict returned; *quod vide ſæpius L.*

But whether they might inquire of abetters there hath been diverſity of opinions, *vide* 2 & 3 *P.* & *M. Dy.* 120, 121, 131. *b.* but by the better opinion they cannot, 10 *E.* 4. 14. *b.* 4 *Co. Inſt.* 160. nor can they arraign the felon at the ſuit of the king, if the plaintiff be nonſuit in his appeal. 22 *E.* 4. 19. *a.* (*).

It hath been held by ſome, that juſtices of aſſiſe and *niſi prius* may by virtue of the ſtatute of 27 *E.* 1. *de finibus cap.* 3. without any other commiſſion deliver the gaol and give judgment of felons, *vide Stamf. P. C. Lib.* II. *cap.* 5. *fol.* 57. *b.* but yet that hath not been uſed, neither is it ſafe to be practiſed without a commiſſion of gaol-delivery: *vide ſtat.* 3 *H.* 5. *ſtat.* 2. *cap.* 7.

But certainly at common law juſtices of *niſi prius* could not give judgment upon an appeal or indictment ſent to them out of the king's bench by *niſi prius* to be tried, no more than in other ordinary civil cauſes, for they have but the tranſcript of the record before them, and their commiſſion is only *ad triandum exitum*, and to remit the tranſcript with the verdict indorſed upon the *poſtea* (†).

But by the ſtatute of 14 *H.* 6. *cap.* 1. juſtices of *niſi prius* have power in all caſes of felony and treaſon to give judgment of acquittal or attainder at the day and place where their inquiſitions, inqueſts, and juries are taken, and then and there to award execution to be made by force of the ſame judgments.

But yet it ſeems this ſtatute gave them not power to inquire of abetters in an appeal, nor to arraign the priſoner upon

(*) *Vide ſupra p.* 41. (†) *Vide ſupra p.* 40.

upon a nonſuit before them at the king's ſuit, 10 *E.* 4. 14. *b.* 22 *E.* 4. 19. *a.* but this was to be done in the king's bench upon the return of the *poſtea.*

But upon this ſtatute theſe things are to be obſerved.

1. That they might return the *poſtea* into the king's bench, and there judgment may be given as at common law, for tho the ſtatute gives them power to give judgment and award execution, yet it leaves them power to return the *poſtea*, and takes not away the power of the king's bench to give judgment and award execution upon the *poſtea* returned, as they might have done at common law.

2. That as the priſoner cannot be arraigned nor plead to iſſue in the king's bench, unleſs the record and alſo the priſoner be there, ſo the record itſelf ſtill remains in the king's bench, and only the tranſcript deliverd to the judges of *niſi prius* and not the record itſelf, as upon the ſtatute of 6 *H.* 8. yet upon that tranſcript the judges of *niſi prius* may give judgment and award execution by virtue of the ſtatute of 14 *H.* 6. *cap.* 1.

But then the priſoner muſt either be ſent down by *habeas corpus* to the ſheriff of the county, where the *niſi prius* is, in cuſtody, or elſe baild to appear there, for no inqueſt can be taken by default, or in the abſence of the priſoner in caſes capital.

And if the priſoner be baild by the king's bench to appear at the *niſi prius*, (as he may,) yet if he appear not, the inqueſt cannot be taken, but only the priſoner called upon his bail, and the default recorded, and ſo upon the return of the *poſtea* new proceſs againſt the priſoner, and alſo againſt his bail.

At common law by granting a new commiſſion of the peace all proceedings before former commiſſioners of the peace were diſcontinued, and if an iſſue were joined, or a perſon convicted, or had judgment, the new commiſſioners could not proceed to trial, judgment, or execution, but all that could be done was to remove the record by *certiorari* and the priſoner by *habeas corpus* into the king's bench, and there to proceed where the juſtices left off.

And to remedy this the ſtatute of 11 *H.* 6. *cap.* 6. was made, whereby it is enacted, " That ſuch proceedings ſhall " not be diſcontinued by ſuch new commiſſion, but the " new juſtices after they have the records before them ſhall " have power to continue the ſame pleas and proceſſes, and " the ſame pleas and proceſſes and all that depend upon " them to hear and finally determine, as the other juſtices " might have done, if no new commiſſion had iſſued.

By virtue of this ſtatute new commiſſioners might not only give judgment upon conviction before former juſtices of peace, but might award executions upon judgments given by the former juſtices, as ſhall be farther ſhewn.

But this ſtatute extended not to commiſſions of *oyer* and *terminer* and gaol-delivery, but only to commiſſions of the peace.

And therefore the ſtatute of 1 *E.* 6. *cap.* 7. was made, which among other things enacts, " That where any per- " ſon ſhall be found guilty of treaſon or any felony, for " which judgment of death ſhould be given, and be reprieved " before judgment, new commiſſioners of gaol-delivery " may give judgment upon ſuch conviction, as the juſtices " of gaol-delivery, before whom he was convicted, might " have done.

" And that no manner of proceſs or ſuit made, ſued, or " had before any juſtices of aſſiſe, gaol-delivery, *oyer* and " *terminer*, of the peace, or other the king's commiſſioners " ſhall in any wiſe be diſcontinued by the making and pub- " liſhing any new commiſſion or aſſociation, or by altering " the names of ſuch juſtices or commiſſioners, but that " the new juſtices of aſſiſe, gaol-delivery, and of the peace, " and other commiſſioners may proceed in *every behalf*, as " if the old commiſſion and juſtices and commiſſioners " had ſtill remained and continued not alterd.

Tho this ſtatute in the firſt part thereof mentions giving of *judgment* upon a perſon convict, yet I take it very clear they may award *execution* upon a party reprieved after judgment by former commiſſioners, for by the ſecond clauſe they may proceed in *every behalf* as the former

commiſſioners might have done, and therefore there is little cauſe for the *quære* made touching that point in *Dyer* (*g*), yet I have generally obſerved this one rule, that I would never give judgment, or award execution upon a perſon reprieved by any other judge but myſelf, becauſe I could not know upon what ground or reaſon he reprieved him (*h*).

CHAP. LVII.

Concerning executions.

MUCH of what concerns this matter hath fallen in under the former chapter, and therefore I ſhall be brief in it. I ſhall conſider,

1. Who may award execution.
2. In what manner it is to be awarded.
3. By what warrant to be made.
4. By whom it is to be done.
5. In what manner.
6. Concerning reprieves or reſpite of judgment or execution.

I. As to the firſt of theſe it hath been diſpatched in the former chapter, they that may give judgment may award execution.

And therefore the court of king's bench upon an *habeas corpus* and a *certiorari* to remove the body of a priſoner and the record of his outlawry or attainder before them may award

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(*g*) *Dyer fol.* 165. *a.*

(*h*) The uſefulneſs of this caution may be ſeen from what is obſerved by Sir *John Hawles* in his remarks on *Corniſh*'s trial, *State Tr. Vol.* IV. *p.* 203. where he relates the caſe of ſome perſons, "Who had been convicted of the "murder of a perſon abſent barely by "inferences from fooliſh words and ac- "tions; but the judge before whom it "was tried was ſo unſatisfied in the "matter, becauſe the body of the per- "ſon ſuppoſed to be murderd was not to "be found, that he reprieved the per- "ſons condemned; yet in a circuit af- "terwards a certain unwary judge, with- "out inquiring into the reaſons of the "reprieve, orderd execution and the "perſons to be hanged in chains, which "was done accordingly; and afterwards "to his reproach the perſon ſuppoſed to "be murderd appeard alive.

award execution upon him. *M.* 5 *Car. B. R. Croke p.* 176. *Coxe*'s caſe, *vide quæ dicta ſunt ſupra cap.* 56.

II. Touching the manner of it there be certain caſes, wherein tho the priſoner be attainted, yet he is not to have execution awarded againſt him, till he be demanded what he can ſay why execution ſhould not be awarded againſt him, *viz.*

1. Where a woman is convicted and attaint by judgment, tho ſhe remain always in cuſtody, ſo that *conſtat de perſonâ*, yet execution is not to be awarded againſt her till ſhe be demanded what ſhe can ſay why execution ſhould not be awarded, for ſhe may allege pregnancy, which, tho it be no cauſe to reſpite judgment, is a good cauſe to reſpite execution.

2. Where the judgment was given at a former ſeſſion, for in that interval between this and the former ſeſſion he may have a pardon to plead.

3. Where the priſoner hath not always remained in the cuſtody of the court, where he firſt had judgment, for in that caſe, if he be brought in by a *capias* by the ſheriff, he ſhall not be concluded, but that he may ſay he is another perſon, and iſſue may be taken upon it, and that iſſue ſhall be tried before he ſhall have execution awarded againſt him, and if he ſtand mute, it ſhall be inquired whether it be of malice. 10 *E.* 4. 19. *b.* Again,

4. If judgment were given in another court, or by other juſtices, as in caſe where a record of an attainder comes from another court by *certiorari* into the king's bench, or if a man be outlawd for felony, and the outlawry either removed or returned into the king's bench, and the felon brought in by *habeas corpus* or *capias utlegat.* he ſhall be demanded what he can ſay why execution ſhould not be awarded againſt him, which 7 *H.* 6. 25. *a.* is called an arraignment, for in theſe caſes, 1. He ſhall not be concluded by the return of the ſheriff from ſaying he is not the ſame perſon, that was outlawd, and upon that iſſue may be joined, and it ſhall be enterd of record and tried (*), unleſs the king's attorney confeſs it: *vide ſupra cap.* 56. 2. He may

(*) *Kel.* 13. The caſe *Barkſted, Okey,* and *Corbet.*

may have the king's pardon to plead. 3. In caſe of an outlawry he may aſſign error in the outlawry, and pray reſpite to purchaſe a writ of error, and the court uſually in ſuch a caſe prefixeth him a day, and gives him reſpite to purchaſe a writ of error, and in the mean time remits him to the marſhal and reſpites his execution.

Thus it was done in the caſe of *David Dene*, *H.* 16 *E.* 4. *Placit. cor. n.* 57. who was taken by a *capias utlegat.* returnable in the king's bench, *Et ſtatim quæſitum eſt ab eo, ſi quid pro ſe habeat vel dicere ſciat, quare ad executionem de eo ſuper utlegariâ prædictâ procedi non debet.*

He alleged, that at the time of the outlawry pronounced he was in priſon in the tower of *London*, *Et ſtatim quæſitum eſt ab eo per cur. ſi habeat aliquid breve de errore necne, qui dicit quòd non; ideò injunctum eſt eidem* David *ex gratiâ per curiam, quòd ipſe breve de errore in hâc parte habeat coràm domino rege in octabis* Hillarii, and upon his failure a ſecond and a third peremptory day was aſſigned him, at which day he ſhewd to the court a writ of error and aſſigned the ſame error in fact, and iſſue was taken upon it, and a *venire facias* returnable in *Mich.* term, the priſoner ſtill remaining in cuſtody, and execution reſpited till the iſſue tried.

But it is to be noted, that he, that will delay his execution by alleging error in the outlawry and praying liberty to purchaſe a writ of error, muſt allege error in fact, or error in law upon the outlawry to obtain that reſpite of execution before his writ of error be brought, for if the court be ſatisfied, that it is merely a pretenſe, they may chuſe, whether they will allow him a day to ſue forth a writ of error, but may award execution preſently. 1 *H.* 7. 13. *b. John Collin*'s caſe, *vide Co. P. C. p.* 212.

If either the priſoner himſelf, or any as *amicus curiæ*, inform the court of any error in the outlawry, the court *ex officio* muſt prefix him a day to purchaſe his writ of error, and in the mean time reſpite execution, but if he purchaſe not his writ in convenient time, execution ſhall be awarded.

III. By what warrant the execution is to be made.

In the king's bench there is no other writ nor warrant but an award of the court upon the judgment, *viz. Et dictum eſt mareſcallo, quòd faciat executionem periculo incumbente*, for in the king's bench the marſhal is the immediate officer of the court to make execution in theſe caſes, for that court never gives judgment againſt any, that is not *in cuſtodiâ mareſcalli* in caſes capital, and ſo are all the antient and modern precedents, *vide* 3 *H.* 7. 7. *a. M.* 5 *Car. B. R. Cro. p.* 176. *Coxe*'s caſe, and ſo was directed by the court upon view of the precedents themſelves mentiond in my lord *Coke*'s book of *Entries*, *Tit. Indictment per totum*, *P.* 25 *Car. B. R.* in *Brown*'s caſe (*a*).

When an attainder of felony or treaſon is againſt a nobleman, the judgment is pronounced by the lord high ſtewward, and the warrant for execution is under his precept and ſeal in his own name. *Co. P. C. p.* 31.

When judgment is given by commiſſioners of *oyer* and *terminer*, regularly the precept for execution ſhould iſſue to the ſheriff in the names and under the hands and ſeals of three of the commiſſioners, whereof one to be of the *quorum*, before whom judgment was given, *Co. P. C. p.* 31. but by uſage (as far as I can learn of late times,) it is now done only by leaving a calendar with the ſheriff declaring their judgments (*).

When a man hath judgment of death before juſtices of gaol-delivery, the regular way is either to iſſue a precept to the ſheriff in the names of the commiſſioners reciting the judgment, and commanding execution to be done, or otherwiſe by an award upon the record, *Et dictum eſt per curiam hìc vicecomiti comitatûs prædicti, quòd faciat executionem periculo incumbente.*

But of latter time there is no more done, but after judgment enterd the judge ſubſcribes a calendar in paper, directing the ſeveral judgments of deliverance of the parties acquitted, or the execution of the parties condemned.

(*a*) 3 *Keb.* 193. 1 *Vent.* 243. (*) *Supra p.* 31.

Only *Rolle* would never ſubſcribe any ſuch calendar (*), but would command the ſheriff openly in court to take notice of the judgments and orders of what kind ſoever, and command the ſheriff to execute them at his peril.

The reaſon of the difference between juſtices of gaol-delivery and of *oyer* and *terminer* is this; all the precepts, that iſſue at a ſeſſions of *oyer* and *terminer*, as for a *venire facias tales &c.* ought in true order of law to be by precept in the names and under the ſeals of the juſtices, but the precepts by juſtices of gaol-delivery need not be otherwiſe than by a ſimple award upon the roll; *Ideò præceptum eſt vicecomiti, quòd venire faciat hìc &c.*

IV. By what officer execution is to be made.

Regularly the officer, that is to make the execution, is that officer in whoſe cuſtody by law the priſoner is at the time of the judgment given, for into his cuſtody he is to be remanded after judgment pronounced, and there to ſtay till judgment executed.

Therefore, where judgment is given at the ſeſſions of gaol-delivery, the execution is to be made by the ſheriff, or his under-ſheriff or deputy, for regularly he is in his cuſtody ordinarily, but if the priſoner be in the *Tower* of *London*, (which is oftentimes the caſe of perſons indicted for great treaſons,) and he be arraigned before juſtices of *oyer* and *terminer*, he is commonly brought before them by a precept to the conſtable of the *Tower*, (which is an exempt priſon from that of the ſheriff,) and if he be convict and attaint, he is commonly remitted thither, and the precept or warrant for execution muſt go to the lieutenant or conſtable of the *Tower*, for it is purſuant to the judgment, *viz. quòd prædictus* E. *ducatur per præfatum locumtenent' turris* London *uſque ad dictum turrim, & deinde per medium civitatis* Lond. *directè trahatur uſque furcas de* Tiburn *&c.* And thus it was done in the caſes of the traitors at the powder-treaſon 3 *Jac.* But uſually a command or precept is made to the ſheriffs of *London* and *Middleſex* to be aſſiſting to the lieutenant.

I If

(*) *Vide Part* I. *p.* 501.

If the priſoner be arraigned in the king's bench either for treaſon or felony, he is or ought to be always firſt committed to the marſhal, and by him is to be brought to the bar upon his trial and judgment, and to him he is to be remitted after judgment till execution, and whereſoever the felony or treaſon was committed, yet the marſhal is to make execution, for he is in this caſe the immediate officer to the court, and the priſoner is not in the cuſtody of any ſheriff, but of the marſhal.

And therefore the entry in this caſe of felony is, *Et dictum eſt mareſcallo, Quòd faciat executionem periculo incumbente.*

But in caſe of high treaſon the marſhal is mentiond in the very judgment, *viz. quòd ducatur per præfatum mareſcallum uſque priſonam mareſcalli mareſcalciæ domini regis, & deinde uſque ad furcas ſancti* Thomas Watrings *trahatur & ibidem ſuſpendatur &c.* thus is the entry of the judgment, *P.* 44 *Eliz.* againſt *Patrick Dalph B. R. T.* 43 *Eliz. B. R.* againſt *John Tipping, T.* 39 *Eliz. B. R.* againſt *John Jones.*

And in the caſe of *Brown P.* 25 *Car.* 2. that had judgment in the king's bench for felony upon the ſtatute of 3 *H.* 7. for an offenſe committed in *Middleſex*, and there preſented and convicted, the execution was made by the marſhal in the uſual place of execution in the county of *Surrey* (*b*).

Only in theſe and the like caſes the court gives order to the ſheriff of the county, where the execution is made, to be aſſiſting to the marſhal.

V. As to the manner of the execution, as it is to be done by the proper officer, ſo it is to be done purſuant to the judgment.

The judgment in caſe of felony is, *ſuſpendatur per collum, quouſque fuerit mortuus.*

The ſheriff may not alter the execution, if he doth, it is felony, and ſome ſay murder. *Co. P. C. p.* 211, 217. (*c*).

If

(*b*) The like was done in *Althoe's* caſe *T.* 9 *Geo.* 1. *B. R. vide ſupra in notis p.* 312.

(*c*) *Vide Part* I. *cap.* 42. *p.* 501. *in notis.*

If the party be hanged and cut down and revive again, yet he muſt be hanged again, for the judgment is to be hanged by the neck *till he be dead* (*d*).

The judgment in high treaſon is complicated, *viz.* hanging, beheading, imbowelling, *&c.*

The king may pardon all but the beheading, for this is part of the judgment, the judgment is not alterd, but part of it remitted. *Co. P. C. p.* 52.

But this muſt be under the great ſeal. *Co. P. C. p.* 31.

CHAP. LVIII.

Concerning reprieves *before or after judgment.*

REprieves, or ſtays of judgment or execution are of three kinds, *viz.*

I. *Ex mandato regis*, thus we find it done in 3 *H.* 7. 7. *a.* tho *ore tenus*, or by ſome meſſage, or by ſending his ring, but at this day it is ordinarily ſignified by the privy ſignet, or by the maſter of requeſts.

II. *Ex arbitrio judicis.* Sometimes the judge reprieves before judgment, as where he is not ſatisfied with the verdict, or the evidence is uncertain, or the indictment inſufficient, or doubtful whether within clergy; and ſometimes after judgment, if it be a ſmall felony, tho out of clergy, or in order to a pardon or tranſportation. *Crompt. Juſt.* 22. *b.* and theſe arbitrary reprieves may be granted or taken off by the juſtices of gaol-delivery, altho their ſeſſions be adjourned

(*d*) *Vide Coron.* 335.

or finiſhed, and this by reaſon of common uſage. *Dy.* 205. *a.*

III. *Ex neceſſitate legis*, which is in caſe of pregnancy (*e*), where a woman is convict of felony or treaſon. *Co. P. C.* 17. *Stamf. P. C. Lib.* III. *cap. ult.*

1. *Enſeinture* is no ground to ſtay judgment, and therefore if a woman convict be asked what ſhe can ſay why judgment ſhould not be given, *enſeinture* is no cauſe of ſtay; but when judgment is given, ſhe ought again to be demanded why execution ſhould not be made, and there ſhe may allege *enſeinture in retardationem executionis.* 22 *Aſſiz.* 71. *Coron.* 180.

2. *Enſeinture* is no cauſe to ſtay execution, unleſs ſhe be *enſeint* with a *quick* child, or which is all of one intendment, if ſhe be *quick* with child. 22 *Aſſiz.* 71. *Coron.* 180.

3. When this is objected in delay of execution, it ought to be inquired of by a jury of twelve diſcreet women, and their verdict is to be recorded, and according as they give it the execution is to proceed or to ſtay. *Ibid.*

4. This privilege is to be allowd but once, for if ſhe be a ſecond time with child, ſhe ſhall not thereby delay execution, but the gaoler ſhall be puniſhed for not looking better to her. 12 *Aſſiz.* 11. *Coron.* 168. 23 *Aſſiz.* 2. *Coron.* 188.

5. If ſhe be *priviment enſeint* and not *quick* with *child*, and only ſo found by the jury of women, that is no cauſe of reſpite; but I have rarely found but the compaſſion of their ſex is gentle to them in their verdict, if there be any colour to ſupport a ſparing verdict.

6. This reprieve is or ought to be a matter of record, and therefore I have always taken it, that altho ſhe be deliverd before the next ſeſſions, yet the ſheriff ought not to make execution after her delivery, neither ought the judge to give ſuch direction upon the reprieve granted, but at the next ſeſſions the woman muſt again be called to

(*e*) Thus it was by the civil law. *Dig. Lib.* XLVIII. *tit.* 19. *de pœnis l.* 3. and alſo by the laws of *William* the conqueror *l.* 35. *vide Bract. de Coron. cap.* 32. §. 11. *Fleta Lib.* I. *cap.* 38. §. 15. *vide Part* I, *p.* 368.

ſhew what ſhe can ſay why execution ſhould not now be made, and ſhe is to be heard 12 *Aſſiz.* 11. *Coron.* 168. *ameſne al barre,* for it may be the *tempus præſtitutum* for her delivery ſince the laſt ſeſſions is not yet paſt, and ſhe muſt ſtay till then, or it may be ſhe hath ſince had the king's pardon, which the ſheriff cannot allow nor judge of.

And therefore the books tell us, that after her delivery ſhe was brought to the bar again to ſhew what ſhe could ſay why execution ſhould not be made; this bringing to the bar muſt needs be at a ſecond or following ſeſſions. 12 *Aſſiz* 11. *Coron.* 168. 22 *E.* 3. *Coron.* 253.

4

The End of the Second Volume.

A

TABLE

OF THE

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Warrant iſſued by juſtice of proper county to take a felon, he before arreſt flies into forein county, and is purſued and taken, he muſt be carried before juſtice of forein county; but if taken in proper county, he eſcape into the foreign, he may be brought before juſtice of either. 581. II. 94, 115

Conſtable hath ſame protection on purſuit and arreſt in forein county, as proper, whether he hath a warrant or not. II. 94

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Conſtable cannot ſubſtitute. *ib.*

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Sheriff or bailiff, on *cap. utlegatum*, *cap. pro fine*, or other proceſs for *king*, may break open doors, if not opend on demand. *Page* 459

Where officer muſt ſhew his warrant, or not. 458, 462, 583. II. 92, 116

A private man muſt ſhew his warrant, or ſignify contents. 459

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Where conſtable *ex officio* may break open doors to take felon. II. 90, 92, 202, 203

Where conſtable on *hue and cry* may break open doors or not. II. 102, 103

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Difference between private man's and conſtable's arreſting on ſuſpicion. II. 92

On

On *excommunicato capiendo* doors cannot be broke open. II. *Page* 116

If juſtice iſſue a warrant to take a felon, who is in juſtice's houſe, officer after demand, *&c.* may break open the door; and ſo for ſuſpicion of felony. II. 116, 117

Where ſheriff on civil proceſs may break open the houſe of another than the party, againſt whom proceſs is. II. 117

Judge of *B. R.* may *ore tenus* command a tipſtaff to arreſt, without expreſſing cauſe. 586

Officer or private man breaking open a houſe to take a felon, a treſpaſſer to the owner, if felon not there. II. 117

Juſtices of *oyer* and *terminer* may iſſue a commiſſion to take one indicted before them, whereby doors may be broke open, but commiſſion muſt be ſhewn, if demanded. II. 106

Conſtable, or his watch may break open doors to keep the peace, or in caſe of diſorderly drinking, or noiſe in a houſe at unſeaſonable hours. II. 94, 95

Conſtable *ex officio* may arreſt one, that has broke the peace in his view, and keep him in his houſe or ſtocks. 587

Where one is dangerouſly hurt, conſtable may impriſon on common fame, or report of another. *ib.*

Whether on an affray out of view, he can arreſt without warrant. *ib.*

Where private man may arreſt without warrant, whether felony done in ſame county, or not. 587, 588. II. 76

A. dangerouſly wounds *B. C.* being preſent may impriſon *A.* till brought before juſtice, or deliverd to conſtable. *Page* 558. II. 77

Felony committed, a private man may arreſt on probable cauſe of ſuſpicion. 558, 595. II. 78, 81

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How and in what time private man to diſmiſs himſelf of offender. 589. II. 77, 81

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Prevention of arreſts, a miſdemeanor, not felony. 606

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What required to maintain a juſtification of impriſonment, on ſuſpicion, and how officers and private men are to juſtify in ſuch caſe. II. 78, 79, 80, 91

No felony, no ground of ſuſpicion. II. 78

No felony done, party arreſted may be inlarged, and eſcape diſpuniſhable. II. 78, 79

But in caſe of a felony, tho party arreſted innocent, who lets him go not being duly deliverd, is puniſhable. II. 79

Regularly, party ſuſpecting muſt arreſt. *ib.*

What party ſuſpecting is to do to oblige conſtable to aſſiſt. *ib.*

Juſtice to be acquainted by him with whole caſe. *ib.*

Juſtification in aid of conſtable on felony done, and a ſuſpicion, is good. II. 79, 80

Suſpicion may be by any; impriſonment muſt be by conſtable. II. *Page* 80

If goods of *A.* be ſtolen, and found in *B.*'s cuſtody, and *A.* makes the caſe appear to the conſtable, and requires him to bring *B.* before a juſtice, this is a good juſtification in *A. ſans averment*, that he ſuſpected him. *ib.*

A felony committed, *A.* has probable cauſe to ſuſpect *B.* and acquaints *C.* with the whole matter, *C.* hereupon having probable cauſe to ſuſpect *B.* may juſtify by his own ſuſpicion; and ſo may one coming in aid of *A.* to arreſt *B.* *ib.*

One may allege twenty cauſes of ſuſpicion, and it ſhall not make his plea double; what makes an iſſue upon the whole. II. 81

If private man diſcharge party ſuſpected without bringing him to juſtice or conſtable, it is an eſcape, but makes not impriſonment illegal. *ib.*

He muſt not carry him to gaol of any other county, than where taken, unleſs there be no gaol in that county. *ib.*

Arreſt on ſuſpicion permitted by law, not commanded. II. 82, 84

Not ſame privilege in all points allowd to him, that arreſts on ſuſpicion, as to one arreſting on hue and cry, or by warrant, or his certain knowledge of the felony. II. 78, 82, 84

If he, that arreſts on ſuſpicion, break open doors, it is at his peril; if party be a felon, it is juſtifiable, otherwiſe not; but he may enter by the doors open to arreſt. II. 82

To prevent murder, a private perſon may break open doors. II. *Page* 82

But in all arreſts muſt acquaint party with cauſe thereof. *ib.*

Party not bound to take notice of a private man, as authoriſed to arreſt, and may fly from him, if innocent. II. 83

But is bound to take notice, and ſubmit to a conſtable arreſting in *king*'s name, or offering ſo to do. *ib.*

Private man cannot beat innocent man arreſted on ſuſpicion, but only lay his hands gently on him. *ib.*

A bailiff cannot beat defendant before the arreſt, yet after arreſt and eſcape, a bailiff may juſtify beating him. *ib.*

Of officers of publick juſtice *virtute officii* impowerd by law to arreſt felons and perſons ſuſpected of felony, and who they are? II. 85, 86, *&c.*

How they are protected by law. II. 85

Their actings not arbitrary, but neceſſary duties; they under ſevere puniſhments for neglect. *ib.*

Need no warrant to arreſt felons, and thoſe probably ſuſpected. *ib.*

All perſons bound to be aiding and aſſiſting to theſe officers upon their ſummons in preſerving the peace, and apprehending malefactors, eſpecially felons. II. 86

If any refuſe, how puniſhable. 581. II. 86, 115

Aſſiſtants under common protection of law with officers. II. 85

By ſtatute may plead general iſſue, and have double coſts, as well as officers. II. *Page* 85
Where a private man may arreſt a felon, theſe officers may do it. *ib.*
What power juſtices of peace have, *quoad* arreſt of felons. *ib.*
Juſtice ſeeing a felony, or other breach of peace done in his preſence, may arreſt felon. 587. II. 86
So he may by word command any one to take him, which is a good warrant without writing. *ib.*
But if done in his abſence, then muſt iſſue his warrant in writing. *ib.*
If there be any riot or breach of peace like to happen by a tumultuous meeting, *&c.* he may command his ſervant, or others to prevent it by arreſting parties. II. 86, 87
If he hath, either from himſelf or by a credible information, knowledge of a felony done, and juſt cauſe of ſuſpicion of any one, he may himſelf arreſt and commit that perſon. II. 87
By ſtatute ſheriff injoined to arreſt felons, and all perſons required to aſſiſt on his ſummons. *ib.*
Taking felons belongs to ſheriff, as conſervator of peace. *ib.*
Sheriff may arreſt one ſuſpected of felony. *ib.*
Coroner conſervator of peace with regard to all felonies, and can command them to be apprehended, tho he can take no inquiſition, but of death. II. 88
Office of *conſtable*, miniſterial and original, or primitive, as conſervator of peace at common law. II. *Page* 88, 90
Ought to execute precepts of juſtices, coroners, *&c.* or in default, finable. *ib.*
By his original power may, for breach of peace and ſome miſdemeanors leſs than felony, impriſon. *ib.*
If one expoſe an infant in the cold to deſtroy it, or charge pariſh, conſtable may take him and put him in the ſtocks. II. 88, 90
If aſſaulted, tho in his own caſe, may impriſon party and carry him to gaol. *ib.*
But for opprobrious words, or a general hindrance of him to ſummon traind bands to attend mayor of *London* on his precept, held he could not juſtify impriſoning, but ought to have brought party to a juſtice. *ib.*
What may be done by conſtable, may be done by his deputy; for by law he may make a deputy, who within 7 *Jac.* may plead general iſſue. *ib.*
If one menace to kill another, on complaint conſtable may arreſt and put him into the Stocks, till he can conveniently bring him to a juſtice, and to avoid preſent danger. II. 88, 89
Conſtable cannot take ſurety of peace by recogniſance, but whether by bond, and that for affray or menace of breach of peace in his view. II. 89, 90
If he be informed, that a man and woman are incontinent together, he may take neighbours and arreſt them, and commit them to find ſureties for good behaviour. *ib.*

Whether

Whether he may arreſt one ſuſpiciouſly reſorting with women of ill fame to a houſe ſuſpected of common bawdry, and what a good juſtification for him, or any in his aſſiſtance to plead. II. *Page* 89, 90

May arreſt ſuſpicious night-walkers, and men that ride armed in fairs or markets, or elſewhere. II. 89, 90

May execute his office on information and requeſt of others, that ſuſpect and charge offenders but with ſuſpicion. *ib.*

Where felony done, he may *ex officio* arreſt and impriſon till felon can conveniently be conveyd to a juſtice, or common gaol. *ib.*

All one, whether felony done in ſame vill, or in any other vill or county, if felon be within vill, where he is conſtable. *ib.*

Is by law injoined to take a felon, and, if he neglects his duty, indictable. II. 91

Not material, whether he ſaw felony committed, or hath it by complaint and information; in both caſes bound to take felon, and ſearch for him within limits of his juriſdiction, and to raiſe hue and cry. *ib.*

If a felony done, *A.* ſuſpects *B.* on probable grounds, and acquaints conſtable, and requires his aid, conſtable may apprehend *B.* tho ſuſpicion ariſe in *A.* firſt. *ib.*

But *A.* ought to be preſent. *ib.*

He ought alſo to inquire and examine circumſtances and cauſes of ſuſpicion of *A.* which tho he cannot do on oath, yet ſuch information may make it conſtable's ſuſpicion. II. *Page* 91, 92

A felony in fact muſt be done, and conſtable muſt aver it in his plea, and it is iſſuable. II. 92

Conſtable, officer known within vill, preſumed of ſufficiency. *ib.*

Conſtable to do his duty, as well in caſe of probable ſuſpicion, as actual felony. II. 93

On a ſudden affray he may put parties in ſtocks or priſon, till their paſſion or intemperance be over. *ib.*

If crime committed, for which conſtable may arreſt, whither he may convey priſoner. II. 95

Safeſt to carry him before a juſtice. *ib.*

Till he can conveniently convey parties arreſted to a juſtice, or common gaol, he may detain them in ſtocks, if none in that vill, then in thoſe of next. II. 95, 119

If he be of quality or ſick, how long, and where conſtable may, and ought to keep him. II. 96, 119, 120, 122

Charges of ſending malefactors to gaol by common law are to be born by vill, where apprehended; but by ſtatute by priſoner, if able; if not, how levied. II. 96

Commiſſion iſſuing out of *Chancery* to take *J. S.* and his goods, before indicted, againſt law. II. 106

Yet a good juſtification in officer. *ib.*

Sheriff at common law might iſſue a warrant, to take a felon before indictment. II. 107

Coroners by their warrants may attach man-ſlayers after inquiſition finding them guilty. II. *Page* 107
May alſo make out warrants againſt perſons preſent, and not guilty; againſt burglars and robbers. *ib.*
If warrant be barely for a miſdemeanor, officer cannot purſue party into another county, but in caſe of felony, affray, or dangerous wounding, officer may purſue him, and raiſe hue and cry upon him into any county. II. 115
Juſtice's warrant ſufficient cauſe of ſuſpicion and purſuit. *ib.*
One having warrant to arreſt for felony, *&c.* cannot make a warrant to another as his deputy, or command another to execute it in his abſence. *ib.*
Warrant directed to a known officer, enough for him to ſay, *I arreſt*, &c. II. 116
Safe for officer to acquaint party with what he arreſteth him for. *ib.*
A warrant of a juſtice may be executed in a franchiſe. II. 116
If juſtice hath juriſdiction, tho he err in granting his warrant, officer in executing it excuſable. II. 119
Yet in ſome caſes, as touching rates for the poor, tho he hath juriſdiction by 43 *Eliz.* officer is puniſhable for executing warrant, where none ought to iſſue, becauſe a circumſcribed juriſdiction. II. 119
After arreſt officer forthwith to bring party to gaol, or to juſtice, according to warrant. *ib.*
When he hath brought him to juſtice, yet in law he is in cuſtody, till either juſtice diſcharge or bail him, or till he be actually committed. II. *Page* 120
For more touching warrants. Vide **Juſtice of Peace.**
Where killing peace-officer is murder or manſlaughter. Vide **Murder** and **Manſlaughter.**
Where killing a felon, that reſiſts or flies, before or after arreſt, is juſtifiable or not. Vide **Homicide.**
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Setting fire to a houſe without burning any part, no felony; *contra*, if part burnt, felony by common law. 568, 569
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How the ſeveral entries are, and of other differences between bail and mainprize. II. 35, 124, 125
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Of bail *corpus pro corpore*; now rarely uſed; why diſuſed; only fined, if he brought not in principal at the day. *ib.*
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Uſually bail only a recogniſance in a ſum certain, for appearance of a felon; principal bound in double the ſum. *Vide* the form. *ib.*
What ſort and number of ſureties are required, but theſe things, as well as the ſum, diſcretionary in him, who takes recognizance; therefore ſureties may be examined on oath. *ib.*
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Form of the true and regular bail, where party an infant, or in priſon, and ſo abſent; hereupon a warrant iſſues under hand and ſeal of the perſon, who takes the bail, for his inlargement, called *liberate*. *ib.*
Seal of juſtice not neceſſary; ſubſcription ſufficient. *ib.*

If party baild by juſtice before commitment, or if committed and brought into *B. R.* or ſeſſions to be bailed, then himſelf is alſo bound. II. *Page* 126

Sometimes recognizance ſimple, with a condition added for his appearance, and ſometimes condition containd in body of recognizance. *ib.*

When any is baild for any miſdemeanor by *B. R.* either on return of *habeas corpus*, or otherwiſe, the return or record ought to be firſt filed, and a *committitur mareſcallo* enterd, and then bail taken. II. 126, 127

All baild in *B. R.* are *de facto*, or ſuppoſed in law to be *in cuſtodiâ mareſcalli.* II. 127

Such bail not only a recognizance in a ſum certain, but alſo real bail, and they are his keepers, and, if cauſe, are puniſhable by fine beyond the ſum mentiond, and may reſeiſe priſoner, if they fear his eſcape, or render him in their own diſcharge. II. 126, 127

Regularly, in all offenſes againſt common law or ſtatutes, that are below felony, offender bailable, except after judgment, or bail be ouſted by ſtatute. II. 127

What ſtatutes relate to bailing offenders. *ib.*

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B. R. may bail in any caſe whatſoever, either in treaſon or murder, but this diſcretionary, not *de jure.* II. *Page* 129, 148

Whereon bail may be taken by *B. R. viz.* on original indictment, *&c.* II. 129

One found guilty of homicide *ſe defendendo*, juſtices of *gaol-delivery* may certify it into chancery, that he may ſue his pardon on courſe, and may bail him till next ſeſſions. *ib.*

They on inquiſition before coroner finding it *ſe defendendo* ſpecially, may bail party till next ſeſſions to procure ſuch pardon. II. 130

They may in the interval of the ſeſſion bail a convict of manſlaughter having a pardon to plead, to another ſeſſions. *ib.*

But if one be convict on trial againſt opinion of the judge, judge cannot bail him to ſue his pardon. II. 130

While court adviſeth, whether convict within clergy, he is not bailable. II. 130, 131, 132

One indicted of murder at a ſeſſions of *gaol-delivery* prays his trial, but proſecutor for *king* is not ready; on cauſe ſhewn, juſtice of *gaol-delivery* may bail. II. 131

One arreſted by *king*'s perſonal command, not bailable on writ *de homine replegiando*, yet by *B. R.* or chancery on an *habeas corpus.* *ib.*

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Common writs *de homine replegiando*, or *de manucaptione* directed to ſheriff. II. 132

Some crimes not bailable for the heinouſneſs, other for the notoriety of them. *ib.*

Perſons outlawd not bailable by 3 *E.* 1. II. *Page* 132
If an outlaw of felony be taken on a *capias utlegatum*, and plead in avoidance of outlawry, or bring error to avoid it, *B. R.* may bail; whether outlawry on appeal or indictment. II. 132, 133
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Perſons having abjured for felony, not bailable. *ib.*
Taken in the *mainouvre* not bailable, but that is intended of thief himſelf. *ib.*
Felons breaking priſon, not bailable. *ib.*
Nor notorious thieves; herein common fame may be oppoſed againſt their bailing, unleſs they ſhew reaſonable evidence to prove their innocence. *ib.*
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Nor for counterfeiting *king*'s great or privy ſeal. *ib.*
Nor one excommunicate, unleſs for a temporal cauſe, and then on a prohibition granted, he may not only be bailed, but deliverd, or on an appeal, and a ſpecial writ *de cautione admittendâ*, which if not obeyd by the ordinary, a ſpecial writ may iſſue for his inlargement. II. *Page* 134
Nor one impriſoned for ſome open miſdeed; as if *A.* dangerouſly wound *B.* he may be impriſond till it be known, whether party will die or live, and regularly, not bailable till danger appear to be over. *ib.*
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Or of commandment, force or aid to felony done. *ib.*
Regularly in all felonies, even murder, acceſſary bailable, till principal attaint. II. 135
But principal once attaint, and then acceſſary taken, he ſhall not be bailed, till he hath pleaded to indictment, but after plea pleaded, he ſhall. *ib.*
One indicted for offenſe, wherefore he ought not to loſe life or member, bailable, ſave for offenſes againſt *acts* ouſting bail. *ib.*
One appeald by an approver ſince dead, bailable. *ib.*
If tenor of *mittimus* be to detain one without bail or mainpriſe; yet if offenſe bailable, he may be baild. *ib.*

Penalties

Penalties of 3 *E.* 1. for bailing one not bailable, and for detaining perſons repleviſable, after ſurety offerd. II. *Page* 135
Juſtices of peace being inſtituted, bailing offenders devolved on them. II. 136
Their power of bailment extended farther than ſheriff's, and in ſome kinds, than limits preſcribed by 3 *E.* 1. *ib.*
In ſome reſpects ſheriff's power, as to bailing in crimes not capital, inlarged by 23 *H.* 6. II. 136, 137
By 34 *E.* 3. Juſtices of peace have power to take and commit malefactors, or bind them to good behaviour. II. 136
1 *R.* 3. gives to any one juſtice power to bail any priſoner for felony, and excepts not manſlaughter. II. 137
Before this *act* doubtful, whether they could bail till indictment at their ſeſſions. *ib.*
3 *H.* 7. repeals 1 *R.* 3. as to bailing by one juſtice, and gives it to two juſtices, whereof one of the *quorum*; it limits their power of bailment to caſes bailable by law, and takes in 3 *E.* 1. as the *directory*, who are bailable by law. *ib.*
1 & 2 *P.* & *M.* expreſly makes 3 *E.* 1. a direction for bailing offenders. II. 128, 132, 137
By 1 & 2 *P.* & *M.* one arreſted for manſlaughter, or other felony bailable by law, or ſuſpicion thereof, ſhall not be baild but by two juſtices, one of *quorum*, both to be preſent at bailing ſuch offender, and certify it at next *gaol-delivery*. II. 138
But juſtices of peace and coroner in *London*, &c. to do as formerly. *ib.*
Juſtices of *gaol-delivery* may fine juſtices of peace offending againſt this *act*. II. *Page* 138
2 & 3 *P.* & *M.* only provides for examinations, &c. to be taken by juſtices, as well on commitment, as bailing priſoner for manſlaughter, or other felony. *ib.*
The queſtion, whether juſtices of peace may bail in manſlaughter, conſiderd. II. 138, 139, 140
In murder *B. R.* only can bail. II. 139
In manſlaughter, if there be plain proof, or a confeſſion, that one was kild, and that by *J. S.* whether done *ex malitiâ præcogitatâ*, or on a ſudden falling out, or but *ſe defendendo*; yet one or two juſtices, (whereof one of the *quorum*), cannot bail by any law in force. *ib.*
Whether it doth *conſtare de perſonâ occidentis*, or *de modo occidendi*, or not, yet if party indicted of manſlaughter, or, tho it were but *ſe defendendo*, juſtices of peace cannot bail. *ib.*
But if manſlaughter committed, and a party ſuſpect is brought before two juſtices of peace, (whereof one of *quorum*), and there be any doubt of identity of the perſon, they may bail him by 1 *R.* 3. *ib.*
1 *R.* 3. the *baſis* of 3 *H.* 7. and this of 1 & 2 *P.* & *M.* *ib.*
3 *E.* 1. (*Weſtm.* 1.) tho it ſay *de morte hominis* there is no bail at common law, it muſt be intended, when offender is certainly known, for it generally provides, that perſons taken on a light ſuſpicion ſhall be bailed. *ib.*

1 & 2 *P. & M.* ſuppoſing one taken for manſlaughter bailable, muſt mean ſuch a manſlaughter, where party is only ſuſpected, not where fact is done by him. II. *Page* 139, 140
Where writ *de homine replegiando* lies, or not. II. 141
Of the general writ *manucaptione*. *ib.*
Where it lies. II. 141, 142
Some taken by writ or proceſs may be baild, *virtute officii*. II. 143
Where ſpecial writs of mainprize lay. *ib.*
Priſoners for felony antiently baild to ſerve *king* in his wars. *ib.*
B. R. may, *virtute officii*, bail any brought before them. II. 148
Sheriff might formerly, *ex officio*, at common law bail offenders indicted before him in his *Turn*, or on a commiſſion to him, but this power transferd to juſtices of peace. II. 148, 149
Marſhal of *B. R.* took on him antiently, *virtute officii*, to bail perſons indicted or appeald, but this power wholly ouſted by ſtatute. II. 149
At common law, without aid of 18 *Eliz.* priſoner acquitted might be bound to his good behaviour, if of ill fame. II. 394
In indictment or appeal tranſmitted to juſtices of *niſi prius*, if priſoner be baild to appear in *B. R.* and appear not, priſoner to be called on his bail, and default recorded; and ſo on return of *poſtea*, new proceſs againſt priſoner and his bail. II. 404
Perſonating bail, felony *ſans* clergy by 1 *Jac.* but no corruption of blood, or loſs of dower. *696*
Bail taken, but not filed, not within it, [but ſince made felony]. *Page 696*
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Baſtiff. Vide Arreſt, Homicide, Murder.

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Whether in indictment will need be alleged. II. 180
Triable *de corpore comitatûs*. *ib.*
A barretor is ſo every where. *ib.*

Baſtard-child. Vide Evidence, Indictment.

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At common law, without aid of 18 *Eliz.* priſoner acquitted might be bound to his good behaviour, if of ill fame. II. 394

Bigamy. Vide Poligamy.

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Breach of Peace. Vide Arreſt, Riot, Juſtice of Peace.

Breach of Priſon.

Thereby cauſing eſcape of traitors, treaſon; but to make it ſo, they muſt be actual traitors; ſo of felons, felony. 141, 234 *to* 237, 326
Priſoner for treaſon, *&c.* breaking priſon may be indicted before convict of principal offenſe; *contra* of eſcape or reſcue. 237, 238, 269, 611. II. 224, 254
Breach of priſon by traitor, only felony. II. 237

War levied to break priſon, with intent to deliver ſome particular perſons, unleſs impriſond for treaſon, only a great riot; but if to break priſons generally, treaſon. *Page* 134
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Reſcuing priſoners for a new treaſon, tho not expreſly mentiond in the *act*, is by neceſſary conſtruction treaſon. 236
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But if commitment expreſs larciny above value, or manſlaughter, tho *de facto* otherwiſe, felony. *ib.*
If *mittimus* want a regular concluſion, ſufficient; but *ſans* cauſe expreſſed, whether felony. *ib.*
When breach of priſon firſt became felony. 610
Enough, if priſoner hath a notification of offenſe whereof arreſted, to make breach of priſon felony. *ib.*
If offenſe, for which party committed, appear not by matter of record, as indictment, neceſſary a felony be done, and ſo laid in indictment, and proved; elſe breach of priſon no felony; *contra*, if it appear by record. *Page* 599 610
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Breach of priſon by one committed for ſuſpicion of felony, if a felony done, is felony. 610
One committed for a felony made by ſtatute *Puiſne* to 1 *E.* 2. breaks priſon, felony. 611
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If gaoler ſet open priſon doors, and a felon eſcape, no felony in priſoner. *ib.*
If priſoner reſcued, or priſon broke by ſtrangers without his privity, no felony in priſoner, but in ſtrangers as a reſcue; but if by his procurement, felony in him, as a breach of priſon. *ib.*
If felon acquitted of principal felony, he ſhall not be arraigned of breach of priſon, or if indicted for the latter before acquitted of the former, and then be acquitted of the former, he may plead it in bar to indictment for the latter. 611, 612. II. 224, 254, 255
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Buggery.

Buggery with man or beaſt, principal ouſted of clergy by 25 *H.* 8. revived by 5 *Eliz.* acceſſaries *before* and *after* within it. *Page* 669

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If committed on one of age of diſcretion, both felons; otherwiſe only the agent. 670

All preſent and aſſiſting, principals. *ib.*

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Watching at lane's end a preſence, and makes party a principal. 439, 534, 555, 563

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When it ſhall be ſaid night. 550, 551

Both breaking and entring muſt be in the night, and a felony done or intended. 551, 555, 559

But if hole broke one night, with intent to enter another, and they come the next night, and commit felony thro the hole, burglary. 551

Antiently barely coming with intent to commit it, capital. *ib.*

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A bare breaking in law not ſufficient to make a burglary. *Page* 551, 552

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Whether going down a chimney to ſteal, be burglary. 552

Servant in the night opens a door and lets in a thief to rob his maſter, burglary in both. 553

A. enters by an open door, *&c.* and then unlatcheth a chamber-door to ſteal, burglary. *ib.*

If a thief be lodged in an inn, and in the night ſteal goods, and go away, or if he enter ſecretly in the day, and ſtay till night, and then ſteal and go away, not burglary; *contra*, if he open an inner chamber-door and ſteal. *ib.*

Servant in the night draws the latch of a ſtair-foot-door, and enter's his maſter's chamber to murder him, burglary. 554

Whether opening door to go out, be burglary. *ib.*

Whether, if door of the chamber of a lodger in an inn be latched, and the lodger in the night open his own door and ſteal goods in the houſe, be burglary. *ib.*

But if he open chamber of another lodger to ſteal his goods, burglary. *ib.*

It muſt in that caſe be ſuppoſed of the manſion-houſe of the inn-keeper. 554, 557

Entring *per oſtia aperta*, breaking a cheſt and ſtealing, not burglary, becauſe cheſt not part of houſe; *contra* of a ſtudy, counting-houſe or ſhop, tho none uſually lodged in the ſtudy, *&c.* *quære*

quære of a cup-board or counter fixed to the houſe. *Page* 554, 555

A. with intent to rob *B.* breaks a hole in his houſe, *B.* for fear throws out his money, *A.* takes it and carries it away, whether burglary. 555

Where putting hand, hook or piſtol within window, burglary. 553, 555

But whether ſhooting without, and bullet coming in be an entry, to make it burglary. 555

A. ſends infant of ſeven years in at window, who ſteals and delivers goods to *A.* burglary in *A.* tho child, who made the entry, be excuſed. 555, 556

So in husband, where wife in his preſence, and by his coercion commits burglary, tho ſhe ſhall be acquitted. 556

How indictment ought to be for breaking and entring a church. *ib.*

May be committed of a houſe, tho all perſons out. *ib.*

So, if one have two houſes, and live in them alternately. *ib.*

A chamber in a college or inn of court, a manſion-houſe. 522, 527, 528, 556

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How indictment laid for breaking lodgings of a ſervant of the *king* at *Whitehall*. 522, 523

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If ſervant's lodging be broke open, whoſe manſion-houſe it ſhall be ſuppoſed. 557

A tent or booth not a manſion-houſe, therefore provided for by ſtatute. *ib.*

A ſhop is parcel of a manſion-houſe. *Page* 557

A. demiſes to *B.* a ſhop parcel of his houſe, burglary may be committed of it, if leſſee or ſervants ever lodge *there*; *contra*, if they only work *there*. 557, 558

Where out-buildings, as barns, *&c.* are parcel of manſion-houſe, and burglary may be committed of them, or not. 558, 559, 567

Burglary, how antiently defined. 559

Whether breaking wall about houſe or gate thereof, and entring *per oſtia aperta*, be burglary. *ib.*

Clearly not, if thief come over wall of the court. *ib.*

Muſt be proved to be *eâ intentione* to commit ſome felony, not *ad verberandum*, tho killing may be the conſequence. 561

Tho intent not accompliſhed, yet burglary, and ſo differs from robbery. 561, 562

Intention muſt be of a felony by common law, and not *newly* made by *ſtatute*. 562

Breaking houſe with intent to commit a rape, tho *per aſcum* no burglary, yet otherwiſe. *ib.*

In burglary thoſe without aſſiſting, ouſted of clergy. II. 359

Simple burglary, 1. When any one in the houſe, and put in fear. 2. Where none put in fear, or none in the houſe. II. 360

Principals ouſted of clergy in former by 1 *E.* 6. and in latter by 18 *Eliz.* 549, 555, 562. II. 360, 361

Acceſſary *before* not ouſt [till late act]. II. *Page* 361, 363
4 & 5 *P. & M.* extends not to burglary at large. 564

Of ſpecial or improper burglaries, or larciny from, or robbing of houſes.

——Robbing one in his dwelling-houſe, the owner, &c. therein, and put in fear.

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In 23 *H.* 8. a ſaving for clerks, but by 1 *E.* 6. equally exempt with others. 517 *to* 521
Clergy allowd to one attaint. 521. II. 352
If a ſtranger only be in the houſe, clergy allowd. II. 352, 353

Breaking a houſe by day or night with intent to ſteal, any one being therein and put in fear.

In what caſes principal ouſt by 1 *E.* 6. both in appeals and indictments. 520. II. 353, 360, 361
Where in a forein county by 5 & 6 *E.* 6. II. *Page* 353, 360, 361
Acceſſaries *before* ouſted. 562, 563. II. 362
If breaking be in the night, ſuch breaking muſt amount to burglary, and then it ouſts clergy, if it be with a putting in fear, tho no robbery. II. 353
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Robbing any perſon in his dwelling-houſe, the owner, &c. being in any part of the houſe, or within its precincts ſleeping or waking, tho there be no putting in fear, and this extends to booths in fairs.

Principal ouſt by 5 & 6 *E.* 6. on conviction only, [but by late act in other caſes]. 520
Acceſſaries *before*, where a robbery committed, and any perſon within the houſe put in fear, ouſt by 4 & 5 *P. & M.* but not without robbery. 521, 548. II. 355, 360, 361, 362
Actual breaking, ſuch as would make a burglary, and *taking* required, but not *putting in fear*. 526, 527, 548. II. 354, 355, 362

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A thief coming into the houſe by doors open, breaks a chamber-door or counter, and takes goods, a breaking within this *act*, whether breaking a cheſt not fixed to the freehold be ſo. 523, 524, 526, 527
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Robbing a ſhop in *Weſtminſter-hall* not within 5 *&* 6 *E.* 6. to be ouſted of clergy. 524, 525
Where a ſervant ſhall be ſaid to break the houſe, or not. II. 354, 355
A ſtranger only being in the houſe, clergy not ouſted. II. 355
To what caſes it extends. *ib.*
It extends to appeal, as well as indictment. *ib.*
Whether, on this ſtatute, he that enters only be ouſted of clergy. II. 359

Robbery to the value of 5 s. out of any dwelling-houſe, or out-houſe thereto belonging, tho none in the houſe.

Principal ouſt by 39 *Eliz.* 524,525
Acceſſaries *before* not [till late ſtatute]. II. 357
To what caſes 39 *Eliz.* extends. 528. II. 357
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Entring by the door open, and breaking open a cheſt and ſtealing goods to the value of 5 *s.* not ouſted by this ſtatute, nor 5 *&* 6 *E.* 6. II. 357
Entring by outward doors open, and breaking open, unlocking or unlatching an inward door, and ſtealing goods to 5 *s.* ouſted of clergy on this act. *ib.*
One breaking open a houſe by day, none being therein, and alſo breaking open a chamber-door and a cheſt, took out goods to 5 *s.* and laid them on the floor, and before he could carry them out of the houſe, was taken, ouſted of clergy. II. 358
Chamber in an inn of court *domus manſionalis* within this *act*. *ib.*
What breaking will bring party within 5 *&* 6 *E.* 6. *&* 39 *Eliz.* which will not make a burglary. 527

Burning in the hand. Vide **Clergy.**

Burning of houſes. Vide **Arſon.**

Canon Law. Vide Laws.

Capias. Vide Outlawry, Process.

Certiorari.

CRiminal cauſes not capital, as indictments of riots committed in *Wales*, may be removed by *certiorari* into *B. R.* and when iſſue joined, it may be tried in next *Engliſh* county, as well as in a *quo minus*. *Page* 157

Whether it lies into *Wales* on indictment of treaſon or felony, and for what ſpecial purpoſes, but not for trial of the fact, but it ſhall be ſent down by *mittimus* according to *6 H.* 8. 158

A felony or treaſon committed in *Durham*, a *certiorari* lies to remove it into *B. R.* out of *Durham*, and to whom it is to be directed. *ib.*

But if party plead *not guilty*, it ſhall be ſent down thither to be tried. *ib.*

Indictment of treaſon or felony removed out of county by *certiorari*, and party pleading, record ſent down by *niſi prius* to be tried; judge of *niſi prius* may on that record proceed to trial, judgment and execution, as juſtices of *gaol-delivery*, by 14 *H.* 6. II. 41

6 *H.* 8. extends to all juſtices, as well of *gaol-delivery*, as of the peace, and enables *B. R.* to ſend to them the record itſelf, and by ſpecial mandate to command them to proceed to trial and judgment on ſuch iſſue joined, as they may command juſtices, before whom indictment taken, to proceed, if no iſſue joined. II. *Page* 41

Appeal taken before coroner, *certiorari* how to be directed. II. 67

If a *certiorari* iſſue to remove record, and *habeas corpus* the body, yet in felony, tho they be returned and filed, court may remand him and record by *6 H.* 8. but in other caſes record cannot be remanded, but they muſt proceed in *B. R.* II. 147

But if body removed by *habeas corpus*, and record by *certiorari*, and the record not filed, tho return of *habeas corpus* be filed, a *procedendo* may iſſue. *ib.*

If cauſe and body be removed into chancery by *habeas corpus* and *certiorari* returnable there, they may be ſent into *B. R.* if body only be returned with cauſes by *habeas corpus* into chancery, and deliverd over to *B. R.* they may determine the return, and either by *procedendo* remand or grant a *certiorari* to certify record, and thereon commit or bail. II. 147, 148

Where *B. R.* either on indictment taken before them, or removed thither by *certiorari*, may iſſue *cap.* and *exigent* into any county. II. 198

Barely on return of outlawry on *certiorari* without *exigent* indorſed and returned together with *certiorari*, no writ of eſcheat lies for the lord. II. 206

But if *certiorari* directed to ſheriff and coroners, and *exigent* be extant in court, and they return

turn this outlawry; poſſibly this may be a ſufficient warrant to enter it on record, as a return on the *exigent*. II. *Page* 206, 207

Certiorari to coroners to remove outlawry after party's death, not grantable. II. 207

For what purpoſes *B. R.* iſſues writs of *certiorari*. II. 210

With writ of error, *quod coram vobis reſidet*, formerly went a *certiorari*. *ib.*

Habeas corpus removes the body, *certiorari* the record; court on return of former cannot give any judgment, or proceed on record of indictment without record removed by the latter, but proceedings ſtand in ſame force they did, tho return be adjudged inſufficient, and party inlarged; and court *below* may iſſue new proceſs on indictment, tho *contra* on *habeas corpus* in civil cauſes, for therein it is a *ſuperſedeas*. II. 210, 211

Certiorari's to remove indictments before juſtices of peace by 21 *Jac.* to be deliverd at quarter-ſeſſions in open court; recognizance in what penalty, and with what condition to be entred into, otherwiſe not a *ſuperſedeas*. II. 211

By whom *certiorari* to be ſigned. *ib.*

To whom to be directed, where it iſſues to remove indictment taken before juſtices of a county palatine, or the mayor of *cinque ports*. *ib.*

If they return privilege of county palatine or *cinque ports*, it ſhall not be allowd, but an *alias certiorari* iſſue, with a precept to produce their charters, whereby ſuch exemption is claimd. II. *Page* 212

Delivery of it doth not hinder taking an indictment after. *ib.*

Indictments taken after *teſte* of *certiorari*, and before or after delivery thereof, ought to be removed; and if court below proceed afterwards, proceedings void; and juſtices *below* in contempt, whether they proceed at ſame ſeſſions, or private ſeſſions after. II. 212, 215

Certiorari to remove all indictments againſt *A.* and *B.* removes all indictments wherein *A.* and *B.* are indicted, either alone, or together with any other. II. 212

Where one indictment is againſt divers men, and the offenſes are ſeveral, as in caſe of indictment againſt divers perſons for keeping ſeveral diſorderly houſes, a *certiorari* removes it only as to thoſe named in it; and as to the others record remains *below*; but *contra*, if juſtices *per manus ſuas proprias* deliver the bill into court againſt them all, as they may, and a record be made of that delivery. II. 214

If divers be indicted, and one tender ſecurity for coſts, it is ſufficient. II. 212, 213

If indictment be at private ſeſſions, it ought to be deliverd into quarter-ſeſſions, but delivery of *certiorari* at private ſeſſions cloſeth hands of juſtices, tho allowance of writ and tender of ſecurity muſt be by ſtatute at quarter-ſeſſions. II. 212, 213

Feme covert not within 21 *Jac.* to find ſureties. II. 213

If *certiorari* ought to be allowd, proceedings of juſtices after *coram non judice*. *ib.*

Removal of indictment of forceable entry by profecutor, not within 21 *Jac.* II. *Page* 213

Indictment of forceable entry at ſeſſions of the peace, and reſtitution awarded, and after ſeſſions, and before reſtitution actually made, a *certiorari* deliverd to one juſtice of peace; before 21 *Jac.* it cloſed up their hands, and no reſtitution was awarded, but juſtice made a *ſuperſedeas* thereon; and the ſame law now remains on indictments of forceably entry found at private ſeſſions. II. 213

Difference between writ of error and *certiorari*, as to ſuperſeding proceedings. *ib.*

Certiorari a *ſuperſedeas* from the delivery thereof for ever, unleſs a *procedendo* iſſue. *ib.*

In what caſes variance between *certiorari* and record cauſeth record not to be removed. II. 214, 215

Tho judicial proceedings void after *certiorari* deliverd, whether miniſterial be ſo. II. 215

Record not removed before return. *ib.*

After *certiorari* iſſued and deliverd, and before record removed, inferior judge may be enabled to proceed by *procedendo* or *ſuperſedeas* out of *B. R.* *ib.*

Record removed and filed, at common law no *procedendo* could be granted, nor record remitted; but *contra* by *6 H.* 8. *ib.*

Difference between *certiorari* in *B. R.* and chancery: In *B. R.* record itſelf is removed, and what remains below is but a ſcroll; but uſually in chancery, if *certiorari* be returnable there, tenor of record only is removed; and if tenor of record of indictment, attainder or conviction be removed by *certiorari* into chancery, and thence ſent by *mittimus* into *B. R.* they cannot thereon proceed to judgment or execution. II. *Page* 215

Vide Habeas Corpus.

Challenge.

Challenge for want of freehold allowd in treaſons, miſpriſions of treaſon, and murders by ſtat. 283

One outlawd in treſpaſs, neither lawful juryman, nor indictor in felony or treaſon. 303. II. 155*, 277

Whether father or ſon, or adverſary in a ſuit, be a lawful juryman. *ib.*

Jurors to be freemen, regularly freeholders. 264

Legales, *i. e.* without any juſt exception. *ib.*

Diviſion and ſubdiviſion of challenges. II. 267

By common law, if one outlawd of felony, *&c.* brought error on outlawry, and aſſignd error in fact, whereon iſſue was joind, he ſhould not challenge peremptorily. *ib.*

Like law, if he had pleaded any forein plea in bar or abatement. *ib.*

But if one had been indicted or appeald of treaſon or felony, and had pleaded *not guilty*, or any other matter of fact triable by ſame jury, and pleaded over to the felony, he might have challenged

challenged peremptorily any jurors under the number of three whole juries. II. *Page* 267, 268

If twenty indicted for ſame offenſe by one indictment, every priſoner allowd his challenge of thirty-five. II. 268

If but one *venire fac.* awarded to try them, perſons challenged by any one drawn againſt all. II. 263, 268

But in treaſon, if priſoner challenge above thirty-five, and inſiſt on it, and will not leave his challenge, it amounts to *nil dicit*, and judgment of death ſhall be given. II. 268

By 22 *H.* 8. none arraigned for petit treaſon, murder or felony, ſhall peremptorily challenge above twenty. II. 269

In high and petit treaſon challenge of thirty-five now allowd, becauſe 1 *&* 2 *P. & M.* reſtores trial of petit treaſon to the courſe of the common law. II. 269, 339

In petit treaſon, if party challenge thirty-ſix peremptorily, he ſhall have judgment of penance, as well in appeals as indictments, and in caſe of women as well as men. II. 399, 400

Acts ouſting clergy, in caſe of challenging above twenty, import, that by ſuch challenge party ſhould be convict; but yet if he challenge above twenty, he ſhall not have judgment of death, but only his challenge ſhall be over-ruled, and jurors ſhall be ſworn. II. 269, 270, 339, 345

If priſoner challenge ſix of the jurors for cauſe, and cauſes be found inſufficient, and the ſix are ſworn, whereby inqueſt remains *pro defectu juratorum*, a *tales* granted, and jury appear, the priſoner may challenge peremptorily any of the ſix; but if it happen, that a new cauſe of challenge intervene after former ſwearing, and he challenge for cauſe, he muſt ſhew the cauſe happend after former ſwearing. II. *Page* 270, 274

If priſoner on firſt pannel challenge fifteen peremptorily, and then jury remains for default of jurors, and a *diſtringas* with forty *tales* is granted, he ſhall challenge peremptorily no more than will fill up his number. II. 270

The ſeveral kinds of challenges for cauſe. II. 271

No principal challenge either to array or poll, that ſheriff or juror is of *king*'s livery, but he muſt conclude to the favour. *ib.*

If alien be indicted or appeald of felony, tho indictors ought to be *Engliſh*, yet by 28 *E.* 3. trial ſhall be *per medietatem linguæ*, ſave in felony by *Egyptians*. *ib.*

This ſtatute extends as well to felonies made after as before. *ib.*

Extends not to trial of aliens for treaſon. *ib.*

If alien indicted of felony plead *not guilty*, and a common jury be returned, if he ſurmiſe not *his being an alien* before any of jury ſworn, he hath loſt that advantage; but if he ſurmiſe it, he may challenge the array for that cauſe, and thereon a new *venire fac.* ſhall iſſue, or award be made of a jury *de medietate linguæ*; but more proper to ſurmiſe

miſe it on plea pleaded. II. *Page* 272
In treaſon or felony, whereto priſoner pleads *not guilty*, at common law four hundreders ought to be returned. II. 272
35 *H.* 8. requiring ſix hundreders and 27 *Eliz.* requiring only two in perſonal actions, extend not to trials on indictments of treaſon or felony. *ib.*
Yet never any challenge for default of hundreders on trial of indictments for felony or treaſon. *ib.*
By 33 *H.* 8. for treaſon or felony committed in *king*'s houſhold, all challenges, ſave for malice, ouſted. *ib.*
By 2 *H.* 5. none to be jurymen on trial of capital felony, *unleſs* he have a freehold of 40 *s. per ann.* above all charges, if he be challenged, and by conſtruction it muſt be land in ſame county. II. 272, 273
He muſt not only be ſeiſed thereof at time of pannel made, but when he comes to be ſworn; elſe may be challenged. II. 273
27 *Eliz.* hath raiſed it to 4 *l. per ann*; yet that extends only to iſſue joind in *B. R. C. B.* and Exchequer, and juſtices of aſſiſe, and not to juſtices of gaol-delivery, *oyer* and *terminer*, or the peace; but theſe trials ſtand as they did by 2 *H.* 5. *ib.*
By ſtatute *defectus annui cenſûs* no challenge as to aliens, but yet remains a good challenge to the other half, who are denizens. II. 274
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33 *H.* 6. of indictments of perſons living in *Lancaſhire*, extends not to trials. *ib.*
By ſtatute challenge allowd of any perſon living in the ſtews of *Southwark*, tho of ſufficient freehold. *ib.*
Where priſoner challengeth for cauſe, he ought to ſhew it preſently; muſt ſhew all his cauſes together. *ib.*
If in trial of indictment of felony eleven be ſworn, and the twelfth challenged, whereby inqueſt remains, *&c.* and a *diſtringas* with a *tales* iſſues, and jurors appear, *king* ſhall not challenge any of the eleven ſworn, ſave for cauſe happend ſince their ſwearing; if it happen before, tho not known till after, it ſhall not be allowd; jurors to be called, as they happen in the pannel. *ib.*
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Clergy allowd till 25 *E.* 3. *pro clero*, in all treaſons and felonies not touching *king* himſelf, ſave in two felonies, *viz. inſidiatio viarum & depopulatio agrorum & arſon*, clergy allowd in former by 4 *H.* 4. 517. II. 328, 332, 333, 335, 346

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In all crimes within 28 *H.* 8. for trial of treaſons, *&c.* done on the ſea, clergy allowd, ſave in *treaſon, piracy and murder*. II. 17

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As to *acts* ouſting clergy in caſe of *challenging above twenty*, party ſhall not have judgment of death, his challenge only over-ruled. II. 270

If judgment of *peine fort & dure* be given, yet if offenſe within clergy, clergy allowd. II. 320, 380

Judge ought to allow it, (tho ſtrictly priſoner ought to pray it), and prays it not. II. 321, 378, 379, 381

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By canon laws nuns were exempt from temporal juriſdiction, but whether by common law; other women had no privilege of clergy, but by ſtatute ſhall be burnt in the hand. II. *Page* 320, 328, 371, 372

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If clerk had his clergy, and was generally deliverd to the ordinary, he might admit him to make his purgation, and on *ſignificavit* into chancery a writ iſſued to ſheriff to deliver to party his goods and chattels ſeiſed, *niſi fugam fecerit eâ occaſione.* *ib.*

Where new felony made by ſtatute, clergy incident thereto. II. 320, 330

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At common law, if clerk convict had broke biſhop's priſon, and been after taken, he had loſt his clergy. *ib.*

Clerks convict are now to be *burnt in the hand*, and diſcharged. *ib.*

By antient law priſoner, not having *habitum & tonſuram clericalem*, had not his clergy. *ib.*

Or ordinary might have refuſed him, if he could read. II. 372, 373

Heretick convict, a *Jew* or *Turk* ſhall not have clergy; *contra* of one *excommunicate*. II. 373

A *Greek* or *Alien* ſhall have his clergy, and read in a book of his own country. *ib.*

So ſhall a *baſtard*, one *blind*. *ib.*

By 4 *H.* 7. one not in orders, that hath once had his clergy, ſhall be burnt in the hand, and ſhall not have his clergy again, but a clerk in orders ſhall have his clergy a ſecond time. II. 373, 389

How clerks in orders ſhall prove themſelves ſuch. *ib.*

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Clergymen, whether principals or acceſſaries, have now no more privilege than laymen, ſave that they are not burnt in the hand; but *quære*, whether, if attaint by outlawry, they ſhall have more

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So if judgment of death be entred upon *non legit* returned. *ib.*

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Yet may purchaſe and retain other goods, and on *burning in the hand* ſhall be reſtored to his lands. II. 388, 389

If *king* pardon it, he may purchaſe and retain goods. II. 389

After clergy and *burning in the hand*, a clerk in orders ſhall not be proceeded againſt by eccleſiaſtical judge to deprivation, or other cenſure; for it amounts to a pardon. *ib.*

He ſhall have ſame privilege, as if he had been *burnt in the hand.* II. 389

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In *homicide* by neceſſity, the matter may be ſpecially preſented, either

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Coroners may attach manſlayers by their warrants after inquiſition finding them guilty. II. 107

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Three kinds of coroners, and who they are. II. 53

Mayor of *London* by charter coroner thereof. *ib.*

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By ſtatute power of electing coroners confirmed to counties, yet a ſaving to *king* and other lords, who ought to make ſuch coroners. *ib.*

So *king* may grant coroners within certain precincts; and lords of franchiſes, having power to nominate them by charter, may ſtill do it without election. II. 54

Admiralty and verge by *king*'s grants have power of granting, or having coroners. *ib.*

Of death of man, or other articles belonging to coroner, ariſing on the high ſea, inquiſitions have been uſually taken by coroners appointed by *king*, or his admiral, and coroners of county have no juriſdiction. *ib.*

Inquiſitions taken before coroner of admiral are returned before commiſſioners on 28 *H.* 8. and inquiſition before coroner of county

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General coroners of counties, how and where eligible, and how to be ſworn. *ib.*

How to be qualified. *ib.*

Their office not determind by *king*'s demiſe. *ib.*

Being elected by freeholders of county, if they be inſufficient, whole county ſhall anſwer. II. 55, 56

Some counties have more, ſome fewer; by ſtatute each county of *Wales* two, and *Cheſter* two. II. 56

If there be above two in a county, and a writ is directed *coronatoribus*, tho one dies, whilſt plural number remains, a return by the coroners is good; but if only one ſurvive, he cannot execute and return it, till another made. *ib.*

But if 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 *coronatores*. II. *Page* 56

Coroners amoveable for cauſe, and new ones may be choſen by writ, tho cauſe not traverſable, yet if falſe, they may have a *ſuperſedeas* to the new writ. *ib.*

Their power of proceeding to trial or judgment in pleas of the crown, or execution upon outlawry, taken away by *Magna Carta*. II. 56, 66

Of what they yet retain a juriſdiction. II. 57

Regularly have no power to take inquiſitions, but *de ſubito mortuis*, and ſome ſpecial incidents. II. 65

If one die of hunger, and vill bury him before coroner ſent for, it ſhall be amerced; *contra*, if of a fever or apoplexy. *ib.*

If vill leaves a body, that died of a violent death, above ground unburied, it ſhall be amerced: ſuch amercements may be ſet on preſentment of grand inqueſt, or coroner. *ib.*

If priſoner die in *king*'s bench priſon, clerk of the crown, who is coroner of that court, is to view the body. II. 58

Coroner muſt take inquiſition in perſon, or elſe it is void. *ib.*

What inquiſition to contain. *ib.*

If body buried before he come, what he ought to do in ſuch caſe, cannot take inquiſition otherwiſe than *ſuper viſum corporis*. II. 58, 66

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In default of coroner, who may inquire of a *felo de ſe*, or other ſudden death; juſtices of peace, or *oyer* and *terminer* may inquire thereof, and ſo may *B. R.* but then that preſentment is traverſable. *ib.*
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Jurors not challengeable by either party. *ib.*
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Of what matters jury charged to inquire. II. 60, 61
If one be kild by another, and it be certainly known, that he kild him, it hath been held, that jury muſt hear evidence only for the *king*, and jury muſt find it murder, tho juſtifiable or excuſable *homicide*; but this practice neither warranted by law nor reaſon. II. 60, 61
His inqueſt rather for his information of the truth of the fact, than for an accuſation. II. 61
Tho priſoner may be arraigned on coroner's inqueſt finding it murder or manſlaughter, yet bill of murder may be preferd to grand inqueſt, and thereon he may be arraigned and tried, tho coroner's inqueſt comes up only to manſlaughter, *&c.* *ib.*
Antient practice hath been for coroner's inqueſt to find the matter, as they judge it. *ib.*
Difference of penning 1 *&* 2 *P.* *&* *M.* of examinations taken by juſtices of peace and coroner. II. *Page* 61
Whole evidence to be returned with inquiſition. *ib.*
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If inqueſt find he died *ex viſitatione Dei*, or *per infortunium*, what only to be done. *ib.*
In no caſe coroner ſets any fine or amercement, but only preſents it to next *gaol-delivery*, who impoſe it. *ib.*
If inqueſt find one *felo de ſe*, what they are further to find and do. *ib.*
Firſt finder of body to be bound over to next *gaol-delivery*. II. 62, 63
If party ſlain and felon not known, inqueſt to find accordingly; what the antient manner of inquiry. 63
If felon known, and inquiſition found him guilty, what were the proceedings. *ib.*
One found guilty by coroner's inqueſt, or that he fled, they are to inquire of his goods and chattels; and antiently coroner was preſently to ſeiſe and inventory the goods, and deliver them to *villata*; how far alterd by 1 *R.* 3. *ib.*
Coroner muſt commit perſons found guilty by inqueſt to ſheriff, who is to ſend them to gaol by ſtatute. II. 64
If any preſent found not guilty, what duty of coroner. *ib.*
If parties found guilty as principals or acceſſaries *before* be not to be found, he might antiently have proceeded to have outlawd them. II. 64

That practice alterd by ſtatute; juſtices of *gaol-delivery* are to proceed againſt offenders, if in gaol; if not, then to certify inquiſition in *B. R.* and thence proceſs of outlawry is to iſſue on that inquiſition. II. *Page* 64

By ſtatute coroner to take examinations againſt principals and acceſſaries *before*, and put them in writing, and bind over witneſſes to next *gaol-delivery*, and then to return their examinations, recognizances and inquiſitions. *ib.*

One indicted on coroner's inqueſt is found not guilty, petit jury to inquire who kild the deceaſed, which ſerves as indictment againſt him; and if they cannot tell, they commonly give in ſome fictitious name. II. 65

If there be an inquiſition of murder or manſlaughter, and alſo indictment of ſame offenſe, and party is arraigned and acquitted on indictment; neceſſary to quaſh inquiſition, or arraign party upon it, who is to plead *auterfoits acquit*, or not guilty, and ſo be acquit on that alſo; otherwiſe he may be outlawd on record thereof. *ib.*

But if both of ſame nature, and for ſame offenſe, and be good, he may be tried on both at once. *ib.*

Where coroner is to have a fee, or not. *ib.*

Hath power to take inquiſition of eſcape. II. 62 65

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Where he may take appeals of other matters. II. *Page* 66

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What appeals coroner may take; they muſt be of facts within his county. II. 67

Appeal to be by bill in proper perſon, and before coroner and ſheriff. *ib.*

Yet coroner principal judge, and *certiorari* may be to him alone, or to him and ſheriff; but not to ſheriff alone, neither for appeals nor outlawries, unleſs in *London*. II. 67

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Corporation.

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Corruption and Restitution of Blood.

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In all cases, but entails, attainder of treason or felony corrupts blood upward and downward. *ib.*
Father and two sons; elder attaint dies *improles in vitâ patris*, younger shall inherit; *contra*, if elder survive the father, except elder an *alien nee.* 356, 357
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One mortally wounded, offender in cuſtody of conſtable, who ſuffers him to eſcape before death of party; nō felony in conſtable, tho he dies within the year. *Page* 427, 591

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A convict of petit larciny ſuffered to eſcape, no felony. *ib.*

The ſame law of eſcape of one committed for, or convict of homicide *ſe defendendo*. *ib.*

But if commitment or indictment be for *manſlaughter*, tho in truth but *ſe defendendo*; yet *primâ facie* eſcape indictable as felony, tho *in eventu* otherwiſe. *ib.*

One indicted of murder is pardoned or acquitted within the year, but left in gaol till year elapſed on 3 *H.* 7. and within year gaoler ſuffer him to eſcape, it is felony *primâ facie*, for poſſibility of appeal; but if not brought within the year, or party be acquitted thereon, gaoler to be acquitted. 593

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1 *Jac.* of ſtabbing; for he, that gave the ſtroke, ſhall have his clergy on ſuch indictment. *Page* 437, 463. II. 185, 292, 344, 345

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If on view of child it be teſtified by one witneſs from probable circumſtances, that child was not come to its *debitum partûs tempus*, this is proof by one witneſs, that child was born dead, ſo as to leave it to the jury, as upon a common law evidence, whether ſhe were guilty of death or not; what ſuch circumſtances are. *ib.*

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If evidence in caſe of murder differ from indictment *in ſpecie mortis*, it doth not maintain indictment; as if indictment be for killing by poiſon, and evidence be of killing by ſtabbing; but *contra*, if indictment vary in ſpecies of the poiſon, or indictment be for killing with a ſword, and evidence be of killing with a ſtaff or gun; effectual word in both *percuſſit. ib.*
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One indicted on 1 *Jac.* againſt ſtabbing, if it appears on evidence, that perſon kild ſtruck firſt; yet good evidence to convict party indicted of manſlaughter. *ib.*
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What warrant for execution was antiently iſſued, or awarded by them. II. 409

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If one be indicted for a riotous and forcible entry *contra formam ſtat.* and the ſtatute is miſrecited; indictment quaſhed. II. 171, 172

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At common law lands intailed forfeited for treaſon, and ſo by 26 *H.* 8. *&* 33 *H.* 8. now in force. 241

In the caſe of grandfather, father and ſon, grandfather is tenant in tail, father attaint of treaſon dies firſt, the lands ſhall deſcend to the grandchild; father could forfeit nothing, and 26 *H.* 8.

H. 8. corrupts not the blood by attainder of the father. *Page* 241

If after 26 *H.* 8. and before 33 *H.* 8. which veſts all in the *king* without office, tenant in tail had been attainted of treaſon, and had died in that interval, the lands would have deſcended to the ſon till office found; but *contra* in caſe of tenant in fee-ſimple attainted, and dying before office; in this caſe freehold is caſt on *king* without office, and none can take it elſe. 242

King at common law, and by 26 *H.* 8. was intitled to a right of entry, where party was in merely by diſſeiſin or abatement, but not to a right of entry, where poſſeſſor was in by title; but by 33 *H.* 8. *king* is intitled to right of entry in both caſes, and that without office; but there muſt be inquiſition or ſeiſure to bring *king* into actual poſſeſſion. *ib.*

If *king* grant over before ſuch ſeiſure, how grant is to be, or elſe void. *ib.*

One committing treaſon hath then a bare right of action touching lands, or a right to reverſe judgment given againſt him, or to bring a formedon or writ of entry, but hath no right of entry without recovery in ſuch action; this right neither by common law, nor 33 *H.* 8. is given to the *king* by attainder of treaſon; *ſed quære.* *ib.*

Tenant in tail of the gift of *H.* 7. reverſion in the crown, made a feoffment in fee, and then was attaint of treaſon, and died, leaving iſſue; tho feoffor againſt his own feoffment could not claim any right at time of the treaſon, yet there remained in him a right of intail forfeited to the *king*; and *king* is in as of his reverſion, which is not ſubject to leaſes duly made by tenant in tail before his attainder. *Page* 242, 243

Tenant in tail general makes a feoffment to the uſe of himſelf in fee, and before 26 or 27 *H.* 8. commits treaſon, and is attaint, and dies leaving iſſue inheritable to the intail, then a ſpecial *act* is made, whereby he was to forfeit all eſtates and rights; tenant in tail can have no right againſt his own feoffment; but when eſtate returns to him, that is forfeited by the attainder; and *king* ſhall hold this eſtate diſcharged of the right of old intail, and that ſhall never revive to the iſſue; retroſpect of *king*'s title by attainder ſhall over-reach and avoid the *remitter* wrought in the iſſue before *king*'s actual ſeiſin by the attainder, or office thereon. 243

King makes a gift in tail, ſaving reverſion to himſelf, attainder of treaſon of tenant in tail bar'd not his iſſue, becauſe of 34 *H.* 8. which derogates from 26 & 33 *H.* 8. 243, 244

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At common law *king* not intitled to a condition of re-entry in party attaint; but in what caſes he is intitled to ſuch a condition, or not, by 33 *H.* 8. 244 *to* 248

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Difference between a term in groſs in truſt for party attaint, and truſt of a term to attend inheritances, *quoad* forfeiture for felony. 250, 251
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At common law by husband's attainder of treaſon, or felony, wife loſt her dower; but *contra* by 1 *E.* 6. *Page* 253

By 5 *&* 6 *E.* 6. husband attaint of treaſon, wife ſhall loſe her dower, and it ſtands ſo now, ſave in treaſons made by particular *acts*, where dower is ſaved, as, *&c.* 253

Tho theſe are called royal eſcheats, the *king* hath theſe forfeitures *in jure coronæ*, of whomſoever the lands be immediately held. *ib.*

A manor is held of the *king*, as of his honour of *D.* and manor *eſcheats* for felony of tenant, it is now parcel of the honour; and if *king* grant it out again generally, it ſhall be held of the honour; but if it *eſcheat* for treaſon, it is no parcel of the honour; and if granted out generally, it ſhall be held *in capite*. 254

Where land comes to the crown by attainder of treaſon, all meſne tenures of common perſons are extinct; but if *king* grant it out, he is *de jure* to revive the former tenure, for which petition of right lies. *ib.*

If tenant in tail of the gift of the *king*, the reverſion in the *king*, make a leaſe for years, and then is attainted of treaſon, the *king* ſhall avoid that leaſe, tho tenant in tail have iſſue living; yet if he after ſuch leaſe had bargained and ſold, or levied a fine to the *king*, the *king* ſhould be bound by ſuch leaſe, as long as there is iſſue. *ib.*

At common law divers lords had by ſpecial grant, or in right of their counties palatine, royal *eſcheats* of the lands held within their franchiſes of perſons attaint of treaſon, and ſeveral inſtances thereof. *Page* 254, 255, 256

In what treaſons or not they ſhall have ſuch royal eſcheats. 256, 257, 258

26 *H.* 8. in force as to forfeitures for treaſons within 25 *E.* 3. 257

There is a proviſo in 5 *Eliz.* whereby clipping is made treaſon, to ſave or confirm the rights of perſons intitled to ſuch royal eſcheats on attainders of treaſon within this *act*. 257

No like clauſe in any other *act* of new treaſon. *ib.*

He, who hath *jura regalia*, ſhall not have forfeitures of tenant in tail for treaſon. *ib.*

Royal eſcheats by preſcription extend not to new treaſons. 256, 271

Of the forfeiture of lands in a county palatine by attainder of treaſon out of a county palatine, or *è converſo*. 286

Antiently, if one had been ſlain in open war againſt the *king*, the *king* did *de facto* take a forfeiture, and how, and where taken. 342

But in all other caſes, whether of felony or treaſon, if party died before attainder, or after conviction, and before judgment, there enſued neither attainder, nor forfeiture of lands. 343

If a traitor, or felon reſcue himſelf, or will not ſubmit to be arreſted, and on reſiſtance is ſlain, on preſentment thereof he ſhall forfeit his goods and chattels; but whether preſentment traverſable; *per aſcuns*, he ſhall forfeit the iſſues of his lands

lands for a year and day. *Page* 343, 363, 489 *to* 492, 602

One arraigned for felony or treaſon, tho he be acquitted, yet if it be found he fled, forfeits his goods. 343

How far in treaſon attainder after party's death ouſted by ſtatute. 343, 344

One attaint of piracy before commiſſioners of *oyer* and *terminer* on 28 *H.* 8. according to courſe of common law forfeits lands and goods; but it works no corruption of blood. 354

If husband ſeiſed *in jure uxoris* hath iſſue by her, and then ſhe commits treaſon, and is attaint and dies, husband ſhall be tenant by courteſy; *contra*, if treaſon committed by her before iſſue had. 359

Tenant in tail is attaint of treaſon; *king* on office found hath the freehold during life of tenant in tail. 359, 360

Attainder of treaſon, or felony of a copyholder gives the *king* no forfeiture; but it regularly belongs to the lord, if not a contrary cuſtom. 360

By cuſtom of *Kent* lands of one attaint of felony deſcend to the heir; *contra* of treaſon; but the lands of one attaint of felony by outlawry, or one abjuring, eſcheat. *ib.*

In petit treaſon and felony lands eſcheat to the lord; but *king* ſhall have *diem*, *annum & vaſtum*. 360

How to be computed. *ib.*

Tenant in tail, or for life, or husband ſeiſed in right of his wife is attaint of felony, *king* ſhall have the *year*, *day and waſt* againſt wife, iſſue and reverſioner. *ib.*

Forfeiture for treaſon or felony to avoid *meſne* incumbrances relates to time of offenſe committed. *Page* 360

Two jointenants in fee; one is attaint of treaſon, and dies; land ſurvives to the other, but ſubject to the title of forfeiture. 360, 361

If one be outlawd on indictment of felony or treaſon, and pending the proceſs alien the land, yet *king* or lord ſhall have the land, which he held at time of felony committed; attainder by outlawry relates to day and year in indictment. 361

In appeal of felony or murder by writ, if pending it party aliens, and then is outlawd before appearance, lord's eſcheat is loſt, becauſe it relates only to the time of outlawry pronounced, the writ containing no certain time of offenſe committed. 361

But *contra*, if defendant had appeard, and plaintiff had declared on his writ, and defendant had been convict and attaint; or if appeal had been by bill, and thereon party had been outlawd, tho before appearance, eſcheat had related to time of fact committed to avoid *meſne* incumbrances. 362

Goods of perſons convict of treaſon or felony, or put in *exigent* for the ſame, or who fled, or ſtand mute, forfeit to the *king*. *ib.*

To what times reſpectively theſe forfeitures relate. *ib.*

Alienation made [of goods] *bonâ fide* by felon, or traitor, or one that flies, *meſne* between offenſe, or flight and conviction, or preſentment of flight is good,

good, and binds the *king*, if fraudulent, it is void by 13 *Eliz.* *Page* 362, 367

If a felon be kild in flight, and it be found by inquiſition, forfeiture of his goods relates to the flight. 362

If party comes not in, his goods forfeit on award of *exigent.* 365

In murder; title of lord by eſcheat to avoid *meſne* incumbrances relates to ſtroke given. 426, 591. II. 179

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Officer killing felon in flight, or that reſiſts, forfeits nothing. 481, 493, 494

If the killing cannot be attributed to any *act* of the perſon killing, but of the deceaſed, the former forfeits not his goods, *quære.* 492, 493

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Forfeiture for flight diſtinct from that for the felony. *ib.*

In petit larciny party forfeits his goods, and ſo if acquitted, and it be found he fled. 530

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If it be found *ſuper viſum corporis*, that felon fled, and was kild in flight, this preſentment, tho after party's death, is concluſive as to the forfeiture for the flight. II. 154

By judgment of *peine fort & dure* party forfeits his goods; but it is no attainder, nor gives any eſcheat, nor works corruption of blood. II. *Page* 319

A convict within clergy forfeits all his goods, tho he be burnt in the hand; yet thereby becomes capable of purchaſing and retaining other goods. II. 388, 389

On burning in the hand, he ought to be immediately reſtored to poſſeſſion of his lands. II. 389

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Expoſition on 5 *Eliz.* making it felony without clergy after former conviction. 683 *to* 687

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What a making forging, or aſſenting to a forgery. 683 *to* 686
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Forging ſurrenders, admittances, or court-rolls, within this *act*. *ib.*
Forging deed or will, purporting a leaſe, or rent-charge for years is within it; ſo is forging aſſignment of leaſe for years, but not of lands in *Ireland*. *ib.*
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Forging a will of goods within it. *ib.*
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Commitment by a juſtice ought to be to common gaol; but if offenſe committed, and party taken within a franchiſe, then by ſtatute to gaol *there*. 585. II. 123

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How expounded by 33 *H.* 8. as to the county; this prohibition uſually diſpenſed with by a *non obſtante*. *ib.*

By charter mayor of *London* of the *quorum*, and ſo in *Norwich*. *ib.*

May proceed againſt priſoners, (if in gaol) on inquiſition before coroner, or any other juſtices. *ib.*

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The import of their precept to the ſheriff; in whoſe name, and under whoſe *teſte* it is to be. II. 32, 33, 261

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May originally take indictments of felony of priſoners in gaol. *ib.*
Where felon is at large, by which of their powers in their commiſſion they may take indictment. *ib.*
Juſtices of *oyer* and *terminer*, gaol-delivery, and of the peace may make up their records by all three of their powers; and if good by any one commiſſion, it is ſufficient, and beſt ſhall be taken for the *king*. *ib.*
Priſoner let to bail in law is in priſon, and therefore juſtices of gaol-delivery may take indictment againſt him; but one let to mainpriſe, not in cuſtody. II. 35
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New juſtices by 1 *E.* 6. may proceed in every behalf, as if the old commiſſions or commiſſioners had continued not alterd. II. *Page* 35, 405
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May aſſign coroner to an appeal, and make proceſs againſt appellee in a forein county. II. 36
Sheriff is to deliver to them names of all perſons in gaol or baild. *ib.*
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Whether

Whether they can iſſue proceſs of outlawry. II. *Page* 37, 199

A. and *B.* are indicted before juſtices of peace, and by 4 *E.* 3. indictment is deliverd over to juſtices of gaol-delivery, *A.* appears, is tried and acquitted, *B.* appears not, the juſtices of peace cannot make out proceſs againſt *B.* becauſe record not before them; nor can juſtices of gaol-delivery make out proceſs to outlawry returnable before the juſtices of peace. II. 37

Neither can they proceed to outlawry before themſelves, as juſtices of *oyer* and *terminer*, where indictment taken before juſtices of peace, but the intire record muſt be removed into *B. R.* by *certiorari*, and from thence proceſs of outlawry iſſue. II. 37, 38

By 26 *H.* 8. what crimes committed in *Wales*, juſtices of peace and gaol-delivery in counties adjacent to *Wales* have power to hear and determine. II. 38

Repeald, as to treaſon, by 1 & 2 *P. & M.* but in force as to other felonies. *ib.*

They are by ſtatute to hold their ſeſſions, where county-court held, but ſtatute only directive. II. 39

They may, after priſoner has pleaded, take his pannel from ſheriff without making any precept to him. II. 261

Where commiſſion ſpecial, they do not ſend out a general precept to the ſheriff to return juries againſt they come. *ib.*

New juſtices may award execution on a party reprieved after judgment. 405

But not fit to give judgment, or award execution on one reprieved by another judge, without knowing on what grounds the reprieve was. II. *Page* 406

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Vide **Commiſſion, Court, Juſtices of Aſſiſe, Juſtices of Peace, King's Bench, Oyer and Terminer, Proceſs.**

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Grant of judicial, or miniſterial offices, concerning adminiſtration of juſtice, during *king*'s pleaſure, is determind by his death. 706

Grant of a judicial office, *quam diu ſe bene geſſerit*, tho a freehold, is determind by his death. *ib.*

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A manor held of the *king*, as of his honour of *D.* eſcheats for felony of tenant, it is now parcel of the honour; but if it eſcheat for treaſon, it is no parcel of the honour; and if granted out generally, ſhall be held *in capite*. *Page* 254

Habeas Corpus.

WHere temporal judge might have taken notice incidently, whether a tenet was hereſy or not, and *nient obſtante* return of dioceſan, have deliverd party impriſond on this writ. 400, 407, 408

Cauſe neceſſary to be expreſſed in commitment in order to be returned on *habeas corpus*. 584

It is *quaſi* a writ of right, or error to determine, whether impriſonment good, or erronious. *ib.*

Where juſtices of gaol-delivery may ſend priſoners by this writ to ſheriff of another county out of their circuit. II. 37

Of writ of *habeas corpus ad ſubjiciendum*, and bailing thereon. II. 143 *to* 148

What to be done on return being filed. II. 143

Party to be remanded till return filed. II. 146

Whence it iſſues. II. 143, 144

When it iſſues out of *C. B.* or *Exchequer*, it is where party is privileged, or to charge him with an action. II. 144, 312, 313

If one be ſued in *C. B.* or is ſuppoſed to be ſo ſued, and is arreſted for a pre-ſuppoſed miſdemeanor, or for felony, this writ lies there; and if it appears on return, that party is wrongfully committed, the privilege ſhall be allowd, and party diſcharged; or if doubtful, baild to appear in *B. R.* II. *Page* 144

If one be ſued in *C. B.* and is arreſted and impriſoned for felony, *&c.* tho gaoler on *habeas corpus* ought to return the cauſes, as well criminal, as that wherewith he is charged out of that court, yet *C. B.* ought not to commit to the *Fleet*, nor diſcharge him, nor take bail to anſwer there, but may bail on the action, and remand him to ſheriff as to the crime. *ib.*

C. B. have now by *ſtatute* original juriſdiction to bail, diſcharge, or commit on this writ one committed by council-table, as well as *B. R.* and that tho party hath no privilege. II. 144, 145

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Of *habeas corpus ad faciendum & recipiendum* granted by *B. R.* when granted, and before whom returnable. *ib.*

If a civil action and matter of crime be returned, and action appear to be fraudulent, party may be remanded; if real, court may commit him to the marſhal with his cauſes, tho they are matters of crime. *ib.*

On writ *ad faciendum, &c.* not ſingly a matter of crime ought to be returned, for that belongs to writ *ad ſubjiciendum*. *ib.*

When *habeas corpus* in criminal cauſes iſſues out of chancery, and

cauſe is returned, chancellor may judge thereof, and may diſcharge or bail priſoner to appear in *B. R.* or may *propriis manibus* deliver record in *B. R.* and thereon *B. R.* may proceed to bail, *&c.* II. *Page* 147

But if chancellor diſcharge him not, but bail him, ſurety muſt be to appear in *B. R.* or if chancellor will do neither, he may commit him to *Fleet* till term, and then he may be turned over to *B. R.* and there proceeded againſt; chancellor hath no power to proceed in criminal cauſes. *ib.*

Habeas corpus [before 31 *Car.* 2.] in criminal cauſes ſhould regularly have iſſued out of chancery in vacation, and *B. R.* in term. *ib.*

Sending *habeas corpus ad faciendum & recipiendum* by chancellor for perſons arreſted in civil cauſes not warranted by law, and as to perſons in execution, forbidden by ſtatute. II. 148

Habeas corpus removes body, *certiorari* record. II. 210, 211

Court cannot on bare return of *habeas corpus* give any judgment, or proceed on record of indictment, unleſs removed by *certiorari*; but it ſtands in ſame force it did, tho return be adjudged ill, and party be diſcharged; and court below may iſſue new proceſs on indictment, tho *contra* on *habeas corpus* in civil cauſes, for therein it is a *ſuperſedeas*. II. 210, 211

By whom *habeas corpus* to be ſigned. II. 211

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Homicide.

The ſeveral kinds of homicide. *Page* 424

Homicide defined. 425

Involuntary homicide defined. 471

In this caſe, indictment muſt find ſpecial matter, or if indictment be of murder or manſlaughter, and on trial it appear to be involuntary, how jury to find. *ib.*

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Homicide *per infortunium* defined and exemplified. 472

If one ſhoot at butts, and by caſualty his hand ſhakes, and arrow kills a by-ſtander, *per infortunium*. *ib.*

So if a carpenter or maſon in building caſually let fall a piece of timber, *&c.* and kills another. 472, 475

But if he voluntarily let it fall without giving due warning, whereby it kills another, it will be at leaſt manſlaughter, *quia debitam diligentiam non adhibuit*. *ib.*

So if one be felling a tree in his own ground, and it fall and kill another, chance-medley. *ib.*

Tho chance excuſeth from felony, it excuſeth not from treſpaſs. *ib.*

If two play at barriers, or run a-tilt by *king*'s command, and one

one kill the other, it is *per infortunium*; but without it, manſlaughter. *Page* 473

If a ſchool-maſter correct his ſcholar, *&c.* who by ſtruggling, or otherwiſe dies, only *per infortunium.* 474

But if correction be with a *lethal* inſtrument, or outragious, it is murder. *ib.*

Several come to enter the houſe of *A.* as treſpaſſers, *A.* ſhoots and kills one, manſlaughter; *contra*, if they had entred to commit a felony. *ib.*

Where, on an alarm that thieves were breaking into the houſe in the night, the maſter kild a ſervant hid in a buttery thro' fear of being diſcovered by them, (the ſervant being miſtaken for one of the thieves, and not diſcerned in the dark,) it was held no felony; *quære*, whether homicide *per infortunium.* *ib.*

If one knowing that people are paſſing along the ſtreet throw a ſtone, or ſhoot an arrow over the houſe or wall, with intent to do hurt, and one is thereby ſlain, this is murder; and if without ſuch intent manſlaughter, and not *per infortunium*, becauſe *act* unlawful. 475

One, in ſhooting at a deer in his own park, by accident kills another man, homicide *per infortunium*; but *contra,* if it be in the park of a ſtranger without his licence, then it is manſlaughter. *ib.*

A. throws a ſtone at a bird, and thereby kills a man, to whom no harm intended, *per infortunium.* *ib.*

But if he had thrown it to kill the poultry, or cattle of *B.* and the like accident had happend, it had been manſlaughter, but not murder; becauſe not with intent to hurt the by-ſtander. *Page* 475

An *act* prohibits ſhooting in a gun without ſuch a qualification, and under a penalty; one unqualified ſhoots with a gun at a bird, and it kills a by-ſtander by ſome accident, that in another caſe would have amounted only to chance-medley; this no more than chance-medley in him, keeping a gun in ſuch caſe, being only *malum prohibitum.* 475, 476

A ſervant ſet by his maſter to watch in the night in a corn-field with a gun charged, and orderd by him to ſhoot when he heard any buſtle in the corn by deer; maſter himſelf improvidently ruſhes into the corn, ſervant ſuppoſing it to be deer ſhoots and kills his maſter, only chance-medley, becauſe ſervant miſguided by his orders. 476

But if maſter had not given ſuch orders, it would have been manſlaughter, becauſe he did not *adhibere debitam diligentiam* to diſcover his mark. *ib.*

A. drives his cart careleſly, and it runs over a child in the ſtreet, if *A.* having ſeen the child, yet drives on upon him, it is murder; but if he ſaw not the child, manſlaughter; but if child had run croſs the way, and cart run over it before it was poſſible for carter to ſtop, it is *per infortunium.* *ib.*

If one riding in the ſtreet whip his horſe to put him into ſpeed; and run over a child and kill him, homicide, and not *per infortunium*; and if he had rid ſo in a preſs of people with intent to do hurt, and horſe had kild another, it had been murder. *Page* 476

But if one be riding in the ſtreet, a by-ſtander whips the horſe, whereby he runs away againſt will of rider, and runs over and kills a man, it is chance-medley only, in which caſe jury are to find the ſpecial matter; yet where coroner's inqueſt finding ſpecial matter ſtands untraverſed, court will receive verdict of *not guilty* on indictment by grand inqueſt, and party confeſſing indictment by coroner, ſhall have his pardon of courſe. 476, 477

Killing another *per infortunium*, not in truth felony, how verdict concludes; party forfeits his goods, and why; tho he ought to have *quaſi de jure* a pardon of courſe, yet he is not to be diſcharged, but baild till next term or ſeſſions to ſue out ſuch pardon. 477

Homicide *ex neceſſitate*, partly voluntary, partly involuntary. 478

Neceſſity of two kinds: 1. Of a private nature. 2. That which relates to publick juſtice and ſafety. *ib.*

Former obliges one to his own defenſe and ſafe-guard, and what inquiries this takes in. *ib.*

Two kinds of homicide *ſe defendendo*, and reſpective conſequences thereof. *ib.*

Homicide *ſe defendendo* defined. 479

What circumſtances therein obſervable. *Page* 479 *to* 484

There being malice between *A.* and *B.* they appoint time and place to fight, and meet, *A.* gives firſt onſet, *B.* retreats as far as he can with ſafety, and then kills *A.* who had otherwiſe kild him, murder; becauſe they met by compact. 479

There being malice between *A.* and *B.* they meet caſually; *A.* aſſaults *B.* and drives him to the wall; *B.* in his own defence kills *A.* this *ſe defendendo*. *ib.*

A. aſſaults *B.* and *B.* preſently thereon ſtrikes *A.* without flight, whereof *A.* dies, this is manſlaughter; but if *B.* ſtrike *A.* again, but not mortally, and blows paſs between them, and at length *B.* retires to the wall, and being preſſed on by *A.* gives him a mortal wound, whereof *A.* dies, only *ſe defendendo*. 479

A. by malice makes a ſudden aſſault on *B.* who ſtrikes again, and bearing hard on *A.* *A.* retreats to the wall, and in ſaving himſelf kills *B.* whether murder, or *ſe defendendo*; what fact the queſtion depends on. 479, 480

In homicide *ſe defendendo*, ſome *act* to be done by party killing, for if he be merely paſſive, only *per infortunium*. 480

A. aſſaults *B.* who flies to the wall, or falls holding his ſword, *&c.* in his hand, *A.* runs violently, or falls on knife, *&c.* of *B.* without any ſtroke or thruſt offerd by *B.* and dies, *per infortunium*; *quære*, whether *A. felo de ſe*. 480, 481

He, who kills in his own defenſe, ought to fly, as far as he may, to avoid violence of aſſault, before he turn on aſſailant. *Page* 481, 483, 486
Argument againſt duelling. *ib.*
If gaoler be aſſaulted by priſoner, or ſheriff, or bailiff in execution of his office, he is not bound to give back to the wall; but if he kill aſſailant without ſuch retreat, only *ſe defendendo*. *ib.*
The like of a conſtable, or watchman. 481
But if priſoner reſiſts not, but flies, yet officer for fear of reſcue gives priſoner a mortal ſtroke, it is murder; for here was no aſſault firſt made by priſoner, and ſo cannot be *ſe defendendo* in officer. *ib.*
Difference between civil actions and felonies. *ib.*
If one be in danger of arreſt by *cap.* in debt, *&c.* and he flies, and bailiff kills him, murder. *ib.*
But if felon flies, and cannot be otherwiſe taken, if he be kild, juſtifiable, and officer forfeits nothing; but perſon kild forfeits his goods. *ib.*
A thief aſſaults a true man, either abroad, or in his own houſe, to rob or kill him, true man not bound to give back, but may juſtify killing aſſailant, and it is no felony. *ib.*
If *A.* aſſault *B.* ſo fiercely, that *B.* cannot ſave his life, if he give back, or if *B.* fall to the ground, whereby he cannot fly, if *B.* kills *A.* it is *ſe defendendo*. 482
Where firſt aſſailer may be ſaid to kill the aſſailed *ſe defendendo*, or not. 482 *to* 484
If *A.* aſſault *B.* and *B.* thereon re-aſſault *A.* and *A.* flies to avoid the aſſault of *B.* who purſues him, and then *A.* being driven to the wall turns again, and kills *B.* whether *ſe defendendo*. *Page* 482
But if *A.* aſſaults *B.* firſt, and *B.* re-aſſaults *A.* ſo fiercely, that *A.* cannot retreat to the wall, or other *non ultra*, without danger of his life, nay, tho *A.* fall on the ground on the aſſault of *B.* and then kills *B.* murder or manſlaughter. *ib.*
Where one is aſſaulted ſo fiercely, that he cannot fly, law will interpret this neceſſity to a flight to give him the advantage of *ſe defendendo*; but *contra*, where firſt aſſailant is re-aſſaulted ſo vigorouſly that he cannot fly, law will not let him take advantage of this neceſſity, the conſequence of his own wrong. *ib.*
Where *A.* the firſt aſſailant flies, and the affray is interrupted, and *B.* the firſt aſſaulted purſues *A.* to kill him, and *A.* after his flight, on neceſſity of ſaving his life, kills *B.* it is but *ſe defendendo*; but when done altogether, without any interval of flight or parting, and *B.* gains the preſent advantage by his addreſs or courage to preclude flight of *A.* and then *A.* kills him, manſlaughter. 483
Flight to gain advantage of *ſe defendendo* to party killing muſt not be feigned, or to gain advantage of breath, *&c.* it muſt be from the danger, as far as party can, either by reaſon of ſome wall or other *non ultra*, or as fierceneſs of aſſailant will permit. *ib.*

Whether party killing was guilty of firſt breach of peace, conſiderable in theſe caſes. *Page* 483

What offenſe, if one kill another in the neceſſary ſaving of the life of a man aſſaulted by party ſlain. 484

A. aſſaults the maſter, who flies as far as he can to avoid death, ſervant kills *A.* in defence of his maſter, it is homicide *defendendo the maſter*, and ſervant ſhall have his pardon on courſe; ſo where maſter kills in neceſſary defence of ſervant. *ib.*

Like law, where husband kills in defence of wife, parent of child, and *è converſo*. *ib.*

How far relation of acquaintance, and mutual ſociety will excuſe one companion killing in neceſſary ſafe-guard of life of another. *ib.*

Killing one attempting to rob or kill another in caſe of neceſſity puts him in condition of *ſe defendendo* his neighbour. 484,485

A woman kills a man aſſaulting to raviſh her in the attempt, *ſe defendendo*. 485

So it is, if husband or father kill him in the attempt, if it could not be otherwiſe prevented; but if it might, it is manſlaughter. 485, 486

What the offenſe in killing him, that takes the goods, or doth an injury to the houſe or poſſeſſion of another, herein many differences, as between a treſpaſſable and felonious *act*, and felonious *acts* themſelves. 485 *to* 489

If *A.* pretending title to the goods of *B.* take them away from *B.* as a treſpaſſer, *B.* may juſtify beating *A.* but if he beat him, ſo that he dies, it is manſlaughter. *Page* 485, 486

A. is in poſſeſſion of *B.*'s houſe, *B.* endeavours to enter on him, *A.* can neither juſtify aſſault, nor beating of *B.* becauſe *B.* had right of entry; but if *A.* be in poſſeſſion of a houſe, and *B.* as treſpaſſer enters on him, *A.* may *molliter manus imponere* to put him out, and if *B.* reſiſt, and aſſault *A.* then *A.* may juſtify beating him *de ſon aſſault demeſne*. 485

But if *A.* kill him in defence of his houſe, it is manſlaughter. 485, 486, 487

A. being in poſſeſſion of a houſe by title, *B.* endeavourd to enter, and ſhot an arrow at them within, and *A.* from within ſhot an arrow at thoſe that would have entred, and kild one of them; not *ſe defendendo*, but manſlaughter, becauſe no danger of *A.*'s life from them without. 485, 486

If *B.* had entred into the houſe, and *A.* had *gently laid his hands* on him to turn him out, and then *B.* had turned on him and aſſaulted him, and *A.* had kild him, ſo if *B.* had entred on him and aſſaulted him firſt, and *A.* had kild him, it had been only *ſe defendendo*, tho entry of *B.* was not to murder, but as a treſpaſſer to gain poſſeſſion. 486

A. in ſuch caſe being in his own houſe need not fly as far as he can. *ib.*

Husband kills adulterer in the *act*, manſlaughter. 486

Difference between killing a man attempting an *act*, which is felony or otherwiſe, as to making it *ſe defendendo*, *&c.* *ib.*

If one come to rob me, and take my goods as a felon, and I kill him, it is *me defendendo* at leaſt, and in ſome caſes juſtifiable. *Page* 486

At common law, if a thief had aſſaulted a man to rob him, and he had kild him in the aſſault, it had been *ſe defendendo*; but *quære*, whether he had forfeited his goods. 487

One attempting a burglary with intent to ſteal, or kill, or attempting to burn the houſe of another, if owner of the houſe, or any within had ſhot and kild the perſon ſo attempting, this had been no felony or forfeiture. *ib.*

By 24 *H.* 8. killing any one attempting any robbery or murder in or near the highway, *&c.* or in a manſion-houſe, or attempting to break a manſion-houſe in the night by any perſon, *&c.* he who kills (tho a lodger or ſervant) ſhall be abſolutely acquitted and diſcharged of the death of ſuch perſon. *ib.*

There being malice between *A.* and *B.* and having fought often, and afterwards meeting ſuddenly in the ſtreet, *A.* ſaid he would fight him, *B.* declined it, and fled to the wall, and called others to witneſs it, and *A.* purſued and ſtruck him firſt, and *B.* in his own defence kild him, he was acquit from any forfeiture by this *act.* 487, 488

Treſpaſſes in houſes, or in or near highways are left as before this *act.* 488

It doth not indemnify killing a felon, where felony not accompanied with force, as killing one attempting to pick a pocket. *Page* 488

What breaking of a houſe in the day this *act* extends to, or not. *ib.*

One attempting wilful burning of a houſe is kild in the attempt, the killer is free from forfeiture without aid of this *act.* *ib.*

If any felon, after felony committed, reſiſt thoſe that attempt to take him, or fly, and be kild, this killing no felony; but this *act* relates not to it. 488

If a felon before arreſt reſiſts and flies, or after arreſt eſcapes and flies, and the officer, not being able to take him without killing, kills him, officer ſhall be found *not guilty*; but if he could have been taken without killing, it is manſlaughter at leaſt in the officer, and jury is to inquire, whether done of neceſſity or not. 489, 490

So where private man without warrant, of neceſſity, kills a felon reſiſting and flying before arreſt, or after arreſt eſcaping and flying, tho felon not indicted, it is juſtifiable, for in ſuch caſe law makes every one an officer to take a felon. 587, 588. II. 77, 78, 82

A felon is taken, and in bringing to gaol eſcapes, villagers purſue, and of neceſſity kill him, they ſhall be acquitted. 489, 490

A felony done, but not by *A.* and *B.* hath a warrant, or *hue* and *cry* comes to *B.* as conſtable to take *A.* *A.* attempts an eſcape, or reſiſts, *B.* kills him of neceſſity, tho *A.* be not indicted, juſtifiable. 490

In all caſes of homicide by neceſſity matter may be ſpecially preſented by grand or coroner's inqueſt,

inqueſt, and thereon party may be preſently diſcharged without being put to plead; but may be indicted again, if former indictment falſe; *contra*, where indictment ſimply of murder or manſlaughter. *Page* 491, 492. II. 158

Expoſition on 21 *E.* 1. *de malefactoribus in parcis.* 491

Caſes, where priſoner is not to forfeit his goods, but be acquitted, re-capitulated. 493, 494

A. ſhooting at rovers, if *B.* after arrow deliverd of his own accord runs into the place, where it is to fall, and ſo is kild, *A.* forfeits nothing, *quære.* 492

If coroner's inqueſt find ſpecially *ſe defendendo*, party ſhall be arraigned and tried, whether it was in his own defence or not, before he ſhall have his pardon of courſe. 493

A conſtable, who commands *king*'s peace in an affray, is reſiſted, he need not give back to the wall, and if he kill thoſe that reſiſt, it is juſtifiable. 494

Killing a rioter, who reſiſts, by ſheriff, juſtice of peace, or conſtable, or his aſſiſtants, no felony at common law, nor makes any forfeiture. 53, 294, 495, 496

What authority *homicide in execution of juſtice* requires in the judge and officer, who executes the judgment. 497

Where judge hath juriſdiction, tho he err, officer in executing judgment juſtified; *contra*, where judge hath no juriſdiction. 501

If after or before arreſt *A.* an innocent man ſuſpected draws his ſword and aſſaults *B.* the party ſuſpecting, and *B.* preſſeth on him; either to take or detain him, and in conflict *A.* kills *B.* it is murder; but if *B.* kills *A.* juſtifiable. II. *Page* 83

If before or after arreſt, bailiff on aſſault made on him kills the party, it is juſtifiable, neither is he bound to retreat. II. 83, 118

If perſons purſued by peace-officers for felony, or breach of peace, or juſt ſuſpicion thereof, as night-walkers, *&c.* ſhall not yield themſelves to theſe officers, but either reſiſt or fly before taken, or being taken reſcue themſelves, and reſiſt or fly, and are on neceſſity ſlain; no felony in officers or aſſiſtants, tho parties kild are innocent. II. 85, 86

By their reſiſtance againſt authority of the *king* in his officers, they draw their own blood on themſelves, and are acceſſaries to their own deaths. II. 86, 118

One charged with ſuſpicion of felony on juſt grounds, and where a felony is actually done, tho he be innocent, yet if he reſiſt officer after notice that he is ſuch, and aſſault him, and officer kill him, no murder. II. 92, 93

If he fly, and cannot be otherwiſe taken, whether officer may kill him. 490. II. 93

One is dangerouſly wounded, and conſtable is kild on purſuit of offender, murder; but if he kills offender, juſtifiable. II. 94

A warrant iſſues againſt one for treſpaſs, or breach of the peace, and he flies and will not yield to arreſt, or being taken eſcapes, and officer kills him, murder. II. 117

But if he either on attempt to arreſt, or after arreſt aſſault officer, who hath the warrant, with intent to eſcape, and officer ſtanding on his guard kills him, neceſſity excuſeth him, and he is not bound to retreat. II. *Page* 117, 118

Where a warrant iſſues againſt a felon, or only as one ſuſpect, and either before or after he flies and defends himſelf with ſtones, *&c.* ſo that officer kills him on neceſſity, no felony; and ſo where conſtable doth it *virtute officii*, or on purſuit of *hue* and *cry*. II. 118

But where warrant is againſt one ſuſpect only, what cautions to be uſed. II. 118, 119

Private man may arreſt a felon; if he kill him of neceſſity, he is excuſable; but then it is at his peril that he be a felon; if not, at leaſt manſlaughter. II. 119

In caſe of juſtifiable homicide, or that which is not felony, what coroner's inqueſt to find, and how indictment to be, and what proceedings to be had therein in order to diſcharge the priſoner. II. 303

In indictment or appeal of felony defendant cannot juſtify, but ſhall have advantage of it on general iſſue. II. 304

Felony committed by *B.* but *A.* that arreſts him, knows it not, law ſame as if he knew it, only what he does, is at his peril. II. 78

Vide **Forfeiture, Indictment, Judgment, Murder and Manſlaughter.**

Homine replegiando. Vide **Bail.**

Houſe.

Where aſſembly to defend one's houſe juſtifiable; it is a man's caſtle of defence. *Page* 445, 487, 547

If one be aſſaulted in his houſe by a treſpaſſer attempting to gain poſſeſſion, he need not fly as far as he can, for he hath the protection of his houſe to excuſe him from flying. 486

Where an aſſault, battery or homicide is excuſable, or juſtifiable in defence of poſſeſſion of a man's houſe, or not. Vide **Homicide, Murder and Manſlaughter.**

Hue and Cry.

A good warrant to purſue and take criminals without warrant of juſtice of peace, and tho no conſtable be in purſuit; and killing any of the purſuants by malefactor, murder; all malefactors in ſame field principals in the murder. 465

Conſtable and vill bound to purſue, or elſe fineable. 588. II. 99, 102

One preſent at commiſſion of a felony bound to endeavour to take felon, or raiſe *hue* and *cry*. *ib.*

It is the old common law proceſs after felons, and ſuch as have dangerouſly wounded another. II. 98

By *Weſtm.* 1. perſons on *hue* and *cry* not purſuing felons, how puniſhable. *ib.*

By 4 *E.* 1. how, and in what caſes to be levied. II. *Page* 98
Statute of *Winton* makes a further proviſion touching *hue* and *cry*. II. 98, 99
Levied and not purſued, an article inquiſible in the *leet*. II. 99
Tho ſometimes proper to have a juſtice of peace to direct his warrant for raiſing *hue* and *cry*, yet not of neceſſity, or ſometime convenient. II. 99, 100, 102
Purſuants in conſtable's aſſiſtance may plead the general iſſue on 7 & 21 *Jac.* therefore expedient conſtable be called to this action. II. 99, 100, 104
Yet may be raiſed by country in his abſence, which is called cry *de pais*. II. 100
If raiſed, and no felony committed, or on an innocent man, how they that raiſed it are puniſhable. II. 102, 104
Where murder to kill purſuants, tho without warrant or conſtable. 465. II. 100
What party raiſing it is to do, and what duty of conſtable thereon. II. 100, 101
Purſuants on a ſuppoſed felony, not actually committed, may arreſt and proceed, as if real felony done. II. 101, 102
There needs no averment that a felony was done in juſtification of impriſonment, on *hue* and *cry* levied. II. 101, 102, 104
Yet it muſt be averd, that an information was given that the felony was done, if arreſt be by that conſtable, that firſt received the information, and ſo raiſed the *hue* and *cry*; or if arreſt was made by that conſtable or thoſe vills, to whom *hue* and *cry* came at ſecond hand, what muſt be averd. II. *Page* 104
As *hue* and *cry* neither deſcribes, nor names perſon of felon, but only felony done; and therefore arreſt of perſon is left to diſcretion of conſtable, or people of ſecond or third vill; he that arreſts any one on ſuch general *hue* and *cry* muſt aver that he ſuſpected, and ſhew a reaſonable cauſe of ſuſpicion. *ib.*
If one purſued on *hue* and *cry* be in a houſe, and doors ſhut, and refuſed to be opend, conſtable on demand, *&c.* may break open doors. II. 102
Same law on dangerous wound given, and *hue* and *cry* levied on offender. *ib.*
If offender cannot be otherwiſe taken may be kild. *ib.*
Conſtable on *hue* and *cry* may ſearch in ſuſpected places within his vill, yet his entry muſt be *per oſtia aperta*, for he cannot break open doors barely to ſearch, unleſs party be there. II. 103
It is a ſort of proceſs, whereby conſtable may arreſt by deſcription. *ib.*
Purſuants to take ſuch as they have probable cauſe to ſuſpect. *ib.*
Who are ſuſpicious perſons. *ib.*
Where they, that live and have land in the hundred, are competent witneſſes, or not, in action againſt hundred. II. 280, 281

Husband and Wife. Vide Coverture.

Idiot,

Ideot, Lunatick and Madman.

REgularly no incapacities excuſe the parties from damages to be recover'd againſt them in a civil action for any *act* done by them; but *contra*, where proceedings are *ad pœnam.* *Page* 16

Ideocy, *madneſs* and *lunacy* fall under the general name *dementia.* 29

Tho by law no man ſhall avoid his own *act* for theſe defects, tho his heir or executor may, yet as to capital offenſes he hath the advantage thereof. *ib.*

Ideot deſcribed; *ideocy or not*, how tried. *ib.*

Dementia accidentalis, *vel adventitia*, from what cauſes it proceeds. 30.

Diſtributed into a partial and total inſanity. *ib.*

Of partial inſanity. 30, 412

It ſeems not to excuſe party in doing any capital offenſe. 30

Moſt offenders under a degree of partial inſanity, when they commit their offenſes. 30, 412

Difficult to define indiviſible line, that divides perfect and partial inſanity. 30

It muſt reſt on circumſtances. *ib.*

Caution againſt inhumanity towards defects of human nature, and *econtra*, againſt too great indulgence to great crimes. *ib.*

What meaſure of underſtanding is ſufficient not to excuſe in capital offenſes. *ib.*

A total alienation of mind excuſeth. *ib.*

Accidental *dementia*, whether total or partial, diſtinguiſhed into *phreneſis* and *lunacy.* 31

The moon hath great influence in all diſeaſes of the brain. *Page* 30

When ſuch perſons are in the height of their diſtemper. *ib.*

One abſolutely mad for a day, killing another in that diſtemper is equally *not guilty*, as if mad without intermiſſion. *ib.*

When lucid intervals ordinarily happen. *ib.*

Crimes committed by lunaticks during their lucid intervals are ſubject to ſame puniſhment, as if they had no ſuch defect. *ib.*

Alienations and contracts made during ſuch intervals bind their heirs and executors. *ib.*

Accidental *dementia*, whether *temporary* or *permanent* is either *furor*, *&c.* or *delirium*, *&c.* *ib.*

The cauſes and effects of *furor*, *&c.* and ſo of *delirium*, *&c.* *ib.*

Dementia affectata, or drunkenneſs regularly excuſeth not, except in two caſes, and what theſe are. 32

Eaſy to counterfeit madneſs. *ib.*

Degrees thereof various, ſome ſufficient, ſome not, to excuſe in capital offenſes. 32, 33

How madneſs with reſpect to offenders, to be tried. 33

Ideocy, *&c.* how tried in order to the commitment or cuſtody of perſon and eſtate. *ib.*

King has an intereſt in an *ideot*, but in caſe of a *lunatick* it is only a truſt in him. *ib.*

Party found *ideot*, *&c.* may be brought before chancellor or *king* for inſpection. *ib.*

All men of age of diſcretion ſuppoſed *ſane*, unleſs contrary proved, and that as well in caſes civil, as criminal. *ib*

If.

If one be a *lunatic*, and hath *lucida intervalla*, and this be proved, yet law presumes acts or offenses of such a person to be committed in those lucid intervals, unless contrary appears, and that as well in civils as criminals. *Page* 34

In civil causes he, who alledges an *act* done in time of lunacy, must strictly prove it so; yet in criminals, (where court is to be so far of counsel with prisoner, as to assist in matters of law, and true stating the fact,) if a lunatick be indicted of a capital crime, and this appear, witnesses must be examined, whether prisoner under actual *lunacy* at time of offense done. *ib.*

Surdus and *mutus a nativitate* presumed an *ideot*, unless contrary appear; if so, he may be tried and executed, tho caution to be used herein. *ib.*

If one, while *sane*, commit a capital offense, and before arraignment become absolutely mad, he ought not to be arraigned during such phrensy, but remitted to prison till he recover. 34, 35

If such a man after his plea, and before trial, become of *non sane memory*, he shall not be tried; or if after his trial, he become so, he shall not receive judgment; or if after judgment, his execution shall be spared, and why. 35

Proper to impannel a jury to inquire *ex officio* touching such insanity. *ib.*

If a madman commit homicide during his insanity, and continue so till he comes to be arraigned, he shall neither be arraigned nor tried, but remitted to gaol, to remain in expectation of *king*'s grace. *Page* 35

But fit in such case to swear a like inquest *ex officio*. *ib.*

If one in a phrenzy happen by some over-sight to plead to indictment, and is put on his trial, and it appears to the court, that he is mad, judge in discretion may discharge jury of him, and remit him to gaol to be tried after his recovery; but if there be no colour of evidence to find him guilty, or there be pregnant evidence to prove his insanity at time of fact done, in favour of life and liberty it is fit that the court proceed to trial in order to his acquittal and inlargement. 35, 36

One during his insanity commits homicide or petit treason, and recovers his understanding, and being indicted or arraigned for same pleads *not guilty*, he ought to be acquitted, *quia non felleo animo*. 36

No difference, whether phrenzy permanent or temporary, provided fact be done, while party under that distemper. *ib.*

Madman cannot act *per electionem*, or *intentionem*. 36, 37

Such insanity, as excuseth in *homicide*, excuseth in treason. *ib.*

Whether there be any exception to this rule. 37

Jury may find one *non compos* either *not guilty*, or the matter specially. 28

Jeofails.

None of the ſtatutes extend to indictments, nor is a defective indictment aided by verdict. II. *Page* 193

Vide **Amendment.**

Jeſuit. Vide **Felony by Statute, Religion, Treaſon.**

Ignorance.

Ignorance of law or penalty excuſeth not one of age of diſcretion, or *compos mentis* from penalty of the breach of it; but in ſome caſes *ignorantia facti* excuſeth. 42

Ignorantia eorum, quæ quis ſcire tenetur, non excuſat. *ib.*

Where ignorance of the perſon excuſeth in homicide. *ib.*

Jac. 1. iſſued ſeveral commiſſions of gaol-delivery, *&c.* juſtices went their circuit, *king* died, yet they proceeded, tho in ſtrictneſs of law they were determind by *king*'s demiſe, yet judges were excuſed. 499

Ignorantia juris in ſome caſes excuſeth a judge, much more *ignorantia facti.* *ib.*

Receipt of felon after attainder in ſame county makes not perſon acceſſary without notice. 323

Every man within vill bound to take notice of conſtable in the day, tho not in night without notice. 461

Sufficient notice that a man is a bailiff by ſaying *I arreſt you.* *ib.*

Juſtices of gaol-delivery not bound to take extrajudicial notice of a ſecond commiſſion, (nor of rumours and reports) the like in caſe of a ſheriff. *Page* 499

For caſes of misfortune, and caſualty falling in with the caſe of ignorance. Vide **Homicide.**

Impeachment.

Appeals of treaſon by particular perſons ouſted by 1 *H.* 4. impeachments by the commons frequent, becauſe rather *quaſi* grand indictments than appeals. 349. II. 150*

It is a preſentment by the moſt ſolemn grand inqueſt in the the realm. II. 150*

Impriſonment. Vide **Arreſt, Commitment, Juſtice of Peace.**

Incapacities.

Divided and ſubdivided. 15

Ordinarily no incapacity excuſes theſe perſons, that are under them, from civil actions; but *contra*, where proceedings are *ad pœnam.* 16

In all caſes of infancy, *&c.* if one incapable to commit a felony be indicted by grand inqueſt, and thereon is arraigned, petit jury may either find him generally *not guilty*, or the matter ſpecially. 28

Vide **Coverture, Ideot, Ignorance, Infant, King, Maſter and Servant, Neceſſity, Parent and Child.**

For caſualty. Vide **Homicide.**

Indictment.

The ſpecification of *high treaſon* conſiſts principally in this aggravation, that it is *contra ligeantiæ ſuæ debitum.* *Page* 58

Proditorie imports a breach of truſt owing to the *king.* 59

How indictment of treaſon ſhall conclude. *ib.*

Indictment of treaſon againſt *alien amy* ſhall be laid to be *contra dominum ſuum*, and not *naturalem, &c.* but ſhall conclude *contra ligeantiæ ſuæ debitum. ib.*

For compaſſing death of king, queen, or prince, how treaſon and the inducement to the overt-act to be ſet forth. 108

The overt-act to be ſet forth in purſuance of the treaſon alleged. 108. II. 187

Several overt-acts may be laid, and proof of any of them maintains indictment. 122

An actual rebellion or inſurrection muſt be expreſt in indictment by the name of *levying war.* 144

Indictment for counterfeiting *king*'s coin ought to ſhew particularly what kind of coin, but, tho uſual to expreſs the numbers, unneceſſary. II. 187

For clipping or impairing coin, *&c.* it muſt purſue the words of 5 *&* 18 *Eliz.* and conclude *contra formam ſtatuti*; and this not only in caſe of clipping forein coin, but alſo the coin of *England.* 220

Indictment muſt ſhew it was *lucri cauſâ.* 328. II. 190

Indictment againſt receiver of a traitor muſt be ſpecial of the receipt, and not generally that he did the thing, which may be otherwiſe in caſe of a procurer, counſellor or conſenter. *Page* 238

All treaſon is a miſpriſion of treaſon and more; and he, who is aſſiſting to a treaſon, may be indicted of miſpriſion of treaſon only. 374

How indictment of *murder* ought to conclude, *Et ſic, &c.* 427. II. 187, 188

In indictment of manſlaughter only, if others be indicted as acceſſaries *before*, indictment is void againſt them. 437

If *A.* be indicted of murder, and *B.* as acceſſary *before* by procurement, and *A.* is found guilty of manſlaughter only, *B.* ſhall be diſcharged. *ib.*

How indictment to be againſt perſons preſent and aſſiſting to a murder. *ib.*

Where *A.* came with *B.* to beat *C.* and *B.* beat him till he died, indictment antiently ſet forth the matter ſpecially, but now it only runs that *A.* was preſent, aiding and aſſiſting. 440

Indictment of murder requires theſe words, *felonicè ex malitiâ ſuâ præcogitatâ interfecit & murdravit*, of ſimple homicide only *felonicè interfecit.* 450, 466. II. 186, 187, 344

Implied malice, or malice in law maintains general indictment of murder. 460

Where *homicide* is within 1 *Jac. of ſtabbing*, uſual to prefer two indictments; one of murder, another on the *act*, and put priſoner to plead to both, and to charge jury firſt with indictment of murder, and then with the other on the *act*, becauſe if convict

convict on either, clergy ousted. *Page* 468. II. 239, 240
How indictment on this *act* to be to oust clergy. 468
It need not conclude *contra formam statut.* because it makes not the offense, but ousts clergy. *ib.*
Tho none ousted of clergy but he who stabs, yet being formed on the *act* is a good indictment of manslaughter against those, who were present and assisting, and thereon principal in first degree may be convict of simple manslaughter, and acquit of manslaughter on the *act.* 468, 469
In case of involuntary homicide, indictment may find the special matter. 471
In *homicide of necessity* grand inquest may present the special case, and party be presently discharged; but he may be indicted *de novo*, if matter false; *contra*, if indictment simply of murder or manslaughter. 491, 492
One indicted on coroner's inquest is acquitted, petit jury are to inquire of the manslayer; which serves as indictment against him. II. 65, 300
Indictment *se defendendo* good before justices of gaol-delivery, but not of the peace. II. 130
A. indicted *quòd primo die* Maii *secundo* Eliz. *apud* C. *habens in manu, &c. gladium, &c.* [*felonicè*] *percussit, &c.* and not said *adtunc & ibidem, malè*; because *day, year and place* relate only to the having the sword, not to the stroke. II. 178, 179
In indictment of murder, *day and place*, as well of stroke as other act done inducing death as of death must be express. II. *Page* 179, 180
Indictment against *A.* that he *apud* N. *in com. præd.* assaulted *B.* of *O. in com. præd. & ipsum adtunc & ibidem cum, &c. percussit*, nought; it cannot refer to both; and if only to one, it must be to the last, and then it is insensible. II. 180
Indictment of murder *cujusdam ignoti*, good. 181
No need of addition of person robbed or murderd, save for distinction. II. 182
Indictment charges that *J. S. fidem adhibens* to the prisoner, and *nesciens potum præd. cum veneno fore intoxicatum accepit & bibit*, and says not *venenum præd. nought*, not to be supplied by implication. II. 184
Indictment, *quòd* A. *exoneravit tormentum, &c. versus* B. *dans ei unam mortalem plagam*, without saying *percussit*, nought. *ib.*
So if *dedit mortalem plagam*, without *percussit*. *ib.*
If *A.* be indicted, *quòd* 1 Dec. *&c. apud, &c. felonicè, & ex malitiâ suâ præcogitatâ in & super* B. *insult. fecit, & cum quodam &c. adtunc & ibidem percussit, &c.* these words *felonice & ex malitiâ suâ* applied to the assault run also to the stroke, because placed in the beginning of the sentence, and done *adtunc & ibidem.* 184, 185
What requisites to indictment of murder or manslaughter more than other indictments. II. 185 *to* 189
If alleged that party was kild with a sword, and proved that he

he was kild with another weapon, indictment maintained; but *contra*, if with another kind of death, as ſtrangling, *&c.* *Page* 185
The kind of poiſon muſt be alleged; but if proved to be done with another kind, *benè.* *ib.*
If killing was with a ſword, it muſt be ſhewn in what hand offender held it. *ib.*
In dextrâ ſuâ, without ſaying *dextrâ manu*, *nought.* *ib.*
Price of weapon to be ſet down, or elſe muſt be ſaid to be *nullius valoris.* 419. II. 185
Indictment muſt ſhew in what part of body party kild was wounded, if *ſuper brachium*, *&c.* without ſaying right or left, *malè.* II. 185
In ſiniſtro bracio, inſtead of *brachio*, inſenſible and ill. II. 186
Wound laid *circiter pectus*, ill. *ib.*
Super partes poſteriores corporis, *nought.* *ib.*
But *ſuper faciem*, or *caput*, or *dextram partem corporis*, or *in infimâ parte ventris*, certain enough. *ib.*
Where length and depth of wound to be ſhewn, or not. *ib.*
If in evidence it appear to be another kind of wound in another place, indictment maintained. *ib.*
Uſual to allege deceaſed was *in pace Dei*, but unneceſſary. *ib.*
Neceſſary to allege party died of the wound, and alſo time and place, as well of death, as the wound given, and why. *ib.*
The form of ſuch allegation. *ib.*
As well in indictment of manſlaughter, as murder, the ſtroke is to be alleged to be *mortalis plaga.* *ib.*
Plaga expounded. II. *Page* 186
If indictment of murder wants *ex malitiâ ſuâ præcogitatâ*, clergy allowd. II. 187
What indictment on 21 *Jac. againſt concealing death of baſtard-children by the mothers* muſt ſet forth. II. 190, 288
It need not conclude *contra formam ſtat.* act creating no new crime, but directing only the evidence. II. 289
If one be indicted and appeald before ſame juſtices for ſame murder or other felony, where there ſhall be a *ceſſet proceſſus* on the indictment; and ſo where there is an inquiſition before the coroner of murder, and returned, and likewiſe indictment for ſame offenſe by grand inqueſt. II. 221
What words neceſſary in indictment of murder to ouſt clergy. II. 344
A. indicted as having given the mortal ſtroke, *B.* and *C.* as preſent and aſſiſting, if proved that *B.* gave the mortal ſtroke, and *A.* and *C.* were preſent and aſſiſting, it maintains indictment, and all ouſt of clergy; *contra* on ſuch indictment on 1 *Jac. of ſtabbing*, he that gave the ſtroke in ſuch caſe ſhall have his clergy. 437, 463. II. 185, 292, 344, 345
Every indictment to ouſt acceſſary *before* of his clergy by 4 *&* 5 *P. & M.* muſt run *malitioſè*, as in murder, *&c.* II. 339, 344
How indictment for robbing houſes (within 5 *&* 6 *E.* 6.) to be laid in order to ouſt perſons preſent and aſſiſting, but not entring, of their clergy, by 4 *&* 5 *P. & M.* 521, 522

How indictment laid on 5 & 6 *E.* 6. for breaking the lodgings of *A.* at *Whitehall*, (*king*'s manſion-houſe,) and taking thence ſeveral goods of *A.* and others. *Page* 522, 523
How indictment to be formed on this *act*. II. 354, 362
All lodgings in *Whitehall* part of the *king*'s houſe, but in an inn of court each chamber is a ſeveral manſion-houſe, and whoſe it ſhall be ſuppoſed to be. 522, 523, 517, 528, 554, 556
Indictment on 39 *Eliz.* againſt *breaking a houſe in the day* muſt preciſely, and in what manner, follow the *act*. 525. II. 170
Uſual to add *tempore diurno* to ouſt clergy. II. 179
If either indictment purſue not the *act*, or evidence maintain not indictment, priſoner to have his clergy; and on ſuch indictment may be acquitted of ſtealing againſt the *act*, and convict of ſimple felony, tho indictment conclude *contra formam ſtat.* ſo on indictment on 23 *H.* 8. or 5 & 6 *E.* 6. 525, 526, 535
Tho indictments in thoſe caſes be ſpecial, and conclude ſometime *contra formam ſtat.* yet they include felony at common law; for *contra formam ſtat.* is unneceſſary, ſo as circumſtances required by the *act* be purſued; for theſe *acts* make not the felony, but ouſt clergy. 525, 535
One indicted on 39 *Eliz.* ſhall not be ouſted of his clergy by any other *act*. 526
If *A.* commits larciny in a dwelling-houſe within 23 *H.* 8. and carries the goods into a forein county, and be indicted there of larciny and convict, and jury find value of goods to be only 12*d.* tho it appear on trial in forein county that it was within the *act*, he ſhall only have judgment of petit larciny. *Page* 536
How indictment of burglary to be laid, and what words eſſential. 549, 550. II. 168, 184
How indictment of burglary ſhall be laid for *breaking and entring a church* with a felonious intent. 556
If *A.* hires a chamber in the houſe of *B.* for a certain time, and it is broke open, whoſe manſion-houſe it ſhall be ſuppoſed. 556
It ſhall be ſuppoſed manſion-houſe of owner, where lodgings of ſervants are broke open. 557
How indictment to be laid to compriſe both burglary and felony. 559, 560
Where in burglary theſe words *eâ intentione ad furandum*, or commit ſome other felony are neceſſary. 560, 561
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Where time of day is material to aſcertain the nature of the offenſe, it muſt be expreſt in indictment, as in burglary, &c. II. 179
Indictment of burglary muſt be *felonicè & burglariter fregit & intravit*. II. 184
In caſe of burglary or robbing houſes, on what ſtatutes principal to be indicted to ouſt acceſſary *before* of his clergy. 363, 364
What words in *larciny* eſſential. 504, 508

If *A.* feloniouſly take my horſe from me, and *B.* from him, *B.* may be indicted as of a felonious taking from me. *Page* 507

Every indictment of *larciny* ought to ſuppoſe the goods ſtolen to be the goods of ſome body. 512

Quòd felonicè cepit quandam peciam panni — J. S. without ſaying *de bonis & catallis* J.S. *nought.* II. 182

Indictment, *quòd felonicè cepit bona ignoti, bona capellæ tempore vacationis*, or *bona capellæ in cuſtodiâ* J. S. good. 512. II. 181

How indictment to be for ſtealing bells, or goods from a church. *ib.*

If *A.* have a ſpecial property in goods, as by pledge, *&c.* and the goods be ſtolen, they muſt be ſuppoſed in the indictment the goods of *A.* 512

If *A.* bails goods to *B.* to keep, *&c.* and *B.* be robbed of them, felon may be indicted for larciny of the goods of *A.* or *B.* 513. II. 181

Indictment for ſtealing goods of a *feme covert, malè.* 513

If goods of an inteſtate before adminiſtration be ſtolen, they ſhall be ſuppoſed the goods of the ordinary; or if the goods of an executor before probate be ſtolen, they ſhall be ſuppoſed the goods of the executor; neither ordinary, nor executor need ſhew his title. 514, 515. II. 181

But without ſaying *de bonis & catallis* of the executor, or ordinary, *malè.* 515. II. 181

Digging a dead body out of the grave, and ſtealing ſhroud, whoſe it ſhall be ſuppoſed. *Page* 515. II. 181

If *A.* put a winding ſheet on the dead body of *B.* and a thief digs up the body and ſteals the ſheet, it may be ſuppoſed *de bonis* A. 515

Indictment of *larciny from the perſon* how to be laid to ouſt clergy by 8 *Eliz.* 529

A. commits a robbery on the highway in *com.* B. of goods to value of 12 *d.* only, and carries them into a forein county, *A.* may be indicted of *larciny* in forein county; but he muſt be indicted of robbery in proper county. 507, 536. II. 349

If *A.* be indicted of *larciny* in forein county, and jury find value to be only 12 *d.* he ſhall only have judgment of petit larciny, tho it appear on examination on trial, that it was a robbery. 536

Larcinies committed of ſeveral things, tho at ſeveral times, and from ſeveral perſons, may be joined. II. 173

Indictment, *quòd invenit quendam hominem mortuum, ac felonicè furatus eſt duas tunicas*, without ſaying *de bonis & catallis cujuſdam ignoti*, ill. II. 181

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Number and value of things ſtolen to be expreſt. II. 182, 183

Where proper to uſe the word *pretii*, or *ad valenciam.* II. 183

But not material, if theſe terms be converted. II. *Page* 183
If one *pretii*, *&c.* be added to ſeveral things, where it ſhould in clerk-ſhip be applied ſeverally, it is good, if party be convict of all; but poſſibly *contra*, if convict but of part. *ib.*
Quòd felonicè cepit 20 *oves matrices & agnos*, or *matrices & verveces*, ill; but *contra*, if 20 *oves* generally. *ib.*
De quatuor riſcis & ciſtis, good, becauſe *ſynonyma*. *ib.*
Quòd felonicè abduxit unum equum, nought, without ſaying *cepit*, *&c.* II. 184
Quòd furatus eſt unum equum, but treſpaſs for want of *felonicè*. II. 172, 183
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But

But *communis barrectator, & pacis domini regis perturbator, & litium ſeminator, benè*; ſo of indictment, that he is *noctivagus*. II. *Page* 182

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Husband and wife indicted of felony, ſuch indictment is joint or ſeveral, as the fact happens, and on ſuch indictment, *baron* may be acquitted, and *feme* convicted, and *è converſo*. 46, 516

Whether indictment be a part or diſtinct thing from the trial. 298 *to* 301

Variance between day in indictment of felony or treaſon, and in evidence, immaterial; yet if variance be great in point of time to avoid the danger of the relation of the attainder to the day in indictment, fit that jury find the true day. 361. II. 179

In all caſes to ouſt *clergy*, indictment and evidence muſt both bring caſe within the *act*, otherwiſe *clergy* allowd. 525, 526, 535. II. 336

Whether owner of ſtolen goods ſhall have more reſtored, than what are contained in indictment. 545

Uſually at ſame ſeſſions the ſeveral indictments againſt ſame perſon are tried by ſame jury. *Page* 545

Acceſſary may be indicted with principal, which is moſt uſual; but when indicted ſeverally, indictment muſt contain certainty and kind of principal felony. 623

Every felony includes miſpriſion, and party may be indicted of miſpriſion only. 652, 708

Where party to anſwer to a felony without indictment at *king's* ſuit. II. 156, 149* *to* 152*

In all criminal cauſes moſt ſafe and regular way to proceed by indictment. II. 151*

The indorſement, *billa vera*, makes not the indictment; the bill itſelf, when affirmed, is the indictment. II. 162

Of the caption of the indictment on return of *certiorari*. II. 165

The form of the caption, and the *analyſis* thereof, *Norf. ad generalem ſeſſionem, &c.* II. 165 *to* 169

Record of indictment, as it ſtands on the file of court, wherein taken, is only, *juratores pro domino rege ſuper ſacramentum ſuum præſentant*, when returned on *certiorari* is more explicit. II. 165

Name of county muſt be in margin of record, or repeated in body of caption. II. 166

Court, where preſentment made, to be expreſt. *ib.*

It muſt appear where ſeſſions held, and that place, where held is within extent of commiſſion; and therefore, if *Dorſet* in the margin and caption be *ad generalem ſeſſionem pacis tent. apud*

pud S. and ſays not *in comitatu præd.* it is nought. II. *Page* 166

So if weſt-riding *in comit' Eborum* be in the margin, and caption be *apud S. in com. præd'* it ſhall be quaſhed, becauſe not ſaid *apud S.* in weſt-riding *in com. præd.* *ib.*

How many juſtices to be named, but reſt may be ſupplied by the words (*& ſociis ſuis, &c.*) *ib.*

How title of their authority to be ſet forth, as *juſtic. ad gaolam, &c.* *ib.*

If there be a ſeſſion by three commiſſions, as of *gaol-delivery, &c.* if it be returned at a ſeſſion holden before them, and record be made up, as on all three commiſſions, if they have juriſdiction to take indictment but by one, it is good, tho not enabled to take it by the other. II. 166

Where return muſt mention any, and which of the juſtices to be of the *quorum*, or not. II. 167

Where caption faulty in form, ſame term it may be amended by clerk of aſſiſes, or peace, but not in another term. II. 168

In another term clerk, that returns it, ſhall be fined for his informal return. *ib.*

Indictment deſcribed. II. 169

Latin a fixt regular language. *ib.*

Falſe *Latin* did not vitiate indictment. *ib.*

But words of art by omiſſion, or miſplacing letters becoming inſenſible vitiate. *ib.*

Of *inſenſible and incertain words.* II. 170

Where verb of *ſingular number* is uſed for a *plural*, indictment ſhall be quaſhed. II. *Page* 170

Of *abbreviations*, and where conſtrued to beſt advantage for maintaining indictments. *ib.*

Figures not allowd in indictments, tho ſometime *literal numbers* be in returns. *ib.*

Indictment grounded on offenſe by ſtatute muſt bring it within ſubſtantial deſcription of it; otherwiſe *contra formam ſtat.* will not ſupply it. II. 168, 192, 193

If offenſe be made felony, or otherwiſe penal by *act*, and by proviſo in ſame, or any ſubſequent *act* ſome caſes are exempted out of it, indictment need not qualify the offenſe, ſo as to exempt it out of the proviſo; but party ſhall have advantage of it by pleading *not guilty*, or in ſame manner ſhall have advantage of the ſubſequent ſtatute by 21 *Jac.* II. 170, 171

If *act* be prohibitory, and by a ſubſtantive clauſe gives a recovery of penalty by action of debt, but is ſilent as to indictment, party may be indicted on prohibitory clauſe, and thereon fined, but not to recover penalty, but fine ought not to exceed it. II. 171

But if *act* be not prohibitory, but only if any ſhall do ſuch a thing, he ſhall forfeit 5 *l.* to be recovered by action of debt, *&c.* but mentions nothing of indictment, he cannot be indicted for it. *ib.*

If one be indicted for offenſe, which was at common law, and

and indictment concludes *contra formam ſtat.* but in truth is not brought within the *act*, it ſhall be quaſhed. II. *Page* 171, 172

One indicted for *arſon*; on *not guilty* pleaded, a ſpecial verdict was found, which was adjudged no felony; on ſame indictment he was adjudged to pillory, *&c. ſed quære*, for being tried for felony, he had not thoſe advantages for his defence, as if indicted for treſpaſs. II. 172

A particular ſtatute muſt be recited and proved by examined copy. II. 172, 192

All penal *acts* inducing a forfeiture to the *king*, or making a felony or treaſon are general *acts*. II. 172

A general *act* need not be recited, but it is ſufficient to conclude *contra formam ſtat. in hujuſmodi caſu edit. & proviſ.* but if miſrecited, court takes notice of true ſtatute, and rejects miſrecital as ſurpluſage. II. 172, 173

But if recited, and miſrecited in a point material, and concludes *contra formam ſtat. præd.* it is fatal, and indictment quaſhed. II. 172

Where *act* is repealed and reenacted, or temporary, and expires, or continued to the end of next ſeſſion, and before it is continued over, how indictment to conclude as to *contra formam, &c.* 667, 706. II. 173

Where one *act* relates to another, as where former makes offenſe, latter adds a penalty, how indictment to conclude. II. 173

If one offender, and *ſeveral* capital offenſes be committed by him, they may be joined in one indictment. II. *Page* 173

If *ſeveral* offenders commit one offenſe, tho in law they are ſeveral offenſes, yet they may be joined. *ib.*

So if offenſes be of *ſeveral* degrees, but dependent one on another, as in the caſe of principal in firſt degree, and principal in ſecond degree, and acceſſary *before* or *after*. *ib.*

Where joint indictments for *ſeveral* offenſes of ſame nature diſtinctly committed by *ſeveral* offenders have been held ill, or not. II. 174

Where *divers* perſons are inſerted in one indictment, the word *ſeparaliter* makes them ſeveral. *ib.*

The *grammatical order* of the ſeveral parts of an indictment. II. 174, 175

If day be inſerted, and not year, nought, and ſhall not be ſupplied by intendment of (*ult. præterito*), unleſs ſo expreſt; but if ſo, ſufficient to aſcertain year by day of ſeſſions. II. 177

Seſſions held 20 *May*, offenſe ſuppoſed on 10 *of May laſt paſt*, it ſhall relate to *day*, and not *month*, and ſo for the words *next enſuing*. II. 178

One indicted, that he *in feſto Sancti Petri, &c.* ill, becauſe two feaſts of that name. *ib.*

Indictment, *quòd primo die* Maii, *&c. in quendam* B. *inſult. fecit, & ipſum verberavit*, and ſays not *adtunc & ibidem verberavit*, good; *vi & armis*, *day and place* named in beginning refer to all enſuing *acts*; but *contra* in felony, there muſt be *adtunc & ibidem* to the ſtroke, or the robbery, *&c.* and

and day and place of aſſault inſufficient. II. *Page* 178
If ſaid that defendant on 1 and 2 of *May* made an aſſault, and feloniouſly took, *&c.* ill, becauſe incertain, to which day felonious taking relates. *ib.*
Uſual to repeat *adtunc & ibidem* to the ſeveral parts of fact charged. II. 178, 180
Regularly *vill*, *or hamlet and county* muſt be expreſt. II. 180
Where time muſt be repeated, regularly place muſt be ſo too. *ib.*
Suff. in the margin, indictment ſuppoſing fact to be done *apud* S. *in com. præd.* ſufficient; but *contra*, if another county be mentiond in the addition of any party, *&c.* *ib.*
Indictment not aided by verdict; none of the ſtatutes of jeofails extends to them. II. 183, 193
What is defect of certainty in a count, is much more ſo in indictment. II. 183
Indictment of felony muſt allege fact to be done *felonicè*, of treaſon *proditoriè*, of petit treaſon, *felonicè & proditoriè*. 59. II. 184, 187
Felony or treaſon at common law was laid to be done *vi & armis*, but now unneceſſary by ſtatute. 187
So are the words *gladiis*, *baculis & cultellis*. *ib.*
Regularly every indictment ought to conclude *contra pacem*, but need not conclude *contra coronam & dignitatem ejus*. II. 188
Concluding *contra pacem*, and ſaith not *domini regis* is inſufficient. *ib.*
Why indictments conclude *contra pacem, &c.* *Page* 130
For offenſe ſuppoſed to be committed in time of former *king*, and concludes *contra pacem regis nunc*, nought. II. 188, 189
One indicted in time of one *king contra formam domini regis nunc*, may be arraigned for that offenſe in the time of his ſucceſſor. II. 189
Indictment not diſcontinued by demiſe of the *king*. *ib.*
If the offenſe be ſuppoſed to be begun in the time of one *king*, and continued in the time of his ſucceſſor, it muſt conclude *contra pacem* of both kings. *ib.*
If an offenſe be alleg'd in the time of one *king*, and indictment taken in the reign of the ſucceeding *king*, and concludes *contra pacem nuper regis, & regis nunc*, good; *regis nunc* ſurpluſage. *ib.*
Where indictments ſhall conclude *contra formam ſtatuti*, or *ſtatutorum*, or not, and where only ſurpluſage. 468, 561, 667. II. 189 *to* 194
If an offenſe be at common law, and alſo prohibited by ſtatute with a corporal, or other penalty, party may be indicted at common law; and if it conclude not *contra formam ſtat.* it ſtands only as indictment at common law, and he can receive only the penalty the common law inflicts. II. 191, 192
Great ſtrictneſſes required in indictments, the reproach of the law, *&c.* II. 193
Rare to take any exceptions to indictments before conviction, ſave on indictments removed into

into *B. R.* by *certiorari*, which *B. R.* may in diſcretion hear or not hear, but remand priſoner and indictment. II. *Page* 237

If exceptions to an indictment appear material, court can quaſh that, and direct a new bill to be ſent to grand jury, wherein faults may be amended, and priſoner arraigned *de novo*. *ib.*

One attaint by outlawry ſhall not be indicted till outlawry reverſed. II. 252

For what cauſes indictments abated. Vide **Abatement.**

Where beſt to arraign priſoner on indictment, or coroner's inqueſt, or both, and for other matters. Vide **Arraignment.**

Where offender indictable. Vide **County.**

What evidence maintains indictment. Vide **Evidence.**

What the quality of indictors. Vide **Jury.**

For indictments in leets and torns. Vide **Leet, Sheriff.**

Infant.

Wherein the *civil* and *common law* agree, or differ with reſpect to the full age of a man *for making contracts, being a procurator or executor, or conſenting to marriage.* 17, 28

As to crimes, into what periods *civil law* diſtinguiſheth the ages, and at what age it preſumeth men *capaces doli*, or not. 18, 19, 20

Both civil and common law leave the queſtion, whether party *capax doli*, or not, *ad arbitrium judicis* on the circumſtances, and with what caution. 18

By common law, as to offenſes not capital, in ſome caſes infant is privileged by his nonage; and herein privilege is all one, whether above fourteen or under, if he be under twenty-one years; but with ſome, and what differences. *Page* 20

Infant convict of riot, *&c.* ſhall be fined and impriſoned, and not be privileged barely becauſe under twenty-one; but court *ex officio* on his trial ought to examine, whether he is *doli capax*, and had diſcretion to do the *act*, wherewith he is charged. *ib.*

But if offenſe charged be a mere non-feaſance, (unleſs of ſuch a thing as he is bound by tenure, or the like to do, as to repair a bridge, *&c.*) there in ſome caſes he ſhall be privileged by his non-age, if under twenty-one, tho above fourteen; becauſe *laches* in ſuch caſe ſhall not be imputed to him. *ib.*

If infant in *aſſiſe* vouch a record, and fail at the day, he ſhall not be impriſoned; and yet *Weſtm.* 2. that gives impriſonment in ſuch caſe, is general. *ib.*

If *A.* kills *B.* and *C.* and *D.* are preſent, and attach not offender, they ſhall be fined and impriſoned; but if *C.* within twenty-one, he ſhall not. 21. II. 75

Where corporal puniſhment is but collateral, and not direct intention of proceeding againſt infant for his miſdemeanor, there in many caſes infant under twenty-one ſhall be ſpared, tho poſſibly puniſhment by ſtatute. *ib.*

If infant of eighteen be convict of *disseisin* with force, he shall not be imprisoned; and yet *feme covert* shall. *Page* 21. II. 75

If infant be convict in action of trespass *vi & armis*, the entry shall be *nihil de fine, sed pardonatur, quia infans*; if a *capiatur* be entred, it is error, for it appears judicially to court, that he was within age, when he appears by guardian, nor shall he be *in misericordiâ pro falso clamore*. *ib.*

General statutes, that give corporal punishment, extend not to infants. *ib.*

But where a fact is made felony or treason, it extends as well to infants, if above fourteen, as others. 21, 22

Civil law uncertain in defining *ætas pubertati proxima*; but laws of *England*, antiently determined it to be twelve years for both sexes; under that age none could regularly be guilty of a capital offense, and above that age he might, or not, according to circumstances, that might induce court or jury to judge him *doli capax, vel incapax*. 22, 23, 24, 515

Infant of twelve compellible to take oath of alligeance. 23

Against infant under twelve process of outlawry on indictment was not awardable; and if awarded, error; but if above that age, such process was awardable. 23, 24

If infant under twenty-one shall confess indictment, court ought not to record it, but put him to plead *not guilty*, or at least inquire by inquest of office of truth of fact. *Page* 24, 27, 491, 492

How the law now is with respect to infants and their punishments. 25 *to* 29

Infant above fourteen and under twenty-one is equally subject to corporal punishments, as well as others of full age, for it is *præsumptio juris*, that after fourteen they are *doli capaces*. 25

A lad of sixteen convict of successive wilful burning three dwelling-houses, *&c.* had judgment to die, and was executed. *ib.*

Fourteen years common standard, at which both males and females are subject to capital punishments for offenses committed by them at any time after that age. 25, 26, 28

Infant under fourteen, and above twelve, is not *primâ facie* presumed *doli capax*, and therefore regularly for a capital offense committed under fourteen is not to be convicted, but may be found *not guilty*, or jury may find specially, and how; in which case court ought to discharge him, because no felony. 26 *to* 29

Yet if it appear to the court that he was *doli capax*, when offense committed, he may be convicted and suffer death, tho he hath not attained *annum pubertatis, viz.* fourteen. 26, 434, 569, 570

Infant [ten years old] that had kild his companion, and hid himself, hanged; *malitia supplet ætatem*. 26

A girl of thirteen burnt for petit treason. *ib.*

If infant be above ſeven, and under twelve, and commit a felony, he is *primâ facie* to be judged *not guilty*, and found ſo, becauſe ſuppoſed not of diſcretion to judge between good and evil; yet in that caſe, if it appear by pregnant evidence that he had ſuch diſcretion, judgment of death may be given againſt him. *Page* 26, 27

Infant of nine kild infant of like age, he confeſt felony, and on examination found he hid the blood and body; held he ought to be hanged. 27

Circumſtances to be inquired of by jury. *ib.*

If convict, court cannot *ex officio* diſcharge infant. *ib.*

If infant be *infra ætatem infantiæ*, *viz.* ſeven years, he cannot be guilty of felony, whatever circumſtances proving diſcretion may appear, for *ex præſumptione juris* he cannot have diſcretion, and no averment ſhall be received againſt it. 27, 28

As to matters of crime, females have ſame privilege of non-age, as males. 28

If infant be firſt arraigned and acquitted on indictment of murder by grand inqueſt, he may plead that acquittal on arraignment on coroner's inqueſt, and that will diſcharge him. 28, 29

Infant under fourteen preſumed unable to commit a rape, but preſent and aſſiſting therein may be a principal. 630

Act making offenſe felony binds not one under fourteen. 706

Informations.

11 *H.* 7. gave power to proceed in all penal ſtatutes by information before juſtices of *aſſiſe* and peace, treaſon, murder and felony excepted. II. *Page* 151*

Ill uſe being made of it, repeald. *ib.*

Tho informations are often practiſed in the crown-office in caſes criminal, and by many penal *acts* the proſecution is by the *acts* themſelves to be by bill, plaint, information, or indictment, yet proſecution in capital caſes is ſtill to be by indictment; except in caſes excepted, which ſee. II. 156 *to* 152*

In all criminal cauſes the moſt regular and ſafe way, and moſt conſonant to *magna charta* is by preſentment or indictment of twelve ſworn men. II. 151*

37 *H.* 8. for curing omiſſion of the words *vi & armis*, *gladiis*, *&c.* in indictments, extends not to informations. II. 187

Inqueſt of Office.

If jury find one, whom they acquit of treaſon or felony, fled; they muſt inquire what goods he had; but this only an inqueſt of office, and traverſable by party, or thoſe who have the goods. 362, 414, 493. II. 154, 301

Where in caſe of inqueſt of office jurors not finding according to evidence have been fined. II. 311

Where court may inquire ex officio, *whether priſoner be of years of diſcretion.* Vide Infant.
Whether he be compos mentis. Vide Ideot, &c.
Where one ſtands mute ex viſitatione Dei, *or* ex malitiâ. Vide Mute.
Vide Coroner *per totum.*

Inquiſition of Death. Vide Coroner, Felo de ſe.

Intention.

To be tried by circumſtances. *Page* 229, 429, 508, 509
In caſes of larciny what are circumſtances evidencing a felonious intent. 509
Antiently, tho not now, *voluntas reputabatur pro facto.* 532
If primary intention be to beat, tho killing may be the effect, yet it is not ſuch felonious intent as makes burglary. 561

Ireland.

Of the laws *there* of treaſon. 147
Ceſſing of ſoldiers expounded; treaſon by 18 *H.* 6. *ib.*
It was chief treaſon charged on *earl of Strafford king*'s lieutenant *there*, what his defence. *ib.*
By 10 *H.* 7. in *Ireland* (*Poining*'s *law*) all ſtatutes of *England* are enacted to be obſerved *there.* *ib.*
25 *E.* 3. declaring treaſons, and 1 *H.* 4. enacting, that nothing ſhall be treaſon, but what is within that *act*, treaſons enacted *there tempore H.* 6. and afterwards before 10 *H.* 7. ſeem not to be repeald. *Page* 147
General introduction of ſtatutes of *England*, being an affirmative law cannot be intended to take away thoſe *acts*, which were made in *Ireland* for declaring treaſon, as 18 *H.* 6. *ib.*
Act for *earl of Strafford*'s attainder juſtly repeald; and why. *ib.*
Tho part of the dominions, yet no part of the realm of *England*, nor *infra quatuor maria.* 155, 317, 693
Ireland hath ſame laws for treaſon that *England*, and ſome more; yet for treaſon in *Ireland* offender may be tried in *England* by 35 *H.* 8. 155
A *peer* there tried *here* for treaſon by a common jury. 155, 317, 693

Judgment.

Court *ex officio* to give judgment for *treaſon*; but if *king*'s ſerjeant or attorney prays it, how prayer to be entred. 396
The form of ſevere judgment for *high treaſon.* 350, 351, 382. II. 396, 397
King often pardons all, but beheading, under great ſeal, *&c.* 351, 370. II. 412
Women to be *drawn and burnt*, as well in *high* as *petit treaſon.* 351. II. 397, 399
Form of leſs ſolemn judgment, which is only to be *drawn and hanged.* 351. II. 397
But women to be *drawn and burnt.* 351
For *counterfeiting great or privy ſeal, or privy ſignet, or ſign manual.* 187, 351, 352. II. 398, 399

For

For *counterfeiting or clipping, waſhing*, &c. *king's coin, or forein coin made current. Page* 219, 220, 223, 224, 351 *to* 354. II. 397, 398

For *knowingly importing falſe money* ad inſtar *the king's coin, with intent to merchandize*, &c. 220

In new treaſons it is to be the moſt ſevere judgment; but *contra* as to *coin*. 220, 221, 352, 353. II. 396, 397

What the conſequents of judgment in *treaſon*. 354

In *high treaſon* marſhal is mentioned as officer, by whom execution is to be made, in the very judgment in *B. R.* II. 411

Judgment of *treaſon* given by the lords *per aſſent du roy* as a tranſcendent puniſhment of the murder of the *duke of Glouceſter*. 266, 267

There may be reaſons not only in policy, but juſtice, ſometimes for a parliament to vary the puniſhment of crimes, in ſubſtance the ſame, when differenced by circumſtances. 270

Judgment for miſpriſion of treaſon. 374. II. 400

For *petit treaſon*. 382. II. 399

A wife or ſervant acceſſary *before* to *petit treaſon*, judgment to be as againſt principal. 379

But if acceſſary, whether *before* or *after*, be a ſtranger, judgment ſhall be, *quòd ſuſpendatur*, &c. 382

Judgment of *peine fort & dure*, where priſoner challenges thirty-ſix in *petit treaſon*, as well in appeals, as indictments, and in caſe of men, as well as women. II. 319, 399, 400

Miſpriſion of petit treaſon puniſhable by fine and impriſonment; ſo is *miſpriſion of felony*. *Page* 375

Judgment in all caſes of *felony*, *quòd ſuſpendatur per collum, quouſque mortuus fuerit*. II. 399

What judgment by *Weſtm.* 1. *in miſpriſion of felony*, if concealer an officer, as ſheriff, &c. or if a common perſon. 374, 375

If jury in caſe of indictment for *murder* or *manſlaughter*, find the *homicide* to have been *involuntary*, & *ſic*, &c. court may give judgment againſt concluſion of verdict, as that the fact is *manſlaughter*, tho verdict conclude *per infortunium*, or *ſe defendendo*. 471

Where thief is kild of neceſſity in purſuit, if ſpecial matter be found, the killer ſhall have judgment, *quòd eat inde ſine die*, becauſe it is no felony, nor cauſeth any forfeiture, ſo much as of goods, and ſo differs from *ſe defendendo*, or *per infortunium* as to forfeiture of goods. II. 304

One indicted of *homicide ſe defendendo*, or *per infortunium* muſt plead to it, or confeſs it, and no other judgment, but *remittitur priſonæ*, or he is baild *ad expectandam gratiam regis*. II. 395

If one by coroner's inqueſt be found to have kild a thief aſſaulting to rob him, &c. he ſhall not be arraigned on that indictment, but be diſmiſt without any judgment. *ib.*

If one be indicted of *murder* or *manſlaughter*, and on *not guilty* ſpecial

ſpecial matter is found, judgment is, *quòd eat indè quietus*, which is a perpetual bar; but if found guilty *ſe defendendo*, judgment is, *quòd expectet gratiam regis.* II. *Page* 395

Judgment in *grand* and *petit larciny.* 504, 530. II. 400

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Judgment of *peine fort & dure*, and how entred. II. 319, 399, 400

How judgment in caſe of *allowance of clergy* entred. II. 395

How a *peer* muſt aver his peerage, and pray benefit of 1 *E.* 6. and how judgment for his deliverance ſhall be entred. II. 396

If it be alleged that priſoner is a clerk in orders, how judgment ſhall be entred after his reading; and the like, if he plead *king*'s pardon of burning in the hand. *ib.*

If a *layman* pray his clergy, and it appear on record, that he had it before, how the entry is. *ib.*

And ſo if he prays his *clergy*, and cannot read. *ib.*

Where judgment on *acquittal* is only *quòd eat inde ſine die*, and there is defect in indictment, it ſhall be ſuppoſed to be given on that defect. II. 248

Judgment of *eat indè ſine die*, general and ſpecial. II. 392

In *covenant* a ſpecial verdict is found, and on peruſal of declaration a fault therein appears, how judgment ſhall be, ſo as not to be a bar in another action. II. 393

If given generally, it ſhall be intended on verdict and merits. *ib.*

In a *quare impedit* by the *king* iſſue is joined, and found for defendant, it is alleged in arreſt of judgment that no patron is named in the writ, judgment ſhall be entred generally, *quòd eat indè ſine die*, and not ſpecially on plea in abatement; but it ſhall not bar the *king* in a new action, for the *eat ſine die* ſhall be applied to the plea to the writ. II. *Page* 393

If one plead in bar to indictment; yet if indictment inſufficient, whether *eat ſine die* ſhall be applied to inſufficiency of indictment, or to plea in bar. *ib.*

Fit to have the *eat ſine die* ſpecial in that caſe, and how. *ib.*

If one plead *not guilty*, and be acquitted, judgment is not only *quòd eat indè ſine die*, but *ideo conſideratum eſt, quòd eat indè quietus*, tho at *king*'s ſuit. II. 394

If entry be, *quòd eat indè quietus*, priſoner cannot be arraigned again, tho indictment inſufficient, till judgment of acquittal reverſed, becauſe it muſt go to matter of the verdict. II. 394, 395

Where priſoner excepts to inſufficiency of indictment, or court doth it *ex officio*, how judgment to be. *ib.*

Judgment on *auterfoits acquit*, *convict* or *attaint*, and confeſſion by *king*'s attorney, how to be enterd. II. 392

How judgment enterd on *plea of pardon*, and how *allowance* thereof enterd in the margin. II. 391, 392

One outlawd of *felony or treaſon*, tho no other judgment but *utlegatum eſt per judicium coronatorum* is of itſelf an attain-

der, and ſubjects offender to ſuch award thereon to be made by court, as is ſuitable to the offenſe. II. *Page* 399

Judgment, *quòd ſuſpendatur, &c.* to be given, as well againſt a *peer*, as another, in caſe of *felony*, and cannot otherwiſe be given by court, or executed by ſheriff. *ib.*

Tho judgment regularly againſt the *king* is *ſalvo jure regis*, yet *contra* in caſe of life. II. 247

Former *acquittal by judgment* not only a bar of new indictment for ſame offenſe; but if party is indicted *de novo*, and outlawd thereon, he may aſſign his former *acquittal* for error in that outlawry, and reverſe it for that cauſe, and in that caſe how judgment to be. II. 243, 244

Theſe words, *Eyt judgement de vy & member* in an *act* create a felony. 627, 641, 703

Court may reſpite judgment on *acquittal*, if againſt full evidence. II. 310

In *England* law more determinate, than in other places, and leaves as little as may, to *arbitrium judicis*. 13

It doth not allow an arbitrary power to the judge to change puniſhment law inflicts. 19

Thorp, C. J. was ſentenced to death before ſpecial commiſſioners aſſigned *ad judicandum ſecundum voluntatem regis*, in reſpect of the oath made by him to the *king* and broken, whereby he had bound himſelf to that forfeiture, that judgment was affirmed in parliament, but with what caution to prevent ſuch arbitrary courſe of proceeding for the future. *Page* 262, 263

One indicted of *arſon* pleaded *not guilty*, and a ſpecial verdict was found, and ſpecial matter adjudged no felony; yet on ſame indictment priſoner adjudged to the pillory; *ſed quære*. II. 172

One indicted of felony before juſtices of *oyer* and *terminer*, *&c.* is convict, if record of conviction and priſoner be removed into *B. R.* *B. R.* may give judgment thereon, but what to be done previouſly thereto. II. 401, 404

No other remedy before 11 *H. 6.* & 1 *E. 6.* for judgment to be given on perſons reprieved before judgment. 401

Where priſoner hath not always from his arraignment remained in cuſtody of court, where he firſt had judgment, but is brought in by *cap.* by ſheriff, he ſhall not be eſtopped from ſaying *he is another perſon*, and iſſue may be taken thereon, and ſhall be tried before execution awarded; and if he ſtand *mute*, it ſhall be inquired *ex officio*, whether of malice. II. 402, 407

But *contra*, if in cuſtody of ſame court from his firſt arraignment, or if he had been baild, and came in and rendred. *ib.*

Where party outlawd, or abjured comes by proceſs into *B. R.* he ſhall be demanded what he can ſay why execution ſhould not be awarded on record removed; and if he confeſs himſelf *ſame perſon*, execution ſhall be awarded. *ib.*

By 14 *H. 6.* juſtices of *niſi prius* on tranſcript of record have power

power to give judgment and award execution; but then prisoner must be sent by *habeas corpus* to sheriff of county, where *nisi prius* is; or else shall be baild to appear *there*. II. *Page* 403, 404

But they may return *postea* into *B. R.* and there judgment may be given, as at common law. II. 404

In what cases execution shall not be awarded without demanding what prisoner has to say against it. II. 401, 407, 408

Form of award of execution in *B. R.* II. 409, 411

Vide **Corruption and Restitution of Blood, Execution and Reprieve, Forfeiture, Gaol-delivery, King's Bench, Oyer and Terminer.**

Jurisdiction.

Where temporal judge may incidently take notice, whether a tenet be *heresy*, or not. 400, 407, 408

Interpretation of a statute belongs to common law. 408

Justices of *C. B.* cannot hold plea on indictment or appeal in capital causes. 498

Where proceedings of judges in capitals without strict extent of their commission, or where their commission happens to be determind, are great misprisions. 498, 499

Altho felony be limited to special jurisdiction, yet misprision of it may be tried by a common jury, and before general commissioners of *oyer* and *terminer*. 653

A justice of peace of county, where fact done, cannot in foreign county do any *act* of jurisdiction, as imprison, but what he may do. *Page* 581. II. 50, 51

Vide **Admiralty, Arrest, Commission, Court, Gaol-delivery, Homicide, Justice of Assise, Justice of Peace, King's Bench, Murder and Manslaughter.**

Jury.

Grand Jury.

Special provision made for quality of indictors in *Lancashire*. 286. II. 52*

So in cases of murders, *&c.* committed in *king*'s palace. II. 53*

Of grand inquests before justices in *Eyre*. *ib.*

On summons of a sessions of the peace, form of precept for return of grand jury; a *scire facias* also issues to all coroners, constables, *&c.* to be there at that day. 154*

According to others, a *venire facias* issues to summon grand jury. *Vide* the form. *ib.*

On commissions of *oyer* and *terminer*, or *gaol-delivery* form of like *venire*. *ib.*

On this precept sheriff returns twenty-four or more out of whole county, *viz.* a competent number out of every hundred, out of which grand inquest of sessions of peace, *oyer* and *terminer*, or *gaol-delivery* are taken and sworn *ad inquirendum, &c.* not as antiently in *Eyre*, which was a kind of grand

grand inqueſt out of every hundred. *Page* 154*

In ſome counties, which conſiſt of gildable and ſuch franchiſe, where antiently ſeveral juſtices of *gaol-delivery* ſat, as in *Suffolk*, there are two grand juries, one for the gildable, another for the franchiſe. *ib.*

Indictors to be *probi & legales homines*, and muſt be ſo returned; and this holds, as well in coroner's inqueſts, as other indictments or preſentments II. 155*, 167

If any of them be outlawd, tho in a perſonal action, it is pleadable in avoidance of indictment. 303. II. 155*

Who not *probi & legales homines*; where one is not *legalis homo*, tho twelve beſide without exception, indictment may be quaſhed by plea. II. 155*, 167

They muſt be *king's lige* people. II. 155*

And muſt be returned by ſheriff or bailiffs of franchiſes, without nomination of any, ſave by ſworn bailiffs. *ib.*

All indictments taken contrary, void. *ib.*

What freehold indictors ought to have. *ib.*

By ſtatute how juſtices of *gaol-delivery*, or peace, (one of *quorum*) in open ſeſſions may reform pannel of grand jury. II. 36, 155*, 156*

Grand jury ſworn firſt day commonly ſerves whole ſeſſions of peace, *&c.* yet court may grant another grand inqueſt to be returned and ſworn, and in what caſes that may be. II. 156*

If on record it appear that grand inqueſt was returned after firſt day of ſeſſions, unleſs adjournment be entred on record, it is erronious. II. *Page* 156*

By ſtatute grand inqueſt may be impanneld to inquire of concealment of another grand inqueſt, and tho it mentions only a grand inqueſt to be returned by juſtices of peace, yet it extends to *B. R.* and poſſibly to ſeſſions of *oyer* and *terminer*, and *gaol-delivery*; tho that can rarely come in queſtion, becauſe ſeſſions of peace ordinarily accompany thoſe commiſſions. II. 156, 157, 160

This proper way of puniſhing grand inqueſt, if they refuſe to preſent ſuch things, as are within their charge. II. 157

Grand inqueſt before juſtices of *gaol-delivery*, *&c.* ought only to hear evidence for the *king*, and in caſe of probable evidence ought to find the bill, and why, [*ſed quære*]. II. 157

Where they may return the bill *ignoramus*. *ib.*

If it appear that *A.* was kild by *B.* and a bill of murder be preſented, regularly they ought to find the bill for murder, and not for manſlaughter, *&c.* and why. 491, 492. II. 158

If a bill be againſt one for murder, and grand inqueſt on evidence before them, or their own knowledge be ſatisfied, that it is but *per infortunium*, or *ſe defendendo*, and accordingly return bill ſpecially, court may remand them to conſider better of it, or hear evidence at the bar, and accordingly direct grand inqueſt. II. 158

A judge blamed for fining grand inqueſt for ſuch a return. *ib.*

If a bill be for murder, and it doth *conſtare de perſonâ occidentis*, whether they can find bill for manſlaughter, and *ignoramus* for the murder, and whether court be bound to receive ſuch a return. II. *Page* 158 *to* 162

Whether they can be fined for ſuch a return. *ib.*

If evidence to grand inqueſt be given at the bar on indictment in *B. R.* and grand inqueſt will not find a bill according to direction of that court, in what inſtance they are finable. *ib.*

If juſtices of *oyer* and *terminer*, or *gaol-delivery* having heard evidence at bar, grand inqueſt will not find according to their directions, juſtices may bind them over to appear in *B. R.* and on information againſt them, they may be fined, [*ſed quære*]. II. 160

Fines ſet on them by juſtices of peace, *oyer* and *terminer*, and *gaol-delivery* for concealments or non-preſentments in any other manner than that preſcribed by 3 *H.* 7. not warrantable by law. *ib.*

Progreſs of fines ſet on juries, firſt on grand inqueſts, then on petit juries for not finding according to direction of court, and then on jurors, in civil cauſes for not finding in point of fact according to court's direction. II. 160, 311

Objections againſt ſetting ſuch fines. II. 160, 161

Grand jury ſworn to keep *king*'s council undiſcoverd; diſcloſing whereof was formerly felony, which is now only finable. II. 161

If thirteen or more be of grand inqueſt, a preſentment by leſs than twelve ought not to be; but if there be twelve aſſenting, tho ſome of the reſt of their number diſſent, it is a good preſentment. II. *Page* 161

But on trial by petit jury, it can be by no more or leſs than twelve, and all aſſenting to the verdict. *ib.*

If preſentment be deliverd into a court of ſeſſions and received, no averment lies, that it was not aſſented to by twelve. II. 162

Contra in caſe of preſentment by a leet, for party diſtrained may ſo aver. *ib.*

Why indictors preſumed to be indifferent. *ib.*

A good exception, that one procured himſelf to be returned on grand inqueſt. *ib.*

If bill be for murder, and they return it *billa vera quoad* manſlaughter, and *ignoramus quoad* murder, what words it is uſual to ſtrike out in preſence of grand jury, and ſo to receive bill. *ib.*

What ſafeſt way with reſpect to this and like caſes. *ib.*

Indorſement makes not indictment, but bill affirmed. *ib.*

Difference between preſentment by grand jury of county and a liberty. II. 167, 168

Indictment of *aliens* to be by grand inqueſt of *Engliſh*. II. 271

In what county party indictable. Vide **County.**

Vide **Indictment, Preſentment.**

Petit Jury.

By 27 *Eliz.* precedent of *commiſſion to give judgment without trial by jury* primæ impreſſionis. *Page* 336

In dubiis rather to incline to acquittal than conviction; caution againſt the wit and invention of accuſers, and odiouſneſs of the accuſed. 87, 300, 509, 636

Not to be tranſported with heinouſneſs of the offenſe. 636

Uſually at ſame ſeſſions the ſeveral indictments againſt ſame perſons tried by ſame jury. 545

Jurors triers of credit of witneſſes, as well as truth of fact. 635. II. 235, 276, 277, 313

After *not guilty* received and recorded, ſheriff returns pannel of jury. II. 293

Oath of jury. *ib.*

The form of charge given by clerk to jury; containing the effect of their inquiry. II. 294

Tho there be twenty priſoners at the bar for ſeveral felonies, and the oath is general to try between *king* and priſoner at the bar, yet jury to inquire of no more than what particularly charged with; and tho twenty have pleaded and ſtand at the bar, when jury is ſworn, yet court may ſtay at any number, and jury ſtand charged with no more. *ib.*

When they go from the bar, and have brought in their verdict, then if ſame jury paſs on the remaining priſoners, yet they are to be called over again, and reminded of their challenges, and jury ſworn *de novo* on their trial. II. *Page* 294

By antient law, if jury ſworn had been once particularly charged with a priſoner, it was commonly held they muſt give up their verdict, and they could not be diſcharged before. *ib.*

Yet contrary courſe hath long obtained. II. 295

Where court may diſcharge jury ſworn, and charged to try one *non compos.* 35

If after jury ſworn and departed from bar, one wilfully goes out of Town, the eleven cannot give any verdict without the twelfth; but twelfth ſhall be fined for his contempt; and that jury may be diſcharged, and new jury ſworn, and new evidence given, and verdict taken of new jury. II. 295, 296, 309

If a jury be charged with ſeveral priſoners, and court finds jury partial to one, court may diſcharge jury of that priſoner, and put him on his trial by another jury. II. 296

Twelve ſworn to try the iſſue; after departure *A.* one of them leaves his companions; by conſent of all parties *B.* another of the pannel is ſworn in *A.*'s place, *A.* returns, and being examined, *why he departed*, anſwer'd to *drink*, and denied on oath, that he had ſpoken with defendant; whereon *B.* was diſcharged, and verdict taken of *A.* and the other eleven, and *A.* fined for contempt. *ib.*

If thirteen be ſworn by miſtake, ſwearing of laſt is void, and the other twelve ſhall ſerve. *ib.*

No verdict can be taken of leſs than twelve, and it is error; and ſo in a preſentment; but if twelve be recorded ſworn, no averment lies that one was unſworn. II. *Page* 296

Court at common law may on juſt cauſe remove a juror after ſworn. *ib.*

When jurors depart from the bar, a bailiff ought to be ſworn to keep them together, and not to ſuffer any to ſpeak with them. *ib.*

After their departure they may hear one of the witneſſes again in open court, and may deſire to propound a *queſtion* to the court for their ſatisfaction; and it ſhall be granted, ſo it be in open court; but if otherwiſe, this appearing by examination in court, and indorſed on *poſtea* will avoid the verdict. II. 296, 307

If they agree not before departure of juſtices of *gaol-delivery*, they muſt be conveyd along in carts, and judge may take and record their verdict in a forein county; *quære*, whether in ſuch caſes, the ſeſſion may be adjourned before verdict taken. *ib.*

If there be eleven agreed, and but one diſſenting, who ſays he will rather die in priſon than conſent, yet verdict ſhall not be taken by eleven, nor refuſer fined or impriſoned. *ib.*

For moſt part in *Eyre* petit jury were all of ſame hundred, where offenſe done; but now jury that tries, as well as inquires, is generally of reſt of county. II. 301

Any of the jury eating or drinking before they have given up their verdict, finable. II. *Page* 297, 306

But antiently, if at charges of either party, verdict ſet aſide, but not ſo now. *ib.*

If at charges of priſoner, afterwards found guilty, verdict ſtands. *ib.*

But if they acquit him, judge before whom verdict given, may record ſpecial matter, and thereon verdict ſhall be ſet aſide, and a new trial granted. *ib.*

A juryman, who hath a piece of evidence in his pocket, and after jury ſworn and gone together, ſhews it to them, is finable; but verdict not avoided, tho caſe appears on examination. II. 306, 307

But if, after jury ſworn, either party deliver a piece of evidence to jury, and verdict is given for him, it ſhall avoid it; but then it muſt appear by examination, which muſt be indorſed on *poſtea* or verdict, ſo as it appear of record, and not barely by *affidavit* made after; but if verdict be given againſt him that deliverd the evidence, it is good. II. 307

If a piece of evidence under ſeal be read in court, jury ought regularly to have it with them; but *contra*, if not under ſeal. *ib.*

If after jury ſworn, a piece of evidence not under ſeal be by court deliverd to jury, it avoids not the verdict. *ib.*

So if deliverd by a mere ſtranger, if verdict given againſt him, on whoſe behalf deliverd. *ib.*

If after jury gone from bar, they ſend for a witneſs, who repeats his

his evidence to them, this appearing by examination, and being indorſed on *poſtea* avoids the verdict; but witneſs may be heard again in open court, and court or parties re-examine him. II. *Page* 296, 307

If depoſitions are read in open court to the jury, and as they are going from the bar, ſolicitor for the *king*, without conſent of parties, or order of court delivers copies of them to the jury, if they find againſt him, on whoſe part theſe were deliverd, verdict is good; but if for him, and this appears by examination indorſed on *poſtea*, verdict ſhall be quaſhed, and a new *venire* or award for new jury returned. II. 308

After evidence given, where divers written evidences are read on both ſides, and clerk is making up his bundle of evidences under ſeal to deliver to jury, ſolicitor for plaintiff delivers a bundle of depoſitions to jury, ſome whereof were read, ſome not, and on examination this appeard, tho jury ſwore they opend not bundle deliverd by ſolicitor, yet verdict for plaintiffs for this cauſe avoided (matter being indorſed on the record), and a new *venire* awarded. *ib.*

It might have been a miſdemeanor for jury to have looked into bundle deliverd by ſolicitor. *ib.*

If party after jury ſworn ſpeak with a juryman of forein buſineſs, this avoids not verdict after given for him. *ib.*

But if he, or any in his behalf ſay to a juryman after his departure from the bar, and before verdict given, *the caſe is clear for plaintiff*, this ſhall avoid verdict, if given for him, for it is new evidence. II. *Page* 308

If *A.* be challenged off, and twelve more ſworn, yet *A.* goes with them, and is preſent at their conſultation, if *A.* gives no new evidence, nor intermeddles, verdict good, but *A.* ſhall be fined. II. 309

If one of the indictors be returned on petit jury, and do not challenge himſelf, he ſhall be fined. *ib.*

If a jury ſay *they are agreed*, and it being asked, who ſhall ſay for them, they ſay *their foreman*, but on further inquiry they are not agreed, every one of them ſhall be fined apart. *ib.*

If a juryman be called and refuſe to appear, or if having appeard withdraw himſelf before ſworn, finable. *ib.*

So if challenged, and while it is trying he withdraw, and challenge be over-ruled, and he be not preſent to be ſworn. *ib.*

If eleven were agreed, and the twelfth refuſed, formerly ſuch juryman hath been fined, and inqueſt taken by the other eleven. 309

But both theſe courſes now diſallowd. *ib.*

If jury convict againſt reaſon and evidence, or without evidence, and againſt direction of court, court may reprieve convict before judgment, and certify *king* for his pardon. II. 309, 310

Court may reſpite judgment on acquittal, if againſt full evidence. II. 310

In ſuch caſe *king* may have an attaint. *ib.*

By ſtatute juſticiar or ſteward, before whom any one is acquit of felony againſt pregnant evidence in *Wales*, or the *Marches* thereof, may bind over the jurors, *&c.* II. *Page* 310
Several inſtances of jurors finding againſt evidence, being fined, but not warranted by law. II. 160, 310 *to* 314
Where fined for their confederacy and practice. II. 311
Where in caſe of inqueſt of office jurors not finding according to evidence, have been fined. *ib.*
Whether *B. R.* can fine jurors for verdict againſt evidence. *ib.*
Jurors to be freemen, regularly freeholders. II. 264
Legales; without any juſt exception. *ib.*
De vicineto; but this not ſtrictly required, for they of one ſide of the county are by law *de vicineto* to try an offenſe of the other ſide of the county. *ib.*
By antient law, if jurors by miſtake or partiality give their verdict in court, yet they may rectify it before recorded, or go together again and reconſider it. II. 299, 300, 310
If recorded, they cannot retract, or alter it. II. 300
In felony or treaſon no privy verdict can be given. *ib.*
For *jury-proceſs*. Vide **Trial.**
Vide **Challenge, Verdict.**

Juſtice of Aſſiſe and Niſi prius.

Juſtices of aſſiſe are to ſend their records determind into the Exchequer at *Michaelmas*. II. 31
By ſtatute *no man of law* ſhall be juſtice of aſſiſe, where born, or he doth inhabit, but it is uſually diſpenſed with by a *non obſtante*. II. *Page* 32
Whether, by 27 *E.* 1. *de finibus*, they may deliver gaol without any other commiſſion, and give judgment of felons. II. 39, 403
Safe to have a ſpecial commiſſion for that purpoſe. II. 39, 40, 403
In caſe of counterfeiting coin on 3 *H.* 5. they expreſly muſt have a ſpecial commiſſion. II. 40
If indictment in the country had been removed into *B. R.* and priſoner *there* had pleaded *not guilty*, after 27 *E.* 1. and before 6 *H.* 8. the tranſcript of record might have been tranſmitted to have been tried at *niſi prius*, and ſo in appeal. II. 39, 403
Naming them juſtices of *niſi prius* in 27 *E.* 1. is nothing, but the deſcription of their perſons, to whom commiſſions of *gaol-delivery* ſhall be directed. II. 40
Juſtices of *niſi prius* could not at common law give judgment in appeal or indictment ſent them out of *B. R.* by *niſi prius* to be tried, no more than in other ordinary civil cauſes, becauſe they have but tranſcript of record, and their commiſſion is only *ad triandum exitum*. II. 403
In appeals, juſtices of *niſi prius* may inquire of abettors, and give judgment, and if plaintiff nonſuit, arraign priſoner at *king*'s ſuit. II. 41
May allow clergy to a convict of manſlaughter on appeal. *ib.*
May by ſtatute proceed to trial and execution on indictment removed

moved by *certiorari*, and ſent down to be tried by them. II. *Page* 41

By 14 *H. 6.* have power in all felonies and treaſons to give judgment, and to award execution. 350. II. 403

This ſtatute gives them no power to inquire of abettors in appeal, nor to arraign on a nonſuit before them at *king*'s ſuit. *ib.*

Juſtices of *niſi prius*, *nient obſtante* 14 *H. 6.* may, in caſe of indictment or appeal ſent them out of *B. R.* return *poſtea* into *B. R.* and there judgment may be given as at common law. II. 404

Juſtice of Peace.

They have no juriſdiction in treaſon, except as a felony [which treaſon includes], and as a breach of the peace; they may take examination of traitors, and impriſon them, and take information of witneſſes, and bind them over, and tranſmit theſe examinations and informations to next gaol-delivery, *&c.* 350, 372, 580. II. 44

They cannot regularly arraign, try, and give judgment in treaſon, unleſs in ſuch caſes, as are by ſpecial *act* committed to their cognizance, becauſe their commiſſion extends not to it. 350, 372. II. 44

Per Rolls, C. J. they may take indictment of treaſon, tho they cannot try it. 372

By ſome *acts* may take indictments of particular treaſons, but muſt certify them into *B. R.* or gaol-delivery. II. 44

May iſſue their warrants within precincts of their commiſſion for taking perſons charged of crimes within cognizance of ſeſſions, and bind them over to appear there, tho not indicted, notwithſtanding lord *Coke*'s opinion to the contrary. *Page* 579

Where juſtice of forein county may grant his warrant, and commit offender; and where offender taken in a forein county muſt be carried before a juſtice of proper or forein county, or which of them. Vide Arreſt.

If *A.* be in commiſſion of peace in proper county, and happen to be in a forein county, and complaint is made to him of a felony done in proper county, as he cannot iſſue a warrant to take party, ſo neither can he impriſon in forein county, becauſe an *act* of juriſdiction; but he may take oath of party robbed in purſuance of 27 *Eliz.* or may take examination or informarion, or recognizance in forein county, (*ſed quære* of the laſt), but cannot compel them by impriſonment. 581. II. 50, 51

One is a juſtice in two adjacent counties, tho by ſeveral commiſſions, whilſt he lives in one county, may ſend his warrant to arreſt in the other. 580

Convenient, tho not always neceſſary, to take information on oath; if party ſuſpected, then to ſet down cauſe of ſuſpicion. 582

When neceſſary or not to bind party to proſecute before warrant iſſued. *ib.*

Previous to commitment three things required. 1. Examination

tion of party accuſed, but without oath. 2. Further examination of accuſers and witneſſes on oath. 3. Binding over proſecutor or witneſſes to next aſſiſes, *&c.* *Page* 585. II. 111

Examinations ought to be in writing without oath, and returned or certified to next gaol-delivery, *&c.* and being ſworn by juſtice or clerk to be truly taken, may be given in evidence. 585. II. 52

If juſtice at return of warrant cannot take examination; he may *ore tenus* order officer to detain priſoner till next day, and this detainer juſtifiable without ſhewing particular cauſe, or any warrant *in ſcriptis.* *ib.*

Time of detainer muſt be reaſonable. 586. II. 46, 121

Information of proſecutor or witneſſes to be in writing on oath, and returned or certified at next ſeſſions, *&c.* and being ſworn by juſtice or clerk, *&c.* to be truly taken, may be given in evidence againſt priſoner, if witneſſes dead, or unable to travel. 305, 306, 586. II. 52, 120

Whether juſtices of peace of a foreign county may tranſmit ſuch informations before juſtices of *gaol-delivery* of proper county. 305, 306

If juſtice commit or bail priſoner, he is to take ſurety of proſecutor to proſecute, and of witneſſes to appear and give evidence, and on refuſal may commit them to gaol. 585, 586. II. 121

Eſcapes within their juriſdiction. 600

They (*nient obſtante* clauſe in their commiſſion) are not comprized under name of juſtices of *oyer* and *terminer.* *Page* 686, 687. II. 23, 44

Where neceſſary to enter their adjournments. II. 24

Where they may, or not proceed ſame ſeſſions againſt party indicted before them. II. 28, 29, 48

They were by ſtatute to ſend their indictments not determind to juſtices of *gaol-delivery,* whether felonies or treſpaſſes, if party in gaol or baild, but now unneceſſary. II. 32, 48

Where they may deliver priſoners by proclamation or not. II. 34, 46

Have power by ſtatute to reform *ore tenus* either pannel of grand or petit jury. II. 36, 155*, 156*, 265

They cannot make out proceſs, when indictment deliverd over to juſtices of *gaol-delivery.* II. 37

Conſervators of the peace how antiently aſſigned. II. 42

Firſt eſtabliſhment of juſtices of peace by 1 *E.* 3. II. 42, 99

Hearing and determining given them by 18 *E.* 3. II. 42, 48, 109

Commiſſion of peace founded in theſe and other *acts.* II. 42

Conſiſted antiently of three, now only two *aſſignavimus.* *ib.*

Of the firſt, and the powers it gives. *ib.*

So of the ſecond. II. 42, 43, 44

Diſtribution of powers given them. II. 43

In returns or making up of records before juſtices of peace touching indictments or convictions, how they muſt be ſtiled. II. 43, 44

Juſtices of peace have power by ſtatute to hear and determine murders or manſlaughters, but ſeldom do, or any crime ouſt of clergy, and why. II. *Page* 45, 46

Juſtices of peace may take indictment of *ſe defendendo*. II. 45

May take inquiſition touching *felo de ſe*, if not inquired before coroners, it need not be *ſuper viſum corporis*, but is traverſable. 414, 419. II. 46

May by ſtatute proceed on indictment taken before former juſtice of peace in the county, but cannot proceed on indictment taken before commiſſioners of *oyer* and *terminer*, or *gaol-delivery*. II. 46

But by ſtatute indictment taken before ſheriff in his *Turn*, to be deliverd to them at next ſeſſions, and they may proceed thereon. *ib.*

Commiſſion of *oyer* and *terminer* in the county determines ſecond *aſſignavimus* of commiſſion of peace *ad audiendum & terminandum, quod quære*. II. 47

General commiſſion of peace in county determines not power of former juſtice by charter, nor of juſtice in a city or corporation parcel of county. *ib.*

Where no words of excluſion, juſtice of peace of county have a concurrent juriſdiction with thoſe by charter, and ſo if they be juſtices by commiſſion in town or city. *ib.*

King notwithſtanding charter may grant commiſſion of peace ſpecially in that city or county, and they will have concurrent juriſdiction with juſtices by charter. *ib.*

But if franchiſe be granted, *ità quòd juſticiarii comitatûs ſe non intromittant*, tho ſubſequent commiſſion be granted in county at large, they have no juriſdiction in this corporation or town; but *quære*, whether indictment or ſeſſion in the franchiſe be void, or only contempt in juſtices. II. *Page* 47, 48

Seſſions private and public. II. 48

Buſineſs of private, *ale-houſes*, *poor*, *&c.* *ib.*

Public ſubdivided into general quarter-ſeſſions and general ſeſſions. II. 49

Both to be ſummond by precept in *king*'s name. *ib.*

In either of theſe ſeſſions they may proceed in matters within their commiſſion, as to take indictments, try felons, *&c.* *ib.*

By particular *acts* ſome things limited to the quarter-ſeſſions. *ib.*

When quarter-ſeſſions to be held. II. 49, 50

Are variouſly held in ſeveral counties, and yet good. II. 50

In *Middleſex* regularly but two ſeſſions, yet they may hold quarter-ſeſſions. *ib.*

Juſtices to execute their authority as juſtices of peace within county, where juſtices. II. 50

If juſtice live, or be out of his county, he cannot by warrant fetch one out of it into county where he is. *ib.*

Whether a juſtice, who is ſuch, both in *London* and *Middleſex*, may not commit one in *Middleſex* brought out of *London*, and *è converſo*. II. 51

Felon taken in forein county, juſtice *there* may commit, examine, give oath to informers, and bind them over to give evidence,

dence, or commit them for neceſſity of preſerving the peace; but *quære*, whether ſuch examination and informations be evidence on arraignment of felon in proper county. *Page* 305, 306, 586. II. 51

Tho by cuſtom of *London* juſtices of *gaol-delivery* ſit at *Newgate*, which is in *London*, both for *Middleſex* and *London*, yet juſtices of peace for *Middleſex* ſit only in that county, and juſtices of peace for *London* there. II. 51

One is brought by *A.* before juſtice on ſuſpicion of felony, if *A.* can materially teſtify, juſtice may bind him over to proſecute, and if he refuſe, may commit him. II. 52

They have juriſdiction of felonies ariſing within the *verge*. *ib.*

In their ſeſſions may by common law proceed to outlawry on indictments found before them, and in popular actions by ſtatute. *ib.*

But cannot iſſue a *capias utlegatum*, but muſt return record of outlawry in *B. R.* and thence this proceſs ſhall iſſue. *ib.*

Where juſtices may proceed on indictments taken in *Turns* or *Leets*, or not. II. 70, 71

Juſtice cannot diſcharge one brought before him for ſuſpicion of felony, if felony was committed, but muſt bail or commit. II. 93

One ſuſpected on probable cauſe preſumed ſuch till contrary appear. *ib.*

Some miſtakes of lord *Coke*, as that *a juſtice of peace cannot iſſue a warrant before indictment*, *&c.* refuted. II. *Page* 107 *to* 111

By 34 *E.* 3. their power further inlarged as to their taking perſons ſuſpected of felonies. II. 109

They are conſervators of the peace and more. *ib.*

Juſtice may by his warrant arreſt one ſuſpected of felony, tho original ſuſpicion not in himſelf, but in party praying the warrant. II. 109, 110

Fit in all caſes of warrants for arreſting for felony, much more for ſuſpicion thereof, to examine on oath party requiring it touching whole matter, whereon warrant demanded. II. 110, 111

Warrant to be under hand and ſeal. 577. II. 111

Regularly ought to contain cauſe. *ib.*

If general, *to anſwer ſuch matters as ſhall be objected*, in diſcretion of *B. R.* to bail or diſcharge party. 578. II. 111

It may excuſe an officer in falſe impriſonment, if true cauſe or miſdemeanor within conuſance of juſtice. *ib.*

Antiently ſuch warrants in treaſon or felony held good; in warrants of the peace and good behaviour cauſe muſt be ſhewn, and why. II. 111

Juſtice may make his warrant to take one ſuſpected by name, but not all perſons ſuſpected; *contra* of a rule in *B. R.* for that purpoſe. 580, 586, 587. II. 105, 112

Juſtice may make a warrant, as well in caſe of felony as the peace, to bring party before

himſelf only, or generally before any other juſtices, and then officer may bring him before any other juſtice of the county, and it is not in election of party to go before whom he pleaſes. *Page* 582. II. 112

In ſome caſes may make his warrant to bring him to the ſeſſions, tho it is better to bring him before himſelf, or ſome juſtice, that party may be baild. II. 112

Warrant may be to bring party to the juſtice to find ſureties for his appearance at the ſeſſions, *&c.* and in mean time to keep the peace, or may be *ſi recuſaverit*, to bring him to common gaol *ibidem moraturus quouſque gratis hoc fecerit*, and yet conſtable may bring him before the juſtice, and if he refuſe there to give ſureties, he may by virtue of firſt warrant bring him to gaol, and commit without any further warrant or *mittimus*. II. 112

Warrant may be in *king*'s name with *teſte* of the juſtice, but more uſually in name of juſtice. II. 113

Whether juſtices out of ſeſſions can iſſue a warrant to take perſons offending againſt a penal law, tho within their cognizance, and ſo to bind them over to ſeſſions, or in default commit them, and this before indictment. *ib.*

On complaint and oath of goods ſtolen, and that party ſuſpects goods are in ſuch a houſe, and ſhews the cauſe of his ſuſpicion, juſtice may grant a warrant to ſearch in thoſe ſuſpected places mentiond therein, and to attach goods and party, in whoſe cuſtody they are found, and bring them before him, or ſome other juſtice to ſhew how he came by them, *&c.* this warrantable, *nient obſtante* opinion of *Lord Coke*. II. *Page* 113, 150

But convenient to expreſs that ſearches be made in the daytime, and that party ſuſpecting be preſent to give officer information of his goods. II. 113, 114, 150

Entry to be *per oſtia aperta*; but if doors be ſhut, and be refuſed to be open'd on demand, officer may break open doors. II. 114, 116, 117

Lawful clauſe in ſuch warrant to attach party, in whoſe cuſtody the goods are found. *ib.*

If the goods ſtolen be not in the houſe, officer is excuſed that breaks open the door to ſearch for them on juſtices warrant; but party, that made ſuggeſtion, puniſhable, for *in eventu* it is puniſhable in him. II. 151

On return of this warrant executed, if it appear they were not ſtolen, they are to be returned to the poſſeſſor; but if it appear they were, they are not to be deliverd to the proprietor, but to remain with ſheriff or conſtable, that party may proceed by convicting offender to have reſtitution. *ib.*

If goods not ſtolen party to be diſcharged. *ib.*

If ſtolen, but not by him, but another that ſold or deliverd them to him, and priſoner appear to be ignorant that they were ſtolen, he may be diſcharged as an offender, and bound over to give

give evidence as a witneſs againſt him that ſold them. II. *Page* 151, 152

If he knew they were ſtolen, fit to bind him over to anſwer the felony. II. 152

Theſe warrants are judicial *acts*, and muſt be granted on examination of the fact. II. 150

To whom to be directed, and what the purport thereof. *ib.*

General warrant to ſearch all places, whereof party and officer have ſuſpicion, tho uſual, not ſafe. II. 114, 150

Warrant ought to mention name of party to be attached, and muſt not be left with blanks to be filled up by party, ſuch warrant void. 577. II. 114

If there be a riot or breach of the peace in preſence of a juſtice, he may arreſt the rioters, or command any officer, or others *ore tenus*, without warrant to arreſt them, and they by virtue thereof may arreſt *flagrante crimine* in abſence of the juſtice. *ib.*

If a riot be committed, and rioters diſperſed by coming of the juſtice, and they be ſuſpected probably to meet again, or threaten it, tho conſtables may *ex officio* ſuppreſs the riot, and raiſe *poſſe* of vill to do it; yet a juſtice may deliver a ſpecial warrant to any perſon to arreſt the rioters, if they reaſſemble, tho there be no particular perſons named in warrant; he may even authorize them by word. II. 114, 115

Juſtice muſt either diſcharge or commit, or bail one arreſted for felony brought to him. II. 120

If one be brought before a juſtice expreſly charged with felony by oath, juſtice cannot diſcharge him, but muſt bail or commit. II. *Page* 121

If charged with ſuſpicion only, yet if no felony proved to be committed, or if fact be no felony, juſtice may diſcharge him as to felony; tho if a treſpaſs, he may bind him over for it. *ib.*

If one be kild by another, tho *per infortunium*, or *ſe defendendo*, (which is not properly felony), or in aſſault on an officer, (which is no felony at all) juſtice ought not to diſcharge him; therefore he muſt be committed or at leaſt, baild. II. 121

They cannot proceed on an indictment taken before ſuperior judges, tho otherwiſe the cauſe might be within their cognizance. II. 133

They, as to their *venire facias*, agree with juſtices of *oyer* and *terminer*, and may indict, arraign and try ſame day in caſes of felony. II. 261, 262

By ſtatute proceedings before them not diſcontinued by new commiſſion. II. 401, 405

Vide **Arreſt, Bail, Commitment,** &c.

Juſtification.

Where warden of the *Fleet* may juſtify impriſonment by virtue of an order of *Chancery*. II. 122

In treaſon or felony there can be no juſtification, as *ſe defendendo*, *&c.* II. 258

But

But on *not guilty* priſoner ſhall have advantage of all ſuch defenſes, and where matter appears not to be felony, he on *not guilty* pleaded may be acquitted. II. *Page* 258, 259, 303, 304

Where, and how arreſt on ſuſpicion may be juſtified, or not. Vide **Arreſt.**

Where one may juſtify breaking open doors, or not. Vide **Arreſt, Hue and Cry, Juſtice of Peace.**

Where one may juſtify beating a treſpaſſer, come to take his goods, or endeavouring to enter on his poſſeſſion, or not. Vide **Homicide.**

King.

PReſumed that he neither will, nor can do any wrong, and therefore, if he command an unlawful *act* to be done, the inſtrument is not thereby indemnified, but puniſhable. 43, 44

Tho he is not under the *coercive*, yet in many caſes his commands are under the *directive* power of the law, which makes the *act* itſelf invalid, if unlawful. 44, 127

In time of peace, if two men combat together at barriers, *&c.* and one kill the other, it is homicide; but if by *king*'s command, it is ſaid to be no felony. 44

By deſcent of crown *king* inveſted with the right of ſovereignty. 61, 101

Supremacy of the *king* in matters eccleſiaſtical a moſt unqueſtionable right. 75

Weight, allay and extrinſic value of coin *inter jura majeſtatis.* *Page* 191, 192, 204

Clauſe in 28 *H.* 8. enabling him to diſpoſe of lands by will was neceſſary, for otherwiſe he could not have done it by will. 278

But without this *act* he had power to diſpoſe of lands belonging to the crown or *duchy* by letters patents under theſe reſpective ſeals. *ib.*

Where there are three powers, as of juſtices of *oyer* and *terminer*, *gaol-delivery*, and the peace, and record is made up by all theſe powers, the beſt ſhall be taken for the *king*. II. 34

Office of coroners being by election is not determind by *king*'s demiſe. II. 55

King cannot arreſt in perſon, or impriſon or command another ſo to do, but by writ, *&c.* II. 131

King's title being of record muſt be avoided by record. II. 205

If *king* ſit in perſon in *B. R.* he cannot pronounce judgment in treaſon; for, as he cannot be a witneſs, ſo he cannot be a judge, *in propriâ cauſâ.* *ib.*

Where *king*'s teſtimony allowd, or not, and how *king* to exhibit his teſtimony. II. 282

Who king, queen, prince, *&c.* within 25 *E.* 3. *de proditionibus.* Vide **Treaſon.**

Vide **Allegeance, Forfeiture, Grant,** &c.

King's Bench.

Marſhal immediate officer to execute judgments of death. 464, 502. II. 5

And

And for that purpoſe is mentiond in judgments of treaſon. II. *Page* 411

There may be a mandate to the ſheriff to aſſiſt. II. 5

Chief Juſtice, or any other judge of *B. R.* may iſſue a warrant into any county for taking or bringing before him a felon, or one ſuſpected of felony into any county in *England*, or *Wales*. 578. II. 5, 6, 198

They are conſervators of the peace through all *England*, more than juſtices of *oyer* and *terminer*. 578. II. 5

To avoid trouble of bringing up offenders, before whom their warrants are made returnable, and to whom directed. 578. II. 6

How their warrants ought to run in caſes of ſurety of the peace, *&c.* againſt one in another county, than where they are. 578. II. 5, 6

Tipſtaves the marſhal's deputies; each judge hath one. 586. II. 6

A judge of *B. R.* may order an arreſt *ore tenus*, without expreſſing cauſe. *ib.*

Where *B. R.* hath made an order to take perſons that party grieved ſuſpects, and bring them into court. 586, 587

B. R. ſwear a grand inqueſt, and take indictments every term. 651. II. 3

Higheſt ordinary court of juſtice next to parliament. II. 2, 159

It is more than a court in *Eyre*; where it ſits, it is ſovereign court of *gaol-delivery*, and *oyer* and *terminer*; the judges are *juſticiarii ordinarii*. II. 4, 22

It is the center of all ſubordinate juriſdictions, eſpecially in matters capital. II. *Page* 401

It hath two kinds of juriſdiction, the plea and crown-ſide. II. 2

Antient and modern way of keeping and titling the records. II. 23

Grand inqueſt to preſent all matters criminal within *com. Middleſex*, and then *B. R.* proceeds on indictment ſo taken. II. 3

Where *B. R.* proceed on offenſe committed in ſame county, they may proceed *de die in diem*, fifteen days betwixt *teſte* and return of *venire fac.* not required; otherwiſe, if they proceed on a cauſe removed by *certiorari*, except on indictment taken by juſtices of peace of county, where *B. R.* ſits. II. 3, 260

At common law record before filing remandable, afterwards not. II. 3

But if iſſue joined, tranſcript may be ſent down to be tried at *niſi prius*; but original record remains in *B. R.* *ib.*

By 6 *H.* 8. court may remand indictments of felony removed hither, and bodies of priſoners to the juſtices of peace, *&c.* where felony committed. II. 3, 4, 41

Coming of *B. R.* into any county ſuſpends (not ſuperſedes) ſeſſion of commiſſion of *gaol-delivery*, *oyer* and *terminer*, and the peace. II. 4.

Where ſpecial commiſſioners of *oyer* and *terminer* may ſit in term in ſame county, where *B. R.* ſits, but *B. R.* muſt adjourn. *ib.*

Tho ſome *acts* limit proceedings in criminal cauſes to commiſſioners of *oyer* and *terminer*, *B. R.* may proceed upon them; but juſtices of peace cannot. II. *Page* 4

One attaint, and record removed, it may award execution. *ib.*

It is ſovereign coroner of *England*, and may take appeals of death, *&c.* by bill. II. 5

Chief Juſtice chief coroner *virtute officii.* II. 53

Felonies within *king*'s palace, *nient obſtante* 33 *H.* 8. triable in *B. R. contra* where felony created *de novo* with ſpecial form of proceedings. *ib.*

By cuſtom may *ore tenus* command a tipſtaff to apprehend for miſdemeanors. II. 6

Chief Juſtice not the *Juſticiarius Angliæ.* *ib.*

The immenſe authority of the antient *Juſticiarius Angliæ.* 106. II. 6

Chief Juſtice created by writ. II. 6

B. R. had antiently, in caſes of felonies and treaſons done on the narrow ſeas out of bodies of counties, a concurrent juriſdiction with the admiralty. II. 12, 13

B. R. compriſed in *acts* giving power to juſtices of *oyer* and *terminer.* II. 22

On trial of felons in *B. R.* if priſoner challenge twenty peremptorily, ſo that thoſe remaining of the pannel be not ſufficient; *tales* to be granted by precept returnable, as the caſe ſhall require. II. 36

Clerks of the crown, aſſiſe and peace to certify hither names of all perſons *outlawd*, *attaint* and *convict.* II. 36, 37

One ſlain in open rebellion, Chief Juſtice on view of body may make a record thereof, and ſend it into *B. R.* and thereon party ſhall forfeit his goods, but not lands. II. *Page* 53

Clerk of crown, coroner for *B. R.* to view body of priſoner dying in king's bench. II. 58

Have not only power to iſſue writs on indictments and appeals before them; but alſo may by order command ſheriff of county, where they ſit, or their marſhal to take felons or diſturbers of peace, and bring them before the court. II. 105

Cuſtom of the court part of the law of land. *ib.*

Where on information on oath of breach of the peace, and a deſign by perſons, whoſe names could not be known, to commit a riot, *B. R.* hath made an order to the ſheriff to bring before them ſuch as ſhould be probably ſuſpected to be parties therein. 586, 587. II. 105

Where B. R. *may give judgment on record of conviction removed before them*, &c. Vide **Judgment.**

Vide **Certiorari Court, Execution and Reprieve, Gaol-delivery, Habeas Corpus, Juſtice of Aſſiſe, Juſtice of Peace, Outlawry, Oyer and Terminer, Proceſs**, &c.

Larciny.

DIvided into ſimple and violent; ſimple larciny ſubdivided into grand and petit. 503

Grand and petit larciny deſcribed. 530

Same in nature, but different in degree of puniſhment. *ib.*

Definition of larciny. *Page* 504
How the indictment muſt be. *ib.*
What are the ingredients in this crime. *ib.*
What ſhall be ſaid a taking. 505, 506
A. lends his horſe to *B.* who rides away with him, no felony. 505
If a man ſeeing a horſe in paſture of owner, having a mind to ſteal him, obtains a replevin, and thereby hath the horſe deliverd, this a felonious taking. 507
A. ſteals horſe of *B.* and afterwards delivers it to *C.* who is no party to firſt ſtealing, and *C.* rides away with it *animo furandi*, larciny. *ib.*
But if *A.* felonioufly take the horſe of *B.* and after *C.* ſteal him from *A. C.* is a felon to both, and *C.* may be appeald or indicted as of a felonious taking from *B.* for by the theft *B.* loſt not property, nor in law poſſeſſion of his horſe. *ib.*
Where a carrier ſhall be ſaid to be guilty of a felonious taking of goods deliverd to him or not. 504, 505
Carrying the goods to the place of delivery, and taking them afterwards, a new taking. 505
Before 21 *H.* 8. if a ſervant had carried away goods deliver'd to him by his maſter *animo furandi*, it had not been felony. 667
By this *act* made felony, if of value of forty ſhillings; offender intitled to clergy, [but where ouſted by 12 *Annæ*]. *ib.*
An Apprentice or ſervant under eighteen exempt from felony enacted *de novo* by 21 *H.* 8. [how far alterd by 12 *Annæ*]. *ib.*
Yet it leaves him in ſame condition, as to any felony at common law, as if he was not excepted. *Page* 668
And therefore, if my butler or ſhepherd under eighteen, or if my apprentice take away my goods felonioufly, without my actual delivery, tho under value of 40*s.* he is indictable of felony at common law. 506, 667, 668
If a man deliver a bond to his ſervant, or goods to ſell, and he ſells them and receives the money, and carries it away *animo furandi*, not felony. 668
Whether delivery of maſter's goods by one ſervant to another, in maſter's abſence, may be ſaid to be by the maſter; delivery of the goods by maſter's wife within the *act*. 668
A ſervant receives his maſter's rents, and *animo furandi* carries them away, not felony. *ib.*
A. delivers the key of his chamber to *B.* who unlocks the chamber, and takes *A.*'s goods *animo furandi*, felony. *ib.*
One that hath a bare charge of goods, tho not poſſeſſion, may be guilty of felony at common law, as a butler that hath charge of plate, a ſhepherd of ſheep, the like of him that hath *a bare ſpecial uſe*, as the gueſt, that hath plate ſet before him. 506, 667, 668
If *A.* by falſe tokens receives money of *B.* and carries it away, no felony. 506
Maſter delivers ſilver to ſervant to change into gold, or leather to make ſhoes, and he runs away with it, felony. 668

Finding

Finding a purſe in the highway, and denying or ſecreting it, not felony. *Page* 506
Taking treaſure-trove, wrecks, waifs and ſtrays [before ſeiſure] no felony, but party muſt believe them to be ſuch. *ib.*
Where a man's goods are in ſuch a place, where ordinarily they are, or may lawfully be placed, and a perſon takes them *animo furandi*, felony. *ib.*
If a ſheep of *A.* ſtray from his flock into the flock of *B.* and *B.* drives it along with his flock, or by miſtake ſhears it, no felony; but otherwiſe, if he knows it to be another's, and marks it with his mark, this evidence of felony. 507
A ſervant finds his maſter's purſe in his corn-mow, and takes part, if he knew his maſter laid it there, felony. *ib.*
If *A.* ſteals goods in county of *B.* and carry them into county of *C.* he may be indicted for larciny in county of *C.* but can only be indicted of robbery in county of *B.* 507, 508
Where continuance of the aſportation is a new caption. 507
A. takes the horſe of *B.* and before he gets out of the cloſe is apprehended, larciny. 508
If a gueſt takes ſheets of the bed feloniouſly, and carry them out of his chamber into the hall, felony. *ib.*
A. came into dwelling-houſe of *B.* where no body was, and broke open a cheſt, and took out goods to the value of 5 *s.* and laid them on the floor, and was taken before he could remove them, he being indicted on 39 *Eliz.* was ouſted of clergy. *Page* 508
If *A.* hath his keys tied to the ſtrings of his purſe, *B.* a cut-purſe takes *A.*'s purſe with money in it out of his pocket, but the keys, which were tied to the ſtrings of his purſe, hang in his pocket, *A.* takes *B.* with his purſe in his hand, but the ſtrings hang to his pocket by the keys, no felony; for *licèt cepit, non aſportavit.* *ib.*
Where there is a pretenſe of title, regularly no felony; but yet it may be a trick to colour a felony. 509
What circumſtances are evidence of a felonious intent. 508, 509
If *A.* takes away goods of *B.* openly (otherwiſe than by robbery) this evidence only of a treſpaſs. *ib.*
A. leaves his harrow in the field, *B.* having land in the ſame uſeth the harrow, and returns it to the place where it was, no felony, but treſpaſs. *ib.*
If *A.* and *B.* being neighbours, and *A.* having a horſe on the common, and *B.* having cattle there that he cannot readily find, takes up the horſe of *A.* and rides about to find his cattle, and having done turns off the horſe again in the common, no felony, but at moſt a treſpaſs. *ib.*
So if my ſervant without my privity take my horſe, and ride a few miles and return, no felony; but *contra*, if in his journey he ſell it. *ib.*
Of what things larciny may be committed, or not. 509, 510

Of *creatures of a baſe nature*, as *dogs*, *bears*, *&c.* or their *whelps* there can be no felony; but of *hawks* reclaimed it may be. *Page* 512

Larciny may be committed of *young hawks* in the neſt, but not of their eggs; *taker of eggs*, how puniſhed. 511

Larciny cannot be committed of wild ſwans, or their young; but *contra*, if they be made tame, or if they be marked or pinioned; but if marked, and yet flying ſwans that range abroad out of precincts of the owner, no felony to kill them. *ib.*

On indictment for ſtealing goods of *B.* who is proved to be a *feme covert*, party may be acquitted, ſo if it appear that the ſuppoſed owner had neither intereſt nor poſſeſſion in the goods, but he ought to be indicted *de novo* for goods of husband or true owner. 513

Where a man may commit felony of the goods, wherein he hath a property. *ib.*

Jointenants or tenants in common of a horſe, one cannot be a felon to the other. *ib.*

A. takes away the trees of *B.* and cuts them into boards, *B.* may take them away, and not felony; and ſo of cloth made into a doublet. *ib.*

If *A.* take away the hay and corn of *B.* and mingle it with his own ſtock, or take the cloth of *B.* and embroider it, *B.* may take the whole heap or garment, and embroidery alſo, and be not guilty even of treſpaſs. *ib.*

Yet if *A.* bail goods to *B.* and ſteal them from him to charge him with an action, felony. *Page* 513

Wife cannot commit felony of her husband's goods; and therefore, if ſhe take and deliver them to *B.* who knowingly carries them away, no felony in *B.* 513, 514

If husband deliver goods to *B.* and wife take them feloniouſly from *B.* felony. 514

Taking away another man's wife againſt her will *cum bonis viri*, felony by ſtatute. *ib.*

Servants in the houſe imbezzelling their maſter's goods after his deceaſe by 33 *H.* 6. if they appear not on proclamation, attaint of felony. 515

To ſteal *ſhroud of a perſon buried*, felony. *ib.*

Larciny from the perſon clàm & ſecretè by 8 *Eliz.* except under value of 12 *d.* principals ouſted of clergy, acceſſaries not. 531

Horſe-ſtealers ouſted of clergy by 1 *E.* 6. & 2 & 3 *E.* 6. but acceſſaries not. 529

Petit larciny, felony. 530

No acceſſaries either *before* or *after*. *ib.*

If *A.* ſteal 12 *d.* at one time, and *B.* 12 *d.* at another, ſo that the *acts* were ſeveral, tho the goods of the ſame perſon; petit larciny in each. *ib.*

If *A.* be indicted of larciny of goods to the value of 5 *s.* petit jury may find it of value of 12 *d.* or under. *ib.*

If *A.* ſteal from *B.* to value of 6 *d.* and then to value of 8 *d.* it is grand larciny, if put together in one indictment. 531

If goods be ſtolen at ſeveral times from ſeveral perſons, and each apart

apart under value, ſeveral petit larcinies, tho in one indictment. *Page* 531

But *contra*, if ſuch goods of ſeveral perſons were in one bundle, or on one table, or in one ſhop, grand larciny. *ib.*

If a man ſteal a horſe not above value of 12 *d.* or break a houſe in the day-time, and ſteal goods only of that value, the owner, *&c.* not put in fear, this but petit larciny, notwithſtanding 5 *&* 6 *E.* 6. for that ſtatute only ouſts clergy, where offenſe capital, as grand larciny. 531

Taking from perſon without putting in fear or violence is not robbery, but larciny. 534

Where words of menace are uſed after the taking, only larciny. *ib.*

For larciny from the houſe or ſpecial burglaries. Vide **Burglary.**

Vide **Clergy, County, Felony by Statute, Indictment,** &c.

Laws.

Laws of England.

More determinate, than forein laws, and leave as little as may be *ad arbitrium judicis.* 13

This law allows not the judge to change the puniſhments, it inflicts. 19

Always affects certainty. 22

Hath no dependance on the civil law. 16

Is excellently adapted to the conveniencies of *Engliſh* government, and full of excellent reaſons. 489

Common law in and after *E.* 3. received a greater perfection, not by change thereof, for that could not be but by ſtatute; but men grew to greater learning and experience, and rectified miſtakes of former ages and judgments. *Page* 24, 25

The *king* and his laws are *vindices injuriarum.* 481

Natural Law.

If one be violently aſſaulted, and cannot otherwiſe ſave his own life, law of nature permits him in his own defence to kill aſſailant. 51

Nature prompts all men in whatſoever condition to preſerve themſelves, which cannot be without ſociety. 432

Law of nature makes a man his own protector *cum debito moderamine inculpatæ tutelæ.* 51

Poſitive Law.

Penalties, as to their degrees and applications, are *juris poſitivi & non naturalis.* 13

Lex talionis, except in murder, is purely *juris poſitivi*, and the *Jews* made a commutation of it. 14

The antient divine Law, the Moſaic, Attic, and Roman Laws touching Homicide.

By the antienteſt divine law homicide was capital. 2

Delivery of a man into his neighbour's hand, explained. *ib.*

Who were intitled, or not, by the *Moſaic law* to the privileges *of places and cities of refuge.* *Page* 2

Killing a thief found breaking up in the night, not capital; but *contra* in the day. 488

The judicial laws made no difference in puniſhment of *homicide* on *malice forethought*, and on a *ſudden falling out*, both capital; but they extended not that rigour to *caſual homicide*, but yet were ſo ſtrict, as to ſuffer *avenger of blood* to kill ſuch manſlayer before he got to *city of refuge.* 477

There is not amongſt theſe laws any one which is expreſs touching *homicide ſe defendendo*, but cuſtom of the *Jews*, and interpretation of their doctors exempted a fact ſo circumſtanced from capital puniſhment. 4

If a woman quick with child took, or another gave her a potion to cauſe *abortion*, or one ſtruck her, whereby *fœtus* was kild, by the *judicial laws* it was capital. 433

Many of the *Attic* laws touching *homicide* collected by *Petit* cited; between which and the *judicial laws* there is a great analogy. 4 *to* 7

Wherein the *Roman* laws differ from, and agree with them. 6, 7, 488

The Attic, Jewiſh, Roman and antient Engliſh Laws touching Theft.

By *Jewiſh* law theft not capital, tho accompanied with burglary, ſave that *plagium* was capital, and that by the civil conſtitution of that ſtate, puniſhment of theft was in ſome caſes enhanſed even to death. *Page* 9

Of the law of reſtitution in caſe of *theft.* 9, 503

Wherein the *Attic* and *Jewiſh* laws agree and differ with regard to theft. 9

The *Roman laws* concerning puniſhment of *theft.* 11, 503

The *antient laws of England* touching the ſame. 11, 12, 503

Notwithſtanding opinion of *ſchoolmen*, &c. policy of moſt countries hath made it capital. 12, 13

Among the *Jews* lawful in caſe of hunger to pull the ears of ſtanding corn and eat, and for one, that paſſed thro a vineyard, *&c.* to gather and eat, without carrying away. 55

Puniſhments inflicted by the Laws of ſeveral Countries.

What the rule to be obſerved in ordaining puniſhments. 1

How divided. *ib.*

The penalties inſtituted by God, amongſt the *Jews*, on breach of their laws are the beſt pattern for inſtitution of puniſhments, tho they conclude not other ſtates. 2

Inſtances of various kinds of puniſhments inflicted by laws of ſeveral countries, eſpecially in *homicide* and *theft.* 2 *to* 15

The degrees and orders of the *Roman* puniſhments. 11

The end and deſign of puniſhments. 14

By

By *Jewiſh* law thief had no exemption from puniſhment by reaſon of *neceſſity*. *Page* 55

Law of Nations.

Allows a ſovereign prince to begin hoſtilities with another deſigning a war againſt him; but *contra* between ſubjects of ſame prince, there one cannot kill another by way of prevention. 52

Where the *king* may deal with a *merchant ſtranger*, who commits treaſon, either as an *alien enemy by the law of nations*, or as a traitor by the law of *England*. 94

Vide Allegeance, Ambaſſador, Marque or Repriſal, War.

Civil Law.

Civil laws wiſe and well compoſed laws, of great uſe to be known, tho not to be made the rules of our *Engliſh* laws; no ſtreſs to be laid on them, either for diſcovery, or expoſition of *Engliſh* laws, farther than by cuſtoms of *England* or ſtatutes they are here admitted. 16

Where *civil law* lays a penalty on tutor for offenſe done by infant *incapax doli*. 19

Inſtances of *artificial acceſſions* by *adjunction*, *commixtion* and *ſpecification* in the common law [the ſame as are in the *civil law*]. 513

Where party according to *civil law* may be examind, as a ſupplemental proof. II. 285

How the civil law *diſtinguiſheth the age of man for ſeveral purpoſes, and wherein the civil and common law agree and differ.* Vide Infant.

By the antient *Jewiſh* law he, that was but a day above thirteen years, was adjudged *in virili ſtatu*, but not if under that age. *Page* 18

Canon Law.

Canons or *decretals of popes, or of provincial councils, or imperial conſtitutions* never bound in *England*, farther than by ſtatutes or common uſage they were received. 399. II. 325, 329, 330

By canon laws nuns exempt from temporal juriſdiction. II. 328

Vide Clergy, Religion.

Rhodian Law.

If common proviſion for ſhip's company fail, maſter may under certain temperaments break open private cheſts of mariners or paſſengers, and diſtribute private proviſion for preſervation of ſhip's company. 55

It is a received cuſtom, if a ſhip wants neceſſaries, and inhabitants of continent will not furniſh them for money, they may by *uſage of the ſea* and *nations* take proviſions by force, making inhabitants reaſonable ſatisfaction. *ib.*

But *contra*, where this done by *Engliſh* mariners on *Engliſh* ſhore, where there is one common magiſtrate, becauſe capable of other remedy. 56

For *maritime* and *martial laws*. Vide Admiralty, Conſtable and Marſhal.

Leet.

Eſcape preſentable there, but common fine or amercement cannot be ſet there, but it may be removed in *B. R.* and there amercement may be ſet. *Page* 603

Felony newly created not inquirable there, unleſs ſpecially limited to them, but *contra* of felonies at common law. 632. II. 71

Cannot hold pleas of the crown. II. 69, 71

Hath in effect ſame juriſdiction with the *Turn*. II. 71

They cannot try felonies preſented there, but muſt ſend ſuch preſentments before juſtices of *gaol-delivery*, or they muſt be removed into *B. R.* that proceſs may be made on them to outlawry. *ib.*

Vide Sheriff.

Local. Vide County, Indictment, Trial.

London.

By charter *mayor* to be in commiſſion of *oyer* and *terminer*, but not on indictment grounded on 8 *H.* 6. againſt *avoiding records*. 562

He is alſo of the *quorum* in commiſſions of *gaol-delivery* by charter. II. 32

Whether juſtice both in *London* and *Middleſex* may not commit one in *Middleſex* brought out of *London*, and *è converſo*. II. *Page* 51

Cuſtom of *London* enables juſtices of *gaol-delivery* to ſit at *Newgate*, which is in *London*, both for *Middleſex* and *London*; but juſtices of peace of the ſaid counties ſit in their reſpective counties only. *ib.*

Mayor by charter coroner. II. 53

Lunatic. Vide Ideot, &c.

Madman. Vide Ideot, &c.

Mainouvre. Vide Arraignment.

Mainprize. Vide Bail.

Malum prohibitum.

BEing only under a penalty will not inhanſe effect of crime beyond its nature, as if one unqualified to keep a gun ſhoots at a bird, and caſually kills a man, it is only chance-medley. 475, 476

Manſlaughter. Vide Murder and Manſlaughter.

Mariner.

Whether lawful to impreſs them. 678, 679

Vide Admiralty, Felony by Statute, Rhodian Law under title Laws.

Market-overt. Vide **Reſtitution.**

Marque, or Repriſal.

A ſpecies of war. *Page* 162
Particular, granted to ſome particular men on certain occaſions to right themſelves. (*Vide* 4 *H.* 5.) *ib.*
General, tho it hath the effect of war, is not a regular war, and wherein it differs. *ib.*

Martial Law. Vide **Conſtable and Marſhal.**

Marriage.

A forcible marriage, tho voidable, is a marriage *de facto.* 660, 661
Vide **Forcible Marriage, Polygamy.**

Maſter and Servant.

Command of maſter excuſeth not ſervant in treaſon or felony. 44, 516
Poſſeſſion of ſervant is poſſeſſion of maſter. 668
Menial ſervant, how deſcribed by *Bracton.* II. 75
For homicide in ſervant *defendendo the maſter*, and *e converſo.* Vide **Homicide.**

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Malitia ſupplet ætatem. 26
Ignorantia eorum, quæ quis ſcire tenetur, non excuſat. 42
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Nor can he apportion his own wrong and breach of duty. 597
De minimis non curat lex. 603. II. 154
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Nullum tempus occurrit regi. 632
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By what *acts* declared to be the right of the crown. 130

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Miſpriſion.

Whether a wife can be guilty of miſpriſion of treaſon committed by husband; *quære.* 48
Two witneſſes requiſite both on indictment and trial of miſpriſion of treaſon. 300

A phy-

A phyſician, *&c.* miniſters help to a ſick traitor, tho he know him to be ſuch, this makes phyſician, *&c.* not incur the guilt of treaſon; but it will be miſpriſion of treaſon, if he know it, and diſcover it not. *Page* 332

Miſpriſion of treaſon at common law defined. 371

By ſtatutes concealment of treaſon ſhall be deemed only miſpriſion of treaſon. *ib.*

By 1 *Mar.* enacted, that nothing be adjudged to be miſpriſion of treaſon, but what is containd in 25 *E.* 3. and tho that *act* do not make or declare miſpriſion of treaſon, yet it virtually doth it by declaring and enacting what is treaſon. 371, 372, 375

Uttering falſe money knowingly not miſpriſion of treaſon, without knowing the counterfeiter, and concealing it. 372, 373

Act puiſne to 1 *Mar.* makes a new treaſon, concealment of ſuch treaſon, miſpriſion thereof. 373, 375

Concealment of treaſon or felony by common law or ſtatute is a miſpriſion of the reſpective offenſe. 374, 618, 708

Every treaſon is a miſpriſion thereof, and more, and he, who is aſſiſting to treaſon, may be indicted of miſpriſion only. 374

Every felony includes miſpriſion thereof, and offender may be indicted of the latter only. 652, 708

Miſpriſion remains ſo long, as the *act* making treaſon continues, and ſo of miſpriſion of felony enacted by ſtatute. 375

Beſide conſequential, there are ſubſtantive miſpriſions, as by 14 Eliz. *againſt forging forein coin not current*, 13 Eliz. *againſt concealing the publiſhing by others of bulls of abſolution*, and 23 Eliz. *againſt aiders and maintainers of perſons abſolving or withdrawing the ſubjects from their obedience, or perſuading them from the eſtabliſhed religion*, &c. *Page* 376, 377.

Where felony by ſtatute limited to a ſpecial juriſdiction, and manner of trial, miſpriſion of it triable by common jury and general commiſſioners of *oyer* and *terminer*. 653

Where upon commiſſion of felony, looking on without uſing means to take the felon is a miſpriſion of felony. 439, 448, 449, 593. II. 75, 76

Mittimus.

Vide **Arreſt, Commitment, Juſtice of Peace.**

For mittimus and tranſcript of record. Vide **Certiorari, Pleas.**

Murder and Manſlaughter.

If one *ex intentione* do an unlawful *act* tending to bodily hurt of another, as by ſtriking him, tho not with intent to kill him, but his death happens within year and day, or if he ſtrikes at one, and miſſing him kills another, whom he did not intend, it is felony and homicide,

micide, and not *caſualty*, or *per infortunium*; ſo it is, if he do an unlawful act, tho not intending bodily harm of any man, as if he throw a ſtone at another's horſe, and it hits a man and kills him. *Page* 39, 440, 472

Want of due diligence and inſpection may make that manſlaughter, which otherwiſe would be only chance-medley. 475, 476

Homicide juſtifiable by ſtatute *de malefactoribus in parcis* not to be committed on any former malice, what required to juſtify ſuch homicide. 491

In time of peace, if two combat together at barriers, or for trial of skill, if one kill the other, it is homicide; but *contra*, if by *king*'s command. 44, 473

33 *H.* 8. as to trial in a forein county of murder, now in force, tho not as to *treaſon*. 283, 374

Murder and homicide defined. 425, 449, 450, 466

Murdrum, what it antiently imported. 447, 448

Stroke without death, nor death without ſtroke, or other violence, makes not the homicide. 426

To what intents murder or manſlaughter relates to the ſtroke, or other cauſe of death, and to what purpoſes it relates to the death only. 426, 427, 428

If a mortal ſtroke [before 2 G. 2.] had been given on the *high ſea*, and party had come to *England* and died, neither admiral nor common law had juriſdiction. 426

By 2 & 3 *E.* 6. the juſtices or coroner of the county, where party dies ſhall inquire and proceed, as if ſtroke had been in ſame county. *Page* 427

By ſame *act* indictment and trial of acceſſaries ſhall be in county, where acceſſary. 427

No murder till party dies. *ib.*

If one gives another a ſtroke, not ſo mortal, but that with good care he might be cured, if he dies of the wound within year and day, homicide or murder according to the caſe. 428

But if it be not mortal, but with ill application party dies, if it appear clearly, that the medicine and not wound was cauſe of his death, not homicide. *ib.*

If not in itſelf mortal, if either for want of applications or neglect thereof, it turns to a *gangrene*, or fever, which proves immediate cauſe of his death, murder, or manſlaughter; wound *cauſa cauſati*. *ib.*

One gives a wound to another ſick of a diſeaſe, which by courſe of nature might end his life within half year, it haſtens his end by irritating the diſeaſe, murder or manſlaughter. *ib.*

If a man by working on the fancy of another, or by harſh uſage put another into ſuch a paſſion of grief or fear, that party dies ſuddenly, or contracts a mortal diſeaſe, tho murder *before God*, yet not ſo *in foro humano*. 429

Phyſician or ſurgeon gives a potion with a good intent, it kills patient, no homicide; neither if he be no licenſed ſurgeon or phyſician. 429, 430

One gives a pregnant woman a potion to deſtroy the child, it kills her, murder. *Page* 429
Owner of a beaſt uſed to hurt people not knowing it, diſpuniſhable. 430
Knowing it, and not keeping him up from doing hurt, how puniſhable. 430, 431
Tho owner have no notice, if it be a beaſt *feræ naturæ*, as a lion, *&c.* if he gets looſe and doth harm, owner liable to damages, for he muſt at his peril keep him up from doing hurt. 430
If owner, knowing that his ox is uſed to hurt people, uſe due diligence to keep him up, yet ox breaks looſe, and kills a man, no felony. 431
If through negligence beaſt goes abroad after warning of his condition, manſlaughter. *ib.*
If owner purpoſely let him looſe to do miſchief, or with a deſign only to fright people and make ſport, and it kills a man, murder. *ib.*
Laying poiſon to kill rats, a man caſually is poiſoned, no felony. *ib.*
But if to kill *B.* and *C.* by miſtake takes it and is poiſoned, murder; ſo in all caſes, where malice intended to one *egreditur perſonam.* 436, 441, 442, 467
Tho party take poiſon by the perſuaſion, but in abſence of another, perſuader is principal in the murder. *ib.*
A. gives poiſon to *B.* intending to poiſon him, *B.* ignorantly gives it to another, who dies of it, murder in *A.* but *B. not guilty.* 436
A. gives purging comfits to *B.* to make ſport only, he dies of it, manſlaughter. *Page* 436
Various inſtances of killing, as by expoſing ſick perſons or infants, *&c.* 431, 432
A man infected with the plague goes abroad with intent to infect another, who is thereby infected and dies, whether murder. 432
If a woman quick with child takes, or another gives her a potion to cauſe abortion, or one ſtrikes her, whereby child within her is kild, it is a great miſpriſion, but no felony; ſo it is if ſuch child were born alive and baptized, and after die of the ſtroke given to the mother, not homicide [*ſed quære*]. 433
One counſels her before the birth to deſtroy it, and after child is born, and the woman deſtroys it accordingly, ſhe guilty of murder, and procurer acceſſary. *ib.*
Killing one attaint of felony, otherwiſe than in execution of the ſentence by lawful officer is murder, or manſlaughter, according to the caſe. 497
Homicide to kill one outlawd of felony. *ib.*
Sheriff beheads one condemned to be hanged, murder. 454, 466, 501
5 *Eliz.* makes killing a man attaint in a *præmunire*, murder. *ib.*
Killing an *alien enemy* murder, unleſs *flagrante bello.* *ib.*
If there be an actual forcing a man, as if *A.* by force take the arm of *B.* and the weapon in his hand, and therewith mortally

tally ſtabs *C.* murder in *A.* but *B. not guilty.* *Page* 434
But otherwiſe of a moral force, as by dureſs, *&c.* *ib.*
If *A.* command *B.* to beat *C.* and he beat him to death, murder in *B.* and in *A.* alſo, if preſent; if abſent, acceſſary. 435, 440
A. indicted of murder, and *B.* as acceſſary *before* by procurement, *A.* is found guilty only of manſlaughter, *B.* ſhall be diſcharged. 437
All preſent and aſſiſting to murder, principals. *ib.*
If *A.* is indicted, as having given mortal ſtroke, and *B.* and *C.* as preſent and aſſiſting, and on evidence it appears that *B.* gave the ſtroke, and *A.* and *C.* were only aiding and aſſiſting, it maintains indictment. 437, 438
If *A.* lies in wait to kill *B.* and *C.* ſervant of *A.* being preſent takes part with his maſter, and ſervant or maſter kills *B.* murder in *A.* only, homicide in *C.* 437
A. having malice againſt *D.* maſter of *B.* by miſtake aſſaults and kills *B.* the ſervant, or *B.* comes in aid of his maſter, and *A.* kills him, murder in *A.* *ib.*
On indictment of murder, tho party acquit thereof, and convict of manſlaughter, he ſhall receive judgment, as if he had been indicted of manſlaughter, for offenſe in ſubſtance the ſame. 449, 450, 466
If *A.* and *B.* and *C.* and divers others be ingaged in an affray together, and *D.* the conſtable comes to appeaſe it, and *A.* knowing him to be ſuch kills him, and *B.* and *C.* not knowing it comes in, and finding *A.* and *D.* ſtruggling aſſiſt and abet *A.* in killing the conſtable, murder in *A.* but manſlaughter in *B.* and *C.* but others of them, that did not know him, or abet, are *not guilty.* *Page* 446
An abettor of murder and homicide muſt be preſent and aſſiſting. *ib.*
One procuring or abetting, and abſent, only acceſſary in murder. 439
If preſent, and not aiding and abetting to the felony, neither principal nor acceſſary, but looking on without uſing means to take felon, a miſpriſion. 439, 448, 449, 593. II. 75, 76
Divers of ſame party come to make an affray, *&c.* and come into one houſe, all are ſaid to be preſent, tho in another room. 439
So are they ſaid to be, if they come into one park, tho at a diſtance from each other. 465
One ready to aid, tho but a looker on, is a principal. 439, 441
Divers come with one aſſent *male faire*, as to rob, kill, beat, or do any treſpaſs, and in doing it one kills a man, all principals. 440, 441, 463
If *A.* come in company with *B.* to beat *C.* and *B.* beat him till he die, *A.* is a principal. 472
A. and *B.* combat, *C.* comes to part them, *A.* kills *C.* murder in *A.* and *per aſcuns*, in both; but if falling out on a ſudden, then only manſlaughter in him that kild him. 441, 442

A. with above thirty enterd with force on a manor-houſe, and ouſted *B.* and his family; twenty others on part of *B.* three days after in the night came with weapons in order to re-enter, and one of them caſt fire into a thatcht houſe adjoining to the houſe; whereon one in the houſe ſhot off a gun, and kild one of the party of *B.* manſlaughter. *Page* 440, 441

A man ſeiſeth goods of an *alien enemy*, and carries them to his houſe; a ſtranger under pretenſe of being deputy-admiral, with a great multitude came with force to the houſe, and at the gate made aſſault upon thoſe within, a woman iſſuing out, without any weapon, was kild by a ſervant, who came to take the goods, by throwing a ſtone at another in the gate; *per aſcuns*, if the woman came in defenſe of maſter of the houſe, it was murder in vice-admiral and his company; *per auters* no malice againſt the woman, and murder ſhall not be extended farther than intended; *per touts*, manſlaughter. 441, 442

Divers come to commit a riotous, unlawful *act*, if in purſuit thereof one commit murder or manſlaughter, all of that party that committed the diſorder, are guilty. 442, 443, 463

But in that caſe it muſt be intended, when one of ſame party commits murder, *&c.* on one of the other party, or on thoſe, that come to appeaſe, or part them, or by law to diſperſe them. 443

A. and *B.* fight upon premeditation, *A.* takes *C.* for his ſecond, *B.* takes *D.* *A.* kills *B.* murder in *C.* formerly held to be murder in *D.* alſo; but it ſeems otherwiſe. *Page* 443, 452, 453

If one have no particular malice againſt any individual man, but comes with a general reſolution againſt all perſons, if *act* be unlawful, and death enſue, it is murder; as if it be to commit a riot, or enter into a park. 444, 445, 466

A. and divers others come together to commit a riot, and in their march *A.* meets with *D.* with whom he had a former quarrel, or by reaſon of ſome collateral provocation given by *D.* to *A.* *A.* kills him without any abetting by his company, they not principals in the murder or manſlaughter. 443, 444

Where many came to commit a diſſeiſin, and one kild, all the company arraigned as principals, and condemned; but it ſeemeth to be only manſlaughter. 444

If many come together on an unlawful deſign, and one of the company kills one of the adverſe party without abetment of the reſt to the homicide, none guilty, but thoſe that gave the ſtroke, or actually abetted. *ib.*

Many come to remove a nuſance committed in the highway, they are oppoſed by divers others, one of the former party ſtrikes one of the latter ſuddenly, and kills him without abetment of the reſt, he, who ſtrikes, is guilty of manſlaughter, reſt *not guilty* without abetment. *ib.*

But if it had been no nuſance, reſt had been guilty. 444, 445

If

If *A.* hath good title to his houſe, or be in poſſeſſion for three years (in which caſe he may detain by force by 8 *H.* 6.) if any perſon come to rob or kill him, and he ſhoot and kill him, no felony, nor forfeits he his goods, as in caſe of homicide *ſe defendendo.* *Page* 445

But if *A.* come to enter with force [being ouſted], and in order thereto ſhoot at his houſe, and *B.* the poſſeſſor having other company in his houſe ſhoots and kills *A.* manſlaughter in *B.* *ib.*

In this caſe, if *B.* ſhoot out of his houſe and kill *A.* not felony in the reſt of the houſhold; nay, tho he had hired an extraordinary guard (as by law he might), yet this not manſlaughter in the reſt of the company, becauſe aſſembly lawful. *ib.*

Actual abetting will make the reſt principals. *ib.*

Some preſent and abetting may be guilty of homicide, and not murder, others of murder. *ib.*

The maſter aſſaults another with malice prepenſe, ſervant ignorant of the malice, takes part with maſter, and kills the other, manſlaughter in ſervant, and murder in maſter. 446

Wherein murder and manſlaughter differ. 449, 466

In appeal of murder, whether jury may acquit, or muſt find party guilty of manſlaughter. 449, 450

What malice conſtitutes murder. 451

Malice in fact defined. *ib.*

The diſtinction of malice in law into its different kinds. 451, 455

From what circumſtances evidences of malice in fact muſt ariſe. *Page* 451

It muſt be compaſſing ſome bodily harm. *ib.*

A long ſuit in law not ſufficient evidence of malice in fact, but how it may be heightend into malice prepenſe. 452

A. and *B.* are at malice, and reconciled, and after on a new occaſion fall out, and one kills the other, not murder; *contra*, if reconciliation counterfeit. *ib.*

If malice between *A.* and *B.* and they meet and fight, *A.* gives firſt blow, yet if *B.* kill him (otherwiſe than in his own defenſe) it is murder. *ib.*

If malice between them, and *A.* aſſault *B.* and after flies to the wall, and there in his own defenſe kill *B.* by ſome it is murder; *ſed quære.* *ib.*

A quarrel between *A.* and *B.* *A.* challenges *B.* *B.* declines it, but at length to vindicate his reputation meets and fights, and kills *A.* murder. 452, 453

A. challenges *B.* *B.* declines it, but ſignifies that he will defend himſelf, if *B.* going about his occaſions is aſſaulted by *A.* and kild, murder in *A.* but if *B.* had kild *A.* it had been *ſe defendendo*, if he could not eſcape, otherwiſe manſlaughter; but if only a diſguiſe, murder. 453

If *A.* and *B.* fall out on a ſudden, and preſently agree to fight, and each fetcheth a weapon, and goes into the field, and one kills the other, only manſlaughter; if they had time to deliberate, murder. *ib.*

The child of *A.* beats child of *B.* who runs home to his father, and he runs three quarters of a mile, beats the other child, and kills him, manſlaughter. *Page* 453

Keeper of a park finding a boy ſtealing wood bound him to his horſe's tail, and beat him, horſe ran away, kild the child, murder. 454

From moderate correction of a ſervant death caſually enſues, homicide *per infortunium.* *ib.*

But if maſter deſign immoderate correction, or ſtrike with a lethal weapon, and kills ſervant, murder; what circumſtances conſiderable in this caſe. 454, 474

One hath liberty of *infangthief*, ſteward gives judgment of death againſt a priſoner againſt law, not murder, *quia factum judicialitèr, licèt ignorantèr.* 454

Killing without provocation, murder. 455

Wilfully poiſoning implies malice. *ib.*

Killing one come to demand debt, or ſerve proceſs, murder. *ib.*

A. diſtorts his mouth, and laughs at *B.* *who* thereon kills him, murder. *ib.*

A. paſſing the ſtreet, *B.* takes the wall, and thereupon *A.* kills him, murder; but if *B.* had juſtled *A.* it had been only manſlaughter; ſo if *A.* riding on the road, *B.* whips his horſe out of the tract, and then *A.* lighting kills *B.* manſlaughter. 455, 456

Words no provocation to kill a man, nor will they leſſen a crime from murder to manſlaughter, except words of menace of bodily harm. *Page* 456

If *A.* give indecent language to *B.* and *B.* thereon ſtrikes *A.* but not mortally, and then *A.* ſtrikes *B.* again, and then *B.* kills *A.* *by many* only manſlaughter. *ib.*

A. ſitting in an ale-houſe, a woman calls him a *Son of a whore*, *A.* at a diſtance throws a broomſtaff at her, and kills her; *quære*, whether murder or manſlaughter. *ib.*

The nature of the weapon, wherewith party is kild, conſiderd. 457

A. and *B.* at difference, *A.* bids *B.* take a pin out of his ſleeve to take occaſion to ſtrike *B.* *B.* doth accordingly, *A.* ſtrikes *B.* whereof he dies, murder. *ib.*

A chiding between husband and wife, thereon he ſtrikes her with a peſtle, and kills her, murder. 457

A bailiff comes to execute a proceſs, but hath not a lawful warrant, if ſuch bailiff be kild, only manſlaughter. *ib.*

If any miniſter of juſtice be kild doing his office, it is murder, tho in the night, or on a Sunday. 457. II. 85

But if the proceſs be executed out of juriſdiction of the court, only manſlaughter; ſo it is, if court had no juriſdiction of proceſs. 458

Murder to kill an officer, tho he ſhew not his warrant or mace, where it is not demanded. 458, 462

Tho bailiff uſe no words of arreſt, nor ſhews his warrant, murder to kill him doing his duty. *ib.*

But if officer doth what is not warrantable, as break open window to arreſt, there, if ſlain, manſlaughter only. *Page* 458, 474

If he enter by an outward door, he may break open inner door, killing him in ſuch caſe, murder. 458, 459

Where officers may juſtify breaking open doors to arreſt, and conſequently murder to kill them ſo doing. 459. II. 94

Where conſtable acts out of his vill without ſpecial warrant, killing him only manſlaughter; but killing a private man in execution of a particular precept from a juſtice of peace directed to him by name to ſuppreſs a riot in the vill of *B.* or to arreſt one for ſome miſdemeanor, and within the juriſdiction of the juſtice, murder; ſuch private man muſt ſhew his warrant, or ſignify the contents. 459

If juſtices warrant expreſs not the cauſe ſufficiently enough, yet if he had juriſdiction, killing officer in execution of it, murder. 460

Where two conſtables and their aſſiſtants are engaged one againſt another, and party of one conſtable kills one of the other party, but manſlaughter. *ib.*

Sheriff having a writ of poſſeſſion againſt houſe of *A.* *A.* gains conſtable of vill to oppoſe ſheriff, and in conflict conſtable is kild, not ſo much as manſlaughter; but if any of ſheriff's officers are kild, murder. *ib.*

Killing bailiff, conſtable or watchman doing his duty; murder. 457, 460, 463. II. 90, 98

What ſufficient notice that a man is a bailiff, conſtable or watchman, to make it murder. *Page* 460 *to* 464. II. 90

What a neceſſary notification of a man's being a private bailiff. 461

Rioters aſſembled in a houſe, ſome iſſue out and kill a conſtable's aſſiſtant within view, murder in thoſe in the houſe, who abetted the aſſault. 463, 464

Killing thoſe, that come voluntarily to a conſtable's aſſiſtance, as well as thoſe that are called, murder. *ib.*

Killing aſſiſtant during neceſſary retreat of conſtable, murder. *ib.*

On *hue* and *cry*, tho without juſtice's warrant, or conſtable, a purſuant is kild by a malefactor, murder; all malefactors in the ſame field principals; one taken before party hurt, *not guilty*, unleſs after taken he had animated malefactor to kill the party. 465. II. 100

A preſs-maſter impreſſed *B.* and with aſſiſtance of *C.* laid hold on him, *D.* finding fault with *C.*'s rudeneſs a quarrel aroſe, *D.* kild *C.* but manſlaughter. *ib.*

A. comes to rob *B.* and either without, or on reſiſtance, *A.* kills him, murder. 465, 474

So if men come to ſteal deer in a park, or rob a warren, and parker or warrener reſiſts, and is kild, murder. *ib.*

If priſoner die by dureſs of gaoler, murder. 466

What the form of pardon of murder, what of manſlaughter: Where a ſpecial *non obſtante* of 13 *R.* 2. neceſſary. 466, 467

How one indicted of murder having a pardon of felony, or *felonica interfectio* must plead. *Page* 467

1 *Jac.* of *ſtabbing*, tho temporary, by 17 *Car.* 1. continued till ſome other *act* ſhould be made to continue, or diſcontinue it. 468

Uſual to prefer two indictments, one of murder, another on this *act*, and to try that of murder firſt, convict on either, ouſted of clergy. *ib.*

How indictment on this *act* muſt be to ouſt clergy; need not conclude *contra formam ſtat.* good with, or without it. *ib.*

Throwing a hammer and killing a man, not a ſtabbing or thruſting within this *act*. 469, 470

Stabbing, or thruſting with a ſword or pike-ſtaff within it; whether a ſhot with a piſtol, or blow with a ſword or ſtaff be within it, *quære*. 470

A cudgel in the deceaſed's hands, a weapon drawn within it, *viz.* ſuch as might do hurt. *ib.*

One within words of the *act*, not within the reaſon. *ib.*

If a maſon in building voluntarily let fall a ſtone, and kill another, without due warning, at leaſt manſlaughter. 472, 475

Two playing at cudgels, or wreſtling by conſent, or playing at foils, one caſually kills the other, manſlaughter. 472, 473

If *A.* cut the hedges of *B.* and *B.* beat him, whereof he dies; manſlaughter. 473

Several come to enter *A.*'s houſe as treſpaſſers, *A.* kills one of them, manſlaughter. 474

If one throws a ſtone over an houſe amongſt people to do hurt, the intention makes it murder or manſlaughter. *Page* 475

Shooting at deer in another's park *ſans licence*, the arrow glanceth and kills, manſlaughter. 475

Throwing a ſtone with intent to kill another's poultry, and it kills a by-ſtander, manſlaughter. *ib.*

A. drives his cart careleſly, and it runs over a child in the ſtreet, and yet drives on, and kills the child, murder; but if he ſaw it not, manſlaughter. 476

One riding in the ſtreet whips his horſe, and runs over a child and kills him, manſlaughter. *ib.*

But if he rid ſo in a preſs of people to do hurt, and horſe had kild another, murder. *ib.*

If there be malice between *A.* and *B.* and they meet and fight upon it, tho *A.* gives firſt blow, and *B.* retreats, as far as he can with ſafety, yet if *B.* kill him, murder. 479

A. aſſaults *B.* *B.* thereon ſtrikes *A.* without flight, and kills him, manſlaughter. *ib.*

If *A.* upon malice prepenſe ſtrikes *B.* and then flies to the wall, and there in his own defenſe kills *B.* under what circumſtances murder, or *ſe defendendo*. 480

If a priſoner reſiſts not, but flies, yet officer for fear of a reſcue ſtrikes him, whereof he dies, murder. 481

Bailiff killing a man flying to avoid arreſt in a civil action, murder. *ib.*

If *A.* aſſaults *B.* firſt, and *B.* reaſſaults *A.* and ſo fiercely, that *A.* cannot retreat to the wall without danger; nay, tho he fall

fall on the ground upon *B.*'s aſſault, and then kills *B.* it is not *ſe defendendo*, but murder or homicide according to the caſe. *Page* 482

Neceſſity of flying ſhall not be taken, as a flight, in favour of aſſailant. *ib.*

A. aſſaults *B. B.* by his own courage and addreſs precludes flight of *A.* then *A.* kills him, manſlaughter. 483

Killing on a ſudden falling out, manſlaughter. *ib.*

A. aſſaults the maſter, and ſervant in defenſe of him kills *A.* if maſter not driven to extremity, manſlaughter in ſervant. 484

Like law of a maſter killing in defenſe of his ſervant; husband of the wife, the child of the parent, and *è converſo.* *ib.*

If husband or father kill one that attempts to raviſh the wife or daughter, if it might have been otherwiſe prevented, manſlaughter. 485

Killing one, who pretending title takes goods as a treſpaſſer, manſlaughter. 485, 486

Killing a treſpaſſer in defenſe of a man's houſe, manſlaughter. 485, 487

Killing adulterer in the act with the wife, manſlaughter. *ib.*

A. is ſuſpected by *B.* of felony, tho no felony committed, neither is *A.* indicted, nor probable cauſe of ſuſpicion, if on offer to arreſt him by *B.* he reſiſts or flies, whereby *B.* cannot take him without killing, and *B.* kills him, at leaſt manſlaughter; but if a felony committed, and there be cauſe to ſuſpect *A.* tho innocent, if *B.* kill *A.* in this purſuit, whether it excuſe him from manſlaughter. *Page* 490

If a man have a park within a foreſt, where he may hunt, and foreſter kills purloin-man, or his ſervant hunting in his purloin, murder or manſlaughter according to the caſe. 491

What authority *homicide in execution of juſtice* requires in the judge that gives, and officer that executes judgment. 497, 498, 499

Giving judgment of death without juriſdiction, if executed, murder. 497

Juſtice of peace gives judgment in treaſon, whether murder or miſpriſion only. 497, 498

Where proceeding of judges in capitals without ſtrict extent of their commiſſion, or where their proceeding after their commiſſion is determined, is not murder, but a great miſpriſion. 498, 499

Executing martial law in time of peace, murder. 499, 500

Where the judge hath juriſdiction of the cauſe, officer executing ſentence *not guilty*, tho the judge err; but otherwiſe, if he hath no juriſdiction. 501

If a ſtranger of his own head execute criminal, murder. *ib.*

If private man kills one ſuſpected on his flight, and refuſing to ſubmit, if innocent, at leaſt manſlaughter, becauſe innocent man not bound to take notice of private man, as authorized to arreſt him. II. 82, 83

If one arreſting on ſuſpicion break open doors, if party a felon, juſtifiable; *contra*, if innocent. II. 82

If before or after arreſt, *B.* an innocent man ſuſpected draws his ſword and aſſaults *A.* the party ſuſpecting, and *A.* preſſes upon him to take or detain him, and in conflict *B.* kills *A.* it is murder, or if *A.* kills *B.* it is juſtifiable. II. *Page* 83

If one arreſted on ſuſpicion kills party arreſting, (always ſuppoſing party arreſted innocent,) only manſlaughter. II. 84

Bailiff about to take a priſoner, before arreſt priſoner draws his ſword, and kills him, murder. II. 83

If there be a felony done, *A.* ſuſpects *B.* on probable grounds, and acquaints conſtable with it, and deſires his aid to take him, if conſtable on ſuch arreſt or attempt thereof be kild, it is murder. II. 92

If there be a warrant againſt one for treſpaſs, or breach of the peace, and he flies, and will not yield to the arreſt, or being taken makes his eſcape, and officer kills him, murder. II. 117

Vide Arreſt, Clergy, Homicide per tout, Indictment.

Mute.

If priſoner proſecuted on 28 *H.* 8. *for trial of treaſons*, &c. *on the high ſea* ſtand mute, he ſhall have *peine fort & dure.* II. 17, 318, 319

Whether *peine fort & dure* be pardon'd by general words of all contempts. II. 252

In caſe of demurrer no ſuch judgment can be given. II. 257, 315

Where defendant fails in pleading *not guilty*, or putting himſelf on his country, it is in law a ſtanding mute. II. *Page* 258

Antiently, if felon peremptorily challenged above thirty-five, he was put to *peine fort & dure.* II. 268

If before 22 *H.* 8. felon had pleaded *not guilty*, and put himſelf on the country, and challenged peremptorily under three juries, whereby jury remained, and a *tales* was granted, and he then ſtood mute, yet jury paſt on him on his plea *not guilty.* II. 269, 316

If priſoner hath pleaded to the country, and when tried ſays nothing, no penance ſhall be inflicted, but jury ſhall be taken. II. 299

If felon challenge above twenty, challenge only over-ruled, and jurors ſworn. II. 270, 316

If he hath received his judgment already, or be convict, and brought to the bar, and be demanded what he can ſay, why judgment ſhould not be given againſt him, or why execution ſhould not be awarded, if he ſay nothing, it ſhall not be inquired whether he can ſpeak or not, but he ſhall have preſent judgment, or execution. II. 314, 315

But if a long time hath paſt between his conviction and judgment and this ſecond calling to the bar, it is prudent to inquire by witneſſes, whether he can ſpeak. II. 315

If one abjure, or be outlawd of felony and return, and be brought to the bar to ſhew cauſe, why execution

execution ſhould not be done, if he ſtand mute, an inqueſt of office is to be taken, and if it be found that he hath loſt his ſpeech by viſitation of God ſince his abjuration, they ſhall inquire of the identity of the perſon before judgment or execution ſhall be awarded; ſo if he were brought in on a *cap. utlegat.* or *hab. corpus.* II. *Page* 315

If one indicted or appeald of felony pleads *not guilty*, and puts himſelf on the country, and jury remains on challenges till another day, and then appear, and priſoner ſtands mute, yet this not ſtanding mute, for inqueſt ſhall be taken on iſſue already joined. II. 315, 316

In that caſe court having any doubt, hath uſed to inquire by inqueſt, ſometimes by inquiry *ex officio* by inqueſt impannelled to try the iſſue, whether he ſtands mute of malice, or *ex viſitatione Dei.* II. 315, 316, 321

When one ſaid to ſtand mute. II. 316, 317

If felon ſtand mute, court *ex officio* ought to impannel a jury as inqueſt of office to try, whether it be of malice, or not; and if they find it to be of malice, he ſhall have judgment of *peine fort & dure*, if otherwiſe, they are to inquire of all the points material for his defenſe. II. 317

On indictment of treaſon judgment of treaſon ſhall be given againſt party ſtanding mute. *ib.*

In treaſon, tho one ſtanding mute ſhall be convicted, yet there are ſome antient inſtances to the contrary, as on indictment for counterfeiting coin, but now the law is otherwiſe. *Page* 223, 328

One arraigned for petit treaſon, challenging above thirty-five ſhall have judgment of *peine fort & dure*, and how judgment enterd. 382. II. 268, 399, 400

In appeal, if appellee ſtand mute, judgment of penance ſhall be given. II. 317, 321, 322

One arraigned before lord ſteward on 33 *H.* 8. and ſtanding mute ſhall have judgment, as if convicted. II. 318

Peer arraigned on indictment of felony before his peers refuſing to plead, ſhall have this judgment. *ib.*

A woman ſhall have ſame judgment if ſhe ſtand mute. *ib.*

One indicted of petit larciny refuſing to plead ſhall have the ſame. II. 320

If a woman be indicted for ſimple larciny of goods under 10 *s.* tho ſhe ſhall only be burnt in the hand for it, yet if ſhe refuſe to plead, judgment of *peine fort & dure* ſhall be given againſt her. *ib.*

If a new felony be made by *ſtat.* tho it be ſilent as to ſtanding mute, this judgment incident to it. *ib.*

In rape, made felony by *Weſtm.* 2. if party ſtand mute, he ſhall have judgment of penance. *ib.*

If this judgment be given, yet if offenſe within clergy, clergy allowd. *ib.*

Priſoner to have *trina admonitio*, and a reſpite to bethink himſelf. *ib.*

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Judgment of penance was by common law. II. 321
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How judgment of *peine fort & dure* enterd, where priſoner doth not directly anſwer. II. 399
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Neceſſity.

NEceſſity of preſerving the peace by taking notorious malefactors excuſeth ſome acts from being felony, which otherwiſe were felony. 53
The dangerous doctrine of the *caſuiſts* on this ſubject refuted. 54, 55
By the laws of *England*, if one being under a neceſſity for want of victuals or clothes, ſhall on that account clandeſtinely, *& animo furandi* ſteal another man's goods, it is capital. 54
This rule, *in caſu extremæ neceſſitatis omnia ſunt communia*, holds in ſome particular caſes, where by tacit conſent of nations, or ſome particular countries or ſocieties, it hath obtained. *Page* 55
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Joining with rebels *pro timore mortis* and departing from them, as ſoon as parties can, no levying war. 139
Quicquid neceſſitas cogit, defendit, refuted. 565
Difference between times of war and public inſurrection or rebellion, and times of peace, for in times of war and publick rebellion, when one is under ſo great a power, that he cannot reſiſt or avoid it, law in ſome caſes allows an impunity for parties compelled, or drawn by fear of death to do ſome acts in themſelves capital, which admit no excuſe in time of peace. 49
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If a man be menaced with death, unleſs he will commit an act of treaſon, *&c.* fear of death doth not excuſe him, and why. *ib.*
If one be deſperately aſſaulted, and in peril of death, and cannot otherwiſe eſcape, unleſs to ſatisfy his

his aſſailant's fury he will kill an innocent man then preſent, fear and actual force will not acquit him of murder, if he do the fact. *Page* 51

A bare fear, tho upon a juſt cauſe, and tho it be fear of life, gives not a man power to take away life of another, but what kind of danger it muſt be. 52

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Conſcience binds not one to keep an oath extorted by menace of death. 532

One of neceſſity kills a felon or ſuſpected perſon flying or reſiſting before, or after arreſt, where homicide juſtifiable, or excuſed. Vide **Homicide.**

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Non obſtante.

Prohibitory clauſe in 8 *R.* 2. that *no man of law ſhall be juſtice in his own county*, uſually diſpenſed with by a *non obſtante.* II. 32

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Outlawry.

AT what age awardable againſt an infant for felony on indictment. 23. II. 208

Poſſibly proceſs of outlawry may go againſt receiver of a traitor at ſame time as againſt principal, and tho principal appear, proceſs may go on againſt the other; *contra* in felony. *Page* 238

A traitor rendring himſelf on outlawry within a year ſhall be received to traverſe indictment. 295

What *acts* take away from perſon outlawd for treaſon advantage of reverſal of outlawry, becauſe *party out of the realm*, but extend not to other offenſes. 354

Where juſtices of *oyer* and *terminer* may iſſue proceſs of outlawry. II. 31

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They cannot make out *cap.* or *exigent.* II. 199

A. and *B.* indicted before juſtices of peace, indictment deliverd over to juſtices of *gaol-delivery*, *A.* appears and is acquit, *B.* appears not, record muſt be removed into *B. R.* and thence proceſs of outlawry iſſued. II. 37, 38

Juſtices of peace by common law in their ſeſſions may proceed to outlawry on indictments found before them, and in popular actions by ſtatutes. II. 52

21 *Jac.* gave proceſs of outlawry in popular actions. II. 113

But they cannot iſſue *capias utlegatum*, but muſt return record of outlawry into *B. R.* and thence it ſhall iſſue. *ib.*

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Whether coroner can make out proceſs of outlawry againſt defendant in appeal. II. *Page* 67, 199

Where proceſs of outlawry lies againſt a *peer*, or not. II. 177, 199, 200

In ſome caſes on indictment it lies not againſt a commoner. II. 194

Whether outlawry an attainder. 521. II. 205, 206, 350, 352

Tho attainder, yet ſmall exceptions are allowd to proceſs or return, and ſo by writ of error eaſily reverſible, and party put to plead to indictment. II. 198

One outlawd prays reſpite to purchaſe a writ of error, *B. R.* uſually prefixeth a day for that purpoſe, and in mean time remits him to marſhal, and reſpites his execution; but priſoner muſt allege error in law or fact to ſatisfaction of court; if court diſſatisfied, they may award execution preſently. II. 408

One attaint by outlawry of treaſon, *&c.* ſhall not be appeald or indicted till outlawry reverſed. II. 252

If two coroners in a county, or more, one may execute the writ, as in caſe of an *exigent*; but return muſt be in name of *coronatores*. 417. II. 56, 195

By 5 *E.* 3. juſtices of *oyer* and *terminer* may iſſue proceſs againſt felons in a forein county. 576

In whoſe name, and under whoſe *teſte* ſuch proceſs ſhall iſſue; clerk of aſſiſe has a ſpecial ſeal for them. 576. II. 199

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In indictments of treſpaſs, *venire facias* firſt proceſs, and when *non eſt inventus* is returned, *cap.* and *exigent*. II. *Page* 194

In all indictments of felony or treaſon proceſs by *cap.* and *exigent* lies, and at common law there was but one *cap.* and on *non eſt inventus* an *exigent*, and ſo to the outlawry. 576. II. 194

In what caſes 25 *E.* 3. requires two *capias's*, and how ſecond *capias* returnable. II. 194

It extends not to treaſon; *exigent* in treaſon muſt iſſue on return of *non eſt inventus* on firſt *cap. ib.*

So in indictment of murder or appeal of robbery, but in *B. R.* there ſhall be two *cap.* in indictment or appeal of robbery. *ib.*

At this day proceſs on indictment of any felony is only one *cap.* and then *exigent*. II. 195

25 *E.* 3. an impracticable law. *ib.*

But by 8 *H.* 6. in indictments or appeals of treaſon, or any felony or treſpaſs againſt one of another county, after one *cap.* a ſecond *cap.* with *proclamations*, and how returnable, ſhall be granted to ſheriff of that county, wherein he is ſuppoſed to be converſant, before *exigent* ſhall iſſue. 576. II. 195

But if party were converſant in county, where indicted, at time of felony or treaſon committed, proceſs to be at common law. 576. II. 195

A *proviſo* in 8 *H.* 6. not to extend to *B. R.* or *Cheſter*. II. 195

By 10 *H.* 6. ſame proceſs [as by 8 *H.* 6.] directed on indictment of felony or treaſon removed into *B. R.* by *certiorari*, or into any other courts. *ib.*

Indictments of felony or treaſon originally taken in *B. R.* are not within theſe *acts*, but by *6 H. 6.* before *exigent* awarded court ſhall iſſue a *cap.* to ſheriff of county, where indictment taken, and another to ſheriff, where party is named, having ſix weeks time at leaſt before the return. II. *Page* 195

6 H. 6. made perpetual by 8 *H. 6.* 576

Theſe *acts* of little effect; for if party was converſant in county, where fact committed, (as he cannot be otherwiſe) then he may be named of that place in indictment, and proceſs is to go as at common law before theſe *acts*; and this is now the uſual courſe. II. 196

If *J. S.* be indicted in county of *B.* for a felony there committed, and indictment runs *J. S. nuper de* A. *in com.* B. *alias dict.* J. S. *nuper de* D. *in com.* S. there ſhall no proceſs go to ſheriff of *S.* becauſe that addition is only in the *alias dictus*, and therefore proceſs ſhall only iſſue in county of *B.* and ſame law in appeal. *ib.*

If it runs, J. S. *de* A. *in com* B. *nuper de* C. *in com.* D. *cap.* ſhall iſſue only *in com.* B. but if it runs, J. S. *nuper de* A. *in com.* B. *nuper de* C. *in com.* D. a *cap.* ſhall only go into the county of *B.* where he is indicted, but on return thereof, (if it be before commiſſioners) a *cap.* with proclamations ſhall iſſue to ſheriff of *D.* and if in *B. R.* on an indictment found there, one *cap.* to one ſheriff, and another to the other ſheriff, according to 6, 8 & 10 *H. 6.* II. *Page* 196

If one be indicted by name of J. S. *nuper de* A. *in com.* Ceſtriæ, the ſecond *cap.* with proclamation ſhall be awarded to the *prince*, or his lieutenant, and the like to biſhop of *Durham*, or chancellor of *Lancaſter*. II. 196, 197

Expoſition on 2 *H.* 5. enabling the chancellor on complaint of any felony or riot to iſſue a *cap.* and writ of proclamation. II. 197

Tho this be marked as an obſolete ſtatute, no *act* repeals it, ſave implication of 16 *C.* 1. which it ſeems not to do. *ib.*

Yet never put in ure. II. 198

B. R. either on indictment taken before them, or removed thither by *certiorari*, may iſſue *cap.* and *exigent* into any county in *England* on a *non eſt inventus* returned by ſheriff of county, where party indicted, and a *teſtatum* that he is in ſome other county. *ib.*

In appeal by writ againſt principal and acceſſary, which is general till declaration, plaintiff muſt at his peril diſtinguiſh the proceſs, for if he take his *exigent* againſt all, he muſt count againſt all as principals. II. 200

But in appeal by bill or indictment, *cap.* is againſt them all, but when it comes to the *exigent*, it ſhall iſſue only againſt principal, and proceſs be continued by *cap.* infinite againſt acceſſary till principal be outlawd, and then *exigent* ſhall iſſue againſt acceſſary. *ib.*

If

If acceſſary appear on *cap.* he ſhall not be let to bail, and have *idem dies* by bail till proceſs be determined againſt principal. II. *Page* 200

If two be indicted as principals in felony, and another as acceſſary to them both, *exigent* againſt acceſſary ſhall ſtay till both be attainted by outlawry or plea. *ib.*

If one of the principals be acquitted, whether acceſſary ſhall be diſcharged. 624. II. 200, 201

Whether there be any, and what diverſity in this caſe between indictment and appeal. II. 201

If defendant render himſelf to ſheriff before *quinto exactus*, and appear in court at return of the *exigent*, and plead, and is baild, and then makes default, inqueſt ſhall not be taken by default in felony, either in indictment or appeal, tho it may in other caſes, but a new *cap.* ſhall iſſue, and after that an *exigent*, and a *cap.* againſt the bail. II. 201, 202

Where *exigi fac.* with an *allocato comitatu* ſhall iſſue, and where *exigi fac. de novo.* *ib.*

Demand of party to be at five county-courts ſucceſſively held one after another, without any court intervening. II. 201

If where there are but two county-courts before return, if after ſecond *exactus* defendant render himſelf, and find *mainprize*, and at return make default, there ſhall iſſue no *exigi fac.* with an *allocato com.* but a new *exigent*, and a *cap.* againſt the bail. II. 201, 202

How an *exigi fac.* with *allocato huſting* proceeded on. II. *Page* 202

If defendant appear on *cap.* and plead to iſſue, and is then let to bail, and then makes default, a *cap. ad audiendam juratam* ſhall iſſue, and if not taken thereon, *exigi fac. de novo*; but if brought in, he ſhall be tried on his plea. II. 202, 224

But if he render himſelf on *exigent*, and plead *not guilty*, and be let to bail till trial, and then make default, whereon *exigent* is awarded, and he is brought in thereon, he ſhall plead, and be arraigned *de novo*, for by *exigent* awarded firſt iſſue is diſcontinued. II. 224

If on *cap.* or *exigent* ſheriff return a *cepi corpus*, and at the day hath not the body, he ſhall be puniſhed, but no new *exigent* awarded, becauſe in cuſtody of record. II. 202

But if party returned outlawd, proceſs *cap. utlegatum.* *ib.*

If party outlawd be in a houſe, and doors refuſed to be opened, conſtable, or any other perſon in purſuit of one outlawd for felony, may break open doors and take him. II. 203

What certainties return of outlawry muſt have. II. 203, 204

Where a *certiorari* iſſued to coroners to certify the truth in order to amend return of outlawry. II. 203

Goods forfeited from *teſte* of *exigent.* II. 204, 206

In appeal, if *exigent* be well awarded, tho writ of appeal abated, forfeiture of goods by *exigent* ſtands in force. 204

Tho

Tho outlawry be reverſed for error in law or fact, *exigent* being well awarded, forfeiture of goods ſtands. II. *Page* 204, 205

Special writ of error lies on award of *exigent* for party or his executors to reverſe award of *exigent*. II. 205

Inſtances of errors in fact. II. 205, 207, 208

Avoiding outlawry avoids not *exigent*, if well awarded. II. 205

If party render himſelf after *exigent* awarded, and plead to indictment, and is found *not guilty*, forfeiture by *exigent* ſtands. *ib.*

Neceſſary for party outlawd in felony to bring his writ of error ſpecially, *tam in adjudicatione brevis de exigi facias, quàm in promulgatione utlegariæ*. *ib.*

Error in *exigent* cauſe to reverſe outlawry, and error in appeal or indictment, on which *exigent* is awarded, is cauſe to reverſe both outlawry and *exigent*. *ib.*

Without judgment of reverſal in a writ of error forfeiture by *exigent* awarded ſtands, tho indictment quaſhed, or appeal abated. *ib.*

Outlawry gives forfeiture of lands in treaſon to the *king*, and in felony to *lord*. II. 206

But bare judgment of outlawry without return of record is no attainder, nor gives any eſcheat. *ib.*

It muſt be returned by ſheriff with writ of *exigi facias*, and return indorſed. *ib.*

If there be a *quinto exactus*, and thereon *utlegatus eſt per judicium coronatorum*, but no return thereof made, there lies a *certiorari* to the coroners, or ſheriff and coroners to certify ſame in *B. R.* and for what purpoſe. II. *Page* 206

Till return by ſheriff party outlawd not diſabled to bring an action. *ib.*

Barely on return of outlawry on a *certiorari* without *exigent* indorſed and returned together with *certiorari*, no writ of eſcheat lies for the lord. *ib.*

If *certiorari* be directed to ſheriff and coroners, and *exigent* be extant in court, and they return this outlawry, poſſibly it may be a ſufficient warrant to enter it of record as a return on the *exigent*. *ib.*

Unleſs *exigent* is ſome way returned or extant, it gives *king* no title to land or goods, it is the warrant of the outlawry. II. 207

Without *exigent* and return of outlawry on it there is neither diſability, forfeiture, nor eſcheat. *ib.*

A *certiorari* not grantable to coroners to remove outlawry after party's death. *ib.*

Outlawry avoidable by plea, by writ of *identitate nominis*, or by writ of error. *ib.*

No error in fact, if *defendant be impriſoned*, provided he be brought to the bar, and demanded, if he will appear and refuſe. II. 208

Of avoiding outlawry of felony becauſe *beyond ſea*; the diſtinctions, where one goes *beyond ſea* voluntarily, or in *king*'s ſervice, and where he goes before *exigent* awarded, or after. *ib.*

How errors in theſe caſes are aſſigned; how attorney general to plead to the errors, *&c.* II. *Page* 208

Error brought on outlawry in felony, record of outlawry *cum omnibus ea tangentibus* is removed into *B. R.* II. 209

Party muſt render himſelf in cuſtody, and ſo muſt come in perſon to the bar, and when demanded what he can ſay, he is to pray allowance of writ of error. *ib.*

Writ being allowd, record is to be removed; what parts record conſiſts of. *ib.*

Then party to aſſign errors in perſon, and a day is given to *king*'s attorney to reply to him, and in mean time a *ſcire fac.* to *lord mediate & immediate* is to iſſue, returnable at fifteen days *ad audiendum errores. ib.*

If any lords appear, they may plead to the errors; if ſheriff returns *there is no land*, then court proceeds to examine errors. *ib.*

Outlawry being reverſed, defendant to anſwer indictment; where indictment to be tried. *ib.*

For forfeiture by outlawry, and to what time it ſhall relate. Vide **Forfeiture.**

What judgment in outlawry of felony or treaſon, and what award of execution to be made. Vide **Judgment.**

Vide **Gaol-delivery, Juſtice of Peace, Oyer and Terminer.**

Oyer and Terminer.

Juſtices muſt be by commiſſion, and not writ, otherwiſe their proceedings void. *Page* 498. II. 23

May iſſue warrants in the counties within their commiſſion for taking felons or ſurety of peace within their limits. 579

Quære, whether they may not iſſue their warrants to take any indicted of felony within their precincts, tho they be abroad in a forein county, by 5 *E.* 3. *ib.*

Diſtinction between ordinary and delegate, juſtices of *oyer* and *terminer*. II. 22

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If there be an inquiſition of murder or manſlaughter, and an indictment for ſame offenſe, and party is acquitted on indictment, 'tis neceſſary to quaſh inquiſition, or arraign party upon it, who in ſuch caſe may plead *auterfoits acquit*, or *not guilty*. II. 65

In all caſes of *homicide by neceſſity*, which are no felony, where the matter is ſpecially preſented, as it may, party ſhall be preſently diſcharged, without being put to plead; but then this acquittal by preſentment is no final diſcharge, for he may be indicted and arraigned again afterwards, if matter of former indictment falſe; but *contra*, where indictment or coroner's inqueſt is of murder or manſlaughter, and thereon he is arraigned and tried, and this ſpecial matter proved in evidence, he ſhall be acquit thereon, and this acquittal is a perpetual bar againſt any other indictment for ſame death. 491, 492. II. 158, 246, 247, 303, 304

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In favour of appeal, if one be indicted of murder, and plead to it, and be convict, and wife enter appeal for ſame death againſt

gainſt priſoner, pending appeal judgment ſhall be reſpited; but if wife be nonſuit judgment ſhall be enterd on the conviction. II. *Page* 220

If one be both indicted and appeald before ſame juſtices of ſame murder, or other felony, and plead, party ſhall be arraigned on appeal firſt, and not on indictment; and if appellant be nonſuit on his appeal, priſoner ſhall be arraigned on appeal, and proceſs ſhall ceaſe on indictment; and if priſoner plead, or be acquitted, or plead *king*'s pardon, and it be allowd, regularly acquittal, or pardon and allowance thereof ſhall be enterd on appeal, tho it be ſafe to enter it likewiſe on indictment; if there be no *ceſſet proceſſus* on indictment, and party be outlawd, he hath no remedy, but by writ of error on the outlawry, and he may aſſign for error his acquittal on appeal, and aver it to be ſame felony. 221

If a *cap.* be awarded againſt a felon, and he render himſelf, and plead *not guilty*, and is let to bail, and then makes default, a *cap. ad audiendam juratam* ſhall iſſue, and if brought in, he ſhall be tried on his plea; but if he render himſelf on the *exigent*, and plead *not guilty*, and be let to bail till trial, and then make default, whereon an *exigent* is awarded, and felon is brought in on the *exigent*, [*quære* whether] he ſhall plead *de novo*. II. 224, 225

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Regularly in all pleas, whether to the writ, or in bar, by matter of record, or fact, or both, if plea doth not confeſs, as a plea of pardon to indictment, or of releaſe to an appeal, tho this plea be found againſt him by iſſue tried, or adjudged againſt him by the court, yet he ſhall not be convicted thereon, but plead over to the felony *not guilty*, as well in indictment as appeal. II. 239, 248, 255, 256

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Regularly, if a record be pleaded in bar, and declared on in ſame court, other party ſhall not plead *nul tiel record*, but have *oyer* of record; and if it be in another court, he ſhall plead *nul tiel record*, and day be given to procure record, or certificate thereof. II. *Page* 241, 242, 243

Priſoner may remove tenor of his record of acquittal into chancery by *certiorari*, and have it in *poigne*, or ſent to the juſtices by *mittimus ſub pede ſigilli*. II. 242

If one be arraigned in *B. R.* on indictment removed or found before them, who hath been formerly acquitted of ſame felony, either before juſtices of peace, or gaol-delivery, court will grant a *certiorari* to remove the record before them, and reſpite his plea, till he can remove his acquittal into the court, that ſo he may form his plea upon it, for record is part of his plea. II. 142

Plea muſt ſet forth record in certain; how it is to conclude. *ib.*

Record muſt be removed by writ, for tho *B. R.* may take an indictment, or other record of juſtices of peace *propriis manibus*, where it is to be proceeded on for the *king*, yet they cannot take record of acquittal to ſerve priſoner's plea without writ. *ib.*

If one pleads *auterfoits acquit de meſme felony*, and vouch the record, court may examine proof, that it is ſame felony, and thereon allow it, without any confeſſion by *king*'s attorney, but what the ſafeſt methods. II. *Page* 242, 243

Plea allowd by teſtimony of juſtices of peace before whom he was acquit. II. 243

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There muſt not only be acquittal by verdict, but a judgment thereon, *quòd eat indè ſine die*, and pleaded alſo. *ib.*

Acquittal regularly a warrant for entring of judgment at any time after. *ib.*

One may plead *auterfoits acquit* notwithſtanding variance in the times alleged in firſt and ſecond indictment, and aver it to be ſame felony. II. 244

If one be indicted for murder of *J. S.* and acquitted, and after indicted for murder of *J. N.* yet he may plead *auterfoits acquit*, and aver it to be ſame man, *& que conus per l'un noſme & l'autre*. II. 244, 245

Where there is a different vill laid in the firſt and ſecond indictment, he may plead *auterfoits acquit*, and aver it to be ſame vill; but *contra*, where party indicted firſt in one county, and then in another, but ſaid to be otherwiſe in an appeal. II. 245

If one commit a robbery in one county, and carry the goods into another, and is indicted of larciny

larciny in forein county, and is there acquitted of the larciny, it is no bar to indictment of robbery in proper county, becauſe another offenſe. II. *Page* 245

Neither is it a bar to indictment of larciny in proper county. *ib.*

Burglary committed, and goods ſtolen, if indicted of larciny for goods ſtolen and acquitted, yet he may be indicted for burglary, and *è converſo*. II. 245, 246

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It muſt be acquittal on trial either by verdict, or battle. II. 246, 252

Party acquitted by miſdirection of judge, may plead it. II. 247

Special verdict found in felony, and court erroniouſly adjudge it no felony, as long as that judgment remains unreverſt, if priſoner be indicted *de novo*, he may plead *auterfoits acquit*. II. 247, 248

If judgment reverſt, party may be indicted *de novo*; but *quære*, whether in point of the verdict party ſhall not be executed. II. 247

If at common law one had been indicted of murder, and arraigned within the year and acquitted, tho arraignment ſhould not have been, yet it ſtood as a good acquittal pleadable to another indictment, or appeal. II. *Page* 247, 249

Auterfoits acquit no plea, where indictment inſufficient, or contains no felony. II. 247, 248

One muſt be *legitimo modo acquietatus*. II. 248

If error only in proceſs in appeal, or indictment, and yet priſoner appear and plead *not guilty*, and be acquit, this acquittal pleadable. *ib.*

One attaint on inſufficient indictment ſhall not be arraigned on new indictment for ſame offenſe, unleſs former judgment firſt reverſt. *ib.*

Where a wrong perſon brings an appeal, *auterfoits acquit* is no plea, neither is it a bar to the *king*, but he may be indicted *nient obſtante* that acquittal; and if right heir bring a new appeal, and be nonſuit, he may be arraigned on that appeal at *king*'s ſuit. II. 249

If defendant be acquit on appeal of murder, or robbery by verdict, regularly a good bar to indictment. *ib.*

Acquittal by battle on an appeal no bar to indictment for ſame offenſe. *ib.*

Indictment and conviction of felony without judgment of death, or prayer of clergy, no bar of a new indictment, nor is *auterfoits acquit* by verdict, unleſs judgment given. II. 248, 251

Auterfoits convict and clergy had a good bar to indictment or appeal for ſame crime. II. 220, 250, 251

And

And ſo it is if he pray his clergy, and court adviſe upon it, tho clergy not actually allowd. II. *Page* 251, 390

Auterfoits attaint de meſme felony, tho on inſufficient indictment, was at common law a bar to appeals, as well as indictments of ſame offenſe, and ſo remains except in appeals of death. II. 251

If *A.* be indicted of piracy, and hath judgment of *peine fort & dure*, and by a general pardon piracies are excepted, but judgment of *peine fort & dure* is pardoned by general words of all contempts, *quære*, whether, if he may be arraigned for ſame piracy, but he may be arraigned of any other piracy committed before that award. II. 252

If *A.* be attaint of treaſon, *&c.* by outlawry, he ſhall not be indicted or appeald of ſame felony till outlawry reverſed. *ib.*

One indicted at common law of felony, and having judgment of death, yet may *nient obſtante* his attainder, be arraigned for treaſon committed before the felony, but *quære* as to treaſon committed after it. II. 252

Where one is appeald of robberies committed on divers perſons, and they bring ſeveral appeals, and he is attaint at ſuit of one, yet he ſhall be put to anſwer to appeals of the others. *ib.*

If there be an indictment and attainder at the proſecution of one, *quære*, whether after he may not be arraigned on an indictment at proſecution of another to have reſtitution on the ſtatute. 545. II. 252

One commits ſeveral felonies, and is attaint of one, and *king* pardons that attainder and the felony for which he was attaint, if after indicted or appeald for ſame felony, he may plead his attainder, and no good replication to ſay, he was pardoned after. II. *Page* 253

But yet may be indicted or appeald for the other felonies; and if he plead his former attainder, it may be replied that he was pardoned after, whereby he is reſtored to be a perſon able to anſwer thoſe offenſes. *ib.*

If one attaint commit a felony after, and be pardoned the firſt felony and attainder, he ſhall be put to anſwer the new felony. *ib.*

If one commit ſeveral felonies, and be convict of one, but no judgment of death, nor clergy given him, he may be indicted for all the former felonies. II. 253

If one had been convict of any one felony, and prayd his clergy, and read, and had been deliverd to the ordinary, formerly he ſhould never have been arraigned for any of the former felonies. *ib.*

For any felony done after conviction, and clergy allowd, he may be indicted; but not if he ſtand attaint and unpardoned. *ib.*

Now by ſtatute clergy diſchargeth all offenſes precedent within clergy, but not ſuch other offenſes as are ouſted of it. II. 254

Acceſſary on arraignment may plead acquittal of principal. *ib.*

Gaoler arraigned for voluntary eſcape of a priſoner for felony may plead acquittal of felon of principal felony, and ſo may reſcuer arraigned on indictment for reſcue of a felon. *Page* 611, 612. II. 254

Felon acquitted of firſt felony ſhall not be arraigned of breach of priſon, or if indicted of it before acquittal, and then is acquitted of principal felony, he may plead it in bar to indictment for breach of priſon. 611, 612. II. 224, 254, 255

He who pleads *auterfoits acquit*, *convict or attaint* muſt plead it ſpecially ſetting forth record. II. 255

He muſt either ſhew record *ſub pede ſigilli*, or have record removed into court, where it is pleaded, by *certiorari*, or if it be record of ſame court, muſt vouch term, year and roll, for record is part of his plea. *ib.*

He muſt make averments, as caſe ſhall require, that he is ſame perſon, and it ſame offenſe. II. 255

No iſſue ſhall be taken on plea of *nul tiel record*, becauſe pleaded in court, but *king*'s attorney may have *oyer* of record. *ib.*

The averments are iſſuable. *ib.*

If iſſue taken on them, they ſhall be tried by jury, that is returned to try priſoner, by 22 *H.* 8. *ib.*

He that pleads theſe pleas, muſt plead over *not guilty* to the felony, for if the pleas be adjudged againſt him, yet he ſhall be tried on *not guilty*. 255, 256

Where one may plead to juriſdiction of court without anſwering to the felony. II. 256

If one by plea confeſs the fact, he need not anſwer to the felony, but he may in that caſe, if he will, plead over to the felony. II. *Page* 256

If one be indicted or appeald of felony, and he will demur to the appeal or indictment, and it be adjudged againſt him, he ſhall be hanged, for it is a confeſſion of the indictment; he may take all exceptions to indictment or appeal, as might have been taken on demurrer, either before his plea, or in arreſt of judgment. II. 257

In caſe of demurrer no judgment of *peine fort & dure* can be given. *ib.*

Plea to the felony conſiſts of *not guilty*, (whereto clerk joins iſſue *cul. priſt*,) and the putting himſelf on his country. *ib.*

If either of theſe fail, it is in law ſtanding mute, either in treaſon or felony. II. 258

In treaſon or felony there can be no juſtification, as *ſe defendendo*, *&c.* *ib.*

But on *not guilty* he ſhall have the advantage of all ſuch defenſes. *ib.*

If dureſs and compulſion from others, *&c.* will excuſe him, jury on the general iſſue ought to find accordingly. II. 258, 259

Where matter appears not to be felony, priſoner on *not guilty pleaded* may be acquitted. II. 303, 304

Where party is convict *within being burnt in the hand*, plea of *auterfoits acquit, and had his clergy*, as good a plea as before 18 *Eliz.* II. 390

If priſoner plead a pardon, how it concludes, and what judgment enterd. II. *Page* 391, 392
What concluſion of plea of *auterfoits acquit*, or *convict*, or *attaint de meſme felony*; moſt commonly priſoner pleads over *not guilty*. II. 238, 248, 255, 256, 392
How ſuch plea is confeſſed by *king*'s attorney, or coroner. *ib.*
If one plead in bar to the indictment, yet if indictment inſufficient, whether *eat ſine die* ſhall be applied to inſufficiency of indictment, or plea in bar. II. 393, 394
Reaſonable to have the *eat ſine die* ſpecial in that caſe, and how. II. 393
If entry of judgment of acquittal be *quòd eat indè quietus*, priſoner cannot be arraigned again, tho indictment inſufficient. II. 394, 395
One indicted of murder or manſlaughter, on *not guilty* the ſpecial matter is found, or jury acquits him, judgment is *quòd eat indè quietus*, it is a perpetual bar; ſo, if found guilty *ſe defendendo*, judgment is *quòd expectet gratiam regis*. II. 395
For pleas in abatement. Vide Abatement.
Vide Judgments.

Polygamy.

1 Jac. Bigamy, or [rather] Polygamy felony within clergy. 692
Caſes excepted out of the *act*. *ib.*
Difference, where firſt wife married *beyond ſea*, and ſecond *here*, and *è converſo*. *Page* 692, 693
A *feme* takes *baron* in *Holland*, and during his life marries another there, then true husband dies, ſhe (ſecond living) marries a third *here*, *dehors* the *act*. 693
But if, living firſt, ſhe had married third in *England*, felony within it. *ib.*
Where notice of party's being alive neceſſary, or not. *ib.*
What *beyond ſeas*, and what *within king's dominions*, *quoad* this *act*. *ib.*
Having two wives, one of which is divorced *a menſâ & thorô* not within it; if divorced *cauſâ ſævitiæ*, whether within it. 694
Where divorce *a vinculo matrimonii*, either party without proviſo in *act* may freely marry. *ib.*
If wife be divorced from the husband *cauſâ adulterii vel ſævitiæ*, *vinculum matrimonii* not diſſolved; but *contra*, if divorced *cauſâ conſanguinitatis vel præcontractûs*. 124, 381
Where divorce *à vinculo*, and one appeals, marriage pending appeal, *dehors* the *act*; *contra*, if ſentence of divorce repeald. 694
If either within age of conſent, ſecond marriage not within *act*; but *contra*, if *feme* of *twelve*, and man of *fourteen*. *ib.*
Trial directed to be where party taken; he may be indicted, where ſecond marriage was, tho never taken. 694, 695, 705
Marriage to a former husband, ſecond being alive, ſimply void. 693

Pope. Vide Religion.
Præmunire.

Præmunire.

1 *Mar.* repeals all *præmunires* enacted in or after 1 *H.* 8. *Page* 308

Vide **Religion.**

Prerogative. Vide King.

Preſcription.

Why *deodands*, goods of felons of themſelves, felons and outlaws cannot be claimed by preſcription. 419

Preſentment.

A more comprehenſive term than indictment. II. 152, 153

Some preſentments of themſelves convictions and not traverſable, others not ſo, but in nature of informations, and therefore traverſable. II. 153, 154, 155

Preſentment of a *felo de ſe* before juſtices of peace, or *oyer* and *terminer*, traverſable by the executor. II. 154

Why coroner's inqueſt of a *fugam fecit* is concluſive, and not that of grand inqueſt, or petit jury. *ib.*

If party be preſented to have ſuffer'd an eſcape, becauſe at leaſt he is to be fined, he ſhall have his traverſe to it. *ib.*

But if eſcape be preſented upon a vill, it is not traverſable, and why. 603. II. 154

Indictment againſt city of *London* for an eſcape traverſable. II. 154, 155

A preſentment of a riot, or forcible detainer by a juſtice, or two juſtices of peace is a conviction by *ſtat.* II. *Page* 155

Preſentment of juſtices of peace of default in repairs of an highway, traverſable. *ib.*

Inqueſts muſt be returned to be *probi & legales homines de comitatu prædicto.* II. 167

For preſentments before coroner. Vide **Coroner.**

Vide **Inqueſt of Office.**

Prieſt. Vide Clergy, Felony by Statute, Religion.

Principal and Acceſſary.

Who ſhall be ſaid principals in felony in the firſt and ſecond degree. 233, 437, 615

Acceſſaries *before* and *after* deſcribed. 233, 613, 615, 618

In treaſon no acceſſaries but all principals, ſo procurer *before*, or a knowing receiver *after*; but whether a knowing receiver of a counterfeiter of the great, or privy ſeal, or the coin be a principal in treaſon. 234, 237, 613

Whether receipt of a felon after attainder in ſame county makes an acceſſary *without notice.* 323, 622

Conſenting to a felony makes a man principal or acceſſary, bare concealing, only miſpriſion. 374

If ſervant or wife be of confederacy to kill the husband or maſter, and be in ſame houſe, where he is kild, tho not in ſame room, they are principals, and guilty of petit treaſon, for it is a preſence, and ſo in other caſes. 379, 439

There

There are principals and acceſſaries both *before* and *after* in petit treaſon. *Page* 381

If one take poiſon by perſuaſion, but in abſence of another, and die of it, perſuader is principal in murder. 431

Counſelling, commanding, or directing killing a man, if he that counſels, *&c.* be abſent, makes him acceſſary *before* to the murder. 435

In caſe of poiſoning, he that counſels another to give poiſon, if he doth it, he, who counſels it, if abſent, but acceſſary *before*. 435, 615

He, who lays, or gives poiſon, tho abſent when taken, is a principal. 435, 615

If *A.* command *B.* to beat *C.* and he beat him to death, murder in *B.* and if *A.* be preſent, murder in him alſo, if abſent, he is acceſſary. *ib.*

If *A.* counſels *B.* to poiſon his wife, *B.* obtains poiſon from *A.* and gives it his wife, who ignorantly gives it to a child, this is murder in *B.* but *A.* who was abſent is not acceſſary to the murder, becauſe the command ſhall be conſtrued ſtrictly. 436

If *A.* counſel *B.* to beat *C.* with a ſmall wand, if *B.* beat him to death with a great club, *A.* is not acceſſary. *ib.*

If *A.* counſel *B.* to kill *C.* and before the fact done countermands it, if *B.* does it afterwards, it is murder in *B.* but *A.* not acceſſary. 436, 452

In manſlaughter there can be no acceſſaries *before*, nor in homicide *ſe defendendo*. 437, 450

If *A.* be indicted of murder, and *B.* as acceſſary *before* by procurement, and *A.* be found guilty only of manſlaughter, *B.* ſhall be diſcharged. *Page* 437, 450

All preſent and aſſiſting to murder, principals. *ib.*

In *burglary* or robbery, thoſe who watch at lane's end, *&c.* tho not actually preſent, burglars, or robbers. 439, 534, 537, 555, 563

Otherwiſe on 39 *Eliz.* that *act* binds up excluſion of clergy to ſtealing in the houſe. 537

Perſons ready to aid, tho but lookers on, principals. *ib.*

Divers come with one aſſent to do miſchief, as to kill, rob, beat, *&c.* and in execution thereof one commits murder, all principals. 440, 441

Divers aiming to rob a perſon charge him with felony, one robs him, robbery in all; but without ſuch intent, reſt not guilty. *ib.*

If *A.* comes in company with *B.* to beat *C.* and *B.* beat him ſo that he dies, *A.* is principal. *ib.*

Several rioters in a houſe, ſome iſſue out and murder one within view, who came to conſtable's aſſiſtance, all within the houſe, who abetted the aſſault, principals. 463

1 *Jac.* ouſts none of clergy but him who ſtabs, not even perſons preſent and aſſiſting. 468

Where principal agent ſhall be excuſed from felony, and principal in ſecond degree be guilty. 514

All that come in company to rob, principals, tho one only do it. 533

Where one may be principal in robbery, tho neither actually preſent at the aſſault, nor robbery, nor aſſenting thereto. *Page* 534, 537, 538

In *acts* making felony acceſſaries *before* and *after* implied. 613, 614, 615, 632, 644, 704

Whether *act* making offenſe felony in offenders, their counſellors, procurers and abettors, and being ſilent as to acceſſaries *after*, extends not to acceſſaries *after*. 704

In treaſon, whether principal in firſt degree ſhall be tried before thoſe in ſecond degree. 613. II. 223

In caſes criminal, not capital, no acceſſaries. 530, 613, 616, 618

Acceſſaries *after* to crimes not capital by receiving offenders cannot be in law under any penalties as acceſſaries, unleſs the *acts* inducing the penalties extend to receivers, or comforters, as ſome do. 613

Maintainers in certain *acts* denote maintainers of offenſe, and not parties. *ib.*

Where an *act* makes a felony, it incidently makes ſuch acceſſaries, as would be acceſſaries *before* or *after* to a felony at common law; but the ſpecial penning ſometimes varies the caſe. 613, 614, 615, 632

But if the *act* expreſs acceſſaries *before* and not *after*, there can be no acceſſaries *after*. 614

Acceſſaries *after* an offenſe of a lower degree than acceſſaries *before*. 614, 615

Procurers, *counſellors* and *abettors* import acceſſaries *before*. 614

Receivers or *comforters* acceſſaries *after*. *Page* 614

In offenſes unpremeditated no acceſſaries *before*, as *per infortunium*, *&c.* 615, 616

Words of bare permiſſion make not an acceſſary. 616

All preſent, when poiſon infuſed, principals; but hiring another to do it, without being preſent, makes him only acceſſary. *ib.*

Buying materials of poiſon makes party only acceſſary. *ib.*

Where the execution varies from the command in perſon ſlain, or in nature of offenſe, commander is not acceſſary; *contra*, where offenſe is only varied in degree. 617

A. gets *B.* with child; and before the birth counſels *B.* to kill it, child is born, *B.* murders it, *A.* acceſſary. *ib.*

Where the inſtrument, as a madman, or wild beaſt cannot be a principal, party, tho abſent, is principal. *ib.*

A. commands *B.* to kill *C.* and before the fact repents and countermands it, yet *B.* kills him, *A.* not acceſſary; *contra*, if he had not countermanded it. 618

A. knows that *B.* hath committed a felony, but conceals it, not felony, but miſpriſion. *ib.*

A. ſees *B.* commit a felony, but conſents not, nor takes care to apprehend him; not acceſſary, but finable. *ib.*

A. knowingly ſuffers a felon in his houſe to eſcape before arreſt, not acceſſary; but *contra*, if corrupted by money. 619

So if he ſhut fore-door, and deceive purſuers, this being an *act*, and not bare omiſſion, he is acceſſary. *ib.*

A. hath his goods ſtolen by *B.* if *A.* receives his goods without any contract to favour him, it is lawful; but otherwiſe theft-bote, but yet *A.* not acceſſary. *Page* 619

Where receipt of ſtolen goods [before 3 & 4 *W.* & *M.* &c.] made an acceſſary, or not. 619, 620. II. 150

Relieving a traitor or felon in priſon or baild out makes not an acceſſary. 620, 621

Conveying inſtruments to a felon to break priſon, or bribing gaoler to ſuffer an eſcape makes an acceſſary. 621

Writing in favour of a felon for his deliverance, or inſtructing him to read to ſave him by his clergy makes not party an acceſſary. *ib.*

If *A.* be committed for felony, and *B.* an attorney adviſe the friends of *A.* to write to the witneſſes not to appear againſt him, who writes accordingly, this makes neither *B.* nor the friends acceſſary, but puniſhable, and how. *ib.*

A husband receiving the wife may be an acceſſary, but not wife for receiving the husband. *ib.*

If the wife alone, without his privity, receive a felon, ſhe only acceſſary. *ib.*

If they jointly receive a felon, it is only the act of the husband. *ib.*

Acceſſary cannot be, unleſs felony committed; *A.* wounds *B.* dangerouſly, *C.* receives *A.* then dies, *C.* not acceſſary. 622

One may be acceſſary to an acceſſary by receiving him, knowing him to be an acceſſary to felony. *ib.*

No acceſſary in receipt of a felon, without knowing that the party hath committed a felony. *Page* 622

Acceſſary may be indicted with principal, or ſeverally. 623. II. 223

An acceſſary *before* or *after* in another county, than where principal felony committed, diſpuniſhable at common law. *ib.*

By 2 & 3 *E.* 6. acceſſary indictable in county, where acceſſary, and to be tried there; this act gives no power to juſtices of peace. 623. II. 44

Juſtices before whom forein acceſſary is, ſhall write to thoſe before whom principal is attaint, for record of attainder, and how the writ is to be. 623

Proceſs of outlawry muſt ſtay againſt acceſſary, till principal attaint. 623. II. 200

Acceſſary ſhall not anſwer till principal be tried, but otherwiſe, if he will wave benefit of the law. 623. II. 200

But if he wave it, neceſſary to reſpite judgment till principal be convict and attaint, for if principal be after acquit, conviction of acceſſary annulled; but if acquit of the acceſſary, acquittal good. 624. II. 224

If he be indicted as acceſſary to three, he ſhall not be arraigned till all the principals be attaint or outlawd; but if he be indicted as acceſſary to one of them only, if that one be attaint, tho the others be not, he ſhall be arraigned. 624. II. 200, 201

But the court may, if he be indicted as acceſſary to three, arraign him only as acceſſary to the

the party attaint, and if acquit of that, he may be arraigned *de novo* as acceſſary to the other two. *Page* 624. II. 200, 201

Beſt to reſpite arraignment of acceſſary till all principals appear, or be outlawd. *ib.*

If principal and acceſſary appear, and plead together, they may be tried by ſame inqueſt; but principal muſt be firſt convict and attaint, and how jury to be charged. 624. II. 223

If principal plead in bar, or abatement, acceſſary not to anſwer till plea determined, if plea maintained, acceſſary diſcharged, if over-ruled, principal ſhall plead over to felony, and may be acquitted. 624. II. 223

If *A.* be attaint of murder on an appeal, and then *A.* is indicted of murder as principal, and *B.* as acceſſary, principal pleads former attainder, *B.* ſhall not be put to anſwer as acceſſary, becauſe he is not attaint upon ſame ſuit; and ſo it is, if attainder of *A.* were firſt on the appeal. 625

If principal was acquit, or convict, and had his clergy, a pardon, *&c.* acceſſary ſhould not [before 1 *Annæ*] have been arraigned; *contra*, if after attainder. 598, 625

If principal be erroniouſly attaint, acceſſary ſhall be arraigned, but principal reverſing his attainder reverſeth alſo attainder of acceſſary. 625

One acquit as principal cannot be indicted as acceſſary *before*, but acquit as acceſſary *before* or *after* may be arraigned as principal. 625, 626. II. 244

But one acquit as principal or acceſſary *before* may be indicted as acceſſary *after*. *Page* 626. II. 244

Acceſſary to crimes within 28 *H.* 8. *of trial of treaſons*, &c. *upon the high ſea*, not puniſhable thereby, but by the *marine law*. II. 17, 18

Principal in murder in ſecond degree may be arraigned and tried before principal in firſt degree. 437. II. 223

Lately acceſſary, if he appear, hath been arraigned and put to plead, but proceſs againſt inqueſt and trial ceaſeth, till principal come in, or be attaint by outlawry. II. 224

Acceſſary may pray proceſs againſt principal, and therefore, if acceſſary acquitted before principal tried, it is a good acquittal; and if convict, a good conviction; but no judgment ſhall be given on conviction till principal tried. *ib.*

If *A.* be arreſted, or in priſon for felony, and *B.* reſcue him, or the gaoler ſuffer a voluntary eſcape, tho they may be preſently indicted, yet they ſhall not be arraigned till *A.* be convict, or attaint by judgment, or outlawd; for if *A.* be acquitted on the indictment, the reſcuer, or gaoler ſhall be diſcharged. 237, 238, 591, 598. II. 224

How far a wife may be acceſſary to her husband's treaſon, or felony. Vide **Coverture.**

Priſon. Vide **Arreſt, Breach of Priſon, Commitment, Eſcape, Gaol,** &c.

Privilege. Vide Habeas Corpus.

Procedendo. Vide Certiorari.

Process.

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In all cases *king*'s writs directed to sheriff, which he executes *per se*, or by his warrant to his bailiffs. 577

Sheriffs or bailiffs may require any one to assist in the execution. *ib.*

If above two coroners in a county, and a writ is directed *coronatoribus*, tho one dies, whilst plural number remains, a return by the coroners is good; but if only one survivor, he cannot execute and return it till another made. II. 56

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By 27 *Eliz.* where a *ſubject, not being a jeſuit, educated in a forein ſeminary, and not returning after proclamation, or a popiſh prieſt coming into the realm* ſhall be guilty of treaſon. *Page* 336

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Vide **Clergy, Miſpriſion.**

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If party reſcued be impriſond for felony, and be reſcued before indictment, what indictment muſt ſurmiſe; but if party be indicted and taken by a *cap.* and reſcued, then there need only a recital that he was indicted

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If *A.* be robbed by *B.* and *C.* and *B.* only is convict of robbery by evidence of *A.* he ſhall have reſtitution. *ib.*
If *A.* be robbed of an ox by *B.* who ſells him to *C.* who keeps the money in his hands, and after kills the ox and ſells it, or if

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By 31 *Eliz.* notwithſtanding ſale of a horſe in market-overt, owner may take him within ſix months after the felony on proof of his property, which ſhews that after ſix months he ſhall not have reſtitution. 543

Scrivener's ſhop no market-overt [for plate] by cuſtom of *London.* *ib.*

By 31 Eliz. & 1 Jac. *no ſale of ſtolen goods in* London, Weſtminſter, *or* Southwark, *or within two miles to a broker ſhall change the property.* *ib.*

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If offender be convict on evidence of party robbed, or owner, he ſhall have reſtitution, tho there were no freſh ſuit, or any inquiry by inqueſt touching the ſame; but *contra* in appeal. *Page* 545

Owner prefers indictment againſt the thief, who flies, and is thereon outlawd, owner ſhall have reſtitution. *ib.*

Two perſons have their ſeveral goods ſtolen, tho thief convicted on the proſecution of one of them, the other muſt proſecute his indictment in order to have reſtitution of his goods. 545. II. 252

Antiently if *C.* was attaint on indictment preferd by *A.* and reprieved till another ſeſſions, and then *B.* preferd indictment of another robbery committed on him by *C.* *C.* might if he would have pleaded to the countrey, and on conviction *B.* ſhould have had reſtitution; but he might have pleaded *autrefoits attaint*, and have refuſed to have anſwerd, and then *B.* ſhould have had no reſtitution, but by 21 *H.* 8. court ought to inquire by inqueſt of office touching robbery of *B.* and being aſcertained thereby to grant reſtitution. 545, 546. II. 252

Reſtitution by courſe of law, either by taking his goods, or action. 546

If *A.* ſteal goods of *B.* and *B.* take his goods of *A.* again to favour him, or maintain him, how puniſhable; but if he take them again without any ſuch intent, no offenſe, but juſtifiable. *ib.*

But after felon convicted, it can be no colour of crime to take his goods again, where he finds them, and why. *ib.*

A. ſteals 50*l.* in money of *B.* *A.* is convicted and hath his clergy on proſecution of *B.* *B.* brings trover for it, and held it well lies; but *contra*, if before proſecution by indictment party robbed brings *trover*, or if plaintiff in former caſe had not given evidence on conviction. *Page* 546, 547

A convict within clergy on being burnt in the hand ſhall be reſtored to poſſeſſion of his lands. II. 389

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A.'s purſe being faſtned to his girdle, *B.* aſſaults him to rob him, and in ſtruggling girdle breaks, and purſe falls to the ground, no robbery; but if *B.* take up the purſe, or if *B.* had purſe in his hand, and then girdle breaks, and ſtriving lets purſe fall to the ground, and never takes it up again, robbery. *ib.*

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Buying a dagger for the purpoſe is an overt-act of compaſſing *king*'s death. *ib.*

Aſſembling together to levy war againſt the *king*, either to depoſe or reſtrain, or enforce him to any *act*, or to come to his preſence to remove his counſellors or miniſters, or to fight againſt his lieutenant, or military commiſſionate officers, *&c.* is an overt-act of ſame kind. 122, 123, 138, 148, 151

A levying war by conſtruction, as to pull down all incloſures, or all bawdy-houſes, not evidence of an overt-act of compaſſing *king*'s death, when it is diſcloſed upon proof, or ſo laid in indictment, but it is an evidence thereof till diſcloſed. 123

Fighting *king*'s forces ſent to ſuppreſs a riotous aſſembly is an overt-act of ſame nature. *Page* 123

Treaſon in violating king's wife, &c.

Who ſhall be ſaid *king*'s wife, his eldeſt ſon's wife, or his eldeſt daughter, to make the violation of any of them treaſon. 128, 229

Treaſon in levying war againſt the king.

Levying war only treaſon within this *act*. 111, 322

What muſt concur to make *levying war* treaſon within this *act*. 130

What ſhall be ſaid a levying of war, or not. 130, 131, 149, 150, 152

A bare conſpiracy to levy war and provide weapons for that purpoſe, tho in ſome caſes it may amount to an overt-act of compaſſing the *king*'s death, yet it is not a levying war within this *act*. 131

Aſſembling many rioters to do unlawful *acts*, if they be not *in ſpecie belli*, nor have any arms, *&c.* may make a riot, but it is not a levying war. 131, 149, 150, 152

War muſt be levied againſt the *king*; *contra*, tho it be *more guerrino*, it is not treaſon. 131, 149, 152

If on a private deſign, or private quarrel, it is no levying war againſt the king. 131, 133 *to* 138, 140, 141, 149, 152, 260

Difference

Difference between *bellum levatum & bellum percuſſum. Page* 152

A war levied againſt the king is of two ſorts, expreſly and conſtructively. Firſt, Againſt his forces, *&c.* Secondly to throw down incloſures generally, to inhanſe ſervants wages, alter religion, expulſe ſtrangers, or remove counſellors, or againſt any ſtatute, *&c.* this is a levying war, becauſe end public. 131, 132, 133, 134, 152, 153

Conſpiring to levy ſuch a war treaſon by ſeveral temporary *acts.* 132

Clauſe in 25 *E.* 3. of conſulting the parliament in new caſes leaves no latitude to multiply conſtructive treaſons, very dangerous ſo to do. *ib.*

If a war levied, conſpirators are traitors, as well as actors. 133

War levied to break priſons to deliver one, or ſome particular perſons out of lawful priſon, unleſs impriſoned for treaſon, only a great riot; but if to break priſons generally, it is treaſon. 134

100 perſons *modo guerrino* aſſembled to pull down bawdy-houſes, and marched with a flag on a ſtaff and weapons, and pulled down certain houſes, held to be a levying war within this *act* by all the judges but one; objections to that judgment. 134, 135

In *earl of Eſſex*'s caſe reſolved, that when *queen* ſent lord keeper to him commanding him to diſmiſs the armed people in his houſe and come to her, and he refuſed to come, and continued the arms and armed perſons in his houſe, it was treaſon. *Page* 138

That when he went with a troop of captains and others from his houſe into the city, and there prayd aid of the citizens in defenſe of his life, and to go with him to the court to bring him into the queen's preſence with a ſtrong hand, ſo that he might be powerful enough to remove certain of his enemies attendant on the queen, it was treaſon, the fact in *London* rebellion. *ib.*

That the adherence of *earl of Southampton* to *earl of Eſſex* in *London*, tho he knew not of any other purpoſe than of a private quarrel, which *Eſſex* had againſt certain ſervants of the *queen*, was treaſon in him, becauſe a rebellion in the earl of *Eſſex*. *ib.*

That all they, that went with *Eſſex* from his houſe to *London*, whether they knew of his deſign, or not, were traitors, whether they departed on the proclamation, or not; but that thoſe, that ſuddenly adhered to him in *London*, and departed on proclamation made, ought to be pardoned. *ib.*

A declaration of the king and lords [*ſans* the commons] not ſufficient within this *act.* 140, 260, 263

Where 300 perſons going in a warlike manner with drums and arms to ſurprize a privy counſellor, held treaſon. 141, 152

Breaking priſon where traitors are, and cauſing them to eſcape, treaſon, tho parties knew not that they were there. 141

Marching with a great army *modo guerrino arraiati*, expreſs levying war, tho no blows ſtruck. *Page* 144, 145, 152

A rebellion is a levying war within this *act*, and by name of levying war it muſt be expreſt in indictment. *ib.*

Bare detaining *king*'s forts or ſhips, or conſpiring to take them, not treaſon; actual taking them by force, a levying war within 25 *E.* 3. 146, 296, 325

Detaining *king*'s towns, *&c.* after demanded by *king*'s commiſſioner, and repelling an aſſault made by him, is a levying war within this *act*. 146, 325, 326

Difference between an inſurrection on account of civil intereſt, and levying war. 146

Holding one's houſe againſt the ſheriff and *poſſe comitatûs* with force, and aſſembling perſons to oppoſe the execution of a writ of poſſeſſion, no treaſon, but a great riot; the like of keeping poſſeſſion againſt a reſtitution on indictment of forcible entry. *ib.*

Aſſaulting *king*'s lieutenant in time of hoſtility or rebellion within the realm, in their march or quarters, as enemies, levying war. *ib.*

If on ſudden falling out, or injury done by the ſoldiers, the countrymen riſe and drive them out, it may be a great riot, but not levying war, except ſome traiterous deſign under cover of it. *ib.*

Open reſiſtance of juſtices of *oyer* and *terminer*, only felony. *ib*

Touching laws of treaſon in *Ireland* by 18 *H.* 6. and *ceſſing* ſoldiers. Vide Ireland.

What uſually is the overt-act of levying war. *Page* 150

Whether the bare aſſembling an enormous multitude for doing unlawful acts without any weapons, *&c.* be a ſufficient overt-act of levying war within this *act*, eſpecially if they commit ſome of theſe acts. 151

Realm of *England* comprehends the narrow ſeas, invading *king*'s ſhips in the narrow ſeas, levy-war *en ſon realm*; where trial to be. 154

For trial of treaſons in *Scotland*, proviſion made by what ſtatutes. 155

What is ſaid of *Ireland* in all particulars applicable to the *Iſles of Man*, *Jerſey*, &c. 155, 156, 157

Vide Ireland.

Treaſon committed in *Wales* before 26 *H.* 8. was not inquirable, or triable before juſtices of *oyer* and *terminer*, or in *B. R.* but before juſtices aſſigned by the *king* in thoſe counties of *Wales*, where fact committed. 156

By 26 *H.* 8. counterfeiting, waſhing, clipping, or miniſhing coin, felonies, murders, *&c.* and acceſſaries of ſame and other offenſes feloniouſly done in *Wales*, or any lordſhip marcher may be inquired of and tried before the juſtices of gaol-delivery, *&c.* in next adjacent county. 156, 157

26 *H.* 8. confirmed by 34 *&* 35 *H.* 8. which ſettles the grand ſeſſions, ſo that as to thoſe offenſes enumerated in 26 *H.* 8. juſtices of *gaol-delivery* in the adjacent

adjacent counties, *viz. Glouceſter, &c.* had thereby a concurrent juriſdiction with juſtices of grand ſeſſions. *Page* 157

Whether 26 *H.* 8. extended to treaſon for compaſſing *king*'s death, or levying war, or whether ſame remained triable by juſtices of grand ſeſſions, but now 26 *H.* 8. ſtands repeald by 1 *&* 2 *P. & M.* as to trials of treaſon. *ib.*

For what ſpecial purpoſes *certiorari* lies into *Wales*, but not as to trial of fact, but it ſhall be ſent down by *mittimus* by 7 [27] *H.* 8. 158

Wales within *England*, and therefore not within 35 *H.* 8. for trial of forein treaſons. *ib.*

If treaſon, *&c.* be done in *Durham*, a *certiorari* lies to remove it into *B. R.* out of *Durham*, and to whom directed; but if party plead *not guilty*, it ſhall be ſent down thither to be tried. *ib.*

Of *treaſons*, &c. in *Tindal* and *Hexamſhire*. *ib.*

Adhering to the king's enemies.

Who ſhall be ſaid an enemy; jury on trial ſhall inquire, whether the perſon to whom the party indicted adhered was an enemy, or not, and whether there was a war between *king* of *England* and that other prince, whereunto party adheres. 164

Enemy extended farther than *king* or ſtate at enmity, even to an *alien* coming into *England* in hoſtility. *ib.*

Duke of *Norfolk* adhering to lord *Heriſe*, a ſubject of *king* of *Scots* in amity with queen *Eliz.* that made an actual invaſion upon *England* without the *king*'s commiſſion, adjudged a traitor. *Page* 164

Who ſhall be ſaid to be a perſon adhering, and what an adhering. 165, 166, 263

If there be war between *England* and *France*, thoſe *Engliſh* that live in *France* before the war, and continue after, they are not adherents, unleſs they aſſiſt the *French king* in his wars, or refuſe to return on privy ſeal, or proclamation, and this refuſal, tho evidence of an adherence, not ſimply ſo in itſelf. 165

Whether ſubjects of forein prince continuing under *king*'s protection after war proclaimed, and aſſiſting the forein prince before renouncing his ſubjection to the *king*, or an enemy ſtaying here under *king*'s ſafe conduct, be an adherent; in time of truce an *Engliſhman* goes into *France*, and ſtays there, and returns before truce expired, no adherence; but *contra*, if he confederate with the enemy. 165, 166

Kings of *England* and *France* in amity, the *king*'s ſubjects ſolicit *king* of *France* to an invaſion, it is treaſon and an overt-act of compaſſing *king*'s death, but not of adherence. 167

An *Engliſhman* during the war is taken by the *French*, and ſwears fealty to the *king* of *France*, if voluntary, it is an adherence, but if for fear of life, and he return as ſoon as he can to his alligeance, this not an adherence. 167, 168

Delivering up the *king*'s caſtles or garriſons treacherouſly, or by bribery, an adherence. *Page* 168, 169

If deliverd on cowardice or imprudence, and not treacherouſly, tho party ſubject to death by martial law, not treaſon by common law. 169

If detaining *king*'s caſtles or forts, or the caſtles of any other be barely ſuch, and without aſſault, yet if in compliance or confederacy with a forein enemy, it is an overt-act of *adhering to king's enemies*, and treaſon within this *act*. 326

By 35 *H.* 8. forein treaſons how tried; by the common law triable in any county, eſpecially where offenders lands lie. 169, 170

Treaſons on the ſea triable by ſpecial commiſſion grounded on 28 *H.* 8. at common law it might be tried in any adjacent county. 170

1 *Mar.* reducing all treaſons to the ſtandard of 25 *E.* 3. not only repeals treaſons newly enacted, but *acts* declarative, and all treaſons farther than the very declaration of 25 *E.* 3. extends. 222, 260, 263, 265, 269, 308

Killing chancellor, treaſurer, &c. *in their place doing their office.*

This extends only to killing, not to conſpiring; but if many conſpire and only one do the act, they are all traitors; 3 *H.* 7. makes the conſpiring felony. 230

Expoſition on this branch of the *act*. 231, 232

Juſtice of peace, as ſuch, not within it, except he be likewiſe juſtice of *oyer* and *terminer*. *Page* 231

What ſhall be ſaid *ſeant en ſon place, feſant ſon office*. 232

Touching principals in treaſon, *vide* **Principal and Acceſſary.**

In treaſon no acceſſaries, all principals; but *quære*, whether receiver of a counterfeiter of the ſeal or money be a traitor. 233, 234, 237

Gaoler voluntarily permitting traitor impriſoned to eſcape, treaſon. 234

Reſcue of a perſon arreſted for treaſon ſame offenſe. 234, 269

Breaking priſon to inlarge a traitor, treaſon; but he muſt really be a traitor. 234, 235, 326

Conſpiracy to inlarge a traitor, neither treaſon, miſpriſion, nor felony, but a miſdemeanor. 326

Offenſes incident to the treaſons declared by 25 *E.* 3. are virtually included within the ſame, as receiving, *&c.* 235, 237, 238, 269

If an *act* make a new treaſon, and enact that the offender his counſellors, abetters and aiders thereunto ſhall ſuffer as traitors, this makes not receivers or comforters after the fact traitors. 235, 236, 328, 376

But whether receiving a counterfeiter of coin within 25 *E.* 3. where no ſuch reſtriction, be treaſon. 328

If offenſe be made treaſon in offender, his procurers, counſellors, abettors, conſenters (without the word *thereunto*) knowing receivers not traitors, unleſs

leſs the words *receivers* or *comforters* be expreſt. *Page* 236
The import of the words *procurers*, *counſellors*, *abettors*, *conſenters*, *aiders*, *receivers* and *comforters*. *ib.*
Receivers, traitors by neceſſary conſtruction of a new *act* of treaſon. 236
Where an *act* general, probably receiver knowing it virtually a traitor. 237
Certainly aiders, *&c.* are traitors. *ib.*
He who reſcueth one impriſoned for treaſon, or ſuffers him voluntarily to eſcape, or receiver of a traitor ſhall not be arraigned till principal offender be convict, and why. 237, 238
Receiver of a traitor how to be indicted. 238
If indicted of the receipt in the ſame indictment with the principal, principal to be tried firſt; and if found guilty, then jury to inquire of the receipt; and if principal *not guilty*, then to acquit both. *ib.*
Whether proceſs of outlawry may go againſt receiver of a traitor at ſame time as againſt principal. *ib.*
What will make a man acceſſary *after* to felony will not make a man principal in treaſon. 239
How far charitable relief will do it. 239, 324, 325
The words in 1 *Mar.* refer to treaſons, not forfeitures; the forfeiture of traitors, as to old treaſons, ſtands in force. 241; 257, 275, 283, 309
Of declaring treaſons by parliament, and thoſe that were enacted or declared between 25 *E.* 3. *&* 1 *M.* 258, 259, 260
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An *act* for ſafety of *king*'s perſon enacts an offenſe to be felony only, or a miſdemeanor, (without the clauſe, *the ſame not being treaſon within* 25 E. 3.) carries a preſumption with it, that ſame was not treaſon before, and is a judgment of parliament in point. 261, 262
Commons impeach ſeveral of treaſon, lords only give judgment, this not *per modum legis declarativæ*. 264
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11 H. 7. *for ſecuring the attendants on the king in his wars* is perpetual. 272, 273
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Touching Jury proceſs.

If *venire fac.* or *diſtringas* be erronious, and would make judgment ſo, if filed, but being not filed is aided by 18 *Eliz.* court never compels clerk to file ſuch writs after verdict, much leſs puniſhes them for not doing it. 651
If offenſe committed in county, where *B. R.* ſits, and indictment be taken there, *B. R.* may proceed *de die in diem*, and there need not fifteen days between *teſte* and return of *venire.* II. 3, 360
And ſo if indictment was taken before juſtices of peace of ſame and removed into *B. R.* by *certiorari*; but *contra*, if taken in another county than where *B. R.* ſits. *ib.*

Of *venire fac.* iſſuing out of *B. R.* how to bear *teſte*, *&c.* II. *Page* 260

Juſtices of *oyer* and *terminer* iſſue a general precept for the return of twenty-four jurors to try the iſſue between *king* and priſoners to be arraigned. II. 26, 27, 260, 261

After the priſoners are arraigned, and have pleaded to the country, a precept iſſues in nature of a *venire fac.* when ſuch precept bears *teſte*, and when returnable; in whoſe name, and under whoſe ſeals, it muſt be. II. 261

If they make it returnable any day after the firſt day of ſeſſions, they muſt make an adjournment, and record it. *ib.*

Juſtices of gaol-delivery after priſoner hath pleaded may take pannel from ſheriff without making any precept to him. *ib.*

Whether proceſs be by writ or precept, as well the award, as writ or precept muſt mention truly the *viſne*, and where it is only by award without writ or precept, as in caſe of juſtices of *gaol-delivery*, the award ought to mention the *viſne*. II. 262

If murder be ſuppoſed at *D. venire fac.* muſt be *de vicineto D.* if at *Briſtol de vicineto Briſtol*, becauſe a city; yet *de vicineto civitatis Briſtol*, tho alſo a county, good. *ib.*

If ſtroke be laid at *B.* and death at *C.* how *viſne* muſt be. *ib.*

Where ſtroke in one county, and death in another, *viſne* ſhall be from place, where party alleged to die. *ib.*

If murder be laid *in quâdam plateâ vocat.* King-ſtreet *in paroch. Sanctæ* Margaritæ *apud* Weſtm. whence *viſne to ariſe*. II. *Page* 262

If murder be laid *apud* B. *in paroch. de* C. whence *viſne* ſhall be. *ib.*

Vill or hamlet may be within a pariſh, and a pariſh may contain many vills. II. 262, 263

Forein pleas triable by a jury of ſame county, where party indicted, except in treaſon. II. 239, 263

Tho *venire fac.* is only to return twelve, yet ſheriff ought to return twenty-four, the general precept that iſſues before a ſeſſions of *gaol-delivery*, *oyer* and *terminer*, and *peace* is to return twenty-four, but commonly forty-eight are returned. II. 263

Several indicted for one felony, juſtices may iſſue one or ſeveral *venire fac.* or awards of that kind. II. 263, 268

If it be joint, and one challenge twenty peremptorily, or for cauſe, jurors challenged ſhall be drawn againſt all, and ſo in appeal. II. 263

Expedient to make out ſeveral *venire fac.* and if pannel be challenged off, yet forty *tales* may be granted on each *venire fac.* *ib.*

If *venire fac.* in appeal be once granted jointly, it cannot be ſeverd, neither can there be ſeveral *tales*, for if *venire fac.* be joint, *tales* muſt be joint, and ſo in caſe of indictment. II. 263, 264

Before juſtices of *gaol-delivery*, where only one award, tho at firſt it be joint, and pannel accordingly returned, and the priſoners

priſoners challenge peremptorily ſeverally, whereby there are not enough left on the pannel to try them, and a *tales* is awarded returnable the next day, yet court may ſever firſt award, and alſo the *tales*. II. *Page* 264

Record being made up, the award is made on the roll, which the juſtices of gaol-delivery may model, as they pleaſe, at any time before trial. *ib.*

On the writ or precept, or command to the ſheriff he cannot return a *mandavi ballivo*, as in ſome caſes of appeal, writ, *&c.* being for the *king*. *ib.*

The *analyſis* of the writ of *venire fac.* *ib.*

They of one ſide of the county are by law *de vicineto* to try an offenſe of the other ſide of the county. *ib.*

Juſtices of *gaol-delivery* and peace have power to reform the pannel. II. 36, 156*, 265

Uſual for the judge on crown-ſide to ſend for a jury to judge at *niſi prius*. II. 265

If proceſs be in *B. R.* and jury fill not, or be challenged off, ſo that there is not a full jury, there ought to iſſue a *diſtringas juratores*, and a command to return a *tales*. II. 265, 266

But if whole jury be challenged off, then there ſhall be a new *venire fac.* and if none appear, then a *diſtringas juratores* ſhall iſſue, and no *tales*. II. 265

If a full jury appear, and before they are ſworn, one of them dies, ſo that there remains not a full jury, a *tales* ſhall be granted; and ſo if a juryman dies after returned, and ſworn. II. 266

If a *tales* iſſue, and they do not appear full, or be challenged off, ſo that thoſe, that appear on principal pannel and *tales* make not up a full jury, another *tales* may be granted. II. *Page* 266

In felony a *tales* may be granted of a greater number than the principal pannel in reſpect of the challenges, ſo that there may be forty *tales*, or more, but if ſeveral ſucceeding *tales* be granted, the latter muſt be leſs in number than that which was next before, unleſs the array of the preceding *tales* be quaſhed, and then the number of the next may equal it. *ib.*

The times between *teſte* and return of *tales* muſt be as in principal *venire fac.* *ib.*

If indictment be before juſtices of *oyer* and *terminer*, the *tales* as well as principal pannel ought to be in the name of three juſtices, and may be returnable *de die in diem*, or *de horâ in horam* of ſame day. *ib.*

As to all other matters, they agree with proceedings in *B. R.* above-mentioned. *ib.*

Before juſtices of *gaol-delivery* no particular precept to return either jury or *tales*, but the general precept before the ſeſſions and the award. *ib.*

And yet there is an inſtance before juſtices of peace and *gaol-delivery* of a *tales* granted returnable the next day. II. 267

After *not guilty* received and recorded ſheriff returns pannel of jury. II. 293

Where trial of treaſon or felony ſhall be, *vide* County, County Palatine.

Where new trial ſhall be granted, vide *petit jury* in titulo Jury.

Vide Arraignment, Certiorari, Challenge, Court, Evidence, Gaol-delivery, Indictment, Juriſdiction, Juſtices of Aſſiſe and Niſi prius, Juſtice of Peace, King's Bench, Oyer and Terminer.

Truſt. Vide Forfeiture.

Turn. Vide Sheriff.

Venire facias. Vide Trial.

Venue. Vide Trial.

Verdict.

ON indictment of treaſon *in adhering to king's enemies*, what jury ſhall inquire of. *Page* 164

In all caſes of infancy, inſanity, *&c.* if one uncapable to commit a felony be indicted by the grand inqueſt, and thereon arraigned, petit jury may either find him *not guilty*, or find the matter ſpecially, and how, and thereon court gives judgment of acquittal. 28. II. 303

But if one in ſuch caſe be arraigned on indictment of murder or manſlaughter by coroner's inqueſt, there if party committed the fact, regularly the matter ought to be ſpecially found, becauſe if the jury find him *not guilty*, they muſt inquire how party came by his death, and how in that caſe they muſt find. 28. II. 303

But if he be firſt arraigned, and acquitted on the indictment by the grand inqueſt, and found *not guilty*, he may plead that acquittal on his arraignment on the coroner's inqueſt, and that will diſcharge him, and petit jury ſhall inquire farther how he came by his death. *Page* 39

If priſoner indicted of murder or manſlaughter by grand inqueſt be acquitted by petit jury, they ſay ſo and no more, and only inquire of the flight; but if acquitted on pleading to coroner's inqueſt, petit jury alſo find, who kild the party, if they do not know, how in that caſe they find. II. 64, 65, 300, 301, 304, 305

If indictment be of murder or manſlaughter, and on trial it appear to jury to be involuntary, (as *per infortunium*, or *ſe defendendo*) jury ought to find the ſpecial matter, and conclude, *Et ſic per infortunium, &c.* and not generally, that it was *per infortunium, &c.* for on the ſpecial matter found court may give judgment againſt concluſion of verdict. 471, 476, 477. II. 302

If jury find him *not guilty*, they muſt inquire, whether he fled; and if they found he did fly, they muſt inquire of his goods and chattels, which is an inqueſt of office and traverſable. 362, 493. II. 301

Where one of full age ſhall be found guilty of burglary, and an infant, who was principally concerned in it, *not guilty*. 556

Baron ſhall be found guilty, where *feme* in his preſence, and by his coercion commits burglary, or larciny, but ſhe ſhall be acquitted. 45, 516, 556

If indictment compriſes burglary and felony, priſoner may be acquitted of burglary, and convicted of felony within clergy, or he may be acquitted of the felony; but *quære*, whether he can in that caſe be convicted of burglary. *Page* 559, 560. II. 302

Where burglary, felony and felony on 5 & 6 *E.* 6. are joined in one indictment, priſoner may be acquitted of one, and convicted of the other two. 560

If he be found guilty of burglary, and not of ſtealing, he may be convicted of burglary; and if acquitted of burglary, he may be convict of felony within 5 & 6 *E.* 6. and if acquitted thereof, he may be convict of larciny. 561

If *A.* kills *B.* upon aſſault made on him in executing proceſs, or in his own defenſe in the highway, or in defenſe of his houſe againſt perſons come to rob him, on *not guilty* pleaded, he ought to be acquitted. II. 158, 303

In treaſon or felony, if any *eſchete* or forfeiture of land be conceived in the caſe, petit jury ought to find true time of offenſe committed. 361. II. 179, 291

In petit treaſon priſoner may be acquitted thereof, and be convict of murder or manſlaughter. II. 184

Where there was once a writ [of exigent] and record ſince loſt, on circumſtances the jury may find the record, tho not ſhewn in evidence. II. 207

Where two indictments for ſame fact; one of murder, the other on 1 *Jac. of ſtabbing*; how jury to find. 468. II. 239, 240

If dureſs and compulſion will excuſe the priſoner, jury on general iſſue ought to find accordingly. II. *Page* 258, 259

If *A.* be indicted for a robbery or murder in wrong county, he ought to be acquitted, but variance between indictment and evidence in the vill, immaterial. II. 291

If verdict be given by miſtake, or partiality, jury may rectify it before recorded, or by advice of court go together again, and reconſider it. II. 299, 300

If recorded, they cannot retract, or alter it. II. 300

In felony or treaſon no privy verdict can be given. *ib.*

If one be indicted *de morte cujuſdam ignoti*, jury ſhall be charged to tell his name, if they can. *ib.*

Where priſoner was acquitted of robbery, court antiently compeld jury to preſent who did it, but now *contra*. II. 300, 301

If coroner's inqueſt *ſuper viſum corporis* preſent a *fugam fecit*, and party be arraigned, and plead to that indictment, jury not charged to inquire of the flight, and why. II. 301

Jury may find a ſpecial verdict, or may find priſoner guilty of part, and not guilty of the reſt, or find him guilty of the fact, but vary in the manner. II. 301, 302

One indicted of robbery may be found guilty of felony, and not robbery. II. 302

So where indictment charges the larciny to be *clàm & ſecretè a perſonâ*. *ib.*

One indicted on 1 *Jac. of ſtabbing contra formam ſtat.* may be acquitted on the *act*, and convicted of manſlaughter. *ib.*

One indicted of grand larciny may be convicted of petit larciny. II. *Page* 302
One indicted of murder may be convicted of manslaughter. *ib.*
Where coroner's inquest found that it was *per infortunium*; and jury found him generally *not guilty*, tho fact appeard to be *infortunium*, verdict of *not guilty* recorded. II. 303
If coroner's inquest find not the special matter, but murder or manslaughter, and prisoner is arraigned on it, and pleads *not guilty*, and on evidence it appears that the prisoner kild the man, but not feloniously, in this case jury cannot find a general *not guilty*, but must find that the prisoner did it, and the manner how, and this to be entred of record, as in case of a verdict *se defendendo*. II. 304, 305
Many special verdicts have been found, as on 1 *Jac. of stabbing*, so on the point, *whether murder or not*, but it is difficult to find them so that judgment be given for murder, and why. II. 305
Rarely on any special verdict, where question *murder or manslaughter*, judgment given for murder, but commonly manslaughter. *ib.*
Felony laid as required by *act* ousting clergy, but evidence comes not up to it, where prisoner shall be convicted of simple felony. II. 336
Where verdict avoided for misdemeanors of jury, &c. *the special matter being indorsed on the* postea, vide *petit jury* sub titulo Jury.
Vide Evidence.

Verge.

For commissions of oyer *and* terminer *for the verge, the extent thereof, and manner of trials within the same*, vide Court.

Visne. Vide Trial.

Use. Vide Forfeiture, Statutes in general.

Waifs.

IF a felon waive the goods stolen without any pursuit after him, those goods are not in law *bona waviata*, nor forfeit to the *king* or lord; but if he waive them on pursuit, then they are *bona waviata*, and forfeit to the *king* or lord. *Page* 541
This forfeiture is not like a stray, where, tho the lord may seise, yet owner may retake them within year and day, but here true owner cannot seize his own goods, tho on fresh suit within year and day. *ib.*
How a man shall obtain restitution of goods waived. 541

Wales.

Before 26 *H.* 8. no treason or felony committed in *Wales* was inquirable or triable before justices of *oyer* and *terminer*, or in *B. R.* in *England*, but before justices assigned by the *king* in those counties of *Wales*, where fact committed. 156
But by the same *act*, what offenses and accessaries of the same, feloniously done in *Wales*, or any lordship marcher may be inquired of, and tried before justices

juſtices of gaol-delivery, and the peace in next adjacent county. *Page* 156, 157. II. 38
This *act* confirmed by the great ſtatute of *Wales* 34 & 35 *H.* 8. which ſettles the grand ſeſſions and juſtices thereof. 157
As to offenſes mentiond in 26 *H.* 8. juſtices of gaol-delivery in the adjacent counties, and what counties theſe are, had thereby a concurrent juriſdiction with the juſtices of grand ſeſſions. *ib.*
But whether 26 *H.* 8. extended to treaſon for compaſſing *king*'s death, or levying war, or whether ſame remained only triable by juſtices of grand ſeſſions, doubtful; but now 26 *H.* 8. ſtands repeald by 1 & 2 *P.* & *M.* as to trial of treaſons. 157, 282. II. 38
In other criminal cauſes not capital, as in indictments of riots, they may be removed into *B. R.* by *certiorari*, and when iſſue is joined they may be tried in next *Engliſh county*. *ib.*
Whether a *certiorari* lies into *Wales* on indictment of treaſon or felony. 158
It ſeems it may iſſue for ſpecial, and what purpoſes, but not as to trial of fact, but it ſhall be ſent down by *mittimus* according to 6 *H.* 8. *ib.*
Wales within realm of *England*, and therefore not within 35 *H.* 8. for trial of forein treaſons. *ib.*

War.

Jus gladii, both civil and military, and ſo is power of making peace, *inter jura ſummi imperii*; none can levy war here without the *king*'s commiſſion. 130, 159
War ſucceeds beſt when concerted with the parliament. *Page* 159
What ſhall be ſaid enemies of the *king*, ſubjects not properly *hoſtes*, but rebels or traitors. 159
The ſeveral kinds of peace. 159, 160
A truce deſcribed. 159
A league explaind, and diſtributed into its ſeveral kinds. 159, 160
Ubi bellum non eſt, pax eſt. 160
War by the *Spaniards* on the *Indians* under pretence of religion, injurious, tho there intervened no former articles of peace between them. *ib.*
War divided into *bellum ſolemne & non ſolemne*. *ib.*
What circumſtances a ſolemn war amongſt the *Romans* had attending it. 160, 161
Theſe ſolemn denunciations of war had place only in offenſive or invaſive wars, and even then had many, and what exceptions. 161
Many of theſe antient ſolemnities antiquated. 162
If *de facto* there be a war between princes, they and their ſubjects are *hoſtes* to each other. *ib.*
Of the modern practice of arms. 162, 163, 164
The wars we have had with forein kings divided into ſpecial and general. 162
Special uſually called *marque* or *repriſal*, ſubdivided into particular and general *marque* or repriſal. 162, 163
Vide **Marque or Repriſal.**
General *repriſal* may grow into a formed war; an inſtance thereof between us and the *Dutch*. 164

A general war of two kinds; *bellum ſolemnitèr denuntiatum*, or *bellum non ſolemnitèr denuntiatum*, both illuſtrated. *Page* 163, 164

A war may be between two kingdoms without any proclamation or indiction thereof, or other matter of record to prove it. 164

When the *king*'s courts are open, it is time of peace in judgment of law. 347

In time of war, if one enemy plunder, or rob the houſe of another, it is only an act of hoſtility. 565

Offenſes of this kind, committed on ſome of ſame party, or others who are not in an hoſtile ſtate, are felonies. *ib.*

Vide **Treaſon.**

Warrant.

For warrants to arreſt felons, vide **Arreſt, Juſtice of Peace.**

For warrants to ſearch for ſtolen goods, vide **Juſtice of Peace.**

Vide **Commitment.**

Warren. Vide **Park.**

Were, or Weregild.

Amongſt the *Saxons* a commutation of judgment of death in caſe of homicide; but if party inſolvent, he was to ſuffer death. 7, 8

How long this cuſtom prevailed, and how it came to ſurceaſe. *ib.*

Witchcraft.

Before 1 *Jac.* it was not felony, becauſe it wanted a trial [how far 1 *Jac.* derogated from by 9 *Geo.* 2. vide *act*]. 429

Vide **Felony by Statute, Religion.**

Witneſs.

Whether 5 & 6 *E.* 6. requiring two witneſſes on trial and indictment of treaſon extends in law to new treaſons made after the *act*. *Page* 297, 324. II. 287, 288

If a new treaſon were made by a ſubſequent *act* without any clauſe directing indictment or trial in any other manner than is appointed by this *act*, there muſt be two lawful accuſers, both on the indictment and trial. *ib.*

If there be by a ſubſequent *act* any derogatory clauſe from this *act*, then there need not be two witneſſes. *ib.*

Whether by any *act* this be repeald or derogated from with reſpect to indictment or trial. 297 *to* 301

As to *counterfeiting coin, or ſo much as was treaſon for impairing it*, by 1 & 2 *P.* & *M.* it is expreſly provided, that no other evidence ſhall be requiſite, either on indictment, or trial than was before 1 *E.* 6. 221, 297, 298. II. 287

As to clipping and waſhing, 5 & 18 *Eliz.* in expreſs terms require only a conviction and attainder *according to the order and courſe of the law*, and 5 & 6 *E.* 6. is ſo far derogated from by theſe *acts*. *ib.*

As to *all other treaſons than counterfeiting, clipping and waſhing coin*, 1 & 2 P. & M. hath taken away neceſſity of two witneſſes on trial, but whether it hath taken away neceſſity of two witneſſes on indict-

ment. *Page* 297 *to* 301, 324. II. 286, 287
In miſpriſion of treaſon two witneſſes neceſſary, both on indictment and trial. 300
What ſhall be ſaid two lawful witneſſes within 5 & 6 *E.* 6. 301 *to* 307
[By 7 *W.* 3. *no perſon ſhall be indicted, tried or attainted of treaſon, but on the oaths of two lawful witneſſes, which two witneſſes muſt be to ſame treaſon, tho not neceſſary that they ſhould both be to ſame overt-act*; in notis]. 341
Lawfulneſs of witneſſes reſpects either the perſons or teſtimony of the witneſſes. 301
Where *feme* a lawful witneſs againſt *baron*, or not. 302. II. 279
She is not bound to ſwear againſt another in theft, if her husband was concerned, tho not directly againſt him. 301
A woman taken away and forcibly married *contra* 3 *H.* 7. may be ſworn againſt her husband; but otherwiſe, if ſhe aſſent to the marriage by free cohabitation. 301, 302, 660, 661
Infant under fourteen not regularly admiſſible, but in what caſes under that age he may be admitted a witneſs. 278, 279
A party intereſted not a lawful witneſs. 302, 303. II. 280, 281, 282
A party to an uſurious contract where a lawful witneſs, or not. 302. II. 280
One having a promiſe of the goods or lands of a party attainted, no lawful witneſs to prove the treaſon. 303
A perſon outlawd in treſpaſs a witneſs, tho no lawful juryman. *Page* 303
A father or ſon, or maſter or ſervant a lawful witneſs for his correlative. 303. II. 276
An adverſary in a ſuit a good witneſs. 303
A *particeps criminis* in ſome caſes a lawful accuſer within 5 & 6 *E.* 6. *ib.*
An approver ſhall be ſworn to his appeal, but whether on the trial, if appellee puts himſelf on his country. 303. II. 234
Two charged with a crime, one ſhall not be examind againſt the other, except he confeſs himſelf guilty. 303. II. 234
The party that is to be a witneſs againſt his accomplices never indicted, becauſe it doth weaken his teſtimony, tho not take it away. 303, 304, 305
A party to the treaſon who hath confeſſed it, may be one of the two accuſers in caſe of treaſon, and is ſufficient to ſatisfy 5 & 6 *E.* 6. 304
A promiſe of pardon to a party to the treaſon if he will diſcover the plot, no impediment to his teſtimony; but if the *king* promiſe a pardon on condition that if he will witneſs againſt any others, he will pardon him, and that be acknowledged, whether it will make him uncapable. 304. II. 280
Hard to take away life on the evidence of a party to the crime ſingly, unleſs there be ſtrong circumſtances. 305
A remainder man expectant on an eſtate-tail not a good witneſs, but a diſſeiſor may be a witneſs to a deed made to the tenant. 306

One convict of conſpiracy, perjury or forgery, not a lawful witneſs; *contra*, if he be pardoned. *Page* 306

Treſpaſs againſt *A. B.* and *C.* if no evidence be given againſt one to prove him guilty, he may be examined on the part of the other defendants; and if two be indicted, and there be no evidence againſt one, whether he may not be a witneſs for the other; but otherwiſe it is, if there be a colourable evidence againſt him. 306, 307

Wife may be an evidence againſt her husband indicted for aiding another to commit a rape on her. 629

Where an infant under twelve in capital caſes may be heard without oath. 634, 635. II. 284

Difference between admitting a witneſs to be heard, and believing him when heard. 635

Second wife married, living the former, may be a witneſs againſt the husband, but not the firſt wife. 693

Jurors triers of credibility of witneſſes, as well as truth of the fact. 635. II. 235, 276, 277

Many things diſable a juror, which diſable not witneſſes. II. 276

Diſtinction between exception to the credit, and to the competency. II. 276, 277

One outlawd a competent witneſs. II. 277

Who witneſſes or not, and how incompetent witneſſes reſtored. II. 277 *to* 285

He that allegeth an exception of record ought to ſhew forth a copy of the record atteſted, or vouch the roll in court. II. 278

If *king* pardon incompetent witneſſes, they are rendred competent, tho their credit ſhall be left to the jury. II. *Page* 278

Whether an infidel be a competent witneſs; a *Jew* may be ſuch. II. 279

A reward given to one for giving his teſtimony, diſables him. II. 280

Conſequential benefit to the witneſs diſables not his teſtimony, tho it may abate his credit. II. 280, 281

Three actions ſeverally brought againſt three perſons for perjury in the ſame point, on trial of the firſt action, the other two are competent witneſſes being not immediately concerned, tho conſequentially the point being the ſame. II. 280

So where indicted of perjury on three ſeveral indictments touching ſame matter, while the other two ſtand unconvicted, they may be examind. 303

Where one not a witneſs, becauſe his own ſuit. II. 281, 285

Appellant nonſuit on appeal may be a witneſs for the *king*. II. 282

Where *king*'s teſtimony allowd or not. *ib.*

Witneſſes are brought in by *ſubpœna* iſſued by juſtices of peace, *oyer* and *terminer*, *gaol-delivery*, or *B. R.* where the plea triable. *ib.*

Or the juſtices that take examination of the accuſed, and information of witneſſes, or the coroner that doth the ſame, may at that time, or any time after, and before trial bind over the witneſſes to appear at the ſeſſions, and in caſe of refuſal either

ther to come, or be bound over, may commit them for contempt. II. *Page* 52, 282
Juſtices, *&c.* have no power to allow witneſſes their charges. II. 282
Formerly evidence given for priſoner in caſes capital examind without oath; but *contra* in caſes not capital. II. 283
If a witneſs be ſworn for the *king*, yet if that witneſs allege any matter in his evidence that is for the priſoner's advantage, that ſtands for a teſtimony for the priſoner as well as the *king*. *ib.*
One of nine years hath been ſworn on evidence in capital cauſes. II. 283, 284
Where they that live, and have land in the hundred, are competent witneſſes, or not, in an action againſt the hundred on the ſtatute of *Winton*. II. 280, 281

Vide Evidence.

Wool. Vide **Felony by Statute.**

Words.

Words are eaſily ſubject to be miſtaken or miſapplied, or miſrepeated or miſunderſtood by the hearer. *Page* 111, 112
1 *E.* 6. puts the very ſame offenſes in words ſpoken in a lower rank of puniſhment than the ſame things written or printed. 291, 296, 315
Writing ſcandalous words mentiond in 5 *&* 6 *E.* 6. and thereby made treaſon, not treaſon within 25 *E.* 3. 296
Whether the two penalties previous to treaſon in caſe of words, *viz.* for the firſt and ſecond offenſe in 5 *&* 6 *E.* 6. be repeald by any *act*. *ib.*
Words no provocation to kill a man, nor will they leſſen a crime from murder to manſlaughter, except words of menace of bodily harm. 456, 457.

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Year and Day. Vide **Computation.**

F I N I S.

CORRIGENDA in the TABLE.

In titulo **Allegeance** for *fidelitas regia* read *fidelitas ligea*. From **Ambaſſador** refer to **Treaſon.** From **Amendment** to **Record.** In the references under **Appeal** inſtead of Vide **Proceſs** make it Vide **Outlawry.** *In titulo* **Arreſt** after theſe words, *For what end conſtable or any other during affray may break open doors*, inſert *but not after — unleſs*, &c. Under **Burglary** dele *clergy allowd to one attaint*, which is inſerted under its proper head **Clergy.** For the form and *analyſis* of caption of indictment on return of *certiorari*, refer from **Certiorari** to **Indictment.** From **Certiorari** refer to **Plea.** Refer from **Coverture** to **Principal and Acceſſary.** Under **Jeſuit** *dele* reference to **Treaſon.** Under **Juſtice of Peace** in ſome places *juſtice* to be made *juſtices.*

Part II. *Page*
138. *to do as formerly* to come after the brackets.
162. *l.* 2. *for* amerciament *r.* averment.
411. *l. ult. in notis, for* p. 312. *r.* Part I. p. 464.